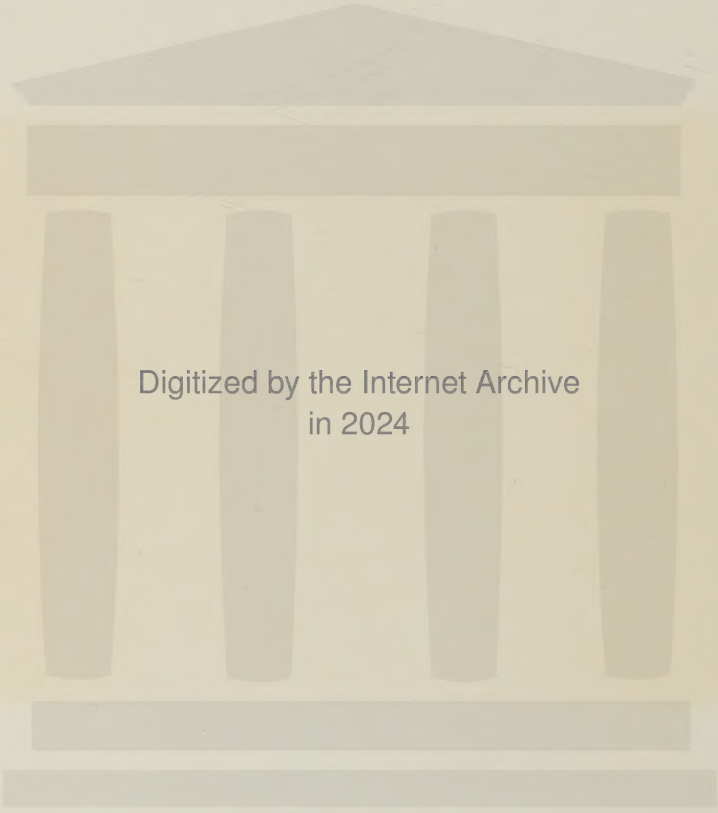
Mandate for Leadership

Policy Management in a Conservative Administration

Edited by
CHARLES L. HEATHERLY

The Heritage Foundation



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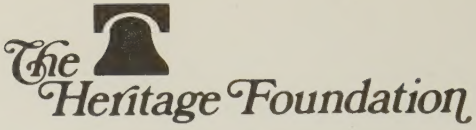
Foreword by
Edwin J. Feulner, Jr.

Washington, D.C.



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FOREWORD

Mandate for Leadership was conceived in the fall of 1979 as a means of assisting the transition to a new administration in the event that a conservative President were elected in 1980. Our premise was that conservatives must be prepared to answer the question, "What is the conservative agenda, particularly for the 'first 100 days'?"

The recommendations in this volume are not presented as cure-alls for the nation's problems, nor as a comprehensive catalogue of every policy concept in the conservative storehouse of ideas. Nor, it should be emphasized, is there unanimity among the trustees or staff of The Heritage Foundation or the several hundred contributors to this volume with regard to the specific recommendations in the various chapters. What is offered by the authors is a series of proposals which, if implemented, will help revitalize our economy, strengthen our national security, and halt the centralization of power in the federal government. The full recovery of our nation in both the economic and foreign policy spheres will require the sustained application of sound policies over several years. There are no "quick fix" solutions to problems that have been years in the making. But no time must be lost in taking the first decisive steps on the road to recovery.

The proposals in this volume have already had an impact in Washington, due to the pre-publication release of the draft manuscript to President-Elect Reagan's transition team and to the press in November 1980. Predictably, the proposals were not well received by that segment of the political establishment whose main preoccupation since the election of Ronald Reagan has been to reinterpret the election results as a victory for "pragmatism" over "ideology." The self-appointed guardians of political fashion, whom Irving Kristol has called "the new class," advise the new President to "avoid ideology," which roughly translates into an admonition to reject any substantive changes in the direction of government. Thus,

"pragmatism" is the new watchword of liberalism in retreat. Of course, pragmatism can be used as another word for prudence, and in that sense it is as sound as it is uncontroversial. But a successful statesman is first of all a strategist with vision: pragmatism is a wise mentor but a dangerous master.

The effort to erect false categories and straw men to divert public attention from meaningful policy debate will not work. The adversaries in the policy arena in the months and years immediately ahead will not be phantom pragmatists or manic ideologues. The real battle will be between those who have done their homework and are ready with imaginative ideas, and those who try to hide their intellectual poverty behind a facade of once-fashionable liberal cliches. But the cliches of liberalism are stale: they have lost their power to motivate or to inspire; they have also lost their power to govern.

Despite the politician's need to cloak his nostrums in the aura of novelty, we should recall that Publius did not rest his case in *The Federalist Papers* for the adoption of our Constitution on the novelty of its basic principles or of its institutional arrangements. As the founders of our republic succeeded in applying classical concepts of man and government to their particular time and circumstances, so our generation of political leaders are challenged to exercise political imagination in the development of organizational and programmatic concepts to deal with today's problems and circumstances.

Political imagination and conservative philosophy are not "strange bedfellows" as some political commentators claim. Quite the contrary: as Burke understood so well, the two are necessary and equal partners in the business of government.

Edwin J. Feulner, Jr.

PREFACE

The production of this volume has been an enterprise involving twenty project teams and over three hundred contributors. The bulk of the work was done in the summer of 1980 when all eyes were fixed on the Presidential campaign and "transition" was not quite the household word it has become since Ed Meese's army occupied the building at 1726 M Street, N.W., five blocks from the White House.

The authors of the chapters in this report were recruited as "team chairmen" for their respective agencies or groups of agencies; each then recruited a team for the production of the report according to certain guidelines. The principal credit for the success of the project belongs to these authors, who translated the concept of a "transition report" into a detailed and illuminating study of the executive branch of the federal government.

The study of the Cabinet departments was our top priority, and those teams were the first launched. The good counsel offered by Richard K. Thompson, Richard Dingman, Margo Carlisle and Phil Truluck was indispensable in selecting these team leaders.

Next in priority were the regulatory agencies, and for this assignment the advice was unanimous: James E. Hinish, Jr., counsel for the Senate Republican Policy Committee and one of the chief architects of the Republican Platform's regulatory proposals. He recruited an outstanding team and did yeoman's work in coordinating the regulatory reform study.

The Environmental Protection Agency was pulled out of the regulatory reform group in mid-stream and established as an independent team with over fifty participants due to the mammoth size and unique character of the agency. This effort was coordinated under the able direction of Heritage environmental policy analyst Louis J. Cordia.

The remaining agency teams were selected and in operation by mid-summer, with most holding bi-weekly meetings in the

conference room at The Heritage Foundation. All of the team chairmen and participants served without pay.

Needless to add, the opinions expressed by the authors are their own and do not necessarily reflect the views of the organizations or persons with whom they may be affiliated.

Each paper was truly a collective effort, with subchapters written by subteams and then edited by the team chairman. It would be impossible to adequately thank all the participants in this effort. The staff and trustees of The Heritage Foundation recognize the tremendous personal commitment represented by their efforts and are deeply grateful.

As project manager and general editor, I have been aided throughout by the entire research staff at The Heritage Foundation, particularly Stuart Butler, Wayne Schroeder and Tom Ascik. Louis Cordia and Milton Copulos served not only as team chairmen for their respective teams but also as critics and consultants on a number of occasions. George Dunlop, Bill Gribbin, Daphne Miller and Craig Potter contributed their considerable editorial skills. A major share of the credit for the success of the project must go to my secretary and editorial assistant, Lynn E. Munn, and senior editor Robert M. Huberty. Carole Currin, Bretton Sciaroni, Virginia Brassfield, Don Hall, Diane Hendricks, Judith Hydes and Charles Via were valuable members of our team.

Whether the *Mandate for Leadership* project will be a success in terms of its original purpose, only history can judge. It is the first attempt of its kind; we had no models and few mentors. The initial response to the study (by friends *and* adversaries) may be due as much to the novelty of the project as its substance.

We will watch attentively as these ideas work their way through the mysterious and fascinating political milieu, sometimes euphemistically called "the policy process."

Charles L. Heatherly

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PART I

THE CABINET DEPARTMENTS

1

THE DEPARTMENT OF AGRICULTURE

Don Paarlberg*

THE AGENCY'S MISSION

The original mission of the Department of Agriculture, dating from its founding in 1862, was to engage in research and education in behalf of farm people, helping them to increase production and improve efficiency. A certain degree of regulation was undertaken for the purpose of making markets work better. The effort was phenomenally successful. Food production rose, efficiency increased, living conditions on American farms improved, the social status of farm people was lifted, and the consumers bought an improved diet with a smaller proportion of their incomes.

In 1933 a second mission was added to deal with excess productive capacity in the farm sector which resulted in severe price deflation. The regulation of farm production to raise prices received by farmers became an important focus of USDA policy and agricultural commodity programs. This mission ran counter to the first mission in some ways. It sprang from a mistrust of markets and a disbelief in the ability of individual farmers to make wise use of their resources. It tended to treat farming and agriculture much like a public utility—trying to guarantee a "profit" at the cost of surrendering much of the freedom for farmers to develop their own planting and marketing strategies. During the last 15 years there has been considerable backing away from this mission in the

**Author's Note:* The preparation of this report on the Department of Agriculture was a collective enterprise in every sense of the word, and many individuals must be credited with co-authorship. James Bostic, Jr., Richard Goodman, Veronica Haggart, Ray S. Harsh, James Lake, Bill Lesher, Russel McGregor and Rexford Resler deserve particular mention. None of the views expressed should be attributed to any of these individuals, since the author alone assumes reponsibility for this report.

structure of commodity programs, though the tendency of the Carter Administration is to manipulate the programs with a "public utility" bias.

In the 1960s a third mission for USDA came into being in an effort to transfer income and resources to those considered disadvantaged, who without federal assistance would presumably be in severe economic and nutritional difficulty. Rural Development programs and food programs were the principal manifestations of this new mission. Despite the fact that the clientele and the subject matter of this third mission were very different from those of the first and second, the new initiatives were placed in the Department of Agriculture. Resources committed to this third mission grew at a phenomenal pace, until they dwarfed the first two. Experience with this third mission is highly controversial, especially among farm people. Since 1979 the focus of the food programs, for instance, has been away from nutrition aid to income transfer functions.

This neat delineation into three missions is of course a simplification. There has been concern regarding natural resources throughout the entire history of the Department. Some of what we call the third mission was discernible in programs of modest size long before 1965. However, with what may be an acceptable degree of generalization, the Department of Agriculture has three missions, unlike in purpose, clientele, and amount of resources:

Mission	Date Initiated	Clientele	Percentage of USDA budget Committed to The Mission
Research and Education	1862	Farmers	4%
Commodity Programs	1933	Farmers	13
Help for those believed to be in special need	1965	Mostly non-farmers	78
Other and unclassified			5
Total			100%

DEFICIENCIES OF EXISTING POLICIES

The first mission, to improve the efficiency of agricultural production, has been so successful that for our major crops, American agriculture has attained comparative advantage over other countries. This has occurred at a time when non-agricultural enterprises were losing out in competition with the rest of the world.

The system of research and education is decentralized, voluntary, and cooperative. This is at once its strength and its weakness. The strength arises from the fact that the problems are identified by the research and education people themselves and therefore have scientific relevance. The weakness results from what is considered by many to be an excessive focus on production research and a slighting of problems of limited concern to farmers and researchers. Among these neglected areas are marketing, conservation, human nutrition, and the social consequences of changes induced by technical change. Critics maintain that the system provides most of its help to those with the fewest problems.

The second mission of government management of supplies and prices also had mixed results, but on balance has been disappointing. While farm incomes were increased in the very early years, they subsequently fell or markets were lost. In fact, the real net farm income declined significantly in 1980. This development emphasizes the fact that farm policy cannot be adequately considered separate from general economic policy.

The early programs widened the income gap within agriculture; the top one percent of farmers got 29 percent of the federal benefits. The U.S. was priced out of world markets, and food prices to domestic consumers were far greater than would have been the case had the efficiencies of the marketplace been dominant in agricultural policy. Resources were misallocated; big farms were encouraged to absorb smaller ones; the price of farmland increased so rapidly as to prohibit the entry of young farmers into business; costs to the federal treasury increased from almost nothing in 1930 to nearly $5 billion in 1978.

However, the second mission overall—and particularly in its present marketplace emphasis—has served to introduce an element of stability in what could be wild gyrations in farm prices and commodity stocks. There is something of a bipartisan consensus that the present delicate mix of farm commodity programs embodying loan rates, target prices, set-asides, farmer held reserves, crop insurance and a farm credit system does provide a useful and desirable degree of predictability and stability for the farm economy. But this delicate mix did not come into being without very difficult trial and error with tremendous adverse side effects for agriculture.

The third mission of income transfer and nutrition assistance to those considered to be at a disadvantage has likewise met with mixed results. Undoubtedly the food programs helped

increase the spendable incomes of many of the poor: the effect on human nutrition, however, has been marginal and doubtful. Originally the School Lunch Program was intended to feed children from homes so poor that adequate food was not provided; now a significant part of the funds go to feed children whose parents are above the poverty line. A USDA study shows that seven percent of the food stamps went to ineligible recipients and another seven percent went to people who received more stamps than they were entitled to. In Puerto Rico, 53 percent of the population was drawing food stamps by 1979, with the stamps serving as a virtual currency to purchase everything from the food for which they were intended to television sets and automobiles. In the United States, 10 percent of the people are on food stamps. The effect of the program on individual self-reliance is adverse, as will be verified by any farmer who has tried to hire urgently-needed harvest time help in areas where large numbers of people were on food stamps.

The Rural Development Program has increased the service available in rural areas. But much of the help has gone to those who were better off and who were sophisticated enough to take advantage of the programs. Grantsmanship has been developed to a high art. Eligibilty standards have been tilted toward the more affluent. For example, the Farmers Home Administration was set up to help those small farmers who were unable to meet the standards of commercial credit. But by 1979 the agency had 300 loans in excess of a million dollars each. The Housing Program was initiated to help the poor; there is now a housing program that makes "above moderate income loans." The Rural Electrification Administration was set up to electrify rural America; this has now been done but the agency makes loans, at interest rates as low as 2 percent and 5 percent to "heavy up" the system, build generating plants, expand a Rural Telephone system and venture into television.

Clearly, efforts to advance the third mission reflect the softness that accompanies mushroom growth. The experience illustrates the validity of the common observation, that when a government program is targeted at a particular group, most of the benefits go to those close to, at, or above the upper limits of eligibility. For the third mission programs, now only about 15 years old, this upward drift has occurred with extraordinary speed. The need to discipline these programs is urgent. Other-

wise they might be discredited generally and their good effects lost with the bad.

There is tremendous opportunity for a new conservative administration to meet the challenges of nutrition assistance and Rural Development by utilizing supply-side economic incentives. For instance, the greatest social welfare program is a job. And if Rural Development is to be effective it must be based upon a commitment to enhance real economic growth in rural areas—not just transfer income to rural areas.

SHORT-TERM PROBLEMS AND OPTIONS

Personnel

A new administration would involve personnel changes. More will be said on this subject in the latter part of the document. Several points seem appropriate here, however, for comment in connection with administrative actions to be taken during the first 90 days.

1. Major personnel changes should be made early. The longer they are delayed, the greater the pileup of deferred decisions, the more troublesome the confrontation between supporters of rival candidates, and the lower the departmental morale.

2. Wholesale housecleaning of all persons eligible for replacement would remove many competent people. This would not only be unfair to the persons immediately involved but would make it more difficult for an incoming Secretary to win the support of his own employees.

Reorganization

Reorganization is of two essential types: reorganization across departmental lines and reorganization within the Department.

There have been proposals to transfer agencies out of the Department of Agriculture to other departments of government:

Forest Service to Interior
Food Programs to Health and Human Services
Industrial Development Loans out of Farmers Home Administration to Commerce
Housing to Housing and Urban Development
Resource Conservation to the Environmental Protection Agency

Energy (a staff agency) to the Department of Energy
Surveillance of Farmer Cooperatives to Federal Trade Commission or Department of Justice
Food for Peace to State

This would be in the tradition of past experience, which saw the transfer out of Agriculture of various agencies and activities:

Weather to Commerce
Ecological work to Environmental Protection
Food and Drugs to Health and Human Services
Commodity Exchange Authority to a new agency, Commodity Futures Trading Commission.

In a new administration, other departments of government are likely to lay before the President revived proposals to transfer agencies out of Agriculture. These efforts, or at least certain of them, are likely to be supported by some farm people, who feel uncomfortable with the clientele and the programs of what we called the third mission. They feel a slimmer Department of Agriculture, with a more homogeneous clientele and a much smaller budget, would stand higher in public esteem and would be easier to influence in behalf of farm interests.

At the same time, some farm people would like to return to the Department of Agriculture functions and agencies that have been removed from it. Among those proposed for "repatriation" are:

Environmental work, lost to the Environmental Protection Agency;
Surveillance of the safety of food supply, lost to the Food and Drug Administration;
Decision-making with respect to programming under Food for Peace, lost to the State Department and the National Security people.

The counsel offered in this assessment is to resist efforts to transfer additional agencies and functions out of the Department—or into it. The displeasure of farm people with what we called the third mission is understandable. But if this mission were transferred out of the Department and concerns limited to serving the farmers who produce the bulk of the food supply, departmental clientele would total one or two percent of the population. The Department's financial resources would amount to about one percent of the federal budget, and would be exceeded by a number of independent agencies. Whether such an attenuated operation could retain

Cabinet status is a real question. Whether a Secretary of Agriculture with so small a group of constituents would have the ear of the President or could contend effectively with the Secretary of State or of Commerce or of Labor is doubtful.

Those people who wish to recapture in behalf of the Department some of those functions and agencies previously lost would do well to consider the weak base from which they operate, and the jeopardy to which existing departmental operations are exposed once the question of interdepartmental reorganization is opened. Public perceptions being what they are and the locus of political power being what it is, the Department—and the farmers—have more to lose than to gain from interdepartmental reorganization.

Inevitably, producers of food and consumers of food have differing views on a variety of subjects. It is probably better to work these through within USDA, resolving them at a low level, rather than to consolidate them respectively in rival Departments, to be slugged out at a high level, requiring Presidential decision.

The best way to deal with the mushrooming programs that support the third misson, in the view of those who prepared this study, is to discipline them within the Department. There is a feeling, supported by some evidence, that these programs are more likely to be run responsibly within the Department of Agriculture than in other departments.

In the past, there have been efforts at major interdepartmental reorganization. These efforts have been resisted by the government employees, the Congress, and the clientele groups. There is no reason to think it would be different now. The resources of an incoming team should be reserved for matters likely to be more fruitful.

Within the Department, responsibility for the budget should be taken from the Director of Agricultural Economics and given either to the Deputy Secretary or to the Assistant Secretary for Administration. It is inappropriate for the head of one group of agencies to hold budgetary authority over the heads of other groups of agencies who are at a similar level of responsibility. The proposed change can be made simply, by Secretary's memorandum.

Change for the sake of change should be resisted. Change to demonstrate the capability of making change is disruptive. Changes deferred until lengthy studies have been made keep the agency in turmoil and reduce the caliber of service rendered. A chief criticism of the Carter Administration is that

it undertook reorganization largely for cosmetic reasons and long deferred the completion of these changes. These are errors that a new administration should not repeat.

Other Matters Likely to Require Early Decision

A new administration will be confronted with a great number of problems:

1. *Deferred decisions.* The outgoing administration will have left various matters unresolved, because handling them would have been unrewarding. These will have piled up.

2. *Current decisions.* The regular flow of ongoing matters will be enough, normally, to absorb the full resources of the Department.

3. *Revived issues.* Various special interest groups whose pleas have been turned down by the previous administration will lay their cases before the new Secretary, hoping for favorable response.

In handling these matters, a new administration will be handicapped by its unfamiliarity with the issues and by the fact that rapport and mutual trust between the Secretary and his employees will not yet have become fully established.

In these circumstances, it is important that the new leadership focus its limited and overworked resources on urgent matters rather than address issues that can, at some cost, be deferred. Among the subjects that can wait are a number of very important matters related to natural resources: departures from sustained yield cutting on the National Forests; protection of prime agricultural lands; roadless area review and evaluation; and the coordination of work on natural resources within the Department. Other matters that can be subordinated in urgency, though not in importance, are: the research agenda, the structure issue, and the controversy regarding competitive grants. Advocates will strongly urge all of these matters on a new administration for early decision. But all, while important, are too complex for quick resolution.

Following is a list of issues that are likely to come up early, usually precipitated by some particular case that will have far-reaching ramifications:

1. *Trade Policy.* Foreign trade issues will arise early. A few hastily made and unwise decisions might set an unfortunate pattern that would be hard to break. Ever since 1934, the executive branch, in whatever hands, has attempted to favor liberal trade—that is, competitive open markets. The attitude

has been pragmatic rather than doctrinaire. This assessment group counsels continuation of that general policy. The particulars are:

The grain embargo. Repeal it promptly, but with adequate safeguards against exploitation by the USSR as occurred in the past. This is a necessary step. Thereafter, renegotiation of the expiring grain agreement with the Soviet Union can be considered.

International Commodity Agreements. Caution should be exercised. The previous administration sought to conclude a number of commodity agreements, with little success. A new administration could appropriately tilt away from them. The Carter Administration appears to be considering a large number of bilateral trade agreements. The merits of such agreements diminish as their number increases.

The President's Special Trade Representative. With agriculture now a major net earner of foreign exchange, the Special Trade Representative should have real competence in agriculture.

CCC export credit. This has been cut back. The view of this assessment team is that the program should be restored.

Import restrictions. These should be held to a practical minimum. The assessment team believes, however, that we should protect ourselves from export dumping on the part of other countries. There is provision for doing this—countervailing duties. They should be invoked when evidence of export dumping is clear.

Export promotion. Export promotion, in cooperation with the private trade, has been productive and should be continued.

PL 480. A PL 480 program of modest size is helpful both to the supplying and to the receiving nations. Agriculture should have a stronger hand in decisions regarding PL 480.

International Agricultural Development. There is no area where the USDA should become more active. Experience has demonstrated that supply creates demand for food, and the great amount of genuine economic growth that can be generated in foreign lands will simply create more and stronger markets for the U.S. Current international development policy too often undermines real economic growth abroad; and strongly

needs an infusion of supply side incentive economics to put it on the right track. Agriculture has a vital interest in assuring that this happens. The geopolitical advantages to the U.S. of our agricultural trade and international agricultural development should become one of the principal activities of the Secretary of Agriculture.

There is a rising tide of protectionism in the world. It is important that the Department of Agriculture not be swept up in this mood. Such influence as the Department has in the executive branch should be exercised in support of liberal trade.

2. *Issues related to Natural Resources.* Issues regarding use of land, water, and forest lands have arisen and are certain to grow. These problems are between farmers and farmers, between farmers and environmentalists, between farmers and city dwellers, between industrialists and conservationists. The Department of Agriculture has constituents on both sides of most of these fights.

The 160-acre limitation. Farmers from the irrigated West will try to get the Department on their side in the fight with the Interior Department on the size of farms eligible for Federal water. The Interior Department has jurisdiction; the Agriculture Department should stay out of the fight.

Agriculture Conservation Program. This program should be operated so as to obtain maximum long-range conservation gains per dollar spent. Not only would this buy good land use practices; it would also help forestall other less attractive federal action aimed at better land use.

Multiple-Use of National Forest Lands and RPA. Because real economic growth is a vital necessity for a new administration, it is incumbent upon the USDA to assure that renewable resources in National Forest lands are managed properly and in a balanced manner. Resolution of the Carter Administration's RARE II program and a sound policy for the Resource Planning Act will be essential priority tasks for a new administration.

While the Department is dealing with Natural Resource issues that cannot be deferred, it should be organizing itself to cope with the broad environmental and ecological issues that now particularly concern the Forest Service, the Soil Conservation Service, the Agricultural Stabilization and Conservation Service, and the Science and Education Administration.

3. *Consumer Issues.* Consumers are the farmers' customers, not their adversaries. It would be well to de-escalate some of the issues involved in the confrontation of recent years.

The Delaney Clause. Experience with nitrites shows that there is administrative latitude within the Delaney Clause. This principle can be applied to new cases as they emerge.

Human nutrition. The Department should require hard evidence before making derogatory statements about the wholesomeness or nutritional qualities of various foods.

4. *Energy.* The energy unit attached to the Secretary's office should be retained, with special emphasis upon developing plans for securing adequate fuel supplies to farmers in the event of sudden disruption of oil supplies.

Also, special emphasis should be devoted to administering the program to enhance the production of biomass energy from farm and forest products and from rural municipal wastes and other agricultural related sources. The gasohol loan program enacted by Congress overloads the already shaky Farmers Home Administration. The distillation of alcohol from farm products is a highly technical process with with FmHA is unfamiliar and probably unsuited. Close scrutiny will be needed to see that this operation does not become an embarrassment to the Department.

THE AGRICULTURE ACT OF 1981

The Agriculture Act of 1977 is the governing legislation for the Commodity Programs as well as for other departmental activities. The Act expires with the 1981 crop. It will be necessary, during the first session of the new Congress, to enact legislation for the 1982 and subsequent crops. The Congress will therefore have to begin early in the session to consider legislation. The Department must develop its recommendations and lay them before the Congress. This work should begin as soon as possible, and not wait until January 20, 1981.

The Agriculture Act of 1977 represented a compromise of farmers and nonfarmers, Congress and the President, Republicans and Democrats. On the whole, it has been received fairly well. The prevailing view is that the Agriculture Act of 1981 will be a modification of the 1977 Act rather than reflect a new approach.

Ever since 1965, successive Agricultural Acts have shown

increments of movement in the direction of greater reliance on the market in the production and pricing of farm products, and less reliance on government.

It is likely, however, that some elements will put pressure on Congress—particularly the Senate (because every Senator has a farm constituency)—to consider changes in the farm bill which will reverse these trends. These include:

1. Substantial increase in loan rates and target prices, or, alternatively, elimination of the target price coupled with reliance upon much higher loans—and correspondingly higher release and call levels for the farm-held reserves.

2. Statutory requirements for set-asides (i.e., removing the Secretary's flexibility).

3. Greater restrictions on release of grain from the farm-held reserve.

4. Some of the more established farm and commodity organizations may well press for the lifting of the $50,000 cap on payments to farmers under any of the commodity programs—though the likelihood for their success is very limited.

5. Pressure will be exerted from wheat states to reinstate the very costly and questionable low yield disaster payments program.

6. Dairy interests may make a substantial demonstration at trying to lock in the dairy price supports at 80 percent of parity.

7. It is very likely that the flip-flops in the Carter farm policies management of the programs will induce the Congress to fix by law a number of the matters now discretionary with the Secretary of Agriculture.

Those who have traditionally disapproved of "subsidies" to farmers may advocate proposals such as the following:

1. Elimination of the tobacco and peanut allotment programs. (Though the tobacco program has separate, permanent authority and will not be considered in the 1981 farm bill unless there are unusual or extenuating circumstances.)

2. A cap on the amount of payments one farmer may receive lower than $50,000.

3. Lower real loan and target price levels.

4. Drop dairy price supports sharply (below 75 percent of parity).

Some groups most comfortable with a government that operates its programs and the economy as a "public utility" may press for provisions in the 1981 farm bill such as the following:

1. Scale the program benefits to the size of the farm, giving most federal help to small operators.

2. Require mandatory adherence to certain conservation practices as a condition for receiving program benefits.

3. Use the farm bill as a vehicle for increasing the amount and scope of income transfer payments under the food stamp program and other "nutrition" programs now operated by USDA.

4. Require that USDA and the Land Grant Colleges devote a larger share of the research and education activities to small or moderate sized farms.

Perhaps under a new and more conservative administration, the Department will wish to continue to move toward greater market orientation, aiming at a position somewhere between that of the strong advocates and that of the strong opponents of the commodity programs. If incremental movement toward individual decision making is sought, these are possible components of such a position:

1. Widen the range between the loan level and the release level so as to give the market better opportunity to function freely.

2. Raise loans and targets to reflect, in part but not in whole, the effect of inflation.

3. Reduce the payment limitation from the present $50,000 level to something considerably less.

4. Reduce the dairy price support level from 80 percent of parity to a lower level.

5. Adjust the farmer-held reserve so as to make excess stocks less likely.

6. Increase the discretionary authority of the Secretary of Agriculture.

If, on the other hand, there is the wish in the Department to move more rapidly toward a market economy, various options are available. Chief among these would be sharp real reduction in loan and target levels as well as reduced authority to limit agricultural output.

Much analytical work has been done on the Agricultural Act of 1981 within the Department, by the Economics, Statistics and Cooperatives Service. A new administration might understandably be wary of work done by personnel of a previous administration. But the judgment of this assessment team is that the available internal analyses are generally of good quality.

This assessment team recommends that the course toward a

market-oriented agriculture be continued, and that any proposals which would push us deeper into government programs should be rejected.

Confrontations between advocates and opponents of the commodity programs have been de-escalated in recent years. The results have been programs that were less costly and more in the public interest. This wholesome trend should be continued.

The Agricultural Act of 1977, which is expiring and must be replaced, has 15 titles including Rural Development, Food Stamps, Public Law 480, Teaching, Research, Education and Energy. Very likely the Act of 1981 will be equally broad. We have here considered only the commodity programs. Other matters, if urgent, appear elsewhere in this paper.

THE BUDGET

The official budget of the Department of Agriculture understates the cost of Departmental programs. Loans made by the Farmers Home Administration and the Rural Electrification Administration are "sold" to the Federal Financing Bank and do not appear in the USDA budget. If Federal Financing Bank outlays were added, the USDA's 1981 budget would have been shown as $33.3 billion rather than the $20.1 billion actually reported. In this paper, full rather than partial reporting of costs will be followed.

In real terms, Departmental programs quadrupled in cost from 1930 to 1979 (Table 1). Individual programs diverged sharply from this pattern. The food programs and programs of the Farmers Home Administration each went from zero to $10 billion.

The new administration will be operating, during the first eight months of its existence, within budgetary guides inherited from the previous administration. It will be necessary to consider what recisions and supplementals may be needed. It will also be necessary to develop a budget for fiscal 1982. Recommendations on both these budgets must be laid before the Congress early in 1981. Hence the urgency.

Ultimately every undertaking of the Department is disciplined by the budget. For that reason, budgetary considerations are the major part of this paper.

Following are suggestions which, if implemented, could reduce the fiscal 1982 outlays of the Department of Agriculture by $5 billion below what they otherwise would be. This is a

Table 1
USDA BUDGET (OUTLAYS) BY AGENCY, AND BY 10-YEAR INTERVALS, 1930-1979
(millions of dollars)

	1930	1940	1950	1960	1970	1979
Extenstion	9	19	32	64	124	273
Forest Service	28	47	72	205	556	1,786
Federal Aid to Hwy system	78					
Agr. Res. Serv.			104	172	267	330
Conservation & Use of Agr. Land		605				
Soil Cons. Serv.		29	54	131	271	560
Farm Security Adm.		158				
Agr. Adj. Act		415				
REA		38	294	330	338	2,351
Farm Tenant Act		42				
Pro. & Mktg. Admin.			516			
Commodity Stab. Serb.				675		
Agr. Stab. & Conserv.					555	507
CCC Price Support			1,606	1,654	3,833	3,611
Fm HA			152	292	1,722	10,705
P.L. 480				1,328	937	806
Food & Nutr. Serv.					960	10,513
Other	63	50	126	568	325	−226
Total	178	1,403	2,956	5,419	9,888	31,216
1979 Dollars	774	7,257	8,909	13,277	18,470	31,216
Deflator 1980 Econ. Report (CPI) 1967 = 100	50.01	42.0	72.1	88.7	116.3	217.3

From Kitty Furlong (CEA)
Source: Eric V. Robinson, Budget Examiner, OMB, retired, unpublished data.

reduction in the overall budget of approximately 15 percent. The cuts are shown in Table 2. Table 2 shows a "base" budget for fiscal 1982. It indicates what the Carter budget would look like if 1981 budget policies were carried into 1982, excluding proposed legislative changes. It shows the budget as it would be if Federal Financing Bank outlays associated with Department of Agriculture programs were included in USDA budget outlays. The budget is shown on a functional rather than an agency basis. The contemplated savings are shown in generalized form.

These reductions would result in some loss of income or sevices on the part of certain individuals and groups, and so would be strongly resisted. But if the changes could be made effective, resources would be better allocated, the income gap

within agriculture would be reduced, and individual initiative would be increased.

In the following pages, activities of the Department are considered on a functional basis.

Price Support and Related Matters

Deficiency payments are on a per bushel or per pound basis. Thus they are regressive. In 1978, a farmer in the top 10 percent bracket got, on the average, 50 times as much money from the government as did the farmer in the lowest 10 percent. Equity between farm and nonfarm people is the rationale for the program. But equity within agriculture is set aside. Average farm income is increased by adding many dollars to those already well-off and adding little or nothing to those on the low end of the income scale. The average is raised by increasing the dispersion that makes up the average. This procedure is increasingly difficult to defend.

The huge payments make it possible for the big farmers to absorb the small ones, speeding the disappearance of farmers with limited resources.

Inflation permits some nominal increase in target levels. However, this alternative budget recommends real reduction. Substantial budgetary savings can be achieved.

Changes would require changes in substantive legislation.

Commodity loans

Commodity loans are intended to increase and to stabilize prices received by farmers. When markets are weak, as has often been the case in the past, the government acquires a large inventory. The effect is to keep the market price, in most cases, from falling below the loan level. If the loan level is kept modest, so that the market clears most of the time, harmful market price gyrations can be dampened to the advantage of farmers and nonfarmers alike. The danger comes when the loan level is raised so high as to price our products out of the markets, pile up commodities in government hands, require deep cuts in production, necessitate controls on imports, and incur heavy government cost.

The strategy proposed for the years ahead is to resist efforts to boost the loans above average market-clearing levels. If, over a period of years, loan rates could be set so that the market clears two years out of three, loans could be helpful both to farm and nonfarm people and savings could be achieved.

Table 2
USDA BUDGET OUTLAYS—1982—AS ANTICIPATED IN THE CARTER BUDGET, BY FUNCTION, WITH PROPOSED SAVINGS
(millions of dollars)

	Base[1] (rounded)	Savings
Agriculture Function		
Price support and related	2,160	1,000
Crop insurance	150	100
Agricultural credit	1,500	1,000
Research	550	
Extension	300	
Animal and plant health	280	
Economic intelligence	170	
Other	430	
Subtotal Agriculture	5,540	
Housing	2,700	1,000
REA	5,400	325
Rural Development	1,500	100
Food Stamps	10,500)	
Special supplemental food programs	1,000)	1,475
School lunch and other nutrition programs	4,700)	
Forest Service	2,300	
Foreign Assistance (P.L. 480)	1,200	
Other	1,000	
Total USDA	35,840	5,000
Offsetting receipts[3]	−1,400	
	34,440[2]	

[1]Includes off budget outlays of the Federal Financing Bank as follows:

Agriculutural credit	$ 943 million
Housing	1,637 million
REA	5,342 million
Rural Development	642 million
	$8,568 million

[2]If FFB outlays were added to USDA's 1981 budget, outlays for USDA would have increased from $20.1 billion to $33.3 billion.

[3]Offsetting receipts (timber sales, recreation fees, fines, etc.) are deposited in Treasury. They are not available to the Agency but for budget purposes are "credited" to the Agency.

Source: Paarlberg, Don and Robinson, E.V., *Alternative Budget, Agriculture Function,* Heritage Foundation Study, 1981.

Changes in substantive legislation and administrative decision would be necessary if this course is to be followed.

Interest rates

The Commodity Credit Corporation provides loans for a variety of programs. The rate of interest usually is subsidized.

The purposes are several: to encourage farmer holding of farm products, to encourage farmer holding of farm products, to encourage certain activities such as the building of storage facilities and to increase exports.

This alternative budget proposes that the government continue to offer these loans, but that the farmers pay an interest rate one percent above what the Treasury charges CCC. Effectiveness of the programs would not be significantly reduced.

Dairy Program

The law requires the government to support the price of manufactured dairy products (butter, cheese, non-fat dried milk) at 80 percent of parity. This is substantially above the market price. During the present year, this will cost the government $1.1 billion. There are several adverse affects of the program in addition to the heavy cost: it stimulates excessive milk production, attracts foreign dairy products to our shores, encourages the production of nondairy supplies of fat and protein, and increases the price of dairy products to consumers.

The proposal in this alternative budget is to reduce the legally required level of price support from the present 80 percent of parity to its previously existing level, 75 percent of parity. This would still provide a program that gives favorable treatment to dairy farmers. Both Republican and Democrat Secretaries of Agriculture have pursued this objective, but have been unsuccessful. If tis could be achieved, budgetary costs could be reduced by an estimated $300 million annually.

Established at a proper level, the dairy price support program could provide a helpful degree of market stability at reasonable cost. The problem arises from setting the support too high.

Some latitude exists for administrative decisions. But changes in substantive legislation would be required to bring about the changes recommended here.

Payment Limitation

Presently, there is a limit on the amount of money which a farmer can receive from the government under the commodity programs. This limit is $50,000, a very high figure. In 1978, only two-tenths of one percent of the program participants were affected by the limitation. Fifty thousand dollars is an amount equal to approximately twice the average family farm income

in the United States. The top one percent of the farmers get 29 percent of the benefits.

The alternative budget here offered recommends reducing the payment limit from $50,000 to a substantially lower figure. The improved equity resulting from a reduction in the payment limitation would be significant. Public acceptability of a program which can help stabilize farm income would be enhanced. Opponents of payment limitations will argue that reducing the cap would drive larger farmers out of the program and be a handicap to supply management. But it appears that supply management is unlikely to be as important a feature of future programs as it was in the past, so that this objection loses force.

Payment limitations are a matter of law, and the law would have to be changed to effectuate this recommendation.

The Low-Yield Disaster Program

In 1974, the Congress enacted a Low-Yield Disaster Program which provided payments to farmers whose crops were severely damaged or destroyed by drought, flood, frost, hail, or other disasters. This in effect provided farmers with crop insurance without the need to pay a premium. It kept in crop production some hazardous areas that should better be in grass. It undercut the regular crop insurance program. During the first five years of is existence, the average yearly cost was $450 million.

The Low-Yield Disaster Program has now been prolonged an additional year. No doubt there will be efforts to extend its life further. Such efforts should be strongly resisted.

The Department of Agriculture has proposed a nationwide crop insurance program that would combine the insurance provisions of the Federal Crop Insurance Act and the Low-Yield Disaster Payment programs to protect producers of agricultural products against loss. This principle is sound.

Changes in the crop insurance program and in the disaster payments program were enacted in the 96th Congress and are now a matter of law. The new conservative administration will want to encourage the early and effective implementation of the new crop insurance law for two reasons: 1) to defuse any effort to extend or reestablish the thoroughly discredited and costly disaster payments program; and 2) it is an imaginative program—as finally written by Congress—that provides an exciting opportunity for the private sector (through a re-

insurance scheme written into the law) to play a major role in the sales and servicing of this all crop, all risk, nationwide program. If this program meets its full potential, it could help redress massive federal intervention into the marketplace.

Agricultural Credit

The Agricultural Credit Insurance Fund is used to insure or guarantee farm ownership loans, farm operating loans, emergency loans and similar obligations of individuals and associations. An insured loan may not exceed $200,000 and a guaranteed loan may not exceed $300,000. These limits are roughly equal to the average value of farm operating units in the United States.

There is a substantial subsidy involved. The borrower is charged not more than the cost of money interest rate for insured loans. Low-income, limited resource borrowers are charged not more than six percent. In 1980, this was about half the going rate of interest and much less than the inflation rate so that the real cost of the borrowed money is negative. Understandably, under these circumstances the demand for loans was very great.

The original objective of the program was to strengthen and sustain the family farm system by helping promising young farmers who were short on capital. Farm plans were worked out with the borrowers, and supervisors helped the operators carry out these plans. The repayment record was good.

In part, this original concept continues. But the size of the loans has increased rapidly. Personnel ceilings for the responsible agency, Farmers Home Administration, have limited the amount of supervision, and the program is now little more than cheap credit. The interest rate is so low that it is difficult to "graduate" borrowers from the program when they have advanced to the state at which they can meet commercial credit standards. And it is extremely difficult to close out farmers when the loans go bad. On September 30, 1979, six percent of the farm ownership loans and nineteen percent of the operating loans were delinquent.

Total commitments to guarantee new loans could be cut approximately in half. The limits for both insured and guaranteed farm ownership and farm operating loans likewise could be cut in half. The interest subsidy could be reduced. The effect would be to direct a greater share of the agency's effort to those in real need, to scale back the rate of growth in this

problem-prone program, to reduce government competition with the private sector, and to cut budgetary outlays below where they otherwise would be.

To bring about the changes here recommended, changes in substantive legislation would be required. The appropriations committees could help. Strong administrative action could also accomplish much.

Housing

The Congress has loaded onto the Farmers Home Administration a volume of work that exceeds its administrative resources. During the past 15 years (1965-1980), the total budget of the Farmers Home Administration (including other than housing programs) rose from $285 million to $8,500 million, an increase of 30 times. The sum total of all obligations (direct loans, guaranteed loans and insured loans) for which ultimate responsibility has been laid upon the government by this agency is estimated at $47 billion at the end of 1980.

A chief increment to the workload of the Farmers Home Administration is accounted for by growing exploitations of the agency by the well-to-do. More and more, the agency is using subsidized credit to compete with—or to co-opt—private lenders.

A Rural Housing Insurance Fund is used to insure or guarantee rural housing loans, loans for rural rental and cooperative housing, farm labor housing loans and rural housing site loans. Rental assistance payments are made from the fund and a Home Ownership Assistance Fund is to be launched. A substantial subsidy is involved in these various housing programs. The fund was established in 1965. The total volume of loans guaranteed or insured under this program has grown so that by the end of 1980 it is expected to reach $21 billion. Farmers Home Administration estimates that for fiscal year 1981 interest subsidies will total $1.7 billion. Sixteen million dollars worth of bad loans will be written off.

A feature of the program which has special attraction to the Congress is that neither the direct not the guaranteed loans for which the agency is ultimately responsible appears in the budget. For example, in the financial plan for fiscal year 1981, USDA housing outlays are shown as a negative $962 million (receipts in excess of outlays). However, there were net sales to the Federal Financing Bank of $4.9 billion. In addition, $275 million worth of loans were insured and guaranteed. Thus,

government assumed responsibility for $4.5 billion worth of loans with a budget "receipt" of $1 billion. It is difficult to see how sound fiscal control can be exercised in a program accounted for in so misleading a manner. How many of the loans that have been guaranteed and "sold" will go bad depends in part on the care with which they are made and supervised. The workload of the agency has increased so rapidly that it cannot give the loan applications the scrutiny they deserve. The government guarantee relieves the private lender, who actually makes the loan, of felt need for careful examination of applications.

The alleged purpose of the program is to service rural persons of low income. Sixty percent of the volume must by law be so utilized. But a new category of loan guarantees has been added: "above moderate income loans." Because of the subsidy, the loans are very attractive to borrowers, so that the demand is great.

Interest rates can be increased and "above moderate income housing loans" can be eliminated.

To discipline this activity, substantive legislation, appropriations language and administrative decision all are needed.

An incoming Secretary of Agriculture should ask the Farmers Home Administration to provide him with an audit of its activities. Included should be the number, size, and kind of its various loans, the attributes of its borrowers, the rates of interest charged, the amount of interest subsidies, totals of loans for which the government bears ultimate responsibility, amount of delinquencies and writeoffs, trends in various programs, reconciliation of its budgetary operations and its relationships with the Federal Financing Bank, projections of comtemplated operations, and the like. A full record of grants made by the agency should be provided. In addition, the General Accounting Office should be asked to inquire into operations of the agency at the earliest possible date and report its findings.

Rural Electrification and Telephone Loans

The Rural Electrification Administration is an agency with a proud history. Begun in 1935 when most farm homes were illuminated—just barely—with kerosene lamps, it turned on the lights in rural America. Today, almost every farmstead has electricity, many of them supplied by REA. In that sense, the job is done. But the agency has found other activites and it continues to grow.

Loans are made to cooperatives which retail electricity and telephone service to farm and rural nonfarm people. Obligations incurred under these programs are obscured by the technique of using the Federal Financing Bank as a financing agent. In fiscal year 1982 such loans are expected to total in excess of $6 billion.

Interest rates for insured electrification and telephone loans presently range from two to five percent, by law. Loans made by the Federal Financing Bank are at the cost of money to the Treasury (well below "market" rates). The attractiveness to borrowers of such rates, and the cost to government, are self evident.

Interest rates should be increased by five points, that is, insured rates would range from seven to ten percent. The direct telephone loan should be eliminated; the guaranteed loan program should be curtailed. These curbs would reduce the voracious appetites of borrowers and cut the tumorous growth implicit in the off-budget operation.

Changes here proposed would require substantive legislation, appropriations language and administrative action.

Rural Development

Rural America was long at a disadvantage, as compared with urban areas, in such matters as water, waste disposal and community services. The objective of what is called Rural Development is to make rural America a better place to live and work. The chief means of moving toward this goal is by subsidized credit. The Rural Development Insurance Fund is used to insure or guarantee loans for water systems and waste disposal facilities. Loans are made to communities in rural areas. The rate of interest is five percent. The loans run for 40 years. Grants are also made.

Five percent is much less than the rate of inflation. In real terms, the government is paying the borrowers to take the money. The program is very popular, affirming the well-known economic law that the demand for a free good is insatiable.

Lending activities under this program are not a measure of its net contribution. Terms are so attractive that the backlog of loans has been enormous. Some communities get tired of waiting and make improvements on their own—proof positive that a considerable part of the government's activity is in replacement of what would otherwise be done privately.

The interest rate should be increased so as to equal the cost

of money to the Treasury. A subsidy would continue, in the form of administrative costs, but it would be much reduced.

Finally, USDA should be especially receptive to the application of supply-side, incentive economic strategies to enhance real economic growth in rural areas. The Secretary may want to name a special task force to investigate the prospects and possibilities of developing legislation to establish "Rural Enterprise Zones" to encourage that kind of real, new growth.

Industrial Development

Industrial development is an aspect of rural development. Loans are made to finance business acquisition, building enlargement or repair. The purpose is to industrialize the rural areas. Loans for constructing gasohol plants are made through Farmers Home Administration. Interest rates vary. The rate for guaranteed loans is negotiated by borrower and lender. Loans to private entrepreneurs are made at the cost of Treasury borrowing. Loans for community development are made at five percent. The government guarantees loans for construction of gasohol facilities, thus bearing the risk.

The Industrial Development Loan program is in its infancy. Volume in fiscal year 1979 was $1.1 billion. Attractiveness to borrowers is obviously very great and the growth potential is enormous. There is concern regarding the rapid growth of this agency. The 1981 budget submission cut the Industrial Development Loan Program in half.

The best way to allocate resources wisely and to keep the program from running away (as have other lending programs) is to increase the interest rate to the cost of money.

All the forces of government: legislation, appropriations, and executive decisions, would have to work together to bring about the proposed changes.

Food Stamps and Other Nutritional Programs

The Department of Agriculture got into the distribution of food to needy people through its price support operations. It acquired huge stocks of wheat, rice, dairy products and other foods by taking them off the market so as to increase prices. There was then the problem of disposing of these stocks.

Through time, the surplus disposal aspect of the program retreated and welfare considerations advanced. The size of the programs increased. Total outlay for the food programs in

fiscal year 1981 stood at $14.4 billion, greater than the combined of all USDA programs in service to its historic clientele, the farmers.

Food Stamps

The major component of the feeding effort is the Food Stamp Program, begun in 1965 with a budget of $34 million, which served relatively few people. In FY 1981, it is expected to serve more than 22 million people at a total federal program cost of almost $11 billion, and it is still growing.

Studies show that only about half the food stamps go for the purchase of additional food. The other half is income supplement. There is no clear evidence to show that participation in the program lifts the nutritional level.

There is public approval for meeting the food needs of people in authentic difficulty. But the program appears to have grown beyond that level. Food stamps are provided to strikers and others who voluntarily remove themselves from the workforce.

To be eligible for food stamps, a household must be unable to buy a "nutritionally adequate diet" with 30 percent of its monthly net income. In computing income so as to determine eligibility, only money income is counted. Omitted are all forms of welfare payments, subsidies, public housing and income in kind. Taking account of these sources of income would eliminate the better-off participants, increase the incentive to find employment, and cut the cost by $600 million. Other requirements such as making annual rather than semiannual adjustments in benefits and restricting student eligibility would reduce costs by an additional $360 million. Additionally, the overlap between the school lunch program and the food stamp program could be eliminated. A stiffer assets test could be used. The purchase requirement could be reinstated. There are ways to discipline this runaway program. It is essential that the nutrition enhancement rationale be restored to the food stamp program by restoring the purchase requirement.

Clearly, it is essential that the nutrition aspects of USDA food program be restored immediately. USDA is not adequately constituted—nor should it ever be—to simply be an income transfer mechanism. A new administration should rise to the challenge of improving the real nutritional quality of life by reasserting a genuine nutrition emphasis to food programs.

Special Supplemental Food Programs

The fastest growing food program of the Department of Agriculture is WIC (Women, Infants, Children). This is a program for pregnant, post partum and breast feeding women. Included also are infants and children up to five years of age. "Participants are judged to be likely to experience nutritional risk, but they do not have to be poor. Persons with income up to 195 percent of the poverty level may participate without any charge whatsoever and without limitation."

Food is provided in various categories of packages, according to need. Food is either purchased with vouchers, picked up at clinics, or delivered at home. Food is free to all participants. There is evidence that the program does in fact improve nutrition. Begun as a pilot program in 1973-74, the program now has 2 million recipients and carries a cost of a billion dollars a year.

The Carter Administration plans further substantial increases in the program. This alternative budget recommends holding to last year's level while the Agency makes the adjustments called for by rapid growth.

School Lunch and Other Nutritional Programs

These programs include School Lunch, Special Meal Assistance, School Breakfast, Equipment Assistance, Summer Feeding, Child Care Feeding, Commodity Procurement, and help to the states for administrative expenses.

The program began as an effort to improve the nutrition of children from families in poverty. However, now a significant part of the funds go to feed children whose parents are above the poverty line. The Carter Administration, alarmed at the shift in focus from the poor to the affluent, recommended reducing the subsidy for middle and upper income students. That position is supported by this study team.

To restrain the food programs as here proposed would require cooperation on the part of the concerned legislative committees, appropriations committees, and program officers.

Activities of the First Mission

Some activities of the Department of Agriculture are directed toward its first mission: to improve the efficiency of agricultural production within a market oriented open system. Among these activities are research, education, surveillance of

markets, providing grades and standards, crop and livestock reports, and protection against plant and animal diseases. The work of agencies engaged in these activities should be supported, taking into account the inflationary increases in cost.

The savings in the fiscal 1982 budget here outlined, below what otherwise is anticipated, are in the neighborhood of 15 percent of the total. The uniqueness of budget accounting, agency by agency, obscures comparison of the depth of these proposed cuts. For example, the proposed cuts in REA and in Rural Development are more severe than indicated by dollar savings in the first year. Savings in subsequent years would be substantially larger.

Most of the budget cuts here proposed are addressed to what have been called the third agenda. One common attribute characterizes the activities singled out for cuts in this paper: in each case, benefits intended for those in financial difficulty have gone disproportionately to those at, near, or above the upper limit of eligibility. The cost-cutting here recommended comes from an effort to redirect the program toward its original stated purpose.

The difficulty of restraining these government programs is clear to the assessment team. These programs grew during several previous administrations that could be characterized as conservative (1952-1960, and 1969-1975). It is possible that in the present mood of the country the prospects for restraint are better.

PERSONNEL MANAGEMENT

A new Secretary can operate successfully only if there is mutual confidence between himself and his top staff. The appropriate course of events is for all who were appointed to their offices by the outgoing President to offer their resignations, for these to be accepted, and for positions to be filled as rapidly as possible with appointees mutally acceptable to the President and the new Secretary.

In the next echelon are people in important policy positions, not appointed by the President. Some are highly capable and some are not. Some are politically active and some are essentially professional. Some are strongly protected in their positions by the Senior Executive Service and others could more easily be replaced. Some will wish to stay and others will want to leave. Some will already have left. These positions

should be reviewed on a case-by-case basis. The individuals concerned should be informed, early on, as to their status.

The great majority of the Department's employees are out in the country, not in Washington, D.C. Many of the top people in these positions, particularly those in the Agricultural Stabilization and Conservation Service, are appointees of the Secretary. They will be uncertain about their positions. The credibility of rumors about personnel changes seems to be inversely proportional to the distance from Washington. The sooner uncertainties can be resolved, the better. Prolonged delay not only means poor performance; it results in the buildup of support for rival candidates and makes the final decision more difficult.

A new Secretary, in making these decisions, will need the help of a full-time personnel advisor. This person must have extraordinary qualifications: political awareness, good judgment as to the qualifications of candidates, honesty, the full confidence of the Secretary and of Party officials, and the capability to convey bad news to hopeful people. This person will be the most important of all in the transition process.

When transition occurs, attention naturally is focused on who is going to leave, the decision allegedly being in the hands of a "hatchet man." This is a narrow view of the process. The incoming official is as important as the departing one; the Secretary's personnel advisor should be much more like the recruiting officer for the football team than like a political executioner.

LONG-TERM PROBLEMS AND OPPORTUNITIES

This report is necessarily focused on the transition period, the first 90 days. The time of the new Secretary and his staff will be fully occupied in dealing with these urgent matters.

But as the new management team gets on top of current problems, time must be found for matters of longer-term significance.

Here we list some of the problems and opportunites likely to be of significant importance in the years ahead.

1. *Issues related to land, water, and other natural resources.* Farm people have custody of more environment than any other group. How this stewardship is to be carried out will be of enormous importance during the rest of the 20th century.

2. *Reemphasis on Science and Technology.* Agricultural productivity cannot be maintained without a continuing supply

of new technologies derived from expanded scientific knowledge. The development of a synfuels industry will increase the competition for land and water resources. The USDA and its allies, the Land Grant Colleges and the industry, need to forge a new partnership that will provide new knowledge and new techniques and thereby new options for the agricultural enterprise.

3. *Structure issues.* Agriculture is being industrialized. The change has enormous side-effects of an economic, social and political kind. What kind of agriculture do we want? What can or should the Department of Agriculture do to influence the pattern of American agriculture in the years ahead?

4. *Problems of clientele.* Traditionally, the Department of Agriculture stood in service of farm people. To this acknowledged and prized constituency, the Congress has now added rural nonfarm people and, with the food programs, 20 million city people. How can or should the Department respond to this broadening of subject matter and constituency?

5. *World hunger.* Increased populations in the poorer countries of Asia, Africa, and Latin America require vastly more food. What are our opportunities and responsibilities in helping meet these needs? How much trade and how much aid? Traditionally, our overseas relationships have been primarily with our trading partners in the industrialized world. How do we relate ourselves to the Third World? Hunger is man's oldest enemy. There is now the scientific knowledge and the institutional arrangement which makes it possible to overcome hunger, not only within the United States but throughout the world. This can be done within the lifetime of people now living, if there is the political will to do so. The Department of Agriculture, the Land Grant Colleges, the Experiment Stations, and the Extension Service have the greatest body of scientific knowledge and practical know-how anywhere in the world. If this is used effectively, the world's well-being will be significantly advanced and the place in history of the USDA and its allied institutions will be one of honor.

2

THE DEPARTMENT OF COMMERCE

Charles H. Bradford*

The U.S. Department of Commerce was originally created as the Department of Commerce and Labor in 1903, and as a separate Department of Commerce in 1913.

More than any other Cabinet-level department, the Department of Commerce resembles a feudal kingdom with a large number of separate and independent duchies rather than a unitary nation-state. Much as a feudal state was effective in its management of various nationalities and interests, this form of organization best serves a Department whose responsibilities range from national weather forecasting to encouraging and administering international trade to issuing patents to counting American heads.

Management of such an agency is a challenge for the Secretary of Commerce. Experts in a variety of highly technical and professional areas must be blended together to serve the Department's overall mission to promote the nation's trade and commerce, its economic development and its technological advance.

Despite the Department's overall responsibility to facilitate and encourage domestic and foreign commerce, it is fundamentally a service Department with less emphasis on policy than most government agencies.

Its 25,000 employees (1980) offer assistance and information

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* *Author's Note:* The preparation of this report was a collective enterprise involving many individuals: Bill Worthen, Karl Bakke, William "Denny" Dennis, Sidney Galler, Lee Hamilton, Dan Burt, William Peterson and Randy Wilcox. Bill Worthen deserves special mention as Assistant Team Chairman. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

to domestic and international business; provide social and economic statistics and analyses for business, government and other groups; assist in the development and maintenance of the U.S. Merchant Marine; and provide research for and promote the increased use of science and technology in the development of the economy. The Department provides assistance to speed the development of the economically underdeveloped areas of the country; seeks to improve understanding of the earth's physical environment and oceanic life; promotes travel to the United States by foreigners; assists in the growth of minority businesses; and administers other miscellaneous functions which facilitate commerce and trade.

Because of the amorphous nature of the Department, an integrated package of policy and organization options is not feasible. Thus, this paper will treat the Department in piecemeal fashion, by office or entity. In the case of the Department of Commerce, it is best to look at the trees instead of the forest. Some entities will receive more complete and detailed treatment than others. Because ofthe length and detail of the treatment of the International Trade Administration and the Maritime Administration, these parts are divided into separate sections on policy and administration.

Following the individual function treatment, the paper concludes with comments on the future problems and opportunities of the Department.

THE INTERNATIONAL TRADE ADMINISTRATION (ITA)

Policy

The International Trade Administration (ITA) is a principal in the execution of federal trade policy. Its policymaking role is less important than its executive function; nevertheless, its policymaking function is important. A number of independent agencies also participate in setting trade policy, among them the Export-Import Bank (Exim Bank), Overseas Private Investment Corporation (OPIC) and the International Trade Commission (ITC). Overall trade policy is coordinated at the White House level through the United States Trade Representative (USTR).

Since foreign trade has an effect inseparable from all forms of government-regulated economic activity, virtually every Cabinet-level department has some policy impact on foreign trade decisions. Further, since foreign trade is a major aspect

of general foreign policy, its decisions affect those agencies and departments which are responsible for foreign relations, national security and military preparedness. It is one part of a "seamless web." Those other government agencies and departments which are most directly involved with foreign trade policy are: the Department of State (DOS), Federal Reserve Board, Department of Treasury (Treasury), Department of Defense (DOD), Department of Energy (DOE), Department of Agriculture, and the Nuclear Regulatory Commission (NRC). These relationships are important as trade policy cannot be formulated in an economic vacuum. Trade decisions must relate to the health of both world and domestic economies. A general decline in domestic productivity will ultimately be reflected in reduced American exports, though floating exchange rates will lessen the initial impact of such a decline. Neither subsidies, nor artificial currency or commodity manipulation will ultimately prevent the negative effect on a general productivity decline.

Trade policy also cannot be executed in a political vacuum. Though free trade remains the American ideal, political constituencies opposed to a particular import or imports have brought and will continue to bring continuing pressure for protectionism.

The Carter Administration's trade policy suffered the same schizophrenia which affected other policy areas. The Administration sought to spur exports while imposing a broader variety of export restrictions.

Inconsistency by the Administration has had a frustrating effect on ITA. The ITA has two inconsistent missions. It is to both encourage trade and restrain it. While such inconsistency is a natural result of the varied interrelationships of economics and—broadly stated—foreign policy (and was not created by the Carter Administration), the presence of mission inconsistency at the level of policy execution severely hampers the ITA.

Export controls represent the major restraint mission of the ITA. The following is a list of major American export restraints, which are at odds with the concept of free trade, most of which are administered by ITA through the Office of Export Administration (OEA):

- Export controls for foreign policy reasons—South Africa, Cuba, Rhodesia, Vietnam.
- Export controls for national security and foreign policy reasons—U.S.S.R., P.R.C., North Korea, Eastern Europe.

• Export controls for reasons of domestic short supply.

• Export controls to achieve the objective of nuclear nonproliferation agreements.

• Export controls to achieve human rights objectives.

• Export controls to achieve objectives regarding protection of the environment in foreign countries.

• Export controls to affect health, safety, and efficacy in the use of pharmaceuticals and drugs in foreign countries.

• Export controls to prevent or punish American firms doing business with countries boycotting Israel (so-called Arab boycott policy).

• Export controls of military and paramilitary equipment—(MCL).

• Export controls to achieve the release of American hostages in Iran.

• Export controls to punish countries for harboring international terrorists.

• Export controls to affect adversely the conduct of the 1980 Moscow Olympics.

• Criminal penalties for American firms engaging in bribery of foreign government officials.

• Taxation of income earned by Americans working abroad.

• Antitrust limitations on American overseas business activities.

While these controls and penalties have been applied under a variety of rubrics, the most important statutory source is the Export Administration Act of 1979, 93 Stat. 503-536 and its predecessors. The Act mandates three rationales for controls: national security, foreign policy, and short supply. The Act provides a broad delegation to the President to act by Executive Order and through regulation. Under the Act and its predecessors, the Carter Administration invoked the foreign policy limitation rationale for reasons of human rights, nuclear nonproliferation and the environment. National security has been a far less important rationale for limiting exports than in previous Administrations.

In order to reverse the trend of limiting exports, exports should be reexamined in terms of point of destination, rather than placing primary reliance on the nature of the product to be exported. The major division should be between Soviet bloc trade and all other trade.

"Controlled" country, Soviet bloc trade has risen year by year, with the exception of 1976, from a 1970 total of $580

million to a 1979 total of $9.8 billion. Typically the Soviets have acounted for about one-half of that total. In 1976, for example, the United States exported $1.358 billion worth of food and livestock to the Soviets. High technology goods and machinery accounted for about $0.605 billion of that. This has been the typical distribution of American exports to the Soviets. From 1974 to 1979, U.S. imports from the "controlled" countries rose from $1.006 billion to $2.468 billion.

The financial stake of the United States in "controlled" countries is also substantial. Private U.S. bankers were owed about $5.2 billion as of December 1979; $1 billion of this total was owed by the U.S.S.R. The U.S.S.R. also owes the Exim Bank $469 million for debts accumulated between 1973 and 1975. As of 1977, the total Eastern bloc debt to the Exim Bank amounted to $945 million.

The Eastern bloc countries of Rumania, Hungary and Poland have received Most-Favored-Nation (MFN) treatment, having complied with the Jackson-Vanik emigration amendment to the 1974 Export Administration Act.

The Peoples Republic of China received MFN treatment pursuant to Executive Order 12167, October 23, 1979. The nonmarket countries constitute about 4.6 percent of the total U.S. exports. As a result of the grain embargo and high technology embargo, 1980 should see a major decline in overall exports to the Soviet Union.

While a number of theories have been used to support trade with "controlled" countries, two of the more important are:

1. Engaging the Soviets and their allies in trade will make them more tractable in world affairs; and

2. The U.S. will be able to split the Soviet bloc allies from the Soviets by reducing their dependence on Soviet economic power.

The principal corollary which supports both arguments is the alternative source theory.

The pro-trade position is attacked on two separate grounds. First, all trade with the U.S.S.R., as the major world outlaw, is immoral. Therefore, all East-West trade should be ended on moral grounds. The second argument assumes that some trade with "controlled" countries is legitimate, but only where such trade does not result in the transfer of high technology and industrial goods and systems which can be used to benefit the Soviet military machine. This analysis proceeds from the second proposition.

While this second approach undergirds the Export Adminis-

tration Act of 1979, the Carter Administration failed to execute this important limitation. The following examples, gathered from public record sources, show the failure of the Administration to comply with the limitation, particularly in the important area of military "diversion."*

The military "diversion" problem is demonstrated by the Kama River Truck Plant; Zil Truck Complex; Gorki Truck Plant; IBM 360 and 370 computers, which were the models for development of the Soviet Ryand I and II computers; Array Transform Processors (ATPs), which are a type of seismic equipment usable for submarine destroyer discovery; and Centalign B Precision grinding machines. The sale of a drill bit manufacturing complex by Dresser Industries was apparently caught up in the Afghan embargo, though it had earlier been approved over the objection of the Department of Energy. The military importance of each diversion can be argued; however, the *fact* of the diversion is unquestionable.

The argument which supports such exports and allegedly rationalizes the nonimposition of limits is "foreign availability." Western nations have worked jointly to supervise exports to "controlled" countries through a Paris-based agency called the Coordinating Committee (CoCom). CoCom is made up of the NATO countries minus Iceland plus Japan. CoCom maintains lists of "controlled" goods which are subject to different types of embargo. They are: (1) the munitions control list (MCL); (2) the atomic energy list that includes sources of fissionable materials and nuclear reactors and their components; and (3) the industrial/commercial list. At issue here is the industrial/commercial list.

For the foreign availability argument to be logically supportable, it must be found that the CoCom list exceptions were requested primarily by the other members of CoCom. In fact, prior to 1976, the value and number of CoCom list exceptions to the industrial/commercial list split about 50 percent United States and 50 percent allies. By 1978 the U.S. share of the exceptions had climbed to 62 percent of the total. In the crucial computer area, the American dominance in requesting exceptions to the general embargo is especially pronounced. The U.S. accounted for 50 percent of the requests; however, American corporate subsidies accounted for 40 percent of the

*Some of the criticized transfer occurred during the Nixon-Ford Administration. However, major military application was demonstrated during the Carter Administration, and no cutoff of spare parts or supporting equipment occurred during the Carter Administration on the grounds of military misapplication.

remainder. A mere 10 percent of the requested exceptions were based on computers of exclusively foreign manufacture and design. In the crucial computer market, the foreign availability argument is basically without merit.

While an American cutoff of high technology trade with the Soviets will not entirely eliminate the availability of all high technology goods, the foreign availability argument is vastly overstated as a rationale for continued trade in such goods.*

The United States faces two different choices. It can ignore the impact of the technology transfer and invest the extra billions of dollars necessary to provide military security, which has been jeopardized by the rapid Soviet military deployment of American technology; or the U.S. can end its technology transfers and encourage its allies to resist Soviet sales blandishments.

There are major reasons to believe that a reduction in allied trade with the Soviet bloc is a realistic goal. Presently, the U.S.S.R. receives betwen 30 and 40 percent of its total yearly accumulation of hard currency reserves through the sale of petroleum products. The Soviets are pumping more oil than any other world state at around 11.5 million barrels per day. Since they use direct water injection, from the moment that they initiate production in the field, they will deplete the available reserves much more rapidly than comparable Western depletion. Further, Siberian oil has not been found at rates capable of meeting their rapid depletion. Soviet growth has required an increase in consumption of about 700,000 barrels per day per year to maintain their low 0.7 percent growth rate per year. The United States has managed a modest economic growth with a drop in oil consumption. Since 75 percent of all Soviet energy is consumed in the industrial and utility sector and a mere three percent is consumed by cars and as fuel for other discretionary uses, and since the Soviets cannot remake their entire industrial plant, the Soviets have few conservation options when supplies drop. On the other hand, in the United States, between 30 and 40 percent of our oil is consumed by automobiles and other discretionary consumer uses.

Since it is currently predicted by the CIA that the Soviets will see a dramatic drop in their oil production within the next several years and will become importers rather than exporters

*There is also a cumulative capacity argument based on the ability of our OECD competitors to make up for a major drop in exports. While the argument is not made here, it also serves to undercut the foreign availability argument.

by 1985, the Soviets will lack the hard currency to pay for a continuing high level of Western goods.* Thus, our allies will be unable to export to the Soviets without major credit grants. Such credit grants would stretch their capacity to provide credit extensions to other markets. Thus, even if the United States concedes the entire Eastern market to our allies, the Eastern bloc's credit needs would either drain our allies' capacity for credit extension, thus making them less competitive in other markets, or they will have to pull back from the Eastern bloc market. Either our position *vis-a-vis* our Western competitors will improve in the rest of the world market, or our allies will have to abandon plans for market expansion in the Eastern bloc. The likelihood is that there will be little foreign availability to make up for a substantial U.S. market withdrawal.

In order for the United States to reassume national security control over U.S. exports to the Soviet bloc, it is proposed that an Executive Order be issued embargoing all nonagricultural trade with the Soviets and their allies for 90 days. The program of granting general licenses for United States-U.S.S.R. trade should be abolished and a case-by-case review substituted. The Executive Order would include a lifting of the grain embargo so as to reduce the resulting political and international fallout. The Executive Order would make clear that the embargo is only a temporary expedient necessary to rationalize our trade relations with the East. The embargo would be based on the national security rationale of the Export Administration Act of 1979, on the President's inherent powers as Commander-in-Chief, and on his responsibility to execute the laws under Article II of the Constitution.

The following are reasons for proposing the embargo:

1. It will put the Soviets on notice that we are not doing "business as usual" despite the lifting of the grain embargo.

2. It will give the new administration time to clear up organizational and personnel problems within OEA, and will press the Senate to act quickly on confirmations so that the temporary embargo can be lifted.

3. It will provide an immediate rationale for a supplemental authorization needed to make OEA function effectively, and it will also allow OEA to review each trade request in detail and still eliminate the major backlogs which have accumulated.

*Some indication of this hard currency problem may be seen in recent Soviet sales of gold on the international gold markets.

4. It will give the new administration time to structure a new and broader licensing requirement for the export of nonagricultural goods to "controlled" countries.

5. It will help switch the burden of proof from those who would deny the license to those who seek it.

6. It will clearly distinguish the Soviet bloc from all other trade, thus properly placing Soviet bloc trade on a strictly political (national security) basis, as distinguished from our commercial relations with other states.

7. It will demonstrate a clear policy break to our allies from seeking to get exemptions from CoCom as we have done in the past, to seeking strict enforcement of CoCom restrictions.

8. The new policy to be put in place after 90 days will appear liberal in comparison to the total embargo. Then there will be less hue and cry over the new, very conservative trade approach to the Soviets.

The political costs of such a policy are obvious. Unquestionably, the pro-detente chorus will orchestrate opposition to the embargo. However, as it is to be done in the first few weeks of the new administration, it will be muted. Further, the lifting of the grain embargo will show the "lack of hostile intention."

The economic costs are modest and primarily short-term. America will be foregoing a market in high technology goods in which we have generated a modest surplus; however, the full embargo of all goods would only last 90 days. Our productive capacity can certainly find other markets for 90 days, or simply pile up inventory. Further, without a major infusion of concessionary credit, East-West trade cannot significantly expand as the "controlled" countries lack the hard currency sources necessary to expand purchases. The long-term elimination of high technology transfers will reduce our market modestly, but the costs are reasonably acceptable.

While East-West trade policy should flow from the presumption that trade should be avoided on the basis of national security, the principle which should dominate all other foreign trade is free trade.

The previously cited list of export controls demonstrates the varying rationales which presently temper free trade.

Unfortunately, for the effective execution of those policies, the U.S. has nothing that can reasonably be seen as a general monopoly over the source of supply for exports. In short, there is no equivalent of a CoCom which can be used to enforce a

monopoly among exporters which do not involve the Soviet bloc.*

These nonnational security rationales for trade restrictions therefore must necessarily proceed from the assumption that their impact will be confined to American business. While it can be argued that foreign importers will be forced to an added expense if the U.S. boycotts them, the boycott of nonmilitary goods, at issue here, will not prevent the importers from securing supplies. Further, boycotts of certain goods necessarily affects trade in other goods with the boycotted countries, as these countries have a strong motivation to move away from importing U.S. goods in a political retaliation. Further, by proving to be an unreliable trade partner, we chill our trade relations across the board, with both the embargoed society and those who could feel potentially threatened by such an embargo themselves.

As many of the societies to whom we are presently exporting are barely beginning to establish internal infrastructures, the absence of present trade relationship will have long-term consequences. These infrastructures will be geared to the receipt and usage of goods which are manufactured to specifications and by processes which do not mirror the American system. As a result, much trading potential will necessarily be foreclosed by a failure to have a strong relationship in the formative stage of infrastructure building.

Our human rights policy of limiting our exports to states which violate human rights should be abandoned as a counterproductive failure. This can be accomplished through the normal notice and comment provisions of the Administrative Procedures Act's (APA) rulemaking provisions.

There are no economic reasons for limiting trade with South Africa. However, such limitations as do exist have a large political constituency which cannot be ignored. It is suggested that the present limitations not be repealed because of the political costs; however, no new trade restrictions should be imposed.

Trade limitations which we have unilaterally imposed to maintain or improve the world environment should be abolished. These are clearly an example of gross interference in the internal affairs of foreign countries. Of course, a multilateral approach to such limitations is possible and can be explored. These limitations can be repealed through APA processes.

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*The Iranian embargo flows from the national security rationale and is outside the discussion of "foreign policy" limits on trade.

Turning to the broader world markets, the United States has not fared well in competing for export business in the past few years. This poor performance reflects some very serious underlying economic problems, such as slow U.S. productivity growth. Despite the rhetorical enthusiasm for exports, the Carter Administration followed a very restrictive export policy. This has been substantially aggravated by insensitive government regulatory, tax and financing policies which shackle U.S. firms operating abroad, while foreign competitors enjoy a rich panoply of benefits and incentives designed to help them increase overseas sales.

The following is a list of some of the specific problem areas that need attention.

1. The heavy burden of taxation on Americans living overseas has an adverse effect on export performance.

2. Tax incentives for market promotion, offered liberally by U.S. competitors, are only offered in token form by the United States.

3. The Foreign Corrupt Practices Act is an act with laudable goals but is badly drafted, poorly administered, and results in lost markets for U.S. business.

4. The Webb-Pomerene Act is so ambiguous and confusing that it no longer encourages the formation of U.S. consortia capable of competing for international contracts in situations where U.S. firms are otherwise exceptionally well qualified to compete.

5. Export-Import Bank financing of U.S. exports is inferior in rates, amounts financed, insurance coverage, and in mixed and concessional credit arrangements compared to terms offered by competitor nations. Therefore, U.S. exports suffer.

The United States is the only major country which taxes the foreign-earned income of citizens living abroad. The taxation of income earned by Americans working abroad should be greatly reduced or ended as it inhibits American corporations from sending American personnel abroad. By cutting down on the number of American executives abroad, we are reducing the number of individuals upon whom the nation's corporations can draw for expertise in international commerce. Americans involved in purchasing, equipping or design decisions are familiar with U.S. goods and technology and tend to specify and order American equipment and services. We recommend the elimination or reduction of the taxes on U.S. citizens working abroad.

Tax policy as it affects exports is a complicated area and is

reviewed in the Treasury Department report. One important area worthy of careful analysis is DISC, a timid U.S. tax incentive for export promotion. Any discussion of positive or negative implications for our balance of payments position which flow from such policies as DISC or deferrals must be premised on their transitory character. In short, the advent of flexible exchange rates, in existence since 1973, will ultimately render any policy of permanently improving our balance of payments ineffective as market forces will tend to balance accounts.

A case could be made that DISC is relatively costly for the return secured. The 1976 reduction in the size of the benefits which DISC provided through partial tax deferral of income earned by DISC subsidiaries makes the program somewhat marginal. However, as George Shultz has argued, the more important factor in tax policy may well be its continuity. In short, the psychological security provided by the program's continuation may be more important than the value in dollars of the increase in trade. Rather than eliminating DISC, consideration should be given to substantially strengthening its provisions. As an alternative, since DISC has been judged a GATT violation, consideration should be given to using it as a bargaining chip in multilateral negotiations aimed at eliminating foreign subsidies.*

Another disincentive to U.S. exports is the Foreign Corrupt Practices Act (FCPA), which the overseas business community argues is helping foreign competition without achieving a reduction in the prevalence of corruption practices. The problem is that the high standards we demand from American business are not matched by any other major trading nation. Side payment for services as part of government duty remains the rule in many world markets. Although it has precluded American firms from taking part in questionable transactions, the FCPA has not reduced corruption in world trade, and in the process has effectively precluded U.S. traders from following some local procedures that, though unconventional by American standards, are perfectly legal and required practice in most countries. The price of this single standard morality is lost export markets for the United States.

The Foreign Corrupt Practices Act could be abolished entirely by legislation. However, it is possible for the Attorney

*An excellent presentation of this problem is found in a Congressional Research Service (CRS) pamphlet entitled "Deferral and DISC: Two Targets of Tax Reform," by Gravelle and Kieffer, February 3, 1978.

General to issue a directive to the the Justice Department, which has partial responsibility for enforcement, stating that the vagueness of the Act makes prosecution under its strictures of dubious constitutionality. Therefore, prosecutions will not be brought by the Attorney General.

While the President lacks the authority to order the SEC to act, the President can propose a deferral or rescission of that part of the SEC budget necessary to enforece its provisions. Further, the decision of the Attorney General not to prosecute due to vagueness of the Act should prevent SEC enforcement action.

The antiboycott law might be the subject of a repeal move on the grounds that it is an interference in other countries' internal affairs. However, repeal is not recommended here. The antiboycott law seeks to prevent other states from dictating our trade policy. As such, it is defensive law and therefore stands on a different conceptual basis. Though its application has some negative impacts, there is a consensus that the law as presently interpreted does not have a large impact on trade. Thus, the law should not be challenged.

The application of U.S. antitrust laws has served as a major unilateral deterrent to an aggressive export policy. The Webb-Pomerene Act does not work as intended. The limited antitrust exemption for export associations provided by the Act has not encouraged trade, except in the motion picture industry. We should grant a broader antitrust exemption. A possible model may be found in S. 2718. As the legislative progress of S. 2718 indicates, such a revision is within the realm of political possibility.

While export stimulation cannot establish a permanently favorable balance of payments in a world of floating exchange rates, an increase in trade will increase the level of trade at which the equilibrium will be established. Since the U.S. will likely continue its upward consumption of imports, particularly oil, the only way in which the U.S. can retain its standard of living *vis-à-vis* the world's economy is through aggressive pursuit of exports.

However, as export subsidies will likely violate GATT provisions, the answer to the problem of increasing exports must lie with the general health of the economy. To secure the health of the economy, high taxation and programs such as the National Environmental Protection Act, the Occupational Health and Safety Act, and other socially appealing but

economically unproductive programs must be reassessed in light of their negative impacts on our exports.

While our position as a major trading nation would be enhanced by elimination of unilateral export restrictions, the financing problem will continue to present a major problem for U.S. exporters.

During the last few years, U.S. financing of trade has moved slowly away from private bank funding and toward more direct government-financed loans. In this regard, the Exim Bank has moved away from loan guarantees, which characterized its approach prior to 1978, and toward making major long- and medium-term loans at concessionary rates in order to meet export credit competition. This approach has been "forced" upon us by our major export competitors and by our own inflation rate.

We have been unsuccessful in negotiating restraints on the degree and type of credit concessions which can be granted by an OECD country. It is the view of many that the French are the primary offenders in this area.

In order to make a large number of loans during the last fiscal year, the Exim Bank substantially overspent its FY 1980 budget and was forced to come to Congress for increased funding authorization. The policy question is whether we will continue to expand subsidized credit to encourage increased exports. Such a decision to expand credit will amount to subsidizing our exporters at the expense of other economic interests. (See the Treasury Department report for a discussion of Exim Bank financing policy.)

Congress is extremely unlikely to make sufficient credit available to provide the funds to meet the demand. The clear result will be that major exporting corporations will receive credit assistance and small borrowers will be deprived.

Since a case can be made for virtually any type of concessionary credit within the United States (housing, minority business, etc.) on policy grounds, it would be virtually impossible to control monetary growth if the broad subsidy approach were given free rein, even assuming that Congress were to make the funds available to provide such broad competition.

Therefore, a continuing expansion of the growth of capital available to Exim Bank to meet across-the-board demand must be rejected. However, the vital role of the Exim Bank in providing *guarantees* should not be ignored.

The Export-Import Bank, in consultation with ITA and the

USTR, should establish a system designed to identify the worst offenders in the area of export credit subsidies. An Executive Order should be issued which contains a list of offenders. Those corporations seeking contracts in competition with such offenders should be encouraged to seek credit from the Exim Bank. If the contract proposal meets the normal, commercially acceptable criteria of credit worthiness, the loan should be made at such a rate as to equal or better the foreign competition. The source of presidential authority is the President's duty to execute the laws, particularly his responsibility to minimize foreign competition among government-supported export financing [12 U.S.C. §635(b)(1)(A)(1980)].

A second Executive Order should be issued stating that Comecon countries are by definition noncredit worthy, and Exim Bank financing would not be in the national interest pursuant to 12 U.S.C. §625(b)(2). This order will expand the financing available for market countries and signal American exporters that the government does not look with favor on Comecon exports.

In the long term, if we are unsuccessful in substantially reducing foreign credit subsidies for exports by OECD countries, the Exim Bank will either have to be funded at massive levels, or we will see a severe long-term drop in our exports.

The most important result of the various foregoing export policy changes is to refocus American exporting on the free trade presumption, and simultaneously refocus East-West trade into a narrow national security rationale. Financial considerations are an important part of this policy change.

Export policy in the nuclear and military areas, while it has an impact on Commerce Department operations, should primarily be examined pursuant to the priorities established by the departments and agencies whose chief roles are in those areas.

Import Policy

Import policy is the second major policy area for which ITA has execution responsibilities. Because of the domestic political impact of raising and lowering tariffs, which varies greatly from industry to industry and has a far more direct impact on the President's ability to develop a governing majority, it is difficult to analyze import policy in a paper of this nature. Clearly, import restrictions violate the free trade premise. On the other hand, while reliance on imported "strategic goods" has a national security dimension, only economic autarky

could eliminate such reliance on foreign supply. The costs of such an effort would be beyond any realistically attainable political consensus. Further, it could not be achieved for our principal allies and would thus produce diminimus political benefits.

Given these two limitations on flexibility, a realistic import policy should seek to accommodate political realities without abandoning the free trade premise.

One argument against increased import restrictions is that such restrictions will inevitably bring about foreign restrictions on American exports. Import restrictions should then be seen as necessary accommodations designed to ease social transitions in failing industries, not long-term palliatives designed to maintain an industry.

On the other hand, U.S. policymakers have generally been reluctant to aggressively use import restrictions to force concessions from our trading partners. As a result, we have been extremely indulgent of the restrictions of our trading partners. While the fear of a trade war is not irrelevant, we should not hesitate to threaten imposition of import restrictions to secure reductions in many nontariff barriers to our exports maintained by our OECD trading partners.

It is recommended that we use the U.S. internal demands for protectionism to buttress our negotiating position for demanding the lowering of nontariff entry barriers erected by our OECD trading partners. The Japanese should be the principal target of this new strategy. Japan is almost completely subsidized by our military structure, which keeps them independent. Since they are unwilling to increase their defense expenditures to provide for their own security, we should be very unsympathetic to their trade barriers (which are based on internal political considerations).

As the Japanese have been particularly destructive in their imposition of barriers to our agricultural products, we should threaten imposition of major import restrictions on their automobiles and electronics until their barriers to our exports are removed. U.S. policy should not be dictated by the fear of offending our Japanese allies. The time for treating Japan as a psychologically scarred protege is past. Support for Japan's massive trade surplus must end. The cost to our country of securing Japanese independence through our military "umbrella" should be factored into our trade relationship. To a lesser degree, this same approach should be pursued with our other industialized trade partners.

The approach to the nonindustrial world should flow from a different impulse. While a number of developing countries—Taiwan, Brazil, Hong Kong, Singapore and Korea, to name the more salient—have reached a point where they now provide major competition for processed products, the overwhelming majority of developing countries serve as sources for raw materials or only partially processed goods. Given their stage of economic development, it is unrealistic and probably unfair as well, to expect them to substantially lower their tariff and nontariff entry barriers beyond what has been agreed to through UNCTAD and GATT. Generally, entry restrictions on these countries should be imposed only where they can be shown to be engaging in a demonstrable policy of export subsidy.

By using such an analysis, we should be able to effectively distinguish between those following a capitalist development model and those following a socialist or modified socialist approach. We should not hesitate to restrict imports from the socialist model societies where our internal economic interests dictate. We *should* hesitate to impose import restrictions on those following the capitalist model, even where they have trade barriers to our imports.

Executive Orders

A number of Executive Orders deal with the policy issues discussed in this section on the Intenational Trade Administration. Intelligent disposition of a number of these E.O.'s requires a detailed economic review beyond the scope of this paper, particularly adjustments in the Tariff Schedule of the United States (TSUS) and Amendments to the Generalized System of Preferences (GSP).

Proposed tariff and trade amendments should be scrutinized with care as tariffs and preferences often have been arrived at by way of detailed negotiated understandings reached in a bilateral or multilateral context. A proposal for unilateral revisions without a detailed awareness of these agreements and understandings would not be responsible. Orderly marketing agreements (OMA's) should only be used in the context discussed above, not as an attempt to prop up a dying industry over a long period of time.

Our tariffs on imported food commodities should be fully reexamined. Some basic food and animal products probably cannot be produced competitively. We should move away from the system of price supports and quotas which subsidize

domestic producers. One caveat should be kept in mind: we should carefully scrutinize the foreign source of competition to be sure that our farmers and ranchers are not being driven out of business by those who are receiving local subsidies.

This trade policy discussion concludes with a review of a few key Executive Orders.

E.O. 11387; January 1, 1968—Governing Certain Capital Transfers Abroad

This Executive Order was based on the proclamation of a national emergency (No. 2914, December 14, 1950). President Johnson barred those Americans with a 10 percent or greater interest in voting securities, capital, or earnings in a foreign business venture from directly or indirectly transferring capital to or within any foreign country or nation thereof outside the United States.

The E.O also contains other restrictions. The Secretary of Commerce is required to administer the order and grant exceptions to its limitations.

The rationale for the order rested on the balance of payments problem.

This order should either be revoked entirely or be superseded by an Executive Order which requires that such capital transactions be reported to the Department of Commerce or Treasury. Though we now have a far larger balance of payments problem, restricting personal American freedom is an inappropriate method of remedying the problem and probably impractical as well. On its face, the order would seem to be unenforceable, and without massive cooperation it would take an army of bureaucrats to actually generate control. As the reporting function would appear to be the only valuable function of this E.O., it should be revoked and the information sought in other ways.

E.O. 11858; May 7, 1975—Foreign Investment in the United States

This Executive Order restricting investment in the United States was undoubtedly initiated to quell the fears of farmers and others that the United States was being taken over. There would appear to be no economic justification for it.

Proclamation 3447—Embargo on Trade with Cuba

The Cuba trade embargo (Proclamation 3447) should be maintained as part of a stepped-up program to isolate Castro.

The Secretary of the Treasury's authority to make exceptions to the embargo should be reexamined with a view toward substantially tightening origin rules.

The Secretary of Commerce should be required to reexamine all exceptions granted under the Export Control Act. All exceptions which do not have a strictly humanitarian rationale or law enforcement reason (hijacking) should be rescinded.

E.O. 12166; October 19, 1979—Export-Import Bank

This Executive Order delegates the President's authority to the Secretary of State to determine that a denial of credit application is in the national interest. The E.O. defines the national interest by reference to clearly advancing policy areas, such as international terrorism, nuclear proliferation, environmental protection and human rights.

This Executive Order should be revoked. A substitute may be appropriate which states that the Exim Bank shall make all loans on the basis of commercial and financial considerations except when those states involved have not qualified for MFN or are embargoed.

Proposed Executive Order: Export-Import Bank Substitute for E.O. 12166

An Executive Order (classified—not published) should contain a list of states that are suspected of harboring terrorists, or in some way encouraging them. All decisions involving Exim Bank loans or guarantees to such states, or on behalf of exporters or importers dealing in the goods of such states, should be referred to the National Security Council or other relevant security-conscious agency before they are made. Decisions vetoing such loans or guarantees at such level would become final unless reversed by the White House. The grounds for the denial of the loan would not be stated to the requesting party and appeal of denial by the security agency to the President would only be available to the Exim Bank Board, acting by a majority.

A number of Executive Orders which deal with export policy mention the Department of Commerce. However, they primarily serve to distribute functions. The appropriateness of such redistributions of responsibility should be assessed in relation to other agencies.

Administration

The Carter Administration substantially redesigned the Industry and Trade Administration, placing Domestic Business

Development under the Bureau of Industrial Economics and reorganizing all the international functions under the Under Secretary for International Trade. The entire international operation is now called the International Trade Administration.

Reorganization Plan No. 3 of 1979, which was mandated by the Multilateral Trade Negotiation (MTN) implementing legislation, strengthened the authority of the White House level trade negotiator, redesignating the position as Office of the United States Trade Representative (USTR).

The USTR was given primary responsibility for developing and coordinating the implementation of U.S. international trade policy. The Plan gives the USTR the leadership position in representing the United States in GATT, UNCTAD, OECD and other multilateral meetings and organizational groupings with responsibility to protect the U.S. interests. He is to coordinate trade policy to expand exports; undertake policy research, including commodity and direct investment matters; and, to the "extent permitted by law," guide policy with regard to unfair trade practices. He is responsible to coordinate bilateral trade and commodity issues, including East-West trade and energy issues. All these responsibilities are to be executed under the direct leadership of the President.

The 1979 Reorganization Plan gives the Secretary of Commerce and his Under Secretary for International Trade general operation authority for major nonagricultural internal trade functions, which include: (1) export development, (2) commercial representation abroad, (3) export and import administration, including administration of antidumping and countervailing duty laws and export controls, (4) trade adjustment assistance, (5) research and analysis, and (6) monitoring of compliance with international trade agreements. While the Office of the United States Trade Representative is not housed in the Department of Commerce, his duties and activities have an important bearing on the operations of ITA, and therefore it is relevant to discuss the USTR in this report on the Department of Commerce.

The USTR is served by a staff of approximately 200 people. This is a major increase in staff. The dynamism of former Ambassador Robert Strauss may account for this. The Office has few administrative problems and functions well.

There is a strong argument for a White House level Ambassador in the trade area. Trade policy constitutes a major arm of Presidential authority. Both constitutional mandates of power

and congressional delegations give the President extensive power to regulate foreign commerce. As no President could execute this power unadvised, some level of authority must be delegated the operational responsibility for policymaking.

Certainly, such a delegation could be made to the Department of Commerce. However, Commerce has been especially subject to criticism of incompetence in this particular function. Further, many believe that the Department is a mouthpiece for large corporations. Regardless of the propriety of such criticism—the argument is not advanced here—the image problem is real and is a major reason not to eliminate the USTR.

Just as a National Security Council inside the White House structure is justified despite the presence of Department of Defense and Department of State, the problems of access and control strongly argue for a White House level trade Ambassador.

However, the size of the USTR Office threatens to develop a new layer of bureaucracy. Its increase in size supports arguments in favor of moving the entire USTR Office out of the White House.

This budding White House bureaucracy threatens other sources of information on trade. As the USTR Office grows, there will be less and less reason for policymakers to rely on the Department of Commerce and Department of State for support in reaching policy decisions. As both Departments are required to execute policy, they should be involved in the decisionmaking process.

Therefore, the Office of USTR should be substantially reduced, probably by one-half, so that it is restricted to policy development and analysis only. All studies should take place at the operational level within ITA, Department of State or other concerned agencies or departments. All implementation should also take place at the operational level. Not only will this eliminate the possibility of another bureaucracy developing, it will continue to guarantee the Office of USTR access to the President and his most intimate advisors.

In order to accomplish the above, Section 1(3) of Reorganization Plan No. 3 of 1979 may need statutory amendment or a new reorganization.

However, the transfer of personnel can be accomplished without such amendment. An Executive or ambassadorial directive transferring personnel to the Department of Commerce or State would accomplish the desired results over the

short term. If necessary, the Ambassador could detail these people to the Commerce Department.

The following is an analysis of the major organizations, departments, agencies and administrations within ITA, focusing on those which have specific problems.

The most serious administrative problem is that the Secretary's role as chief trade advocate is contradicted by his role as chief administrator of export controls.

No Executive Order can correct this, nor can reorganization authority be used, as it lapsed in 1980. However, two administrative possibilities exist:

1. Instruct the Deputy Assistant Secretary for the Office of Export Administration (OEA) to report directly to either the Under Secretary of Commerce or some other selected individual within the Secretary's office. The Under Secretary of Commerce rather than the Secretary would serve as the principal Department spokesman for export controls.

2. As an alternative, the position of Deputy Under Secretary for International Trade should be given the direct *operational and program responsibility* for the Office of Export Administration. Direct *regulatory* control of OEA should be removed from the Under Secretary for International Trade, and the Under Secretary should pursue only a coordinating function in regulatory matters.

A longer term solution is to take OEA out of the Department of Commerce. It should be administered as a separate entity like the ITC. However, it should not be a commission and should have one head who can serve as an ex-officio member of the Exim Bank Board. This requires either legislation or new reorganization authority.

A second long-run legislative alternative is to create an Office of Strategic Trade leaving nonstrategic export controls such as antiboycott rules in the hands of the ITA. This would clearly emphasize the difference between national security controls and other types of controls. S. 2606 in the 96th Congress could constitute a good basis for such an effort. However, it would still leave the Secretary with the contradictory position of advocating trade and seeking to limit it at the same time.

Under Secretary of Commerce for International Trade

The problem of mixing advocacy with regulatory restraint, criticized at the Secretarial level, is even a bigger problem for

the Under Secretary of Commerce for International Trade. The same solutions as listed for the Secretary apply here.

Foreign Commercial Service

The Foreign Commercial Service is an excellent idea. However, institutionally, Foreign Service Officers (FSOs) and Foreign Service Reserves (FSRs) should not be encouraged to work in the Foreign Commercial Service, as they will probably tend to reflect the general approach of the FSOs, which has been political rather than economic.

Foreign Commercial Service Officers (FCSs) should not be stationed in Communist countries; trade relations with those societies should be based on political, not commercial considerations. FSOs should take over "economic" duties in Communist countries except Yugoslavia.

To handle this, Foreign Commercial Service Officers should be removed by Administrative order from all Communist countries. The State Department should issue an order mandating that FSOs will fill the vacancies. This change of representation will emphasize the political nature of trade with these societies.

As a longer term solution, legislation should be considered which prohibits service by Foreign Commercial Service Officers (FCSs) in Communist countries. This could also be done by reorganization.

Assistant Secretary for Trade Development; Export Development; East-West Trade and U.S. Commercial Service

The responsibility of the Assistant Secretary for Trade Development may be seen by some as being in conflict with the free enterprise responsibility of private industry to seek its own markets. However, the great physical distance from major markets and the relative lack of experience by businessmen with international trade make the concept of trade development and the U.S. Commercial Service sound.

All East-West trade development should be transferred to the Department of State. Lifting this responsibility from the Department of Commerce should result in significant savings to that Department. The entire Office of Deputy Assistant Secretary for East-West Trade should be abolished. Personnel who are doing useful economic evaluations which have signficance for other government agencies should be transferred to other agencies. The intention here is not to abolish East-West trade *per se*, but to make the decisions concerning it political, rather than economic.

The U.S. Commercial Service, through its 44 district offices, provides business with information, technical assistance and counselling on export and investment matters. The Service assists in identifying potential U.S. exporters and participates in overseas promotional events. In its operations, it utilizes Export Development and East-West Trade information services, including the Worldwide Information and Trade System (WITS).

There is personnel rotation between the U.S. Commercial Service and the Foreign Commercial Service, a good practice. However, it should be made clear that the U.S. Commercial Service is only on a trial basis, to be reviewed after a two- or three-year period. Whether or not it is retained depends on the extent to which it is successful in getting new U.S. businesses into exporting and in expanding U.S. export sales.

Assistant Secretary for International Economic Policy; Trade Agreements; Finance Investment and Services; Policy Planning and Analysis and Textile and Apparel

The trade agreements section requires a reorientation of our policy which can be accomplished through personnel changes. Keeping in mind that protectionism is not the goal, a threatened aggressive use of import tariffs in order to secure reductions in nontariff market barriers in other countries should be considered. As a practical matter, errors should be in favor of imposing tariffs to secure export concessions rather than not imposing them as is now the policy. However, we should not look to protect our own industries through agreement except on a temporary basis.

Textiles and apparel is presently a heavily protected industry. There is a major political problem in reducing our textile import protection. However, it should be the U.S. goal to eliminate domestic subsidies.

It would be easy to eliminate our protective mechanisms which are subsidizing industry by Executive Order. However, we would receive no *quid pro quo* from the exporting countries. Thus, textile agreement talks should be reopened with a view to eliminating the high tariffs on textile products.

The phaseout of all U.S. import restrictions should be a goal of multilateral negotiations.

Assistant Secretary for Trade Administration; Import Administration and Export Administration

The Office of Export Administration presently suffers from

low morale and slow and uneven performance. The disposition is discussed in the Secretary's review. However, here it should be noted that a supplemental appropriation will be necessary to improve performance.

Administration of the antiboycott law should remain in the Department of Commerce, since it is being administered competently.

The Import Administration, which receives the bulk of its duties from Treasury, is functioning well. Since the function of import restraint is closely related in conceptual terms to free trade theory, it should remain in the Commerce Department, particularly since the ITC has an independent input.

MARITIME ADMINISTRATION

Policy

The Assistant Secretary of Maritime Affairs, also designated the Maritime Administrator, is the head of the Maritime Administration (MARAD).

Pursuant to the Merchant Marine Act of 1936, as amended (46 U.S.C. §1101 *et. seq.*), the principal responsibility of the Maritime Administration is to "further the development and maintenance of an adequate and well-balanced Merchant Marine, to promote the commerce of the United States, [and] to aid in the national defense . . . ." The principal vehicle for achieving this policy goal is the subsidy mechanism.*

The 1936 Act established the major subsidy programs in force today. Principal among them are:

1. A Construction-Differential Subsidy (CDS), to cover the gap in shipbuilding costs between higher cost American and lower cost foreign shipyards;

2. An Operating-Differential Subsidy (ODS), to bridge the similar gap in certain operating costs;

3. A Capital Construction Fund program, to promote replacement of old vessels with U.S.-built ships by means of favorable tax treatment to subsidized operators;

4. Mortgage and war risk insurance for U.S. shipowners.

The above programs have not succeeded in maintaining the U.S. position in maritime trade. After a period of post-World War II dominance, American merchant shipping has declined

*The *promotional* role of the Maritime *Administration* concerning the U.S.-flag merchant marine should be distinguished from the *regulatory* role of the independent Federal Maritime *Commission* with respect to ocean common carriers in foreign and domestic offshore trade.

to the point where the U.S-flag dry bulk fleet in 1979 accounted for 0.3 percent of the world dry bulk fleet.*

In 1970 Congress responded to this decline by passing the Merchant Marine Act of 1970, which was intended to add 30 ships each year for 10 years to the U.S.-flag merchant fleet, at a cost (then) of about $6 billion. By mid-1978 no more than 78 ships had been built.

The primary causes for this dramatic failure are economic, though the program was unquestionably over-ambitious. The Arab oil embargo, which touched off the worldwide recession, created a depression in the shipbuilding industry. The pre-1973 shortage of tankers had caused massive expansion in the worldwide shipbuilding industry. The contraction caused by the 1973 embargo reduced the worldwide shipbuilding industry to operating at 25 to 35 percent of capacity. This contraction has not yet stopped. In order to attempt to protect local shipbuilding industries, foreign nations have begun their own subsidy programs.

Further clouding the future of American shipbuilding has been Third World pressure to enter the shipbuilding industry. The United Nations Conference on Trade and Development (UNCTAD) has responded to the pressure of its Third World majority by proposing a code of conduct for liner conferences. This proposal includes a controversial provision reserving to each national flag fleet (in bilateral trade) 40 percent of liner cargoes carried on conference vessels, and 20 percent available to Third-flag vessels on a competitive basis. Since the European Economic Community has accepted this proposal with certain reservations, it is likely to go into effect next year. Moreover, UNCTAD discussions are underway to extend this cargo-reservation concept to bulk shipping, which is intended to phase out open registry or "flag of convenience" fleets.

The position of the Carter Administration was to convene an Interagency Task Force to prepare recommendations necessary "to achieve a maritime program which will return us to the seapower status we deserve."** The report issued on July 20, 1979, one year after the deadline, achieved an interagency consensus which dealt largely with regulatory issues, not revitalization of the U.S. Merchant Marine. The one exception was a proposed promotion of the U.S. dry bulk fleet

*Thirteen of our 19 ships were over 30 years old.

**This task force approach was made necessary to coordinate U.S. maritime policymaking, now scattered in MARAD, Federal Maritime Commission (FMC), and the Departments of Defense, Justice, State, Treasury and Transportation.

through numerous regulatory revisions that would permit subsidized owners more flexibility in their operations. However, with respect to the liner trades, the President opposed the UNCTAD code's cargo-sharing provisions and accepted the concept of bilateral cargo agreements only when no other option was available to protect U.S. interests.

The fundamental, practical question raised by this background is whether a program of subsidized shipbuilding and subsidized American flag transportation will effectively produce a fleet in the public interest or merely profit a specialized segment of American society at substantial government expense. The question is important, not merely for its commercial implications, but because the goal of a healthy maritime industry capable of operating as a national defense resource has been a central objective of U.S. maritime policy since 1870.

Three major policy alternatives are presented:

1. Abandon the attempt to develop a merchant fleet subsidized in both its building and its operation and gradually eliminate the regulatory provisions which limit access to foreign-built and foreign-flag ships.

2. Maintain the present program, accepting the reality that it will not result in a significant fleet, and maintain protection for American shipbuilding and operation.

3. Substantially increase the subsidies, incentives and financing available to promote the construction of a major U.S. merchant fleet.

The first alternative would reduce federal outlays for shipbuilding and operation, but it will run into substantial opposition from the U.S. shipbuilding industry, American-flag carriers and their associated unions. This power represents a major obstacle, and important House and Senate committee members have a substantial political interest in the continuation of these programs. The long-term advantages to the taxpaying public are substantial. If the goal of 300 ships is retained, the building costs alone, under the onslaught of inflation, can reasonably be anticipated now to be in excess of $10 billion. Further, regulations which restrict non-U.S.-flag shipping have caused underutilization of energy-efficient intercoastal maritime services. Measured in BTU's, the per ton cost of a mile of freighthauling by ship requires one-fifth the amount of petroleum needed by trucks, one-third of that needed by pipeline transport and two-thirds of that needed in railshipping. A 10 percent shift from intercity truck carriage to

marine-hauling would save up to 50,000 barrels of crude oil per day.

The introduction of foreign operators into intercoastal shipping would increase competitiveness in such shipping over the long-term. The line haul costs in 1976 average a little over one-half cent per ton-mile by water, eleven cents by truck and a little over two cents by rail. Rising fuel costs will increase these differentials. This competitive reality will attract foreign-built and foreign-flag shipping. To the extent that foreign-built shipping is being subsidized by foreign governments, foreign governments would be subsidizing U.S. transportation.

Nevertheless, the national security approach which should dominate export controls should also be applied to shipping in coastal waters. The Merchant Marine of the Comecon countries are naval auxiliary vessels. Their officers are Reserve Naval Officers, and while serving on "commercial" vessels they carry out duties of political and military significance, particularly intelligence gathering. "Profit" is not the chief motive of Comecon shippers and thus subsidy is implicit in the fleet's very existence. Since access by such shipping presents a national security problem for the U.S., Comecon shipping liners should not receive access to U.S. intercoastal shipping. The extent to which Soviet bloc shipping gains access to U.S. origin cargoes should be based strictly on *quid pro quo* U.S. access to similar Soviet bloc cargo.

The national security rationale for a U.S.-built flag fleet remains significant. However, with the general decline in the size of the U.S. Navy, it must be asked whether the money spent under this national defense rationale might be better spent on U.S. naval vessels which would, of course, be built in American shipyards. Further, it may be argued that the availability of shipping in time of war should be viewed in an allied rather than strictly national context. In such a context, shipbuilding potential is not a problem.

Assuming, however, that lack of access to the shipbuilding capacity of U.S. allies becomes an important military problem based on a probable war scenario, the problem should be handled directly through action of the Department of Defense to keep the necessary capacity available.

Deregulation and elimination of subsidies would have to be phased in gradually. The approach used in interstate trucking deregulation could serve as a model for the phase-out of maritime regulation.

The second policy alternative is to leave the present program intact without major injections of new federal funds and maintain regulatory protections for U.S. flagship construction and operation. A major political advantage in this is avoiding the difficulty of going to Congress for huge new shipbuilding appropriations. However, even with program alterations designed to make the subsidy system more efficient, a new fleet will not be built sufficient to expand U.S. intercoastal marine transportation to compete with foreign-flag carriers.

The third alternative calls for the expenditure of huge sums of federal money on a package of federal subsidies and incentives. Because of the heavy drain on the Treasury, it is not recommended here, but it is presented for the simple reason that the current program will not bring forth the ships. If, indeed, the goal is to build up a large merchant fleet, some of the specific recommendations listed below will have to be adopted. Present policy and procedure will not do it.

The phase-out of subsidies and the deregulation option should be chosen. This will result in a modest, short-term saving and a substantial, long-term saving to the Treasury.

Administration

Regardless of the outcome of the policy choices on the Maritime Administration outlined in the previous section, MARAD should be transferred to the Department of Transportation. This is the one major administrative recommendation concerning MARAD. A real effort should be made to achieve this goal despite the sparks that will fly both downtown and on Capitol Hill.

Maritime Administration problems and planning should be made part of an overall national transportation policy. This is particularly important with respect to coastwise and intercoastal marine transport, which has suffered competitive disadvantages compared with other domestic modes because it has not been integrated into Department of Transportation policy planning, as have motor and rail transportation. Such a transfer would require new reorganization authority.

Looking at purely domestic transportation over the past decade, total intercity freight traffic has increased in step with overall U.S. economic growth, and a significant expansion of transport services has occurred. However, the marine shipping segment of this traffic has been relatively stagnant, with the coastwise and intercoastal services experiencing dramatic re-

ductions in vessel engagement and traffic carriage. By the end of the 1970s, only 15 self-propelled vessels remained in the coastwise and intercoastal dry cargo service; in 1960, there were 71. Two basic factors account for this decline: inflexibility of marine services and high market entry costs.

Use of domestic marine transport is limited to access to ports and waterways. Marine service operators do not offer the full transit and scheduling services that characterize the other modes. Marine shipping service is a disjointed, rigid service committed to specific cargoes and lacking in market influence. Highway transport, by contrast, offers rapid transit, flexibility, convenience of door-to-door service, and small-lot handling. The continuing growth of truck carriage indicates that these benefits outweigh the high service cost.

The high market entry, replacement and expansion costs associated with marine services create grave risks for operators and financial backers. Currently, ship costs range from $9.5 million for a small break-bulk vessel to $69.8 million for a combination roll-on/roll-off containership.

Although the carrying capacity per dollar invested is high and can provide a good financial return, the problem of identifying cargo sources to utilize the large increment of capacity associated with a single ship is a formidable one. This has discouraged both expansion and replacement within the coastwise and intercoastal fleets. In contrast, a locomotive can be purchased for about $800,000; individual freight cars for $30,000 to $40,000; and a new tractor-trailer for less than $70,000. Furthermore, a railroad or trucking company can be started with a few of these low-cost units, and replacement and expansion can be phased in to maintain tight control of capital costs and avoid purchase of excess capacity.

Improvement in marine shipping can only come about through service integration with other transportation modes. Service integration suggests the development of a national transportation policy and network in which all carriers, regardless of primary mode, make optimal use of each mode for best overall service to shippers.

The logical place for this synthesis is the Department of Transportation, which already has major policy responsibilities with respect to promotion of the rail and motor modes.

OFFICE OF THE CHIEF ECONOMIST (STATISTICAL AND ECONOMIC SERVICES)

The Chief Economist of the Department of Commerce has a

large empire of economic and statistical services to administer. Included under this domain are: Bureau of the Census, Bureau of Economic Analysis, Bureau of Industrial Economics, Statistical Standards and Methodology, and Federal Statistical Policy and Standards. These operations require the services of some 3,300 permanent employees, 2,600 of whom are in the Bureau of the Census. During each decennial population census, the Census Bureau is augmented by an army of part-time workers.

Bureau of the Census

The Bureau of the Census is the biggest statistical bureau in the government. It is a general purpose statistical agency, collecting figures not only on population but also on housing, agriculture, state and local government, foreign trade, manufacturing, construction, mineral industries and retail, wholesale and service trades. In addition to its routine data collection, the Bureau conducts special censuses at the request, and expense, of state and local government units.

Concerning the census of population, Commerce had won legislative approval for a mid-decade census to begin in 1985 and to be taken every 10 years thereafter, thus increasing the frequency of a census to every five years. Congressional Appropriations Committees, however, wisely withheld authorization of funds for this purpose. It costs a billion dollars to run a census today, and will cost more as time goes on. A five-year census would be costly and unnecessary, and the authority to conduct such a census should be repealed. Improved population estimates obtained by IRS coding efforts, in conjunction with existing current surveys and other special surveys as needed, can fulfill the requirements intended to be met by a mid-decade census.

Bureau of Economic Analysis

The Bureau of Economic Analysis prepares, develops and interprets the economic accounts of the United States, consisting of the national income and product accounts, the wealth accounts, the input-output accounts, which trace buying and selling interrelationships among industrial markets, regional economic information, U.S. balance of payments, associated foreign economic measures and a system of economic indicators tracing economic trends. The Bureau of Economic Analysis is the government's most important analyst of economic conditions.

BEA has done pioneer work in its surveys of business plans, the best known being the quarterly and annual surveys of business spending for plant and equipment. These surveys provide a key clue to the behavior of the economy and should be continued.

Bureau of Industrial Economics

The Bureau of Industrial Economics conducts analyses and research on a broad range of industrial economic questions. It develops data on producer goods, consumer goods and consumer services. These data are used in economic analysis by the Department of Commerce and other federal agencies. They assist in the formulation of industrial policy.

General Analysis of Commerce Statistical and Economic Services

Almost all of government is involved in collecting statistics, and several agencies have formal statistical programs, but the Department of Commerce is the biggest and one of the best of the data collection centers. The Department of Commerce does a good job with its statistical and economic functions. The professional staff in the Office of Chief Economist, Bureau of the Census, Bureau of Economic Analysis, Bureau of Industrial Economics and Office of Statistical Standards and Methodology are all technically proficient and dedicated. No changes are recommended in any of these areas.

However, this is not to say that the Department is without problems. Indeed, there are some serious political problems facing the Census Bureau, but these do not reflect on the competence of the Bureau.

Population and other data furnished by the Census Bureau play a sensitive role in the allocation of billions of dollars of federal money to state and local governments under legislated formulas. Moreover, congressional representation hinges on population data. Because of their critical importance, census data are carefully scrutinized by politicians, economists, econometricians and others.

In Detroit and New York, lawsuits have been filed by city and state officials calling for adjustments in alleged population undercounts, primarily among black, Hispanic, non-English-speaking residents.

Disputes about undercounts have plagued the Census Bureau since the first one was taken in 1790. George Washington

is said to have complained that thousands of people were missed. The 1980 count has prompted an unusual number of lawsuits.

The Census Bureau spent more than a billion dollars doing the 1980 census, about four times as much as in 1970, adding aggressive advertising campaigns to its budget to get fuller participation. Even so, officials acknowledge that there still undoubtedly were undercounts. These court challenges may mean some adjustments in the census data. In 1970, for example, 4.9 million were added to the count on the basis of postal information and other evidence that people were living in housing thought to be vacant.

The upshot is that the Census Bureau will need more money in FY 1981 to fight its court battles and to make adjustments in its data.

The foregoing problems, however, are not of the type to call for a restructuring of the Census Bureau or require major changes in its statistical procedures.

In addition to the Census Bureau problems cited above, there are a few problems in Commerce statistical functions from time to time—e.g., profit and depreciation data developed by the Bureau of Economic Analysis that do not adequately reflect the impact of inflation—but BEA revisions along the way continually improve the data, and they are quite adequate today. Certainly, the statistics and economic information flowing from the Department of Commerce could be improved by increased expenditures of time and money, but, except for added funds for the Census Bureau to fight its legal battles, this is not recommended at this time.

Overlaps in Data Collection

One gnawing problem is the duplicate collection of data by different government agencies. Over 100 federal agencies have statistical programs, and, naturally, there are some duplications. For example, both the FTC and Commerce collect profit data and both the SEC and Commerce collect foreign investment data. The purposes are different—for regulation purposes in the case of the FTC and SEC; for knowledge and policy formulation purposes in the case of Commerce. But businesses have to fill out forms for both agencies, an annoying duplication of effort.

One proposed solution is the creation of a super statistical agency, to collect data for *all* government departments and agencies, disseminating them on an "as needed" basis to both

public and private groups. However, such a proposal is too mindboggling to be taken seriously. There would be jurisdictional jealousies, technical problems and problems of data relevancy for different types of uses. It's the kind of major surgery that would leave scars. Moreover, for certain regulatory agencies—utilities, bank regulators, etc.—data collection is an integral part of the regulatory process itself.

The better part of wisdom would be to improve the coordination of data collection. It may require some revision of rules of confidentiality, to permit sharing of data with other government agencies.

Office of Federal Statistical Policy and Standards

Under present arrangements, government statistical coordination is handled by the Office of Federal Statistical Policy and Standards in the Department of Commerce. While Commerce does a good job shepherding this Office, it should be returned to the Executive Office of the President. There are many inherent conflicts when one department attempts to coordinate the statistical programs of other departments and agencies.

In 1977, President Carter shifted this central coordinating agency, then called the Statistical Policy Division, from OMB to Commerce in order to help fulfill a campaign promise to reduce the size of the Executive Office of the President, of which OMB is a part. Commerce seemed like a logical place because it is the largest government data-gathering center.

The Office of Federal Statistical Policy and Standards does a reasonably good job considering the problems it faces. There has been a dramatic growth in data collection and analyses over the past three decades, but over that period the OFSPS staff has been cut in half, from 69 when it was created in 1947 to about 30 today. The Office is seriously understaffed to do the basic work of seeking reduction of duplication, excessive paperwork and burdens on data suppliers, let alone other demands to ensure policy relevance, quality and integrity of statistical data.

Clearly, a statistical policy office with broader vision is needed. It is time to put the Office of Federal Statistical Policy and Standards back in the Executive Office of the President or in the Office of Management and Budget.

The Bonnen Task Force, a federal statistical system reorganization study project, created in 1977 and which reported to

Presidential Advisors in December 1979, calls for the establishment of an Office of Statistical Policy in the Office of the President for the coordination of the Federal Statistical System. The President approved the Bonnen project recommendations in January 1980. The Office would function as a separate agency in the Executive Office, reporting directly to the President and accountable to the Congress.

Such an arrangement would broaden the vision and perspective of the Office, and, with direct Presidential backing, could tackle its lofty mission to:

- Ensure the policy relevance, quality and integrity of statistical data and analyses produced by agencies of the Federal Statistical System.
- Develop plans so that the Federal Statistical System will be able to meet future information needs efficiently in the face of technological, social and economic changes.
- Assist in minimizing the burden of all persons and organizations asked to supply statistical or other data to the federal government.
- Maintain a proper balance between protecting individual and business rights of privacy ad confidentiality and meeting information needs for public policy.

Abolition of Certain Interagency Councils and Committees

The Department of Commerce is represented on three government interagency councils dealing with economic matters that should be abolished: (1) the Interagency Coordinating Council, (2) the National Productivity Council and (3) the Energy Coordinating Committee.

The Interagency Coordinating Council was created by Executive Order 12075 on August 16, 1978. It is made up of the Secretaries of all Cabinet departments, including Commerce, plus the Environmental Protection Agency, Small Business Administration, General Services Administration and the Community Services Administration. It was set up initially to implement the President's urban policy, later to include rural policy. It is now basically a policymaking body for various regional commissions. It also has some responsibility for economic adjustment policy when federal bases are closed and is responsible for a few other specific projects such as employment initiatives. The Council is also directed to solve interagency and intergovernmental problems which impede the effective functioning of the federal system.

The National Productivity Council was created by Executive Order 12089 on October 23, 1978. It is made up of the Secretaries of Commerce, Labor and Treasury and other offices of government that could have a reasonable input on productivity matters and chaired by the Director of the Office of Management and Budget.

The basic functions of the Council are to identify opportunities for cooperative projects on productivity; to identify major policy issues with productivity implications for consideration by the President and for legislative initiatives; to serve as liaison with elements of the private sector concerned with improving productivity and for other similar purposes.

While these are lofty goals, the Council is not really doing anything constructive and it should be abolished. The information it puts out can be obtained directly from the Bureau of Labor Statistics or Commerce. It was set up initially as a sequel to the old, and useful, Productivity Commission. President Carter felt the need to keep something alive to avoid the charge that the federal government was dropping its interest in productivity. Thus, he worked out the least-cost, least-active kind of mechanism to keep this "motherhood" issue alive, and called it the National Productivity Council. However, it is pretty much a facade.

The Energy Coordinating Committee, created by Executive Order 12083 on September 27, 1978, is made up of all Cabinet Secretaries, including Commerce, and a dozen other agency and administration officials, and chaired by the Secretary of Energy. Its role is to ensure that there is communication and coordination among Executive agencies concerning energy policy and the management of energy resources.

Staffing for the Committee was recently switched from the Department of Energy to the White House, and it has done virtually nothing for a year.

None of these interagency groups is effective or productive. They are made up of Cabinet Secretaries and agency heads, with a skeleton staff borrowed from one of the agencies. They meet infrequently—every three to six months—with the attendees being primarily "designated representatives" or "deputies," a Washington signal that the work of the Council is not very important. Few people know of their existence. Those who do know of them are not impressed. They are not vital forces in the government. The new administration should abolish all three of them.

THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

The National Oceanic and Atmospheric Administration (NOAA) is a subset of the organizational diversity that typifies the Department of Commerce as a whole. NOAA was created in 1970 by bringing together the functions of the Department of Commerce's Environmental Science Administration, including the Weather Bureau, Coast and Geodetic Survey, Environmental Data Service, National Environmental Satellite Center and Research Laboratories; the Interior Department's Bureau of Commercial Fisheries, Marine Game Fish Research Program, and Marine Minerals Technology; and Navy-administered National Oceanographic Data Center and National Oceanographic Instrument Center; the Coast Guard's National Sea Grant Program; and elements of the Army Corps of Engineers' U.S. Lake Survey.

NOAA's budget has increased from roughly $200 million when it started to $800 million for FY 1980. Its full-time personnel totals over 12,000, comprising half of the Department of Commerce's permanent employment.

Scientific Research

Since NOAA was created in 1970, it has slowly been shifting its emphasis away from research to policy and political concerns, regulation, and to a smaller extent, enforcement. For example, much of the traditional research conducted by the National Marine Fisheries Service in the past has been drastically reduced. Part of the problem has been the rash of new legislation bombarding NOAA during the 1970s. However, internal decisions to downgrade research, especially during the past four years, are equally responsible for the reduction in scientific research.

Although scientific research is generally costly, it is more costly in the long run to *not* base decisions and management plans on solid scientific data. Often NOAA must establish regulations on fish catch quotas based on rather scanty information. Similar problems exist in pollution control, habitat protection and resource development.

With the addition of a large number of ideologically oriented administrators, the overall management situation in NOAA has deteriorated in the last few years. This has had an adverse impact on the effectiveness of the agency and the morale of its professional scientists. Moreover, the current administrator

and his principal deputy are not scientists, nor have they had any prior experience in managing a highly sophisticated scientific and technological enterprise. The future administration of NOAA should have a much stronger commitment to science.

An interim technical and organizational advisory group should be established to examine the current structure of NOAA to determine if the current mix of responsibilities is compatible. One question that should be addressed by the group is whether responsibilities for scientific fact-finding, data-gathering and analysis should be separated from economic- and policy-oriented support services.

Fisheries

The National Marine Fisheries Service (NMFS) is charged with all aspects of fisheries management and development. It conducts research, establishes management schemes for habitat protection, conducts fish stock assessments, co-regulates, along with the Coast Guard, both domestic and foreign commercial fishermen and has responsibility to help develop the U.S. commercial fisheries.

NMFS works with the Regional Councils, established under the Fisheries Conservation and Management Act of 1976 (FCMA), to draw up management plans for each species important to the commercial fish industry. Unfortunately, there are two significant omissions in the overall management of the fish stocks that severely hinder decisions.

There are an estimated 20 million marine recreational fishermen in the United States that catch as much foodfish as the commercial fishing industry. In fact, the marine recreational fishing interests within NMFS have been downgraded. NOAA has purposely, for political reasons, removed a small office devoted to recreational fishing problems and has generally removed any reference to such activities.

The second omission is the lack of management responsibility for the three-mile territorial sea. The FCMA only covers species principally caught outside three miles. Although species freely interact inshore and offshore, NOAA virtually ignores the inshore species, leaving that responsibility to the individual states. Unfortunately, many states do little research on marine species and some have management programs inconsistent with NOAA's.

Without proper input from the marine recreational fishing industry, and without knowledge or coordination with the states on inshore species, proper management of our fish

stocks will be virtually impossible. The National Marine Fisheries Service is not adequately organized to keep our fishing industry healthy and viable. Future review of NOAA's structure must take these problems into consideration.

The National Sea Grant College Program

The Sea Grant Program is a matching fund federal grant research program for development, utilization and conservation of ocean and coastal resources. It has an impressive record of success, primarily because it is based largely on local priorities and needs. It operates in partnership with state and local governments, private industry, universities, organizations and individuals concerned with or affected by ocean and coastal resources. The Congress makes regular requests of Sea Grant for information.

A key element of Sea Grant is its outreach mechanism whereby results of research are provided to users in industry, government agencies and the general public.

Sea Grant funding should be increased by 10 percent per year in real terms for the next five years.

Northwest Administrative Service Office

The Northwest Administrative Service Office was created in 1971 in Seattle, Washington. The Office is somewhat of an anomaly since it is the only regional administrative office in NOAA. The reason for its existence is directly related to NOAA's rapid expansion in Seattle and the Northwest, and the fact that Senator Warren Magnuson had been Chairman of the Commerce Committee (NOAA Authorization) for 12 years prior to becoming Chairman of the Appropriations Committee in 1978.

The Office serves as a common administrative services unit, which recognized the fact that there are 1,800 NOAA employees in Seattle alone. Its functions include personnel, procurement and local construction. Last year, this office was responsible for 50 percent of NOAA's total procurement work and hired 1,000 employees.

From the standpoint of coordination and control, the concept of a regional administrative unit is a good one. Either this regional group concept should be expanded to the rest of the country, thus eliminating much of NOAA's Washington, D.C. bureaucracy, or the Northwest Administrative Service Office should be closed.

Satellites

During the past year, NOAA has created a new office of Satellite Services at the assistant administrator level. The office will handle NOAA's satellite programs, particularly the Landsat and the National Ocean Satellite System (NOSS).

Both Landsat and NOSS will eventually be totally funded and administered by NOAA and will far outstrip the rest of NOAA's budget.

OMB is presently considering the extent of funding for Landsat, which realistically could cost about $10 billion over the next ten years. NOSS will cost somewhere between $1 to $2 billion over ten years. Apart from the enormous cost of these satellite programs, there is concern that NOAA's conventional oceans and atmospheric programs will suffer financially and politically. Before NOSS is implemented, careful assessment must be made of its effect on other oceans and atmospheric programs.

Weather Service

Over the past few years, NOAA has shifted weather prediction priorities from serving the agricultural industry to serving the urban dweller. This shift in emphasis could have detrimental effects on agriculture in the long run and should be reconsidered.

Consolidation of Ocean Programs

There are ocean programs in other agencies that should be consolidated under NOAA.

First, the Bureau of Land Management has an extensive ocean research program on offshore oil exploration and development. Most of BLM's funding is contracted to NOAA, particularly in Alaska, because NOAA is the agency with ocean expertise. BLM is also involved in oil spill damage research, which is clearly in the jurisdiction of NOAA. It would increase efficiency, reduce costs and avoid duplication by moving BLM's oceans programs to NOAA.

Second, ocean pollution research should be consolidated either by moving the Environmental Protection Agency's ocean research programs to NOAA or vice versa. This will eliminate research redundancy and wasteful spending.

ECONOMIC DEVELOPMENT ADMINISTRATION

The Economic Development Administration (EDA) was authorized by the Public Works and Economic Development Act of 1965, a classic Great Society program. It provides economic development and adjustment assistance to areas experiencing conditions of chronic unemployment and income lower than in the nation as a whole. It also provides some adjustment assistance under the Trade Act of 1974 to firms and communities adversely affected by increased import competition.

Assistance programs include loans, loan guarantees and interest subsidies for commercial and industrial establishments; direct and supplementary grants for the construction or renovation of public works and development facilities; grants for technical and adjustment assistance; and a program for economic research and program evaluation related to economic development problems.

The stated purpose of EDA is to assist distressed communities that have experienced or are threatened by disruptions in their economies. Designated geographic areas are eligible for EDA assistance if they have substantial or persistent unemployment, a sudden rise in unemployment, low per capita employment, low per capita income or a low median family income. These assorted criteria are so broad that they apply to 2,231 areas with a population of 175 million. *Accordingly, 85 percent of the U.S. population is now considered "distressed."* Additional areas are eligible for "adjustment" assistance after certain findings are made. Given this broad eligibility, the program is a political boondoggle. Unfortunately, Congress has been firmly resistent to any attempts to narrow eligibility or drop areas whose economic condition improves.

Under the Carter Administration, EDA was transformed from a modest-sized, rural public works program into a major big-city business lending agency with enormous potential for influencing capital markets.

In fiscal year 1977, when President Carter took office, 50 percent of EDA's program budget was directed to public works and development grants to communities, but only 15 percent was budgeted for assistance to private firms, mostly direct loans. The proposed Carter budget for FY 1981 for EDA's regular program provides 24 percent for public construction, but 69 percent for business assistance in the form of loans, guarantees and interest subsidies.

Further evidence of this transformation toward direct assistance to industrial sectors, as distinguished from assistance to communities, is the $550 million loan guarantee program initiated to help the steel industry in fiscal 1979.

Because all funds are distributed at the discretion of the Secretary of Commerce, the opportunity for political rather than economic forces to direct EDA investments is enormous.

The Carter Administration's original budget request for 1981 was $1.2 billion in spending authority, plus $1.8 billion for loan guarantees, a total of $3 billion. That appropriation request is more than double the level provided in each of FY 1979 and 1980, and four times the program level for FY 1977.

These spending plans were later modified significantly by the Administration and sharply cut by the Budget and Appropriations Committees of the Congress. Because legislation to reauthorize the Economic Development Administration has been stalled in Congress for more than a year, the House Appropriations Committee provided no program funds for EDA in the 1981 appropriation bill. The Senate Appropriations Committee recommended $685 million in 1981 budget authority, plus $425 million in loan guarantee authority. However, until congressional action on pending appropriations bills is final, EDA will operate under the terms of a continuing resolution in 1981, as it did during 1980, at a level of about $550 million.

After 15 years of operation, the evidence is not strong that EDA legislative intent has been achieved. An EDA financed research study indicates that roughly 50 percent of counties provided aid achieved a faster growth rate than unaided counties, but the same study points put that the EDA program has had little or no effect on closing the total income gap. The trend in combined per capita personal income as a percent of that in all nonaided counties showed no significant change with the introduction of the EDA program. EDA has not achieved its objectives.

At the beginning of the EDA program, economically depressed counties were concentrated in the South, the Mountain West and Appalachia. Now parts of the South, energy rich areas of Appalachia and the Rocky Mountain West are showing impressive economic gains. However, these gains are unrelated to EDA efforts, and it is the industrialized and urbanized Midwest and Northeast which now are having trouble. Public works, federal loans and loan guarantees to firms in economically depressed areas have been ineffective in

reversing the fundamental causes of high unemployment and low family income.

The basic policy question with respect to EDA is whether this federal program approach to reducing poverty should be continued. As economic policy, the program is unsound.

In view of the present uncertainty surrounding enactment of legislation to reauthorize the EDA, it is difficult to suggest a specific course of action. However, its economic development policy should observe the following principles:

1. Business Assistance: If the program is to be continued, the focus should be returned to aiding communities and localities, not private businesses. The federal government should resist a major new multi-billion dollar credit program that interferes in the market process for allocating capital to industrial firms. In the name of "saving" jobs, EDA will, in effect, be following the British approach of sheltering inefficient firms or firms in dying industries from the competitive forces that ensure good management and high levels of productivity.

Under current policy, EDA could become an agency servicing the financial needs of many "mini-Chryslers," at the complete discretion of the Secretary of Commerce and at the behest of relatively few Members of Congress.

Since such subsidies must ultimately come from the general capital market, the subsidy approach will reduce the credit available to more productive and dynamic companies. This is very bad economic policy.

2. Reporting Function: Under the present EDA mandate, there is an obligation to inform the Congress and the public of government's role in the fundamental economic problems which cause unemployment and low income. EDA should undertake research and regularly report to Congress results which identify government policies that restrict economic growth, cause sudden capital shifts, increase unemployment and hurt productivity. This will require the hiring of policy analysts who share the Assistant Secretary's goal of promoting economic growth and increased private employment and productivity.

3. Public Works: Research continues to demonstrate that the EDA public works programs do not significantly contribute to community economic development or to the creation of permanent jobs. The average size of an EDA-assisted project is $1 million, and duplicates other federal programs.

Recent studies show that an estimated $100 billion already appropriated by the federal, state and local governments for

public works construction remains unused because of a complex array of regulations and procedures. Such delay adds enormously to the cost of construction, and renders such activities useless in creating jobs during downturns in the business cycle. Rather than operate an EDA-assisted construction program, the Administration should focus efforts on eliminating the causes of delay, thereby reducing costs of needed public construction.

4. Countercyclical Public Works Jobs: In FY 1977, Congress appropriated $6 billion for EDA to make 100 percent federal grants to states and municipalities for job-creating public works activities. This program, called "local public works," was a special one-shot program intended to counter the unemployment effects of the 1974 recession and was in addition to EDA's regular economic development and business assistance programs. Not only did construction on such projects begin two years after the end of the recession, the construction continued for years into the recovery, adding to inflationary pressures in the economy. There is no money in the program now, but there have been suggestions to start up another round to help in the recovery from the 1980 recession. These efforts should be strongly resisted.

Studies performed by EDA contractors and others have demonstrated that such programs do not create many jobs due to high materials cost and federally mandated wage rates; do not create jobs during the business downturn; do not benefit the long-term unemployed (most jobs are taken by previously employed, highly-skilled construction workers and consequently do not help the poor or the unemployed). To a large extent, such programs merely substitute federal construction dollars for local construction, potentially leading to a reduction in overall construction activity.

Despite these critical conclusions, a substantially streamlined Economic Development Administration may function usefully to help communities adjust to sudden and severe economic disruptions in their local economies caused by the closing or a personnel reduction at defense installations; cancellation of defense contracts; reduced demand caused by changes in international trade policies; or imposition of environmental controls. The present budget devotes approximately $40 million annually to this type of adjustment assistance. However, legislation pending in Congress to reauthorize EDA proposes increasing this to the range of $100 to $250 million.

Since this is the most effective EDA program, this increase should be considered sound.

Significant reductions in federal spending, taxing and regulation will do more to aid depressed areas and advance the cause of economic growth for the nation as a whole than the whole spectrum of EDA programs. Reducing federal intervention in the daily decisionmaking of private firms will do wonders in increasing productivity in the private sector, and will provide more jobs than EDA's activities.

REGIONAL ECONOMIC DEVELOPMENT COMMISSIONS

Pursuant to Title V of the Public Works and Economic Development Act of 1965, as amended, eight Regional Development Commissions, which cover all or portions of 34 states, have been established. They are: the Atlantic Coastal Plains (Southeast), Four Corners (Arizona, Colorado, New Mexico, Utah), New England, the Upper Missouri River, the Ozarks, the Pacific Northwest, the Southwest Border, and the Upper Great Lakes. The Commissions provide technical and planning assistance, demonstration projects, and supplemental grants for regional development. Pending passage of the 1980 Appropriations Act, four new regional commissions will be established.

We recommend that the Regional Development Program be abolished, and any essential functions be folded into the Economic Development Administration. The program has become a boondoggle, giving governors a private tap to the Treasury.

The concept of providing special economic assistance to economically deprived areas has been expanded to include practically every region of the country. An example of the level of absurdity that this program has reached is the fact that Alaska and Hawaii are trying now to justify why they together should qualify for the next regional commission. Also, the State of Texas now believes that it should be recognized as a separate commission. Projects are becoming less meritorious and beneficial.

There is no need for the regional commission program. State treasuries and general revenue sharing can accommodate the truly justified projects.

MINORITY BUSINESS DEVELOPMENT AGENCY

The Minority Business Development Agency (MBDA), originally the Office of Minority Business Enterprise, was founded in 1969 by Executive Orders. Though many of MBDA's activities duplicate those of the Small Business Administration (SBA), political considerations thus far have prevented merger of the two.

MBDA coordinates federal activities designed to assist minority business, stimulates private sector efforts in support of minority business, and provides financial assistance to private and public organizations which in turn provide management and technical assistance to minority businesses.

In its 11 years of existence, the Agency can demonstrate very little contribution to minority business.

One problem is that MBDA has been unable to define a constituency separate from SBA. All minority businesses are "small businesses" by reasonable definition, with only a few exceptions. The result is overlap and duplication of SBA's work.

For example, the management and technical assistance program is duplicated at SBA where management counseling was provided to 48,000 minority firms in 1978. Both MBDA and SBA work with the states and localities to promote minority business.

Congress has directed SBA to become heavily involved in minority business. As a result, SBA not only now has programs for all small businesses, including minorities, but specific minority programs as well.

In order to avoid duplication, MBDA has concentrated on assisting only the largest firms. Such a concentration is bad policy. The development program should create a broad class of minority entrepreneurs who function in local settings and provide broad social mobility. The subsidy of an economic elite is indefensible.

Returning to the fundamental problem, the unified government program to advance the cause of minority business will better serve that constituency and will streamline government operations. To this end, two options are suggested:

1. Abolish the Minority Business Development Agency and transfer all functions to the SBA. This would have to be on a phaseout basis. Half of MBDA's budget is in the form of grants to local vendors which provide MBDA services to the client population. As contracts expired, they would not be renewed.

2. Consolidate minority business program in the Department of Commerce's MBDA.

This report recommends the first option. Consolidating minority business functions in one agency would save about 25 percent of the combined MBDA/SBA budget requests for 1981. The total of the two requests is $104 million. The consolidated program could operate for about $77 million.

UNITED STATES TRAVEL SERVICE

The United States Travel Service (USTS) was established in 1961 to develop, plan and carry out a comprehensive program to stimulate and encourage travel to the United States by residents of foreign countries. After issuing volumes of literature on tourism to the United States, promoting travel to this country at international fairs and offering promotional travel for foreign journalists, there is no convincing evidence that USTS has had much effect on increasing travel to the United States.

USTS is a perfect example of government getting involved in an activity the private sector is quite willing to perform. U.S. carriers are currently spending more than $300 million a year on advertising, plus another $40 million on other forms of promotion annually. U.S. airlines serving foreign countries spend an estimated 30 percent or more of their advertising budget to encourage foreign travelers to visit the United States.

Promoting travel to the United States is clearly an area which can and should be left to the private sector, which already has substantial resources, expertise and commitment.

The United States Travel Service should not be switched to another department nor should it undergo a change in administration or orientation. It simply should be abolished.

PATENT AND TRADEMARK OFFICE

The Patent and Trademark Office (PTO) was established by Congress ". . . to promote the progress of . . . the useful arts . . . ." under Article I, Section 8, U.S. Constitution.

The Patent Office examines applications for three kinds of patents: design patents (issued for 3½, 7 or 14 years), plant patents (issued for 17 years), and utility patents (issued for 17 years). More than 70,000 patents are issued annually which provide inventors with exclusive rights of their creative efforts. The patent system is intended to give incentive to invent, to

invest in research and development, to commercialize new technology, and to make public inventions that otherwise would be kept secret. The Office also registers about 30,000 trademarks each year and renews about 7,000.

The Patent and Trademark Office is involved in a number of related activities as well. It sells printed copies of issued documents; maintains a scientific library and search files containing over 20 million documents; hears and decides appeals from prospective inventors and trademark applicants; and participates in legal proceedings involving the issue of patent or trademark registrations.

The Patent and Trademark Office provides a valuable service but is often accused of being very slow, lacking enough funds to properly carry out its duties in a timely fashion. One way to correct this is to change the manner by which the PTO is funded. The Office is currently financed through appropriated funds. This could be changed to funding from income received from the services provided to individuals and corporations. This would be advantageous, allowing the Office to charge fees which would accurately reflect the cost of the services rendered and which would keep the Office adequately funded. This would help the Patent and Trademark Office to perform its functions quickly and efficiently.

GENERAL COUNSEL

The Office of General Counsel has no policy role of its own. Therefore, this discussion will be limited to administrative matters.

The General Counsel is a statutory Executive Level IV position established by 15 U.S.C. 150. The General Counsel is appointed by the President with the advice and consent of the Senate. Pursuant to Department Organization Order 10-6, the General Counsel is chief legal officer of the Department, reporting directly to the Secretary of Commerce. In accordance with Secretarial Circular No. 16, the General Counsel is second in line (following the Deputy Secretary) in the order of Secretarial succession. Accordingly, the General Counsel is also, *de facto*, a principal policy advisor to the Secretary. This logically follows from the fact that, apart from the Secretary and Deputy Secretary, the General Counsel is the only departmental official with Department-wide substantive responsibilities.

The General Counsel's responsibilities are:

1. To ensure that the Department's operational units do not exceed their policy charters.

2. To represent the Department before other agencies and Congress.

3. To advise the Secretary and Deputy Secretary on legal and policy aspects of departmental activities.

Conflicts during the past two decades have frequently developed with the Departments of Justice and Treasury, as well as the Environmental Protection Agency. The Department of Commerce has lost most of the major battles before OMB and the White House, not so much on the basis of merits but because of the power of the special interests arguing against the Commerce position. A reversal of these results depends on appointing a Secretary who is *primus inter pares* within administration circles and in perception of Congress.

At present, EDA, the Inspector General, MARAD, MBDA, NOAA, NITA and the Patent and Trademark Office all have independent legal staffs. The programs administered by the Assistant Secretary for Administration, the Under Secretary for International Trade, the Assistant Secretary for Productivity, Technology and Innovation and the Assistant Secretary for Congressional Affairs receive their legal advice from the Office of the General Counsel.

This division of legal staff has been severely criticized on grounds that it provides a potential for forum shopping within the Department and limits the General Counsel's administrative flexibility. Further, under the present arrangements, the General Counsel has a difficult time controlling the quality of the legal work produced by Department lawyers. Finally, the system is criticized because the lawyers working for separate shops develop loyalties to the program (MARAD, MBDA, EDA, etc.) rather than to the Department as a whole. The result, according to this line of reasoning, is that all legal activity except support for the Inspector General and Patent Office should be centralized in the General Counsel's office.

We believe this centralizing approach is unwise for an agency with so many separate programs requiring such separate and diverse expertise. Policy control over the various sub-entities should be maintained through the Secretary's control over the administrators responsible for individual departments. To the extent that an administrator is following a policy inconsistent with the position of the Secretary, he/she should be ordered by the Secretary to change the policy. At present, the Office of General Counsel filters virtually all

material generated by the different agencies for policy consistency and legal sufficiency. If the General Counsel is unsatisfied with the quality of the legal work, it should be returned to the authorizing entity. As long as the Secretary supports the General Counsel in such actions, the General Counsel will be able to control the quality of the Department of Commerce's legal work. Disputes over policy within Commerce should be resolved based on the power of the Secretary, not the power of the General Counsel. Of course, the Secretary may wish to delegate power to the General Counsel. Such could be accomplished without a reorganization.

As a general matter, there is a shortage of lawyers in the Office of General Counsel. This should be resolved by increasing that staff, not by dismantling the system of legal advise at the program level, which would fly in the face of the unique nature of the various Department programs.

MISCELLANEOUS FUNCTIONS

There are a few other offices in the Department of Commerce, discussed very briefly below—without recommendations—to complete the full picture of this Department.

These miscellaneous offices are the Office of the Inspector General, the National Telecommunications and Information Administration, the National Bureau of Standards, the National Technical Information Service, and the Assistant Secretary for Productivity, Technology and Innovation.

The Office of the Inspector General is responsible for conducting and supervising audits and investigations on the programs and operations of the Department. The Office provides leadership and coordination and recommends policies and corrective actions to promote economy and efficiency. It is also charged with responsibility to detect and prevent fraud and abuse in departmental programs and operations. The Office provides a means for keeping the Secretary and the Congress fully informed of problems and deficiencies in the administration of Commerce programs and operations and the necessity for corrective action.

The *National Telecommunications and Information Administration* (NTIA) was formed on March 26, 1978, pursuant to Reorganization Plan No. 1 of 1977. The reorganization combined the resources of the Office of Telecommunications within the Department of Commerce and the Office of Telecommunications Policy from the Executive Office of the President.

NTIA's broad goals include formulating policies to support the development, growth and regulation of telecommuncations, information, and related industries; furthering the efficient development and use of telecommunications and information services; providing policy management for the use of the electromagnetic spectrum; and providing telecommunications facilities grants to public service users.

The *National Bureau of Standards* was established by an Act of Congress on March 3, 1901. The Bureau's overall goal is to stengthen and advance the nation's science and technology and to facilitate their effective application for public benefit. To this end, the Bureau conducts research and provides a basis for the nation's physical measurement system, scientific and technological services for industry and government, a technical basis for equity in trade, and technical services to promote public safety. The Bureau's technical work is performed by the National Measurement Laboratory, the National Engineering Laboratory, and the Institute for Computer Sciences and Technology.

The *National Technical Information Service* (NTIS) was established on September 2, 1970, by the Secretary of Commerce by Department Organization Order 30-7A. The agency was established to simplify and improve public access to Department of Commerce publications and to data files and scientific and technical reports sponsored by federal agencies. The agency is obligated by Title XV of the United States Code to recover its cost from sales to users.

NTIS is the central point in the United States for the public sale of government-funded research and development reports and other analyses prepared by federal agencies, their contractors or grantees.

The *Assistant Secretary for Productivity, Technology and Innovation* gives policy direction to the National Bureau of Standards and the National Technical Information Service, just described, as well as the Patent and Trademark Office, the Office of Productivity and Product Technology and the Office of Product Standards.

As a result of a belated recognition of the serious economic problems confronting American industry today, the Carter Administration launched an approach to "reindustrialization." An important part of this task was given to the Assistant Secretary for Productivity, Technology and Innovation. However, there are problems with its implementation.

Specifically, the authority vested in the Assistant Secretary

for PTI is very inadequate to carry out his assigned responsibilities. Closely related, the Assistant Secretary has no control over Commerce's apparatus for economic review and evaluation. Therefore, he cannot serve as a fundamental input in prescribing a PTI approach to reindustrialization. As a matter of fact, one of the key elements under his control, the Office of Environmental Affairs, which has served to provide the Secretary of Commerce with objective review and evaluation of environmental regulations having an economic impact on the nation, has been moved from his domain. This Office is now under the Assistant Secretary for Policy as part of a larger Office of Regulatory Review.

COMMERCE DEPARTMENT AND THE FUTURE

There are major challenges facing the Department of Commerce and the U.S. economy in the decade of the 1980s. Many exciting new machines and processes will affect the daily lives of Americans. The Department of Commerce should take an active role in encouraging such "new" industries as semiconductors, robotics, medical technology and solar energy. These will contribute to our well-being but will challenge the ingenuity and management skills of both industry and government.

Nevertheless, many gazing into this future are pessimistic because of serious economic problems which we face. Americans must deal with high taxes, increasing government regulation, inflation, fuel shortages, frequent periods of high unemployment, and enormous bureaucracies at federal, state and local levels. Abroad, the United States appears to many to have lost the vision of how to act like a great power as well as the means to project its power and influence.

Concerning the domestic economy, government overregulation of business is diminishing the productivity of American workers. Growing inflation, brought about in part by billions of dollars of federal budget deficits, is eroding personal savings and investment. High taxation has encouraged state and federal tax and spending limitation movements, as voters begin to voice their views concerning the mounting costs of government. Escalating costs jeopardize the availability of health care to all Americans. The price and availability of energy are uppermost in many minds. The Social Security System is not on sound financial footing. There are major problems in the systems of delivering welfare, health care and housing. In-

comes will rise but they may not keep up with inflation, and the overall real living standard may decline.

While many factors contribute to these problems, one of the most fundamental is the decline in the rate of U.S. productivity— output per worker per hour. The industrial base of the United States has worn out, while our competitors have been expanding and modernizing their industrial plant and equipment. As a simple but powerful illustration, of 22 modern steel mill blast furnances in the world, 14 are in Japan; none are in the United States. In the 1960s, U.S. nonfarm productivity was rising by 2.6 percent per year. In the 1970s, the rate had dropped to 1.3 percent per year; in 1979, it fell by 1.1 percent and in the first half of 1980, it declined at a 2.0 percent annual rate.

During the decade of the 1970s, the United States was at the bottom of the heap in productivity growth among the Western industrial nations. If recent trends continue in the decade of the 1980s, the U.S. will not only be at the bottom of the heap, we will be buried under negative annual rates of output per worker.

At the present rate, we are headed for the status of a second-rate world power unless we turn around our productivity performance.

The Department of Commerce is well-suited to play a major role in solving our problems, particularly in the areas of lagging productivity growth and government overregulation. Both of these deserve further elaboration.

Productivity

To date, the Department of Commerce has done very little to raise U.S. productivity. The creation of inter- and intra-industry centers for basic research is a minor start in addressing the problem.

Also contributing are the new Productivity Reference Service, the Experimental Technology Incentive Program and Corporations for Innovation Development. This latter program, which provides seed money as venture capital must be examined very closely as it risks competition with the private capital market.

However, much more needs to be done. The Department of Commerce is a good place for a major productivity center covering data gathering, economic analysis, technical research, experimentation and industry information-sharing on productivity matters.

The Department of Labor's Bureau of Labor Statistics is heavily involved in labor productivity studies too, and therefore it would also be a logical place for such a productivity center. Perhaps both Departments could contribute to such a center, although cross-agency jurisdictional problems would have to be resolved.

A recommendation earlier in this paper to abolish the National Productivity Council, on which Commerce serves, is not contrary to the proposed strengthening of the Department of Commerce's productivity functions recommended here; the National Productivity Council is an ineffective body.

While the quality of Commerce's work is generally high, its reputation to date as a promoter of productivity and competitiveness among the world's industrial countries is low. This problem can be dealt with by making productivity and competitiveness in American industry a primary goal of the Department.

Reducing Regulation

One of the sleeping giant economic problems in the U.S. is the heavy hand of government regulation. Today, the cumulative *Federal Register* fills 52 large shelves and totals over 800,000 pages. A 1978 study for the Joint Economic Committee by Murray Weidenbaum of Washington University in St. Louis estimated the cost of complying with federal regulation at $100 billion a year. It isn't just the dollar cost, but the terrible drain on incentives, productivity and the adverse impact on inflation that are of concern.

Studies by Edward Dennison of Brookings and a recent study by the Office of Technology Assessment released in September 1980 by the Senate Commerce Committee and the Joint Economic Committee note the serious impact of regulation on productivity. Dennison has shown that one-fourth of the recent decline in U.S. productivity is directly attributable to the heavy hand of government regulation. This reduced output-per-person, in turn, exacerbates our already disturbing inflationary pressures.

The clock should not be turned back on the good that has come from social and environmental regulation, but it is time that we recognize that these regulations are not costless. Heretofore, we have charged forward with tunnel vision, seeking to correct flaws in our environment and seeking to improve our quality of life, but without a thought for the costs

that these regulations impose on business, on productivity and on inflation.

The Department of Commerce would be a logical place to take the lead in organizing an aggressive effort on regulatory reform. The key to that reform is the development of a regulatory budget, which would establish a procedure whereby Congress would set annually a limit on the amount of compliance costs federal agencies could impose on the private sector. The reason Commerce would be a logical place for this effort is the familiarity with, and access to, Census industry data, and the wide industry contact network of the Bureau of Industrial Economics. Moreover, senior Department of Commerce staff members have already been studying the feasibility of a regulatory budget. They have held conferences and commissioned papers on the subject.

The rationale for a regulatory budget is quite sound. Most of the economic effect of regulation is hidden, since government-required private sector spending for auto safety, mine safety, pollution control and consumer protection, plus the attendant paperwork costs, do not appear in the government's budget figures. They are cloaked in what might be termed "off-off-budget" spending, required of the private sector to comply with the federal regulations. For example, the massive cost of a smokestack scrubber to achieve cleaner air is passed on directly to consumers, who pay higher utility bills as surely as they pay taxes. But the federal budget fails to show these higher costs and prices.

If these private sector compliance costs were minor, their omission from the budget process would not be a serious problem. But they are not minor. They are significant and they are growing. In addition, spending by state and local governments is also heavily influenced by federal regulations.

A regulatory budget would provide an incentive for the regulatory agencies to limit the compliance costs that their regulations impose. It would certainly make the agencies more conscious of those costs. But it would have other important effects as well. A regulatory budget, along with the fiscal budget, would provide a more accurate picture of the federal government's total impact on the economy, allowing Congress to determine how much of the nation's output is to be devoted to public uses and how much is to be left to private users. It would make possible a better balance between regulatory programs and traditional government spending and loan guarantee programs. It would enhance the protection of the

public's health and safety by requiring that the federal government establish consistent priorities in pursuing regulatory objectives.

The Department of Commerce has important contributions to make in solving the problems that face us in the coming decades. All that is needed is a capable top level staff and a Chief Executive in the White House to give the proper motivation and inspiration. Above all, the Secretary of Commerce and the Department as a whole should be vigorous advocates of free competitive enterprise in pursuing the Department's mission to promote international and domestic commerce.

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THE DEPARTMENT OF DEFENSE

Tidal W. McCoy and Sven Kraemer*

FOREWORD

The Heritage Foundation Project Team Report for the Department of Defense deals specifically with defense policy formulation and implementation with the Department of Defense. It does not address organizational and management issues such as the role or responsibilities of either the Service Secretaries or the Joint Chiefs of Staff. National security issues concerning intelligence have been left to the Intelligence Team.

The Heritage Foundation study on policy formulation and implementation in the Department of Defense should help the new, incoming administration to:

1) prepare its transition plan and team;

2) identify weaknesses in current U.S. defense policy;

3) develop short-term and long-term policies with which to reverse current military trends;

4) formulate fiscal guidance for the FY 1981 supplemental, FY 1982 defense budget and the Five Year Defense Plan for the period FY 1982-FY 1987;

5) choose between alternative defense program options;

6) address the manpower and personnel problems it will face the first months in office.

At no other time in our nation's history has there been as critical a need to adopt comprehensive and coherent defense

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* *Authors' Note:* The Preparation of this report was a collective effort involving many individuals. Lawrence Korb, Christopher Lehman, Joseph Lehman, James Malone, John O'Shaughnessy, Mark Schneider, Wayne Schroeder, Bretton Sciaroni and Leonard Sullivan deserve particular mention. The authors alone assume responsibility for this report. No views expressed herein should be attributed to any other individual.

policies. The present study should help serve as a framework for the development of a new defense policy for the 1980s.

SUMMARY OF U.S. DEFENSE REQUIREMENTS

Military Balance

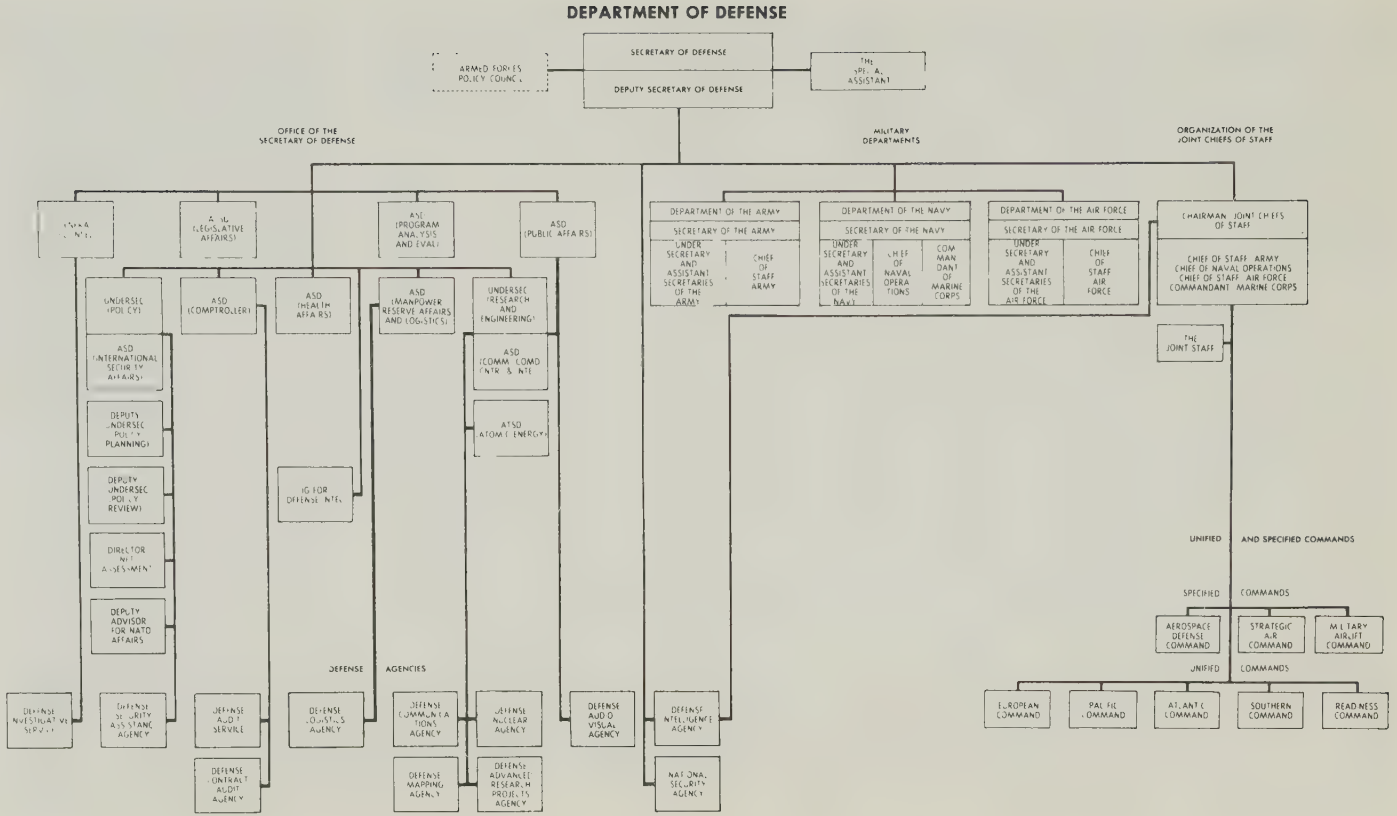
The past fifteen years have witnessed history's most dramatic shift in the world's military balance of power. The United States has moved from a position of overwhelming military superiority over the USSR in the mid-1960s to second place in military power and is rapidly moving toward a state of military inferiority. U.S. inferiority, in contrast with Soviet power, increases international instability and raises the danger of war.

The stark fact is that today, deterrence of Soviet aggression is no longer assured. The Soviets are continuing to move farther ahead of the U.S. in every static and dynamic indicator of the strategic balance, and in every measure of relative strength in the critical areas of Central Europe, the Western Pacific and the Middle East and South Asia. Moreover, the Soviets were drawing ever nearer to us in naval power and are opening up a wide gap in the number and firepower of theater nuclear weapons in Europe. The Soviet Union is ahead of the United States by 25-50 percent in its total stock of military equipment and that the disparity will continue to grow. Under the Carter Administration, it will widen to 40-60 percent by 1985. However, the Administration had a rationale for its lack of response to this challenge. That rationale placed great hope on arms control and detente.

Lacking effective strategic concepts and placing unwarranted enthusiasm in arms control as an end in itself, the U.S. entered into a period of unprecedented unilateral restraint in the military field. Meanwhile, the USSR made great advancements in most significant categories of strategic, theater, and conventional arms. The USSR developed and deployed an entire new generation of highly accurate ballistic missiles. Soviet missile accuracy is virtually equal to that of the U.S. In the early 1980s, long before the U.S. deploys the MX ICBM, the USSR will actually forge ahead of the U.S. in this vital area—a fact that the Carter Administration admits.

Balance in Defense Investment

Using the most conservative estimates, the Soviet Union is now annually spending 50 percent more for defense than the


DEPARTMENT OF DEFENSE
ARMED FORCES POLICY COUNCIL
SECRETARY OF DEFENSE
DEPUTY SECRETARY OF DEFENSE
THE SPECIAL ASSISTANT
OFFICE OF THE SECRETARY OF DEFENSE
MILITARY DEPARTMENTS
ORGANIZATION OF THE JOINT CHIEFS OF STAFF
ASD (LEGISLATIVE AFFAIRS)
ASD (PROGRAM ANALYSIS AND EVAL)
ASD (PUBLIC AFFAIRS)
DEPARTMENT OF THE ARMY
SECRETARY OF THE ARMY
UNDER SECRETARY AND ASSISTANT SECRETARIES OF THE ARMY
CHIEF OF STAFF ARMY
DEPARTMENT OF THE NAVY
SECRETARY OF THE NAVY
UNDER SECRETARY AND ASSISTANT SECRETARIES OF THE NAVY
CHIEF OF NAVAL OPERATIONS
COMMANDANT OF MARINE CORPS
DEPARTMENT OF THE AIR FORCE
SECRETARY OF THE AIR FORCE
UNDER SECRETARY AND ASSISTANT SECRETARIES OF THE AIR FORCE
CHIEF OF STAFF AIR FORCE
CHAIRMAN JOINT CHIEFS OF STAFF
CHIEF OF STAFF ARMY
CHIEF OF NAVAL OPERATIONS
CHIEF OF STAFF AIR FORCE
COMMANDANT MARINE CORPS
THE JOINT STAFF
UNDERSEC (POLICY)
ASD (COMPTROLLER)
ASD (HEALTH AFFAIRS)
ASD (MANPOWER RESERVE AFFAIRS AND LOGISTICS)
UNDERSEC (RESEARCH AND ENGINEERING)
ASD (INTERNATIONAL SECURITY AFFAIRS)
ASD (COMM, COMD CNTR & INTEL)
DEPUTY UNDERSEC (POLICY PLANNING)
ATSD (ATOMIC ENERGY)
DEPUTY UNDERSEC (POLICY REVIEW)
IG FOR DEFENSE INTEL
DIRECTOR NET ASSESSMENT
DEPUTY ADVISOR FOR NATO AFFAIRS
DEFENSE AGENCIES
DEFENSE INVESTIGATIVE SERVICE
DEFENSE SECURITY ASSISTANCE AGENCY
DEFENSE AUDIT SERVICE
DEFENSE CONTRACT AUDIT AGENCY
DEFENSE LOGISTICS AGENCY
DEFENSE COMMUNICATIONS AGENCY
DEFENSE MAPPING AGENCY
DEFENSE NUCLEAR AGENCY
DEFENSE ADVANCED RESEARCH PROJECTS AGENCY
DEFENSE AUDIO VISUAL AGENCY
DEFENSE INTELLIGENCE AGENCY
NATIONAL SECURITY AGENCY
UNIFIED AND SPECIFIED COMMANDS
SPECIFIED COMMANDS
AEROSPACE DEFENSE COMMAND
STRATEGIC AIR COMMAND
MILITARY AIRLIFT COMMAND
UNIFIED COMMANDS
EUROPEAN COMMAND
PACIFIC COMMAND
ATLANTIC COMMAND
SOUTHERN COMMAND
READINESS COMMAND

United States. In the area of weapons procurement, the Soviets are outspending the U.S. by at least 80 percent. In strategic forces, the Soviets are outspending and outproducing the U.S. by a ratio of between 2.6 and 3.3 to one. In ground forces, the ratio is at least 2.0 to one. The percentage of the Soviet gross national product going into military forces is rising and is estimated to be at least 15-18 percent.

The U.S. technological advantage of the 1950s and 1960 has largely eroded as a result of constrained budgets, with the Soviets outspending the U.S. on R&D by at least 50 percent. Moreover, the U.S. has delayed or has been unwilling to deploy many of the systems that have been developed with superior U.S. technology.

FY 1976 marked the nadir of the post-Vietnam decline in the level of defense spending. Democratic Congresses cut some $40 billion from the defense budget requests of Republican administrations during the 1970s. Since then, the defense budget has not gone down, but it has not gone up very rapidly, either.

In 1975 President Gerald Ford, alarmed by the precarious state of the military balance, laid down a 5-year spending program that would have increased defense spending at a compound annual rate in excess of 6 percent. Ford would have increased defense spending by 40 percent in real terms between FY 1976 and FY 1981.

Ford proposed to:

1) construct 32 ships per year (157 over 5 years);
2) build a full force of 244 B-1 strategic bombers;
3) deploy the MX missile by 1983;
4) fund 3 TRIDENT SSBNs every two years;
5) purchase 500 tactical fighter and attack planes each year;
6) buy over 2,000 tanks and other tracked combat vehicles annually.

Had the Ford program been adopted, it would have helped to reverse the trends in the military balance dramatically by the early 1980s. Unfortunately, in his first two years in office, President Carter scuttled major portions of the Ford program. Carter essentially proposed no-growth defense budgets. Although by shifting the base from authority to outlays and changing the base year, it was made to appear that the defense budget was increasing by 3 percent, in point of fact this was not the case. Carter's FY 1980 budget proposal was actually 3 percent less than what he had sought from Congress for FY 1978.

Between FY 1978 and FY 1980, Carter cut about $40 billion in investment funds from the recommended Ford program. He accomplished this by delaying the MX program by four years, cancelling the B-1 bomber altogether, cutting the TRIDENT building rate by one-third, slashing the Navy shipbuilding program in half, and reducing tactical air and tank procurement by about 20 percent. Although Carter claimed that forces for NATO would receive primary emphasis in his budget, his spending on NATO procurement in FY 1979 was 13 percent below that proposed by Ford. Moreover, his widely heralded Rapid Deployment Force proposed in 1977 for dealing with secondary or minor contingencies in areas like the Persian Gulf received virtually no funding at all in the FY 1978-80 period. Consequently, the military balance, rather than improving in the post-1975 period, became even more precarious.

Geopolitical and Regional Power Balances

The shift in the military balance of power between the superpowers has had serious geopolitical consequences. Soviet use of 60,000 proxy forces and military advisors in Angola, Ethiopia, South Yemen, Mozambique and elsewhere has dramatically affected the regional power balance in Africa and the Persian Gulf. In 1975-76, some 20,000 Cuban troops were introduced into the Angolan conflict on the side of the Marxist-Leninist MPLA, backed by Soviet airlift and financing. In 1977-78 the USSR airlifted some 18,000 Cuban troops and $1 billion in arms to Ethiopia in the conflict with Somalia and the Eritrean rebels. Moscow has been a major arms supplier to the radical Arab states of the Middle East, especially Libya, Syria, Iraq, and South Yemen. It has used Treaties of Friendship to solidify its politico-military relations with Ethiopia, Vietnam, Syria, and now Nicaragua. Finally, the 1979 Soviet invasion of Afghanistan—coming just one and a half years after the pro-Soviet coup in Kabul—directly increases the Soviet threat to Iran and Pakistan and places Soviet military forces just 400 miles from the vital Straits of Hormuz, gateway to the Persian Gulf.

The gravity of these aggressive Soviet moves cannot be understated. While substantially building up its military strength at home and in its East European satellites, the USSR has been able to expand its collective security network beyond the confines of continental Europe and Asia. For the U.S. and the West, these developments have serious implications. Western

dependence upon Persian Gulf oil makes this region vital and a potential center for confrontation. Moreover, the industrial base of the U.S. is heavily dependent upon southern Africa as a vital source of strategic minerals. The U.S. is only beginning to establish a capability to respond to contingencies in the Persian Gulf, indeed, the hardware components for the Rapid Deployment Force now being contemplated will not be ready until the mid-1980s. The belated negotiation of agreements with Oman, Kenya and Somalia for access to their military base facilities will not deter Soviet expansionism in the Gulf. As former Secretary of Defense James R. Schlesinger noted in a recent speech sponsored by the International Institute for Strategic Studies, "The military forces presently and prospectively in place in the region are not sufficient by themselves adequately to constrain Soviet moves if the Soviet Union becomes more aggressive." Unless the adverse military trends of the past four years are reversed, and action is taken to establish a credible U.S. military presence in these regions, Soviet adventurism should be expected to increase, thus further impinging upon vital U.S. and Western interests. As former Secretary of State Henry Kissinger has noted, ". . . to conduct business as usual is to entrust one's destiny to the will of others and to the self-restraint of those whose ideology highlights the crucial role of the objective balance of forces. . . . Never in history has it happened that a nation achieved superiority in all significant weapons categories without seeking to translate it at some point into some foreign policy benefit."

Arms Control

It became apparent in the first year of the Carter Administration's term of office that it brought to the Pentagon a markedly different perspective on the utility of military power in world affairs. During 1977, Presidential Review Memorandum #10 (PRM-10) became a subject of national controversy. A major theme of PRM-10, which was never denied by the Administration, was that arms control could be used to solve U.S. military problems. PRM-10 stated that, "The U.S. might pursue arms control initiatives more vigorously to obtain reductions in threats and force levels, thereby minimizing the risks of unilateral U.S. reductions." Arms control came to be seen as an end in itself, rather than primarily as a means to an end—the preservation of U.S. national security. Furthermore, PRM-10 suggested that arms control initiatives could be jeop-

ardized by "visible and rapid" increases in defense spending, which were assumed to be unacceptable to the American public. Clearly, the Carter Administration was willing to place an unprecedented amount of faith in arms control as a solution to defense problems.

It will be necessary for the next administration to substantially revise the arms control concepts and objectives of the Carter Administration. A comprehensive approach is necessary, in which decisions on force structure and arms control are complementary. True arms reductions—based upon reciprocity of benefits—must be the goal. Any arms control agreement entered into by the U.S. must be verifiable, and should be considered within the context of Soviet geopolitical behavior.

The most promising approach to arms control would be to demonstrate to the USSR that, no matter how much resources it devotes to any area of defense programs, it will gain no net improvement in its current situation because of a U.S. commitment to respond fully with technology, money and vigilance. The Carter approach of trying to persuade the Soviets to foreswear gaining an advantage in face of a U.S. example of unilateral restraint has been totally discredited.

Key arms control policies in need of reformulation include: 1) SALT II; 2) Nuclear Proliferation; 3) Threshold Test Ban; 4) Comprehensive Test Ban; 5) Arms Export Control Policy; and 6) MBFR.

Given the depth of the defense problems now facing the U.S., it will be necessary to adopt both long-term and short-term policies geared toward reversing the adverse strategic and conventional military trends that have accelerated over the past four years. The key prerequisite of the next administration should be a clear, firm and consistent defense policy.

The next administration should identify:

1) U.S. defense objectives;

2) U.S. strategy;

3) the time frame within which it will seek to achieve its objectives;

4) the resources which are to be devoted to achieving those objectives;

5) the significant problems the administration expects to have to deal with in the process.

The next administration should place a high premium on an honest assessment of where the U.S. defense posture stands today, what it should be and how those goals can be met.

Program Requirements

There should be no illusion about the massive scope of U.S. defense problems. They can be remedied, but the problem of planning a multiyear timetable for the resolution of military deficiencies should not be minimized. Three distinct calendars should be kept in mind as defense planning proceeds.

Timetable

The legislative calendar: There will be an immediate need for an FY 1981 supplemental. Beyond that, an eight year program can be developed, subdivided into two four-year programs. It could be developed with the following two timetables in mind:

- Research and Development Calendar:
  In planning a defense program for the 1980s, the lead-time necessary for the R&D of new weapons systems must be taken into account.
- Industrial Production Calendar:
  The sorry state of the military industrial base must be taken into consideration. This is the area which is least susceptible to quick solutions. Any defense program must recognize what can be produced now and what must be done to meet the defense requirements for the rest of the decade.

Strategic Forces

Objective:

U.S. strategic forces should be sufficient to deter across a broad spectrum of nuclear conflict scenarios. This can only be accomplished with the maintenance of a capable, survivable strategic triad, comprised of intercontinental ballistic missiles (ICBMs), submarines-launched ballistic missiles (SLBMs) and strategic bombers. The significance of triad is that each leg of triad has unique attributes which cannot be duplicated by the other two legs, whether it is in size and accuracy of the warhead, vulnerability characteristics or ability to react on a time urgent basis.

The U.S. nuclear forces should be sufficiently strong so that the Soviet Union is not tempted to believe that it could strike at U.S. strategic systems and have enough nuclear forces for a second strike. Deterrence is aided if American strategic forces are able to sustain a Soviet attack and are still capable of

destroying Soviet economic, military and political targets which would make it impossible for the USSR to continue in a conflict.

Problems:

The Carter Administration's commitment to the retention of the triad has been questionable at best. President Carter delayed or eliminated virtually every strategic weapons program he inherited in 1977. He cancelled the B-1 bomber, the ALCM-A cruise missile program, and the production of Minuteman III ICBMs. Among the strategic programs which have been delayed are the MX missile, three cruise missile programs and the TRIDENT submarine. The following table depicts the delays caused by Carter administration policies:

FORD AND CARTER ADMINISTRATION
STRATEGIC PROGRAM PLANNING
DATES OF INITIAL OPERATING CAPABILITY

PROGRAM	FORD (FY 1978)	CARTER(FY 1981)
MX missile	late FY 83	July 1986
B-1 bomber	FY 1979	Cancelled
Trident SSBN	September 1979	August 1981
ALCM	1981	December 1982
GLCM	FY 1980	December 1983
SLCM	FY 1980	1982

Source: *DoD Annual Report, FY 1978,* pp. 131, 134-136, and; *DoD Annual Report, FY 1981,* pp. 130-131, 133, 147.

The Carter Administration actions were taken in the face of mounting evidence that the Soviet Union had made significant strides in missile deployment and accuracy and would soon threaten the survivability of the U.S. ICBM force. It was also evident that the bomber leg of the strategic triad was becoming vulnerable. The situation has declined to the point that Chairman of the Joint Chiefs of Staff, Gen. David Jones, warned in his annual report to Congress in 1980 that the U.S. has slipped "another year closer to a potentially unstable and acutely dangerous imbalance," and that "regardless of U.S. actions, Soviet strategic capability will continue to increase relative to that of the United States through the mid-1980s." Gen. Richard Ellis, Commander of the Strategic Air Command, has underscored this point (testimony before the House Armed Services Committee, January 25, 1980):

> At the present time, however, . . . I can only state that by today's measurements, an adverse strategic imbalance has developed, and will continue to for several years to come. This imbalance exists not only when our forces are in a day-to-day alert posture (the worst case) but also when fully generated (the best case).

Recommendations:

The next administration should recognize that the combination of aging and underfunded strategic weapons and their growing vulnerability to Soviet strategic forces makes it imperative that each leg of the Triad be strengthened. This can be accomplished by the following programs:

ICBMs: Land-based strategic systems can be aided by:

- Rebasing part of the Minuteman III force in a vertical mutiple protective shelter (MPS) at existing missile sites.
- Speeding development and deployment of the MX missile in a survivable configuration.
- Speeding deployment of the Mark 12A warhead on Minuteman III ICBMs to improve accuracy and warhead yield.

SLBMs: The nuclear submarine force can be improved by:

- Increasing the production rate of the Trident submarines to the original schedule of 3 boats every two years.
- Speeding development of the submarine-launched cruise missile (SLCM).
- Increasing the funding for the research and devlopment of the Trident II (D-5) missile which will give U.S. submarines a hard-target capability.

Strategic Bombers: The aging B-52 manned bomber force is increasingly vulnerable and suspect in its role as a penetrating aircraft. Recommendations for an improved bomber force include:

- Immediate development and deployment of a new strategic bomber which will utilize the B-1 and advanced bomber technology.
- Acceleration of the deployment of the air-launched cruise missile (ALCM).
- Rebasing the B-52s further inland so as to increase the warning time for an SLBM attack.

Defensive Weapon Systems: The advances made by the Soviets in missile and bomber development and deployment require a renewed U.S. emphasis on defensive weapons. Improvements can be accomplished with:

- Research and development of an anti-ballistic missile system.
- More sophisticated radar system for NORAD and the deployment of modern interceptors.
- Long-range research on high technology defensive weapons such as a space-based laser ABM system.

Theater Nuclear Forces

Objective:

It is imperative that NATO and U.S. armed forces in Europe be strong enough to deter Soviet aggression. In case the Warsaw Pact does attack, U.S. and allied forces should be capable of defeating the invaders at whatever level of combat on which the war is fought. Therefore, theater nuclear weapons play an important role, especially in light of the traditional preponderance of Soviet conventional forces.

Problems:

The appearance of the SS-20 IRBM and the deployment of the Backfire bomber has altered the theater balance of power in Europe. The ratio of Warsaw Pact theater nuclear forces is now greater than 3:1. The Carter Administration has unfortunately done little to reverse the growing imbalance. It has slowed the development of ground-launched missiles (GLCMs) and cancelled the neutron bomb program altogether.

Recommendations:

In order to rectify U.S. theater nuclear deficiencies, the next administration should:

1) Immediately press for deployment of its "Euromissiles": a combination of GLCMs and Pershing II missiles;

2) reverse the neutron warhead decision: this weapon could be significant when employed against Soviet armor.

Nuclear Weapons Production

Objective:

The weapons program of the 1980s will require new warheads. The Minuteman III and MX ICBMs, the Trident submarine SLBMs, the Lance and Pershing missiles and a variety of cruise missiles will all need nuclear devices.

Problem:

Unfortunately, the ability of the U.S. to produce these weapons in the 1980s is suspect. House Armed Services Chairman Melvin Price has termed the U.S. nuclear weapon building complex "old and, in many cases, decrepit." Capital investment in nuclear weapons production facilities is only a

fraction of what is necessary in order to replace existing facilities on a timely basis. The Carter Administration has underfunded the nuclear weapons program to the point where the Department of Energy was compelled to inform the White House in June 1980 that it could not build the weapons called for in Carter's defense program without an additional $250 million.

Recommendations:

A prudent course would be to 1) expand production of the three reactors at Savannah River, S.C.; 2) restart the L-reactor at Savannah River and the N-reactor at Hanford, Washington; 3) the construction of a new reactor: all of the current reactors are aging—the most recent was constructed 26 years ago.

General Purpose Force Deficiencies

U.S. general purpose forces are suffering from a wide variety of problems ranging from inadequate manpower to inadequate training, equipment and weapons. As a result, the Soviet Union clearly has the capability to defeat NATO forces along its periphery, to seize the oil fields of the Persian Gulf and even deny the United States the use of the seas in the event of war. Some of the key general purpose force problem areas are:

1. Readiness:

At no other time in our nation's history have military readiness and operations and maintenance problems so adversely affected levels of training, maintenance of military equipment and protection of war reserve material. The most important readiness issues facing the U.S. at present include the military fuel situation, military training, depot maintenance, real property maintenance and spare parts. Current deficiencies can be seen in any number of ways:

- Air Force flying hours have been reduced from FY 1980 to FY 1981, due to the high cost of military fuel.
- Navy steaming hours continue to fail to meet Fleet Commanders' optimal requirements.
- Shortages of O&M funds have necessitated cut backs in military training exercises.
- The Army's depot maintenance backlog will rise by $40 million in FY 1981.
- Deferral of real property maintenance and repair problems jeopardizes the protection of war reserve material.

General Bryce Poe II, commander of the Air Force Logistics Command, has stated that "only 15 percent of the war reserve spare parts needed for the first days of war have been funded through the current fiscal year." Such revelations indicate that the ability of the U.S. to fight a major war today can be considered marginal at best.

Should a wartime mobilization ever occur, it is likely that the surge requirements would overload the supply and maintenance system (according to a letter to Army Chief of Staff General Edward Meyer from General John R. Guthrie, head of the Army's Material Development and Readiness Command).

Recommendation:

The new administration must visibly increase operations and management expenditures during the coming fiscal year. The Department of Defense has estimated that the Congress has cut $2.8 billion from the O&M requests over the past four years. An increase of at least $4-5 billion is necessary to properly make up for the severe underfunding of fuel costs, the large depot maintenance and real property maintenance backlogs and the curtailing of training exercises that all the military services have been experiencing in recent years.

2. Ammunition Shortages

U.S. war reserve munitions are now not even at one-sixth of U.S. requirements. The munitions shortfall problem is pervasive and extends to all of the services. In testimony before the Senate Budget Committee in March 1980, John Lehman, former Deputy Director of the Arms Control and Disarmament Agency, estimated that the U.S. has "more than a $29 billion shortage of ammunition" needed to meet even a 30-day war reserve level. The Chairman of the Joint Chiefs of Staff has recently informed the American people that:

- "All the services had inadequate stocks of ammunition."
- "At present there is a war reserve shortfall in Europe."
- "The U.S. industrial base cannot influence the first six months of a NATO conflict even if a national emergency is declared."

The military services are suffering from a wide range of munitions shortages. The Navy suffers from shortages in both Phoenix missiles (at 60 percent of what is deemed to be an acceptable inventory) and Mark-48 torpedoes. Army war reserve stock levels, according to a memorandum reportedly

written by Army Chief of Staff General Edward Meyer and Army Secretary Clifford Alexander in the fall of 1980, have been cut from 30 days to 15 days. U.S. air-to-air missiles for fighters in Central Europe are stocked for only one or two days of fighting. Sparrow medium-range missile procurement has been reduced by the Carter Administration.

Recommendations:

Since there is currently a $20-30 billion shortage of ammunition needed to meet the minimum 30-day war reserve level, immediate funding is required to begin to make up the shortfall. While this deficiency can't be made up overnight a start should be made in categories of ammunition from small arms to anti-tank and anti-aircraft missiles.

3. Personnel/Reserves

Due to a combination of mismanagement and nearsighted personnel policies, the volunteer army is failing:

- Nearly 200,000 military personnel qualify for food stamps.
- Military pay compensation has been gradually declining every since the inception of the all-volunteer force in 1973. Former Secretary of Defense Melvin Laird has noted in a recent study, *People, Not Hardware—The Highest Priority*, that real income levels for all military personnel have declined by an average of 14 percent during that period. The Carter Administration's blanket federal pay-cap of FY 1979 and FY 1980 (5.5 and 7.0 percent, respectively) has contributed to that decline.
- The two major problems facing the services in the personnel area are retention and recruitment. Retention rates for all of the services have been sliding, with the rates for skilled pilots and mid-career non-commissioned personnel particularly troublesome. In the recruitment area, the major problem involves an unacceptable level of non-high school graduates entering the services, primarily in the Army. The current personnel problems of the services underscores the need to have people-oriented policy-makers in the Pentagon.
- Reserves forces are now perhaps the most neglected U.S. military manpower area. The serious shortfalls now existing in Selective Reserve units raise the distinct possibility that U.S. military planners could not count on the Reserves to meet major mobilization requirements.

- The major reserve deficiencies facing the U.S. are particularly acute in the IRR (Individual Ready Reserve). The shortfall in Army IRR manpower is estimated to be 270,000. Moreover, reserve units have many of the same "quality" problems that plague the active duty forces.

Recommendations:

Manpower problems can be partially rectified by:

- resumption of Selective Service registration, examination and classification and drafting for the reserve forces for the 6 year period, with an option to serve in the active force for 2 years;
- eventually increasing authorized military personnel levels by 300,000;
- increasing pay by ten percent above inflation in FY 1981;
- making a commitment to increase pay 2 percent above inflation from FY 1982-1985.

4. Logistics/Lift

The past decade has been characterized by a decreasing ability of the U.S. to project power overseas. In contrast, the Soviets have markedly improved their mobility capabilities, as can be seen not only in their invasion of Afghanistan, but also in the growth of their sealift capabilities and acquisition of overseas bases and base rights.

Because the U.S. must rely more heavily on its ability to lift arms, men and material abroad than the USSR (because the USSR enjoys interior lines of communication), the revitalization of U.S. logistics/lift capabilities is absolutely necessary.

This process will be neither quick nor easy. Secretary of Defense Harold Brown admitted in a hearing before the House Armed Services Committee on January 29, 1980, that the 1978 "Nifty Nugget" exercise demonstrated that U.S. mobility contingency plans have serious deficiencies. Concerning current U.S. mobility problems, the *FY 1981 DoD Annual Report* stated, "Our existing mobility forces cannot meet the deployment objectives we have set for FY 1982 for NATO and for some non-NATO contingencies."

The efforts of the previous Administration to create a Rapid Deployment Force did not meet the criteria of either timeliness or structural suitability. The two major elements of the RDF, the CX cargo aircraft and maritime prepositioning ships, will not contribute to U.S. RDF capabilities until the mid-1980s.

In particular, the CX—a 5-year, $6 billion program—will in all probability impinge upon improving U.S. mobility capabilities in other areas.

The key issues to be decided upon by the new administration in this area include:

- the role and composition of the Rapid Deployment force;
- the size and structure of the U.S. airlift/sealift force, including the RDF; and
- the nature and location of the basing structure the U.S. should have in non-NATO areas in order to more effectively project its power overseas.

Recommendations:

U.S. logistical planning and performance must be improved as the disastrous "Nifty Nugget" exercise amply demonstrated. This can be done, in part, through strengthening U.S. lift capabilities.

Airlift: American airlift will not be most appropriately helped by the proposed CX aircraft, which should be considered for termination, but rather by:

- purchasing additional C-130 transport aircraft;
- building the C-5B aircraft;
- increasing funding for the C-5A, C-141, and CRAF modification programs.

Sealift: an ability to project force overseas will rely heavily upon U.S. sealift, and improvements can be made by:

- the purchase of SL-7s which can sail at a high rate of speed with 27,000 tons of equipment;
- the acquisition of a number of roll-on roll-off ships on which military equipment can be stored and pre-positioned;
- increasing amphibious landing capabilities by acquiring additional LSD-41 landing craft.

Rapid Deployment Force: Although airlift and sealift capabilities will play an important role for the utilization of the RDF, the rapid strike force should be examined to see if it is appropriately structured and equipped to carry out its missions successfully. The RDF can be made into a viable military force, however:

- It should be largely composed of light vehicles which maximize tactical mobility and firepower. Light tanks and armored personnel carriers can carry high velocity anti-tank weapons yet also retain great agility. They have the advantage of being able to be deployed in greater number and more quickly than heavy tanks.

- An overseas base structure is needed in order to effectively project force. Without the logistical system and base infrastructure, the additional ships and air transport will not be able to effectively support an army in the field.

5. General Purpose Force Structure and Procurement Problems

The U.S. must take the lead in reversing the adverse military trends that have accelerated over the past five years. Of necessity, this will require a substantially greater U.S. investment in defense procurement than has been the practice of the Carter Administration.

It is also imperative that U.S. allies contribute more to the Western defense effort. Their assistance will especially be necessary in the short-run, while Washington is implementing its new defense program. Greater reliance will also be placed in the long-run on America's allies in recognition of the fact that the U.S. can no longer provide the measure of defense support that it has in the past.

A new administration can immeasurably improve U.S. relations with its friends overseas. The past four years have been marked by policy reversals which destroy American credibility and infuriate allies. (The neutron bomb decision is a case in point.) And there have been too many cases where American talk has not been accompanied by American action. (The U.S. security commitment to countries like Pakistan are indicative of this problem.) Therefore, the next administration can help resolve this situation by implementing consistent policies which do not betray Western security interests. First, however, the Administration must identify the major conventional force deficiencies that currently plague the U.S. defense posture.

Navy

At the end of FY 1976, the U.S. had an active naval fleet of 476 ships. Based on recommendations of the Chief of Naval Operations, the Ford Administration pressed for an early build-up to a 600-ship Navy. Upon entering office, however, the Carter Administration cut the 157-ship, 5-year shipbuilding program it inherited. The Administration's FY 1979-83 shipbuilding program planned for the construction of only 70 ships.

The first three defense budgets of the Carter Administration

contained no new amphibious warfare ships and no new cruisers. The current five-year shipbuilding program contains so few ships that the number of naval surface warships will continue to decline over the next decade. (By the end of FY 1980, the U.S. active fleet declined to 446 ships.)

The naval vessels in the Carter Administration's plan were generally small and inadequately armed. They do not compare favorably to the new Soviet cruisers in either numbers or diversity of armaments. In fact, the ships the Carter Administration proposed for the next decade are actually inferior in performance to many of our existing ships.

The Soviet Navy, on the other hand, is in the process of introducing new generations of aircraft carriers, cruisers, new warships and new submarines that threaten our ability to gain control of the seas. They dwarf the firepower of our new ships.

The adverse implications of these naval trends should be underscored. Early in 1980, Admiral Thomas B. Hayward, Chief of Naval Operations, had stated that the U.S. is "trying to meet three-ocean requirements with a one-and-a-half ocean Navy." Admiral Isaac C. Kidd, Jr., USN (Ret.), NATO's former Supreme Allied Commander, Atlantic, testified in 1978 before the House Merchant Marine and Fisheries Committee that the U.S. Navy and U.S. flag merchant marine would face "staggering . . . horrendous" losses of up to 50 percent in any conflict at sea against the Soviet Navy. Vice Admiral M. S. Holcomb, Director of Navy Program Planning, noted in 1980 that the current U.S. fleet "is smaller today than at any time since before World War II, when we were a one-ocean Navy."

The U.S. will not only have to adopt a shipbuilding program capable of meeting our international security requirements, but also make more efficient use of naval technology if it is to successfully offset Soviet advantages of short lines of communication and first strike capability. Such a program for the 1980s should include the following:

Recommendations:

- Procurement of four additional Nimitz class (CVN) nuclear aircraft carriers;
- creation of four CVN task forces including additional CG-47 cruisers, DDG-963 destroyers and FFG frigates;
- increased production of SSN-688 attack submarines from 1 per year to 3-5 yearly. (Soviets currently have a 3 to 1 advantage.)

Army

In ground combat force equipment, the situation is also adverse. The Soviet T-72 tank represents a major new threat creating great difficulties for the U.S. M-60 series tank and for existing anti-tank weapons. Most Soviet infantry weapons are better than their U.S. and NATO counterparts.

The Soviet BMP/BMD armored personnel carriers have more firepower than NATO's light tanks. Combined with a few T-72 tank battalions, Soviet motorized rifle divisions have firepower comparable to many armored divisions. In rapid deployment capability, Soviet airborne divisions have far more mobility than their Western counterparts.

Secretary of Defense Brown's fiscal 1982-86 guidance to the Army would further exacerbate the adverse ground force balance between the U.S. and the USSR. Army Secretary Alexander and Army Chief of Staff General Meyer strongly criticized the FY 1982-86 fiscal guidance given to the Army by the Office of the Secretary of Defense in the memorandum leaked in August 1980. That guidance would necessitate a decrease in FY 1982 Army funding by $1.4 billion, and a decrease of $7.2 billion of FY 1982-86. Both General Meyer and Secretary Alexander reportedly told Secretary Brown in an internal Pentagon memorandum that the effect of these decisions would be "the wrong Army prepared for the wrong war in the wrong decade." The trend now established toward slowing the Army modernization program should be reversed.

Another area in which action should be taken is in the upgrading of U.S. unconventional warfare forces. The Carter Administration has drastically cut back on these forces during its tenure in office. U.S. Army special forces are facing a reduction-in-force of approximately 15 percent as of October 31, 1980. Moreover, Navy unconventional forces (SEALS = sea-air-land) have also been cut back over the past three years. These forces provide the nucleus for undertaking unconventional warfare and combating international terrorism. At a time when unconventional warfare and terrorism can be expected to rise, these cutbacks should be considered as ill-advised.

Recommendations:

1. Field five new divisions (two active, three reserve) and restore all reductions made by the Carter Administration in unconventional, special forces.

2. Procure additional tracked combat vehicles including more
   - XM-1 tanks
   - FVS infantry fighting vehicles
   - M113 armored personnel carriers
   - M548 ammo/logistics carriers
   - M109 Howitzers
3. Procure much larger numbers of missiles including
   - TOW anti-tank missile
   - Roland and Patriot air defense missiles

Air Force/Navy Aircraft

Procurement of aircraft and helicopters have been dramatically cut back by the Carter Administration in its five-year defense plan. Production levels have been generally set at uneconomically low rates. Production of naval aircraft is less than peacetime attrition and the number of long-range attack aircraft on Navy air craft carriers will decline over the next decade.

In terms of tactical fighters, Ford Administration plans to procure 500 tactical fighter aircraft each year from FY 1978-1982 were abandoned. By FY 1980, the Carter Administration was requesting only 424 such aircraft; its FY 1981 budget request was for only 345. The Congress, disturbed by Administration plans in this area, added substantial numbers of tactical fighters to the Administration's budget requests in both FY 1980 and FY 1981. During the FY 1981 authorization process, Congress added 6 F-14s, 12 F-18s, 12 A-6Es and 12 F-15s to the Administration's aircraft procurement requests. Furthermore, Carter Administration plans call for the termination of the F-14 and F-15 procurement programs in the mid-1980s, and the slowing of the rates of procurement for the F-16 and F-18.

Recommendations:

1. Establish 9 new air wings (four Navy and five Air Force);
2. Increase production of the F-15 and F-16 fighters so that the Soviet challenge can be met and older F-101s and F-106s can be replaced;
3. Increase procurement of F-14 and F-18 naval aircraft. (The Carter Administration has consistently requested less than the number required for normal peacetime attrition.);
4. Increase production of A-10 and A-7 aircraft; these aircraft will be critical in stopping Soviet armored columns and should be procured in large numbers; and

5. Increase procurement of E-3A (AWACS) to improve U.S. warning and control capabilities.

Defense Industrial Base

The deterioration of the industrial base needed to support a re-invigorated military program is one of the most serious and intransigent problems facing the new administration. While far-reaching action will be necessary early in the administration, the erosion of industrial capabilities is not something which will lend itself to an easy or quick solution.

The problem is manifestly evident: currently U.S. defense spending is at the lowest point since 1940 as a percent of all public spending and at the lowest point as a percent of gross national product (GNP) since 1947-48.

The decline in defense budgets in the 1970s has exacerbated a problem which was evident during the Vietnam War. While the entire military budget went up during that conflict, much of the budget was allocated to operations and maintenance. At the same time, production readiness declined as investment in military hardware was curtailed. For example, American shipbuilding declined precipitously *during*, not after, the war in Indochina. The shrinking military-industrial base was evidenced by thousands of subcontractors either dropping military work or going out of business entirely. In addition, many of the primary contractors have re-tooled their plants for other types of production other than military, and many of those who are left have equipment which is outmoded.

Recommendations:

The new administration will find it necessary to start rebuilding the military-industrial base immediately. A joint government/industry commitment is a prerequisite. Even so, experts expect that even if there was an immediate world crisis it would take three years to achieve a sufficient level of production to sustain American armed forces. But the legal basis for action by a new administration exists: the Defense Production Act of 1950, as amended, and the National Emergencies Act of 1976 could be utilized to re-orient industry toward defense requirements. In addition, legislation is desirable to ensure that in case of a national mobilization, regulations and environmental laws do not hamper the expansion of industry to accommodate increase defense needs.

U.S. defense budget policies should move to a multi-year procurement procedure. Acquiring quantity over a period of years will discipline Defense Department procurement practices and stability will be given to the industrial base. Also, by making purchases of large quantities over a multi-year period, efficiencies will be achieved in the per-unit cost and would assist industry's ability to respond quickly and effectively to a mobilization in a crisis.

Conclusion

Before the U.S. begins to plan its defense program and budget for FY 1982, it must revise the inept national security policies that have been pursued for the past four years. This will require a major shift in U.S. military strategy, procurement planning, defense decision-making and arms control policy-making. The basic objectives outlined in this chapter could serve as a basis from which to initiate a new defense program in the 1980s, one which places a premium on consistency, steadfastness and clarity.

UNDERTAKING SHORT-TERM MEASURES

The new administration will be faced with the challenge of reversing the course of the Carter Administration's long-term defense policies and programs. The ability of the new President and his administration to radically alter the momentum and course of on-going policies and programs is quite limited in the short-term. Policy initiatives are limited by the availability of experienced and properly placed personnel to implement them, and also by the constraints of the budget process, both within the Executive and the Congress. That challenge will undoubtedly absorb the time and attention of a substantial number of the new policy planners in the Pentagon. Nonetheless, there are a significant number of measures which could be effectively implemented in the short-term which would enhance the overall defense posture of the United States.

All of these short-term initiatives should be undertaken with an eye to the fact that they are, in essence, interim measures designed to protect America's interests until a more coherent long-term strategy and defense program can be formulated and put into effect.

FY 1981 Supplemental Funding

Those actions directed towards improving the military pos-

ture of the United States should focus, not only on the most serious readiness deficiencies within our armed forces, but also on hardware and operational deficiencies. Improvements can be made, but not without substantial supplemental appropriation.

Consequently, one of the most important initiative which should be taken in the immediate term with a new administration is an urgent defense supplemental request for FY 1981 from the President to Congress. Funds from such a request could be utilized to fund some urgent near-term programs (such as ammunition stock purchases or O&M funding) and/or longer term procurement items such as tactical aircraft or armored equipment for the army. Funds for near-term measures will obviously be in short supply, having to come "out of hide" or from limited funds which the Congress may provide in a FY 1981 supplemental appropriation. The FY 1981 supplemental appropriation request should be about $20 billion.

Improving Readiness

Some of the more glaring deficiencies in the U.S. military posture have to do with the combat readiness of military units. The press in recent months reports of large numbers of land, sea and air units being rated "not combat ready," some because of personnel, materiel, ammunition and training deficiencies. Whole army divisions are currently unready to go into combat, Navy ships are deploying even though unable to engage in sustained combat, and tactical aircraft squadrons, in many cases, are unable to get more than half their aircraft off the ground on any one day.

Personnel

One obvious approach is to reduce the shortages of skilled personnel which have had such a harmful impact on combat readiness. With a combination of a direct Presidential appeal and a strongly publicized emphasis on the improved compensation which is now being made available to our military personnel, a substantial reduction in the "hemmorhage of talent" that is leaving our armed forces could be expected. Re-enlistment rates have already begun to improve as a result of recent congressional initiatives in the area of compensation and perhaps a number of skilled individuals who have already left military service could be persuaded to re-join.

Career military people have suffered in recent years from a lack of public appreciation for their work and the tremendous hardships they undergo. A combination of Presidential emphasis on the personnel problem, plus the recently enacted compensation improvements should have some tangible effect on the personnel shortage problem and prompt improvements in combat readiness could be expected. However, supplemental pay appropriations will be needed as soon as possible.

Training

Another initiative that could be undertaken by military commanders would be to institute additional training hours for combat units and combat personnel. Refresher training in the basic skills of individual occupational specialities or MOS's would have an immediate payoff in readiness and require only a minimum of additional training dollars. Classroom-type training would obviously be far less expensive than operational training in aircraft, tanks and the like and an effort to maximize the effectiveness of training dollars spent would be required.

Materiel

Aside from the above mentioned less tangible measures, some prompt measures could be taken to improve the materiel readiness of America's military forces. Greater numbers of highly skilled and trained people will obviously improve materiel readiness, but adequate quantities of spare parts and tools are also an indispensible factor in military readiness.

A relatively few dollars spent for spare parts can have a tremendous impact on readiness. Parts themselves are relatively inexpensive, especially when compared with the procurement costs of weapons systems. With reprogramming and use of the DoD discretionary fund (now containing about $150 million) a substantial dent could be made in the parts backlog that now exists.

Another initiative which would yield short-term improvements in America's military capability would be for the Secretary of Defense to utilize his authority to assign a high priority to certain military procurement items that currently have exceedingly long procurement times due to private industry demand and reduced industry capacity. Aircraft castings, for instance, now have to be ordered up to 48 months in advance because of the reduced number of producers and the commercial aircraft industry demand. By giving priority to defense

procurement items, years can be shaved off the procurement time for major weapons systems, as well as spare parts, thus improving America's military posture substantially.

Conclusion

The long-term neglect that has brought U.S. military posture to its current state cannot be cured overnight. Medium- and long-range plans and programs will also have to be formulated to follow through on the short-term measures enumerated above. If these things can be done, however, America will soon feel secure again with a defense posture adequate to meet the threats it faces.

Hardware and Operational Capabilities

The perception of America's military strength and her credibility as an ally are important factors in the overall military posture of the United States and there are a number of short-term measures which could be undertaken to enhance the deterrent effect of existing U.S. armed forces.

Strategic Forces

With the United States entering a period of maximum peril and the Carter Administration having promoted defense programs which fail the critical tests of timeliness and cost-effectiveness, what then can be done rapidly to rectify our deteriorating strategic position? The answer lies in the creation and development of *quick fixes* which are improvements in our strategic nuclear forces that can be accomplished in a relative short period of time.

The primary criteria by which such quick fixes should be judged are first that they improve the pre-launch survivability of current U.S. strategic systems (or creating more viable deployments or weapons), and second that they improve the lethality of our forces against targets in the USSR.

During the early to mid-1980s, American strategic systems will be at their most vulnerable so that improvements are urgently needed within this time frame to ensure their survivability. A "business-as-usual" approach to defense programs and expenditures will not solve the immediate problems of U.S. strategic force vulnerability. The early creation of new weapons systems and the acceleration of existing programs is required if we are to maintain a credible deterrent.

This report is mindful that short-term programs or spending

are not substitutes for long-range planning and consistent levels of spending over many years. And the argument is not being made here that all of the suggestions which follow necessarily are optimal uses of defense expenditures in the long-run, although they are not seen as incompatible with meeting long-term needs. One cannot escape the conclusion, however, that it would be the height of irresponsibility not to implement a number of corrective strategic measures within the next 2 to 3 years.

ICBMs: MX

Clearly the most vulnerable leg of the U.S. strategic triad is the ICBM force, and the Carter Administration's proposals to correct this include the separate elements of basing modes and a new missile, the MX. However, this is a late fix, as the MX's Initial Operational Capability (IOC) involves only 10 missiles and is planned for July 1986, with Full Operational Capability (FOC) estimated no earlier than the end of 1989. The MX thus will not become available for deployment in significant numbers until years after U.S. land-based missiles become vulnerable; therefore, the MX fails to address the problem of timeliness.

ICBMs: MMIII

Among the various proposals which could quickly be implemented to ensure the survival of the ICBMs, the best would appear to be the cannisterization of the Minuteman III ICBMs and creating a vertical Multiple-Protective Shelter (MPS) basing mode around some of the existing Minuteman III ICBM fields. In addition to new silos built around the existing fields, silos could also be constructed between the existing silos which are spaced five miles apart. Thus, four times the number of silos could be deployed within the existing ICBM basing system. The creation of this basing scheme should not be exceedingly difficult: because of the experience garnered from years of operating Minuteman fields, the U.S. has the necessary technological, managerial, and command infrastructure.

The rebasing of Minuteman III could be accomplished in a relatively short time. During past construction of silos they were finished at a rate of almost one per day. This rate could be improved upon with a crash program. The proposed vertical MPS basing would be less costly and could be completed more quickly because it would entail a more simple silo

for the cannister than some of the proposed basing modes. In a 1979 letter to the House Armed Services Committee, Air Force Chief of Staff General Lew Allen stated, "Modifying a Minuteman III for deployment in vertical shelters requires only about two years, consequently the pacing item in this case would be development and deployment of the basing mode, both for IOC and FOC."

Rebasing the Minuteman III in a vertical MPS around and within existing Minuteman III sites might well be the most cost-effective and timely program which could be implemented in the next 2-3 years. If only 100 Minuteman III missiles were deployed in a vertical MPS system using between 9 and 18 separate shelters for each missile, some 20 percent of U.S. MIRVed ICBM force would be protected at an estimated cost of about $2.2 billion. There would be an additional advantage derived from the fact that the U.S. would have experience dealing with an MPS system when the MX is ready for deployment, if that is judged to be the appropriate basing mode.

If it is the assessment of the new administration that the vertical MPS basing of Minuteman III missiles is neither the quickest nor most cost-effective solution to the survivability of U.S. ICBMs, several other options could be considered for implementation. These include an accelerated MX in a vertical and austere MPS basing mode, basing the MX in Minuteman silos with the Low Altitude Defense System (LoADS), accelerated exoatmospheric ABM, layered ballistic missile defense, or a mobile Minuteman or MX.

An FY 1981 supplemental appropriation should include R&D funding for whatever strategic "quick fixes" are decided upon. To wait until the FY 1982 appropriations process to ask for funding will not serve to convince Congress of the immediacy and urgency of the threat. Rather, it might cause Congress to react negatively to the proposal, in light of the substantial amounts of R&D funding it has already appropriated for the MX. An FY 1981 supplemental appropriation should also be considered for the acceleration of the MX IOC.

There are other strategic improvements which will help correct the immediate strategic vulnerability. For example:

- The accuracy and payload of the Minuteman III warhead should be increased. Both categories are significant areas of ICBM improvement for a "hard-target kill" capability. The more powerful and accurate the warhead on MIRVed ICBMs, the fewer American missiles need to survive a

Soviet first strike in order to pose a realistic retaliatory threat. Thus, the Mark 12-A re-entry vehicle can enhance the deterrent effect of U.S. strategic nuclear forces, and should be mounted on all of the Minuteman IIIs. Its employment would double the warhead yield of the ICBMs from 170 kilotons to 350 kilotons. Such deployment, coupled with the Advanced Inertial Reference System (AIRS), which could improve accuracy to a 700-foot CEP, would be a considerable improvement in the Minuteman III. Unfortunately, the Carter FY 1981 Defense Department plans call for the deployment of the Mark 12-A on only 300 of the 550 deployed Minuteman III missiles. This program should be expanded to include the other 250 Minuteman III missiles. In addition, the Minuteman III production line, closed by President Carter, should be re-opened in order to provide additional U.S. options.

- The deployment of 100 or more Minuteman IIIs now in storage in Minuteman II silos should be funded. That would increase the number of warheads by 200. It would be a qualitative improvement as well; the Minuteman III can be remotely targeted and does not have the "pin-down" problems that the Minuteman II does. This deployment would cost about $35 million over the next two years.

The Strategic Bombers:B-1

A new strategic bomber will be required to replace the aging B-52s. The B-1 is still a possibility for a new penetrating bomber because of the continued research and development funding it has received since President Carter decided not to produce and deploy it. The B-1 or the modified B-1 still represents an improvement over the B-52 according to several criteria:

- The B-1 can use electronic deception to hide more easily than the B-52 due to its small radar cross section.
- It is more likely to evade enemy air defense systems because of its ability to fly lower and faster.
- an improved navigation system and a larger payload would increase the damage a B-1 could wreak on enemy targets.

Strategic Bombers: B-52

There remains the problem of how to deal with growing bomber vulnerabilities until the B-1 or the modified B-1 starts coming off the production lines, and there are two sets of proposals which warrant close attention.

- The first series of recommendations center around upgrading the B-52 bomber. Its ability to survive a Soviet first-strike and then penetrate the USSR has been called into question. The system of SAC bases where the B-52s are located hinders prelaunch survivability. Alert rates and reaction times are low. The prospects for the bomber's ability to penetrate Soviet airspace are not encouraging: the Russians continue to upgrade their air defenses and they will soon have a look-down/shoot-down capability which will further complicate the penetration problem.
- The current basing mode of the B-52s should be changed. Of the two dozen SAC bases in the continental United States (CONUS), most are within a hundred miles of the coastline and therefore are susceptible to a surprise attack from Soviet SLBMs using a depressed trajectory. In order to ensure the survival of the strategic bombers, the quick reaction alert time should be increased to 2 or 3 times the current rate. In addition, three alternatives should be examined to guard against prelaunch vulnerabilities: a) increasing the capacity at the primary air bases by building parallel runways; b) moving the bases to the interior of CONUS, thus increasing the alert time; and c) developing multiple aimpoint basing with shelters and hardening the air field facilities.
- The ALCM program should also be accelerated to answer short-term strategic vulnerabilities. Suggestions for acceleration include utilizing a three-shift basis for production or to have a competitive production effort. If various measures were taken to speed production, it has been estimated that 150-300 ALCMs per month could be produced in 1½ years and 4,000 total within 3 years. The ALCM/B-52G program should be accelerated so that 20 ALCMs can be put on all B-52Gs.

Submarines

The Trident submarine construction rate has fallen behind schedule, and should be increased from the current one boat a year to 3 boats every two years through FY 1985 and then 2 boats every year thereafter. While the Trident program is not an inexpensive program, the addition of 24 missile tubes with each additional submarine can substantially improve the U.S. strategic posture in the early to mid-1980s.

The Trident II missile program should be accelerated. While

Trident SSBNs will originally be outfitted with the Trident I SLBM (C-4) with a range of 4,000 miles, the accelerated D-5 program will soon provide the submarines with considerably more range. The Trident II is necessary in order for the Trident submarine to fulfill its mission. As the former Deputy Secretary of Defense, Governor William Clements of Texas has testified, "The purpose of building the Trident submarine was to equip it with the Trident II missile. . . ."

The SLCM program should be accelerated. Polaris SSBNs should be retained and possibly armed with SLCMs for deployment in the early 1980s.

ABM

Regardless of the basing mode of either the Minuteman or MX missiles, their survivability can be greatly enhanced by the rapid development of ballistic missile defense (BMD). In light of the increased capability of a Soviet breakout from the 1972 ABM Treaty, consideration should also be given to intensified development and possible deployment of an ABM site defense for part or all of the U.S. ICBM forces. Advances accomplished in ABM technology in the last decade make effective BMD possible, and as the Los Alamos ABM assessment report stated, a layered defense of U.S. strategic systems would respond to further increases in the Soviet threat. The type of ABM system which might be considered could include both the high altitude, exoatmospheric interceptors as well as a Low Altitude Defense System (LoADS).

Command & Control and Civil Defense

A new Navy TACAMO command aircraft should be procured at the same time research funding is provided for the extremely low frequency (ELF) communications program and blue-green laser communications system. A FY 1981 supplemental should include increased funding for Civil Defense.

Conventional Forces

With regard to conventional military forces, there are also a number of short-term actions which could be taken to enhance the perception and credibility of American military forces.

In light of renewed instability in the Persian Gulf area, the new administration might consider the formation of a coordinated allied fleet to patrol the Indian Ocean and Persian Gulf region. A combined fleet consisting of ships from a substantial

number of our European allies would provide an important and highly symbolic contribution to stability in that region. A similar type of combined fleet might be a possibility in the Western Pacific, although the contribution of allied countries would be far less in that region.

A highly publicized Presidential visit to the Sixth or Seventh Fleet to observe fleet operations or perhaps a joint allied exercise would focus attention on the still formidable capability of the U.S. Navy and also the substantial contribution that allied navies possess. In particular, attention should be paid to the ability of the U.S. Navy to put air power at sea.

With regard to ground and air forces, the new administration could announce a two or three year plan to substantially increase conventional ammunition stocks with initial funding to come immediately from DoD contingency funds and additional funding included in a DoD Supplemental Budget Request.

Another step which could be taken to enhance American credibility would be an announcement by the new President that the United States was immediately initiating the production of enhanced radiation warheads for storage in the United States. By announcing such weapons would be stored in the United States, but available for rapid shipment to any crisis area, many of the problems encountered earlier with our European allies would be reduced or eliminated.

These kinds of highly visible actions would give a substantial boost to American credibility in the world and would require only a limited investment. None of these actions, however, would have as great an effect immediately as would personal Presidential actions and steady Presidential leadership regarding the need to strengthen America's defenses.

The new President with a new team of respected individuals in important national security positions in the government will provide a strong signal to allies and potential enemies alike. An early Camp David-type meeting of the President with his Joint Chiefs of Staff and respected defense experts from the Congress, from academia and from previous administrations would do much to convey an impression of strength and of renewed American leadership on matters of national and international security.

Conclusion

In sum, while the scope of actions which can be taken to strengthen America's defense posture in the short-term are

limited, they are not, in fact, without major significance. Those first few months in office will do much to establish an impression amongst friend and foe alike, and will help to establish a course for the remainder of the administration's term.

To strengthen America's defense posture will, of course, take a concerted effort over the long haul. It will require the establishment of clear goals and the formulation of a coherent national strategy to achieve them.

The formulation of goals and strategies should be addressed in the transition period so that the new President and his Administration get set to work immediately on America's most serious and threatening problem.

BUDGET OPTIONS: THE FY 82 BUDGET AND FY 81 SUPPLEMENTAL

Introduction: Issues and Funding Requirements

The Carter Administration's Five-Year Defense Plan (FYDP) for FY 1982-87 is woefully inadequate to meet the minimum national security requirements of the United States during the next decade.

One of the first orders of business for a new administration, then, will be to totally revamp the current Carter FYDP and replace it with a new one which involves substantially increased defense spending. In order to reverse the current unacceptable trends as soon as possible, this new defense effort will have to involve:

- A FY 81 supplemental request of $15 to $20 billion to cover the second half of the current Fiscal Year;
- a revised FY 82 defense budget with an increase of at least $35 billion, to replace the one prepared by the Carter Administration; and
- a new FYDP for FY 82-FY 87—or preferably an *Eight-Year* Defense Plan to cover the next two administrations. It would be highly desirable to establish a firm FYDP early on, and then make every practical effort to stay within it, so that the nation can also make reasonable long-range plans for its other pressing domestic and international problem areas.

Despite the hopes of the transition team and new appointees, there are several factors likely to remain essentially unchanged under the new administration:

- Ultimately, the preparation of the new defense plan in

budgetary detail and their explanation and justification on Capitol Hill will be predominantly the work of the military departments, not the Office of the Secretary of Defense, although the latter will have overall responsibility for it.

- Despite the change in national mood and growing threat and despite the mandate of the new administration to bolster U.S. national defenses, there will be competing interests vying for allocations from the federal budget. This report, however, necessarily focuses on what is required to meet the national security needs of the nation. Independent estimates of additional real defense needs approach $50 to $100 billion annually, and even more if past shortfalls are to be made up. Practical and affordable defense increases in the near-years are more likely to be in the neighborhood of $30 to $35 billion annually over Carter projections.
- The Defense Department's Planning, Programming, and Budgeting System (PPBS) has been evolving for almost 20 years. While some defense experts like to find fault with this process, the fact remains that it has largely worked, and that the entire DoD bureaucracy is accustomed to working within it. Given appropriate inputs in the form of policy and planning guidance, the military departments can, in relatively short order, produce a responsive and internally consistent output.
- Any new administration anxious to gain the cooperation and sincere support of the military departments will have to revive the "participatory management" approach of the last Republican administration. The Carter Administration's return to secretive centralized control reminiscent of the McNamara era for the program and budget cycle has produced highly negative reactions throughout the U.S. military structure.

There is no justification for the Transition Team expending vast amounts of uncoordinated effort trying to construct a new defense budget, line item by line item in the procurement accounts (with virtually no visibility into the other appropriations such as Manpower and O&M), unless they have come to grips with some of the more basic issues that will necessarily drive future force structures and future force equipments. This "from-the-top-down" approach is essentially the equivalent of evolving the new planning and programming guidance—and fiscal guidance—on which the military departments would prepare their own new budget proposals.

The purpose of this paper is to initiate the process of coming to grips with the fundamental issues around which the new guidance would be developed. Rather than only starting with a long "laundry list" of individual procurement programs, each one of which has some vocal advocate, one has to recognize that among the major defense appropriations, the Procurement Account is actually the last one to be settled. It is, and always has been, funded essentially with whatever is "left over" when the other major accounts have been properly funded for the near term.

The following pages are intended to highlight the funding requirements produced by various changes in strategy and policy for the next few years. In essence, these discussions frame the basic questions which must be addressed before a new Secretary of Defense's "Consolidated Guidance" can be prepared. Understanding these fundamental issues and their impact on future defense budget trends is the first step in preparing a sound new defense plan.

Military Personnel

The MilPers account provides all military salaries, plus ancilliary costs associated with travel, moving, expenses, etc. The most serious current problem among uniformed personnel is the retention of skilled officers and enlisted men. Their pay has now fallen almost 20 percent behind the Consumer Price Index (CPI), and this situation almost certainly contributes to the current mass exodus from the services. Rectifying this situation may cost as much as $5 billion annually.

Retired Pay

The Retired Pay account is currently charged against the Defense Department's budget. In constant dollars, its growth is predictable: it will require almost $75 billion over the next five years.

Operations and Maintenance

The O&M account provides most of the routine support for existing forces and their facilities. It is comprised of the civilian pay account, and O&M purchases, including food, clothing, fuel, purchased services, etc. The civilian workforce costs are stable, but O&M purchases are growing erratically in response to OPEC oil pricing. The Pentagon's annual fuel bill is now roughly $10 billion. It is the O&M account which is the primary

indicator of current readiness, and the one which the Carter Administration has begun, belatedly, to increase. Nonetheless, O&M could be raised another 8 percent, and this would cost roughly $5 billion annually.

Military Construction, Family Housing, Etc.

This is a "catch-all" for the lesser appropriation accounts. Spending for military construction and family housing stays stable at roughly $5 billion annually *unless* there is: a) a major weapon-related MilCon program such as MX; b) a major force redeployment away from existing home or overseas bases; or c) a major increase in force levels requiring new bases/ports, etc. Current MilCon planning includes large funding for the MX program, and is retained in these estimates. Increased spending of at least several billion dollars annually could accompany significant force level increases.

Research, Development, Test and Evaluation

RDT&E expenditures have been maintained very close to 10 percent of total defense spending for over a decade. Nonetheless, it is by no means clear that, if other accounts are raised for other reasons (such as readiness or staying power), the RDT&E community need levy a "tax" on those other appropriations. Nonetheless, RDT&E expenditures may well have to be increased if the U.S. is to design more versatile forces (such as RDF), and if we are to perform rapid modernization of our strategic nuclear forces.

Minor Procurement

Minor procurement is the unglamorous half of the Procurement appropriation that is seldom reviewed by the Office of the Secretary of Defense (OSD). It contains all the funding for major spares, ammunition and other consumables (missiles, etc.) that define the "staying power" of U.S. forces in combat. Currently, U.S. forces are incapable of fighting for more than a few weeks. The Carter Administration's most ambitious plans call for being able to support a high-intensity NATO conflict for 90 days by FY 86 at the earliest—for U.S. forces only. Enhanced staying power could—at a minimum—require $6 billion more annually—much more if it is hoped to more fully modernize all U.S. forces.

Major Procurement

This portion of the procurement appropriations contains all the Defense System Acquisition Review Committee (DSARC) level programs which so pre-occupy defense planners and analysts—even though it currently amounts to only 15 percent of the defense budget. The fact remains, however, that total spending for force modernization (Major) and sustainability (Minor) is only about two-thirds of that necessary to prevent slow, insidious force "aging." This gradual obsolescing of existing inventory equipment essentially wipes out any hoped-for qualitative advantage in our numerically smaller forces. As we spend more per unit to enhance "quality," the quantity bought drops and the average force equipment is actually getting older—not younger.

In FY 81 dollars, the replacement value of our total inventory of equipment and consumables is roughly $1500 billion, with a "useful life" of about 25 years. Hence, that inventory should be "rolling over" at approximately $60 billion annually. Yet, the current Procurement appropriation is only $40 billion. This has caused considerable "aging" over the past ten years which would would require about $176 billion added expenditures over the next eight years, i.e., another $22 billion annually atop the missing $20 billion to prevent future aging.

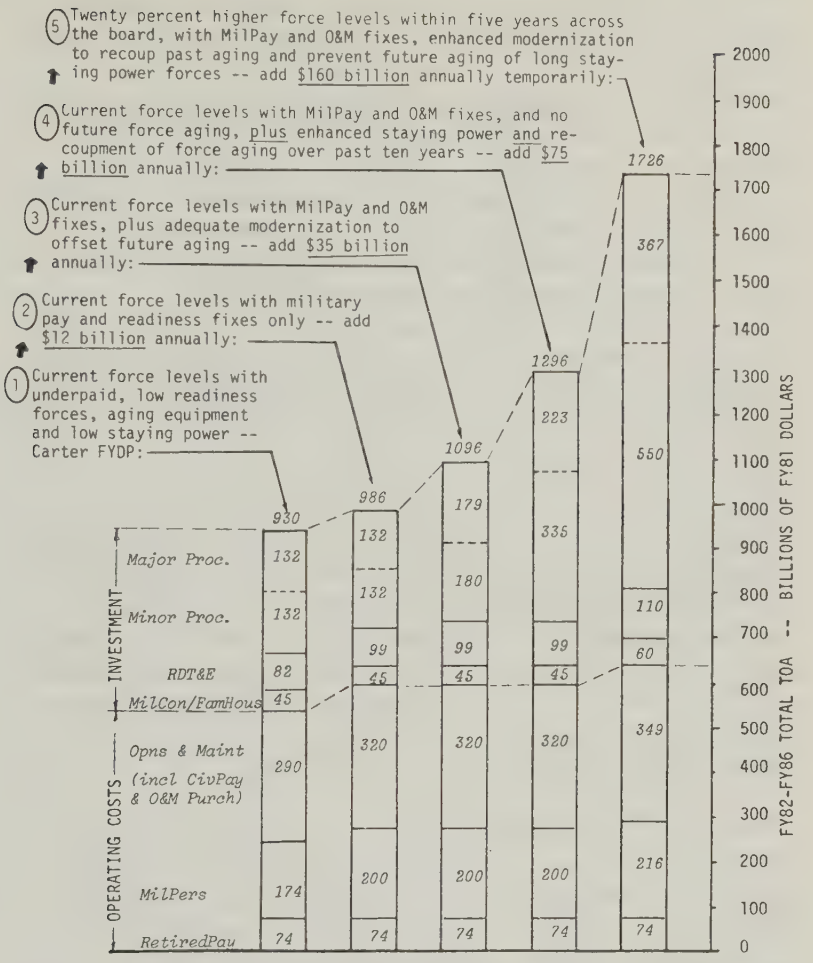
Force Level Changes

It is by no means evident that even with perfect pay, readiness, and modernization that our existing force levels are adequate to handle the increased size and worldwide distribution of the threats to Western interests. Force level increases clearly require additional expenditures in both MilPay and O&M. However, the truly large expenditures come from procuring new equipment for them. To add 4 percent annually to our force levels essentially *doubles* the steady state investment requirement (involving a 25-year or 4 percent annual turnover).

Five-Year Defense Requirement Options

Applying different strategies and policies it is possible to demonstrate a variety of alternate defense budgets which range from increases of $12 billion annually—just to fix readiness and military pay—up to $160 billion annually more—as outlined in the previous chapter—to increase force levels and rectify lagging modernization. Four such alterna-

THE SPECTRUM OF TOTAL FIVE-YEAR DEFENSE NEEDS



tives to the current Carter FYDP are shown on the following page. The total five-year costs (TOA in FY 81 dollars) vary from the presently planned $930 billion to a figure of $1.73 trillion—almost twice as much.

The point of this short tutorial is to indicate that real defense requirements could readily exceed any realistic reallocation of federal resources currently intended by the political aspirants. Moreover, the true and balanced funding requirements are not identified by generating lists of favored Major Procurement items alone. Other basic policy and strategy issues must also be addressed from the outset:

• How much should we pay to encourage service retention of needed military skills?

• How much more do we wish to improve the day-to-day readiness of our operational forces, and which elements in particular?

• Are there valid additional basing/facilities requirements?

• Do we wish to increase the rate of development of all-new weapon systems?

• Do we need to increase the staying power of our forces, and if so which components?

• For what mission areas or military departments do we need increased (or decreased) active force levels?

These are the kinds of issues, appropriately addressed in revised program and planning guidance, that would permit development of new FYDPs by the military departments.

Major National Security Strategy Issues

The U.S. alone cannot sufficiently increase its defense spending to assure the security of all Western industrialized nations against the various Soviet and Soviet-inspired threats, under the present strategies. However, it is incumbent upon a new administration to consider some of the basic strategic alternatives and to lay out any general changes in direction from the outset. Many of the options will take 8-10 years to implement. This paper will consider four basic issues, each with strong implications for defense funding.

Alliance Burden Sharing

There is a natural tendency for the U.S. to approach the overall force balance issues on a bilateral U.S. vs. USSR basis. The Soviets, on the other hand, dwell more on the overall "correlation of forces"—an approach which the U.S. could well adopt. It is really the security of the Western industrialized nations which needs to be addressed, and it is our *collective* capabilities to constrain the Soviets and their proxies in the Third World which are in question.

Since our enhanced defense efforts will still involve the allocation of shortfalls, it is important to address the areas in which our allies might reasonably do more. This is clearly a complicated issue, and even the components of our collective security go well beyond military forces—to grant aid and energy independence. Nonetheless, it may be informative to estimate how defense spending would change the ten wealthi-

est Western nations if each put five percent of their 1979 GNP into defense efforts:

United States	−$17.0 billion
United Kingdom	−2.5
Japan	+36.5
West Germany	+12.0
Italy	+6.9
Canada	+6.4
Australia	+2.4
Belgium	+2.2
France	+1.6
Netherlands	+1.5
TOTAL	+$50.0 billion (FY79$)

There is a clear implication that equal sharing of the defense burden would require substantially greater efforts on the part of American allies. It would seem unreasonable therefore, that the U.S. should give first priority to satisfying those requirements of its military forces that could not reasonably be assumed by its allies. These might be strategic nuclear forces and conventional forces for use outside the NATO and Northeast Asia regions. It does not appear completely impossible to envision a collective security effort in which:

- Japan might well take on the defense of Northeast Asia and the North Pacific sea lanes;
- West Germany might take on more of the burden on the NATO Central Region;
- Italy might take on more responsibility for the NATO Southern Flank (along with Israel?);
- Canada might take on more responsibility for reinforcing the NATO Northern Flank; and
- NATO nations could do more in the Indian Ocean.

Clearly, these trends would have significant implications for both how—and how much—the U.S. should add to its defense spending.

Strategic Nuclear vs. Conventional Forces

From a strictly monetary point of view, U.S. strategic nuclear forces are substantially less expensive to procure and maintain than are general purpose conventional forces. It is possible to make some crude estimates of the total *20-year* defense costs of major American force elements (SFY81B):

Mission Area	Procurement	MilPers	O&M	Total
Strategic Forces	455	34	79	568
General Purpose Forces	1720	370	641	2731
Other Misc. Forces	165	36	115	316
Unallocated Costs	—	230	525	755
TOTAL	2340	670	1360	4370

To a first order approximation, then, a 50 percent increase in strategic nuclear forces could, over the long run, be offset by a 10 percent reduction in general purpose forces. While there is little rationale to support substantial trade-offs between these disparate forces, one must conclude that it would be easier to "match" the Soviets in nuclear forces than in conventional forces—if that ever became an objective in itself.

Planning for NATO vs. Non-NATO Conventional Wars

There would appear to be substantial question as to whether the Soviets would, in the foreseeable future, attempt to conquer Western Europe militarily. It is doubtful that the Soviets would be able to either rebuild the economic potential of Western Europe—or even be able to occupy and control their vast population. Nonetheless, the nature, distribution, and configuration of U.S. conventional forces is heavily oriented towards rapid reinforcement of NATO against a sudden Soviet/Warsaw Pact attack. Compared to any other major conventional contingency, the "NATO-first scenario" dictates substantially larger ground forces and substantially smaller naval forces—as well as marginal air and sealift forces.

Again, the total *20-year* defense costs of our current operational general purpose forces may be estimated as follows (SFY81B):

Mission Area	Procurement	MilPers	O&M	Total
Ground Forces	426	196	209	831
Naval/Marine Forces	794	90	290	1174
Tacair Forces	500	84	142	726

While these numbers are speculative at best, they do not indicate trends. For instance, if greater emphasis were to be placed on conflict in the Middle East/Persian Gulf area, at the expense of the NATO area, one might consider trading off a 15 percent reduction in ground and Tacair forces to achieve a 20 percent increase in conventional naval forces.

Standing Forces vs. Mobilization Potential

The concept of the U.S. having to fight a protracted

conventional like World War II went out of vogue with the achievement of nuclear supremacy in the 1950s. Despite the current loss of nuclear parity, the concept of a worldwide, long duration conventional conflict has not reasserted itself. The U.S. has allowed its industrial—and manpower—mobilization capabilities to disappear. The U.S. does not even maintain plans for civil defense mobilization. In part, this approach results from long indoctrination into the philosophy that U.S. military forces will be able to *deter* war, and hence they need not be designed nor backed up to actually *fight* a war. The Soviet approach has been diametrically the opposite. They have developed a mobilization potential which would allow them to produce a very stunning change in the apparent balance of military forces in a relatively short time. This provides the Soviets with yet another way to intimidate the West without resort to using their vast military machine.

If one becomes less convinced that a Soviet "bolt-from-the-blue" attack into Western Europe is the major threat to the Western industrialized world, then one might consider a significant imbalance between active and reserve forces, a different balance between stockpile inventories and industrial mobilization—and possibly even a difference in total force readiness, even including nuclear force alert rates. Reconsideration of the range of options could make substantial impacts on all the major appropriation accounts. It is virtually a national scandal that there exist no up-to-date studies of the resource implications of recreating a modern mobilization capability. Based on crude estimates, however, it would appear that reserve forces can be maintained (MilPers and O&M) for no more than 20 percent of their active force counterparts, while their equipment should "last" considerably longer if it does not become technologically obsolete. Moreover, the creation of a substantial industrial mobilization capability probably costs no more than 10 percent of the investment required to "buy out" any modern weapon system (and subsequently lose the option of further procurement). At present, any efforts to maintain weapon production (such as torpedos) at a minimum sustaining rate, thus preserving a mobilization potential, are scorned and rejected for their "acquisition inefficiencies"—both by Defense officials (analysts) and the Congress.

These consideration raise some very basic issues which should be addressed in any revised budgetary guidance:

• In what mission areas can the U.S. encourage allied rather than U.S. force development/expansion?

• To what extent should the U.S. emphasize strategic nuclear force expansion/modernization at the expense of conventional forces?

• To what extent should the U.S. change our "most critical scenarios" for the use of U.S. forces (NATO vs. elsewhere), and how should this change the distribution and equipping of our conventional forces?

• To what extent should the U.S. recreate a national manpower, industrial, and civil defense mobilization potential, and to what extent can it replace active standing forces and inventories?

Procurement in Advance of Foreign Transfers

As a result of what the Congress perceived as Executive Branch attempts to circumvent congressional insistence that the Defense Department stop supporting the war in Southeast Asia, legislation was passed specifically prohibiting Defense from procuring material in anticipation of transfer to some friendly client state. In the subsequent 1973 war in the Middle East, consumed Israeli war materiel was replaced from already inadequate U.S. operational inventories. In short, the direct impact of the Israeli war was to lower U.S. force capabilities for up to three years while replacement equipment was procured. Since wartime consumption rates vastly exceed peacetime production rates, one can readily envision situations where Soviet-inspired client wars can rapidly and substantially reduce the remaining U.S. deterrent, even though we have not been directly involved in the hostilities. Needless to say, Soviet practice in this regard is far different. Not only are their weapon equipment production rates far higher, they maintain stocks of equipment clearly intended for ultimate transfer (sale or grant) to their allies and clients. Until transferred, this equipment clearly adds to their own staying power in case of conflict.

It is proposed that the new administration make sensible plans for production of foreign transfers (sale or grant). Such production would not only keep the U.S. industrial base more active on a continuing basis, it would assure American friends and clients that the U.S. can resupply their losses if and when they are forced to fight for their survival. Those same inventories would meanwhile add to the U.S. potential staying power, and assure that American forces need not be placed at risk by client/client actions. If this approach is adopted, then the

services should be encouraged to include such procurement in their program plans:

- Should the military departments plan on supporting procurements in advance of foreign transfers?

Major National Acquisition Strategy Issues

There is a growing feeling in many quarters that the national "culture" which surrounds the defense acquisition process is not serving us well. Major U.S. weapon systems are becoming more expensive at an alarming rate, and they seldom if ever work well and reliably in operational surroundings. The critics claim that the following are the major sins of the "acquisition community":

- too great a preference for "quality over quantity";
- too much application of immature new technology to new systems;
- too long a development cycle from the lab to operational inventories;
- too little standardization and commonality even among U.S. systems;
- too little procurement of operational quantities of both the systems and their operational support (spares) and combat consumables (ammunition, etc.);
- too little similarity with, and dependence on, components and equipments from the civil sector, where reliability is higher and training demands are far lower.

Best current estimates are that military equipment is becoming more expensive at an average overall rate of 6 percent annually. This requires an annual increase in the procurement accounts of that much just to "stay even." Moreover, many weapon systems appear to be discarded not when their total life has been consumed, but when some subcomponent has either worn out or become obsolete. [Military systems are seldom designed for "modular" replacement of components, because they appear to be a little "off-optimum" by making such provisions.] Total *20-year* inventory replacement costs for the Defense Department currently appear as follows, as a function of varying "technological growth rate" and "useful life" limits ($FY81B):

Tech Growth	Total Useful Life (yrs)		
Rate	20	25	30
6%	2925	2340	1950
5%	2605	2085	1735
4%	2325	1860	1550
3%	2075	1660	1385

This table shows quite clearly that replacement costs will differ by a factor of more than two, depending on the useful life expectancy and the rate of technological growth. Even if we just moved from 6 percent x 25 years to 4 percent x 30 years, we could reduce our procurement demands by 33 percent (1—1550 2340). The savings might actually be larger than this because it could well be possible to get along with a somewhat lower RDT&E budget—the lion's share of which is devoted to "full scale development" of new weapon systems, not to the development and demonstrations of new technologies.

This suggests a series of basic changes within the acquisition community of the Pentagon which should be established from the outset of any new administration (total development leadtimes now run 8-10 years).

Technology Prototypes vs. Full Scale Developments

The failure to develop technology prototypes of both components and full systems enhances the R&D community's emphasis on applying immature technology to full scale development items. This raises the cost and time of development as well as producing less operationally ready equipment. A trend away from full scale development towards technology prototypes could result in some reduction in the total RDT&E budget.

Product Improvement vs. New Starts

New starts are not only extremely expensive in development, but cause substantial introductory costs: from retraining and reprovisioning to all the problems of working "the bugs out" of the new machine. Moreover, new starts generally end up changing every aspect of a system (because it is developed by a different manufacturer)—including many components which might otherwise have remained "standard." There are no more startling differences between U.S. and Soviet acquisition practices than this. The Soviet designers must in essence "show cause" why a component *should* be changed, while in the American system, engineers must "show cause" why it *shouldn't* be different. This results in excessive rates of "technological growth," even though many of the cost-increasing changes are virtually unrelated to final system performance. Finally, failure to pursue the product improvement approach as far as possible results in premature retirement and obsolescence of existing designs. Strong guidance to the acquisition community to increase the use of product improvement and delay the

development of replacement systems could markedly reduce "technological growth" and increase "useful life." One could envision clear and precise identification of all systems for which product improvement is to be pursued over the next decade rather than replacement systems.

Application of Commercial Products and Components

The military acquisition community has become accustomed to developing its own equipment for everything from transport vehicles to administrative computers. Such an approach may have been justified in earlier times when military technology was in fact far ahead of the civil sector. Following World War II, it was in part the impetus of the defense-related technologies which helped produce the revolutions in air transportation, electronics, computers, etc. However, the situation has now changed dramatically. In many areas, military technology is now considerably behind its commercial equivalents, as the commercial sector has vastly outstripped the military sector in size and dynamism. One is hard pressed to envision any commercial equipment which is kept "first line" for 25-30 years—as the U.S. demands from our military equipment. In fact, keeping spares available for military equipment becomes increasingly more difficult as their commercial counterparts move more rapidly to new technology. Moreover, since most commercial equipment exists in vastly larger quantities than its military equivalent, it works more reliably, and more people are trained in its maintenance (which must, because of commercial competition and pressures, be kept far more simple).

Furthermore, if the U.S. is to develop a meaningful industrial mobilization capability, it will have to be centered about the adaptation of commercial products. While the Soviet's civil economy is largely driven by their military demands on "heavy industry," the much greater U.S. civil economy exists almost independent of its tiny military component. Thus, the Soviets will convert their civil production to military devices. The U.S., on the other hand, should look more towards converting military needs to commercial standards and equipment. The U.S. will become far better prepared for this by accepting far more commercial products and components during peacetime. It is not impossible to consider lowering the replacement value of all of our military inventories (depreciation allowance) by possible 5-10 percent by the greater utilization of the civil sector. That might be enough, incidentally, to offset the need for higher military pay!

Lastly, in times of crisis, there are many items in civil inventory which can be directly expropriated for military use in logistic and support roles—transportation and communications in particular. By adapting military needs to civil products, instead of insisting that the "requirements" are different, the U.S. could markedly increase our total available resources under crisis situations. It might be noted that this approach may be even more applicable to less affluent allies who are willing to pull their own weight, but cannot afford the U.S. luxuries of buying single-purpose assets.

To provide a single example of this last point, it is interesting to note that Boeing will produce this year almost as many aircraft as currently existing in our Strategic Airlift Forces! Over 80 percent of these new units will be for foreign customers, and many of them, including the 747s, will include cargo-conversion features considered "inefficient" by American carriers.

In short, there are very substantial opportunities to influence defense costs of introducing major innovations in defense acquisition strategy. This requires the immediate addressal of the basic questions posed below—and the inclusion of the new administration's answers in their initial program and planning guidance:

- To what extent should the U.S. insist on *more* technology to new production systems?
- To what extent should there by greater use of product improvement of existing weapon systems to satisfy near-term procurement needs, and of "modular" design in new systems to enhance their future product improvement potential?
- To what extent can military departments adapt commercial components and end-products to lower overall procurement and maintenance costs, while developing an important mobilization potential?

Military Department Individuality

There has been a longstanding tendency to try to squeeze both the mission priorities and the resource requirements of the three military departments into a common mold—presumably in the name of centralized management expertise. Nothing could be less appropriate or more counterproductive. To begin with, two departments "man their equipment," while the third "equips its men" and is relatively manpower-intensive rather than equipment-intensive. In one department, only its

commissioned officers partake in offensive combat. One service takes its logistic support into combat with it, while the others, to varying degrees, leave it behind.

Moreover, the mission priorities of the different elements of each military department are clearly different, and have suffered substantially by trying to present the rationale for their existence based on a single, common conflict scenario. For instance, the critical U.S. airlift and sealift requirements clearly are not meant to be the reinforcement of the NATO Central front with allied help: they are the rapid deployment to the Indian Ocean without allied help. It is equally clear that the primary mission of the Marines and aircraft carriers is not reinforcement of the Central NATO front, as opposed to securing friendly and eliminating enemy bases and projecting power elsewhere. By the same token, U.S. strategic nuclear forces are not all intended to respond to a sudden all-out nuclear attack: some elements must comprise a viable reserve force.

Consequently, it is of vital importance to recognize a broad spectrum of potential conflict scenarios and to allow the military departments to judge which portion of each scenario should dictate their critical readiness and materiel requirements. This can only be done by recognizing a full spectrum of potential contingencies and highlighting the unique nature of certain aspects for each major force component.

The other side of this coin, of course, is the tendency of each military service to deny the existence of the others. The urge to retain such total independence is very costly. The Marines, for instance, would like to be able to pursue their amphibious landings without naval aircraft carrier support. The surface Navy, meanwhile, assumes they must be able to assault any Soviet target without cooperative actions by the Air Force. By the same token, the Air Force believes it should provide close air support without the cooperative defense suppression efforts of the Army it is supporting. To complete the circle, the Army, designed to fight anywhere but on the North American continent, firmly believes that it must be prepared to support itself almost entirely without host nation infrastructure support (transport, medical, food, etc.). In addition, none of the services will voluntarily count on the support of allied forces, or on the potential contributions from the U.S. or allied civil sectors (communications, construction, etc.). It is mandatory, then, that the planning scenarios strongly indicate the levels of interdependence between forces, nations, and sectors.

Finally, the composition of the budgets of the individual

military departments vary substantially from one another. Consequently, one cannot offer "fiscal guidance" unless it has been tailored to the future projections of each department. This is not currently done, and the effects are shown in the following chart, illustrating the most likely *20-year* needs of each department by major appropriation ($FY81B):

	ARMY	NAVY	AIR FORCE
MilPers	280	224	204
Civilian Pay	144	134	110
O&M Purchases	254	546	362
MilCon/FamHousing	20	16	22
RDT&E	90	160	180
Procurement	436	1014	890
TOTAL	1224	2094	1768
Equal Projections	1124	1596	1496
Adequacy	92%	76%	85%

When the expected totals are compared to a common 3 percent projection for each department in the outyears (beyond the FYDP), it becomes apparent that the adequacy of the projection varies significantly. Good fiscal guidance, then, must account for these department differences.

This leads to another set of broad questions which must be addressed in the program and planning guidance:

- What is the total range of conflict scenarios for which U.S. force components will be designed, and which is crucial for whom?
- To what extent must the individual services depend on each other, on American allies, and on the civil sector in each scenario?
- How should the budget projections be tailored to each military department?

Fiscal Guidance Issues

The foregoing sections have attempted to make it clear that U.S. defense funding requirements could very well exceed any levels which might reasonably be made available by the Congress during peacetime. Just how much funding is needed depends to a very large degree on the guidance provided and the strategies and policies which the new administration sets forth. In broad terms, it is possible to project overall defense needs on the basis of a "top-down" analysis, such as the one sketched out herein. There are two pertinent points to be recognized:

• It is difficult if not impossible to develop a meaningful "required funding level" for defense by simply adding up "bits & pieces" in the major investment accounts; and

• There is virtually no point in asking the military departments "how much they could spend" irrespective of overall national security goals, and free from fiscal constraints. The responses would be excessive and virtually impossible to reconcile or judge.

National defense budgets, even for a conservative administration, will still be limited by "what the traffic will bear"in the Congress. And in fact, valid defense requirements can be met in a variety of different ways, depending on resource availability. Whether one procures a C-X or a C-5B, an M-X or a MM IV, a CVN or a CV, depends as much, if not more, on the total amounts of funds available rather than any wise and timeless analysis of firm "requirements." The McNamara approach of claiming no fiscal limits, inducing the services to put forward their "wishlists," and then chopping them down at the level of the Office of the Secretary of Defense (OSD) proved to be a grotesque process in which imbalanced budgets resulted with no valid rationale or military support. The military departments essentially forfeited their role in generating sound budgets within fiscal limits. It is absolutely essential that the military departments regain their own initiative for developing their own programs and budgets—within OSD guidelines.

Continuity of Defense Projections

Although it is impossible to project economic conditions and inflation rates in great detail, there is virtually no reason why a long-range projection of defense needs should change several times a year. The Ford Administration demonstrated that it was possible to arrive at a long-range planning projection and leave it basically unchanged from year to the next. There is no valid rationale for the projections to have changed as frequently or as much as they have under the Carter Administration.

Next is the inescapable fact that defense spending is going to continue to consume more than 22 percent of total federal receipts—and possibly as much as 80 percent of the readily "controllable" federal expenditures. It is clearly unreasonable to be able to manage other important aspects of the federal budget, such as Energy or Transportation, if there are large uncertainties each year as to how much money will be "left over" to satisfy their needs after Defense needs have been met.

Moreover, one cannot visualize any sort of major defense program—personnel or hardware oriented—that does not require several years to complete. It takes as much as seven years to build a single ship, and it can require two or three years to create or disband an Army division. Continuity of projections is equally important for other government agencies as for Defense.

Controllability of Defense Spending

There are those who still believe that defense spending must remain a major variable in federal spending so that it can be used to "adjust the economy." In this respect, they lose sight of the fact that defense outlays in the near-year are essentially "uncontrollable" for two major reasons. First, the major outlays in any given year flow from personnel (civilian or military) expenditures appropriated that year—often after the beginning of that fiscal year. Given separation costs, and the attendant reshuffling of remaining personnel, it can be clearly demonstrated that there are virtually no savings to be accrued in the first year of a major personnel reduction—unless it was planned a full year or more ahead. Second, the remaining outlays in a given year stream primarily from appropriations made in prior years, and these are also largely uncontrollable in subsequent years since they have been committed to major programs of one sort or another. These outlays, then, can only be controlled by retroactive interference in a previously authorized program. In short, defense outlays, large as they are, cannot really be dialed up and down in the short term for national economic control purposes.

Moreover, there is a disturbing tendency within the Defense Department to request additional funds to compensate for "overruns" without accepting program slippage. Somehow, the program completion dates take on a degree of sanctity which is completely without justification. Since firm, long-range commitments often do not exist, there is a prevailing assumption that poor management will be compensated for without delay and without impact to other programs. Such a philosophy does not tend to provide suitable incentives to live within one's means and one's promises. Setting firm multi-year funding profiles (at least in constant dollars) can have a very salutory effect on internal defense management, then, without really hampering the imaginary use of defense expenditures as national economic controls.

There are few if any procurement programs which do not

extend for several years at least. The average weapon system tends to stay in production at relatively low production rates for at least a decade. None of these weapon procurements are really "mass produced" in the commercial sense. Nevertheless, frequent changes in production rates, and the inability to place multi-year orders, do produce significant procurement inefficiencies. On a few sample programs, there is some indication that being able to make multi-year procurements can save as much as 10-15 percent of the total procurement costs. While these estimates may be high, or apply only to a few programs, it would still be worthwhile to achieve a 5 percent procurement savings by this technique.

Taken all together, there appear to be clear and compelling reasons to strive for a fixed long-range commitment to defense expenditures early in the new administration. There is no reason why such projections cannot be roughed out within the first 6 to 12 months of the new administration and projected for a full eight year span of a two-term administration. Clearly, such projections would not remain unchanged for that period of time. Nonetheless the discipline and commitment involved in making a firm projection and *trying* to live within it, barring changes in world circumstances, would be very worthwhile, and a tremendous source of pride and challenge to the defense community.

Gradual Increases in Defense Spending Commitments

In recent years there has been an increasing tendency to describe defense funding requirements in terms of some regular, annual, percentage increase in real defense spending (constant dollars). This concept of the 2 percent or 3 percent annual increase had its origins in the early 1970s when defense spending was closer to that which was considered essential over the long haul. Hence, one could estimate annual increases in, for example, fuel costs, or technological growth, and simply request that defense budgets rise to match them. Unfortunately, those modest annual increases during the 1970s were not achieved. As a result, the difference between current funding levels and needed funding levels have diverged. The divergence cannot be eliminated by these small incremental increases. The U.S. is now over $280 billion behind a 3 percent constant dollar growth curve starting in FY72! What is needed at this time, therefore, is a very rapid rise in defense TOA over the next two or three years, followed by a more gradual continuous increase thereafter. These near-term increases

should be at a minimum $35 billion in each of two successive years, building on a supplemental in the first year (FY81) so that there would be virtually a "step-change in the level of defense commitment, followed by a more gradual but steady increase (i.e., 3-4 percent) thereafter. In fact, the downstream growth rate should be contained within the real national GNP growth rate. If it isn't, the U.S. would be committed to an ever-increasing share of GNP for national security, which does not appear rational.

The economic "shock" of a really impressive add-on to defense spending may be less imposing than its critics would suggest. While there have been claims—even from within the Pentagon—that such additional sums "could not be well spent", such assertions are clearly political rather than factual. Pay and O&M increases can be absorbed immediately. Furthermore, increases in spares and consumables procurement can be almost immediate. Moreover, if the U.S. simply returned the production rates of systems now being procured to the maximum they have each experienced over the past five years, the U.S. could readily begin to purchase up to $20 billion more annually. On the other hand, such hardware spending does not turn to outlays overnight. Thus the outlay stream that follows a step-increase in TOA for weapon systems like ships and aircraft will lag the appropriation by two or three years.
appropriation by two or three years.

This discussion leads to the framing of a few more basic questions that would form part of the essential guidance in formulating a new defense budget:

- What near-term step increases in defense TOA will be acceptable to the Budget and Appropriations Committees of the new Congress?
- Can the U.S. count on a long-term gradual growth rate pegged to 3-4 percent annual increases in the real GNP?
- Can a firm "topline" be established to defense funding requirements and establish management techniques for living efficiently and responsibly within those limits?

It might be noted that the existence of a well-publicized maximum defense spending rate can provide a substantial stimulus for military department incentives to stay within those levels—if they sense that they will have some freedom to maneuver within their share of the total. During the Ford years, such a "topline" existed for the Department of Defense, and it had been largely apportioned to the military departments. A small "wedge" in outyear funding was maintained

unallocated to provide both incentives for worthwhile programs, and as a buffer against some unforseen "overruns" or possible Congressional cuts. The net effect of this system was to raise the services' confidence that they had control within their funding allocations. The Carter Administration has adopted a strikingly different approach. The Office of the Secretary of Defense establishes "toplines" for the military departments that *exceed* the total presidential commitment to the Congress. This has been done to provide OSD management with "something to cut". In short, the services always know that their outyear program plans are subject to further manipulation by the OSD—and that in fact such manipulation will be essential even if they do a good management job. The use of negative "contingency allowances" may make good sense to McNamara-schooled analysts, but it certainly cannot stimulate good and responsible management at the service level.

Summary of Issues

The most important twenty questions in formulating revised policy and planning guidance for the preparation of new military department five-year defense plans are repeated below. If the new administration transition team can offer reasonable answers to these questions, then the military departments can readily provide their inputs to a new national defense program within a period of a few weeks.

- How much should be payed to encourage service retention of needed military skills?
- How much more does the U.S. wish to improve the day-to-day readiness of our operational forces, and which elements in particular?
- Are there valid additional basing/facilities requirements?
- Does the U.S. wish to increase the rate of development for all-new weapon systems?
- Does the U.S. need to increase the staying power of our forces, and if so, which components?
- What mission areas or military departments need increased (or decreased) active force levels?
- In what mission areas can allied rather than U.S. force development/expansion be encouraged?
- To what extent should strategic nuclear force expansion/modernization at the expense of conventional forces be emphasized?

• To what extent should the U.S. change its "most critical scenarios" for the use of forces (NATO vs. elsewhere), and how should this change the distribution and equipping of conventional forces?

• To what extent should the U.S. create a national manpower, industrial, and civil defense mobilization potential, and to what extent can it replace active standing forces and inventories?

• Should the military departments plan on supporting procurements in advance of foreign transfers?

• To what extent should *more* technology prototypes, be required and *less* application of immature technology to new production systems?

• To what extent should the U.S. insist on the greater use of product improvement of existing weapon systems to satisfy near-term procurement needs, and of "modular" design in new systems to enhance their future product improvement potential?

• To what extent can the U.S. insist that the military departments adapt commercial components and end-products to lower overall procurement and maintenance costs, while developing an important mobilization potential?

• What is the total range of conflict scenarios for which U.S. force components will be designed, and which is crucial for whom?

• To what extent must the individual services depend on each other, on U.S. allies, and on the civil sector in each scenario?

• How should the budget projection be tailored to each military department?

• What near-term step increases in defense TOA will be acceptable to the Budget and Appropriations Committees of the new Congress?

• Can a long-term gradual growth rate be pegged to 3-4 percent annual increases in the real GNP?

• Can the U.S. establish a goal of formulating a firm "topline" to defense funding requirments and establish management techniques for living efficiently and responsibly within those limits?

FORMULATING POLICY FOR THE INTERMEDIATE TERM

The Lost Decade of the 1970's

In the mid-1960's, the U.S was the world's preeminent power and most of that power flowed from its military strength. Reputable scholars like George Liska and Raymond Aron spoke confidently about American hegemony. The economy was strong and vibrant. Inflation was low, productivity was high. America's conventional and nuclear forces were markedly superior to those of its principal adversary, the U.S.S.R. The American Secretary of Defense could boast that this nation could afford to spend whatever was necessary for defense. The U.S. possessed a worldwide network of bases and alliances that enabled it to project military power effectively and quickly anyplace on the globe. American military forces were configured to wage one major and one minor war simultaneously.

Indeed, when the Vietnam War began in earnest in 1965, the Pentagon was able to place almost a million military people into the Southeast Asia Theater without calling up the reserves or reducing its strength or commitments in other parts of the globe. In the last half of the 1960's, DoD poured almost $200 billion into the war against Communist forces in Southeast Asia while other government agencies vigorously pursued the War on Poverty at home. All this was done without a significant tax increase.

By the latter half of the 1970s, the situation had reversed itself dramatically. The core inflation rate was in double digits, productivity had declined to the point where it was actually going down. U.S. military forces were clearly inferior to those of the Soviet Union all across the spectrum of violence. Every static and dynamic measure of the strategic and conventional balance demonstrated that the U.S. was falling farther behind the Russians each year. The American military base structure around the world had practically vanished and the global military presence outside Western Europe had diminished markedly. The U.S. alliance system was in a shambles and military forces stretched almost to the breaking point. For example, in late 1979, when the U.S. placed a comparatively small naval force, some 20 ships or one-third of a fleet, into the Indian Ocean, the Navy was forced to temporarily remove its two forward deployed carriers from the Western Pacific and one from the Mediterranean. This marked the first time in the

post-World War II period that those areas did not each have two carriers.

The reasons for this decine or relative demise of U.S. power are numerous and interrelated. For purpose of analysis, they may be grouped into five categories:

The Decline of U.S. Defense Spending

The U.S. simply stopped spending enough on national security. In FY 1969, at the height of the war in Vietnam, measured in constant FY 1981 dollars, that is, adjusted for inflation, the U.S. was spending $193 billion for its national defense. By FY 1976, that amount had dropped to $125 billion, a decline of $68 billion or 35 percent in just seven years. While it was somewhat unrealistic to expect U.S. expenditures to remain at their wartime peak, few knowledgeable people anticipated that the level would drop so far rapidly. As indicated in Table 1, the FY 1976 level was almost $19 billion or 13 percent below the amount of FY 1964, the last pre-war year. As Table 1 also shows, that marked the first time in this century that expenditures after a war declined below their pre-war levels. Nothing so dramatic had happened since the U.S. had become a world power during the Spanish-American War, not even in the days between World War I and World War II, which General George C. Marshall often proclaimed as the military forces' period of agony, did the U.S. reduce its expenditures below the pre-war level of 1916. Similarly, the lowest point of the post-World War II demobilization saw defense spending remain 5 times above its pre-Pearl Harbor level.

Not only did the overall level of defense expenditures drop, but more importantly, the amount of funds spent for investment declined even more sharply. Because of the large increases in the size of the military population, the adoption of comparability for federal government employees, and the creation of the all-volunteer force, payroll costs rose rapidly for DoD between FY 1964 and FY 1976. In FY 1964, about 400,000 military people were drawing retired pay. By FY 1976, 1.2 million people were on the retired roles. Consequently, retired pay jumped from $1.2 billion in FY 1964 to almost $7 billion within a decade. In FY 1964, the average pay of a military person was about $4,500 and a defense civilian, $7,200. Twelve years later, the individual military person cost the Pentagon over $11,000, and the civilian in excess of $17,000. As

Table 2 shows, between FY 1964 and 1976, payroll costs rose $7 billion and took 12 percentage points more of the defense budget. Similarly, primarily because of the dramatic increase in the cost of the 200 million barrels of oil used by DoD, operating costs took an additional $5 billion or 6 percentage points more of the DoD budget in FY 1976. Thus, in FY 1976, the Pentagon had less than $34 billion or only 27 percent of its total budget, which was already small in size, to spend on investment, that is, procurement of weapon systems, construction of bases and infrastructure, and research and development. This was $31 billion or 18 percentage points less than FY 1964.

TABLE 1
PRE AND POST-WAR
DEFENSE SPENDING
IN THE 20th CENTURY
(IN BILLIONS OF CONSTANT FY 1981 DOLLARS)

	LAST PRE-WAR		WARTIME PEAK		POST-WAR LOW	
WAR	FISCAL YEAR	BUDGET TOTAL	FISCAL YEAR	BUDGET TOTAL	FISCAL YEAR	BUDGET TOTAL
SPANISH AMERICAN	1897	1.2	1899	4.1	1902	2.4
WORLD WAR I	1916	2.8	1919	77.2	1925	3.7
WORLD WAR II	1940	11.6	1945	55.4	1949	50.9
KOREA	1950	53.6	1953	162.2	1956	125.8
VIETNAM	1964	143.4	1968	192.6	1976	124.8

SOURCE: *Statistical Abstract*

TABLE 2
PRE AND POST VIETNAM DEFENSE TOTALS
(IN BILLIONS OF CONSTANT FY 1981 DOLLARS)

	PAYROLL		OPERATING		INVEST-MENT		TOTAL
FISCAL YEAR	TOTAL	%	TOTAL	%	TOTAL	%	BUDGET
1964	61.6	43	17.2	12	64.6	45	143.4
1976	68.6	55	22.5	18	33.7	27	124.8
DIFFERENCE							
1964-76	+7.0	+12	+5.3	+6	29.9	18	18.6

SOURCE: *Defense Posture Statements FY 1964 and FY 1976*

The percentage of funds available for investment in the post-Vietnam period was further diminished by the fact that

during the war itself the Pentagon was not permitted to spend very much on investment. In order to hold down the level of defense spending, and thus hide the true costs of the war from the American people, President Johnson and Secretary McNamara channeled funds that would normally have been spent on investment into conducting the war. For example, in the five years prior to 1965, DoD spent about 27 percent of its budget on strategic forces. During the war, the percentage of the budget devoted to these forces dropped to 9 percent. Similarly, between 1960 and 1965, the Navy received funding for construction of 45 ships per year. During the war, an average of only 8 ships per year were built. In addition, weapon systems and supplies built for U.S. forces in Europe were diverted to Vietnam, leaving U.S. troops committed to NATO short of equipment and supplies by the early 1970s.

The lack of funding available for investment in the 1970s also made it difficult for the Pentagon to handle the problem of bloc obsolescense which was created by two factors. During his first 1,000 days in office, President Kennedy accelerated the production of such systems as Minuteman and Polaris dramatically. For example, when Kennedy took office, the U.S. had two Fleet Ballistic Missile submarines with 32 launchers in commission. Within the next five years, an additional 39 boats and 624 launchers were put into the U.S. strategic arsenal. Since these boats have a useful life of 25 years, that meant they would all become obsolescent almost simultaneously in the latter half of the 1980s, and since it takes about a decade to develop a weapon system, funds for a follow on system should have been set aside in the 1970's. Second, the great number of Navy ships built during Word War II all came to the end of their useful lives in the late 1960s and early 1970s.

When funds available for this should have been increasing, as might be expected, this decline in spending for investment had a dramatic impact upon the size and capabilities of the U.S. general purpose force structure. As indicated in Table 3, in 1974, the U.S. was left with an armed force much smaller than the one which existed during or even before the war in Southeast Asia. Compared to 1964, manpower had declined from 2.7 million to just over 2 million, a drop of 26 percent; the number of aviation squadrons had been cut from 203 to 110, a decline of 46 percent; the number of ships had fallen from 932 to 495, a drop of 47 percent; and the number of ground combat divisions had declined from 19 to 16; a reduction of 16 percent.

Table 3: Summary of Weapons Inventory, 1964-1974

Weapons System	End of Fiscal Year			Percentage Change	
	1964	1968	1974	1968-1974	1964-1974
Squadrons					
Long Range-Bombers	78	40	28	−30	−64
Fighter Attack	85	103	75	−27	−12
Fighter Interceptor	40	26	7	−73	−83
Total Squadrons	203	169	110	−35	−46
Number					
Aircraft Carriers	24	23	14	−39	−42
Amphibious Assault	133	157	65	−59	−51
Sealift	101	130	37	−72	−63
Surface Warships	368	387	187	−52	−19
Strategic Submarines	21	41	41	0	+95
Nuclear Attack	19	33	61	+85	+221
Support	266	205	90	−56	−66
Total Ships	932	976	495	−19	−47
Number					
Army Divisions	16	19	13	−32	−19
Marine Divisions	3	4	3	−25	0
Total Divisions	19	23	16	−30	−16

Sources: *Annual Defense Reports* and *Military Posture Statements*

Compared to 1968, the decline was even greater in some areas, for example, in the number of ships. Besides undermining the military balance, this decline in the level of defense expenditures had two other undesirable effects. It has virtually destroyed the American mobilization or industrial base and seriously undermined the all volunteer force (AVF). Since the Pentagon spent so little on investment in the last decade, many defense-oriented industries either went out of business or diversified into commercial and foreign military sales markets. Last year, for the first time in the post-World War II period, sales by American aircraft companies to the commercial sector exceeded those to DoD. The Nifty Nugget Mobilization exercise, conducted by the national security establishment in the fall of 1978, demonstrated that this nation simply could not produce enough of the equipment and supplies needed to meet its requirement if a large scale conflict should break out.

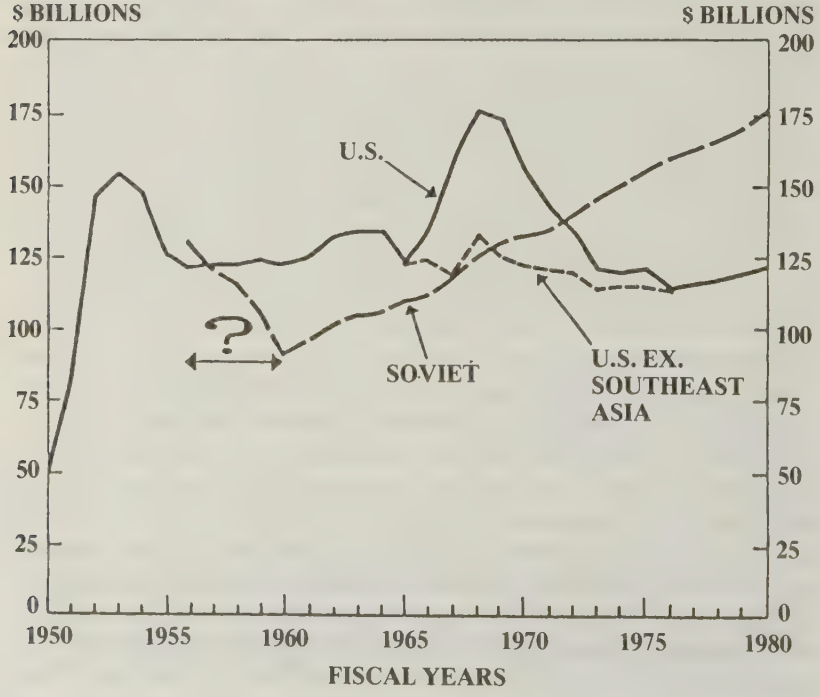
Although personnel expenditures already consume more than half of the DoD budget, active military personnel have not had a real increase in pay since the inauguration of the AVF in 1973. Moreover, since that time their compensation has fallen 15 percentage points behind increases in the cost of living. As a result, skilled non-commissioned officers (NCOs) or petty officers and middle grade commissioned officers are now leaving the military in droves. At the present time, the

armed services have a shortage of some 70,000 NCOs and 10,000 middle grade officers in areas like pilots, engineers, doctors, and nuclear submarines. Since these people leave after 8-10 years of service, their skills and experience levels are irreplacable. Not even a reinstitution of conscription can solve this critical shortfall. The draft would only bring it large numbers of new inexperienced and unskilled people.

The Increase in Soviet Defense Spending

While the size of the U.S. force structure was decreasing markedly during the 1970's the size and capabilities of the armed forces of its principal adversary, the Soviet Union, were increasing substantially, primarily because the Russians increased their emphasis on defense while the U.S. was decreasing the emphasis on its armed forces. As the U.S. embarked upon its involvement in Southeast Asia, DoD was spending slightly more on defense than the Soviets. In 1968, if one

Figure 1
COMPARISION OF U.S. DEFENSE OUTLAYS AND ESTIMATED DOLLAR COSTS OF SOVIET DEFENSE PROGRAMS
(Billions of Constant FY 80 Dollars)



excludes the incremental costs of the war in Southeast Asia, the Russians outspent the U.S. on defense for the first time since before the Korean War. Between 1968 and 1972, the Soviets spent about $60 billion or 21 percent more on national security. Over the next five years, they spent $117 billion or 28 percent more than the U.S. By FY 1977, the Soviet defense budget was more than 40 percent greater than that of the U.S. and in FY 1980, the Soviets spent $53 billion or 43 percent more than this nation. Figure 1 contains a comparison of U.S. and Soviet defense outlays for the 30-year period between FY 1950 and FY 1980.

Since only 17 percent of the Soviet defense budget is spent on personnel, the Russians were able to spend the vast majority of their own large budget on investment. For example, during the decade of the 1970s alone, they outspent us in the investment area by $104 billion. This was enough money to have paid for 244 B-1 bombers, 200 MX missiles, 14 Trident submarines, 7,000 XM-1 battle tanks, 300 transport aircraft, and 5,000 tactical aircraft for the Navy and Air Force. These huge expenditures enabled the Soviets to increase the size of their armed force from 2.7 million in 1964 to 4.5 million in 1976. During the same period, the Soviets added over 2,000 strategic missiles, 2,500 tactical aircraft, 25 major surface combatants, and 25 ground combat divisions to their inventory. These additions, coupled with the U.S. decline, brought about a deteriorating military balance and by the mid-1970s left the once nearly omnipotent U.S in a position of what can best be described as "clinging parity."

Table 4 compares U.S. and Soviet force levels from the mid-1960s through the mid-1970s. As that table shows, by 1976 the Soviets had significantly more land-based and sea-based missiles, major surface combatants, tactical aircraft, and ground divisions than did the U.S. This was exactly the reverse of the situation which prevailed in 1964 and 1968. By the mid-1970s, the lone U.S. force advantage was in the area of manned bombers.

The Decline in U.S. Power Projection

A third reason for the decline in U.S. capabilities was the reduction of the worldwide U.S. base structure and ability of the U.S. to deploy forces to all parts of the globe. In 1969, the U.S. had over 2 million men and women stationed in some 20 countries around the world. In addition, the U.S. Navy had 157 amphibious assault ships and 130 sealift vessels and the mer-

chant marine consisted of almost 1,000 ships. A decade later, the U.S. had only 410,000 military personnel in 14 nations. Moreover, 312,000 or 76 percent of these forces are in the 10 NATO nations, leaving less than 100,000 for the remainder of the world. Similarly, the number of amphibious ships has declined over the past decade, dropping nearly 60 percent to 65 while the number of sealift vessels has fallen by almost three quarters to just 37. The merchant marine has fared no better during this period, declining by almost half to 567 ships. Today it ranks only tenth in the world. This reduction in American overseas power projection capabilities was rationalized on the basis of the Guam or Nixon Doctrine, that is, the U.S. expects that local forces would provide for their own defense. However, the Nixon Doctrine begged the question of how the U.S. would act when its vital interests were threatened and local forces were unable or unwilling to sacrifice themselves in order to protect American interests. President Carter compounded the problems by imposing a 25 percent reduction in the level of foreign military sales, thus placing the U.S in the somewhat ridiculous position of encouraging others to contribute to the common defense while simultaneously denying them the weapons to do so.

The Increase in Soviet Power Projection

While the U.S. was cutting back on its power projection capabilities, the Soviets were increasing theirs both absolutely and relative to that of the U.S. Today the "Land Power" nation, the U.S.S.R. has 18 more amphibious ships of 1,000 gross tons and over. Over 100,000 troops of the Soviet Union or its satellites are stationed in 10 third world nations. while another 600,000 Soviet troops are Eastern Euorpe and 100,000 more are in Afghanistan

U.S. Inability to Control Non-Defense Spending

Over the past decade, the nation has devoted so large a portion of its resources to social programs that it has become increasingly difficult to control inflation, generate capital accumulation, increase productivity, or provide for the national defense. During the 1960s, at the same time that the U.S. was conducting the war in Vietnam, Lyndon Johnson committed this nation to undertaking a War on Poverty at home. As a result, the federal government enacted a number of open ended indexed, and thus fiscally uncontrollable, entitlement

Table 4. U.S./U.S.S.R. Force Levels for Selected Calendar Years

SYSTEM	1964		1968		1972		1976		N		%	
	U.S.	USSR	U.S.	USSR	U.S.	USSR	U.S.	USSR	U.S.	USSR	U.S.	USSR
ICBMs	654	200	1054	700	1054	1118	1054	1527	400	1327	61	664
SLBMs	336	20	656	50	656	450	656	845	320	825	95	4125
Bombers	630	190	650	250	569	140	387	140	−243	−50	−39	−26
Major Surface Combatant Ships	300	200	325	200	250	225	175	225	−125	25	−12	−18
Tactical Aircraft	5700	3500	5700	3500	5000	4500	5000	6000	−700	2500	−12	71
Division Equivalents[1]	19	7	20	10	16	25	16	25	−3	18	−16	266

[1]U.S. and Soviet divisions are not directly comparable. Soviet divisions are made equivalent to the U.S. in this comparison.

Source: *United States Military Posture* and *Reports of the Secretary of Defense* (for selected years).

programs (that is, if a group or individual established eligibility for the program the government has to pay the benefits). In FY 1968, these uncontrollable programs amounted to $107.2 billion or 36 percent of the federal budget. By FY 1976, they came to $261 billion or almost 60 percent of the budget. In FY 1980, these "uncontrollables" will reach a staggering $412 billion or 76 percent of the budget.

In contrast, the share of the federal budget available for defense has dropped sharply. In 1964, defense received about 44 percent of the budget. During the 1970s, defense received an average of 28 percent. Last year, DOD received only 22.7 percent. Yet the tax burden on the average American taxpayer has become crushing. In FY 1981, federal taxes will take 23 percent of the GNP, a higher percentage than during most of World War II! The economy needs a tax cut to stimulate capital accumulation. More funds are needed for defense, and the budget needs to be balanced to hold down inflation. Yet, with these uncontrollable social programs growing rapidly, none of these things is possible at the present time.

Formulating Policy for the Intermediate Term

The decade of the 1980s will be perilous for the United States unless the U.S. changes its behavior radically. As U.S. dependence on the international arena for the health of the economy grows, Washington's ability to have an impact upon that environment will decline rapidly. While the U.S. cannot regain the hegemony that existed 20 years ago, it does not have to become a second rate power. However, time is running out. Indeed, there is not a great deal that the U.S. can do to increase its capabilities in the near term, that is, in the first half of this decade. During that period, the U.S. will be paying the price of a decade of neglect. However, if America does not act now, it will not be able to control its destiny in the latter half of this decade or the remainder of this century.

What the U.S. must do is reverse the pattern of the 1970s; specifically: the military balance must be restored; the capability to protect the sea lanes and to project U.S. power even to the most remote corners of the globe must be enhanced; the alliances must be rebuilt and major allies must make a greater contribution to the common defense; bases and base rights, especially in the Third World, must be secured; and the intelligence apparatus reinvigorated. All of these steps must be preceeded by a recognition that our internal economic health

and political stability are intertwined with the international environment and that environment is susceptible to power, that is, armed force is still the basic ordering factor in the international system. Just as the United States focused on its domestic problems in the last decade, so it must now concentrate on international concerns in the coming decade.

Increase in Defense Spending

Reversing U.S. behavior patterns of the 1970s will require that it does several things. First, and foremost, the U.S. must simply allocate more resources to DoD. In FY 1980, this nation spent about $130 billion for national security. While this sum is substantial, it amounts to under 5 percent of our GNP and less than 23 percent of the federal budget. This is the lowest portion of GNP allocated to defense since the Korean War and the smallest portion of the federal budget since Pearl Harbor. Moreover, it is $50 billion less than the USSR, which allocates about 14 percent of its GNP to defense, will spend. The Carter Administration proposed to increase this amount by about 4 percent a year in real terms over the next five years. If this program had been enacted, defense would have received 5.2 percent of the GNP and 23.7 percent of the federal budget in the FY 1981-85 period. This would simply not have been enough either in absolute or relative terms. At best, it would only prevent a widening disparity between the level of the Soviet effort and that of the U.S. A growth rate of 4 percent a year will not let the U.S. make inroads into the Soviet advantage in the military balance nor will it make up for the lost decade of the 1970s.

The U.S. must spend *at least* an additional $35 billion per year in FY 1981 dollars every year over the next five years. These additional funds will not disrupt our economy. The extra $175 billion over the next five years will consume a little more than 1 percentage point of the annual GNP, bringing the defense share to a little over 6 percent. This is still considerably less than it was a decade ago and less than half of the level of GNP devoted to defense by the Soviets. Moreover, the additional funds can be added without increasing the tax burden or postponing tax cuts, if reductions are made in the rate of growth of some entitlement programs. For example, these program can be indexed to the GNP deflator rather than the CPI. If this system were in existence in FY 1980, $15 billion would have been saved. The debate can no longer be framed in terms of guns or butter. As we enter the decade of the 1980s, if

the U.S. does not buy guns there surely will not be any butter. For example, a loss of access to 2 million barrels of oil would cost the U.S. $90 billion in GNP and add 2.5 percentage points to the rate of inflation.

The additional funds alone will not solve the problem. Much depends upon how they are spent. The first priority must be increasing the compensation of active duty military personnel. If the military is to remain competitive in the marketplace, comparability to the pay levels of 1973, when the U.S. embarked on the all volunteer force, must be restored. In addition, housing allowances and reimbursement for moving expenses must be brought into line with the actual costs. The average military family loses about $1,000 on each move and spends $2,000 per year over and above its housing allowance on quarters. This is a tremendous burden on families already living below the poverty level, i.e., 275,000 military people are eligible for food stamps. Finally, special annual bonuses or proficiency pay will have to be paid to people possessing critical skills, for example, pilots, engineers, doctors, electricians, computer programmers, and plane mechanics.

Taking these steps will not be inexpensive. It will amount to about $5 billion per year. However, not spending this money will be catastrophic. The sea lanes cannot be secured without skilled people on board ships, nor can the Rapid Deployment Force be activated to protect U.S. interests in the Third World if there are no skilled men in the brigades. Navy ships presently operating in the Persian Gulf are so undermanned that it is difficult to predict how effective they would be if conflict should break out in the region. Moreover, the Navy, which is half the size it was a decade ago, is now being forced to lay up ships because of a lack of skilled manpower.

Readiness and O&M

The second priority for the additional funds must be increasing the readiness and sustainability of the present force. Because there is less of a constituency for this area and because it is not as visible as procurement, it is often neglected. However, it is critical. Sophisticated weapon systems cannot be effective if they lack spare parts or trained personnel. Fighting men, no matter how brave, cannot prevail in battle if they run short of ammunition.

About $11 billion ($5 billion on O&M; $6 billion on minor procurement) per year must be spent to increase war reserve stocks; pay for additional training ammunition; decrease the

maintenance backlog on ships, planes, runways, hangars, and even motorpools; and purchase additional fuel for training time for ships, planes, and tanks. At the present time, war reserve stocks in the NATO area need to be increased threefold. The services need an additional 40 million barrels of oil annually to bring fuel levels back to where they were just five years ago, for example, so that Navy ships will not have to operate at only 80 percent of their desired levels. Soldiers in Europe need to fire more than one TOW anti-tank missile per year, and fighter pilots more than one missile per year if they are to remain proficient. Aircraft need an availability rate above 50 percent if they are to be effective.

Strategic Forces

The third priority in allocating the additional defense funds must be the restoration of the strategic nuclear balance. Table 5 displays the strategic balance between the U.S. and USSR as it exists now and projects that balance for the remainder of the decade. As Table 5 shows, the USSR is ahead of the U.S. in every single indicator of the strategic balance except in the number of warheads, where the U.S. has a 50 percent advantage. At the start of the decade, the Russians have some 500 more delivery vehicles, (missiles and bombers), 62 percent more throwweight (lifting capacity), 67 percent more destructive power (EMT) and 150 percent more hard target capability. Under the present defense program, by 1985 the Soviets will even overcome the U.S. advantage in warheads and increase their lead in the other areas, giving them clear superiority. At the close of the decade, the situation will be even less favorable for the U.S. Not only is the balance deteriorating, but the very existence of the most secure, reliable, accurate, and ready component of our strategic triad, the ICBM, is in jeopardy. As Table 6 indicates, if the Soviets were to launch a preemptive strike, only a small portion of our 1054 ICMBs would survive. Within a few years, almost none of them could ride out an attack.

To reverse the trends in the strategic balance, Washington needs to take a number of additional steps to increase the effectiveness of the triad. ICBM vulnerability can be reduced in the near term by deploying Minuteman in the Multiple Protective Shelter (MPS) mode and in the long term by going ahead with the MX program as rapidly as possible. Deploying MX will also increase the firepower of America land-based missiles by the end of the decade. Reopening the Minuteman

TABLE 5
STRATEGIC FORCES OF THE U.S. AND U.S.S.R. FOR SELECTED CALENDAR YEARS

Category	1980		1985		1990	
	U.S.	USSR	U.S.	USSR	U.S.	USSR
Delivery Vehicles						
ICBM	1054	1398	1054	1283-1400	900	1238-1500
SLBM	656	950	688	900-1000	720	900-1100
Penetrating Bombers[a]	348	156	220	100-200	180	100-200
ALCM Bombers	—	—	100	—	150	25-50
Total Vehicles	2508	2504	2062	2238-2600	1950	2263-2850
Warheads[b]	9200	6000	10,300	9,400-11,000	12,800	9,500-12,500
Total Throw Weight[c]	6800	11,000	7700	13,500-15,000	8946	14,500-15,500
EMT[d]	3300	5500	4000	6800-8000	4633	8000-8700
Hard Target Kill Potential	800	2000	900	5000-5200	2000	6500-6800

Source: International Institute for Strategic Studies, *The Military Balance*. 1979-80, pp. 86-88; *FY 1981 Defense Report*, pp. 71, 87, 89, 123-135.

a. Excluding U.S. FB-111s and Soviet BACKFIRES
b. Independently Targetable Weapons
c. In Thousands of Pounds
d. Equivalent Megatonnage

TABLE 6
SURVIVING U.S. SILOS
(Minuteman and Titan)
1980-1990

	Fiscal Year						Differences FY 1980-1990	
	1980	1982	1984	1986	1988	1990	Amt.	%
Scenario[a]								
Optimistic	360	350	210	160	50	25	335	(93)
Pessimistic	150	120	50	40	0	0	150	(100)
Realistic	200	180	135	75	25	10	190	(95)

a. Depends upon uncertainties concerning yields, accuracy, and reliability of Soviet strategic forces.
Source: Derived from *FY 1981 Defense Report*, p.122.

III production line could increase the destructive power of the ICBM force in the near term.

Restoring the Trident submarine building rate to 3 every 2 years will prevent a sudden and rapid drop off in the number of SLBM launchers in the early 1990s, while building a full 25 Tridents and placing the Trident II missile on the last 11 of these vessels will increase markedly the amount of target coverage and the destructive power of this leg of the triad by the turn of the century. More rapid improvements in SLBM capability can be obtained by increasing the number of warheads on the Poseidon conversions from 10 to 14 and from retrofitting all 31 Lafayette class submarines with Trident I missiles instead of just 12.

The long term survivability and effectiveness of the bomber leg can be enhanced by building approximately 200 modified B-1 bombers to serve as cruise missile carriers and in a penetrating role. More immediate effectiveness can be gained by building 165 stretched FB-111s and increasing the B-52 alert rates from 30 to 50 percent.

If there is an equilibrium in the offensive area, the edge will go to the nation with a more effective strategic defense. In the short term, the U.S. can build an additional 200 F-14s and F-15s to use in an air defense mode and enhance the civil defense program. For the future, capability can be gained by a vigorous research and development effort in the area of ballistic missile defense emphasizing both lasers and particle beams.

These programs will consume about $7 billion per year over the next five years, about one-third of the funds available for new programs. Moreover, they appear to contribute very little to maintaining our access to natural resources. Why then do strategic programs receive first priority in the procurement category? The answer very simply is that if the U.S. does not deter the Soviets in this area, it can accomplish very little in other places. If the Soviets are, in fact, or are perceived to be superior to the U.S. in the area of strategic weapons, then they can limit American freedom of action in other areas as well. Since strategic weapons can directly destroy the American homeland, this threat must be neutralized before the U.S. can hope to apply other forms of military power successfully. Moreover, other nations, perceiving the U.S. to be strategically inferior, may, with good reason, come to doubt the reliability of the American commitment.

Power Projection

The fourth priority in allocating the additional funds must be the buildup of U.S. mobility forces used for power projection. These forces take priority over all other conventional forces for three reasons: they impact most directly on the U.S. ability to use military power in the Third World where dependency is the greatest, they have been seriously underfunded for the past three decades, and Europe is more threatened by an oil cutoff than by the forces of the Warsaw Pact. The Carter Administration placed its primary emphasis on building up the "heavy" forces, which are must suitable for use on the Central Front in Europe, but of comparatively little use in those areas of the world upon which the U.S. relies for critical natural resources.

Table 7 displays the naval balance existing between the U.S. and the U.S.S.R. over the past decade. As that table shows, the last ten years have seen a shift in the relative position of the American and Russian navies. In 1969, the Soviets had 746 more vessels than the U.S., but the U.S. had greater numbers of ships in every major category of combatant. The American navy had more surface combatants, nuclear powered submarines, and amphibious ships than its Russian counterparts. Moreover, the U.S. had 22 large aircraft carriers while the Soviets had none. The Soviet advantage in size of the total fleet came in support ships and diesel powered submarines where they outnumbered the U.S. by about four to one.

Today, the situation is vastly different. Over the past decade, the size of the U.S. fleet has been cut in half while the Soviet Navy has grown slightly. Ten years ago, the U.S. Navy was 55

Table 7
Active Naval Forces of the U.S. and U.S.S.R., 1969-1979

	1969		1979*		Change	
Ship Type	U.S.	USSR	U.S.	USSR	U.S.	USSR
Aircraft carriers	22	—	13	2	−9	2
Surface combatants	279	220	178	269	−101	49
Nuclear submarines	79	63	118	142	39	77
Conventional submarines	77	291	5	215	−72	−76
Patrol combatants	9	148	3	120	−6	−28
Amphibious	153	103	63	91	−90	−12
Mine warfare	74	165	3	165	−71	0
Mobile Logistic	112	56	59	150	−53	94
Support	119	624	20	610	−99	−14
Total	924	1,670	462	1,764	−462	94

*As of December 1979.

percent the size of that of the Soviet Union. Today, that figure has dropped to 26 percent. The U.S. has significantly fewer ships than in 1969 in every combat and support category except nuclear powered submarines where it has increased in size by 39 vessels. It is true, as Table 7 shows, that the Soviets have experienced a slight decline in some areas: conventional, submarines, patrol combatants, amphibious ships, and support vessels. However, these areas are relatively minor, and the reductions have been more than balanced by large increases in the number of surface combatants, nuclear powered submarines, and logistic ships. As a result of American and Soviet behavior over the last decade, the Soviet Union is now ahead of the U.S. in every category except that of aircraft carriers, where we have a 13 to 2 advantage (as opposed to 22 to 0 a decade ago).

What makes this shift in the maritime balance all the more ominous is that the U.S. is a sea power while the Russians are primarily a land power. The U.S. must depend upon sea control to maintain access to those resources vital to its economic well being and to prevent the Soviets from expanding beyond the Eurasian land mass, where the U.S. has conceded them large advantages in manpower and equipment. The Russians do not need to control the seas, nor even with their large Navy can they yet do so. However, all that they need to do in order to achieve their geopolitical goals is to prevent us from gaining that control in selected areas, that is, sea denial. This is a task their Navy is becoming increasingly capable of accomplishing.

The current defense budget calls for building 17 ships a year. While this is an increase of four ships over the program presented a year ago, it is still woefully inadequate. As Table 8 indicates, the present program plus the current backlog of construction, will enable the U.S. Navy to grow slightly to 492 ships by FY 1984. However, after that year, the size of the fleet will drop rapidly and by the middle of the next decade the U.S. Navy will be down to about 400 active ships. Moreover, the composition of the fleet will change significantly. At the present time, the U.S. Navy has 231 combatant ships, that is, carriers, cruisers, destroyers, and submarines. The Navy of the mid-1990's not only will be smaller, it will have only 194 combatants—a drop of 37 or 12 percent in this critical area.

In order to reverse this decline in total fleet size and to keep the combat to support ratio at its present level, the U.S. needs to spend $8 billion per year on shipbuilding. But even this will

not be enough. The current 450 ship Navy is at best a one and one half ocean Navy trying to cover three oceans. To protect its interests, the U.S. needs a three ocean Navy at a minimum. This requires a Navy made up of 600 active ships, at least half of which must be major combatants. Building up to and maintaining that level would involve constructing 30 ships per year at a cost of $11 billion per year in constant FY 1981 dollars. The FY 1981 Navy budget allocates only $6.1 billion to shipbuilding. Thus, the U.S. needs an additional $5 billion per year to build a navy capable of meeting our present needs and counteracting the Soviet Navy.

However, if the Soviets continue to increase their naval capabilities, an additional $1 billion per year will be required to maintain the relative maritime balance. Since the Soviets show no indication of slowing down their naval buildup, the extra $1 billion would seem to be a prudent investment for a maritime nation. For example, the Russians are now building four classes of cruisers, all of which are superior to our own, and will add 25 new cruisers to their fleet over the next decade. One of these will be a 30,000 ton Kirov Class nuclear powered cruiser. This will be the first nuclear powered Soviet surface ship. In addition, the Soviets will add three aircraft carriers to their force during this decade. Two of these will be 40,000 ton Kiev Class carriers, while the other one is expected to be a 50,000 ton nuclear-powered aircraft carrier. Finally, the Russians are building a force of 13,000 ton IVAN ROGOV class amphibious ships, a new family of guided missile destroyers, and 20 new frigates. Thus, by the end of the decade the Soviet Navy will grow considerably in size, tonnage, and firepower.

The remaining $7 billion of the minimum essential $35 billion must be targeted toward improving the capabilities of our other flexible forces. For example, the Navy and Marine Corps are not even building sufficient tactical aircraft to replace those lost every year to accidents and obsolescence. Unless this trend is reversed, there will not be enough Navy Air Wings to put on the air craft carriers, or Marine Corps Wings to support the ground divisions. American strategic (long range) and tactical (with theater) airlift is woefully inadequate. Today the U.S. would be hard pressed to deploy one full division to the Persian Gulf in less than 45 days. Current DoD plans to stretch or modify the C-141 and to prolong the life of the C-5A, are steps in the right direction. However, much more needs to be done, particularly to enhance the capabilities of the Civilian Reserve Air Fleet (CRAF). Over the next five

Table 8
CARTER NAVY FORCE PROJECTION
FY 1980–95

Ship Type	1980	1981	1982	1983	1984	1985	1986	1987	1988	1995
Carriers	13	12	13	12	12	12	11	12	12	12
Conventional	(10)	(9)	(9)	(8)	(8)	(8)	(7)	(7)	(7)	(7)
Nuclear	(3)	(3)	(4)	(4)	(4)	(4)	(4)	(5)	(5)	(5)
Surface Combatants	99	99	99	101	101	103	103	101	99	85
Cruisers[1]	(26)	(27)	(27)	(28)	(28)	(30)	(33)	(36)	39	(30)
Destroyers	(73)	(72)	(72)	(73)	(73)	(73)	(70)	(65)	(60)	(55)
Escort Forces Frigates[2]	72	82	92	99	106	111	114	114	114	120
Submarines	122	120	123	128	134	135	131	127	124	97
Attack[3]	(81)	(85)	(89)	(93)	(97)	(97)	(91)	(86)	(86)	(77)
FBM	(41)	(35)	(34)	(35)	(37)	(38)	(40)	(41)	(38)	(20)
Logistic/Support[4]	74	74	74	73	75	65	66	64	64	66
Pre-Positioned Ships	—	—	—	—	(2)	(5)	(8)	(10)	(18)	(16)
MCM	3	3	3	3	3	2	2	1	1	—
Amphibious	63	63	63	63	61	60	58	57	58	26
NRF	53	43	34	25	15	6	6	7	7	15[5]
NFAF	22	22	22	21	21	21	20	19	19	20
Total	521	518	523	525	528	515	511	502	498	437

[1]Includes CG 47, formally known as DDG 47.
[2]Includes patrol combatants.
[3]Includes five diesel powered submarines, does not include FMBs converted to SSN
[4]Excludes naval fleet auxiliary force.
[5]Assumes MCM ships go directly to NRF.

Source: Derived from *FY 1981 Defense Report,* pp. 170-189.

years, DoD proposes to modify only 30 passenger 747 aircraft to carry military cargo in an emergency. However, the airlines have offered to allow an additional 57 to be reconfigured. This offer should be accepted without delay.

The second step that the U.S. must take is to begin re-establishing its base structure outside of Europe. The U.S. must: take immediate steps to double the capacity of our base at Diego Garcia; secure quick access to the Indian Ocean bases in Kenya, Oman, and Somalia; place American forces in bases in the Sinai and Negev; reopen the American bases at Udorn and Sattahipin, Thailand, which the U.S. abandoned as it withdrew from Southeast Asia in 1975; and build quickly a major naval base on the west coast of Australia. In addition, the U.S. should negotiate with the Turks to gain permission to use the bases there for non-NATO contingencies which impact on NATO nations. Building and buying this base structure will not be inexpensive. However, failure to secure these bases could prove to be very expensive if the U.S. cannot regain its ability to use force quickly to guarantee access to its vital resources.

Third, the U.S. must require that its major allies do more to help provide for the common defense. For example, the Japanese Navy can perform some sea control functions in the Western Pacific while the NATO allies can provide some naval power in the Arabian Gulf. In addition, these nations can offer additional monetary compensation for the cost of U.S. forces which help guarantee them access to resources.

Fourth, the U.S. should pursue a vigorous arms export policy, particularly outside of NATO. All ceilings on arms sales volume should be lifted. The only criteria in deciding on arms exports should be U.S. national security.

Conclusion

At the beginning of this new decade, the U.S. stands poised on a threshold. It can control its own destiny or it can place itself at the mercy of other nations. To control its own destiny, it must recognize the geopolitical realities of the international arena, and make some short term sacrifices. However, the long term benefits will be well worth the additional costs.

4

THE DEPARTMENT OF EDUCATION

Ronald F. Docksai*

RESHAPING THE FEDERAL ROLE IN EDUCATION

The mission of a federal education agency is directly determined by the nature and scope of the authority granted to it by its authorizing legislation. This legislation should be altered to shift significant departmental responsibilities to the state and local levels, as proposed by Congressman John Ashbrook, Senator Orrin Hatch and others. The Department of Education can be reduced in size and budget, and its relation to state and local education authorities can become supportive rather than interventionist. State authorities would reassume programmatic responsibility for elementary and secondary education, and would attain greater administrative authority over current grant programs. To achieve these goals, a new administration must count among its first priorities the revision of the Elementary and Secondary Education Act (ESEA), and review of the administration of the Higher Education Act including a comprehensive review of their appropriation bills in order to recommend an incremental reprogramming of money authorities back to the states.

ESEA should be completely restructured to shift educational decision-making back to the state and local levels and to eliminate most of the enormous paperwork and administrative burden. The Ashbrook bill (H.R. 7882) is a workable model for the kind of restructuring which would accomplish this with substantial support from the education community.

**Author's Note:* The preparation of this report was a collective enterprise involving many individuals. George Archibald, Margaret Currin, Justine Davis, Raymond English, Polly Gault, Onalee McGraw, Ronald Preston, Charles Radcliffe, Donald J. Senese and Lawrence Uzzell deserve particular mention. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

As the Department of Education divests itself of some of its administrative responsiblities, there will be a substantial reduction in personnel, as well as a reduced federal presence in our schools. But this need not mean that the federal role in education must be passive or that the government should abandon its legitimate concerns about the quality of American education. Rather, the federal government will be freed to pursue a far more effective role in helping our schools and colleges improve their performance. This should be the basis on which the Secretary of Education explains his policy of reducing his department's controls over American education.

There are three types of educational activity in which a more active federal role is desirable. They have been eclipsed in recent years by the government's increasing involvement in the process of grant administration, but could be revitalized to give substance to a new federal role in education. They are: 1) information gathering and dissemination; 2) consultation and technical assistance in dealing with on-site teaching problems; and 3) educational research and development. These were the traditional duties of the old U.S. Office of Education. They have been neglected in recent years, despite the initiatives of the National Institute of Education, and in the past they were seldom performed with great distinction or impact. Yet there is a tremendous need for these kinds of services to education, and there is the potential for doing them effectively. It is not true that the federal government must be coercive to be effective in education. On the contrary, while educators and school administrators are receptive to genuine help, they resent and resist federal interference and the threat of fund cut-offs. Most of these impositions (e.g., school busing) have had a disruptive effect on education and on the federal government's relationship to the local community.

1. Information gathering and dissemination are two activities which can be best accomplished at the federal level, and the need for these activities is great. Anyone who has dealt with education statistics knows that they are pathetically inadequate for analysis of problems or as the basis of policy-making. The machinery for gathering education data is total inadequate, even as it is performed by the Department of Education. The establishment of a comprehensive, timely and reliable education information system is a task which ought to be performed at the federal level, and one which is necessary for the improvement of educational quality. Any federal education office which succeeds the Department of Education,

should it be abolished, should handle this among its principal tasks.

2. Consultation and technical assistance on educational questions should be handled by the federal government as a service to state and local government. The services rendered should be of high quality, practical in nature, and offered on a cooperative, not coercive, basis. Here is an area where the federal government is positioned to attract the limited number of genuine experts who can offer advice on such educational fields as vocational and technical education, adult education, education of the handicapped, the disadvantaged and the non-English speaking.

3. The results of federally-funded research and development in education have been, at best, spotty and inconclusive; at worst, they have been programs for indoctrinating students in ethical relativism and social determinism. Reseach necessarily involves a certain amount of failure and spent effort, especially in a field like education where many promising concepts do not produce the anticipated successes, and sometimes appear to reverse the learning process. But research and development projects, if oriented toward practical problem-solving, rather than "values clarification," can be worthwhile. For instance, it would be particularly helpful to investigate what methods would best work in dealing with youth unemployment.

In this regard, the new administration should have a strong commitment to vocational education. Vocational education programs serve 20 million young people and adults, and currently receive $750 million annually in federal funds. They have long enjoyed bipartisan support. Reconsideration of the CETA Title IV-A youth employment programs (the authority for which expired September 30, 1980) and reauthorization of the Vocational Education Act should be the occasion of an examination of federal policies and programs.

Concerning the Office of Civil Rights (OCR) within the Department of Education, it must be said that this office with its civil penalties and enforcement authority has been destructive of good federal-state relations in educational policy. OCR since its inception has been the vocational haven of class action advocates who have zealously carried out their interpretation of the letter of the law, while violating its spirit and intent. If OCR demands outrageously detailed and expensive data from schools and colleges, no one dares challenge it because it currently enjoys ready access to the Secretary and the President. The best interest of education and law enforce-

ment is served by preventing the federal government's legal harassment of schools and colleges. But unfortunately, OCR's legal challenges of the policies of schools and colleges seems to serve its current administrative interest. A change is required both in policy and personnel in OCR (and in the Justice Department). But this may be possible only after the most careful political preparations have been made. The interest groups supporting OCR's present policies are well organized and will be directly effected by any change in OCR's power or policies.

In principle, the Department of Education should be abolished as a Cabinet department. But the authors of this report take the position that the status of the agency as a Cabinet department is less critical to a new administration than the overhaul of federal education *policy*. The proposals presented in this report, if implemented, will do more to restore a healthy federal role in education than the mere abolition of the agency's Cabinet rank.

It is clear that the Department's continuing interference with local and private education, and its threats of coercion have not improved the quality of education. Conservatives must develop a more genuinely "federal" education policy, a program of federal and state cooperation. By removing the adversarial atmosphere which currently exists, a conservative administration would better manage the limited financial and human resources that it can bring to bear on educational problems.

INTRODUCTION: THE DEPARTMENT OF EDUCATION: HOW AND WHY IT EXISTS

On September 27, 1979, after a protracted and closely fought battle, Congress approved President Carter's proposed Department of Education.

By a 215-201 vote, the House adopted the conference report on the bill setting up the separate department (S. 210—PL 96-88), marking the end of an 18 month-long effort to create the thirteenth federal Cabinet level department. The Senate, which generally supported the bill throughout the long congressional debate, approved the conference report. The 14 vote margin in the House was relatively comfortable in comparison with the extremely difficult problem the bill faced there earlier. The bill had survived the Government Operations Committee by only one vote, and the whole House by a four vote margin.

The Department's creation was a longtime goal of the National Education Association (NEA) which along with the personal lobbying of President Carter, played the pivotal role in the bill's passage. One day after the bill's passage the 1.8 million member teachers' union endorsed Carter for re-election.

The bill was opposed by NEA's rival organization, The American Federation of Teachers (AFT) and the AFL-CIO, as well as conservative political groups and many colleges and universities who saw the Department's creation as the institutionalization of federal dominance in education.

The new Department was a scaled-down version of the original proposal sent to Congress by Carter in 1978. Unlike the original proposal, which would have included in the new agency a broad range of education-related programs such as Indian education, Head Start and the School Lunch programs, S. 210 established a department composed almost exclusively of programs housed in the Education Division of the Department of Health, Education and Welfare. In effect, it extracted from HEW its Office of Education, retained and augmented the original personnel, and preserved and expanded the administrative configuration except with a fullscale transformation of the names of departmental officers and offices.

The biggest addition to these now transferred programs was the system of overseas schools for military dependents run by the Defense Department, i.e., 267 schools serving 135,000 students. More than half of the Education Department's personnel would be employees from that system. The transfer from the Defense Department to DOE put the new Department in the position of running the nation's 12th largest public school system.

152 existing education-related programs were consolidated in the Department of Education. With an annual budget of $14 billion and 17,000 employees, it is the fifth largest of the 13 Cabinet departments.

Administrative Structure

Titles II, III and IV of the legislation enacted outline the administrative makeup of the Department of Education.

Title II provides for a Secretary and Under Secretary appointed by the President and confirmed by the Senate.

The following offices are established within the Department, each headed by an Assistant Secretary appointed by the President and approved by the Senate:

- Elementary and Secondary Education

- Postsecondary Education
- Vocational and Adult Education
- Special Education and Rehabilitation Services
- Educational Research and Improvement
- Civil Rights

It also provides for miscellaneous administrative offices, including an Office of Education for Overseas Dependents, and an Office of Bilingual Education and Minority Languages Affairs.

Title II also sets up an Intergovernmental Advisory Council on Education to report on the impact of federal policies on state, local and private education and to comment on proposed departmental regulations. The council is composed of 20 members, appointed by the President and serving four year terms. It includes six elected officials of state and local governments, five representatives of public and private elementary and secondary education, five representatives of public and private postsecondary education, and four members of the public, including parents and students.

Finally, Title II establishes a Federal Interagency Committee on Education as a mechanism for ensuring coordination between the policies of the Department and other federal departments and agencies with education responsibilities.

Title III transfers to the newly formed Department agencies from the Defense Department (i.e., the operation of school systems for overseas military dependents); the Labor Department (i.e., programs relating to Migrant Education); the National Science Foundation (i.e., all programs relating to elementary and preschool science teacher training and minority institutions science improvement); the Department of Justice (i.e., loan and grant programs for law enforcement students); the Department of Housing and Urban Development (i.e., college housing loan programs); and all education programs, including the Office of Education, from within the Department of Health, Education and Welfare, which is renamed the Department of Health and Human Services.

Title IV authorizes the appointment of career executive employees equal to the number of employees in similar positions in programs transferred to the Department.

It limits to 175 the number of scientific, technical or professional employees in the Office of Educational Research and Improvement who were hired outside the regular Civil Service procedures. It authorizes 15 limited-term appointments to the Senior Executive Service. It authorizes Congress to

include in each annual appropriation for the Department, a limit on the total number of personnel work-years. It requires that one year after establishment of the Department, the total number of employees be 500 less than the number of employees of programs transferred into it.

Powers of the Secretary

Title IV authorizes the Secretary to reorganize or abolish offices within the Department, unless they had been established by statute; it gives the Secretary specific authority to reorganize or abolish the following offices established by statute, provided that 90 days notice is given to congressional committees: the Office of Bilingual Education, Teacher Corps, Community College Unit, National Center for Education Statistics, National Institute of Education, Office of Environmental Education, Bureau for the Education and Training of the Handicapped, Institute of Museum Services and administrative units for guidance and counseling programs, the veterans cost of instruction program and the program for gifted and talented children.

It also authorizes the Secretary to promulgate rules and regulations subject to the legislative veto provisions of the General Education Provisions Act. As this description is being written, in the fall of 1980, there is a legal-qua-political battle pitting the White House and the Secretary against Congress over whether legislative veto authority in fact exists. The outcome of this battle will determine how such legislative veto authority can be used in the future.

This guide outlining the structure of the Department of Education indicates what Congress had in mind in creating the Department. However, as noted earlier, the congressional mandate was hardly overwhelming.

Weaving Gold Back Into Straw

It is the common assumption of the authors of this report that the creation of this Department was a mistake, that its enactment is analogous to an inversion of the proverbial miller's tale, spinning something fine back into something coarse.

The authors of this report, to different degrees and for different reasons, recognize and support a role for the federal government in national education policy. But they agree that the new Cabinet level Department of Education has in its

maiden period made education policy more amorphous as a collection of programs to be implemented; less accessible to parents, community and state leaders desiring and deserving a direct role in education policy; and more bureaucratized, allowing an ever-decreasing level of discretionary authority to state and local education authorities.

The authors of S. 210, which set up the Department, appeared to respond to widespread concerns that the establishment of a Cabinet level agency would undermine the traditional independence of locally-run public schools. They put in the legislation's report language long and bravely-written commandments against further federal encroachment. The provision for an Intergovernmental Advisory Council is intended to check any future federal expansion, and there is a proscription in the legislation against any federal pre-emption in the shape and conformity of state education progamming.

However, in the short time the Department has been in existence, an established collection of literature has developed chronicling the administrative excesses of the Department, the wasted time, money and energies that have failed to improve educational quality or extend its reach. For the most part, and given the most ideal of circumstances, the authors of this report would prefer to erase what Congress has done during the past two years. We would develop a federal education policy which restores authority to the states and local communities, and increases their discretionary funding power.

Because circumstances are likely to be considerably less than ideal, however, this report's recommendations are presented as options which can be taken in whole or in part by planners at the Executive level.

CURRENT POLICY ASSUMPTIONS AND DEFICIENCIES

Elementary and Secondary Education

To a degree probably unique among the major departments, the mission and role of the Department of Education is shaped by the design and content of the legislation it is given to administer. If all or most of the many and detailed aid-to-education acts within the Department's jurisdiction were replaced by one or two block grants, most of the Agency's workload would be eliminated. There would be one other result: the Department's influence on state and local education policy and practice through discretionary grant authority would disappear. Few people have ever read or tried to read

the text of the Elementary and Secondary Education Act. Title I, in particular, is written in such complex, convoluted, involved language that it almost defies attempts to decipher it. Literally hundreds of individual requirements and conditions, written in agonizing specificity, are scattered throughout the Act. Each *requires* regulation writing. Each *requires* monitoring education agencies for conformity. If the role of the federal government in education is to be changed, the Department must alter its relationship to state and local agencies and educational institutions. This can only happen if the legislation is rewritten.

Instead of the present labyrinth of prescriptive programs, a basic policy assumption of the federal role in education should be to provide needed financial support with a minimum of administrative burden. We should resurrect the traditional role of the old U.S. Office of Education to provide basic information about the status and needs of education and to fund needed research in education. Accordingly, one of the highest priorities for immediate action must be a comprehensive overhaul of federal education legislation. There is growing support in Congress as well as in the "education community" for such action, but that support could be quickly lost through the advocacy of overly simple solutions. Just saying "block grants" will not suffice. Some federal programs do not lend themselves to this treatment (e.g., student financial aid) and others are already essentially "block grants," though broadly directed toward a purpose (e.g., vocational education).

Moreover, there are education programs which have been established because it is said that they are in the national interest. Special assistance for disadvantaged (title I, ESEA), the education of handicapped children, student aid, and aid for vocational education are prominent examples of categorical aid programs. To emphasize the national interest in them, these might be continued as categorical aid programs—with the caveat that the legislation in each case should be simplified as much as possible, with federal *aid* emphasized and federal *controls* reduced to a minimum. This, too, can only be achieved by re-writing the legislation.

The pending reauthorization of the Vocational Education Act represents still another opportunity to stress traditional values (employment; job preparation; productivity, etc.) while simplifying over-grown legislative detail. This, too, would result in an altered federal role which emphasizes state and local responsibility for decision-making.

Again, the fundamental mission of the Department of Education should be to assist education in the national interest, but without interference in the fundamental responsibilities of state and local educational agencies.

To summarize the deficiencies of federal policies for elementary and secondary education:

1. Numerous categorical aid programs authorized by extremely detailed and prescriptive legislation result in interference in the operation of state and local school systems and costly and time-consuming administrative burdens which are counterproductive.

2. A host of grant programs for narrowly categorical purposes distorts state and local institutional program choices, which have to be shaped to meet federal priorities in order to qualify for the funds.

3. Formula grant programs chopped up into narrow categories of assistance automatically mean that federal funds are available for the specified purposes only in the amounts determined by formula—which from state-to-state and year-to-year would bear no necessary relationship to actual program needs.

4. An additional number of discretionary grant programs greatly increases the federal "clout," since recipients must compete for the funds solely on terms laid down by Washington bureaucrats.

5. All of the above make it possible for the federal government to influence to an enormous extent the policy and practice of public education, even though the government "contributes" no more than 7 percent of the funds that pay for public elementary and secondary education.

Higher Education

It is discouraging to realize just how much of contemporary discussion about education concerns the role and responsibilities of the federal government. Many Americans currently regard education not as an end in itself, but as a means to accomplish ends prescribed by government: compliance with state plans, and conformity with federal guidelines and court orders. They spend their entire professional lives in the arcane business of negotiating an ever-expanding inventory of points at issue between government and education. And agencies have grown up within each which are creating systemic presssures to extend the patterns of future government regulation.

Institutions of higher learning like all others in society, have

been made subject to government regulation. But the imposition of regulations on colleges and universities has not been the result of careful policy-making by the current or previous Administrations. Two problems with federal regulatory activity are worthy of note: (1) because rules are imposed on institutions by a wide variety of agencies, no one is adequately concerned with the total regulatory burden on the institutions; and (2) the pursuit of accountability has resulted in deep federal intrusion into the academic affairs of educational institutions.

New rules to implement laudable social goals are imposed on educational institutions in ever-increasing numbers, but nobody is watching to see how much pain the victim can stand. It is costly to comply, and colleges and universities, like others who are so burdened, have limited resources. At some point, money and time devoted to implementing federal rules are taken from educational programs. If U.S. colleges and universities were to add the cost of compliance with federal regulations (such as OSHA requirements and those of Section 504 which mandates access for handicapped persons) to the cost of the maintenance they have deferred in recent years, most would discover they have been effectively bankrupt for some time!

The federal battle cry of "accountability" has brought about a significant federal intrusion into the academic affairs of colleges and universities by reversing the presumption of innocence. Recipients of federal assistance are presumed guilty unless federal investigators and auditors can be satisfied they are innocent. Unfortunately, the federal government fails to distinguish between responsible recipients of federal assistance and irresponsible ones; between high-risk and low-risk institutions. All recipients are guilty from the day they receive their first federal dollar.

In the name of accountability, no fact of college or university operations is free of federal scrutiny. Student admissions, faculty hiring, financial practices, student class hours, and even what faculty do with their free time—all are subject to federal examination and approval.

The federal presence on college and university campuses threatens the nature of the institution itself. In order to comply with federal demands, universities have staffed large business offices, admission offices, planning offices, audit offices, and the like. The president's role has been shifted from one of academic and administrative leadership to one of chief negoti-

ator for and with bureaucracies. As the authority for decision-making is shifting from the faculty to the university bureaucratic offices, the decentralized structure of the institution, which fosters intellectual innovation, is threatened.

Any responsible federal administration must require that all recipients of federal funds reach generally accepted social objectives and that they develop good financial management systems, but it should assume that those federal objectives are met unless developments prove otherwise.

The obvious first step in a new national policy for higher education is to devise a new system of financing measures that relieves education's dependence on direct govenment financing, and thereby relieves the vulnerability of education to government controls.

Such a system of financing measures would include:

1. Enactment of pending legislation to extend the charitable deduction to all taxpayers, regardless of whether or not they itemize deductions, to stabilize and stimulate non-governmental support of education;

2. Reform the government student aid programs to maximize emphasis on direct payments to students and/or their families to help them meet education expenses, and to minimize direct payments to education entities;

3. Replacement of categorical grant programs with bloc grants based on costs of instruction and/or enrollments of government-aided students;

4. Remodelling of research support programs to maximize emphasis on, and incentives for, achievement of mutually agreed-upon research objectives; and

5. Coordinated initiatives, including financial incentives, to foster self-regulation in education, as a viable alternative to government regulation.

With the adoption of these financing measures, the government's role in higher education would be proscribed and limited to the business of recognizing tax-deductible contributions, processing payments to students, families, and educational entities, and obtaining proper accountings for the use of public funds. Both the need and the jurisdiction for government control of higher education would be ended, along with the rationale for agency structures to formulate government policies, to monitor compliance with such policies, and to threaten educational entities with deferral or termination of government financing if they fail to conform to government directions. Under such circumstances, it would become at least

theoretically possible for American education to be restored to its historic position as a free and independent enterprise. In short, higher education could be conserved and replenished as an end in itself, rather than plundered to serve government's ends.

PROBLEMS AND OPTIONS IN FEDERAL EDUCATION POLICY

Department Legislative and Administrative Options

Legislative Options

It is virtually indisputable that the federal programs in elementary-secondary education have done more damage than programs in higher education: the former involve more detailed mandates and prohibitions, and test scores show that the quality of the schools has declined farther and faster than that of the colleges.

If he pays heed to the letter and spirit of the U.S. Constitution and the sorry experience of the 15 years since the Elementary and Secondary Education Act was passed, a President will try to transfer as much decision-making power as possible away from Washington back to state and local educators. The fastest practical way to do this is replacing ESEA with a system of block grants.

The programs under ESEA fall logically into two categories: (1) aid for the compensatory education of "disadvantaged" children, commonly referred to as "Title I"; and (2) everything else: aid for libraries, counseling, textbooks, innovative and experimental programs, bilingual education, metric education, arts education, consumer education, environmental education, health education, law-related education, population education, women's education, ethnic heritage programs, etc. Title I is the colossus: in dollar terms it is the single largest federal education program. Title I is also distinctive in that it allocates federal dollars among recipients according to a mechanical formula based on student population. The other ESEA programs distribute dollars on a "discretionary-grant" basis; states and locals apply for grants under each program, and the program's Washington administrators reward what they consider to be the "best" applications. Thus, these other programs give federal officials more opportunity to influence (or dominate) local decision-making than Title I, even though they do not involve nearly as much money. This point is especially important for the programs that are at present being used as

captive vehicles by groups of ideological militants, such as the "Women's Educational Equity" program and the Title VII Bilingual-Education program.

Unless it's done in a fairly ambitious and comprehensive fashion, the "block-grant" reform is probably not worth doing at all. Consolidating only two or three of the dozens of elementary-secondary programs would not break up the mechanisms by which decisions are currently made, or transform the existing philosophy which is based on giving each special interest its protected slice of the pie. The four worthwhile options are as follows:

1. Consolidate everything *outside* Title I, except for the three best-entrenched programs: vocational education, handicapped education, and "impact" aid for school districts with large proportions of families who live or work on federal property.
2. Consolidate everything outside Title I, *including* the vocational, handicapped, and impact-aid programs.
3. Consolidate Title I together with the non-Title I programs other than vocational, handicapped, and impact-aid.
4. Consolidate Title I together with *all* non-Title I programs.

In 1978, when the Elementary and Secondary Education Act was being authorized, Congressman John Ashbrook proposed a substitute amendment which essentially embodied Option 3. The amendment failed by a vote of 79 to 290.

In the summer of 1980, Mr. Ashbrook introduced a more moderate proposal: similar to Option 1, but somewhat simplifying the Title I programs to reduce paperwork and shift major decisions from the federal to the state level (H.R. 7882, the Education Improvement Act). This proposal was designed to have a chance of passage in 1981 even if there is no major upheavals in the partisan/ideological composition of Congress.

Any of these options would give state and local educators greater discretion to pursue their own priorities; would reverse the 15-year trend toward greater complexity and convolutedness in ESEA programs; and would make possible substantial cuts in the 1,400 pages of federal education regulations, in the 10 million state and local man-hours now consumed by federal education paperwork, and in the payroll of the new Department of Education which totals more the 5,000 full-time permanent employees (excluding staff of the overseas schools serving U.S. military dependents).

Obviously, Options 3 and 4 would go the farthest along this

desirable path. But either would be vulnerable to the charge that the economically disadvantaged were unjustly losing their special entitlement to federal assistance under Title I.

Therefore, the new administration might want to consider a fifth option: keep Title I separate from all the other programs, and retain its character as aid specifically targeted for the disadvantaged; but transform it into a voucher system. *Eligibility* for this aid could continue to be based on the Orshansky poverty definition and on AFDC payments, just as at present; but the aid itself would go, *not* to local school districts and state departments of education, but directly to the parents of disadvantaged children in the form of vouchers which could be used for either public or private education.

Even if it did not pass, this proposal would make it impossible for anyone to accuse the Administration of "middle-class bias" in its advocacy of private-school tuition tax credits. (It would also lay the rhetorical groundwork for fighting for cuts in Title I appropriations under the existing structure.) If it *did* pass, the Administration would be rescuing the public-school monopoly's most helpless victims, the inner-city blacks and Hispanics, at a single stroke. This one victory would sound the death-knell for statist education.

Administrative Options

A federal law already on the books (General Education Provisions Act, Section 417) gives the administration great opportunity to identify and penalize mediocre education programs.

This law requires the Department of Education to state—in measurable, quantitative terms—the specific goals and objectives of each of its programs, and to report annually to Congress on each program's progress (and lack thereof) toward these goals. A 1977 GAO study confirmed that the U.S. Office of Education (as it was then called) was not in compliance with this requirement, had never been in compliance, and did not intend to comply. Congress did nothing to penalize USOE for its non-compliance, and little has changed since.

The general evaluation reports provided to Congress under the law, averaging well over 500 pages, are masterpieces of equivocation. They try to avoid saying anything definite, and often rely on the dodge of measuring *inputs* rather than *results* (e.g., ESEA Title I succeeds in channeling funds to the most disadvantaged students, therefore it is meeting its objectives). They appear months after the statutory deadline, making it

difficult or impossible for OMB or the relevant House and Senate committees to use them in making decisions about budget, appropriations, and reauthorizations.

But the private contractors who conduct most of the federally-commissioned education evaluations required by law do a surprisingly honest and accurate job. Groups like the Rand Corporation and American Institutes for Research have repeatedly produced findings which show that programs under study are ineffective or even harmful. Sometimes, these findings are couched in technical terms that only a professional statistician can decipher; consistently, the bureaucrats and Congress have disregarded negative results and proceeded to expand programs which are clearly doing positive harm to their intended beneficiaries, such as the ESEA Title VII bilingual programs.

A Secretary of Education should make it clear that he *does* have a clear objective against which all education programs will be evaluated: their contributions to the basic academic skills of reading, writing, and calculation, as measured by standardized norm-referenced tests.

He should schedule an early meeting with the evaluation chiefs of the leading contractors, and make it clear that under this administration, they will *not* be harassed for bringing bad news, as the American Institutes for Research was in 1977 when it told the truth about Title VII. They *will* be encouraged to make their conclusions in forthright, non-technical terms. (He should make sure not to imply that he wants their findings to be artificially slanted *against* the programs, either.)

The Secretary should also make it clear, in advance, that programs whose officials fail to cooperate with the evaluation process will be penalized when the time comes to set the proposals for their future budgets. The burden of proof will be on those who contend that a program makes a positive and significant difference; absent such proof, the program should not merely be "level-funded," but cut.

Office of School Improvement

While Title I programs are administered by the Office of the Assistant Secretary for Elementary and Secondary Education, many of the other ESEA programs are within the Office of the Assistant Secretary for Educational Research and Improvement. These programs are grouped administratively under an umbrella Office of School Improvement which is headed by a

Deputy Assistant Secretary. This is a significant policy-making position.

The titles of these programs give an indication of what was regarded as educational "improvement" by the education lobbies in the 1960s and 1970s: Consumer Education, Arts in Education, Metric Education, Women's Education Equity, Ethnic Heritage Studies. These programs are the products of the view that by appointing administrators, giving grants, and distributing reports, education will be "improved." But there is little to suggest that this has occurred. These specialized programs have accomplished little, and, with a few exceptions, could be abolished.

However, there is legislative authority for most of these programs. Consequently, it would seem that the best route to educational reform is through budgetary control. The truism that policy is made through the budget process can be applied with great and good effect on the programs within the Office of School Improvement.

Basic Skills Division

The Basic Skills Division has the highest funding level in the Office of School Improvement. This Division appears to have strayed least from the intent of Congress and best reflects a commitment to the higher purposes of education that will have the greatest public benefit. We recommend that the Basic Skills Division be maintained at its current level of support. To the greatest extent possible, the Office of School Improvement should be reorganized so that career executives will be primarily concerned with improving basic skills.

Women's Education Equity (WEEAP)

Women's Education Equity is the unit within the Office that is, to judge by the content of programs receiving grants, more in keeping with extreme feminist ideology than concern for the quality of education. The Women's Education Equity Act was enacted as part of the Special Projects Act of the Educational Amendments of 1974. Former Representative Patsy T. Mink and Senator Walter Mondale were its chief sponsors. Grants authorized under this act are "to support innovative approaches to the achievement of education equity for women." While only $10 million was appropriated for FY 80, WEEAP's authorization rose from $30 million in FY 79 to $80 million in FY 80, and President Carter recommended an appropriation of

$20 million in FY 81. These figures suggest the increasing political leverage of feminist interests.

Grants awarded and cited in the WEEAP Annual Report for September 1979 include funding for a Women's Educational Equity Communications Network (WEECN) run under contract with Far West Laboratory, one of the private labs that receive continuous federal support; grants to eliminate "sexual stereotyping" in curriculum; and dissemination of model programs for providing equity to women devised by the Education Development Center in Newton, Massachusetts, another private enterprise that lives off tax dollars. WEEAP is a top priority item for the feminist network and is an important resource for the practice of feminist policies and politics. Its programs require immediate scrutiny and its budget should be drastically cut.

The Teacher Corps and Teacher Centers

The Teacher Corps and Teacher Centers are the two major programs within the Department of Education intended to meet the "needs" of teachers. The purpose of the Teacher Corps is to improve, encourage and support teachers who deal with low-income and minority students. By contrast, Teacher Centers are the legislative product of intensive NEA lobbying. By and large, Teacher Centers function as taxpayer financed union halls.

As with the Women's Education Equity programs, Teacher Centers use government money to support the programs of special interest groups.

A commitment to academic excellence and public responsibility suggests that the Teacher Corps continue to receive continued support, but that support for Teacher Centers be cut.

Other Programs

Some of the divisions in the Office of School Improvement do not now have funds with which to make grants. These include Energy Action, Citizen Education, Health Education, and Environment Education. We strongly recommend that this continue.

There are divisions that are smaller and less visible than Basic Skills, Women's Education Equity, and Teacher Corps—the big three in the Office of School Improvement. They do have grant-giving authority provided by legislation. The more important of these divisions are Consumer Education, Alcohol

and Drug Abuse Education, Arts in Education, Metric Education, Ethnic Heritage Studies, and Law-Related Education. They have budget allocations of from $2 to $4 million. In each of these divisions, funding for grants and conferences can be greatly reduced. Their support constituencies consist primarily of those who administer the programs and apply for the grants.

The Hatch Amendment (20 U.S.C. 1232h(b)

In an Administration oriented toward reforms, the Secretary of Education should give priority to enforcing the Hatch Amendment which protects the rights of students and parents. At the present time, there are no regulations to implement the law whose wording is so ambiguous that enforcing it is extremely difficult. Congress clearly intended that the Hatch Amendment should apply to schools receiving federal funds. In other circumstances where "human rights" have been defined by law, agencies are quick to devise regulations that often go far beyond the intent of Congress. The rights of parents and students attending compulsory public schools should be considered as fundamental and receive the same degree of commitment as other legally-defined rights. Currently, educational researchers have a very free hand in experimenting on young people in the schools. Little concern has been shown for protecting pupils and parents from their never-ending programs and projects. The Hatch Amendment mandates that the government demonstrate such concern. Were it to be applied to all research in education that is federally-funded as well as to all schools that receive federal funds, parents and pupils might have reason for once to appreciate the rulemaking power of a government agency.

Office of Civil Rights

The Office of Civil Rights (OCR), a division of the Department of Education, is charged with the responsibility for enforcing the following authorities prohibiting discrimination in federally-assisted programs and activities:

1. Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin in federally-assisted programs and activities. Implemented by 45 C.F.R. Part 80.

2. Title IX of the Education Amendments of 1972, which prohibits, with certain exceptions, sex discrimination in federally-assisted education programs and activities. Implemented by 45 C.F.R. Part 86.

3. Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against qualified handicapped persons on the basis of physical or mental handicap in federally-assisted programs and activities. Implemented by 45 C.F.R. Part 84.

4. Age Discrimination Act of 1975, which prohibits discrimination on the basis of age in federally-assisted programs and activities. Implemented by 45 C.F.R. Part 90.

5. Title VI of the Elementary and Secondary Education Act of 1965 ("Emergency School Aid Act"). The Office of Civil Rights must assure that applicants for funds meet the civil rights requirements contained in the statute. Implemented by 45 C.F.R. Part 185.

1,181 positions were transferred from OCR/HEW to OCR of the Department of Education. The current distribution of these positions is uncertain; however, in March 1980, 29 percent of the positions for civil rights enforcement were allocated to headquarters and 71 percent to the ten regional offices.

For fiscal year 1981, OCR requested $49.2 million in budget authority and $46.8 million in outlays to support its responsibilities for compliance reviews and complaint investigation.

OCR is seeking $26,138,300 and 617 positions for compliance reviews, monitoring and technical assistance activities in fiscal year 1981. OCR expects to undertake 250 new compliance reviews in FY 1980 and 400 in FY 1981.

For complaint investigations and pre-grant review activities, OCR is requesting $10,234,000 and 349 positions for FY 1981, representing almost 50 percent of the resouces allocated for investigative activities in OCR. Under current regulations implementing civil rights statutes, the Department of Education is required to address each complaint filed by citizens alleging discrimination in federally-assisted education programs.

During fiscal years 1980 and 1981, OCR anticipates receiving over 9,000 individual discrimination complaints. About 55 percent of the complaints will require a full investigation. Approximately 7,900 of these complaints should be resolved, leaving a carryover of approximately 1,100 complaints at the end of FY 1981. There was, as of March 1980, a backlog of approximately 1,400 discrimination complaints.

The Assistant Secretary for Civil Rights is given the authority to make yearly reports to Congress, and to make legislative recommendations. Title II provides that these reports can be made without the approval of the Secretary. The Assistant Secretary for Civil Rights is also given authority to collect data,

hire staff, and enter into contracts with outside consultants with the Secretary's consent.

The foregoing information applies to OCR activity for enforcement in all its areas of responsibility. The recent controversy over regulations issued by the Office of Bilingual Education specifically illustrates OCR "enforcement" of Title VI of the 1964 Civil Rights Act.

Bilingual Education

Title VI of the Civil Rights Act of 1964 prohibited discrimination in federally-funded programs, and the Department of Health, Education and Welfare promulgated regulations implementing the law (45 C.F.R. Part 80, republished as 34 C.F.R. Part 100). Although these regulations were primarily directed toward the elimination of segregation, they did prohibit certain practices by recipients which, *inter alia*, denied access to education programs because of national origin and limited English proficiency.

The Supreme Court in *Lau v. Nichols,* 414 U.S. 563 (1974), upheld both the authority of HEW to issue guidelines and its application of these guidelines to students with limited English proficiency. The Court in *Lau*, however, did not prescribe the steps which a school district must take to accomodate these students. The Office of Civil Rights, however, took the position that they would have to be taught school subjects in their native language.

Subsequently, the Department developed what came to be known as the *Lau Remedies.* They were developed to help guide the Office of Civil Rights in evaluating plans designed to eliminate alleged Title VI violations resulting from the exclusion of students with limited English-speaking abilities.

Title VI is not the only measure enacted to assist students whose primary language is not English. The Equal Educational Opportunity Act of 1964 and Title VII of the Elementary and Secondary Education Act of 1965 (the Bilingual Education Act) are two other federal efforts. In addition, more than one-half of the states have enacted laws requiring some type of bilingual education programs.

The New Regulations

On August 5, 1980, the newly-established Department of Education published for public comment proposed new regulations with regard to the prevention of national origin discrim-

ination in elementary and secondary education. 45 Fed. Reg. 52052 *et seq.* (1980). According to the regulations, any school district that has over twenty-five students in two grades who are superior in a language other than English, must provide for classwork taught in that language.

The procedures defined by those proposed rules establish four requirements for school districts:

Identification. The proposed regulations require school districts which received federal funds to use interviews or questionnaires to identify the primary language of its students.

Assessment. Each student identified as having a primary language other than English must be assessed to determine two things:

1) The student's proficiency in English is tested to determine whether he is eligibile for any services by virtue of limited English proficiency, defined as falling below the fortieth percentile of a relevant comparison group.

2) The student's relative language proficiency is tested to determine whether he is (a) stronger in English, (b) stronger in the primary language, or (c) comparably limited in both languages.

Services

1) Equal Access. Those students found to be English-superior in language skills need not be given specially tailored services.

2) Improving English Skills. Those students who are (a) comparably limited in both languages and (b) primary-language-superior must receive instruction designed to develop full proficiency in English.

3) Instruction Through Both Languages. To prevent, to the extent possible, students with weak English skills from falling permanently behind in other required subjects while learning English, the proposed rules require that primary-language-superior students receive instruction in required subjects through both languages while they are learning English. These classes must be comparable to those offered exclusively in English in size, content, quality, objectives, and instructional materials.

4) Modifying Required Services. Where bilingual instruction requirements would be particularly burdensome, an alternative to providing qualified bilingual education teachers may be permitted. Other methods (e.g., magnet schools, "circuit riding" teachers, aides, tutors, and tape recordings) may be used when a recipient school district has too few students from

a particular language background to combine into a single class. The Secretary may grant waivers to recipients (a) facing unexpectedly large and rapid increases in eligible students, (b) who want to conduct pilot programs, or (c) who now operate effective programs which differ to some degree from these proposed rules.

Exit Criteria. Placement in a particular program is not permanent. Students receiving instruction to improve English language skills may cease to receive these services when they are no longer limited-English-proficient, or in any event, after five years. Students receiving instruction through two languages need not continue if after two years in the program they are reassessed as English-superior or comparably limited in both languages.

Discussion

Local authority has always been one of the greatest strengths of our educational system. When Congress created the Education Deparment, it was made clear that the Department was in no way to interfere with local school district authority. Local school officials must certainly know the needs of their students better than the federal government.

In issuing these bilingual education regulations, the Department has circumvented the intent of Congress and in doing so, has set a dangerous precedent. Secretary Hufstedler's insistence that the proposed new regulations constitute "a mandated result, rather than a mandated method" is a distinction without a difference. The effect is the same: the Department, only three months after its creation, is presuming to usurp important decision-making authority of state and local school administrators. The federal government has absolutely no business dictating to local school districts how or what they must teach, and yet this is what the Education Department intends to do.

Furthermore, the Education Department has failed miserably in recognizing the financial and personnel restraints under which many school districts operate. The Department has proposed these regulations without knowing how many students are involved, the number of trained bilingual teachers available, the extent of non-compliance with existing remedies, or the cost of implementation.

It is *estimated* that more than three and one-half million students would be affected by these proposed regulations. The cost *above current services* is variably estimated to be between $142 million and $632.7 million for the first year, depending

upon certain variables and upon selection among several alternatives available.

While an estimated 70 percent of the children involved are Spanish-speaking, languages in which instruction is now conducted include: Central Yup'ik, Aleut, Yup'ik, Gwich'in, Athabascan (the foregoing in Alaska), Navajo, Tagalog, Pima, Plaute, Ilocano, Cambodian, Yiddish, Chinese, Vietnamese, Punjabi, Greek, Italian, Korean, Polish, French, Haitian, Haitian-French, Portugese, Arabic, Crow, Cree, Keresian, Tewa, Apache, Mohawk, Japanese, Lakota, Choctaw, Samoan, Chamorro, Carolinian, Creek-Seminole, Russian, and others.

If a state decides that such a program is needed for its minorities, it should be free to establish and pay for it. Federally-funded programs in bilingual education, however, are designed to aid only a limited group of students and to build up a self-perpetuating constituency. Worst of all, they fail to equip students to advance and compete in the mainstream of American society. The advantages of bilingualism should be achieved through private efforts in families, churches, and community organizations.

A government-financed study by the American Institutes for Research in Palo Alto was highly critical of bilingual education. The Palo Alto study found little difference between progress made by Hispanic students in bilingual programs and that by Hispanics in regular classrooms. In math, those in bilingual programs did better; in English, they did worse.

There was, however, a wide difference in costs. The report showed an average of $1,398 spent on bilingual pupils—$376 more than on students in regular classrooms.

The study also reported that 85 percent of the students were being kept in bilingual classes after they were capable of learning in English.

Bilingual education began as an attempt to aid the transition of those with limited-English proficiency to keep up with their studies while learning English. In the eyes of many, it has become a means of cultural maintenance. There is nothing wrong with people trying to maintain their culture, but they should be in charge of doing it—not the federal government.

This well-intended program, in effect, keeps children out of American society by delaying the learning of English. By delaying the emphasis on learning English, this federal program requires duplication of teachers in the classroom, and the spending of a great deal of taxpayers' money on the recruitment, training, and certification of bilingual teachers and

instructional aides. Not only that, the program requires that textbooks and teaching materials have to be developed in scores of languages other than English.

Our schools should concentrate on teaching English to these children. They are going to have to learn English sooner or later—so why not sooner?

The Offices of Civil Rights and Bilingual Education have undermined the principle of reserving control over educational policymaking and operations to states, localities, and public and private institutions. The goal towards which they appear to be striving is federal control over the curriculum, administration, and personnel of our educational institutions.

The civil rights of individuals are fundamental, and should not be abridged. But the role of the OCR in "enforcement" of Title VI—and possibly other areas as well—needs to be narrowed so as to allow state and local education officials to develop programs which will take into consideration the unique situations of particular schools and school districts. Guidance and assistance, not broad, heavy-handed mandates and regulations, should be the role of this division.

Effects of the Grant Process on Course Content

During the past 15 years, there has been a concerted nationwide effort by professional educationists to turn elementary and secondary school classrooms into vehicles for liberal-left social and political change in the United States.

These efforts have been successful to a large degree owing to generous and unremitting support from the federal government.

More than $4 billion each year is available to state and local education agencies and individual grantees under the Elementary and Secondary Act (ESEA) of 1965 and subsequent amendments passed by Congress. Additional millions of dollars are available from other programs and agencies, including the National Science Foundation (NSF). Much of this money goes for development and implementation, teacher training, and "innovative" school programs. An average of $160 million in federal funds has been spent in each of the past 10 years for education research and development.

The rise to prominence of behavioral science in educational theory, the activist liberal-left ideology of many professional educators, and the growing power of the National Education

Association and its affiliated groups have been the underlying forces behind the commitment to social engineering in the schools.

In order to pursue their new role as "change agents," with encouragement and support from the NEA, many teachers throughout the country have abandoned traditional textbook-oriented courses and replaced them with psycho-social "life adjustment" and humanities courses.

This new approach emphasizes a student's "feelings" and "emotions," rather than cognitive learning and skill training. Many of the new psycho-social courses have a "crisis orientation," and tend to use historical materials only insofar as they illuminate a present-day problem. The courses are often infused with "values clarification" techniques and stategies.

Values Clarification

Values clarification is the process of weighing alternatives to decide what is important to individuals and society, according to its proponents. This includes resolving conflicts between traditional values at home and family and the changing attitudes of the day. Using this process, the student is told that there are no absolutes, no truths, no certainty with regard to right and wrong, and that factual knowledge is unimportant in choosing values.

In the values clarification process, students are confronted with a variety of contemporary issues and questions in order to force them to assess and possibly change their own values. Issues and questions such as the following are often raised in group discussions: "How many of you would apply for a contractual marriage license, renewable every five years, if you were planning to marry?"; "How many of you would like to live in a commune?"; "How many of you live in a house that is kept too neat and tidy to suit you?"; "Should Bill and I live together before marriage?"; "How do I know whether marijuana is really harmful to me or not?"; "Does religion have some meaning in my life, or is it nothing more than a series of outmoded traditions and customs?"

Federal funds have been used to implement such values clarification exercises, and in the development and implementation of many thousands of other school projects and programs intended to affect or change student values. These techniques and strategies in the schools have come under sharp attack by some educators and medical authorities, as

well as concerned parents. A critic of this educational innovation, Dr. Rhoda Lorand of New York, has written:

> Programs have been instituted which clearly disregard parents, and whose stated purpose is to mold the thoughts, feelings, and actions of children in regard to all areas of life, in accordance with new concepts belonging to situation ethics. [These programs] deny to parents the right to be their children's authorities and guides in all matters . . . while at the same time invading the privacy of the home . . . .If the teacher tells the children that some people think it is wrong and others think it is right, she is undermining [the parents'] authority if they have taught their children that it is wrong, because the teacher is also an authority figure . . . . Whenever a parent is thus demoted, the child's development suffers. His confidence in them is weakened at a time when he needs to be permitted to regard them highly and incorporate their standards. Moreover, he then unconsciously identifies with a denigrated parental image.

Until 1969, the Office of Education of the Department of Health, Education and Welfare compiled a catalogue of these projects funded under Title III (Supplementary Centers and Services) of ESEA. Title III (Supplementary Services and Centers) has since been consolidated under Title IV-B (Instructional Materials and School Library Resources) and Title IV-C (Improvement in Local Educational Practices—State Grant Program) of ESEA by Public Law 93-380. This funding supports model experimental programs with the stated intent of "changing" the schools, the community, and individual students. The programs are devised at the local or State level by classroom teachers, college of education professors, other professional educationists, and nonprofit organizations established for curriculum innovation purposes. They are expected to have potential for widespread dissemination once completed. A review of some of these programs will provide an indication of their scope and intentions.

PACE (Projects to Advance Creativity in Education)

The 584-page Federal catalogue published in 1969 was entitled *Pacesetters in Innovation.* The subject headings and project descriptions clearly show that the intent is psychosocial change and the employment by teachers of clinical psychological techniques designed to inculcate or alter students' moral, social, religious, and political attitudes and behavior.

PACE projects funded by the Federal Government have included:

- A project in Grand Rapids, Michigan, involving 4,446

suburban and rural students to acquaint teachers with the psychological and sociological dynamics of value development and value assessment, and to test students for their "value orientation."

• A project involving sensitivity training for teachers and students in English, social studies, science, and math, to develop significant change in classroom practices.

• A "Project Redesign" in New York, covering 10 percent of the State's schools, calling for replacement of traditional courses with a "new system of education" to emphasize "direct, real and relevant experiences . . . human interaction . . . and positive self-concept."

Education Resources Information Center (ERIC)

Advertising the availability of humanistic or value-shaping teacher methods, instructional materials, and other assistance for professional educationists nationwide is a major undertaking of the Federal Government through its Educational Resources Information Center (ERIC), a computer-linked network with 16 major clearinghouses throughout the country funded by the National Institute of Education (NIE).

The ERIC clearinghouse system acquires and lists information concerning all types of "innovative" methods or projects being devised, tested, or used throughout the country, regardless of Federal funding, as well as information concerning educational literature and journals according to subject headings of interest to professionals in the field.

Some recent publications lists of the ERIC Clearinghouse on Teacher Education listed the following items:

• "And By Opposing Them, End Them: The Genre of Moral Justification for Legal Transgress";

• "Behavior Modification in Education: A Few Opinions on Critical Issues";

• "We Don't Call It Moral Education: American Children Learn About Values"

The Wingspread Report: A Call for "World Order Education"

The replacement of traditional elementary and secondary courses in history, geography, civics, and science with new multi-media interdisciplinary curriculum packages has also been made possible by hundreds of millions of dollars in Federal grants. A major objective of this effort, according to reports and education journal articles resulting from educator conferences held in the late 1960s and early 1970s, is to

implement social planning and social change to build a new world social and political order.

The implementation of this ideology by professional educationists in the classroom was outlined in *The Wingspread Report on New Dimensions in Teaching of the Social Studies*, issued by the National Association of Independent Schools in 1970.

The report attacked the examination system, called for elementary and secondary school students to have a major role in formulating school policies, and for students and teachers together to become active through the educational process in social and political activities in the community.

Scores of liberal-left education activists who share the ideological worldview and objectives outlined in the Wingspread report have responded to this call for action through efforts to develop and implement instructional materials. The Federal Government, particularly the National Science Foundation, has spent hundreds of millions of dollars in support of social studies curriculum programs modelled after the Wingspread philosophy. Where necessary, curriculum innovators with the help of Federal funding, have bypassed the commercial publishing industry.

Some prominent "career curriculum innovation centers" established for this purpose, which have received Federal grants continuously since the early or mid-1960's, are: Education Development Center (EDC) of Newton, Massachusetts; Biological Sciences Curriculum Study Company (BSCS) of Boulder, Colorado; Social Science Education Consortium (SSEC) of Boulder, Colorado; and Individualized Science Instructional System (ISIS) at Florida State University in Tallahassee.

Since 1960, these four organizations alone have received more than $200 million from the Federal Government for curriculum development and dissemination. College grantees who have conducted promotional seminars and teacher training to help sell and implement the programs of these organizations in school districts throughout the country have received an additional $100 million in Federal funds.

The development of this primarily college-based curriculum innovation network to develop and market the "new social studies" programs was patterned after the highly successful Federally supported marketing system devised to get new science and math courses into the nation's schools during the Sputnik era.

Man: A Course of Study (MACOS)

A good example of the successful efforts to implement the Wingspread philosophy through the new Federally-supported curriculum innovation network is *Man: A Course of Study*, known as MACOS, a 5th grade social studies and behavioral science course structured on the concept of survival. MACOS was the subject of intense controversy in Congress following its implementation and subsequent outraged complaints from parents and some teachers.

MACOS was developed by Education Development Center (EDC) over a seven-year period, and then placed by the marketing network in more than 1,700 elementary schools nationwide, with grants totalling $7.5 million from the Federal Government. It is an ungraded one-year course which uses no single textbook. The children are given a wide variety of books, pamphlets, posters, maps, games, cards, and shown numerous films and filmstrips of animals and Eskimos with no dialogue so that they will have to make their own judgments about what they experience.

MACOS was devised by Jerome Bruner, a behavioral psychologist from Harvard University and the principal advocate of the "inquiry" or "discovery" approach to education.

The 10- and 11-year-old children in MACOS classrooms role-play Eskimo living and stories, and are involved in free-wheeling discussions about Eskimo behavior. They are asked to relate native customs to some of the complex value questions and moral problems facing our own society today. Teachers are instructed in MACOS teacher guides not to take sides or tell the children what is right or wrong, but to give "support to open-ended discussions where definitive answers to many questions are not found."

Some of these issues and questions include:

- Old grandmother Kigtak has become a burden to her family. Should she be left out on the ice? How does this relate to the issue of mercy killing in our own society?
- Since boys are more useful than girls in Netsilik Eskimo society, is it right for a family that has a girl baby but does not need one to leave her on the ice? How might this relate to our society's problem of unwanted children and the issue of birth control and abortion?
- Several years ago, a young male Eskimo ran off with someone else's wife. Should he be ostracized, made to give her up as a condition for re-admission to the group, or simply forgiven?

George Weber, executive director of the highly regarded Council for Basic Education, said of MACOS in *Phi Delta Kappan:*

> There is an air of indoctrination about the course. Although there are a number of references to getting the children to think about various questions, a thorough examination of the teachers' guides suggests that the authors have definite ideas about what conclusions the children should come to. There is an underlying assumption that young children must be made to understand that cultural relativism and environmental determinism are the only "scientific" answers to the place of man in society. There seem to be many other "correct answers" in the material.

Human Sciences Program (HSP)

Another interdisciplinary package currently being developed with Federal support is the BSCS Company's three-year Human Sciences Program (HSP), designed for adolescents 10 to 14 years of age. To date, about $4 million in Federal funds has been awarded for this program.

Like MACOS, the *Human Sciences Program* started out with a large amount of highly controversial content, including class data banks on the attitudes and activities of students and their families, the charting of menstrual cycles by seventh graders, a comparison of Ben Franklin's personal code of conduct with a contemporary permissive code designed to appeal more to young people, and a section on human genetic experimentation to manipulate birth and development entitled "Reproduction in the year 2015."

Much of that controversial material has been dropped from the program following objections and field-testing revisions. However, when such programs are used in a wholesale manner to replace basic courses, and are innovative in name but marginal in content, there is widespread belief among parents, private sector publishers, and many educators themselves that their worth at the very least is questionable.

Short-Term Options

Appointments

Positions within the Department of Education, the National Science Foundation, and other agencies involved in education activities of the Federal Government should be filled by individuals with a strong commitment to the attainment and improvement of basic academic skills. Such individuals should

also oppose any further Federal support for "humanistic" or psycho-social education activities, projects, or programs.

Personnel Reassignments

The new Administration should establish procedures within the first 30 days to interview all program managers and other department personnel involved in solicitation or approval of grant applications and disbursal of Federal funds to determine their philosophy of education. All such personnel who indicate support of "humanistic" or psycho-social programs in the schools should be relocated to other agencies or moved to positions where they will have no authority over policy decisions, project approval, funding, or other administrative actions involving Federal financial support of education activities, projects or programs.

Termination of Federal Support

Blue-ribbon panels of distinguished citizens and educators committed to the attainment and improvement of basic academic skills in the schools should be formed to help review all ongoing curriculum development and implementation activities being administered or supported by the Federal Government. Those that are not consistent with the objectives and policies of the new Administration should be phased out promptly or terminated.

Public Accountability of Grantees

A requirement of every Department-sponsored grant for the delivery of services (as opposed to research grants) should be that all participants/recipients involved in the service rendered should be provided a suitable and practicable means of evaluating the quality and usefulness of the service provided by the contractor/grantee. This would include a general notification to all affected parties that the service was funded by the Department of Education.

The kind of evaluation could vary from program to program, and should not involve any significant paperwork burden for the Department. Certainly, the small administrative cost would be more than offset by the gains in more effective Departmental evaluation of services rendered by grant recipients. Evaluation comments should in all instances be directed to an independent office within the Department, not to the office administering the particular grant.

Medium-Term Options

Local Autonomy and Parent/Student Rights

Federal regulations should be implemented by the department (or if necessary new legislation should be drafted and proposed for enactment by Congress) to affirm the rights of school governing boards, parents, and students regarding federally administered or supported programs, including—

1. A requirement that the governing body of a local school must formally approve (a) the introduction or use of any instructional materials, methods, and education programs supported during development or implementation by the Federal Government prior to the implementation or use of such materials, methods, or programs in the school; and (b) the participation by any employee or consultant of the school in any federally administered or supported activity or program, prior to such participation.

2. A requirement that Federal grant recipients or contractors provide and publicly announce an opportunity for at least a 30-day public review of all instructional materials, methods, and education programs supported during development or implementation by the Federal Government, before such materials, methods, or education programs are submitted to the local governing body of a school for approval for use in the school.

3. A requirement for informed written consent of the parent or legal guardian of a minor student, or of an adult student, prior to (a) participation or assignment of a pupil in any innovative, experimental, or trial program administered or supported during development or implementation by the Federal Government; and (b) participation or assignment of a pupil in any values clarification exercise, encounter or sensitivity training group, or other psycho-social activity in connection with any federally administered or supported activity, project, or program.

4. Expansion of the Hatch Amendment (20 U.S.C. 1232h.(b)) to cover all applicable federal programs outside the scope of the General Education Provisions of the U.S. Code.

Protection of Family/Student Privacy

1. The department should establish a blue-ribbon panel of concerned parent group representatives, Constitutional scholars, civil liberties representatives, and other concerned citizens to draft and recommend a Code of Privacy Standards to

govern all education activities, projects, and programs administered or supported by the Federal Government, in order to prevent invasion of personal privacy of individual students and their families as a consequence of such activities, projects, and programs.

2. The Administration should enact regulations or recommend legislation by Congress based on the proposed Code of Privacy Standards, in order to require their appropriate implementation with respect to all education activities, projects, and programs carried out or supported by the Federal Government.

Needs Assessment

1. A "needs assessment" should be required to demonstrate the national, State, or local need for any federally-funded education activity, project, or program before it is approved for federal support. Such a "needs assessment" should include a demonstrated need by a broad base of public, educator, and professional organizations, as well as parent groups and students in the community or throughout the country, taking into account other existing education programs of a similar nature or designed to fulfill a similar need.

2. Applicants for Federal funds should be required to fulfill the requirements established for a "needs assessment," and to demonstrate the unavailability of support from other sources before approval of federal support is given for any proposed education activity, project, or program.

Accuracy and Public Acceptance

The department should establish procedures to ensure that the factual and scientific accuracy and public acceptance of any education activity, project, or program administered or supported by the Federal Government are determined before such activity, project, or program is proposed for use or implemented in school classrooms.

Protection of Human Subjects

The "Policy on the Protection of Human Subjects" adopted by the Department of Health, Education and Welfare in 1971 should be expanded to include any education activity, project, or program administered or supported by the Federal Government, in order to ensure that no student or teacher will be placed "at risk" by being exposed to possible physical, psycho-

logical, sociological, or other harm through participation in such activity, project, or program.

Curriculum Development and Marketing

The Administration should draft and propose legislation to terminate federal support for development and marketing of school course (curriculum) materials, so that full responsibility and control over this important area can be returned to State and local education agencies and private schools, in conjunction with private sector commercial firms.

FEDERAL POLICY FOR HIGHER EDUCATION

Federal Regulations and Higher Education: An Overview

Colleges and universities are a unique industry for which federal programs have special import. But, in many respects, these schools are businesses like other businesses, and the effects of federal regulations upon schools are similar to the effects of federal regulations upon other businesses.

A multitude of general laws now influence the higher education community. The environmental protection laws, the Occupational Safety and Health Act, the Employment Security Act, the Civil Rights Act of 1964, and the recent and scheduled increases in social security taxes, and more make college administration more expensive and complicated, just as these laws make all businesses more expensive and complicated.

Although no one factor sets higher education apart from other industries, several factors combine to define the particular significance of federal programs and requirements for higher education:

1. Colleges and universities are inevitably labor intensive. They employ 1.5 million people, a number that could hardly be reduced without a direct effect upon capacity. A substantial portion of this labor force must be highly trained, and therefore, university employees tend to be especially expensive. An extensive and expensive work force makes the federal income and retirement security programs especially onerous for colleges and universities that must pay all or a portion of the premiums for their employees. Social security is by far the most expensive of all federal programs for the schools. The scheduled increases in social security taxes will place a heavy burden on university budgets.

2. Colleges and universities have only limited control over

their income. Only a portion of their financing comes from charges to customers, i.e., tuition. Tuition is set on a yearly basis. Income from investments depends on how well the investments do. Private giving is a chancy affair, and various levels of government control the rest of the financing. Even annual increases in tuition are problematic, especially for private colleges, whose tuitions are already higher than those of state subsidized public colleges. The private colleges fear losing students to the less expensive public colleges.

3. The decentralization of many universities makes it more difficult for them to comply with some federal requirements. Schools have had to establish interdepartmental and sometimes university-wide committees to set and enforce standards, to keep records, and to prepare reports for federal agencies. At times, the schools have been less than efficient in creating these committees. Committees often are unclear in their goals and operations, and not infrequently colleges have established organizations with overlapping or redundant duties. College departments do not want to relinquish their autonomy, a vital aspect of their "academic freedom." But federal interference with universities is spawning central administrative interference with individual departments, gradually transforming the structure of higher education in this country.

4. Colleges and universities are a handle on the future. They are at the center of America's science establishment. They select, mold, and position most of the nation's future leaders, executives, professionals, scientists, technocrats, and bureaucrats.

Consequently, the schools have come to be viewed by Congress as a tool of federal policy. They are thus subject to a plethora of federal enticements in the form of grants in aid. "Grants in aid" has always been something of a game since college administrators and professors have their own purposes, and are adept at diverting federal funds to ends that are questionable in terms of official goals. In response the federal government has become more of a task master, perhaps too much so. Grant recipients must make extensive efforts to justify their work. In addition, school administrations have recently been burdened with a detailed and perplexing document known as A-21. A-21 is the manual for calculating the "allowable" costs, including overhead costs, of federally sponsored projects. The bureaucracy is intent on knowing the uses and depreciation of facilities, and the percentage breakdown of the efforts of personnel.

Three major issues are entailed in federal involvement with higher education. The first issue focuses on questions of *effectiveness*; the second on questions of *affordability*, and the third to questions of *propriety*.

Efforts to manipulate research and education from Washington must be clumsy, since both defy standardization, and require on-sight inspection. The more the federal government tries to discipline universities in their use of federal funds or prod them toward efficiency with detailed instructions, the more surreal these efforts will become. The schools will have to hire more people to process the documentation; the professors will have less time for research and teaching, and the bureaucracy will receive mountains of exceptionally boring material whose very complexity will invite convenient interpretations, both by the professors and by the bureaucrats. Confusion will reign.

Like most people, university professors want to be left alone with the goods. The federal government cannot responsibly dole out money without any attention to returns. But, perhaps the grants' process can be made more businesslike. The government could contract for a certain product or effort, and after a reasonable time, the government could see what the taxpayers had gotten for their money. This judgment could influence further dealings with the relevant professor/researcher and with the institution that he represents. Of course, this process occurs now, but it is embellished with a multitude of details. More attention should be paid to results, and less to process.

The schools, especially private schools, unlike other businesses, cannot readily pass on additional costs to customers. Therefore, the increasing costs of employee benefits such as social security, and the increasing administrative costs of complying with federal regulations and meeting grant requirements are placing the higher education community in a financial squeeze. Although non-profit organizations are exempt from income and property taxes, these organizations must pay for social security or comparable benefits, and as the cost of these benefits increases, the true tax burden upon them increases. For this reason, college administrators tend to favor the use of general tax funds to buttress social security in place of increased social security taxes. Granting colleges some exemption from social security taxes would help college budgets appreciably.

A reduction in the administrative costs of regulations and

grants would also be beneficial. Here, coordination would help. As of 1977, colleges dealt with 400 federal agencies that were supervised by more than 50 executive agencies. The new Department of Education is not likely to remedy this situation. Indeed, it may well become a springboard for more elaborate interference.

Despite the onus of employee benefits and the hassles with grant applications, the college administrators have remained relatively calm concerning these measures. The administrators and academics may grumble over the red-tape with which the government wraps its carrots, but no open rebellion is contemplated. It is quite another matter with another class of federal requirements.

These are requirements designed to promote "social justice" as defined by Washington. The requirements are alleged to be reasonable contractual stipulations, but the implied volunteerism of a contractual relationship is a legal fiction as far as colleges are concerned. College administrators perceive extortion behind these requirements.

For instance, Grove City College in Pennsylvania purposefully refused federal grants, yet the Department of Health, Education and Welfare still demanded compliance. The Department argued that some of Grove City's students were receiving federally guaranteed loans. Thus, even though the college did not administer the loans, it still received indirect federal support. By this criterion of "indirect support", it is virtually impossible for a college to evade the strong arm of the federal bureaucracy.

The main controversy between the federal bureaucracy and the schools centers on two laws and one executive order. These directives are Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, and Executive Order 11246.

Section 504

Section 504 of the Rehabilitation Act of 1973 is meant to insure social equity for handicapped persons. Section 504 provides:

> No otherwise qualified handicapped individual in the United States . . . shall by reason of handicap be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

To implement this law, schools are required by regulation to appoint a compliance officer, to institute procedures for self

evaluation and grievances, to modify buildings and facilities, and to reform programs so that handicapped persons can participate fully in college life. Colleges are required to make "reasonable accommodations" to eliminate obstacles to the inherent ability of handicapped students to learn.

Interpretations pose one of the greater problems with this law. The variety of potential human handicaps is infinite. What is and what is not a handicap, and which handicaps are and which are not relevant to one's ability to learn are constant matters of concern to college administrators. The definition of "reasonable accommodation" is extraordinarily vague. The expense of a given accommodation often determines its reasonableness; the reasonableness of a given expense is determined by federal overseers. The schools are in a difficult position.

Structural accessibility is the greatest headache for college administrators. Buildings built after 1968 have by regulation been designed to be accessible to handicapped students. But, earlier buildings must often be remodeled at tremendous cost. The regulations do not say so explicitly, but they require that all programs and activities be accessible to the handicapped. In 1976 the remodeling costs for George Washington University were put at over $5 million. The cost for elevators alone at the University of California at Berkeley has been estimated to be $2 million.

Title IX

Title IX of the Education Amendments of 1972 provides:

> No person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal assistance.

Title IX regulations require steps to insure educational equity between the sexes. They are similar to those required by Section 504 regulations. A college must appoint a Title IX coordinator. It must make a written evaluation of its policies and activities to determine in what respects it is guilty of sexual discrimination. It must develop a detailed plan for ridding itself of such discrimination. Finally, it must develop grievance procedures to answer charges of Title IX violations from students and employees.

The fundamental controversy concerning Title IX is the legal scope of its provisions. As interpreted from the very beginning by HEW (and now the Department of Education),

Title IX has been interpreted as though its operative provision extended to "any school system or institution of higher education receiving federal financial assistance," rather than the more limiting language of the statute which extends only to "any education program or activity receiving federal assistance." The difference is critical. Under the broader interpretation, OCR has been able to regulate physical education classes, school athletic programs, intercollegiate sports, school-related social organizations, overall educational personnel policies, *ad infinitum.* In a whole series of federal court cases (at least ten U.S. district courts and three U.S. Courts of Appeal) involving this basic issue, but focussed on attempts to regulate personnel practices, all except one U.S. appeals court have ruled that the Title IX regulations exceed the scope of the statute. The relevant legislative history strongly supports this view and has been extensively cited by the courts.

A proper interpretation of Title IX, with a limited programmatic application rather than the broad institutional one which has been applied, would have avoided many controversies (many having the effect of trivializing women's rights) and the massive invasion of education administration.

Executive Order 11246

Executive Order 11246 prohibits federal contractors from discrinating on the basis of race, color, religion, national origin or sex. It also requires contractors to undertake "affirmative action" to insure that discrimination does not occur. This executive order is implemented in accordance with the Department of Labor's Revised Order No. 4 which is in turn enforced by the Department of Health and Human Service's Office of Civil Rights which also supervises compliance with 504 and Title IX.

The Revised Order requires reverse discrimination, although it carefully avoids this terminology. The schools are to develop "specific and result oriented procedures" to remedy "deficiencies" of women and specified racial groups in all job categories on campus. The courts have forbidden explicit quotas, but implicit quotas are a virtual necessity.

Schools without visible and acceptable increases in the right sorts of people or without proper and detailed plans to this end face on-campus investigations by the Office of Civil Rights which is intent on reviewing personnel records, including letters of recommendation. The schools have balked at this instrusion with mixed results.

A school can also be investigated upon a complaint to the OCR even if the school's record is impeccable. The burden of proof in all these "social justice" proceedings is clearly always upon the colleges. They are guilty until they prove themselves innocent. Their accusers need only bring a charge, and the OCR, ever ready to protect its sources, is frequently vague concerning the nature and source of a charge in confrontations with a college.

The enforcement of Section 504, Title IX and Executive Order 11246 is barely judicial. For the most part, it is a political process, a clash of interest groups with the OCR as a highly politicized arbiter. The campus based groups that bring the charges against the universities are articulate adversaries. They seem to have the OCR at their disposal, and are usually successful at getting this agency to harrass the schools. Yet, these advocacy groups are also frustrated by the bureaucracy. The OCR is naturally reluctant to cut federal assistance to any university, and no total cut off has yet occurred, although Secretary Califano practised brinkmanship with the University of North Carolina at Chapel Hill. The point is that both the advocates and the schools have political clout and both use it, which combined with the byzantine nature of the OCR makes for a confusing and angry process.

Part of this confusion has undoubtedly resulted from the legislative and executive directives themselves which are platitudinous in their soaring intent and dearth of practical instruction. The agencies—the Department of Labor and the Department of Health and Human Services—had to translate the directives into workable procedures, a most difficult task made more difficult by the highly politicized nature of appointments to the relevant offices. Initially, the schools were at a total loss as to how to comply.

Federal requirements are becoming increasingly expensive for the nation's colleges and universities. A 1976 study by van Alstyne and Coldren showed a dramatic growth in administrative expenses attributable to federal regulations. These costs increased for six universities over ten years from a negligible portion of their administrative budgets to between one-eighth and one-quarter of these budgets.

The burden federal regulations place on universities is counted in more than money. Increased federal intrusion is an aggravation to administrators and professors. It introduces into their consideration of personnel "functionally irrelevant" statuses such as race and sex. It inevitably leads to the ill

treatment of qualified persons who do not belong to federally favored groups. It introduces an adversary relationship among all parties. It inundates the schools with tedious process. It introduces lawyers into situations in which they do not belong. Liberty suffers, and so do prospects for informal solutions.

Colleges and universities have not been singled out for federal interference; such is the plight and privilege of all American enterprise. Federal regulations affecting the schools are not substantially different from the regulations affecting other businesses. The complaints from the schools echo the complaints made throughout the business community.

The "social justice" directives such as Section 504, Title IX and Executive Order 11246 will be particularly difficult to reform or remove. They deal with extraordinarily emotional issues. Any effort at additional restraint on the part of the Office of Civil Rights will be seen by a variety of activists as a manifestation of "benign neglect", a retreat to sexism, racism, and indifference to the handicapped.

Nonetheless, reforms are needed. The burden of proof should be shifted. The schools should not be judged guilty until they prove themselves innocent. They should not be judged in advance. The OCR should be entirely neutral in its consideration of the evidence. Each side in a dispute should have to make its case.

The originator of a complaint should not remain anonymous. Currently, the OCR withholds the names of accusers to protect them from campus retribution. This policy is outrageous. Any person or persons calling on the federal government to act against any other person or persons should have the courage for confrontation. At any rate, people have a right to know their accusers.

Compliance with Section 504 should be tailored to a school's financial capacity to comply. Perhaps, a certain portion of a school's budget can be devoted to reasonable accommodation of the handicapped. Requiring massive changes without regard to cost is unreasonable.

Affirmative action is the sorest point of all. The proponents of affirmative action see it as the quickest and most practical means of upward mobility for America's women, Blacks and Hispanics. Its opponents see it as an attack on equal opportunity and merit selection. Affirmative action is perhaps a quick way to lift women and minorities into prominent or lucrative positions, but it is not necessarily the most just. Affirmative action has produced at least some demoralization and resent-

ment among workers, and caused management to emphasize gender and race at the expense of skill.

Affirmative action does not run counter to American practice; it runs counter to American ideals. It should be jettisoned as soon as it is politically possible to do so. In the meantime, it should not be administered with a heavy hand. Prudence and tact should mitigate the adversarial relationship that Executive Order 11246 has established and nurtured between the federal government and academe.

Adams vs. Califano:
The Case Pending Against the University of North Carolina

What happens when a university must deal with federal civil rights enforcement authorities? The experience of the University of North Carolina is illustrative.

In a 1973 case, *Adams v. Richardson*, a federal district court ordered six southern states to comply with Title VI of the 1964 Civil Rights Act which forbade discrimination in any program receiving federal funds. In June 1973, the District Court ruling was upheld by the Court of Appeals. In a judgment pertaining to public higher education, the Court of Appeals asserted that desegregation of public institutions of higher education had to be carried out for a state's public higher education system as a whole, not on an institution-by-institution basis. The central issue was the "systematic racial imbalance" in these states. In addition, the lack of any statewide plans to attract more minority individuals into the professions (lawyers, doctors, etc.) emerged as a critical fault. Necessary for any effort to bring more minority students into graduate and professional programs, according to the court, was "a viable, coordinated state-wide higher education policy that takes into account the special problems of minority students and of Black colleges." *Adams v. Richardson*, 480 F.2d at 1165 (D.C. Cir. 1973).

In 1977, after more legal skirmishing, the Court of Appeals decided that the desegregation plans accepted by OCR "did not meet important desegregation requirements and have failed to achieve significant progress toward higher education desegregation." *Adams v. Califano*, 430 F. Supp. 118, 119 (D.D.C. 1977). The focus of the decision was OCR's failure to set specific goals.

Some significance of this decision lies in its language on the traditionally black public college. Judge John H. Pratt wrote:

> The process of desegregation must not place a greater burden on Black

institutions or Black students' opportunity to receive a quality public higher education. The desegregation process should take into account the unequal status of the Black colleges and the real opportunities for Blacks. *Without suggesting the answer to this complex problem, it is the responsibility of HEW to devise criteria for higher education desegregation plans which will take into account the unique importance of Black colleges and at the same time comply with the congressional mandate. Adams v. Califano*, 430 F. Supp. at 120 (emphasis added).

This, then, is the process through which the *Adams* case led to the requirement that OCR issue new criteria for a new round of desegregation plans. The two main demands placed on the states as a result of the legal proceedings are (1) to end the systemwide racial imbalance in higher education, and (2) to strengthen traditionally black institutions of higher education. The Court does not indicate how the second goal can be squared with the first.

On August 11, 1977, specific criteria which desegregation plans had to meet were published in the *Federal Register*. The criteria, whose preamble noted the unique role of the traditional black college, consisted of five parts: (1) disestablishment of the structure of the dual system; (2) desegregation of student enrollment; (3) desegregation of faculty, administrative staffs, non-academic personnel, and governing boards; (4) submission of plans and monitoring; and (5) definitions.

The plan North Carolina submitted on September 2, 1977 was rejected by HEW in March 1979.

Days later, the University of North Carolina sued the federal government, charging it had violated the University's right to due process and academic freedom. U.N.C. sought to enjoin (1) the administrative proceeding, (2) the termination of overall federal financial assistance to the University system (which amounted to $89 million per year), (3) deferral of federal assistance during the pending administrative proceedings, and (4) enforcement of HEW's revised criteria for higher education. Judge Franklin Dupree held that administrative proceedings should continue, but that there could "be no ultimate fund terminations without an administrative finding that UNC is in non-compliance with Title VI." *North Carolina v. Department of Health, Education and Welfare*, 480 F. Supp. 929, 937 (E.D.N.C. 1979).

The attempt to make that administrative finding began on July 22, 1980. The government, first to present its argument, is expected to take two to three months to question its sixty witnesses. After a six to ten week recess, the U.N.C. argument

is expected to consume three to four months and to include nearly ninety witnesses.

Discussion

What is really at issue in this prolonged confrontation is much more than whether traditionally black institutions have been slighted in their competition for funds, facilities, faculty, students, and academic programs. Nor is deliberate discrimination by the University of North Carolina at issue. The evidence from U.N.C. has shown that progressive efforts have been made by University officials to assure that admissions policies, appropriations, facilities, and curriculum development are racially neutral.

The true issue in this case is academic freedom and the proper standards for desegregation in higher education. By demanding that programs be shifted as a condition for reaching "voluntary" compliance, the government has sought to dictate what shall be taught, to whom it shall be taught, and where it shall be taught.

The criteria developed by HEW seek to impose a racial balance at the institutions comprising the University of North Carolina without regard for a variety of factors other than the past existence of a *de jure* segregated system of higher education.

The governing officials at U.N.C., as at any other institution for post-secondary education, do not control student decisions to enroll in particular institutions of higher education. Unlike elementary and secondary education, higher education is voluntary, has no attendance zones, and has admissions policies based on individual merit. A host of personal preferences and societal forces beyond the administration's control determine student enrollment decisions. Therefore, racial percentages from the campuses of the University of North Carolina cannot accurately reflect the University's vigorous and successful Title VI compliance efforts.

Thus far in the administrative proceedings, the government has offered a parade of witnesses recommending ways to bolster racial balance that almost certainly would impair education opportunity for both blacks and whites. Many of these witnesses have no special knowledge of problems in North Carolina, and their recommendations are not consistent among themselves. A few examples from the government's shopping list are instructive.

One witness recommended open admissions at U.N.C.'s

most selective campuses for all black high school graduates. This would mean that *all* black high school graduates who applied for admission to U.N.C.-Chapel Hill or North Carolina State University would have to be accepted.

Another witness suggested that U.N.C.'s predominantly white campuses could achieve a fifteen percent (15%) representation of blacks on their faculties. That is notwithstanding the fact that, according to the witness' own statistics, only two percent (2%) of the Ph.D's in the country are black—and sixty percent (60%) of those have degrees in education, which means that less than one percent (1%) of the doctorate-holders in other fields are black. The witness' own data suggest that this goal could not be attained even if black Ph.D's were hired without regard to their qualifications.

Critical to OCR's desegregation designs is the elimination of what OCR contends is unnecessary program duplication. Yet, federal insistence on elimination of duplication interferes with educational decisions constitutionally reserved to University officials and may significantly impair the University's ability to provide quality education to persons of all races.

Furthermore, this technique of eliminating "unnecessary program duplication" could severely damage the education and research functions of this, or any other university, and impair its ability to attract new students and faculty. It disrupts existing bonds among disciplines, increases the likelihood of losing key faculty members, diverts resources from needed projects, and forces substantial numbers of students with widely differing levels of academic preparation to be grouped at the same instructional level. The ever-looming threat of further federally-imposed elimination of alleged duplication only adds to these problems.

To date, these desegregation hearings have cost U.N.C. about $1.5 million, two-thirds of which have gone for legal fees. Much of the remainder has been attributed to the time and efforts of the University staff in preparing for the case. This diversion of resources from their intended purposes cannot help but harm all programs, students, and institutions within the University system. No estimate is currently available on the cost to the federal government.

Office of the Assistant Secretary for Postsecondary Education

Mission.

Of all the areas in the new Department of Education, the

Office of the Assistant Secretary of Postsecondary Education has had the most legislative activity since the founding of the Department. Unfortunately, no one within any of the related bureaus has performed competently and the relationship of the postsecondary branch with Congress and the various higher education constituencies is at an all-time low.

The function of the postsecondary programs is to provide federal financial assistance for students and institutions of higher education. All of the programs contained in this administrative unit are authorized by the Higher Education Act, which has recently undergone a two-year process of reauthorization. Since this legislation is one of the largest and most expensive programs to be considered by the 96th Congress, it is safe to assume that the Administration should have had more than a passing interest in its reauthorization of higher education programs for five years. However, the Administration lost the opportunity to influence the new Higher Education bill. This development has not seemed to concern anyone in the Department from the Secretary on down, but it has not gone unnoticed by Members of Congress from both sides of the aisle.

Problems

Both the Secretary of Education and the Assistant Secretary for Postsecondary Education have not participated actively in any issues which have come up in the last six months. Those who have been sent to different Congressional meetings have been unable to speak for the Department. The Secretary has spent most of her time on the road making speeches and therefore has been unable to follow the day-to-day operations in the postsecondary area. No one from the office of the Assistant Secretary has adequately represented her opinions.

Without any leadership, the daily operations and legislative agenda of the department have collapsed. The staff of the Department seems to have no idea how the Congress works, and they appear to be under no pressure to make sure that the programs in their areas are working effectively. This lack of interest has grown worse under the new department.

Areas for change

The number one priority should be the appointment of an Assistant Secretary who understands the higher education legislation as well as the needs of higher education students. This person should have ready access to the Secretary and

should be able to speak for the Administration. He or she should also have some understanding of the way Congress works and should cultivate a much closer relationship with its members. With dynamic leadership, many other problems afflicting the bureau can be resolved.

Higher and Continuing Education

Mission

Programs contained in this account were created to complement the already sizeable federal student financial assistance programs. The higher and continuing education programs are particularly targeted on supplemental services to needy students at poor institutions. The federal budget in 1980 is $400 million, the bulk of which goes to special programs for the disadvantaged or special incentive grants for institutions which serve large numbers of low-income students.

Problems

In the past, this division has been used as much for political purposes as for anything else. The Title III Developing Institutions program has been used by the Carter Administration to punish political enemies and reward political friends. Black colleges have come to expect a substantial portion of the $110 million appropriations. Other institutional aid programs have in the last year received substantial increases from Carter, but previously have been held at level funding because of the low priority of funding for institutional aid programs compared to the student aid programs. The lack of a coordinated policy towards these higher education programs has led to a fragmented and haphazard "throw a little money at everything" approach to funding.

Bureau of Student Financial Assistance

Mission

The federal student financial aid programs authorized by the Higher Education Act are contained in this division. These programs, including both the grant and loan programs, cost more than $5 billion each year. Since 1978, the number of middle income students participating in the loan and grant programs has risen dramatically because of passage of the Middle Income Assistance Act of 1978. Of the more than 11 million higher education students in this country, at least

one-half use some form of federal assistance to help pay for their college education.

Problems

The student aid programs, which have run smoothly in the past, have had many problems in 1980, starting with the confusing signals given out by the Administration on how to implement a budget rescission request of $140 million in the Basic Educational Opportunity Grant Program, and culminating with unauthorized multiple changes in the allocation formulas for the campus-based aid programs. Chaos has reigned, and the student financial aid administrators say that this is the worse year they have ever had in terms of actually processing the requests of the new Department of Education. Many institutions have had to send out two and three different aid package notices to the students as new instructions were given by the Department. Part of the problem is that no one within the bureaucracy is empowered to speak for it or to make decisions. Thus, in a year when many important student financial aid decisions were being made both in the authorizing and appropriating processes, the Administration has had virtually no impact.

Serious data processing delays have been caused by lack of staff. Programs and services should be reviewed to ensure they are delivered on a timely basis. Currently, many of the Department's student aid publications are not printed or delivered until they are out of date. This is a waste of millions of dollars, and planning and management control could eliminate this problem.

5

THE DEPARTMENT OF ENERGY

Milton R. Copulos*

INTRODUCTION

On October 1, 1977, the Department of Energy was established. With its creation, a new epoch of federal intervention in the energy arena was opened. The sentiment for the creation of a single cabinet-level department with exclusive authority over federal energy programs arose largely out of a sense of frustration which had evolved from the inability of the federal government to deal with energy issues. While the 1973 embargo had elicited an immediate congressional response in the form of a complex set of price and allocation regulations and laws governing the production, distribution, and sale of crude oil and refined products, the results of this response proved less than satisfactory.

Initially, the price and allocation rules served to actually worsen the shortage by misallocating supplies. Once the supply situation improved, they created disincentives for domestic production of oil and gas, and encouraged imports. Ironically, their net impact has been to strengthen OPEC's position at the expense of the American consumer. Other federal programs have been characterized by a similar lack of efficacy.

The past several years have amounted to an experiment in federal control of the energy market—an experiment which has proved a dismal failure. The time has come to recognize that the only way the U.S. will be able to attain the energy

**Author's Note:* The preparation of this report was a collective enterprise involving many individuals. Sam Ballenger, Danny J. Boggs, Randy Davis, Gregg Evans, H. Peter Metzger, Raymond Momboisse, Marc Rowden, Robert Terrell, Charles Trabandt and Jan Benes Vlcek deserve particular mention. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

security so essential to the future of our children and grandchildren is through the free functioning of the marketplace. Any other course can only lead to a continuation and worsening of the periodic shortages and supply interruptions which have occurred in the past.

Restoring a free market in energy will not, however, prove to be an easy task. There has been a rapid proliferation of legislative and regulatory impediments to it over the last decade, and there have evolved special interests whose survival depends upon those statutes and regulations. There are the companies whose profits depend on regulatory advantage. There are the bureaucrats continually seeking to expand their influence and authority. Worst of all perhaps, the advocates of economic stagnation, who know that the one thing which will frustrate their goals is the majesty and power of the free market.

Although all of these groups will prove to be powerful adversaries, in the end a forceful and well thought out program to reverse current trends should prevail. Both within the Congress, and among the citizens of our nation, the need for a free market in energy has gained a growing following. Granted, it will take courage to mount this challenge to the entrenched and the politically influential; however, in undertaking it a new administration will be fulfilling the mandate of its election.

BASIC POLICY ASSUMPTIONS

The Present Policy Consensus

Some observers argued that the cause of the failure of federal energy policies was a lack of focus and central direction. It was their contention that the only solution for this problem was to establish a central authority for all federal energy programs in a single unit. This view carried with it the inherent policy assumption that it was both proper and desirable for the federal government to intervene in the energy market. It also assumed that the problems with the federal energy initiatives were not programmatic, but rather administrative. Finally, it envisioned a broad incursion of the federal government in the energy arena. The scope of this incursion is manifest in the agency's official description which states:

> . . . The Department of Energy (DOE) provides a framework for a comprehensive and balanced national energy plan through the coordination and administration of the energy functions of the federal government. The Department is responsible for the research, devel-

opment, and demonstration of energy technology; the marketing of Federal power; energy conservation; the nuclear weapons program; regulation of energy production and use; pricing and allocation; and a central energy data collection and analysis program. Of primary concern to the Department are the promotion of consumer interests, and the encouragement of competition in the energy industries, as well as the protection of the Nation's environment and the health and safety of its citizens . . . .

In addition to the policy assumptions inherent in the advocacy of the creation of the Department of Energy, others have manifest themselves in the direction the agency's policies have taken. One central assumption is that government regulation can, and should supplant the market in the energy area. Another is that conservation and alternative energy sources should be emphasized even if such emphasis occurs at the expense of more conventional energy forms. Finally, DOE policies carry the implicit assumption that in the future we will not be able to provide adequate supplies of energy to sustain current levels of economic growth or our current standard of living, and that we must therefore force people into less energy-intensive lifestyles.

A New Direction for Federal Energy Policy

In assessing what the policy assumptions and mission of the Department of Energy *should* be, we start from the basic position that when given two alternative solutions to a problem, one in the private sector, and one in the public sector, generally, the private sector solution will prove preferable. While there will obviously be some circumstances where the existence of significant externalities, or of some national defense consideration will mandate a public sector solution, these instances will be the exception rather than the rule.

In the area of the management of energy resources in particular, private sector solutions are to be preferred. In the years following the 1973 embargo, our nation has undergone an experiment in the public management of the energy market, and it has proven a dismal failure. In fact, an internal DOE memorandum concerning certain aspects of the regulation of refined products noted that the regulations were like a clamp inhibiting the movement of a part on a machine. No matter what adjustments are made to it, the fact remains that it should not be there in the first place.

At the heart of the matter is a far more optimistic view of the future than currently pervades policymaking circles within the

Administration's energy community. We simply reject the contention that ours must be the first generation to leave its successors in worse economic condition than our predecessors left us. We do not believe that all the future holds is an ever-increasing spiral of shortages and diminished lifestyle. Those who are proponents of this litany of doom ignore the mineral wealth our nation possesses: the creativity and industry of our people, and the strength of our economic system. We need only to harness these material and human resources and allow the free market to function to find a path out of our present dilemma.

To do this, of course, we must have an appropriate regulatory and statutory environment. To no small degree, our present problems are the product of the cumulative effects of overregulation. We therefore must carefully scrutinize existing regulations, wherever possible eliminating them, and be highly suspect of imposing new regulations in the future.

Given our basic orientation towards a diminished federal role in the energy market, it logically follows that we call into question the basic need for a cabinet-level department to perform those limited functions which would properly constitute the government's role in the energy market. We believe that all necessary federal programs could be administered under the aegis of other agencies, or under an independent agency of less than cabinet rank. Therefore, one of the most important tasks DOE could perform in promoting the development of adequate supplies of energy is to dismantle itself. Until this occurs, DOE will need some coherent statement of its mission. Its current mission statement was outlined earlier, and reflects the philosophy of the department as currently constituted. If its policies are re-oriented on the basis of a more conservative philosophy, a new statement will be required. We suggest the following:

> The Department of Energy will administer laws and programs relating to the production, conservation, distribution, and use of energy and fuels, and will develop and coordinate the policy of the federal government in those areas. The Department will also administer programs of energy research and development. In carrying out these functions, the Department will operate so as to allow the maximum opportunity for individual choice and decision making in both production and use of energy within the limits of statutory law. The ultimate goal of the Department will be to promote national security and the greatest economic efficiency in the use of energy, not to enforce any particular level of energy use or mix of energy sources.

As can be seen, our statement de-emphasizes the notion of

federal planning, and emphasizes economic efficiency instead of "consumer interests." Those changes in wording are more than a matter of phrasing, they are a reflection of the basic differences in our approach to energy questions. In the final analysis, we place our confidence in allowing the market to function unencumbered, so that the full weight of the creativity, industry, and initiative of our people can be brought to bear on this problem.

SUMMARY OF MAJOR DEFICIENCIES OF EXISTING POLICIES

While a comprehensive analysis of the deficiencies of the Department of Energy could easily fill a fairly long book, an overview of its major shortfalls is all that can be discussed within the context of this study. We feel obligated, however, to emphasize one point. The central problem is not found in any specific deficiency of the agency, but rather with the concept that such an agency is needed in the first place. This concept has its basis in the contention that the government can and should play a major if not dominant role in the management of the energy market, an assertion we flatly reject.

Given this point of view, it may be said that our basic position is that the major deficiency of the Department of Energy is found in the fact of its existence. As previously stated, it would then follow that the resolution of its major deficiency would lie in its dissolution. Absent that, however, there are numerous specific areas in which the agency is open to criticism.

For the sake of clarity, we have divided the Department's problem areas into two general categories. The first deals with the agency's structure in the most general sense. These problems stem from basic flaws in organizational relationships which exist within the Department. The second category will deal with more specific deficiencies, both in the nature of the DOE's activities, and in specific actions it has taken. The examples cited are aimed at highlighting the worst offenses, and should not be taken as representing anything more than a partial listing.

Organizational Deficiencies

From a theoretical standpoint, organizations should be designed to accommodate two objectives. First, an organization's structure should facilitate the flow of information within

the organization, thus reducing the uncertainty in decision making. Second, the structure should be such that organizational behavior across all parts of the organization is coordinated.

Experience in the energy "business" has shown repeatedly that information flows more readily within "communities" of individuals working on a common energy source, e.g., coal, oil and gas, electric power generation, etc. Call this a "fuels" approach to organization. Information about technological advances or commercial developments is easily communicated, assimilated, and *used for decision making* by persons knowledgeable about the common energy form. However, artificial barriers to information flow are created when these "communities" are broken into smaller units, each involved with a common functional problem, and then regrouped so that similar functional activities (covering all energy forms), are combined. Call this the "functional" approach. For example, the research and development responsibility for all energy forms—coal, oil and gas, etc.—could fall within one group. This structure hinders the flow of information among members of, for example, the "coal community," particularly if official communication flows only through one spokesperson-usually the director.

When the Carter Administration originally developed the DOE organization structure, the functional approach was chosen, apparently for two reasons. First, there was concern that a "fuels" approach at the Department of Interior (DOI) has resulted in bureaucratic "fiefdoms" that were difficult for senior management to influence. Secondly, in addition to avoiding a possible concentration of power within any "fuels" group, a functional approach was believed to provide greater control over the progress of development of any project from basic research through commercialization. This control would result from the requirement that no program would pass from, for example, the technology group to the commercializaton group without express senior management consent.

In practice, however, this approach has proven inefficient and stultifying to the progress of energy development. The functional approach is just as susceptible to problems of power concentration, albeit along functional lines. Moreover, the functional approach is counterproductive from the perspective of allocating resources among the various energy forms in a manner consistent with energy policy. The national energy strategy assigns priorities and resources to energy forms according to the role each is designed to play at various points in

the future. For each energy form, allocations are made for budget years in a manner that stimulates the desired pace of technological development and commercialization. Under the functional structure, however, budget allocations must be redistributed to the functional areas, cutting across the original "fuels" priority scheme. Consequently, there is difficulty assuring that the respective energy forms are receiving proper funding and resource increments. It is easy, for example, for research and development money, originally intended for one energy form, to be diverted to another project when all such projects are housed within the same functional area.

It is important to note that a "fuels" approach to DOE organization was considered also by the Ford Administration. Concern was expressed that a fuels approach would be aligned too closely with particular energy industries, and would create an uncoordinated collection of industry advocates within the department. This is, of course, possible. But, it can be avoided by placing special emphasis on the proper function of the "Policy" group, that being the development of a coordinated energy strategy with concomitant priorities determined and enforced among the particular "fuels" groups. Within each "fuels" area, consistent decison making and progress is facilitated best by maintaining the integrity of emphasis on that particular energy form. Strong advocates for each energy form should not be feared.

Particular Problems Deriving from DOE's Functional Approach

Several fundamental problems can be traced to the existing DOE functional approach to organization. Two illustrations are discussed next.

- The functional division of responsibility between Resource Applications and Fossil Energy is ambiguous, resulting in little coordination at the respective "fuels" levels, and bickering that delays progress of individual projects.

In general, Fossil Energy is responsible for technological development through the point where, presumably, commercial viability has been demonstrated. At this point, Resource Applications is responsible for commercial development of an industry for that particular application. There is little information flow, except through informal channels, among units working on common energy forms. This hinders the development of a comprehensive strategy for each energy form.

More importantly, this functional ambiguity has created a management problem that, if not resolved soon, will create confusion and delay in the development of a synfuels industry:

- The functional ambiguity between Resource Applications and Fossil Energy has resulted in "turf" battles over who will monitor the recipients of early synfuels feasibility study grants, loan guarantees, cooperative development agreements, etc.

Resource Applications, as a result of internal DOE politics, was made responsible for soliciting proposals for synfuels feasibility studies, cooperative agreements, etc. (under P.L. 96-126 and the subsequent DOE supplemental funding in July 1980). However, the function seems more properly assigned to the Fossil Energy area, since most involve evaluations of non-commercial processes. More distressingly,

- There is yet to be developed either (1) a coordinated development strategy for each emerging synfuel technology, i.e., a plan that traces from beginning to end all planning, permitting, siting, etc. activities required for commercial operations, or (2) a transition strategy to eventually transfer these projects to the Energy Security Corporation, and eventually the private sector.

While the lack of progress in these latter planning areas does not necessarily result from "functional" organization, such problems are hindering the development of a coordinated strategy for the synfuels industries.

"Policy Making" by the General Counsel

The Office of the General Counsel (GC) is responsible for the legal adequacy of DOE programs. However, primarily by virtue of long-standing personal relationships, the GC's office has assumed a policy role. Often, regardless of competent analysis supporting the position, if the GC does not like the policy implications, the GC will not concur. This frequently goes to the extreme of literary style in documents that are legally adequate, but perhaps editorially not his style. Frequently, the result is protracted negotiation with GC over matters they are unqualified to judge.

In general, this problem results from ambiguity in internal procedures regarding what "concurrence" by the GC really means. "Concurrence" should be forthcoming when a matter is judged legally sufficient, but should not pivot on GC's agreement with the policy implications. His views on the latter should be given equal weight with those of all concerned

program offices, but the GC should not be accorded a "veto" capacity by virtue of the need for his "concurrence."

The Office of Hearings and Appeals

The Office of Hearings and Appeals has become an enormously powerful one as a catchall for rectifying "evils" and errors committed elsewhere. As often as not, though, the results of its actions have been worse than the problem they were intended to cure. Originally, an office within the Economic Regulatory Administration, OHA has now been moved to the Secretarial level, and has taken on an existence separate and apart from ERA. It represents a classic example of a relentless expansion of bureaucratic power. It most recently demonstrated this fact with its decision to change the status of Alaskan oil under the entitlements program, in spite of the heavy penalty its decision imposed on consumers. It is a sign of just how arbitrary that decision was that the Secretary of Energy chose to overturn it within hours of its announcement.

What is revealing about this particular move by OHA is that it demonstrates the extent to which policymaking takes place there. OHA was always intended to be a sort of Appeals Court for the Economic Regulatory Administration. Instead, it has turned into a policymaking entity, responsible only to its director.

Contracting

One of the most serious deficiencies in the Department is found in the manner in which it manages its contractors. These persons are by far the largest category of employees, numbering some 130,000 as opposed to around 20,000 civil service positions. While many of the contract employees are at the weapons labs, power administrations, and similar captive organizations, many are not. For example, there is an individual who is currently paid over $40,000 per year to monitor hearings for the agency. The agency has also used contract employees to perform normal clerical functions. While the use of contract employees to help with an unexpected crunch might be appropriate, the use of contract clerical employees for routine matters is an inexcusable waste of taxpayer dollars.

There are many problems with the substantial use by DOE of contractors to perform basically professional and regulatory activities. For one thing, they have a strong incentive to produce advice that will mean continuing employment and

involvement for themselves, without even the semblance of control that exists over government employees. For another, in some circumstances, these contractors are in the position of judging themselves, as in a recent case where a company received a grant under the Alcohol Fuels program when it was itself involved in the evaluation of the applicants. In other cases, DOE has funded outside contractors for the specific purpose of lobbying DOE to adopt certain policies. In all these ways, the taxpayer's control over his own money is diluted, and given over to interested outside parties.

Another flagrant abuse of grants and contracts is found in the activities of the Solar Industry Research Institute. Intended to provide the cutting edge of research into the applications of solar energy, it has evolved into a conduit of funds for social activists and the advocacy of so-called appropriate technology. It also serves to fund numerous questionable activities overseas. For example, it recently gave a $50,000,000 grant to Saudi Arabia.

In general, the Department's contracting procedures and policies fail to protect the public interest. In spite of congressional rejection of various intervenor funding measures, the Department uses contracts to channel significant amounts of money to such groups. In spite of the public concern over government waste, the Department persists in funding countless programs of questionable efficacy. In spite of the mandate that contracts be subject to competitive bidding, all too frequently DOE contracts are not.

Strategic Petroleum Reserve

One of the monumental failures of the Department of Energy has been in its management of the Strategic Petroleum Reserve. While the original 500 million barrel target was doubled to one billion barrels by the Carter Administration, only about 93 million barrels have actually been stored to date. The program has been plagued by a variety of problems ranging from a lack of pumps to retrieve the oil in time of need, to fires caused by the mishandling of crude oil, to a fill rate wholly inadequate to meet its targets. Although the Administration recently moved to resume filling the reserve, pursuant to the requirements of the Energy Security Act, it now appears that even this token effort may be abandoned due to the loss of production in Iran and Iraq.

Patent Policy

One of the sticking points with U.S. industry has been the manner in which the Department's Office of the General Counsel has awarded rights on patents developed by the government. One observer suggested that it appeared that DOE would rather award the rights to a patent to a foreign firm than to a U.S. firm. It appears that this criticism is at least partly true and that there has been an anti-business and especially anti-energy company bias demonstrated in this area.

Non-Proliferation Policy

The non-proliferation policy our government currently has in effect has alienated many of our closest allies. Within the Department responsiblity for it falls within the purview of the Assistant Secretary for International Affairs. His office has persistently followed a path predestined to cause conflict with our allies. Its basic assumption seems to be that anyone who wishes to develop nuclear power reactors does so in hope of using them to provide materials to construct nuclear weapons. This, obviously is a patently false assumption. A Japanese official complained that our attitude seems to lump their government in the same category as Idi Amin's in terms of responsibility. The result of this attitude is that our nation has lost its previously dominant position in the international sales of nuclear technology, and as a corollary effect, has lost the control in proliferation activities which would accompany that dominant position in sales.

Nuclear Waste Policy

Another issue related to nuclear technology which has been a singular failure under the current policy environment at DOE has been the development of a nuclear waste repository. The technology for the construction of such a repository has been known for years, and yet the Department persists in its insistence on further study. The result of its failure to come up with a comprehensive nuclear waste management policy which moves forward at a rapid pace has been to jeopardize the very existence of the U.S. nuclear industry.

Price and Allocation Controls on Crude Oil and Refined Products

Among the most serious areas of deficiency within the

Department has been its attempt to regulate the production, sale, and distribution of refined products and crude oil. While the present controls expire in September of 1981, there is a significant possibility that they could be reimposed. Pressure for this sort of action would be especially strong should the cut off of supplies from Iran and Iraq persist, and the world price of oil escalates sharply.

The effect of the present price and allocation regulations has been clear: in times of shortage, they make the shortage worse, and in times of adequate supply, they tend to interfere with the normal development of market trends. This occurs at all levels of the market from the wellhead to the filling station. In 1979, for example, the price and allocation controls were largely responsible for turning a nominal five percent shortfall of supply into regional shortages of as much as 25 percent in some areas.

Coordination with Other Agencies

A major area of deficiency has been the inability of the Department of Energy to coordinate federal energy policies effectively with other departments. This has been especially evident in the areas of oil and gas leasing, and surface mining. These are not the sole examples of the intermural conflict which seems to plague the Department's relations with other agencies. EPA regulations conflict with its coal conversion goals, tax policies undermine the production of domestic oil, and so forth.

One basic cause of the Department's problems in this area is its poor liaison with the Congress. All too often, it fails to fully inform the Congress of the possible conflicts inherent in pending legislation. As a result, we find that at the same time coal conversion is a major goal of the Department, it failed to inform Congress that the imposition of the 1977 Surface Mining and Reclamation Act would make attainment of this goal difficult, if not impossible. While the production of domestic oil and natural gas are critical from both a strategic and economic standpoint, it failed to fully explain the effects on domestic production of the windfall profits tax. In the same vein, the Arctic Wildlife Range is known to be one of the most promising areas for oil and gas exploration available to us, yet they did little to enhance congressional awareness of this fact, while at the same time, the Department of the Interior was issuing press releases misinforming members on the issue.

The lack of coordination with other agencies has clearly demonstrated the failure of the Department in one of the major charges in its mandate: the coordination of federal energy policies. It may also, however, speak to the impossibility of performing such a function. The trouble may simply be that energy issues cut across so many areas that no single agency could properly address every concern which might arise.

Leadership in the Department

One of the most pressing problems of the Department has been the lack of leadership evidenced at the highest levels. DOE can only function effectively if it is given a clear direction and clear lines of authority. Instead, the Department has been given to constant jockeying for position, internecine warfare between divisions, and a lack of policy focus. The effect of these internal conflicts has been that instead of a single cohesive energy policy, the Department has been characterized by multiple policies, each promulgated by a division head, office director, or assistant secretary. The situation has been further exacerbated by the tension which has evolved between the career professionals in the bureaucracy, and the appointees who were placed by the Carter Administration. All too often, the advice of professionals who had the technical knowledge to make intelligent policy choices has been disregarded by appointees who preferred to follow the fashion of the moment. In addition to appointees ignoring the advice of the career professionals at DOE, there has been another factor removing careerists even further from the policy process. This is the tendency for policymaking to take place at the Domestic Council rather than at DOE. One effect of this situation is that in many instances, the central concern of decisions in the energy arena is some consideration other than energy. Energy policies have been used as a means of promoting social change, redistributing wealth, and funding social activism. As a result of the role of the Domestic Council, many energy issues which should be decided on their technical merits have been catapulted into the political arena. As might be expected, this has had a singularly demoralizing effect on the career professionals in the agency.

Conclusion

A number of broad areas of deficiency become evident from

our overview of the Department of Energy. They all, however, share a common attribute to varying degrees: they stem, at least in part, from deficiencies in the organization and management of the Department. It would appear, then, that a primary focus of any effort to improve Department policy must first focus on correcting the inherent conflicts and fuzzy lines of authority contained in the present structure. In order to accomplish such a reorganization, the Department must also be invested with a sense of direction and purpose, and that can only come from strong leadership at the highest levels. The fragmentation of authority and independent policymaking which currently are legion cannot continue if the Department is to function with even a modicum of efficiency. It is this task, then, which will occupy the immediate attention of any incoming administration.

SHORT-TERM PROBLEMS AND OPTIONS

In the initial 90 days, the first task will be the reorganization and staffing of the new agency. One major advantage the Secretary of Energy enjoys in undertaking this task is that there is a fairly broad authority contained in the law for internal restructuring. Before addressing the specifics of the reorganization, though, it is useful to take a look at the legal framework governing reorganization.

The Legal Framework

The authorities to conduct the various phases of our proposed reorganization and ultimate abolition of the Department are contained in existing statutes. The first phase would take place under discretion granted the Secretary by 42 U.S.C. §§ 7252 and 7253. His authority to make transfers within the budget of up to 5 percent is contained in 42 U.S.C. § 7269. The authority for the President to submit an Executive Reorganization is contained in 5 U.S.C. § 901 *et. seq.* Finally, the sunset provisions of the enabling legislation are contained in 42 U.S.C. §§ 7351 and 7352.

Reorganizational Proposal

What then should an incoming administration do *vis-a-vis* the Department of Energy? A first priority will obviously be to gain a firm hold on the reins of the Department. Fortunately, as noted, the Secretary has considerable discretion with regard

to internal restructuring, even without actually drafting a reorganization plan. Secretary Duncan, to some extent, reorganized the Department through the imposition of what amounted to an additional level of bureaucracy in the form of the Chief Financial Officer and the Special Assistant to the Secretary. The mode of organization, however, has proved cumbersome, and did not address the conflicts inherent in the pre-existing structure. Therefore, we would suggest a reduction in the number of persons at the top rather than an expansion. This can be initially accomplished through an internal reshuffling of responsibilities, and followed shortly afterwards with an actual reorganization plan. Therefore, immediately upon taking office, the incoming Secretary should make a series of reassignments as follows:

1. The responsibilities of the Assistant Secretary for the Environment will be divided among the Assistant Secretaries of Fossil Energy, Nuclear Energy, and Conservation and Solar Energy.

2. The responsibilities of the Assistant Secretary for Resource Application will be divided among the same three Assistants listed above.

3. The responsibility for the Strategic Petroleum Reserve and Naval Petroleum Reserves will be assigned to the Assistant Secretary for Fossil Energy.

4. The responsibility for the Office of Inertial Fusion, the Nuclear Materials Production Office, and all other nuclear-related programs will be assigned to the Assistant Secretary for Nuclear Energy.

5. The position of Chief Financial Officer will be left vacant, and all functions currently under his jurisdiction will fall under the authority of the Director of Administration.

6. The responsibilities for overseeing the Power Marketing Authorities will be transferred to the Director of Administration.

7. The positions of Deputy Under Secretary and Associate Under Secretary will be left vacant.

The aim of these moves is to concentrate all of the functions associated with a particular type of fuel under the jurisdiction of the Assistant Secretary responsible for it. Further, it is also aimed at eliminating or de-emphasizing those functions presently performed by the Department which are not properly its concern where possible, or at least preparing the way for a reorganization which will do so.

The next step will be to submit a reorganization plan to

Congress as provided by law. The reorganization plan would do a number of things. First, it would reduce the number of mandated Assistant Secretaries from eight to four. These would be: 1) the Assistant Secretary for Fossil Energy, 2) the Assistant Secretary for Nuclear Energy, 3) the Assistant Secretary for Conservation and Renewable Energy, and 4) the Assistant Secretary for Administration. The responsibility for maintaining a Strategic Petroleum Reserve would be transferred to the Department of the Interior. Under separate legislation, a program would be initiated to encourage private industry to participate in filling the reserve through a system of private purchases. These private purchases of crude oil would be stored in the reserve and the purchasers could draw them out in the event of an interruption, without fear of the imposition of some sort of economic penalty such as a windfall profits tax or similar measure. The establishment of such a program, however, would not be a requirement of the transfer.

The Naval Petroleum Reserves will be transferred to the Department of the Interior, and those functions of the Energy Information Agency which directly relate to the compilation of statistics on reserves or other aspects of energy stocks will be transferred to the Department of Commerce. The remaining functions (essentially modeling and futures capability) will be transferred to the Office of Policy and Evaluation under the Office of the Secretary. Separate legislation would be passed to abolish EIA.

Other legislation will be introduced to spin off the Power Marketing Authorities and sell their assets to the utilities serving their area. The responsibilities of the Economic Regulatory Administration under the Fuel Use Act will be transferred to the Assistant Secretary for Fossil Energy, and under separate legislation the ERA will be abolished upon expiration of the Price and Allocation Controls of September of 1981.

The Assistant Secretaries for Defense Programs, Environment, Resource Applications, and International Affairs will be eliminated. The Offices of International Security Affairs, Military Applications, and Safeguards and Security will be transferred to the Department of Defense.

The effect of these actions will be to complete the realignment of all functions according to type of fuel, except for those which are strictly administrative and fall within the jurisdiction of the Assistant Secretary for Administation. This would also create an organization through which information can flow

rapidly and easily within the specific communities of interest which need it.

In addition to the structural changes which should take place during this critical early period, there must also be a revitalization of the management structure. The Department can only function effectively if it has strong leadership to provide it with a central focus and direction. Towards this end, the roles of the top officials should be clearly spelled out.

The Secretary of Energy should function as the chief executive officer of the Department. His role should be to assist the President in the formulation of national energy policy and in the implementation of the President's policies through the functional arms of the Department. All policies of the Department should originate in the Secretary's office. He also should function as the primary spokesman for the Department before the Congress, as the President's primary liaison with that body.

The Deputy Secretary should function primarily as an assistant to the Secretary. His role should be one of support and counsel. Whenever the Secretary is unable to directly represent the Department before a legislative hearing, then his Deputy should represent him; however, such substitutions should be kept to a minimum. The Deputy Secretary should also act as the primary administrative officer for the offices of the secretariat. In this role, he will be responsible for initiating and administering the Department's sunset review upon taking office.

The Under Secretary should function as the chief operating officer of the Department with day to day responsibility for administering the organization. He will also act as liaison with the Department of State in order to assist in coordination of international responsibilities of the Department. His primary mission will be to implement the policies of the Secretary through the operating divisions of the Department in a fashion consistent with the agency's mission statement.

By the end of the first 90 days after the new administration has taken office, the changes outlined in this section should have been implemented. Should this occur, the Department will have been completely reorganized along the lines of fuel type, and should be firmly under the control of the new Secretary. At this point, his efforts can be focused on shaping national energy policy in a direction consistent with his mandate. This, of course, will lead him to the next phase of activity which concerns itself with the medium term problems.

MEDIUM TERM PROBLEMS AND OPTIONS

Among the medium term problems and tasks the new Secretary of Energy will have before him will be: the filling of the Strategic Petroleum Reserve, if it has not been transferred to the Department of the Interior; the expiration of federal price and allocation controls on petroleum and refined products in September of 1981; possible revisions to the Natural Gas Policy Act, the oversight of programs under the $20 billion allocated to the Energy Security Corporation; and the 1982 sunset review of the agency.

Of these tasks, the most important may appear to be the most innocuous: the Agency's sunset review. The Departmental Review requires a comprehensive analysis of all of its programs, including the justification for continuing their budget authority and alternative approaches where possible. This required review represents a unique opportunity to abolish or at a minimum radically restructure the Department. Unlike other cabinet-level agencies, the Department has not as yet developed a large, vocal constituency which would lobby for its continuation. Moreover, the one area with some semblance of a following—Research and Development—would likely be continued as it is the one for which there appears to be reasonable justification on the surface.

Given this situation, the preparation of the baseline data for the sunset review will be a task of critical importance. The preparation of this data, then, should receive the highest priority within the agency. This is why we recommend that the Deputy Secretary take on its administration as his major responsibility. Furthermore, there will be ancillary benefits to conducting such a review beyond providing a rationale for recommendations in 1982. It will also afford the Secretary the opportunity to determine which of the present programs are consistent with his mandate, and which are not, and therefore what areas should be subject to rescissions, or deletions from the next year's budget.

The review will also provide the Secretary with an opportunity to exert some control over the contracts let by the agency. As noted earlier, the Department has around 20,000 Civil Service employees, and 130,000 contract employees. While some of these persons are employed by captive organizations such as the Power Marketing Authorities and the national labs, many others are not. Contracting has been widely abused throughout the agency and has served all too often as a subsidy

for social activism. A review of these contracts will allow such abuses to be brought under control and eliminated.

If the Department continues to have authority over the Strategic Petroleum Reserve, then it should move forward with plans to induce industry to participate in filling it. As established earlier, this could be accomplished by allowing companies to purchase oil to be stored in the reserve. This could offset the current large outlays for purchasing crude, and thereby reduce the cost to the taxpayer.

A major accomplishment for the new administration could be a revision of the regulations under the Natural Gas Policy Act. This law stands as an example of the type of regulation which has caused so many problems for our nation. Much could be accomplished through amending it.

A major goal of the new Secretary should be to move forward with a comprehensive waste managment program for nuclear waste disposal. Any such plan should provide immediate action on Away From Reactor Storage (AFR) of spent fuel from operating power reactors, and move rapidly on the selection of a site for a demonstration of disposal technology.

With regard to the monies dispersed under the synthetic fuels program, the nominal responsibility will lie with the new Energy Security Corporation; however, the responsibility for assessing the technical merits of the various efforts will ultimately lie with DOE. It must be made clear by the Department that one of its primary goals will be to move the entire synthetic fuels program into the private sector as rapidly as possible, and that the Department will oppose any further expenditure of federal monies to subsidize such projects.

A final major responsibility of the new Secretary will be the preparation of a budget for Fiscal Year 1982. Assuming that the general categories remain more or less the same as for FY 81, then the budget might look as follows. It should be noted that the commercialization funds for coal-related programs will be largely administered by the Energy Security Corporation after 1980, and will, therefore, be outside the authority of the Department.

RECOMMENDED FY 82 BUDGET

In examining the budget of the Department of Energy, there are a number of ways in which savings can be realized without reducing real services. Among the most important of these is the use of contractors. DOE has approximately 12,000 consultants it uses on a regular basis to perform tasks which would

normally be performed by civil service employees. For example, a contractor is responsible for all of DOE filing. Other routine clerical services including answering correspondence and monitoring the Department's hearings are also often performed by outside contractors. The cost of using such services can often be twice as much as having them performed in-house. Of greater concern is the extent to which the use of such services is merely a vehicle to make it appear that personnel levels are lower than they really are.

Another area which could realize tremendous savings is the implementation of an alternative means of filling the Strategic Petroleum Reserve. At present, the federal government is purchasing the oil to be placed in storage. We suggest as an alternative that industry fill the reserve. Companies would make purchases, and be allowed to take an investment credit as an incentive. They would also be allowed to store refined product on site, and receive a similar break. The supplies could only be accessed in times of serious interruption, to be determined by some specific percentage loss. There would be protections to insure that the companies would not have their supplies appropriated, and that they would not have to bear a financial penalty for their prudence by being subjected to some form of severance tax. Homeowners who wished to store home heating oil would also be allowed to take the tax credit. The savings to the federal government by implementing this system would amount to $2.5 billion, and in all likelihood the reserve would be filled faster.

One area of the DOE budget which could readily be cut is its public information program. This has been one of the budget's fastest growing areas, and is one which is highly questionable. A recent draft of a report by the House Science and Technology Committee on the subject accused the Department of bias and misinformation in documents published by this program. Savings in this area could amount to as much as $150 million.

In the long run, much can be saved through reducing the pervasiveness of DOE's regulatory activities. For example, the price and allocation regulations are set to expire in September 1981, and if allowed to do so, can represent a savings of $11.4 million earmarked for fuels regulation, and at least $37 million in compliance.

Some areas of the budget might warrant additional expenditures. For example, nuclear programs for waste management, completion of the Portsmouth centrifuge, and the Breeder

Reactor might receive additional funds. The same might hold true for other areas of R&D. In other instances, such as conservation, funding levels might be maintained, but real increases realized through reduction in the reporting requirements which create such an onerous burden of administrative overhead.

The total amount of budget reductions would come to $2,904.2 million under our recommended expenditures. These will be offset partially by increases in some nuclear-related programs in the amount of $664 million for a net reduction of $2,276.2 million. These do not include possible reductions in some areas of research and development which were not considered due to a division of opinion among task force members concerning where and how much to cut. It is reasonable to assume, however, that the budget could be significantly cut, or redirected within these programs.

PERSONNEL MANAGEMENT

One of the most critical aspects of effectively managing the Department of Energy after a change in administration, should the new administration choose to reorient the agency's policies is the establishment of a proper rapport with existing career civil servants. Many members of the Department's staff are technically oriented and have tenure dating from the Atomic Energy Commission, Office of Coal Research, Bureau of Mines and so forth. These professionals are in a position to either assist or hamper a transition. Moreover, many of them are frustrated by the Carter administration's policies. It would therefore be possible to obtain their assistance in implementing the new programs. It should follow, then, that a major task of the new Secretary will be to win these people over. There are a number of ways in which this can be accomplished.

One of the easiest ways to gain support within the bureaucracy is to select certain persons who are already members for high visibility promotions into policy positions. Candidates for such action can be selected from recommendations of Members of Congress, or from people in industry, who are familiar with the agency. This would create immediate allies, and also develop a pool of manpower which is knowledgeable about the personalities and proclivities of the career professionals. It will also signal others who might be sympathetic to the policy goals of a new administration that cooperation would be rewarded.

A second method of gaining cooperation from career profes-

sionals is to make them aware of policy at the outset, so that they know what is expected of them. Many will make an honest attempt to implement the new policies if they are only given a chance and clear guidelines on how they are to be implemented. Towards this end, a compilation of changes in interpretations of key regulations, solicitors opinions, and the like should be prepared in advance. This will give incoming office directors and assistant secretaries a frame of reference to hold out to the professionals in the bureaucracy.

LONG-RANGE PROJECTIONS

Once the dismantling of the Department of Energy is completed, a major step will have been made towards eliminating the myriad, government-fostered impediments to energy production. However, as significant as this action may be, it will not signal the end of the pervasive influence of government in the energy market, and there will not be an end to the work of the new administration in the energy arena.

Among the issues which will face the incoming administration over the longer term will be the selection of the projects in the first phase of the Energy Security Corporation's activities. Congress has appropriated some $20 billion for these projects; the Department of Energy has the role of allocating about $6 billion of that amount. DOE is attempting to distribute all of these funds by the end of 1980, but the outstanding balance will obviously be sizeable. In the long run, the new administration must also be prepared to review the activities of the ESC when its first increment of funding is exhausted, with an eye towards their ultimate disposition.

The reform of federal lands management policy must have high priority for the longer term. There should be a focus on means of easing access, and moving towards a multiple-use policy. There will undoubtedly be strong opposition from environmental groups, but such a change is not only necessary for the development of the energy resources so essential to our national survival, but for developing many strategic minerals as well.

Other environmental laws and regulations which affect energy will also have to be reviewed. Of these, the most important may be the Clean Air Act, National Environmental Policy Act, and the Clean Water Act. These laws, of course, also affect other areas of the economy.

One major problem will be eliminating the government's

role in the commercialization of technology. This is a role which has been expanding, and which is a primary means of federal intervention in the energy market. While the role of the government in research and development has long been established, and certainly should continue in certain areas (i.e., the weapons labs, uranium enrichment programs, and other nuclear-related research), its role in commercialization is more recent. Although it would not be wise, or possible, to simply abandon projects well on their way to completion, the initiation of new projects should be avoided.

Generally it should not be the function of the federal government to involve itself in the commercialization of technologies. What the federal government can do is remove the regulatory and legislative impediments to the normal function of the market, and thereby ease the task of building commercial facilities. Instead, it should focus on the development of the technological base in advanced areas which will serve as the basis for industry efforts to develop commercial facilities. This could be accomplished through some agency similar to the Energy Research and Development Administration which preceded the Department of Energy.

One of the highest priorities of the new research agency should be development of a U.S.-designed breeder reactor. Our nation developed nuclear energy, and until the advent of the 70s, was the dominant force in the field. We find that we have now lost our lead to the French, British, Germans, and Japanese. Even more disturbing is the move by the Soviet Union into the nuclear export market. From the standpoint of both non-proliferation and our balance of trade, the revival of our domestic nuclear industry is essential.

The regulatory process for energy-related projects should be revised so that regulation serves the interest of the nation rather than the narrow interests of some vocal minority. It is the purpose of regulation to protect the public health and safety, not to implement social change, or a redistribution of income. The licensing process should not merely provide a means for intervenors to raise one specious issue after another to delay the construction of critical energy facilities until they are abandoned in frustration.

In the same vein, we must remove the barriers to capital formation in the energy market which serve to further hinder the attainment of a secure domestically based energy supply. This is best accomplished through the tax code, removing disincentives such as the windfall profits tax on newly discovered

oil, and providing incentives, such as exemptions of savings account interest from income taxation, and a re-institution of the depletion allowance.

We must facilitate the wider use of coal through a rational federal leasing policy, and through thoughtful environmental standards. Our nation has the capability to become the world's principal supplier of this fuel, but in order to do so we must be able to transport it. It should, therefore, be a goal of the new administration to foster the construction of adequate port facilities, and to open the way for investment in upgrading our rail system and in the construction of slurry pipelines.

A final task for the new administration will be found in the determination of the nature and placement of emergency preparedness functions. There can be no doubt that the Congress will want any President to have the power to deal with a severe supply interruption. While a strong case can be made to support the contention that in times of modest shortfalls, say up to 10 percent, government's attempts to alleviate problems tend to worsen them; in times of severe shortages, of say 20 percent or more, it is clear that some sort of intervention will be required. Obviously, the real solution is to stimulate domestic production so that the possibility of a supply interruption does not exist. Until such time, though, some agency, or agencies must retain the authority to step in and manage a crisis.

In summary, the basic thrust of the long-term policies of the new administration should be to reduce federal involvement in the direct production and distribution of energy supplies, and in the commercialization of technologies. It should move rapidly to reduce the burdens of overregulation, and to develop policies which allow the free functioning of the market. It should work to encourage the development of secure domestically based resources, including minerals lying on federal lands, and should help to restore the U.S. to a dominant position in the nuclear industry. Taking these steps will insure that our nation can approach the coming decades in the knowledge that adequate supplies of energy will be available to continue to grow and develop as a nation.

EPILOGUE:

REVIVING THE NUCLEAR OPTION

Some twenty-five years after President Eisenhower launched this country's Atoms for Peace initiative, the U.S. nuclear

power program is a study in stark contrasts—on the one hand, major accomplishments; on the other, the prospect of atrophy, if not extinction.

Where We Stand Today

A sober look at national accomplishments since 1954 shows progress which, by any fair reckoning, has been remarkable. A wholly new source of electrical energy has been developed and commercialized—the only such new source in the past fifty years—and today plays a vital role in the country's economy and well-being. At the year's start, there were over 70 operating nuclear power plants in the U.S. with a generating capacity exceeding 50,000 megawatts of electricity. These nuclear units—whose capacity is equal to the nation's entire electrical generating capacity at the end of World War II—produced about 12 percent of the total U.S. electrical output in 1979. In several regions of the country, the nuclear percentage was double the national average; in the Chicago area, nuclear units provided over one-half of the electrical generating capacity. Moreover, in an era of soaring energy costs, this electricity from the atom was appreciably cheaper than that produced by either oil or coal.

The contribution that can be made by nuclear power projects now underway is even more impressive. As of July 1980, an additional 87 large (1000—plus MWE) nuclear units were under construction, and more than 20 such facilities were in the preconstruction, licensing review stage. In fact, of all the electrical generating capacity which is *now* under construction or on order, nuclear units account for substantially more megawatts than coal. As to the industrial significance of those numbers, if one tallies only the nuclear plants which are now under construction, nuclear power's contribution to the nation's electrical generating capacity will *double* by 1985 and nearly *triple* by the end of the decade, as these plants go into operation. By 1990, nuclear plants could be producing up to 25 percent of the nation's electrical generating needs.

Using another sensitivity index, the facts are equally compelling. Nuclear generation of electricity in 1979 saved consumption of the equivalent of 1.92 million barrels of oil. Importing that much oil at the current OPEC prices would have added more the $21.25 billion to the U.S. trade deficit. To look ahead ten years, the nuclear plants now in operation, under construction and on order, can provide the country with the energy equivalent of more then 3.7 million barrels of oil a day.

But these statistics do not capture another reality. Paradoxically, as energy security concerns mount for the United States and as imported oil prices maintain their explosive growth, the American nuclear program is in deep trouble. Absent far-reaching political and regulatory reform initiative, the U.S. program—historically, the world's pioneer and technological leader—is in peril of atrophy and ultimate extinction, with grave consequences for the country's economy and security for the balance of this century.

Other figures lend substance to this prospect. Today, it would take a utility up to fourteen years to bring a nuclear power plant from the stage of license application to that of commercial operation—more than *double* the time required a decade ago. This licensing process is enormously costly, unnecessarily duplicative and dangerously unpredictable in its outcome for a utility. Industry confidence—the essential ingredient for an orderly expansion of nuclear power—has been gravely undermined. There has been a famine of domestic nuclear plant orders for the past three years and no resumption of significant utility orders is expected before 1983-84. By way of contrast: in 1973, a record 41 nuclear power plant units were ordered by domestic utilities; in 1975 through mid-year 1980, twelve units were ordered and 45 were cancelled.

Coupled with this, commercial reprocessing—essential to the future of the breeder reactor and to sound waste management planning—has been barred by the federal government and breeder commercialization delayed for an indefinite period. This is the result of Carter Administration policies designed to curb plutonium use by others in the international community and to advance that aim by a policy of "self-denial" applied to the American nuclear program. The "self-denial" has been near-terminally effective on the U.S. program; other nations, however, have refused to follow Washington's lead and have maintained their commitment to reprocessing and breeder development.

Official projections for nuclear power's future in the U.S. reflect its dramatic decline. The 1,000 nuclear plants which 1970 planners believed would be in operation by the year 2000, while plainly optimistic, have now fallen to a mid-range figure of 250 to 300. Each new projection lowers that prospective number. Ironically, as the need for nuclear energy mounts, its path has become more difficult.

How has this come about? While reduced demand for electricity has been a factor, there are other, compelling, reasons for the present state of the nuclear option in the United States. The addition of new nuclear capacity (or the determination not to cancel an existing nuclear project) begins with a decision by a utility; and, from a utility standpoint, nuclear power projects (though needed and vigorously supported in concept) carry an unacceptable level of financial and planning risk. The utility faces a highly unstable and unpredictable regulatory landscape: a chaotic licensing process at the federal and state levels, with an absence of stable requirements, enormous delays, cost escalation and decisional unpredictability; regulatory uncertainty about the siting of nuclear plants (the accident at Three Mile Island has generated demands for even greater licensing conservatism); a governmental failure to put in place coherent national policies on spent fuel reprocessing and waste management; and concerns in the financial community spawned by all of these factors. Equally disquieting has been the lack of clear and consistent policies at the political level respecting the need for, the role and the future of the nuclear option. At best, the Carter Administration has given ambivalent support to the current generation of light-water reactors (calling them the energy option of "last resort") and has actively opposed reprocessing and forward movement on breeder development—thus, throwing into doubt nuclear's long-term future.

These factors have undermined not only industry confidence, but have badly fractured the previous public and political consensus on nuclear power and its future.

What Needs To Be Done?

There are three basic needs for the revival, if not the survival, of the nuclear option in the United States:

1. The completion and timely licensing for safe operation of the 110 nuclear power plants which have been authorized for construction or are on order;
2. A licensing structure which will permit utilities to plan for new nuclear capacity and realize its operation within a drastically shortened and predictable licensing process; and
3. Timely and orderly completion of the nuclear fuel cycle—specifically, programs to move forward with reprocessing and nuclear waste management—and a

firm commitment to breeder development and facility demonstration.

These can be realized only within the framework of a clearly defined national policy on nuclear energy and a regulatory structure shaped and implemented in the light of that policy.

Defining National Policy

National policy with respect to the development and use of nuclear energy was charted over 25 years ago in the Atomic Energy Act of 1954. Though suited to a developing technology and its control, that Act's policy judgments and implementing regulatory structure are fairly remote from nuclear power's present status and the national needs it is now called upon to serve. The lack of a current political judgment has made licensing hearings the forum for public controversy on whether additional nuclear plants are in the public interest. This distorts both the political and the licensing processes. The President and the Congress must decide whether expansion of nuclear power serves the national interest; the regulators must act within the confines of that judgment.

What is needed is a clear and persuasive articulation of the country's need for nuclear energy by the President and a restatement of national policy, in legislative form, by the Congress. These political judgments will require a balancing of energy, economic, national security and social considerations. If the judgments are to be affirmative, however, they can only be made within the context of a justifiable sense of confidence in the safety of nuclear energy. The basis for this exists: from a technological as well as a social standpoint, the facts warrant the judgment that nuclear power presents an acceptable level of risk. Nuclear energy is the technology on which we have expended the most time, talent, and resources to assure safety; and the safety regime for nuclear power plants is the most elaborate, conservative and pervasive protective apparatus that we have for an industrial undertaking. Without discounting the operator training and other deficiencies underlying the accident at Three Mile Island—deficiencies being addressed by industry and government—the defense-in-depth approach to nuclear safety worked there; the accident's consequences were contained and there were no deaths or even detectable injuries to the public.

We cannot have zero risk. We know, however, from two decades of remarkably safe nuclear power plant operation in

the U.S. and elsewhere, that nuclear reactors can be operated with acceptably low levels of public risk—health and safety hazards which compare favorably to those of alternative fuels and to the risks posed by inadequate energy supplies.

The foregoing underscores a vital dimension for the new political judgment—the need for energy perspective. We cannot continue to treat nuclear issues and decisions on them as something isolatable from broader energy questions and judgments. *The public needs to be informed by its political leaders—more convincingly than has been the case to date—that charting nuclear's future requires a recognition of the country's dilemma and of the need to develop, as rapidly as possible, energy sources which are within our own control.* Part of that is a clear understanding of the consequences of a national energy mix without a strong nuclear component. No energy source is risk-free; the risks of nuclear energy must be weighed both against its benefits, and also against the risks and benefits of alternative energy choices and the cost to our well-being and security if we forego an adequate supply of energy.

Reforming The Licensing Process

There is virtual unanimity that the present licensing process is unworkable. This is not surprising, since it is unrealistic to expect that a law enacted in 1954 to deal with a developmental technology would provide a sound basis for licensing nuclear power plants in the 1980s. The system worked reasonably well when there were few license applications and the focus of the federal regulators was on nuclear safety matters. However, the past ten years has seen both a vast expansion of license applications and progressive dilution of the safety preoccupation of the federal regulatory agency (now the Nuclear Regulatory Commission) by the addition of other regulatory responsibilities: pre-licensing antitrust review; the panorama of social issues mandated by NEPA, as construed by court decisions; and, more recently, extensive nuclear export functions. These collateral responsibilities divert time, attention and resources from regulation to assure nuclear safety. In too many instances, moreover, they duplicate reviews performed by state or other federal agencies, making the licensing process even more cumbersome and unpredictable for utility applicants—and more costly for their ratepayers.

The needed reforms are a renewed safety focus for the Nuclear Regulatory Commission within a more rational and

efficient regulatory structure. The NRC mandate should be confined by legislation to nuclear safety and domestic safeguards and the agency should be divested of unrelated functions. To be specific:

- NRC should be relieved of nuclear export responsiblities. These functions can be performed, and more competently so, by an Executive Branch agency such as the State Department.
- NRC should be relieved of responsibility for non-radiological environmental decision-making. Its current NEPA role overlaps approval functions not performed (or which could be) by the states. In particular, NRC should not duplicate the need-for-power decisions universally made by state public service commissions.
- NRC should be relieved of its present antitrust review responsibilities. These functions can be transferred to an agency such as the Federal Energy Regulatory Commission.

Moreover, the agency's statutory mandate should reflect that licensing judgments involve a mix of factors. As in all other areas of our lives, cost-benefit trade-offs play a proper role in nuclear decisionmaking and should be specifically sanctioned by law. Cost-benefit determinations should be made systematically and openly, with the basis for the resulting choices made part of the public record.

Beyond the foregoing, we must develop a licensing structure which is appropriate to the mission of the agency and to national needs. For nearly a decade now, there has been growing consensus among nuclear supporters and critics alike that the twin concepts of design standardization and early site determination would promote sounder licensing decisions, better serve the planning needs of the regulated industry and advance basic objectives of the public-at-large. The new licensing structure should encourage, if not require, the use of standardized facility designs, and make provisions for advance approval of suitable power reactor sites. We should replace the current two-stage licensing approval with a combined authorization—given prior to construction start—for utility use of a reactor of standard design on a pre-approved site. The reformed licensing process would allow far earlier public participation than at present, within a more informal (i.e., non-courtroom) format.

Thus, when a utility arrived at the point of determining its next addition of generating capacity, (potentially, a multi-

billion dollar commitment), it could do so with the confidence that the regulatory process had already approved the safety, environmental and other requisites of both the site and the design the utility had chosen. The public, moreover, would have already participated in that approval process, doing so at a point in time which made its contribution to decision making most effective and least disruptive, i.e., well before the utility had made vast financial commitments to a particular site and design.

Such a licensing process could substantially reduce the present reactor licensing cycle with the attendant cost-savings, and enhanced plant safety and reliability as well. It would also allow utilities to make, and the public to benefit from, fuel choices based on technical and economic merit rather than the course of least regulatory resistance.

Waste Management and Reprocessing—Closing the Back-End of the Nuclear Fuel Cycle

A further problem still to be effectively addressed is waste management, where policy setting and programmatic implementation have been mired in governmental indecision. Delays in establishing a national program for radioactive waste disposal—with clear goals, meaningful schedules and necessary resources—have created uncertainties in the public and political mind about the technical capability for discharging this task. The best scientific advice, however, is that this is an undertaking well within our technological capabilities. National legislation is needed to put a program in place for regional Away-From-Reactor storage facilities and to set a timetable for selection and completion of geological repositories for permanent waste storage.

An important step in this process will be a determination on reprocessing of spent reactor fuel. While the Carter Administration vetoed commercial reprocessing in this country on the grounds of proliferation concerns, Western Europe and Japan are proceeding to implement that course as an essential element of their national fuel cycle programs. Reprocessing will be necessary in our country as well—for a sound domestic waste management program and for the development and commercialization of the breeder, the future of the nuclear option and an energy source which would free us from dependence on others virtually indefinitely. The absence of

programmatic decisions on these matters is depriving us of a vital energy option, undermining the nation's historic leadership in nuclear technology development and putting us at odds with our principal allies and trading partners in the world.

6

THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

David A. Winston*

OFFICE OF THE SECRETARY

According to the *U.S. Government Manual*, the Office of the Secretary of Health and Human Services has a three-fold responsibility: to advise the President, carry out programs, and advise the Congress and the taxpayers about the validity and disposition of tax allocations.

HHS is a Joseph's coat department of many programmatic colors. Without giving any weights to importance, the Department is an insurer of health (Medicare and Medicaid) and income (Social Security for the aged, and welfare for the poor), a limited provider of health services (Public Health Service hospitals and clinics, Indian health clinics, and community health clinics), and environmental watchdog over the purity of the nation's processed foods and drugs, and the nation's major health science researcher (62 percent).

The clear mission of the Office of the Secretary is to provide the leadership for the Department and to serve as the key access to the Congress, the media, state and local government, and the public. In spite of the desire by both recent Secretaries under the Carter Administration to be strong executives, there remain serious administrative problems with the Office of the Secretary.

**Author's Note:* The preparation of this report was a collective effort involving many individuals. Dwight "Speed" Geduldig, Joe Jenkes, Don Moran, Harvey Pies and Jack Svahn deserve particular mention. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

Principal Deficiencies of Existing Policies

Even though the Department admits that at least $500 million is lost annually through fraud, waste and abuse, it has been forced, through the budget process, to further admit that it cannot plug this drain.

As much as any other agency, HHS has heavily relied on outside consultants for two reasons: (1) to get a "job" done despite purported lack of staff, and (2) to lend credibility to a desired result masked by the mantle of objectivity.

The agency has sought to achieve "savings" as health care costs escalate by creating a labyrinth of mechanisms to restrict payments to providers for health services mandated by congressional programs. Instead of providing incentives for change in health care delivery mechanisms, HHS in effect has attempted to "punish" the system for perceived inadequacies or surpluses.

HHS has pursued the policy of national health insurance despite ample evidence that the system is not prepared for the workload, nor are funds available to pay for it. Only current economic trends have muted the demand, even though a number of surveys show that physician availability is no longer a public concern.

Since 1976, HHS has dropped the goal the government-subsidized physicians transit into the private sector after completing their obligation for medical training. This mutation occurred with neither congressional direction, nor consultation with affected providers who approved the original policy.

Welfare reforms in the guise of guaranteed annual income schemes have lowered the profile of this controversial approach since the release of surveys of two disparate populations that showed that total care of the poor only makes them more helpless and contributes to the disintegration of the family unit rather than cements it. Without the guaranteed income vehicle, departmental proponents of federalizing welfare must seek other ploys to further their cause.

Short-term Options

To reduce the proliferation of questionable health care delivery, there should be created within the Office of the Secretary a unit to screen all *new* surgical procedures in the light of availability of alternatives. At present, nobody performs this funcion. New procedures are phased in on a multiplicity of performance criteria, not on the basis of viability or balance of alternatives. In the medium-term, all medical

procedures should be re-evaluated in the light of new procedures and standard practice. This mechanism would not deny the right to perform disputed procedures, only announce that Medicare and Medicaid and other payment mechanisms would not pay for them.

At the same time, a task force should be set up to review data on effectiveness of treatment modes and improve capacity to evaluate controversy of unnecessary medical procedures. Better data results will delineate new standards.

Most of the Executive Orders do not call for any early action, because they are peripheral, but one bears mention.

The Office of Civil Rights is currently considering comprehensive, far-reaching, extremely powerful new regulations for the enforcement of non-discrimination in the provision of health services funded in whole or in part with federal monies. These proposed regulations go well beyond any intent of Congress and any reasonable notion about civil rights. They are, in fact, income redistribution programs disguised as civil rights enforcement. They reflect the latest, most extreme trend in the state of the art of civil rights enforcement: they imply that someone has suffered discrimination if his economic status is lower than some segment of the community where he lives.

These regulations must be rejected. Nevertheless, the HHS policy on civil rights enforcement must be revised in order to implement the authentic intent of Congress, that is to say, the federal government must be color-blind and gender-blind. A strict policy of non-discrimination and equal treatment under the law should be promulgated and enforced. For the purposes of HHS enforcement of civil rights, the traditional legal standard of individual "intent to discriminate" must be the standard. Reverse discrimination, consideration of demographics, and socioeconomic engineering projects disguised as constitutional rights are repudiations of a policy of "equality under the law."

The Schweiker Amendment, which is now law (42 USC 300(a) to 307(e)) and which prohibits discrimination at medical schools on the basis of views on abortion, must be enforced. Pursuant to that end: All medical schools should be required to state on their application forms for hiring and admissions that they do not discriminate against anyone because of his or her views on abortion. The Secretary should require a follow-up study of medical school records to ensure that the full intent of

Congress on the policy of the Schweiker Amendment is carried out.

The Office of Consumer Affairs should be kept, if for no other reason that to allay congressional efforts to create a department.

Based upon the recent CBO report on federal credit activities, much more attention should be paid to the *Federal Financing Bank.* An interdepartmental advisory committee to oversee the FFB is advisable.

The new *Assistant Secretary of Public Affairs should be given authority over all* of HHS media efforts, a legitimately cost-saving measure that can be linked to:

- Beefing up the Inspector General's office to expose current fraud and waste within HHS, and providing a programmatic vehicle for the new Secretary to enunciate new policy directions.
- Freezing all consultant contracts while a review of each in terms of efficacy to the programs is evaluated.

A female leader of a major consumer group should be appointed to head the *Office of Consumer Affairs* and redefine the consumer agenda for the 1980s.

The *Office of Legislative Affairs* should be realigned with instructions to drastically improve relations with Congress, and clarify the policies of the department so that positions are uniformly known and resources identified.

Medium-Term

- The Undersecretary, should ensure that regional directors are welded into a cohesive group that coherently speaks for the administration.
- The medical ethics advisory commission should be reshaped. This reshaping should be the occasion for the public repudiaton of the Democrats' drift away from the ethical common sense of the American people.
- Statutory requirements should be examined for various bureaus and units which could be amalgamated or dropped administratively.

Long-term Opportunities

HHS must foster legislation and an administration that fully implements a competitive approach in health care delivery. Its posture ought to be put in terms of minimizing its role as a government entity, reducing its regulation, opposing legisla-

tion that would expand its role, and instead devising statutes that would enable and at least enhance the private sector's innovative approaches—a "last resort" philosophy in program enactment.

OFFICE OF HUMAN DEVELOPMENT SERVICES

Basic Policy Assumptions

The essential mission of the Office of Human Development Services is the administration of grant programs aimed at key social services constituencies—the poor, aged, Native Americans, and children. Taken together, the programs administered within OHDS comprise the majority of federal financial support for "social work." Due to this emphasis, OHDS presents a significant challenge for a conservative administration. First and foremost, most of the consitutencies to which OHDS programs are aimed, with the notable exception of the aged, are not, *per se*, conservative constituencies. In certain instances, faithful execution of the law will run heavily against the conservative grain. Moreover, the great majority of nationally-recognized experts in dealing with social services to these contituencies have long demonstrated antipathy to conservative approaches to social welfare problems. This will make OHDS very difficult to staff with persons recognized by their non-governmental counterparts to be quality appointments; it also ensures continued close scrutiny of those program operations in a transition to a conservative administration.

Nevertheless, the original intent behind social services legislation—to promote self-sufficiency in the recipient population—is not contrary to conservative principles. There is the potential to effectively administer the law without offending key conservative constituencies.

Summary of Deficiencies of Existing Policies

The major problem facing a conservative administration in confronting the Office of Human Development Services is that OHDS has effectively showered the benefits on an ever-wider range of constituencies and special interest groups. The natural desire of a conservative administration to streamline operations and hold down costs will inevitably produce a head-on confrontation between the Administration and the "public interest" lobbies (and their growing cadre of litigants).

Nevertheless, the degree of waste, duplication and confusion in these programs is so appalling that a conservative administration cannot fail to come to grips with the task of making some sense out of these programs.

Duplications

The major problem in social services efforts in general is that overlap and duplication are *unavoidable* when programs that target wide ranges of services to a specific constituency (e.g., WIN, Older Americans Act) are administered side-by-side with programs that provide limited sevices to the explored universe of constituencies (e.g., child welfare services). Efforts to organize specific activities, such as job training, along functional lines soon confront the criticism that generalized job training programs for everyone fail to deal with the "special problems" of a particular group. In the Congress, this state of affairs is remedied by allowing the constituency's target program to take on the specialized service as well, thereby making matters worse.

OHDS is a laboratory in which can be seen the end product of this evolutionary path. Within OHDS, for example, "employment and training services" are provided via the Older American Act to seniors, via WIN to welfare recipients, via Title XX to low-income families generally, and via the Indian programs to Indians not on the reservations. Meanwhile, over at the Labor Department, CETA provides job training and employment services to *all* of these groups, the Employment Service provides counseling and placement services to the general public, via Green Thumb to senior citizens, etc. Not to be outdone, the newly-created Department of Education provides vocational rehabilitation and training services to the handicapped (who otherwise fall within the purview of OHDS/ADD), and the Department of Agriculture administers the Youth Conservation Corps program.

Another area in which massive duplications are rapidly developing is in transportation services, particularly in rural areas. Under the Carter Administration's Rural Transportation Initiative, high priority has been given to "enhancing" services to residents of rural areas and small towns—particularly for those groups, such as the aged, the economically disadvantaged, and the physically handicapped, which are the main constituencies of OHDS programs.

Legislative Agenda

A second major problem area for a conservative administration will be the problem of legislative reauthorizations. For sunset laws, designed to ensure that the merits of programs are reviewed at least triennially, have instead become vehicles whereby programs invariably are considerably expanded every three or four years. Several key reauthorizations, notably the Older Americans Act, will be up in the Congress very quickly in 1981. Unless the Administration is prepared with alternative legislative proposals, its opponents in Congress would force the Administration into a highly negative posture very quickly.

Pending Controversies

Reorganization

The Office of Human Development Services has just gone through a major reorganization, the dust from which will not have settled by the time a new Administration takes office. The basic thrust of this reauthorization was to make functional entities more constituency-specific. The result will be that internal cohesion will still be non-existent when a new Administration takes office.

A second aspect of this reorganization is that, to a certain extent, it makes it difficult for a new administration to reorganize again after a short time, should it desire to do so. The resistance of career personnel to constant turf upheavals could produce serious barriers to the ability of a new team to smoothly make the place over in a more conservative image.

Day Care Centers

Last year, HEW published proposed regulations for Federal Interagency Day Care Centers Requirements. Per their usual zeal, the regulations were so stringent that they would have put half the existing day care centers that are recipients of some federal funds out of business, or substantially raised their costs of doing business. OHDS is expected to promulgate compromise regulations that, while buying off many of the objectors, will nevertheless produce controversies. If given a second 90-day comment period, these proposed regulations would not become final until around the time of inauguration.

Child Welfare Amendments

With the passage of H.R. 3434, the Congress mandated a

major shift away from a reliance on foster placements in out-of-the-home situations to a promotion of either reconciliation or adoption. Such sweeping changes in the ways in which 50 large state agencies do business are inevitably chaotic, necessitating a considerable expenditure of time at the federal level in revising grant procedures, interpreting new legislative language, etc.

Advocacy

The furor over intervenor funding at the FTC is nothing compared to the amount of federal dollars that go to "public interest law firms" that represent constituents of OHDS programs, and that are subsequently used to sue the federal government for ever-more-literal interpretations of standing social welfare legislation. In a conservative administration, every effort to streamline programs or control costs will generate an even greater litigious response unless federal money is denied to these political lobbies.

The First Year's Agenda

Unless guided by a general rationale for administering and seeking legislative changes in the mandate of the Office of Human Development Services, a conservative administration will find itself unable to cope with the tendency of programs of this type to devolve into factional welfare, inevitably at the expense of budget economies.

While a number of approaches are consistent with conservative policies generally, the "least cost" path would probably embody the following principles:

Any new initiative should consist of approaches outside of the traditional "social work" framework. For example, the problems of senior citizens, to the extent they are economic, can be addressed through more equitable estate tax policy, et al., rather than through new OHDS programs. Hence, across the board a policy of "zero real growth" for OHDS programs seems a *minimum* goal.

While broad efforts should be made to rationalize the existing structure, special care should be taken not to give the appearance of confronting head-on programs earmarked for conservative constituencies, e.g., the aged.

In seeking "coordination" of conflicting and duplicative program requirements, no amount of Washington-level treaty-making between administrative entities can help matters if

conflicting delivery structures exist on the ground. Tossing in a load of coordination requirements without changing local delivery patterns either through regulatory changes or legislative restructuring will simply pad the *Federal Register.*

In general, the problems are with the legislative mandate to provide every conceivable service to a wide range of Democratic constituencies, rather than simply being due to bureaucratic ineptitude and intransigence. The best hope of a conservative administration is to pursue actively legislative changes and appropriations restraint, while showing a willingness to be faithful (albeit canny) executors of the legislative outcome.

One caution appears necessary. Many of the current executors of these policies, particularly within the ACYF, carry a strong "new class" bias; they could be characterized as anti-family, in particular. It may not be possible to adopt the "benign neglect" approach with the programs spawned by the social change partisans. Hence, a strategy for dealing with OHDS will have to include a policy to minimize damage from the "new class" element.

Short-term Options—Regulations and Executive Orders

The Child Welfare Amendments regulations should be carefully reviewed. The substance of these amendments is to allow states to continue to make payments to adopting families in certain instances after adoption in order to facilitate adoption in lieu of foster placement. If such a practice results in a net reduction in outlays below the cost of foster care, it is a good idea. This outcome, however, is hardly foregone. Special care should be taken to ensure that eligibility requirements for various types of post-adoption assistance are not excessive, and that formulas for the computation of payment amounts are not overly generous.

If the Interagency Day Care Regulations are not yet final, they should be pulled pending further review.

A thorough reevaluation of the Carter Administration's Rural Transportation Initiative is called for, with an eye to revamping it to force elimination of duplication in transport facilities between OHDS programs—and among programs of other agencies.

The emphasis for Title XX should be on actual delivery of services, not on training for social sciences professionals that

does not immediately benefit the poor. The Secretary should arrange for an immediate consultation with the states to explore ways to correct this situation.

Family involvement should be reaffirmed as central to the success of services delivered under Head Start. Extensive parental involvement as required in current regulations should be continued and emphasized.

By regulations, the Secretary should apply to programs of this office the provisions of the Hatch Amendment contained in P.L. 95-561, and the Education Amendments of 1978. Coverage of the Buckley Family Rights and Privacy Act (P.L. 93-380), guaranteeing the confidentiality of student records at all levels of education and guaranteeing the access of parents to these records, should be extended to cover participants in Head Start and other programs in this agency.

The Administration for Children, Youth and Families should give top priority to grants for provision of direct services rather than grants for theoretical research.

Short-term Options—Legislative

The Office of the Assistant Secretary should embark at once on drafting a reauthorization bill for the Older Americans Act, which expires in FY 1981, with a preliminary introduction target of late March or early April. Failure to introduce legislation by this point will force the authorizing Committees in the House and Senate, under the May 15 deadline for authorizations contained in the Budget Act, to begin work without an Administration proposal. Such a policy vacuum ensures excess, forcing the Administration into a negative, rear-guard posture. It is far superior to force a Committee of extravagant bent to *appear* extravagant as it adds new money and new authority on top of the Administration's hopefully prudent proposal.

A second major expiring authority is the Child Abuse Prevention and Treatment Act, which in large part is under the aegis of ACYF/OHDS. A similar logic applies.

Medium-term—The First Year

If the needed short-term tasks are set underway in the first ninety days and followed to completion, efforts to tame OHDS can proceed in a more deliberative fashion to achieve the following possible mid-term objectives:

- Regulatory changes to minimize overlap in employment

and training services within OHDS are essential. A longer-term project, perhaps targeted to result in legislation for 1982, would be legislation proposing a major consolidation of employment and training programs across the various Departments. Only if the delivery structure in the field (which currently consists of local CETA Prime Sponsors, State Employment Service Personnel, State Welfare Department caseworkers, and myriad sub-contractors) can be integrated, can the problem of conflicting program objectives at the federal level be achieved.

• It is truly in the public interest that regulations should be drafted as soon as possible (or internal unofficial policy be amended) to starve out the "public interest" law firms. They will undoubtedly sue; after the first years, however, they would be doing it with their own money. In any event, every legal effort should be made.

• Consideration should be given to preparing a major initiative for the aged outside of the scope of traditional welfare state principles, allowing deemphasis of same over time. Such an initiative could take the form of a major tax revision bill hitting hard at the key tax problems faced by the elderly, i.e., estate tax questions, taxation of savings and pension benefits, *et al.* Going further, *quid pro quos* could be developed to, say, exchange elimination of the Social Security earnings test for a test that really accomplishes the task of barring the retired from receiving unemployment insurance, etc.

• Finally, there must be a major review of research work underway, proposed in RFP form, and in the design stage, starting before the transition and continuing throughout the first year. While it would be improper to steer away from legitimate research whose main defect is that it provides unpopular answers, the great majority of social science research is infected with ideology that distorts its findings. Research and development funds should be substantially redirected to block grants to the states and to nutrition services. Federal funding of social science research projects should be reduced and eventually eliminated. The money can be better spent providing direct services to the aged.

Budgetary Recommendations

Until "current services" numbers are made available, any

budgetary planning is pure guesswork. A few principles, however, can be generally applied.

• Attempts to lift or otherwise circumvent standing authorization ceilings in programs—notably, the current $2.5 billion cap on Title XX outlays and child welfare services—should be opposed at all costs. A conservative Administration could, it would seem, win on caps in the services area even if the mood of the Congress is hostile to a cap in income maintenance, entitlement programs, e.g., Food Stamps. If the caps are blown on Title XX, all credibility for further restraint efforts in the more costly entitlement programs would be undermined.

• The following programs seem to be promising candidates for cuts below current services levels: research and evaluations across the board; Title XX training funds; "social change" programs within ACYF; and coordination activities within ADD.

Personnel Management

Managment Plan and Staffing Philosophy

The Office of Human Development Services, because its operations consists primarily of grants administration, must be run by a team that stresses sound management as a companion of policy expertise, at least in the great majority of appointments.

This asumption carries several implications. First, the great majority of managerial expertise in OHDS programs currently lies with current OHDS employees. Staffing should be handled with an eye to hanging on to as many experienced "nuts and bolts" personnel as possible, unless individual considerations of competence and policy support indicate otherwise.

Secondly, while it is tempting to make high appointments a vehicle for constituency appeasement, tokenism would be a mistake: a *competent* Native American, for example, should be appointed to run the Administration for Native Americans. Simple selection of the most well-known Native American, regardless of technical competence, could be disastrous.

Third, given the extent to which many currently within the agency—and the great majority of outside constituencies—will be opposed to conservative approaches to the operation of OHDS programs, strong, reliable teams will have to be built. This suggests that the staffing focus should concentrate on the top positions, allowing those appointed to build their own

teams (using candidates both inside and outside the agency) over time, rather than attempting to have, say, the top twenty positions staffed by the transition team.

Staffing Levels

Perhaps the biggest mistake an incoming Administration can make is to eliminate positions in a symbolic effort to show fiscal restraint. Allowing delegated positions and Schedule Cs to disappear either through inaction or other means, far from producing economies, usually has the opposite effect, for it lowers the ratio of "us" to "them." Hanging onto the present personnel who are familiar with the new SES regulations—and using their skills to hang on to every feasible appointable slot, whether currently filled or not—should be the top staffing priority. Six months to a year later, the need for the positions can be reexamined. In the interim, however, their potential for augmenting Administration policies should not be dissipated.

Consultants and Other Contracted Management Services

To be credible, all evaluations and most research must perforce be performed by entities independent of the agency. In the case of research, however, contracts should be directed first to independent university researchers, and away from the typical consultant think tanks. The resulting product will be more likely to be dispassionate, and free of the normal connections of the big-ticket research groups to the constituencies themselves.

In general, program evaluations of substance questions—should take precedence over "process" questions—in initial allocations of both research and evaluation dollars.

Care should be taken to make research and evaluation scientific, i.e., replicable. The emphasis should be placed on fundamental evaluation of significant program and policy variables across a wide—and representative—sample of sites and programs.

Long-term Problems and Opportunities

The Office of Human Development Services is the site of many of the programs designed by social engineering constituencies to influence the structure of American life. Ranging from domestic violence programs to efforts to universalize state-supported child care, OHDS programs are a haven for a wide range of social theorists whose views are, at bottom, antithetical to the profamily principles upon which a conserva-

tive Administration must be based. The potential for head-on confrontation with these groups is significant; the potential for sabotage from within the organization by careerists committed to the goals of the social change advocates is strong.

In such an environment, a conservative Administration must be constantly on its toes. Many of the recommendations made in such areas as staffing, research and evaluations, and short-term regulatory initiatives are designed with this principle in mind. The key element running throughout is the notion of centralized control over policy and operations by a well-knit team that is loyal to the Assistant Secretary's efforts to carry out the Administration's mandate. If the agency is instead operated on a loose, decentralized basis by small cadres of appointees pursuing private agendas, disaster will be inevitable.

The central thesis of OHDS programming is that intervention by the state is often necessary to promote self-sufficiency in key disadvantaged groups. The central thesis of a conservative Administration must be that self-sufficiency is best promoted by providing private individuals with rational incentives to promote their own self-sufficiency through work effort, family unity and community involvement. A key challenge for a conservative administration is whether, through both legislative changes and redesign of OHDS program components, it can shift the emphasis within OHDS from the former view to the latter.

Many of the changes needed to effect the conservative strategy for individual self-sufficiency, of course, are outside of the scope of activities conducted by OHDS—across-the-board tax reduction, reform of punitive estate and gift taxation, etc. Yet to the extent that OHDS programs can be redesigned to complement Administration initiatives in these directions, OHDS, rather than being an albatross, instead could make a major contribution to the effort to restore the nation to the people.

HEALTH CARE FINANCING ADMINISTRATION

Basic Policy Assumptions

The Health Care Financing Administration (HCFA) primarily is responsible for administering the Medicare and Medicaid programs (Titles XVIII and XIX of the Social Security Act, respectively). The agency has gone through several

reorganizations, the most recent one occurring on June 20, 1979. Its professed objectives are to:

- Ensure the timely and appropriate delivery of health services (hospital, physician, nursing care, home health, drugs, health screenings, kidney dialysis, etc.) through effective administration of Medicare, Medicaid, related quality assurance programs, and other programs.
- Make certain that program beneficiares are aware of the services for which they are eligible, that these services are accessible, and that they are provided in the most effective manner.
- Ensure that HCFA's policies and actions promote efficiency and quality within the total health care delivery system that serves all Americans.

Its "key priorities" are stated to be:

- Better performance standards for contractors and states and improved quality and financial control over program expenditures;
- Reduction of fraud and abuse;
- Simplification of Medicare and Medicaid program administration;
- Reform and control of Medicare and Medicaid reimbursement; and,
- Improved understanding by its beneficiaries of their rights and responsibilities as health care consumers.

The most recent reorganization of HCFA greatly increased the authority of HCFA activities along functional lines. This type of organization has some advantages, in that the states and regions are able to get the benefit of more centralized expertise. However, a major disadvantage is that the operations of HCFA emphasize the federal role to a much greater extent. Some observers express the belief that the Medicaid program, in the states, has not been served well by this reorganization. Others point out that the confusion and lack of control with respect to Medicaid may stem from a failure to view the agency's mission in terms of assisting states to provide services to beneficiaries with greater autonomy. One solution suggested is to strengthen the regional operations of HCFA, particularly program operations.

Because HCFA administers primarily entitlement programs, there is not much room for total overhaul of the manner in which the agency functions. In addition, major philosophical changes (such as a movement to reduce regulation and promote competition) would require legislation to accomplish

significant change. However, within the framework of the existing law or new legislation that may be passed, there is room for HCFA to experiment and to reduce the number and complexity of regulations. One approach would be to increase competition among alternative health care delivery systems (for example, traditional fee-for-service, Health Maintenance Organizations, individual practice associations and other prepaid group practices of physicians).

Summary of Principal Deficiencies of Existing Policies

Problems Associated with Increased Cost of Health Care Delivery

There is little doubt that HCFA is faced with serious problems in attempting to control health costs, which have increased from $69.2 billion in 1970 to $245 billion in 1980. Under current law those expenditures are projected to reach $440 billion in 1985 and $760 billion (11.5 percent of GNP) in 1990. Public expenditures, and the federal share of those expenditures, also have grown rapidly. In 1985, approximately 42 percent of total health spending is projected to be financed from public funds, of which 72 percent will be paid by the federal government.

Most health financing experts agree that the present reimbursement system generally employed for Medicare (and many states under Medicaid)—retrospective, cost-based payments to institutions and fee-for-service (usual, customary, and reasonable charges) for physicians—is a major culprit in encouraging high-priced care and lax control over utilization. To the extent this is true, HCFA will need statutory changes if serious improvements are to be made. In particular, experiments being conducted by HCFA to develop new, alternative reimbursement methods (such as prospective payment or capitation payment, including the use of HMOs), are not sufficient to get at the problem; attention should be given to seeking legislation that encourages cost-effectiveness through such alternative methods. Moreover, competition and the purchase of less costly health insurance are retarded by tax laws that encourage expensive "first-dollar" comprehensive coverage.

Over-Regulation

HCFA has issued, and proposes to issue, a vast array of regulations. Many regulations are, of course, needed because

the federal government is such a large purchaser of health care. Several of these regulations have been greeted with a great deal of criticism by the affected parties—generally hospitals, skilled nursing facilities, home health agencies and hospital-based physicians or physicians in teaching institutions. Such regulations include, for example, those intended to implement provisions of P.L. 95-142 calling for a uniform hospital reporting system (known as the Annual Hospital Report or AHR and formerly as "SHUR"). Also, the use of "experimental authority" under Sec 222 of the 1972 Social Security Amendments to develop competitive bidding by fiscal intermediaries has been a controversial initiative.

Litigation over the validity of many regulations has resulted, and Medicare generally pays a pro-rata share of the litigation costs, which can be quite high. The litigation process, in turn, is delayed by an administrative appeals mechanism that most providers claim in unfair and costly. That mechanism requires disputes to be resolved by a Provider Reimbursement Review Board which is not independent. Instead, the Administrator of HCFA can reverse decisions of the Board on his "own motion"; and providers are required to litigate issues before the PRRB even when the PRRB is without jurisdiction to decide an issue (such as the validity of a regulation). Proposed regulations of HCFA now exist that would further tend to weaken the Board's independence.

Poor Administration of Medicare, Medicaid and PSRO Programs

A number of areas exist in which HCFA has been found to be deficient in administering programs. For example, in a recent report the GAO noted many improvements could be made with respect to HCFA research and demonstration projects, and this area has been the subject of congressional oversight by the House Ways and Means Committee. Similarly, GAO and the FBI continue to document cases of fraud and abuse in the Medicare and Medicaid programs in areas such as clinical laboratories, drugs, home health care, etc. The effectiveness of the Bureau of Quality Control and the Office of the Inspector General has been questioned. Many knowledgeable people have indicated that Medicaid, in particular, needs to be monitored more closely to determine where the federal money actually goes.

Several outside groups commented on the over-complexity and red tape that surrounds eligibility determinations. (They

suggested that a Reagan Administration should be bold enough to state that, like any business, in some cases it would be *willing* to let HCFA absorb a small, but predictable amount of losses due to "abuse" or errors, in order to achieve speed, simplicity and efficiency of operation that ultimately would prove cost-effective and gain support of providers and beneficiaries for the program.)

In recent months, the PSRO program has been scrutinized. In particular, a May 1980 staff analysis by the Congressional Budget Office (CBO) indicated that PSROs may not be cost-effective; in particular, CBO found that PSROs consume more resources than they save and do not have much impact on federal outlays. However, the CBO report was challenged in a June 1980 critique by HCFA.

Legislative Proposals of the 96th Congress Concerning Medicare and Medicaid

Several bills were introduced in the 96th Congress that both provided additional benefits and were intended to require administrative and other changes to Medicare and Medicaid, as well as the PSRO program. In addition, several bills were introduced that would provide for catastrophic health insurance protection and make changes to the present tax laws and reimbursement system by promoting competition and encouraging the purchase of most cost-effective health plans. These issues, and that of how to best deliver and finance long-term care, remain as potential legislative areas that will directly affect, and be affected by, HCFA.

Short-term Problems and Options—Administrative

Review All Adminstrative Initiatives Required by Omnibus Budget Reconciliation Act of 1980

At this time, both the House and the Senate have passed major legislation that is labeled "Budget Reconciliation." Although the Senate version is limited to provisions that affect Medicare and Medicaid which only provide for cost savings to the program, the House version provides for additional spending as well as provisions designed to achieve savings.

In any event, if this legislation should be enacted into law after conference, there will be dozens of new provisions of law that will affect HCFA. Many of these provisions provide for increased benefits, and virtually all of them impose additional obligations on the Secretary and HCFA. Some of the provi-

sions will be extremely controversial, particularly with respect to how they are administered by HCFA. The most prominent of these provisions is the one that is in the Senate bill and that provides for the so-called "Talmadge amendment" with respect to reimbursemnt limits for providers under Medicare and Medicaid. At this time, it appears likely that the Secretary will be empowered to act more vigorously in setting limits and may also have the opportunity to develop incentive payments for hospitals that control costs by staying under the limits which are established. In addition, the legislation may set up a new commission which will act as a "buffer" advisory body between the Secretary and Congress with respect to future reimbursement policies. Other provisions of the proposed legislation call for new studies, demonstrations, and implementation of benefit provisions. It would thus seem desirable for a new Administration to immediately assemble a team to study this major legislative initiative, and to determine what must be done, and when. It may be that some reorganization of HCFA would be desirable in order to more effectively carry out the legislative mandate. In addition, the development of the HCFA FY 1982 budget by the new Administration should take into account the legislative directives imposed under this legislation, if it is enacted.

Monitor Enforcement of the Hyde Amendment

A small team of staff assistants to the Secretary of HHS should be formed to closely monitor the adherence of the states to the limitations placed on Medicaid funding by the Hyde Amendment. Follow-up studies should be done to insure strong enforcement of the Hyde Amendement. Special emphasis should be given to detecting and eliminating Medicaid fraud and abuse so that Medicaid resources can be concentrated upon better health care for the poor.

Review Existing and Proposed HCFA Initiatives for Possible Modification or Deletion

- Thoroughly review, and modify where necessary, HCFA FY 1982 budget as proposed by the Carter Administration.
- Determine whether to request continued funding for the Office of Health Regulation and, if so, how that Office should be restructured and staffed.
- Review all regulations appearing in FY 1980 Regulation Plan (45 Fed. Reg. 115, pp. 40050 *et. seq.*), to determine which are complying strictly with congressional mandate and

which are being "expanded" in an undesirable fashion; this might stimulate FY 1982 and other additional legslative proposals. Determine which might be delayed pending additional review and/or comment.

This recommendation applies specifically to existing regulations that pertain to apportionment (for purposes of Medicare payment) of malpractice insurance paid by providers. These complex and controversial regulations will cost hospitals a lot of money, and the industry has attempted to challenge them in court on the ground that the government is applying Medicare reimbursement policies in an inconsistent fashion, contrary to law.

- Review (and put on hold) all efforts pursuant to OMB directive concerning capital construction (and efforts to further centralize health planning in the federal government). This memorandum was published in the June 17, 1980 *Federal Register* and involves a number of administrative attempts to reduce excess hospital beds and construction. The plan has been roundly criticized by many affected groups, including veterans' hospitals and investors.
- Review the budget for new Office of Beneficiary Services; question desirability of not acting first on a "sample" basis with respect to distribution of pamphlets, information, etc.

Develop Methods to Improve Administration of Medicare, Medicaid, and Other HCFA Programs

- Improve program integrity through enhancement of Bureau of Quality Control and Office of Inspector General of HHS (expedite development of training programs for state agencies).
- Determine the desirability and feasibility of increasing physical centralization of HCFA offices, to improve morale, productivity, etc.
- Develop ways to improve coordination of Medicare and Medicaid (administrative and legislative proposals).
- Begin intensive analysis of cost-effectiveness of Medicaid program—to determine why problems of tracking federal dollars are so legion and compliance by states is so spotty.
- More rapidly implement efforts to effect the use of uniform billing forms.
- Examine degree to which coordination exists (and can be enhanced with respect to research activities of HCFA, National Center for Health Services Research (NCHSR), Na-

tional Center for Health Statistics (NCHS), and National Center for Health Care Technology (NCHCT).

- Office of Legislation and Policy should begin immediately to establish good liaison with key members and staffs of Congress and should consist of persons with personal commitments to Administration policies.

Develop Alternatives to Regulation for Promoting Cost Containment and Quality Control Through Reimbursement Reforms, Less Regulation, and Increased Competition in Health Care Delivery

- Establish office to assist states through improved dissemination of data, relevant information, results of experiments, studies, etc. (e.g., prospective reimbursement, hospital administration reforms, etc.)
- Request GAO to determine whether certain HCFA reimbursement policies are causing hospitals or other institutional providers to have an insufficient return on investment, with possible serious consequences down the road (regarding capital formation, etc.)

Short-term Problems and Options—Legislative

If the Omnibus Budget Reconciliation Act of 1980 is enacted into law during the 96th Congress, there do not appear to be many legislative initiatives which will demand attention by the new Administration in the short term. However, some proposals might crop up:

- If not enacted into law in the 96th Congress, the House and/or Senate might quickly pass a version of the Child Health Assurance Program (CHAP), designed to expand health care benefits to children. This legislation became controversial during the 96th Congress, because of the abortion issue and the bill's benefit provisions that some Members of Congress believed were not necessary and too expensive. This legislation is intimately related to the Medicaid program, in that it provides benefits to many children who would not otherwise be eligible under existing state Medicaid programs.
- A legislative initiative of the 96th Congress that probably will not be enacted involves assisting "financially distressed hospitals" through demonstrations and experiments under existing legislative authority (Sec. 222 of the 1972 Social Security Act Amendments). These hospitals (mostly in inner cities) are not necessarily being operated inefficiently, but are not reimbursed adequately because of restrictive federal and

state reimbursement procedures that, for example, do not take into account bad debts and charitable care. The problems of these hospitals have been exacerbated in areas where there has been an influx of refugees or illegal aliens, particularly for public hospitals in those areas.

• The schedules of limits that have been promulgated by the Secretary pursuant to Sec. 223 of the Social Security Amendments of 1972 (concerning reimbursement of hospitals, skilled nursing facilities, and home health agecies) may spark considerable controversy and precipitate a call for legislative acton. As mentioned previously in this report, the Omnibus Budget Reconciliation legislation, if enacted, may deal with these issues. In that case, because of the way in which the legislation is being considered, there has not been a large amount of input from industry into last-minute staff suggestions, and it may be necessary to anticipate reactions by industry for certain legislative changes.

• Another issue that the new Administration may have to become involved with quickly concerns restructuring the appeals process for Medicare, particularly provider appeals to the Provider Reimbursement Review Board. Hospitals and other providers have contended that the present methods are unduly lengthy and expensive, as well as unfairly restrictive. Legislation has been proposed and introduced in the 96th Congress to attempt to deal with the problem, and might be a subject of early action in the 97th Congress.

Medium-term Problems and Options

Develop Methods to Improve Administration of Medicare-Medicaid and Other HCFA Programs

• Consider creation of an Office of Exceptions and Appeals within HCFA, to give providers the opportunity to seek expeditious relief from requirements that would be unduly prejudicial or improper in particular cases (even if appropriate generally).

• Work with Treasury Department and Congress to rationalize conflicts between tax and Medicare policy, or antitrust and Medicare policy, that tend to induce less than optimal decisionmaking by providers from a health care delivery standpoint.

• Focus heavily on reducing superfluous contracts and grants awarded by HCFA. If possible, develop mechanisms for putting potential contractors and grant recipients (and HCFA

contract and grant offices) at risk in the event studies and research projects are awarded or conducted in ways that do not actually result in useful, high-quality product.

Develop Alternatives to Regulation for Promoting Cost Containment and Quality Control Through Reimbursement Reforms, Less Regulation, and Increased Competition in Health Care Delivery

• Increase the number and variety of experiments and demonstrations designed to promote competition and reduce regulation, with as large a role for states and private industry as possible (this could also include seeking legislation to waive requirements for such programs as health planning, PSROs, etc., in certain areas in the manner of "controlled experiments").

Also, it would be desirable to develop regulations (perhaps using demonstration or experiment authority) intended to give providers—especially physicians—incentives to cooperate and assume a leadership role in such projects; changes in tax laws should also be considered for this purpose.

• Address the murky, controversial area of physician reimbursement under Medicare and Medicaid. Determine which, if any, alternatives to the present UCR system would be desirable and politically acceptable, and explore possible incentives to induce physicians to accept any proposed changes.

• Continue to explore ways to assist states to develop cost-effective prospective payment systems.

• Develop methods for assuring that home health services continue to grow, in a cost-effective manner.

• Determine whether unnecessary utilization and higher costs of hospital care may be associated with the inability of physicians to practice at certain hospitals within a community because of restrictive medical staff privileges; and if so, what solutions may be feasible.

• Examine whether continuation of the PSRO program is desirable, and alternatives that might be appropriate.

• Consider alternatives for coordinating the growth of technological development in medical care delivery with the desire and ability of people (including third-party payers) to finance new procedures and equipment that could be very expensive.

Consider Methods for Improving Coverage for Catastrophic Medical Expenses

Develop mechanisms for enhancing opportunities to secure catastrophic protection especially for Medicare (and/or Medicaid) beneficiaries. Also, consider ways to increase costsharing for Medicare—with respect to co-insurance and premium payments under Part B (see President Ford's FY 1977 Budget proposal).

Consider Methods for Improving Long-Term Care Services

- Consider new ways to reimburse skilled and intermediate care facilities under Medicare and Medicaid, such as prospective payment systems that will help reduce the use of unnecessary hospital beds for chronically ill people.
- Develop realistic proposals for *financing* long-term care. Also, more experiments in the use of capitation payments for long-term care would be desirable. In addition, help states and communities develop more effective programs of providing long-term care to the elderly and disabled or chronically ill.

Budget

The budget for HCFA within HHS is not subject to a great deal of flexibility, because most money spent by HCFA is an entitlement. Thus, few options in terms of cutting the budget exist without major changes in the entitlement legislation. One possibility for cutting the budget would be to reduce or eliminate the PSRO program (presently spending about $193 million a year). Hearings recently have been conducted by Subcommittees of the Ways and Means Committee and Interstate and Foreign Commerce Committee on PSROs, and considerable difference of opinion exists with respect to the cost-effectiveness of the PSRO program. Some argue that, even if the program is not saving money, it is valuable for setting certain standards of care and thus improving quality. Critics of the program comment, however, that setting standards and norms could lead to "cookbook medicine."

Another possibility for cutting the budget of HCFA would be to reduce the volume of research, demonstration, and evaluation projects. In this regard, it would be important to determine which projects are not worthwhile. Recently, many of the demonstration and research projects have been directed toward developing greater competition in health care, for instance, and these experiments might be valuable to retain.

However, it is also true that a great number of contracts are given each year that produce unnecessary data or reports that either are incompetently prepared or simply not useful for any practical purpose. Careful oversight within the agency should be exercised, and the budget might take this fact into account.

Personnel Management

The need for managerial competence and a philosophy consistent with the President and Secretary is particularly vital in certain bureaus and offices. For example, besides the Administrator and Deputy Administrator, the Office of Research, Demonstrations, and Statistics is important. This is because that office will be responsible for guiding HCFA into areas where change is desirable (such as turning away from a regulatory approach to one based on the free market and competition). Also, the Office of Legislation and Policy is influential in giving the Administrator policy guidance. A newly-created office within the Office of the Administrator is the Office of Beneficiary Services. It could become important as more attention is given to promoting consumer choice in selecting health care policies, by providing beneficiaries with information and assistance (such as would seem to be necessary under the kinds of proposals adovcated by pro-competitive forces). Among the bureaus, the Bureau of Program Policy stands out as a center of HCFA where extreme care should be exercised in choosing a Director who is creative, knowledgeable, and shares a philosophy consistent with that of the President and other senior members of the Administration.

Long-term Problems and Opportunities

- Develop new ways to encourage philanthropic contributions (both time and money) to health care services delivery.
- Prepare for eventual "phase-out" of both Medicare and Medicaid (perhaps HCFA itself) pursuant to development over 10 to 12 years or less of a delivery system that better serves the poor and the aged by relying on "vouchers," private health plans, and the free market.
- Develop better programs for assisting handicapped people to function normally and become working, tax-paying citizens.
- Determine whether, and to what extent, HCFA is spending funds that could be spent more cost-effectively to improve

health status by focusing on areas like housing, nutrition, sanitary conditions, highway safety, etc.

PUBLIC HEALTH SERVICE

The Public Health Service is one of the oldest components of the federal government, tracing its origins to the 1798 Act authorizing establishment of Marine hospitals for the care of American merchant seamen and is charged by law to promote and assure the highest level of health attainable of each American and to promote international cooperation in health matters. The major functions of the Service, according to the 1981 version of the *United States Government Manual*, are:

- To stimulate and assist the state and communities with the development of local health resources;
- To further develop education for the health professions;
- To assist with improvement of health delivery services;
- To conduct and support health and related research;
- To protect against unsafe food, drugs, cosmetics and other unsafe hazards;
- To provide leadership for prevention and control of communicable disease and for other public health functions.

Analysis of Bureaus

A discussion of various components of the Public Health Service follows.

Alcohol, Drug Abuse, and Mental Health Administration

Mental Health

The FY 1981 budget justification states that the Administration will continue to implement recommendations of the President's Commission on Mental Health (PCMH). The PCMH recommended that psychiatry be designated a manpower shortage specialty, and concluded that there were shortages across all other mental health disciplines. The Senate Appropriations Committee FY 1980 Labor-HEW report directed the Institute to review its planning to determine where changes should be made to deal with the shortage of mental health professionals, be prepared to show how the shortage can be reduced or eliminated over the next five years, and the amount of money it would take to do this. Funding has been held constant for the last three years, and when inflation is taken into account, the total clinical manpower funding recommended

by the President is 62 percent lower than the FY 1970 appropriations level.

Based on recommendations of the PCMH, the Administration proposed a major new services initiative entitled the Mental Health Systems Act. It was to provide a flexible approach which state and communities could plan, develop, and implement programs that promote mental health and prevent mental illness, particularly among groups of the population that are at higher risk of mental illness than others. The bill as introduced did not create an integrated system of services delivery. Instead, it would have continued the existing fragmented delivery of services between inpatient state and outpatient federal and local services. Furthermore, the PCMH's recommendations about services for the chronically mentally ill, the elderly, and youth were not addressed in the legislation. Many of these concerns were addressed at Republican initiative in the recently approved Mental Health Law now being implemented.

Alcoholism

One of the major stated objectives of the National Institute on Alcohol Abuse and Alcoholism is an increased emphasis on the state and local government's involvement in the national alcoholism effort. However, the Administration reversed its position and proposed to terminate the formula grant program which awards monies to states to assist them in developing more effective prevention, treatment, and rehabilitation programs to deal with alcohol abuse and alcoholism. This was done at a time when the NIAAA estimated that the hidden health care costs due to alcohol problems now absorb 12 percent of our nation's health budget.

Drug Abuse

Likewise a major objective of the National Institute of Drug Abuse is to assist states to carry out a full range of drug abuse functions with the objective of reducing the incidence and social costs of drug abuse. Again, the Administration proposed to terminate the formula grant program which states used to prepare plans for planning, administering, and monitoring projects for the development of more effective drug abuse prevention functions. Furthermore, even though the direct grant services program is level funded since FY 1979, funding is being cut from ongoing treatment services because of

inflation and a prevention "set-aside" provision enacted into law.

Center for Disease Control

As infectious diseases have begun to take a relatively smaller toll on Americans, CDC has begun to broaden its traditional role into the field of chronic diseases, for example in the state diabetes control projects, and environmental hazards, for example in responding to the need for health expertise at Love Canal. The mission of CDC, never completely clear, and its relationship to other health-related agencies, have as a consequence become rather fuzzy. Within the agency, there is some indication of tension between those who wish to hold fast to the communicable disease-centered mission and those who advocate emphasis on chronic disease as the most important feature of future CDC activities. The Carter Administration has favored an expanded, "updated" CDC mission.

In its effort to update its role while maintaining successful existing categorical programs, CDC may be spreading itself too thin. Perhaps it is now the time to expect state health agencies to take on more responsibility, especially financial responsibility, for CDC programs. The location and organization of CDC activities are also worth reviewing. Relationships with other agencies, including the Environmental Protection Agency, Health Services Administration, and NIH need to be re-evaluated.

One of CDC's major components is the National Institute of Occupational Safety and Health, which conducts research and training aimed at improving our ability to identify, evaluate, and control occupational diseases and hazards. NIOSH's work, including on-site workplace health hazard evaluations, is used by regulatory agencies that are responsible for actually promulgating and enforcing workplace standards, such as the Occupational Safety and Health Administration, the Mine Safety and Health Administration, the Department of Labor and the Environmental Protection Agency. NIOSH is not itself a regulatory agency. The placement of NIOSH in CDC, instead of making it dependent or part of another agency (for example, NIH) has been questioned by many, including NIOSH.

Food and Drug Administration

Any large bureaucracy charged with such wide-ranging responsibilities is bound to be the subject of continuing controversy, and FDA is no exception. For the most part, with

some notable exceptions, these controversies have centered around implementation of FDA statutes, not the mission of the agency of the intent of the laws themselves. Commonly cited problems include unnecessary bureaucratic delays in regulatory decision-making, internal management practices, and the difficulty of attracting top expertise into the agency.

The costs of regulatory compliance frequently work to depress competition and innovation by driving out small business and making private industry less willing to invest in new ideas and new products. The consumer bears the ultimate burden or excessive regulation, in higher prices for the goods he buys and decreased opportunity for choice in the marketplace.

Health Resources Administration

There have been persistent rumors of the dissolution of HRA, with health professions programs being transferred to the Health Services Administration and health planning and health facilities functions being moved to HCFA. In addition, there is some evidence that morale at HRA is low. The dissolution of HRA in accordance with the above proposal is not without some good sense because HRA is not a particularly cohesive concept as it is presently structured.

The Bureau of Health Planning

As a function, health planning is a questionable hybrid because it clearly does not promote cost-savings or efficiency through competition yet falls short of the "utility" model of regulating the market. While the health planning process was given a new lease on life by the 1974 Act, it has from the beginning been involved in a great deal of controversy. This has primarily focused on: (1) opposition of providers (for-profit and not-for-profit) to regulation of their business investment decisions (such as hospital expansion and purchase of major capital equipment); (2) regulations and guidelines produced by the Bureau which have been subject to substantial delays prior to publication and which, when published, have tended to be overly restrictive and inflexible; and (3) the seemingly irrepressible tendency of the local health systems agencies to involve themselves in controversial issues that have only peripheral relationship to the primary mission of certificate-of-need and planning major health services with an area (e.g., HSA involvement in abortion services, air bags for cars, gun control, physician directories). As a result of these problems,

many of the new Administration's supporters within Congress and also the American Medical Association support repeal of the entire Health Planning process. This movement has gained some momentum as an after-effect of the most recent legislative changes which highlighted significant differences within Congress over whether a competitive or utility model should prevail in the health care delivery systems.

Bureau of Health Professions Education

The Carter Administration policy correctly noted that federal goals in the health professions area have significantly changed since the 1960s and early 1970s. The adequate supply of physicians is no longer a major concern, instead replaced by concerns about the geographic and specialty distribution of health professionals, the quality of the training that they receive, and the stability of the institutions which train them. In addition, a significant and growing problem is finding ways for health professions students to finance their education.

Bureau of Health Facilities Financing, Compliance and Conversion

It is difficult to evaluate the Bureau of Facilities because it is a relatively new entity. Its mission is not totally clear, it has received very little money to accomplish its goals, and most of the attention focused on the Bureau has been upon the controversy generated by the recently-issued regulation to require detailed reporting on compliance with the uncompensated care requirement of the Hill-Burton Hospital Financing Program. The uncompensated care requirement is thirty years old but regulations were never issued and for various reasons it has been assumed that hospitals were in compliance without any forms being filled out other than a general assurance. Controversy has focused on whether the regulations adequately reflect the current realities of the ways in which uncompensated care is provided and whether the cost of compliance with the bookkeeping requirements is excessive compared with the amount of additional free care that will be obtained.

Health Services Administration

In its budget request for fiscal year 1981, HSA noted an expectation of further *expansion* of its "efforts in developing health care systems which are designed to meet the special health needs of people who have difficulty in gaining access to comprehensive health care services." The major criticism with

relation to this goal is that over the past few years HSA leadership has viewed the agency mission as the development of an alternative health care delivery system, implicit in the above quote. In contrast, the original mission was as a highly selected tool for gap-filling in the existing health care delivery system. Presumably, this policy change reflects the orientation of the Carter Administration towards a national health insurance plan that relies heavily on creation of a federal delivery system as both a provider of last resort and as a competitive model.

Bureau of Indian Health Services

The Bureau of Indian Health Services is generally acknowledged to have done a good job of improving the health care of tribal Indians in the United States. However, much remains to be done since the health status and life expentancy of Indians is still far below the rest of the population. Efforts to provide the tribes with greater control over health care services have met with mixed success but quite properly are still being encouraged.

Bureau of Medical Services

The heart of the BMS is the Public Health Service Hospital System. Of the other functions, emergency medical services was designed as a limited federal involvement and will be phasing down over the next 6 to 8 years, if not sooner; the federal employee occupational health program and the other smaller functions are likely to continue, but never as more than modest federal commitments. In contrast, the Public Health Service hospital system represents a federal investment of about $165 million per year and there are genuine questions about the appropriateness and need for this system. It is not clear why the services provided to beneficiaries could not be handled more efficiently and inexpensively through a reimbursement system rather than a direct delivery system. Many of the facilities are severely under-utilized by statutory beneficiaries and have managed to partially offset this only by involving themselves in delivery of services to the general community. This of course raises concerns about federal competition with local hospitals, clinics, and physicians.

The Bureau of Community Health Services

In recent years, the Bureau has pursued the policy that it has a responsibility to provide access to health care wherever it

determines appropriate access does not exist. Pursuant to this, it has identified medically-underserved areas (MUAs) and areas with a shortage of health manpower (HMSAs) and determined that 50 million people or nearly one-fourth of the entire U.S. population are living in such areas. HHS also uses two additional criteria—high infant mortality and high migrant impact. HHS has found that all or part of 2,874 counties (92.5 percent) of a total of 3,106 U.S. counties meet at least one of these criteria, and 2,144 counties (69 percent) meet as least two criteria. To meet this alleged need, substantial expansion of BCHS programs is contemplated, including a four-fold increase in the NHSC.

The absence of private medical resources in many parts of this country and the need for available health care is indisputable. Arranging for the availability of medical resources in these areas may be an appropriate public role, though not necessarily a federal one. However, in carefully measured steps, particularly since 1976 and to a large extent because of conscious Carter Administration policy decisions, the government has begun expanding the federal role. As a consequence, the appropriateness of government involvement in health services delivery in many federally-designated areas of this country is highly debatable.

National Institutes of Health

Obviously, the key to maintaining U.S. leadership in health research is the provision of a degree of stability that will attract talented, innovative new researchers into the health field and enable progress to continue without wide fluctuations in program support. All elements of the research program, including training, basic research, clinical trials, and other activities, must be part of a balanced program. Administration policy in FY 81 has failed to provide for a balanced research program by focusing exclusively on research grants, while not providing for clinical trials to validate the research results.

Frequently, these problems have been attributed to arbitrary funding decisions by the Office of Management and Budget, while policy-makers at the Department of Health and Human Services count on the fact that Congress will provide additional funds for a balanced program. In effect, HHS seems to be abdicating its responsibility for maintaining a balanced program within given fiscal constraints, on the assumption that NIH will not really have to live within those constraints

anyway. The Administration budget therefore is not regarded as a true estimate of what NIH expects, or needs.

In the broader policy arena, much has been made of the decline in U.S. innovation in all fields of research and development, including health. As budgets tighten, it becomes more and more important to encourage private industry to invest in innovative research and development. Government patent policies and tax incentives should be examined as a means of fostering the public-private/basic-applied research continuum, particularly in areas which seem to have little commercial value, such as the development of new therapies for diseases that affect only small numbers of people.

Health, Research, Statistics and Technology

Within the Office of the Assistant Secretary for Health, there are three operating centers: the National Center for Health Services Research, the National Center for Health Statistics, and the National Center for Health Care Technology. Although it would be inappropriate for the centers to be located in an operational agency and it is probably good from their point of view to have a DAS as an advocate with the Assistant Secretary for Health, there does not seem to be any compelling reason for the current organizational setup. The Centers' work is objective in nature. The directors are not policy-makers. A logical case could be made, for example, that the centers should be placed within the National Institutes of Health, which conducts some similar activities.

Staff Offices-Offices of Assistant Secretary for Health

Office of Smoking and Health

This activity is clearly a category of disease prevention and health promotion. There is overlap in approach and grantees with other such efforts. Consideration by a new administration should focus on bringing together these similar departmental activities.

Office of Health Maintenance Organizations

The two principal problems posed by the current strategy are 1) the adverse impact federal monitoring, compliance and regulatory control have on developing HMOs, and 2) the exclusion of or lack of attention devoted to rural areas in the long-term development strategy. Some of these problems are admittedly legislative ones, such as federal qualification re-

quirements. It is also well established that rural HMOs are more difficult to initiate.

As legislative belt-tightening continues and the availability of discretionary health funds continues to shrink, the HMO program will no doubt be affected. The current shift of funding priority to expanding existing programs is distressing since it could be argued that the federal government's interests would best be served by simulating further HMO development rather than subsidizing or fortifying existing projects. The long-term success and replicability of the HMO type of delivery system across the country has yet to be demonstrated. Increased federal involvement in the operation of these programs will no doubt affect the outcome. More judicious use of limited grant funds and continued availability of loans and loan guarantees to stimulate private capital is perhaps the optimal strategy.

Health Information and Health Promotion

The Office has received limited funding during its initial years. The bulk of the health information, health promotion, and health education activities are carried out in different agencies within HHS. OHIP has been ineffective in coordinating such activities within the Department. In order for this initiative to have any impact at all, it would be appropriate to pull all DHHS activities with similar intent together under one umbrella to direct grant activities in a centralized manner. It also appears that the most effective method of leveraging what are obviously scarce resouces is through other public and private programs.

Office of Adolescent Pregnancy Program

The Office of Adolescent Pregnancy Programs was created as a result of increasing congressional awareness of the large number of adolescent pregnancies and the near total lack of service focused on helping these individuals. Pro-life groups were instrumental in setting up and pressing for this legislation, hoping that its emphasis would be on providing services and counseling to pregnant adolescents who needed an alternative to abortion. However, pro-life groups have been virtually *excluded* from the program.

Deputy Secretary for Populations Affairs/Office of Population Affairs

DASPA will always be exposed to a cross-fire of interests

because of the abortion/family planning interface and because of the heavy emphasis on education as a goal within the programs (which in turn leads to various controversies involving sex education, contraception as an encouragement of sexual activity, etc.).

Summary of Short-term Problems and Options

HMOs

The question is whether the federal requirements for HMOs are too restrictive and whether the benefits required are so extensive that the program cannot be financially feasible. A new administration should review the federal involvement to determine what, if any, role the federal government should play. Specific administrative actions to be considered are:

- Impose a 6-month moratorium on new program awards and extensions (beyond the 6-month period) of existing awards.
- Conduct a detailed assessment of existing projects to look at financial viability and organizational development.
- Determine whether the emphasis should be on continued support for existing programs or for planning and feasibility of new projects.
- Undertake a thorough assessment of the federal role in HMO development.

Office of Adolescent Pregnancy

Despite the obvious appeal of this program (especially but not exclusively to pro-life groups), there is some question whether existing availability of other programs which, while not solely focused on adolescents, should be able to meet their needs. On balance though, reorganization of the program is a more appropriate alternative. What is needed is better integration with other initiatives so that their programs doing research, family planning, etc., maximize their effectiveness in reaching pregnant adolescents. Also efforts should focus on trying to develop models and test different approaches which can be utilized at the local level and integrated into more comprehensive programs. This would reflect the reality that this program will never receive enough money to substantially affect the problem directly.

Public Health Service, Title IX

With regard to Title X of the Public Health Services Act, the following new regulations should be promulgated:

• The provision of prescriptive contraception services to unemancipated minors shall be conditioned upon the written notification to one or both parents or legal guardian of said minors. (Such notification to parents to the prescribing of contraceptive drugs and devices is consistent with the legal responsibility that parents have for the medical care of their minor children.)

• Patients receiving services under Title X must be informed by grantees of the potential consequences to their health and safety of recommended drugs and devices and of abortion.

• Grantees under Title X must provide the facts of fetal development, as stipulated by the Secretary, to all recipients of pregnancy testing services, abortion counselling or referral services, or the provision of abortion itself.

• A significant portion of Title X funds shall be reserved for those organizations that provide family planning services within the context of respect for human life at all stages of development. (Pro-life, pro-family organizations that do not provide abortions or abortion referrals are currently excluded from eligibility for family planning funds.)

With regard to the family planning services under Title X of the Public Health Services Act, the Department of HHS should undertake three studies:

• A study to determine the relationship between the provision of family planning services and the incidence of venereal disease, adolescent pregnancy, and the choice of abortions by unemancipated minors.

• A study to determine the effects of abortions on the physical and mental health of women.

• A study to determine whether a woman seeking pregnancy services is more likely to choose abortion if she receives such services from a Title X grantee that provides abortions than if she receives such services from a Title X grantee that does not provide abortions.

Alcohol, Drug Abuse and Mental Health Administration (ADAMHA)

The Administration has serious problems including a shortage of trained mental health professionals, a redirection of funding away from the states (the formula grant program) and a fragmented mental health program which does not address the needs of the chronically ill. Specific short-term options are:

• NIDA: Because of the current drug (especially heroin)

epidemic, regulations implementing the Waxman prevention set-aside should be flexible so that some treatment services could be funded from this money. Reinstate the formula grant program.

- NIAA: Reinstate the formula grant program.
- NIMH: Strengthen the Community Support program—the current administration program dealing with chronically mentally ill—and gear up for implementation of the MHSA.

Center for Disease Control:

Although the CDC is a very professional and largely technical organization charged with what are usually thought of as "Public Health" functions, there are certain short-term actions which should be considered. They are:

- Policymakers in the Center for Disease Control should have a demonstrated concern for human life and the dignity of all human beings. A policy statement should be promulgated to the effect that the only purpose of the Center for Disease Control is the identification and control of diseases and illnesses.
- Assess the impact of requiring states that receive funds through CDC to identify resources that they will commit to CDC programs, including perhaps the establishment of a minimum dollar figure or percentage and requiring reimbursement for the salaries of Public Health Service Advisors in the states.
- Work with EPA, developing legislation if necessary, to get a clear agreement on HHS and EPA responsibilities with respect to environmental health effects.

Food and Drug Administration

Drug Regulation

Both legislative and administrative initiatives must place greater emphasis on the need to speed up FDA procedures so that drugs will reach the U.S. market sooner. This is the surest way to stimulate private sector innovation, by making it clear that innovation will pay off in the marketplace. Companies must also have the assurance that valuable trade secret information will be protected. Otherwise, it would make little sense for them to do research and development in this country. If drugs can get on the market in foreign countries with less burdensome regulations more quickly, without releasing trade

secrets, companies will begin to realize the return on their research investment sooner, while patent life is longer.

Regardless of the extent or causes of drug lag and the trend to foreign research, there are clearly excellent reasons to reduce unnecessary barriers to innovation and speed approval of important new drugs in this country. Reform proposals in the 96th Congress focused on the need to encourage research and expedite the approval process in ways that are consistent with the protection of the public health and the safety of participants in drug research. In addition, the 96th Congress witnessed efforts to liberalize our drug export policy and to guard against the proliferation of burdensome and conflicting new regulatory requirements.

Other means of fostering innovation and competition in the drug industry, including possible change in the tax treatement of research investment, should be examined. The GAO identified a number of additional steps that could improve FDA's internal management, requiring timely feedback to drug sponsors, upgrading automated data processing systems, clarifying and implementing FDA's stated policy of accepting data from foreign studies, and improving post-marketing surveillance systems. With respect to this last point, GAO and other experts have asserted that approval times could be reduced if an adequate system to monitor drugs after approval existed and FDA had the power to act more expeditiously to withdraw or restrict the use of marketed drugs. The rationale is that less extensive pre-marketing clinical tests would be required, since FDA officials would no longer feel pressure to examine every possible effect of a drug before releasing it. Great care should be taken to ensure that any post-marketing surveillance system does not prove to be yet another layer of costly regulation.

The burden that current law places on competition by requiring duplicate testing of post-1962 drugs could be alleviated by providing for the establishment of an abbreviated approval procedure for subsequent manufacturers. Of course, such a procedure must contain safeguards to ensure that consumers can rely with confidence on the drugs prescribed for them, by requiring that all manufacturers demonstrate that their products are truly equivalent. FDA officials have shown interest in simply "presuming equivalence" unless there is a known problem. This is unsatisfactory; some limited form of equivalence testing should be routinely required. Innovative companies must also retain their rights under the patent laws,

in order to maintain incentives for the development of new drugs.

On this last point, some have suggested that drug patents be extended to run 17 years from the date of FDA approval, with or without mandatory licensing after a certain number of years, instead of from the time the patent office grants an application. A new administration should seek legislation which will provide a full 17-year patent protection once marketing is approved while at the same time developing mechanisms to ensure timely submission of required data.

Medical Devices

In the field of medical devices regulation, FDA has not been the focus of particularly heavy criticism, probably because of the fact that implementation of the 1975 devices law has proceeded very slowly. Problems similar to those in the drug field could quite easily develop, however, unless care is taken. Changes in Bureau leadership may retard FDA's progress, but prompt and rational implementation of the law should be an administration goal and a concern of congressional oversight committees.

Radiological Health

FDA's radiological health activities should stress the need to implement product safety standards and continue to improve programs aimed at helping state agencies and medical personnel eliminate unnecessary radiation exposure, and not be diverted into a misguided campaign for federal licensure of radiologic personnel, as some have suggested. Current BRH leaders seem to recognize this.

Veterinary Medicine

During the 1970s, the Bureau of Veterinary Medicine was plagued with serious allegations of undue industry influence, poor enforcement, and internal management cover-ups of information with important ramifications for public health. FDA hopes that changes in Bureau leadership will alleviate similar problems in the future.

FDA: Specific Short-Term Options

- Assess the effectiveness of FDA's "fast track" system for important new drugs.

• Propose exemptions for a broad range of antibodies now subject to batch certification, perhaps requiring a small number of batches to be tested at first to establish the manufacturer's track record, but then relying on other means, such as GMPs, to ensure antibiotic quality.

• Review and implement where feasible the GAO's recommendations for improving internal management.

• Examine pending proposals which would preempt state laws on hearing aids under the medical devices statute—in fact, it would be a good idea to do a quick review of all pending regulations.

• Re-examine FDA conflict of interest regulations, especially with respect to outside advisors, to ensure they do not keep the agency from taking advantage of the best scientific expertise, as has been charged.

• Begin to implement provisions like those in Senator Schweiker's drug bill administratively as far as possible.

• Assess scientific consensus on what constitutes adequate and well-controlled clinical trial: what standards should be for a study to be acceptable to FDA.

Health Resources Administration

HRA is composed of three bureaus: the Bureau of Health Professions Education, the Bureau of Health Planning, and the Bureau of Health Facilities.

Over the last year or so, there have been persistent rumors of the dissolution of HRA, with health professions programs being transferred to the Health Services Administration and health planning and health facilities functions being moved to HCFA. This proposal is not without some good sense because HRA is not a particularly cohesive concept as it is presently structured. Reorganizing HRA, perhaps along these lines, definitely should be considered as a medium-term objective.

The Bureau of Health Planning

The mission of the Bureau of Health Planning (BHP) is the development of "a national health planning capability geared to promoting equal access to quality health care at a reasonable cost." Probably the most important area of change with regard to the programs of the Bureau of Health Planning would be a streamlining of the regulation writing process, combined with a more restrictive view of the purposes to be accomplished by health systems agencies. While some of this would

require legislation, a great deal of the process could be handled administratively.

The Secretary should publish a comprehensive list of all members of health systems agencies so that the public and the Congress are informed as to who is making the day-to-day decisions regarding the future of American health care.

Much could be accomplished in the short-term by administrative and attitudinal changes, as follows: an acceptance that there are substantial and legitimate differences in health care needs among different regions and types of communities; a substantially speeded-up regulation drafting process in order to provide adequate guidance to state and local health planning agencies; an end to the centrist tendency in Washington to capture or control the decisions of the local HSA either by restrictive regulations or reversing local decisions; and a directive to the local agencies that the federal government will not provide them any support for extraneous functions.

The Bureau of Health Professions Education

Traditionally, the purpose of the Bureau of Health Professions Education has been to stimulate the supply, availability and quality training of individuals in the health professions. The adequate supply of physicians is no longer a major concern, instead replaced by concerns about the geographic and specialty distribution of health professionals, the quality of the training that they receive, and the stability of the institutions which train them. In addition, a significant growing problem is finding ways for health professions students to finance their education.

In the short-term highly selective rescissions should be proposed (with a major cut in the NHSC scholarship program, now transferred to HSA, as a centerpiece) with some of the funds, reprogrammed to high priority health professions areas rather than just removed. There should be a major focus on remedying the nursing shortage.

Finally BHPE designates health manpower shortage areas. This program should be revamped, with emphasis on areas whose needs are now being met and can be de-designated.

Bureau of Health Facilities Financing, Compliance and Conversion

The Bureau of Health Facilities was created to promote the effective utilization of existing health facilities, to further cost

containment, and to direct programs relating to health facilities modernization and construction. The Bureau is new, small and ill-defined and receives so little funds that goals are difficult to set. However, there are two obvious questions: whether the Bureau's functions could be better performed in HFCA, and whether departmental resources currently focused on Hill-Burton compliance are a useful investment.

Health Services Administration

As of October 1, 1980, HSA is composed of four bureaus: (1) the Bureau of Medical Services, (2) the Bureau of Indian Health, (3) the Bureau of Community Health Services, and (4) the Bureau of Health Personnel Development and Services. Activities funded through HSA encompass a broad ranged of programs structured in diverse ways including direct grants, state block grants, and project grants and contracts for direct delivery of health care services.

In establishing priorities within the Health Services Administration, attention should focus primarily on the Bureau of Community Health Services and the Bureau of Health Personnel Development and Services. The other two Bureaus lack the dollar total and the national systemic impact that could be achieved by changes in these Bureaus.

Bureau of Community Health Services

The mission of the Bureau of Community Health Services is the development and expansion of our national "capacity to provide family-oriented comprehensive health care services in order to alleviate health care access problems now existing in the medically underserved rural and urban areas of this country." The BCHS has interpreted its mandate in the broadest sense, pursuing an agenda not envisioned in the law. A change is necessary to get the Bureau back on track. Its goal should be altered to assure services that are truly needed to be provided in a cost efficient manner without interfering with the ability of the private sector to provide such services and without using these programs as a bootstrap to a national health service program.

There should be a freeze all decisions that have long-term fiscal or policy implications for at least six months. This would include: no new consultants, short-term (180 days or less) extensions of existing consulting and external contracting work, no new designations of medically underserved areas, and

no approvals of new community health centers or migrant health centers. Additionally, a mechanism for updating the BCHS data base with regard to medically underserved areas with emphasis on identifying areas for de-designation should be developed.

The Bureau's Common Reporting Requirements (BCRR) is an expensive, burdensome management reporting system. Its effectiveness as a grants management tool is questionable. The BCRR's usefulness both as an aggregate data source for reporting to Congress and as an instrument upon which to manage individual projects should be evaluated.

The Bureau of Health Personnel Development and Services

The mission of the BHPDS is to oversee and integrate the placement of health professions personnel in underserved areas, the National Health Service Corps program, and a variety of health professions loan and scholarship programs. To the extent that the recent reorganization signals an emphasis on placement (rather than service) of health professionals in underserved areas, it is welcome. This administrative shift, however, may not result in a change in the policy by which the National Health Service Corps Service programs are the health services delivery staff for substantial numbers of community and migrant health centers. The Bureau's principal objectives, both short- and long-term, should be to restrain federal costs, maintain maximum flexibility, and impact on health personnel needs of underserved areas.

A great deal needs to be done at BHPDS in a very short period of time. An obtainable goal would be to place a substantial number (400-500) of NHSC scholarship recipients who were ready for NHSC service on July 1, 1980 in independent practice sites. Achieving a goal of 500 independent practice placements and laying the groundwork for an even greater number in 1982 is an extraordinary task for the first six months of 1981, but vitally necessary. In addition, emphasis for July 1981 placements should be away from placing individuals in Community Health Centers and other integrated sites. A high legislative priority would be a substantial rescission of the appropriations for National Health Service Corps scholarships, since the scholarship program locks in high program levels for future years.

National Institutes of Health/Biomedical Research

The problems associated with NIH have been discussed

earlier and relate to duplication with the private sector, unnecessary paperwork requirements and problems with indirect costs. Specific policy options include:

- Commission a report on the extent and type of NIH drug development research and assess potential overlap with private sector activities, directing NIH wherever possible to encourage private industry to take on this work.
- Fill any vacancies on any of the Institutes' Advisory Councils.
- Launch an initiative to do away with unnecessary paperwork.
- Strengthen the NIH Director's authority vis-a-vis the individual institute directors, for purposes of overall research priority planning and budgeting.
- In cooperation with the Office of Management, examine the proportion of funds that go to indirect costs rather than research itself and seek ways to minimize indirect costs.
- Carefully review government patent policies to ensure that worthwhile NIH-supported inventions are brought through the development process, preferably by private entities picking up on NIH leads; and examine the need for changes in tax treatment of private research investment, especially in risky, innovative fields that may not seem to have much commercial potential.

Budget

The budget for the Public Health Service is always a tempting area for scrutiny because so much of the discretionary (as opposed to mandated) health funds can be found in the PHS. As a general rule, a current services budget would be the best approach for most programs in the PHS while a thorough review of programs is underway.

Unless funding can be stabilized and reduced in the PHS at least for the short-term (pending reform in Medicare/Medicaid), no savings in health will be realized. A new administration should immediately establish a no-growth policy in the programs in the PHS and should then move to make reductions in such programs as Health Planning, Community Health Centers, National Health Service Corps, Health Professionals Education programs, support for HMO development, and certain programs in ADAMHA.

Areas of Emphasis for a New Administration

It should be assumed, given the high level of the responsibility, that the vast majority of individuals who head the major components of the Public Health Service will be replaced (Secretary Califano replaced the heads of all PHS agencies except NIH).

The PHS, given the nature of its many programs has numerous client groups who have strong interest in particular programs and who often have close relationships with the personnel who administer the federal programs.

Since the programs within PHS are what is generally described as "discretionary health programs"—as opposed to entitlement programs in SSA and HCFA—any new administration looking for areas to cut back will be forced to find economies in PHS programs. In order to effect this end from a personnel management standpoint, two things will be necessary: (1) the client relationship with the bureau chiefs and administrators and outside groups must be altered. If this is not done, new intiatives will frequently fall prey to congressional pressure before they are formally initiated; and (2) the new administrators and bureau chiefs will need to identify and promote persons from within who while loyal can provide the necessary continuity and expertise. With reference to item (1) it should be noted that several of the bureau heads in the PHS have developed strong power bases and have very strong views about the direction of their respective programs. Many of these individuals, although undoubtedly capable, would find it difficult if not impossible to accommodate to the policy redirection of a new administration.

The replacement of the Assistant Secretary and the Administration Heads is expected and should be completed as soon as possible. The Assistant Secretary is potentially a very important position, particularly if the PHS does in fact report to this office. Traditionally, this position has been filled by a physician and it is to be expected that organized medicine will seek to continue that custom. The Agency heads have come from a variety of backgrounds. Any replacements should be selected for administrative ability, program knowledge, and an eagerness to implement Administration policy. Since the responsibility to implement Administration policy would be placed at the Administrator level, they should be given latitude to select bureau chiefs with whom they can work. It should be emphasized that particularly in the Health Resources Administration

and Health Services Administration the bureau chiefs, and in many cases the deputy bureau chiefs, should be transferred to other responsibilities in order to alter the client relationship mentioned above.

Summary of Long-term Problems and Options

Food and Drug Administration

The area of *food* safety policy is a clear example of one field in which our scientific sophistication has outstripped the provisions of current law administered by FDA. Food additives and colorings must be shown to be safe for their intended use and approved by FDA. Since 1958, the Delaney clause of the Federal Food, Drug and Cosmetic Act has flatly required the banning of a food additive which is shown by appropriate scientific tests to induce cancer in man or animal, regardless of the benefit it might offer.

The answer to the food additive safety dilemma is to apply, insofar as possible, the same rational standard of risk-benefit analysis to all direct, intentional food additives, though obviously some benefits, such as coloring, would weigh less heavily than others. This will require new legislation, like that sponsored by Senator Richard Schweiker (R-Pa.) and Congressman James Martin (R-N.C.), to give FDA more flexibility. Specifically, a new administration should press for legislation to modify the Delaney clause on food additives and allow risk-benefit assessment.

With regard to drug regulation, new legislation is needed to:

- Change the patent law to ensure drug companies receive the full benefit of their patent.
- Work toward consistent labeling language for all generic equivalent drugs.
- Press for other new legislation where needed that could have an impact on drug development, e.g., tax treatment of research investment could be liberalized, particularly for research on "orphan drugs."
- Set priorities for implementing a Patient Package Insert program based on the nature and extent of use of several key drugs.

Health Resources Administration

Two of the major programs under the Health Services Administration include Health Manpower and Health Planning. Any long range program in these areas should clearly

focus on the continued viability and/or necessity of health planning and the changing needs with respect to health manpower.

Health Services Administration

With the renewal of the Migrant Health and the Community Health Center Authority necessary in 1981, it is very important that careful consideration be given to the scope of the federal delivery system being developed which also employs National Health Service Corps personnel. Unless this program is controlled, we will have a National Health Program before anyone is aware of it.

Over the next ten years, the primary goal is to keep the Corps service program at a level where it is serving only the most underserved areas. It should not become the recruitment device for a federal health service system or an alternative to the private sector. Nor should it become a dominant federal cost squeezing other controllable health programs. To accomplish this the NHSC scholarship program should be phased down and the NHCS should be returned to its original design as a placement program with heavy emphasis on independent private practice and non-integrated sites.

Health Maintenance Organizations

With congressional extension up for consideration in 1981, it is time to cast the future direction of the program. The size and nature of the grant program needs examination. With fewer and smaller grant awards directed to better selected sponsors, a diminished grant program might be appropriate. The federal loan program should also be overhauled. There is concern that rigorous review and criteria to evaluate loan applicants are not employed by the federal program. These criteria should emulate those of private lending institutions.

A variety of organizational models sponsoring prepaid health care have been spawned over the past decade. Many of these are private endeavors. The federal program has been accused of bias toward certain organizational arrangments. A long-term objective for the HMO program is to work more closely with the private sector augmenting their efforts to develop innovative prepaid models.

THE SOCIAL SECURITY ADMINISTRATION

The Social Security Administration has a mixed mission.

The Agency has been beset with criticism since it began dealing with welfare programs because these programs did not enjoy the popularity of the pure social insurance programs. The crisis in funding the breakdown of EDP systems have caused SSA to lose much credibility both in the Congress and with the public.

In summary, the SSA has the responsibility of providing cash payments to eligible person under the

- Old Age and Survivors Insurance Program
- Disability Insurance Program
- Special Benefits for Disabled Coal Miners Program
- Aid to Families with Dependent Children Program
- Emergency Assistance Program
- Refugee and Repatriated Americans Programs
- Supplemental Security Income Program.

In addition, the SSA has responsibility through the Office of Child Support Enforcement for the locations and collection of support payments from absent parents of welfare and non-welfare families.

Finally, SSA, through its own district offices, is responsible for determining eligibility for Medicare under Title XVIII and, through the respective state AFDC agencies, is responsible for determining eligibility for Medicaid under Title XIX. Both of these determinations are made for HCFA and its constituent state agencies.

Summary of Deficiencies of Existing Policies

Financing

The major deficiency evident throughout the OAS-DI system relates to financing of the programs. Most persons do not realize that Social Security is a pay-as-you-go system where current contributions are used to pay current benefits. Under this current-cost financing, current revenues are almost immediately paid out to current beneficiaries. The trust funds therefore do not have a large positive balance at any given time and generate little income.

As a result, the trust funds are in a precarious position and could be subject to depletion in times of major economic downturn. In 1977, Congress enacted major increases in the social security tax rate to rebuild the trust funds. These are to go into effect, sequentially, with the 1981 increase planned as the turning point where revenues would exceed expenditures and the trust fund balance would begin to regain stability.

Unfortunately, the forecasts upon which the 1977 increases were based did not take into consideration the drastic recession which the country is currently experiencing. The next several months will be telling in terms of trust fund viability during 1981-82. Should the economic downturn continue, hard decisions will have to be made early in a new administration regarding financing.

As of the date of this writing, OMB has made its more recent fall projections for the economy. These projections show that the trust fund, even with the scheduled 1981 increases in taxes, will be bankrupt within twelve months. The SSA intends to make an inter-fund transfer from the surplus DI trust fund to shore up OAS. It was estimated by the Carter Administration that this transfer will keep the funds solvent until 1982.

Insurance Versus Welfare

It has been the consistent policy of the current administration to becloud the dividing line between welfare programs and social insurance programs. A group of planners in HHS and its predecessor, HEW, for the past three administrations has maintained a continuity of service and has greatly influenced this policy direction.

Begun by the Nixon Administration's move toward a guaranteed annual income program, the Family Assistance Plan (FAP), incremental steps have been taken which will lead to the inevitable development through legislation and by administrative action of a single all-purpose income maintenance program with its intended income redistribution as a result. The Congress has assisted in this by federalizing the aged, blind, and disabled welfare programs, and camouflaging them as a social security adminstered program under the seemingly non-welfare name of Supplement Security Income (SSI).

Similarly, when the AFDC program and the Office of Child Support Enforcement were moved under the Commissioner of Social Security, steps were taken to assimilate these programs to the extent possible by law into the ongoing operations of the Social Security Administration. Nowhere within the upper levels of the SSA and DHHS is there a direction to maintain the differential between the welfare and insurance programs.

Just as in the income maintenance programs, the distinction between Medicaid, the means-tested welfare health program and Medicare, and trust fund health insurance programs, is being eliminated not by the Congress but by the Administration with support from the health care providers. The Carter

Administration, by creating HCFA, merged functionally the two programs. Indeed, one of the most popular liberal solutions to the trust fund financing debate is to combine Medicare and Medicaid and finance them as a new National Health Insurance Program out of inflated General Revenue Fund dollars. The money currently taken in for the health insurance trust fund could then be used to rebuild stability in the OAS-DI trust funds. This scheme should not be allowed to continue in a conservative administration.

Lack of Leadership and Management

The SSA has suffered through the past six years without strong executive leadership. The career appointees within the agency were not, and are not, equipped to deal with the critical and politically sensitive issues which SSA finds itself facing in the new environment. Because of the weakened leadership of HEW during the Ford Administration, SSA management problems were held in "caretaker status" until well into the first year of the Carter Administration.

Benefits and Coverage

The Social Security System is for all practical purposes sex neutral. Women as a group are not disadvantaged under the Social Security System, but rather get a higher return for their taxes than men do. The frequent and exaggerated charges of discrimination and inequities against women by the "women's movement" have drawn unwarranted attention to the issue of the treatment of women under social security and have improperly focused the debate. Thus, the problems that certain groups of women have under social security have been elevated above countless other concerns of equal importance. These are not matters of sex discrimination in the present system, and the answers cannot be found in further sex neutrality.

Pension Policy and Its Impact on the Nation's Economy

The lack of a coordinated federal policy in dealing with the federal pension policy impact on the economy is a significant deficiency. The President's Commission on Pension Policy in its Interim Report looks at many issues surrounding pension policy and the number of pension plans currently in existence. Unfortunately, none of the Commission's work has focused on the economic impact of the system and its effect on the money supply. The policy for an annual cost of living adjustment (COLA) in social security and government retirement benefits

resulted in approximately a $17 billion injection of money into an already inflationary economy in July of 1980. Little concern has been shown for the overall impact of such policies.

Short-term Problems and Options

Financing

It is likely that a deficit situation will become apparent in the Retirement and Survivors Trust Fund within the first quarter of calendar year 1981. The situation exists currently, but the Carter Administration masked it by shifting a small surplus from the disability insurance trust fund to the RSI trust fund. It is estimated that this will carry the latter into the early part of 1981. Even with the increased tax rate scheduled for January 1981, it now appears that, absent some significant improvement in the economy, the trust fund will be in serious financial difficulty.

If the economy has a significant upturn in employment before the first of the year, the increased tax rate may well maintain the trust fund solvency and allow a continued "pay as you go" operation. This will not allow any rebuilding of the trust fund, however, and the risk is that without action, a new administration will be blamed for the collapse of the trust fund or in the logical alternative be blamed for the significant tax increase.

Disability Insurance Program

Recent studies conducted by the SSA show that the rate of ineligibilty for the DI program is approximately 20 percent. This information has not been made public by SSA or HHS. At a time when SSA has announced fiscal penalties against the states for errors in the AFDC program, SSA doesn't want it made public that it is paying out approximately $3 billion a year to ineligible recipients. The new administration should take immediate steps to validate this rate of ineligibilty, publicize it, and develop a corrective action plan to reduce the level of erroneous payments.

A second problem area in the DI program revolves around the disability determinations themselves and contributes significantly to the level of error and is discussed under medium range problems.

Refugee Programs

In this area, the Carter Administration allowed policy to be

dictated by events, rather than shaping events by policy. From the inital "boat lift" from Cuba and Haiti, to the continuing pick up of "boat people" off Vietnam by U.S. Naval vessels, the Carter administration blundered about without a policy on U.S. treatment of refugees. Decisions must be made regarding policies on whom to admit; what type of processing they are to receive; where they will stay; whose responsibility (government vs. private agency) it is to resettle them; and who is responsible for their health and maintenance needs.

A second problem in the area of refugees is the long-term funding of their needs. This has been a sore spot with the congressional appropriations committees and with the Governors. The Carter Administration signed a bill funding a new wave of Cuban refugees in October. However, it is not known at this writing what the level and duration of that funding is. The options are three. Refugee needs are the responsibility of:

- the refugees' sponsor family,
- the state in which the refugee is resettled, or
- the federal government.

The advantages and disadvantages of each have been discussed at length during the Cuban Refugee Program. It is apparent, however, that the state governments have no say over who is admitted to the United States and it would be an almost impossible task to find sponsors willing to accept full financial responsibility for each refugee's life. Therefore, a clear, concise U.S. policy should be adopted immediately, and refugees currently in camps within the U.S. should be processed quickly.

Relationships with States

Perhaps one of the areas of poorest policy over the past five years has been that of SSA relationships with state government. Prior to the 1974 establishment of the SSI program, SSA had little to do with the states. When SSI came along, it was a shock to the system than anyone other than federal bureaucrats would have a say in a program administered by SSA. With the reorganization of 1977, SSA became responsible for the volatile AFDC program and further felt the pressure of dealing with independent state agencies. SSA response to this new challenge has been less than satisfactory. It has reached the point of open hostility in many instances, and it will be incumbent on a new administration to ease the strain.

Paramount in this discussion will have to be an immediate review of the organization and the role of the regional offices.

The Carter Administration, and the Social Security Administration in particular, so confused the role of the regional offices vis-a-vis the state agencies that most states will not deal with the regional office. This has resulted in Governors' staffs and single state agency heads relying solely on the central office of SSA for policy and procedural instruction. In turn, regional staff, left to their own device, spend considerable time inventing a role for themselves and harassing state government. This leads to inconsistent application of policy and poor relationships with state government.

Early in the new administration and in coordination with the rest of HHS, the role of the regional office should be clearly defined. After having tested the various alternatives through the past three administrations, the options appear to be limited to three:

- provide the regional office with full authority for program operation within its jurisdiction;
- specifically define the regional office authority with a laundry list of program material and decisions which are reserved fo the central office; and
- remove all authority from the regions for making program decisions and return this authority to the states. Broad policy parameters would be set by the central office and states would communicate specifically with Washington. Regional offices would have significant responsibilities in the compliance and program audit areas.

Further, immediate attention should be paid to staffing the SSA with some people who have experience in either running a state program or in working in an inter-governmental environment. Too much of the "federal perspective" is evident in the SSA and little attention is paid to the needs and capabilities of the Governors and their state agencies. SSA has several major areas where it has regular on-going activities with states:

- AFDC
- Child Support Enforcement
- SSI
- State Voc Rehab Agencies

Medium-range Problems and Options

SSA Organization and Operating Efficiency

The SSA suffers today from organizational apathy. The Agency has been through such trauma over the past five years that a new administration must move cautiously before trying

to get it to move through yet another organizational mode. Many of its problems are a function of three major reorganizations over the past several years, namely:

- Commissioner Cardwell's reorganization of 1975 that created a vast "operations" concept with great power, and little check on its operational performance.
- Secretary Califano's reorganization of 1977 which consolidated the health programs and removed Medicare from SSA's administrative directions, but added public assistance to its responsibilities.
- Commissioner Ross' functional reorganization of 1979 that greatly added to the span of control of the Commissioner, while at the same time provided no day-to-day general manager to run the Agency. In addition, the roles and responsibilities of the regional commissioners were in effect married and made effectively autonomous.

Each of these reorganizations were piled one upon another. None had been effectively implemented, before the next was announced. The synergistic effect has been one of uncertainty, low morale, significant operating differences, ineffective policy planning and the inability to focus at senior levels on significant administrative or programmatic problems.

The most significant problems are:

- The reorganizing concept of "functionalization" has been pushed to the extreme, blurring the differences between each program.
- Planning has become unwieldly and nonresponsive.
- The organizational relationship between the regional commissioners and the central office is not working well.
- The span of control of the Commissioner is so large as to make it nonresponsive.
- The greatly-increased need to coordinate the broadened functions makes all decisions very time-consuming, or what is worse, causes the principals to make unilateral decisions.
- The ruthless shakeup of senior level personnel in 1979 has left the Agency with numerous inexperienced managers in senior level positions. Political promises and a drive to take affirmative action have greatly harmed the Agency's management capability.
- Union relationships have severely deteriorated because of present management attitudes.

There is a widespread feeling that many employees do not have enough to do, do not know in what direction they are

supposed to go, and are in general unhappy with the way things are going. Union relations have severely deteriorated to the point where contract negotiations are at a virtual impasse and a record number of unfair labor charges and counter-charges are being exchanged. There are certain specific problems and each may have a solution:

• The functional reorganization of 1979 has created a tremendous gap of "general management." The Commissioner's office, through the Executive Secretariat, is attempting to direct 10 Regional Commissioners, and at least 12 other principals, not counting "task forces," individually on a day-to-day basis. As a result everything of any dispute of importance is handled by the Commissioner's Office. When the other responsibilities of the Commissioner are added to the formula it is easy to see why the process of leadership and decision-making is too time-consuming, repeatedly redone, and ineffective.

Recommendation: Make the Deputy Commissioner for Operations responsible for Operations. Provide him with a staff, independent of a mission staff, to assist him in dealing with his subordinates. Have the Associate Commissioners for Assessments, Systems, Central Operations, Policy and Procedures, and Management and Budget report directly to him. Provide the Deputy Commissioner with all delegations necessary for performance of his responsibilities. Access to the Commissioner of these associates should only be through the Deputy Commissioner.

• The Commissioner cannot direct, nor hold accountable, the ten Regional Commissioners who presently report to him. Reporting and intelligence from the field tend to be dissipated by the absence of a full-time central office unit responsible to receive and use it. Regional variance in priorities and objectives should not be tolerated. Social Security programs are national in scope and should be so administered.

Recommendation: Establish an Associate Commissioner for Field Operations to include the responsibility for all district office operations. Direct that all Regional Commissioners report to that office, and not to the Commissioner. This staff should be similar to the old office of the Bureau of District Office Operations (BDOC) but much smaller and streamlined.

• The Computer Systems Office suffers from several major problems:

1. SSA's systems (hardware and software) have been, for about 10-15 years, add-ons to previous systems. The advanced

systems design was an attempt (no matter how flawed) to address the *total* system requirements, not merely adding on to an obsolete system.

2. As a result of the incremental approaches, the SSA system is at the same time cumbersome, fragile, and inflexible. While so intertwined and outmoded, attempts to incrementally redesign will take decades at the present rate of redesign. The systems situation can only be described as potentially catastrophic. Current planning in the systems area is based on an incremental approach to shoring up the SSA systems capability. This is a complete reversal from the agency position of the Ford Administration. Systems planning has changed direction so often as to make it nonresponsive to present day needs.

Recommendation: Long-term systems planning is an absolute must for the SSA and is critical for the survival of the programs and their efficient operation. SSA current capability in this area is extremely limited. System capability has been demonstrated recently when energy assistance checks were sent to all recipients, even those in institutions, because the "system" did not have the capability to differentiate.

• Senior staffing must be immediately reviewed. There are many glaring deficiencies that must be corrected as soon as possible. In addition to some minor reorganizational changes, these personnel changes should implemented as soon as possible:

1. Below the Associate Commissioner level, particular attention should be paid to the personnel administering AFDC in the Office of Family Assistance. Most of these are committed to a guaranteed annual income. A complete shake-up of this organization is needed with a refocusing toward providing assistance to states rather than trying to run their programs for them.

2. Attention should also be given to the Office of Child Support Enforcement at all levels of personnel. This program is one which should be supported by a new administration. Current management personnel are adequate but need more direction from top level. Collections have been decreasing as a percentage of total costs. This must be reversed. By the time a new administration is in place, the first year evaluation will be complete and should be referred to for direction.

The Disability Insurance Program

Perhaps one of the more critical medium-term problems is in the DI program. This is a program with all of the symptoms of

incompetent management: high ineligible rate: problems with state government; inconsistency in program management around the country and thousands of law suits filed in district court.

The denial rate on applications for DI increased during the Carter administration from 35 percent to 75 percent. This was done, according to some insiders, in a pure political move to keep the trust fund solvent. This increase in denials has led to a concomitant increase in appeals. Appeals are handled by Administrative Law Judges. ALJs reverse agency disability decisions at a rate ranging from a low of 15 percent to as high as 85 percent for some individual judges. Even with this high reversal rate, SSA is the defendant in over 18,000 cases pending in the U.S. district courts. Within the first year of a new administration, action should be taken to revamp the existing disability determination process and appeals procedure.

Recent studies of the number of persons receiving DI have shown that between 17 and 20 percent of them are not disabled and therefore are not entitled to benefits. This equates to between $3 and $3.5 billion being spent annually on ineligibles. It has been known for some time that there was a problem of ineligibility in the program but no one knew that it was as significant as it is. Aside from the fact that huge amounts of money are being spent illegally, the error rate points out the basic problems of this program design and will require legislation to correct. Immediate steps should be taken to clean up the eligibility process and the current caseload. Plans should be drawn to take to the Congress to relieve the longterm problem of the definition of disability. Further, the SSA should set up a program of periodic redeterminations of eligibility to assure itself that beneficiaries are still eligible.

BUDGET

The proposed budget for the Department Health and Human Services has been developed for the years 1980-1982. The figures used are only to give a general idea of what may be appropriate and will undoubtedly be changed. This is obvious since we do not yet know what the current level of spending for 1981 will be since the appropriation was not made before Congress adjourned. The following table indicates the proposed level of spending for the entire Department.

BUDGET FOR DEPARTMENT OF HEALTH AND HUMAN SERVICES
(in millions)

	1980	1981	1982
PHS	7,466.0	7,289.3	7,320.1
OHDS	4,497.0	4,922.0	4,923.0
HCFA	23,472.2	26,878.5	28,278.7
SSA	16,729.8	18,287.1	19,795.0
OS	810.8	975.6	932.3
Total HHS	52,975.8	58,352.5	61,249.1

The 1981 budget figures are based on the lower of either Administration request or House approved levels. No rescissions are recommended for lack of final estimates because the Senate has not considered the HHS budget at this writing. The 1982 figures assume a major reduction in inflation rates during the first years of a new administration, so while nominal increases are less than recent trends would dictate, overall spending power is assumed to be greater.

The Social Security Administration and Health Care Financing Administration trust funds assume rates of growth similar to 1980-81 growth rates for the fiscal year 1982. While trust fund expenditures are included for both agencies, Office of the Secretary estimates include federal funds only.

Several programs which have proven marginal at best are given reduced funding, but programs with acceptable records are granted small increases in the period 1981-82. Office of the Secretary's funding is also maintained at relatively high levels to reflect need for management resources to reorganize the Department and eliminate fraud and abuse.

A more detailed breakdown by Agency is discussed below.

Office of the Secretary—Health and Human Services

The budget for the Office reflects several diverse trends in funding for programs managed within this Office. In general, refugee assistance programs show a relatively large increase; nevertheless, the Cuban Refugee Phasedown continues. Office of the Inspector General funds are increased reflecting a concern over fraud and abuse now rampant in the Department. General Departmental Management funds are increased slightly to provide sufficient resources for reorganizing HHS in a more constructive direction. Numbers do not include advance appropriations or trust fund expenditures; federal funds only.

Office of Human Development Services

The legislated caps on spending for OHDS, particularly for Title XX and child welfare services should not be removed. In addition, the general rule for a new administration should be to hold all OHDS programs to current services in order only to maintain the current level of service. Areas in which cuts may be passable includes research and evaluation programs, Title XX training funds, "social change" programs in ACYF, and coordination functions within ADD.

The following chart indicates a more detailed breakdown of the proposed budget.

OFFICE OF HUMAN DEVELOPMENT SERVICES
Budget Estimates for FY 1982

Component/Program	1980	1981	1982
Administration for Children, Youth & Families			
Head Start	$ 735	$ 825	$ 900
Other	62	64	64
	797	869	964
Administration on Aging			
Block Grants	247	280	305
Nutrition	320	350	400
Other	85	85	85
	652	715	790
Administration on Developmental Disabilities	63	63	63
Administration on Native Americans	34	34	34
Administration for Public Services			
Admin.	5	8	10
Title XX	2,351	2,500	2,500
Training	75	116	100
Child Welfare	57	57	62
Evaluation	—	3	—
Supplementals[1]	438	523	400
	2,951	3,241	3,072
GRAND TOTALS	$4,497	$4,922	$4,923

[1]Primarily for Child Welfare Initiatives.

[2]All programs estimated to grow at 9.1 percent *fiscal year* 1982/1981 inflation estimate, derived from Administration's mid-year budget review, *except* Nutrition programs, which are estimated at 15 percent.

Health Care Financing Administration

The budget for HCFA within HHS is not subject to a great deal of flexibility, because most money spent by HCFA is an

entitlement. Thus, few options in terms of cutting the budget exist without major changes in the entitlement legislation.

The major exception is the PSRO program which has received criticisms from GAO and other analysts for not saving any money. In addition, the research, demonstration, and evaluation projects are reduced pending analysis of the effectiveness of such efforts. Overall, the budget reflects a reduction in the present dependence on regulation and shows a vote of confidence for the forces of market competition.

Social Security Administration

The Social Security Administration has one of the least controllable budgets in the federal government. Assumptions for the 1982 budget includes a rate of growth between '81 and '82 at the same rate as between '80 and '81. Low-income energy assistance is held at 1981 House approved level ($1,800 million).

Public Health Service Budget

The budget for the Public Health Service reflects a need to restrain spending in those programs which lack purposeful direction and those which compete with services which could be provided by the public sector. It reflects a desire to return functions to local and state government when possible and an effort to encourage the private sector to accept responsiblity once again for those functions they perform so well. In addition, management overhead is reduced when possible, but not when current resources are necessary to sustain restructuring of programs. A more detailed breakdown follows:

Food and Drug Administration

1980	1981	1982
324.2	356.6	374.5

The budget for this agency has been increased by 10 and 5 percent to accommodate inflation. Carter 1981 (362.5) estimates call for increases for buildings to replace antiquated facilities. FDA, however, suffers from the same shortcomings as most regulatory agencies in serving the overall well-being of society and should not receive any more than an inflation adjustment pending new policies regarding drug regulation from the new administration.

Health Services Administration

1980	1981	1982
1,297.4	1,295.0	1,338.3

An attempt is made to restrain the growth of spending in virtually all programs under HSA. Most levels for 1981 are the lower of Carter request or House approved level. For 1982, levels reflect small (5 percent or less) increases for most programs. The levels of spending for National Health Service Corps ($82m, $92m) are driven by an obligation to use scholarship graduates as they become available. In addition, the spending totals reflect a reduction in PHS hospitals ($160m, $155m) over the two fiscal years.

National Institutes of Health

1980	1981	1982
3,429.1	3,490.4	3,590.0

These figures recognize the inherently public nature of basic research for health and, consequently, grant a 1.8 percent increase for 1981 and another 3 percent for 1982. Resources for basic research could be found also in a realignment of spending by NIH so as to de-emphasize the more advanced research all too common to NIH. Budget discipline requires that only basic research be funded by the federal government, thereby removing disincentives for the private sector to shoulder this responsibility. Tax incentives, and a reduction in unnecessary regulatory burden should be employed concomitantly to foster private sector research.

Health Resources Administration

1980	1981	1982
735.8	453.3	412.9

Funding recognized a need to avoid dependence on state and local planning agencies whose performance has been spotty owing to a fundamental conceptual flaw. State and local planning funds are reduced below the 1980 figures of $32.0 million and $124.7 million. Health education professions program funds reflect a need to refocus existing resources to those areas truly short of health professionals rather than to scatter large number of federally-supported personnel throughout the country in competition with the private sector.

Center for Disease Control

1980	1981	1982
364.1	329.2	334.5

The 1981 and 1982 budgets express a need to maintain the present level of most CDC categorical programs with an intent to shift some financial responsibility for disease prevention to state governments. Epidemiology and the Technical Development and Application programs are allowed small increases to account for inflation, but buildings and facilities are reduced by 40 percent.

Alcohol, Drug Abuse, and Mental Health Administration

1980	1981	1982
1,053.7	1,102.2	1,007.5

Totals for ADAMHA show an intent to reduce management overhead within the federal program and to share more of the fiscal responsibility of the ADAMHA programs with the states. Peculiarities in the problems faced by each state demand better diversification and flexibility. Research programs are held to 1980 levels or raised slightly to reflect the overflow benefits of this research to all regions. Unauthorized programs are not funded.

Office of the Assistant Secretary for Health

1980	1981	1982
261.7	262.6	262.4

The OASH itself is in a period of transition when its programs are being overshadowed by or turned over to other agencies. There is some question as to the future of this Office. Figures above reflect stable funding or modest increase in most programs, although there is a reduction in funding for HMO programs. Also, smoking and adolescent health care were reduced from 1980 levels.

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THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

M. Danny Wall*

BASIC POLICY ASSUMPTIONS

The Department of Housing and Urban Development is not unlike other organizations in that each attempts to assess their environment and prepare their role. During the past few years, HUD officials have learned to change the Department's primary role from housing production to low income housing preservation. While "real housing" is a goal sought by all administrations previous, HUD's original charge as stated in the Housing Act of 1949 has not been realized. The goal of providing "decent, safe and sanitary" housing for families of low income" was to fault the slipping further down our grasp.

Whether HUD's role should be primarily a low income "development agency," a "production agency," or both, remains to be seen. The basic point of this report is that it will continue to have "production" responsibilities and commitments that the Reagan Administration will adhere to the goal stated in enabling law of giving localities "the maximum amount of responsibility in the administration of their housing programs."

Current Organizational Relationships Within the Department

Organizational and operational relationships within the Department of Housing and Urban Development are noteworthy

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somewhat complex. The Department has many programs, most of which are interrelated and grouped under several Assistant Secretaries. The programs are actually conducted by the Area and Service Offices with technical supervision provided by the Assistant Secretaries and management supervision by the Regional Administrators.

The administrative pattern of the Department involves three different levels of organizational responsibility and functions:

- The Headquarters sets and interprets policy; establishes priorities; promulgates standards, criteria, and procedures for all levels of field operations; directs program administration and provides technical guidance; and evaluates programs.
- The Regional Offices supervise, coordinate, and evaluate the management of Area and Service Office operations. They represent the Secretary in the Regions with the Governors, Federal Regional Councils and other federal agencies, and coordinate HUD activities regionwide. The major responsibility of Regional Offices is to oversee the allocation of resources to Area and Service Offices. A limited portion of the program operations are carried out in Regional Offices, usually for reasons of efficiency and economy in the use of staff.
- The Area and Service Offices (Field Offices) are responsible for field operating and decision-making functions and are the Department's principal point of contact for program participants and sponsors. In most cases, delegation of authority for final action has been decentralized to this level without procedural qualifications or review requirements to dilute that authority. Area Offices are empowered to administer all of the Department's programs. Service Offices do not administer the Community Development programs, and most do not have multifamily insurance functions.

SUMMARY OF PRINCIPAL DEFICIENCIES OF EXISTING POLICIES

The principal deficiency of existing policies in each major area of HUD activity is the excessive federal control and intervention in what should be local government or market decisions.

The Community Development Block Grant program (CDBG) was intended to provide a stable flow of funds with a minimum of federal "second guessing" about appropriate local development priorities. Administrative actions over the past 3½ years, however, have added numerous federal requirements

and guidelines which substantially reduce local government flexibility and initiative.

The administration of the public housing and Section 8 housing assistance programs leave local government little opportunity to develop a coordinated approach to understanding and solving local housing problems. These programs also place accelerating cost burdens on the federal budget.

The traditional unsubsidized FHA mortgage insurance programs continue to be unable to provide lower downpayment mortgages. Rather than rely on the underwriting judgment of private market lenders, FHA mortgages are caught up in administrative processing delays.

The Department's regulatory functions are focused in five areas:

- Mobile homes, where there has been significantly increased regulatory burden in the past three years;
- Real estate settlement procedures, recently simplified by Congress. (An ongoing "controlled business study" must be considered prior to further regulatory expansion in this area);
- Fair housing, the area where vast changes are possible;
- Interstate land sales, which also received recent Congressional attention (Housing and Community Development Amendments of 1979);
- Finally, the lead-based paint poisoning prevention program where there has been much research but little development of methods and procedures to cope with the problem.

The chief administrative deficiencies in HUD are the overstaffing of many Central Office divisions and the excessive power and control over program operations by other Central Office divisions. They are both the cause and consequence of HUD policies of excessive federal regulation.

SHORT-TERM PROBLEMS AND OPTIONS

A major reorganization in 1969 restructured HUD into three tiers—the Central Office in Washington; 10 Regional Offices in designated major U.S. cities; and 77 Field offices with varying degrees of authority. Field Offices were placed under Regional Office jurisdiction. While the structure looked good on paper, the Regional Offices became duplicative and friction developed between the two levels.

In 1978 the Regional Offices were relieved of the duty of supervising the Field Offices. This increased the Washington bureaucracy's role, but it has improved efficiency by removing

a time consuming processing step. The Regional Offices are now primarily administrative.

General Recommendations for HUD Administration

A total hiring freeze department-wide should be implemented to include promotions, new hiring, use of outside consultants, and temporary appointments. This, however, would not include vital policy and advisory positions.

An in-depth personnel study (to be completed not later than July 1, 1981) should be undertaken for the Central Office and for key officials of HUD Field Offices (Senior Executive Service (SES) and other top supervisory positions). This should include a complete evaluation and needs assessment, review of grade structure through desk audits for functions and job descriptions, and a plan for consolidation and realignment.

Budget and program changes need to be initiated. These will include: department-wide reductions in travel, training, and overtime costs; development of block grant programs for all housing assistance functions and consolidation and simplification of all FHA functions; decentralization and deregulation of Community Development Block Grant (CDBG) and Urban Development Action Grant (UDAG) programs; appointment of a strong, decisive HUD Secretary and Under Secretary with executive leadership ability and experience in housing and urban areas; and phased-in decentralization of major HUD programs from a top-heavy Central Office to Field Offices and local governments to alleviate staff imbalance.

Recommendations for HUD Sub-cabinet Administration

Office of the Secretary and Under Secretary

Office and staff should be reduced and realigned. We suggest that the Secretary can do without three of his Special Assistants; that the Office of International Affairs should be abolished or transferred to the Department of State; that the Office of Small and Disadvantaged Business should be abolished or transferred to the Small Business Administration (SBA); and that the Deputy Under Secretary for Field Coordination needs a slight increase in staff and importance. We would maintain the Office of Labor Relations as it is; transfer the Office of Budget from Administration to the Office of the Secretary; and abolish the Office of Assistant to the Secretary for Growth Issues.

Budget Request: reduce FY 1981 request of $9.3 million by 10 percent to $8.3 million for FY 1982.

Office of the General Counsel

HUD's current Office of General Counsel consists of 225 Central Office personnel and an additional 315 Field Office legal service employees. It is widely recognized that HUD has an overabundance of largely overemployed lawyers. During the Carter Administration the role and functions of the HUD General Counsel was relegated to a subordinate advisory role with little or no policy-making input. There is a strong need for an assertive, more active legal and policy advisor to serve the HUD Secretary and the program Assistant Secretaries.

There is also a need to consolidate and simplify duplicative legal offices and to drastically reduce the size of the Central and Regional Office legal staff.

Budget Request: reduce the Central Office budget 10 percent from the $8.7 million FY 81 amount to $7.8 million for FY 82, and maintain the FY 82 request of $11.3 million for Field legal services; FY 82 total—$19.1 million.

Office of the Inspector General

The Office of the Inspector General has grown rapidly over the past four years from 407 full time employees in 1976 to 553 in 1981. We evaluate the performance and work product of the Inspector General as fair to good. Therefore, we recommend that little, if any, short-run changes take place. This office has tended to engage in insignificant and low-level audit and investigative activities; it needs to examine more serious abuses. The autonomy of this important office needs to be reinforced.

Budget Request: Maintain the $19.1 million FY 81 level for FY 82.

Office of Assistant Secretary for Administration

This office's powers and functions have been expanded far beyond the level needed to fulfill its intended function which is to provide administrative housekeeping for the Department. The Deputy Assistant Secretary for Administration now controls, either directly or indirectly, the following vital support systems: all budgetary functions (money); all data processing systems (information); all personnel functions (people and payroll); and much correspondence (communications). This control will have to be decentralized before any meaningful

policy, program, personnel or organizational changes can occur within HUD.

The office's staff has grown from 2,126 in 1976 to 2,438 in 1981, inclusive of administrative field staff.

The Task Force recommends the following:

- Transfer the Office of Budget to the Office of the Secretary or Under Secretary.

- Switch the authority and management control for all functions from the Deputy Assistant Secretary to the Assistant Secretary of Administration, who is directly accountable to the Secretary.

- Undertake a thorough personnel and organizational evaluation and audit to consolidate duplicative and unnecessary offices.

- Evaluate in all departments the staff and operations of the Office of Automated Data Processing (ADP) operations, ADP Systems Development, and the Office of Finance and Accounting. It may prove more cost effective to subcontract computer operations.

Budget Request: a 20 percent reduction of the $91 million Central Office level for 1981 to $73 million for FY 82. No change from the $89 million 1981 figures for Field Administration and Operational Support for FY 82.

Assistant Secretary for Community Planning and Development (CDP)

The program changes recommended here will require decentralization and deregulation for the basic community development block grant (CDBG) and Urban Development Action Grant (UDAG) programs. Such decentralization will naturally shift staff needs from the Central Office CPD operations to the HUD Field offices to provide technical assistance to local communities and expand their role in performance monitoring. There will be no need for the current large number of special assistants or for the three Deputy Assistant Secretaries and the mini-empire built by the Carter Administration to support the centralized operation of these programs.

The current CPD staff consists of 376 Central Office and 1,523 Field Office personnel, an increase of 234 employees since 1976. We propose that the staff be reduced by 10 percent for 1982 through consolidation and transfer of functions.

Budget Request:	FY 81	FY 82	FY 83
CDBG—	$3.8 billion	$3.9 billion	4.1 billion
UDAG—	675 million	675 million	675 million
Sec. 312—	140 million	129 million	
Sec. 701—	40 million	40 million	
Administration Expenses—	68 million	62 million	

Office of Assistant Secretary for Housing

Ironically this vital office, which is responsible for administering all Federal mortgage insurance and assisted housing programs in the nation, has been starved by the Carter Administration while all of the other HUD offices have increased in staff. There were 8,873 employees assigned to Central and Field offices in 1976. For 1981 this number had dropped to 7,911. This resulted from the shift of appraisal work for single family mortgage insurance to outside fee appraisers.

Two major program changes are recommended, which will have significant impact on both the budget and staffing organization for the housing programs. Since these changes will require legislative approval, implementation will take at least one year. The recommendations which are detailed in Section 5, include the following: consolidation and simplification of FHA mortgage insurance programs; and similar consolidation and decentralization of all assisted housing programs into a community housing block grant program. Both options are designed to reduce red tape, lower costs, and minimize the need for HUD Central Office housing staff by shifting staff and budget resources to the HUD Field operations.

Prior to legislative approval of these proposals the existing housing programs should be continued but with modifications. The following assisted housing program changes are recommended: subsidy cost containment for Section 8 Fair Market Rent levels should be reactivated, and contract rent approvals should be strictly limited to a reasonableness of rent test. There also needs to be a greater emphasis on the use of existing and moderate rehabilitation.

Staffing recommendations: In the first year, staff should be gradually realigned toward Field Offices, followed by a decrease in Central Office staff by 10 percent in the second year of a new administration.

Budget (in billions):

Item	FY 81	FY 82	FY 83
Assisted Housing Contract Authority	1.5	1.3	1.3
Budget Authority (50-50 mix)	30.5	29.4	29.4
Public Housing Operating Subsidies	.8	.7	
Housing for the Elderly (202) and the Handicapped	.7	.7	
GNMA Tandem	1.8	1.0	
Section 235 Stimulus	. 4	—	
Administration Expenses	.253	.253	

Office of Assistant Secretary for Field Operations (Proposed)

Since the three-tier reorganization of HUD in 1969, the relationship between the ten Regional and 77 Field Offices has matured. The Field Offices, when placed under the jurisdiction of the Regional Offices, found duplication and friction when they tried to work through the Regional Offices. The Regional Offices were relieved of this supervisory responsibility in 1978. While this stregthened the Central Office bureaucracy, it also improved efficiency by removing an unnecessary layer between Field and Central Offices.

Regional Offices now concentrate on administrative management. In addition, they represent the Department on the Federal Regional Council. This arrangement is superior to the pre-1978 system. Elimination of the Regional Office completely would inevitably lead to the reestablishment of the zone commissioner concept which increases the power of the Washington bureaucracy.

The Task Force recommends the retention of the three-tier system. Regional Offices should stay out of processing, and the Secretary's control over field operations should be strengthened.

Accountability of Field Offices

Under the present organization the Field Offices look to the Assistant Secretaries for specific program guidance. For overall guidance, by default, they look to the Office of Administration. Although the Assistant Secretary for Administration can be expected to reflect the Secretary's wishes, the same cannot be said of the bureaucracy which reports to the Assistant Secretary. Consequently, the Secretary's direct control of the Field structure is filtered through a powerful career bureaucracy which has an indifferent attitude toward Administration policies.

To establish control and act as a check on the career bureaucracy, the HUD Secretary must have his own direct

chain-of-command to the Field. This should be in the form of a greatly strengthened Deputy Under Secretary, or Assistant Secretary, for Field Operations. This individual should have a close working relationship with the Secretary and the authority to resolve disputes between programmatic Assistant Secretaries and the Field. This office should also provide the Field structure with a meaningful appellate process when they object to the operating plans developed by the Office of Administration.

Size and Jurisdiction of Field Offices

Some Field Offices are becoming unmanageable, either due to size or the complexity and number of problems they must face. For example, there are 402 employees in the Los Angeles Field Office and another 200 in sub-offices reporting to Los Angeles. Other Field Offices cover too wide a geographical area to effectively serve their constituencies. For example, the Dallas office services New Mexico, approximately 1,000 miles distant, burdening both clients and Department officials with added travel costs.

While not proposing "reorganization" as such, we recommend the individual Field Offices and the Region VIII Office be examined to determine whether they are manageable and accessible to clients within their jurisdiction.

Field Staffing

The Department has undergone a gradual shift of personnel and grades to the Central Office. In 1972, HUD had 11,892 permanent full-time (PFT) personnel in the Field, and 3,308 in the Central Office. The 1981 figures call for 11,983 in the Field compared to 4,003 in Washington, an increase of only 91 Field positions (less than 1 percent), but a whopping 695 (17 percent) for the Central Office. Any shift of this type is accompanied by an accumulation of high-ranking positions in the Central Office. For example, in Community Planning and Development, there are 1,523 employees in Field Offices. Of these, only 23 are GS-15, and none are Executive Service level (super grades). In contrast, of the 376 Central Office employees, 69 are GS-15, and 16 are Executive Service.

The Field has been hampered by unnecessary rigidity in fulfilling the operating plans developed in the Central Office. More flexibility to shift personnel between programs is necessary. In addition, the Department operates under an antiquated communication system. Modernization would be ex-

tremely beneficial for such a decentralized Department and would help free up individuals with hard to replace skills, such as local Field Office attorneys.

We advocate shifting of Central Office personnel to Field Offices to bring them to full strength; providing Field Offices with grade levels commensurate with their expanded duties; and modernizing the Department's nationwide communications system.

Office of Assistant Secretary for Fair Housing and Equal Opportunity (FHEO)

FHEO has experienced rapid and accelerated growth in staff size from 465 in 1976 to 682 for 1981—an increase of 217 (46.6 percent).

It is recommended that FHEO's staffing and functions be completely reviewed to streamline organization, increase efficiency and improve coordination between this and other program offices.

Office of Assistant Secretary for Policy Development and Research

This office has a history of approving research projects of dubious value. A generous assessment of the proposed and actual research grants awarded during the past four years would conclude that as much as 90 percent of funding has been wasted on useless academic research efforts which do not support HUD's housing and urban development mission.

We endorse an immediate end to this policy of wasteful expenditure of taxpayer funds. Recommendations: return the policy development function to the Secretary and redirect the office's mission toward real and applied research to support program objectives for housing and community development as determined by the Secretary and program assistant secretaries; terminate, or do not renew, wasteful contracts; and transfer the Economic and Market Analysis Division's (EMAD) functions to the Assistant Secretary for Housing.

The number of full-time employees should be cut from the present 200 to 175 by transfer and consolidation.

Budget Request: the budget should be reduced from the $50 million figure for FY 81 to $40 million for FY 82.

Office of Assistant Secretary for Neighborhoods, Voluntary Associations and Consumer Protection

This office was created in 1976 to administer Regulatory and

Consumer Affairs. These legitimate and necessary functions remain, but the office was expanded beyond its original scope in 1977 with the addition of Neighborhoods and Voluntary Associations. These new responsibilities duplicate program office activities and should be transferred to, or consolidated with, program and Field Offices for direct administration if in fact they are found to be necessary at all.

This office has 376 employees, 225 in the Central Office and 151 in HUD Field Offices, a growth of 234 employees (or 165 percent) since 1976.

The Office of Neighborhood and Consumer Affairs should be consolidated within existing program offices or appropriate Field Offices. This also applies to the Office of Neighborhood Self Help Development which might possibly be transferred to the Neighborhood Housing Services of America Corp., Inc.

The remaining programs consisting of the Office of Regulatory Functions should remain intact.

Budget Request:

Neighborhood Self Help—0 FY 82
Administrative Expenses—$6 million FY 82

Office of Assistant Secretary for Public Affairs/Legislation and Intergovernmental Affairs

If a new Office of Assistant Secretary for Field Operations is established, then two existing Assistant Secretary offices, Public Affairs and Legislation and Intergovernmental Affairs, should be combined.

There should be a staff reduction within the Office of Public Affairs and a redirection of its activities which currently overemphasize "public relations." The staff of the Office of Legislation and Intergovernmental Relations should also be reduced and its activities redirected to emphasize congressional relations.

New Community Development Corporation

The New Communities program is no longer active or viable and should not be reactivated. The continued phase-out of this program is now in process and should be continued. Staff levels have decreased from 80 employees in 1976 to 40 in 1981.

Budget Request: A 10 percent reduction from the 1981 level of $40 million to $36 million for FY 82.

MEDIUM-TERM PROBLEMS AND OPTIONS

Community Development Block Grants

The Community Development Block Grant Program (CDBG) was enacted in 1974. Its stated purpose was to consolidate numerous categorical development and redevelopment programs to provide local governments with a stable flow of funds based on a formula of recognized need and the principle of general revenue sharing. CDBG was intended to enhance local government's flexibility and reduce federal intervention. Indeed, the restraints placed on federal involvement in local plans and priorities dominated the legislative deliberations.

As enacted into law, HUD was required to approve formula-determined CDBG fund applications within 75 days unless an applicant's description of its community development and housing needs was proven plainly inconsistent with generally available facts and data, or that the activities proposed were plainly inappropriate to fulfill those needs.

Unfortunately, over the last 3-1/2 years the program has been altered drastically through administrative actions which would not have been acceptable to Congress. Few changes were made through the process of revising CDBG regulations. Virtually all of them came through the issuing of handbooks or notices to the Field Offices, which mandated substantive requirements or procedures without complying with the formal rule-making process. This practice has reversed the concept of limiting Federal involvement in community affairs. In many cases, the actions of field personnel have exceeded "guidelines" set forth in instructions to the field limiting local decisions and initiatives.

It is critically important to reverse this trend and address the problem of handbooks and notices—possibly through a statutory requirement that such items be issued only as formal regulations, or that they be considered as rules or regulations and therefore subject to the legislative review process.

The following are possible changes in the law and CDBG regulations which should be considered:

- In the area of law, allow services to be funded even though local funds are providing the physical development activities rather than CDBG funding.
- Allow greater local flexibility in the choice of strategies to pursue redevelopment, neighborhood conservation, housing, jobs, services or general economic development.
- As for regulations, allow greater flexibility in economic

development activities which currently have to show a benefit principally for low and moderate income persons.

- Remove the rigidity of "proportionality" in measuring Housing Assistant Plan (HAP) performance.
- Recognize that performance criteria need flexibility, particularly in the area of HAPs, since there is little correlation between resources (available funds) and opportunities (developers with viable projects).
- Clarify the distinction between administrative and program expenses so local governments can determine whether they are complying with appropriation limitations.

Urban Development Action Grants (UDAG)

The Urban Development Action Grant Program (UDAG) was enacted in 1977 as a supplement to the CDBG program to enable communities to take advantage of unique opportunities —particularly in the area of economic development.

At the time UDAG was proposed, the question was raised whether UDAG and the Economic Development Administration (EDA) should be combined. That question remains valid, although these programs generally serve different constituencies: EDA—rural, UDAG—urban. The apparent similarity of the UDAG and EDA programs should be examined to determine whether this justifies their merger.

The UDAG program needs modification and clarification in its operations and award criterion. UDAG could be amended to authorize loans in addition to grants. Presently, only grants may be made to communities, even though the community uses the grant merely to make loans. The subsequent repayment of loans by the private sector could boost the level of funds for other distressed communities having worthwhile projects.

Another revision worth exploring is the clarification and rationalization of those regulations dealing with leveraging. How private investment is counted, and differences in the treatment of similar private source funding, leads to confusion and erratic awarding of grants. In addition, neighborhood projects, which are almost exclusively related to housing, need special regulatory consideration in recognition of their lower leveraging possibilities.

A more rational treatment of local administrative expenses should be explored. Allowing reimbursement of administrative expenses from successful UDAG awards would ease the excessive use of CDBG technical assistance funds to solicit and

assist grant proposals for a program already oversubscribed. Also, a more careful review of the program's pretesting requirements is necessary to assure that grants are not being made on projects that would have proceeded without the UDAG award. For any such case, the leveraging factor is actually zero or negative and represents extremely poor use of taxpayers' funds.

Finally, without legislative changes, the UDAG program could very easily be paired with job and enterprise zone tax incentives and regulatory relaxation. UDAG grants could be used as the carrot to encourage localities to establish job and enterprise zones, and the UDAG-aided project could be a starting point for private economic investment in the zone which tax and regulatory incentives would then sustain.

Housing Assistance

Present housing assistance programs (public housing and Section 8) are faced with waning political and public support because of the escalating costs required to assist each additional household and the rapidly snowballing aggregate costs of the programs. In searching for alternatives, the 96th Congress nearly turned to a middle-income apartment subsidy program which many believed would result in the abandonment of the Section 8 new construction program and reliance on "trickle down" housing for lower income families. Rejecting that approach, Congress has returned to the opinion that the Federal government can determine the appropriate type of housing needed to solve local problems. Congress has mandated that no more than half of the additional assisted housing units for FY 81 can be newly constructed even though local government Housing Assistance Plans call for 60 percent new construction.

The concept of a housing block grant offers the most promising programmatic alternative to the problem of high costs in the Section 8 and public housing programs. It is based on the premise that local government officials are better able than federal bureaucrats to understand and solve local problems. A new administration should put to good use the Housing and Community Development Act of 1980 which provides that "The Secretary shall conduct a comprehensive examination of the feasibility of a housing assistance block grant program, including the feasibility of replacing the categorical housing assistance programs proposed to be utilized in fiscal year 1982,

and shall transmit to the Congress a report thereon not later than March 31, 1981."

The direct annual subsidy commitment for Section 8 new construction in FY 1981 is expected to average from $5,300 to $5,900 per unit. The comparable cost for Section 8 substantial rehabilitation is expected to be $6,250. The direct annual subsidy cost (without including lost taxes) for public housing in FY 1981 is expected to average $4,450 per unit. These high costs are causing substantial backlash in Congress and among the public, who see that the cost of subsidized housing exceeds the rents ordinary citizens must pay. Moreover, the current programs serve only a small percentage of the income-eligible population.

Finally, the decision-making responsibility for constructing and operating new or substantially rehabilitated housing is diffused among HUD staff, developers and public housing authorities which are often independent of units of general local government. Accordingly, housing construction and rehabilitation are not well coordinated with other physical construction in the community. Nor are housing programs well coordinated with other income assistance programs.

Current legislation appears to preclude the housing block grant, even on a limited basis. Accordingly, the short- and medium-term issues are essentially the same: (1) whether in the short or medium term to propose a housing block grant for FY 1982 or FY 1983; (2) if so, whether (a) to propose a limited "blocking" of Section 8 programs such as was proposed in President Ford's FY 1978 budget or (b) to propose a broader housing block grant; and (3) what interim steps, if any, to take.

Program Design Issues

• In what form should the block grant be provided? (Block grants may be provided to recipients under budget or contract authority either separately or in combination.)

The preliminary Task Force view is that the grant should allocate budget authority. To insure that the budget authority does not lead to excessive expenditures (outlays) in the first, or early, years, there could be a ceiling on outlays of perhaps 10 or 20 percent of a given year's budget authority.

• Who should administer the grant?

Grants could be administered by cities and urban counties now eligible for CDBG with the balance either administered by the states, or by the federal agencies—HUD or the Farmers Home Administration (FmHA).

The Task Force consensus is that the program should be administered by eligible cities and urban counties with the balance administered by the states. At each level, the grant should go to the general unit of government, which should have the authority to delegate primary responsibility to a special-purpose housing or community development agency. This would entail a reduced role for FmHA, which now receives a 10,000-unit subsidized housing set-aside. The state housing finance agencies could take on an expanded rural role if the states choose that mechanism. Their role in urban cities and counties, with respect to federal funds, would depend on whether the city or county sought their assistance.

• What should be the allocation formula?

There are several options available for arriving at an allocation formula: the present HUD fair-share housing procedure, refined to bring it down to the level of the eligible cities and counties; a housing-needs formula as indicated in the established HAP now prepared for CDBG purposes; the twin CDBG formula; or some new plan, such as the housing purchasing gap.

The Task Force advocates retaining the present HUD fair-share formula. It would eliminate the contention caused by redistribution of benefits. The difficulty with the use of HAPs is that there would be incentives to inflate HAP needs estimates if they became the basis for allocations of subsidies, while use of the CDBG formula would reduce the program's political attractiveness. A detailed option analysis should use computer calculations to explore the implications of these and other formulas on states, cities and congressional districts.

• What should HUD's role be?

The options are technical assistance; review of a plan (perhaps HAP) to insure that funds are being used for eligible activities; HUD processing deadline/sanctions; hold harmless; discretionary funds.

The Task Force's initial view is that HUD's role should be that designed for it in connection with CDBG: plan review subject to a processing clock, study of a performance report and of complaints, and authority to impose sanctions. The nature and extent of sanctions should be scrutinized with great care because of the impact on the political acceptability of the program by mayors on the one hand and civil rights groups on the other.

We also believe HUD would have to continue to be responsible for assistance contracts which have already been

executed. As Section 8 existing authority is recaptured when short-term leases with landlords expire, the recaptured authority should be transferred to the city, county or state. Discretionary funds for American Indian housing and disaster assistance should be no more than five percent of the total program funding. If there is a special statutory set-aside for an Indian housing program, discretionary funding should be no more than 1 percent of the program total.

• Who will be eligible beneficiaries?

The question arises whether to limit beneficiaries to those at 65 percent of the area median income, at perhaps 80 percent, or even at having no income restriction. Another suggestion is to allow 10 percent of the grantees to be between 65 percent (or 80 percent) and 100 percent of the area median. Our preliminary view is that 80 percent of median is an appropriate cutoff to insure that the program serves its intended lower-income beneficiaries. Some at 80 percent will be able to afford home ownership in existing or moderately rehabilitated housing. A city, county or state should be free to set a lower ceiling.

• What will be eligible uses?

Among the suggested eligibility criteria are: debt service; interest reduction payments; front-loaded grants or tandem-type mechanisms; rent subsidies; home ownership; displacement resulting from the housing block grant program; or anything housing-related including site improvements.

The keynote of the program in the opinion of the Task Force members should be flexibility of uses. The funds should be available for any purpose which improves the quality or availability of housing for the intended beneficiaries. The extended option paper, however, should take into consideration the advisability of prohibiting certain collateral uses.

• What programs will be eliminated?

Section 8, public housing, tandem, Section 235, and the performance funding system for public housing operating subsidies should be eliminated. But as a practical matter the performance funding system may have to be phased out rather than immediately terminated. There will be a substantial impact on local politics if public housing authorities are required to obtain their operating subsidies from local government officials.

• Will the federal government impose unit cost controls?

Cost controls would be inconsistent with the philosophy of the program. We do expect that a higher percentage of the

funds under the housing block grant would be spent on existing and moderately rehabilitated housing as compared with present programs and that, consequently, per unit costs would drop.

- What will be the relationship with FHA insurance?

The Task Force believes FHA insurance should be available on an actuarially sound basis. Subsidized insurance would in practice reintroduce mandatory HUD processing cost controls, etc. because cities, counties, and states would not forego the additional subsidies.

Resource Issues

Several questions on HUD resource programming need study.

- What should be the program size?
  1. How much budget authority would be required to provide assistance to 100,000, 200,000, or 400,000 units assuming present HAP breakdowns?
  2. What program level could be supported by HUD's FY 1981 budget?

- How much HUD staffing (permanent full-time) would be required to administer a 100,000, 200,000, or a 400,000 unit program?
  1. How many PFT's would be needed in the Central, Regional and Area Office respectively?
  2. What PFT savings would be realized in these respective offices through elimination of existing programs?
  3. How much of the savings would be in housing program PFT's? What additional PFT savings could be realized in the counsel's offices at each level? And in administration and staff services at each level?
  4. When would these increases and decreases in staffing occur?

- What non-salary expenses would be required to support the program?
  1. What expenses would be incurred in each—the Central, Regional and Area Offices?
  2. What non-salary expenses would be reduced or eliminated in the offices at each level?
  3. What savings could be realized in non-salary expenses in the counsel's office at each levels? And in administration and other services at each?
  4. When would these increases and decreases in non-salary expenses occur?

Organizational Issues

Organizational questions to be studied are:

- What sub-offices are now administering the superseded programs at each level? And what other programs do they administer?
- What sub-offices at each level should administer the housing block grants?
- Should these grants be administered by existing or newly created offices?

In addition to these programmatic issues, a new administration should consider:

- What would be the views of such principal interest groups as: the National Association of Home Builders, the National Association of Housing and Rehabilitation Officials, the National League of Cities, the U.S. Conference of Mayors, the National Coalition for Low Income Housing, the Mortgage Bankers Association of America, and the National Urban League?
- What other initiatives might support or conflict with a housing block grant?

1. Outside of HUD there is a general movement toward block grants and welfare reform initiatives.
2. Conversely, within HUD there are advocates of reorientation of insurance programs and simplification of CDBG.

Whether or not a housing block grant is proposed in the short or medium term, we recommend that the existing programs be vigorously implemented to preserve the credibility of the new administration with Congress, the constituent groups and HUD staff.

Budget

In the absence of a new moratorium, a housing block grant would entail no FY 1981 rescission. Because the program would not be in operation in FY 1981, no supplementals would be required.

In preparing a housing block grant budget alternative to the FY 1982 categorical housing assistance programs, the first step should be to decide the cost of maintaining current commitments (and those estimated to be made during FY 1981). A housing block grant budget should include sufficient funds to allow these commitments to be honored. The next step will be to decide on how much *new* money to recommend.

There will be four general choices:

- Can we increase the FY 1982 budget by the same ratio

as FY 1981 over FY 1980. This will encourage housing block grant administrators to continue with a local version of the Section 8 program, making long-range commitments during the current year, with the promise of a substantial block grant increase next year, then another round of long-range commitments, then another, etc.

• Or we may decide that the geometric increases of the past few years should not be an automatic part of the housing block grant program. We can set a "reasonable" amount of new money to be included in the FY 1982 budget and provide that same amount for FY 1983 and FY 1984 without increase.

• Perhaps we should propose no increase over the FY 1981 budget.

• Or finally, the administration might budget whatever is necessary for communities to subsidize their lower-income households (say those at 65 percent of the area's median income) over a definite period of time, e.g., ten years.

This fourth budget choice deserves at least theoretical attention, since it answers the logical question: "How much is enough?" As a matter of fact, it may not be "enough," since the total dollar figure would include only subsidies and would not count the cost of those financial incentives necessary to attract investors in, e.g., multifamily rehabilitation mortgages. Once the cost of choice four is known, the next question should be: Can the country afford it?

The Task Force recommends Option Two as the most feasible approach to place restraints on escalating housing subsidy costs. A figure of $29.4 billion in budget authority is suggested for each of the fiscal years 1982-1984 with the expectation that savings from reduced processing delays and other efficiencies under a block grant approach will permit increases in assisted units over each of the first three years of a block grant program.

FHA Mortage Insurance Operations

Periodically for the past ten years, the Federal Housing Administration's operations have been critically examined by Congress and others concerned with the Agency's current and future role. The more thoughtful analyses consistently reveal a desire to strengthen FHA's unsubsidized mortgage insurance operation (basically the Mutual Mortgage Insurance Fund and the Section 203(b) program) while at the same time maintaining a presence in those other programs which are supported by the

non-actuarial insurance funds. This view has inherent and so far unresolved conflicts because fiscal responsibility cannot be maintained in most of FHA's more recent programs. Efforts to revise FHA's role have invariably met with broad public and private resistance when proposals attempted to trim or eliminate these higher risk programs. The development of such revisions has been a challenge for each incoming Administration since 1968.

Congress has repeatedly protected FHA's higher risk programs, while continuously criticizing their administration. It is unlikely that Congress will completely withdraw support from them at this time given the present state of the housing market. Consequently, it would be better to simplify and split FHA's functions along lines of actuarial and non-actuarial soundness in order to more clearly define the agency's roles and responsibilities, much as was proposed in the early 1970s by Secretary George Romney. The feasibility of doing so within or outside the framework of HUD (and even FHA) has been the subject of past Congressional consideration. In short, it is doubtful that a new administration can develop plans regarding the separation of FHA's actuarial and non-actuarial programs that have not already been considered.

Historically, new administrations have found it politically expedient to accept the status quo view of FHA's role. This has led Congress to oppose subsequent broad program revision. Perhaps the best recommendation to the new administration is that it break with tradition and make no specific proposals regarding FHA's present or future role beyond a commitment to analyze significant areas of concern. We, therefore, recommend as a base line modification, a balanced, noncontroversial approach favoring the FHA consolidation and simplification initiatives agreed to by the Senate and the House Banking Committees in the Housing and Urban Development Act of 1972. This legislation was never enacted into law.

We propose consolidation and simplification of FHA mortgage insurance authorities contained in the National Housing Act to the following elements:

- Home Mortgages insured under two authorities—subsidized and unsubsidized;
- Multifamily residential mortgages divided between these dual authorities;
- Hospitals, nursing homes, group practice and intermediate-care facilities covered in one health-facilities mortgage insurance program;

• Manufactured housing and property improvement loan programs retained but simplified;

• That FHA interest rate authority be optional—set at either a fixed rate determined by the Secretary or a negotiated market rate;

• Maximum mortgage and sales price limits established at 90 percent of the median sales price of a new single-family home and 90 percent of appraised valuation for multifamily units, based on area comparables;

• Consolidation of the mortgage insurance funds into two funds—subsidized (high risk) and non-subsidized (actuarially sound); and

• Incentives for delegated processing with increased fee allowances, acceptance of certifications for compliance with MPS by local codes, delegated inspection and processing where single family and/or multifamily risk sharing (co-insurance) is utilized.

This proposal is the least controversial, and would have a greater chance for Congressional acceptance during 1982—the new administration's first full year.

Legislative authority already exists approving the concept of experimental authority for a negotiated FHA rate and a departure from a fixed statute determined FHA mortgage limit. FHA should also be authorized to consider the concept of developing alternative mortgage instruments.

This modest approach will result in the following benefits: (1) less red tape and bureaucratic delays in FHA processing; (2) modernization which tracks the private market system for FHA interest rates, mortgage limits, and more flexible mortgage terms; (3) reduced risk to the federal government through emphasis on co-insurance with the private lender; and (4) reduced costs due to a reduction in the number of federal employees.

REGULATORY FUNCTIONS

HUD is responsible for administering five regulatory acts: the Mobile Home Construction and Safety Act of 1974, the Lead Base Paint Poisoning Act, the Real Estate Settlement Procedures Act, the Fair Housing Act, and the Interstate Land Sales Full Disclosure Act.

For the most part, HUD has limited authority under this legislation. Because of this, the offices have low funding and have not been particularly controversial. However, both the

Interstate Land Sales Act and the Mobile Home Construction Code have been the subject of recent legislative action.

Mobile Homes

The Mobile Home Act pre-empted state laws regarding mobile home construction. It was designed to protect purchasers of mobile homes and to allow for the development of an interstate market for manufactured housing.

During the Carter Administration a conscious and unwarranted decision was made to rewrite the construction standards to unreasonably rigid and expensive levels in the name of safety. The Act requires standards that protect the public from "unreasonable risk" and must consider the cost effect of such a standard on mobile homes.

The Carter Administration spent $5 million to research the safety of a standard household plug, to test the effects of a crash on a mobile home in transit and other equally unreasonable safety research projects.

The new administration should develop standards which will lead to equitable financing of mobile homes under the regular FHA home insurance program. Changes should be made which reflect the real needs of consumers and to improve the acceptability of manufactured housing.

HUD has also taken legal action against manufacturers of large recreational vehicles, arguing that travel trailers were actually mobile homes not constructed to the Act's specifications. HUD's action has threatened the jobs of thousands of workers and the very existence of 30 companies. There have been no consumer complaints, no state request for action, and no Congressional call for action. HUD unilaterally has expanded its authority to regulate an industry already regulated by the Department of Transportation and the states.

The new administration should act to clarify present regulations, establish a clear and appropriate definition of a mobile home, and not use HUD to regulate recreational vehicles.

Finally, HUD should develop standards and procedures which will recognize manufactured housing as a form of housing no different in any important aspect from site-built construction. HUD should recognize the role manufactured housing—with a median price of $20,000—can play in accommodating low- and moderate-income families.

Real Estate Settlement Procedures Act

The Real Estate Settlement Procedures Act was passed in

1974 and amended in 1975. It was intended to help reduce real estate settlement costs and eliminate kickbacks. The law requires pre-disclosure of settlement costs and has been administered fairly well. On the other hand, the section that prohibits kickbacks has been the source of great controversy. HUD staff believes that controlled businesses create situations which are similar to kickback payments. They have come to this conclusion prior to completion of a $2 million study of the issue. Based on this finding, HUD has issued an interpretive ruling which has in effect outlawed service corporations and other settlement companies owned or controlled by financial institutions or real estate companies.

The new administration should wait for the completion of the controlled business study before taking action. Then it should carefully consider the impact of any action on competition and on costs to the consumer.

Fair Housing

Under the Fair Housing Act, HUD has very limited authority. In addition to monitoring housing programs, HUD's main activity is the awarding of approximately $3 million per year in grants to state fair housing agencies.

Interstate Land Sales

The Office of Interstate Land Sales has generated a great deal of controversy since it was established by Congress. That controversy led to a substantial revision of the legislation in 1979 which resolved most issues. Currently, HUD is promulgating regulations to enforce the new law.

Nevertheless, there are a number of ongoing problems the new administration can address. HUD should develop a mechanism to ensure uniform law enforcement. The current procedure does not prevent identical questions from receiving contradictory answers, and thus places an uneven burden on developers. HUD also needs to develop a relationship with the states which respects state authority and results in improved enforcement.

Lead-Based Paint Poisoning Prevention Program

This program was established within HUD in 1971 to eliminate the dangers of lead-based paint in federal and federally-assisted housing.

The program may be among the most expensive invisible programs within HUD. Over $8 million in research funds have

been expended without determining the nature and extent of the problems or developing effective methods to solve them. HUD has not established effective mechanisms to ensure compliance with the Act. Neither has it established the interagency partnership required by the Act.

An incoming administration should develop reliable and reasonable methods to fulfill the mandates of the Act. It should also establish a procedure to ensure that housing rehabilitated or sold with federal assistance does not contain lead-based paint.

LONG-TERM PERSPECTIVES

Several short- or medium-term items identified in this report will also require attention in the longer 3- to 5-year perspective. If a housing block grant program is developed and enacted, it will have to be efficiently and fairly administered. If current administrative strings on the Community Development Block Grant Program are relaxed as recommended, the long-run problem will be to avoid further legislatively mandated burdens on the program. A concerted effort will be necessary to provide local officials with the additional flexibility and self-determination which is so important to the success of CDBG.

Other longer term issues facing HUD programs arise from the rapidly changing market conditions in housing finance, the necessity for housing to be adapted to higher energy costs, and the effects on urban grant programs from initiatives involving urban development tax incentives under the Enterprise Zone concept.

Coping with the substantial evolution in housing finance is a principal long run problem for the FHA mortgage insurance function and the secondary market function of GNMA. FHA and GNMA are now restricted to insuring standard, level-payment, fixed interest rate mortgages and only limited forms of graduated payment mortgages, but market pressures are pushing financial institutions and other investors toward increased reliance on alternative mortgage instruments. Other government-sponsored mortgage finance entities, such as the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, significantly influence how private lenders respond to higher, rapidly changing interest rates. The role of these entities must also be considered in any long-term strategy for meeting the housing credit demand.

Soaring energy costs have created the demand and necessity for substantial changes in housing design. What the appropri-

ate government role should be in encouraging these changes is a long-run issue for housing and energy policy decisions. HUD now sets minimum property standards for thermal efficiency for FHA-insured houses, will enforce any building energy performance standards developed by the Department of Energy, and runs the Solar Energy and Energy Conservation Bank.

Finally, the development of the Enterprise Zone concept will create a long term need for coordination with other urban-aid programs such as CDBG, UDAG and revenue sharing. These programs will provide local governments with a stable flow of funds based on formulas whose elements recognize need. They will also provide greater local flexibility and reduce federal "second guessing." But the problem of coordination within the context of the existing community development programs will become a major long-term issue.

8

THE DEPARTMENT OF THE INTERIOR

Robert L. Terrell*

ENERGY AND MINERALS

Deficiencies of Previous Policy

Perhaps "flaccid" best characterizes the energy and minerals posture of the Department these last four years. The absence of an administration advocate to promote and facilitate the orderly development of domestic mineral resources has generated a precipitous decline in the morale and professionalism of the nation's premiere repositories of minerals scientific and technical expertise, the U.S. Bureau of Mines and the U.S. Geological Survey.

The newest agency under the Assistant Secretary for Energy and Minerals, the Office of Surface Mining Reclamation and Enforcement, was born of the commendable goal of returning coal mined lands to their former productive state, but was reared under a Department zealously bent on regulating the coal industry into submission.

The previous honed advocacy in the Department asserting the need for developing domestic minerals resources and maintaining this country's superiority in mining and processing technologies has clearly deteriorated. In its place is an apparent timidity in discussing the energy and mineral wealth of the United States, a new departmental constituency positioned against prudent development of domestic resources, and a

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**Author's Note:* The preparation of this report was a collective enterprise involving many individuals. Sam Ballenger, Frank Cushing, Gary Ellsworth, Harry McKittrick, Ray Peck, Perry Pendley, Craig Potter and Dave Russell deserve particular mention. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

cadre of minerals professionals in the federal sector disillusioned with their scuttled policy role.

Most disturbingly, the atrophy visible within the energy and minerals function has developed precisely at the time the U.S. finds itself confronting an impending minerals crisis—a crisis potentially more destructive to this country's national security than our excessive dependence upon foreign oil imports. America is now 50 percent or more dependent on foreign sources for 24 of the 32 strategic and critical minerals essential to our national survival.

The vulnerability the nation faces because of this growing dependence upon imported minerals deserves far more serious attention than has been paid these past four years—time marked by diminished, rather than renewed, appreciation of the vital role of strong energy and minerals leadership.

Office of the Assistant Secretary—Energy and Minerals

Creation and Constituent Bureaus

The Office of Assistant Secretary—Energy and Minerals and that of the Assistant Secretary—Land and Water Resources was created in 1973, when the Department reorganized the responsibilities previously delegated to the Assistant Secretaries for Mineral Resources, Public Land Management and Water and Power Development.

At that time, AS/EM was delegated direct line authority over the U.S. Geological Survey (USGS), the Bureau of Mines (BOM), the Mining Enforcement and Safety Administration (MESA), the Ocean Mining Administration, the Office of Minerals Policy Development and the Office of Research and Development, and the four agencies by which the Secretary of the Interior marketed hydroelectric power generated at U.S. Army Corps of Engineers Projects (the Bonneville, Southeast, Southwest and Alaska Power Administrations).

With enactment in 1977 of the Surface Mining Control and Reclamation Act, the Office of Surface Mining Reclamation and Enforcement was created. AS/EM has direct line responsibility for this regulatory agency.

Reduction in Authority

Since creation of the AS/EM office in 1973, with the exception of the addition of the Office of Surface Mining, the Assistant Secretary's jurisdiction has diminished materially:

• In 1976, the Offices of Mineral Policy Development and of Research and Development were combined into the Office of Minerals Policy and Research Analysis. The Department is now apparently disbanding this office altogether.

• The Mine Safety and Health Act of 1977 renamed MESA the Mining Safety and Health Administration, and transferred all of its enforcement responsibilities to the Department of Labor. Jurisdiction over the National Mine Health and Safety Academy at Beckly, West Virginia, was retained in AS/EM.

• The Department of Energy Organization Act in 1977 transferred the energy research and development responsibilities of the Bureau of Mines and certain other responsibilities of the Secretary relating to the timing and economic aspects of resource development on public lands to the new Department of Energy (DOE). In the same Act, the four power marketing agencies (and similar responsibilities of the Bureau of Reclamation) were transferred to DOE.

During the Carter Administration the AS/EM and constituent agencies have lost major elements of their authority and responsibility. Virtually all energy related authority was transferred to other agencies within and outside the Department. The only increase in authority was the creation and delegation to AS/EM of responsibility for the Office of Surface Mining, the administration of which has been consistently adverse to the timely development and expanded domestic production of coal.

As a result of the changes in the Assistant Secretary's authority since 1977 and the Departmentally sanctioned move toward a much less visible energy and minerals function, the size and prestige of the office have been reduced significantly. The number of Deputy Assistant Secretaries has been reduced from four to two (DAS/Policy, DAS/Regulations). Responsibilities previously exercised at the Deputy Assistant Secretary level are now performed by Assistants (for Minerals, Budget and Administration and for Regulations) and Special Assistants (for Environment, Nonfuels Policy and for Policy) to the Assistant Secretary.

Changed Mission

The perceived constituency of the Carter Department of the Interior is the environmental community. At the time of the previous transition in early 1977, the Administration publicly announced that the era in which the Department was a

"captive" of special interest groups was over. Thus, the U.S. Government Manual for 1975-76 describes Interior as follows:

> "The jurisdiction of the Department of the Interior includes the administration of over 500 million acres of federal land . . . the conservation and development of mineral and water resources; the promotion of mine safety and efficiency; the conservation, development, and utilization of fish and wildlife resources . . ."

By contrast, the same entry for the following year 1976-77 and for each year thereafter begins:

> "As the Nation's principal conservation agency, the Department of the Interior has responsibility for most of our nationally-owned public lands and resources. This includes fostering the wisest use of our land and water resources, protecting our fish and wildlife, preserving the environmental and cultural values of our national parks and historic places, and providing for the enjoyment of life through outdoor recreation. The Department assesses our energy and mineral resources and works to assure that their development is in the best interests of all our people."

But, more importantly, the change evident in the mission statement has manifested itself quite clearly in the operational decisions of the Secretariat. The public record of Secretarial Issue Documents of the previous Administration compared with that of the incumbents suggests a significant institutional bias against the development aspect of the Department's mission and in favor of non-development.

Inadequacies of the Current Energy and Minerals Function

The shift in Departmental policy emphasis from "conservation" to "preservation" is reflected internally in the decision-making processes of the Department. An informal but determinative adversary relationship has always existed between and among the Assistant Secretaries. The Assistant Secretary —Fish, Wildlife and Parks (and, to a lesser degree, the AS/LWR) has tended historically to argue for the subordination of resource development activity to the "development" of such intangible values as wilderness, parks, refuges, preserves and for recreational use.

Historically, AS/EM has been the principal proponent of orderly development and appropriate utilization of the mineral resources under the control of Interior. This advocacy role is no longer present.

A review of Secretarial Issue Documents of energy related matters discloses a pattern of reluctance, or inability, to

advocate at the Secretarial level mineral development views generated by the bureaus and agencies reporting to AS/EM.

Moreover, in those relatively few instances in which development oriented policy positions have been advanced by AS/EM, or in which the contrary policy positions of other offices have been challenged, Secretarial decision making has tended to disfavor the pro-development view.

The institutional bias in Interior against development is the combined result of political, structural and personnel management decisions by the incumbents.

From a political standpoint, at all levels, the Department evidences a compelling sensitivity to an environmentalist constituency.

From an institutional standpoint, the decision-making process now results in an adversary relationship among Secretarial offices of significantly unequal weight. AS/EM and its constitutent bureaus have been stripped of many energy related responsibilities and resources. Within AS/EM, organizational restructuring has diminished the opportunity for constituent bureaus to present for Secretarial level review development related data and policies with respect to remaining mineral responsibilities.

From a personnel management standpoint, the incumbent staff of AS/EM is in marked contrast to those of the other Secretariats. It is deficient in experience and expertise of development related priorities. It has, to a large degree, been drawn from environmental constituencies in the private and public sector. It is simply not as competent, not as forceful, and not as dedicated to its presumptive mission as the staffs of the other Secretariats.

Personnel changes within the Bureau of Mines and the U.S. Geological Survey have tended to reinforce this policy bias. The quality of work by these agencies, previously considered to represent primary expertise in technical, scientific and geologic matters, is now widely regarded as inferior to past efforts. This view prevails throughout the academic community, is repeatedly found in internal working documents by senior career civil servants in the constituent agencies, and has been noted in recent reports by the General Accounting Office.

Finally, the personnel and staffing both in Washington and the regional offices of the new OSM have been drawn nearly without exception from the environmental constituency which had supported the enactment of stringent surface mining control legislation. Virtually all positions of policy or enforce-

ment responsibility have been filled in this manner. Of perhaps greater importance, at all levels above OSM itself, the stringent and aggressive rulemaking and enforcement responsibilities have received Secretarial support. Thus, within the Executive Branch, vigorous opposition to specific elements of proposed and final rulemaking by the Council on Wage and Price Stability and, to a lesser degree, by the Department of Energy (DOE) have been largely ignored and, on appeal to Office of Management and Budget (OMB) or the White House, the Interior position has generally been sustained.

Absence of a Nonfuel Minerals Policy

The Mining and Mineral Policy Act of 1970 (MMPA) assigned to the Secretary of the Interior the responsibility to foster and encourage development by the domestic mining and minerals industry. Adopted at a time of increasing dependence upon foreign minerals and just one year following the passage of the National Environmental Policy Act (NEPA) of 1969, the Act clearly envisioned an examination by the Secretary not only of decisions made within the Department of the Interior regarding minerals but within the Executive Branch. Conceived as the minerals answer to the environmental "major federal action" language of NEPA, the Department of the Interior was to act as a clearing house and an advisor for the disparate actions taken by the Executive branch impacting the mining and minerals industry.

The Assistant Secretary for Energy and Minerals carries the responsibility for the enforcement of the MMPA. Expertise within that position gives it the unique ability to perform that task. Yet both the Secretary of the Interior and the Assistant Secretary in the present Administration have contended that the MMPA carried no authority to effectuate its goal to foster and encourage the domestic mining and minerals industry. Thus, while driving NEPA to the limits of interpretation, while urging the Solicitor to untenable assertions of Secretarial power and prerogative, while participating in the development (out of the preamble phrase "protect and enhance") of an entire court-ordered and administratively argued concept of Prevention of Significant Deterioration, the Secretary and Assistant Secretary have declared the Mining and Mineral Policy Act to have little force or effect.

With regard to energy decisions, rather than advocate fewer land withdrawals and less single use land designations, the AS/EM has encouraged minerals experts to inform Congress

that such withdrawals pose no cause for concern. During debate on Alaska, for example, the Department found itself in the awkward position of attempting to repudiate a minerals study it had commissioned. The Assistant Secretary has, as well, advocated an early abandonment of drilling in the National Petroleum Reserve in Alaska.

The Assistant Secretary's poor record regarding energy minerals is second only to the dismal record concerning critical minerals. The current Administration, urged in mid-1977 by twenty-five Members of Congress to initiate a Nonfuel Minerals Policy Review, has, after nearly three years and expenditures of $3.3 million and thousands of man-hours, abandoned the project. Envisioned as a comprehensive study of strategic and critical mineral issues resulting in a Presidential decision document, the effort has been nearly forgotten by the Department's hierarchy. It was the Assistant Secretary who led preparation of that Review. The absence of such a policy was clear during debate of the Central Idaho Wilderness Act. The Assistant Secretary, when asked of the importance of the rich cobalt deposit within the then proposed wilderness area and its use for defense purposes indicated that that was a matter within the purview of the Department of Defense.

The Administration, despite much talk, has no non-fuel minerals policy.

Problems and Opportunities

A clear and unequivocal commitment to minerals advocacy by the incoming Secretary is a must to restore balance to Departmental policy making and to review unnecessarily restrictive policies affecting mineral development.

The new AS/EM should have the background and experience to foster a broad advocacy role for the timely and orderly development of domestic energy and minerals resources. The Assistant Secretary, having within his responsibility the Bureau of Mines and the U.S. Geological Survey, becomes the mineral expert for the Secretary, and, indeed, for the President. No other individual in government can call upon the level of expertise available to the AS/EM regarding mineral resource decisions. Decisions made without sufficient minerals input deny the nation the vital role that America's abundant mineral wealth can play both in decreasing foreign energy dependence and in assuring the reliability of supply of strategic and critical minerals.

Unfortunately, no single position within the Carter Admin-

istration has been subjected to the purposeful abdication of responsibility and statutory duty as has been the Assistant Secretary for Energy and Minerals. During this Administration's short four year tenure, the AS/EM has gone beyond abdicating its role of minerals advocate to actually participating as a proponent of anti-minerals policies.

The trend within the energy and minerals function away from the traditional role of technical advisor and the marked tendency to regulatory excess must be reversed. Without an assertive leadership role by the replacement AS/EM and with continued acquiescence, the Department may irretrievably lose its now dormant responsibilities of guiding the Administration's mining and minerals policy.

Of equal importance to the need for a minerals spokesman for the Administration is the need to rebuild the decision-making responsibilities of AS/EM within the Interior Secretariat. The assertiveness of the replacement AS/EM must, therefore, be effectively utilized to sponsor a more balanced approach to resource planning among the other policy officers of the Department. To augment the shift to a responsible level of consideration of energy and minerals, the Department should review Secretarial orders which assign responsibility among AS/EM and AS/LWR regarding mineral development and land use planning on the public lands. Interior should, as well, assert an increased minerals advocacy to other Executive Branch agencies with surface land management responsibilities and to the Executive Office of the President.

The incoming President and Secretary should pay particular attention to the appointment of the Directors, Bureau of Mines, U.S. Geological Survey and Office of Surface Mining. Clear Secretarial direction to the new AS/EM should be drafted to ensure that constituent bureaus reflect their respective missions in reports and recommendations to AS/EM. A major policy shift is necessary to structure within the U.S. Geological Survey the analytical function necessary to propose policy input and recommendations from the Director to AS/EM, with emphasis on those functions which impact minerals development on federal lands and the Outer Continental Shelf.

Coordination and communication between the BOM, USGS and OSM are lacking because of policies by the current Administration which foster isolationism and should be improved. Relationships between the constituent bureaus and the Bureau of Land Management, the Federal Lands Leasing

Office of the Department of Energy, the Fish and Wildlife Service, the National Park Service, and the National Oceanic and Atmospheric Administration should be encouraged and facilitated. The constituent bureau's expertise and staff professionalism, when strengthened, will provide valuable liaison to these other agencies and the public.

Lines of communication between the states and the AS/EM and bureaus should be broadened to more fully service states' needs. In addition, the bureaus should be instructed to open lines of communication to the private sector. For example: increased liaison between the Bureau of Mines and the mining industry may serve to spur more rapid sharing of research innovations and new technologies; a symbiotic relationship between Office of Surface Mining inspectors and coal mining companies would certainly be preferable to the current adversary relationship in which the desirable agency role perceived by the Department is vindictive enforcement.

An early priority for the AS/EM should be to implement, with substantive input from the Bureau of Mines and the USGS, the mandate of the Mining and Minerals Policy Act and other statutes which direct the Executive Branch to structure, make recommendations toward and implement a national minerals and materials policy.

Organizationally, the number of Deputy Assistant Secretaries and supportive staff to the AS/EM could be increased to permit the expanded energy and minerals function as proposed here to assert itself. The Office of Minerals Policy and Research should be housed in the Bureau of Mines as the generator of policy input to the AS/EM.

U.S. Bureau of Mines

Authority and Mission

The Bureau was established in 1910 as a spin-off of the U.S. Geological Survey (Bureau of Mines Organic Act, 30 U.S.C. 1). Its principal mission is to assure an adequate supply of minerals to the nation, so that strategic, economic and social needs are met. As previously noted, the responsibilities of the BOM have been reduced significantly in recent years through legislation transferring authorities to the Departments of Labor and Energy and elsewhere.

Remaining authorities were also reorganized in the past two years. There are now two Deputy Directors, one for Minerals Research and one for Minerals Information and Analysis. The

Deputy Director for Minerals Research is responsible for fundamental and applied research and development programs to advance technology in mineral development and in the areas of health and safety, environmental protection and resource analysis. It oversees conduct of the Bureau's operations to develop and sell on behalf of the government helium resources pursuant to the Helium Act. The Deputy Director for Minerals Information and Analysis is responsible for all mineral data gathering and mineral land assessment activity.

Problems and Opportunities

Over the last decade mining and metallurgy research sponsored by the Bureau has languished, barely keeping pace with inflation—this despite an increasing strategic vulnerability due to mineral imports. The BOM budget must be revised significantly upward to reflect the higher priority by the new Administration on ensuring an adequate supply of critical minerals.

The increased budget request should also represent reestablishment of the state liaison officers deleted by the recent and poorly conceived reorganization. Budget increases would also be anticipated in the areas of nonfuel mineral data and policy analysis. The policy analysis function should predominantly employ minerals expertise, rather than administrative or generalist personnel and the function should be tightly integrated with operating and research offices.

An increased policy role utilizing minerals expertise and a substantially larger budget phased in over several years should do much to improve deteriorated morale and to install professional expertise at the management level.

To attract and retain professionals within the Bureau, grade levels and other financial inducements should be reviewed. And, stressing the expertise of Bureau employees, the use of contracting should be minimized.

An immediate review of internal Bureau practices which govern responsiveness to mandates of mineral resource assessments and to congressional and agency requests should be initiated. While slow response times appear attributable to some degree to reluctance or inability by AS/EM to communicate with BOM and sponsor their output, management deficiencies within the BOM have been notorious as well. A major review of all outstanding efforts should be undertaken and clear priorities identified so that staff understands the

importance of its output and has renewed confidence in its work product and its impact on federal policy.

Longer Term Policies and Legislation

Several of the BOM initiatives recommended for the first ninety days of the new Administration will continue as longer term policies. Additional long-term programs necessary for the Bureau to orchestrate are the building of a public awareness of the importance of mining and minerals, and an educational program to foster a better level of understanding of the need for government policies which promote prudent mineral development.

Longer term policy shifts requiring legislation include: transfer from the Office of Surface Mining to the Bureau of Mines, the Mineral Research Institutes and from DOE the Coal Research Laboratories; transfer of some Department of Energy coal research functions back to the Bureau of Mines; examination of the role assigned to DOE with respect to the supply of energy minerals and, as appropriate, reassignment of energy mineral assessment responsibilities to the Bureau; completion by BOM of mineral surveys prior to the curtailment of mineral exploration or development; and drafting of specific legislation to expand upon statutes providing general guidance for minerals and materials policy.

Nonfuel Minerals Policy

While public attention has been continually drawn to energy policies, there remains undiscovered by the public an impending minerals crisis which, by its very nature, poses even more disastrous consequences than the energy crisis. That crisis concerns not the fuel minerals crucial to energy self-sufficiency, but instead nonfuel minerals, most often referred to as strategic and critical minerals.

Of top priority to the new Administration's energy and minerals function should be the formulation and implementation of a nonfuel minerals policy. Operational responsibilities for this policy should be overseen by the AS/EM with detailed analysis provided by the Bureau of Mines.

No issue facing the nation in the years ahead poses the risks to the national economy and defense presented by our dependence upon foreign sources for strategic and critical minerals. Minerals such as manganese—essential to the production of steel (import dependence 98%); cobalt—vital hardener and strengthener of steels (import dependence 95%); and

chromium—indispensible to the production of stainless steels and the least substitutable of all ferroalloys (import dependence 90%)—reveal a vulnerability more serious than the energy crisis.

America's mining and mineral industry is increasingly unable to explore on mineral rich federal lands, is subjected to restrictive and costly environmental health and safety standards (adopted with little understanding of the regulated industry), is confronted with ambiguous governmental policies, anti-trust laws, taxes and rules regarding depreciation and depletion allowance, and is encouraged to seek mineral development abroad at the same time that the international situation frustrates that alternative. Of no great surprise, then, the nation finds itself in the process of mandating the export of the minerals industry at a time of increasing international tension. The United States cannot long afford to pursue its present course.

America must implement national materials policy statutes, including the Mining and Minerals and Policy Act of 1970. The Administration should adopt, as a key aspect of U.S. foreign policy, the assurance of a dependable, free market supply of foreign minerals. The United States should provide support for those nations which permit direct foreign investment without discrimination and which practice anti-cartel price and supply behavior.

The Department should reexamine its approach to land-use policy regarding mineral rich federal lands. Access for mineral exploration and potential development must be protected in order to assure discovery of domestic strategic and critical minerals wealth.

The Administration should provide a means for the monitoring of environmental and health and safety regulations and their impact on the domestic mineral industry. Isolated actions of government agencies with disparate responsibilities can no longer be allowed to inadvertently curtail vital sectors of the domestic minerals industry.

Office of Surface Mining Reclamation and Enforcement

Authority and Mission

The Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, SMCRA, created the Office of Surface Mining Reclamation and Enforcement within Interior. It mandates control at the Federal level of all surface effects of coal mining

operations, including surface mining itself and the effects of underground operations. It also provides for reclamation of previously mined and abandoned ("orphan") lands through the collection and disbursement by the Secretary of reclamation fees assessed on a current coal production (tonnage) basis.

A federal program requiring approval of a mine plan and compliance with detailed performance standards is established permanently for operations on federal lands (including federal coal overlain by private surface). A separate mechanism is created for private lands, in which an interim federal program was imposed by SMCRA itself, subject to later displacement by State-enforced programs which come into effect only after approval by OSM and the Secretary. Under the Carter Administration's interpretations, these state programs must be almost identical to the federal program.

Nearly all aspects of OSM rulemaking and enforcement efforts are currently in litigation. To date, virtually all substantive and many procedural aspects have been reversed by trial or appellate courts, and several aspects of the constitutionality of SMCRA will shortly be before the U.S. Supreme Court.

Problems and Opportunities

The Office of Surface mining is unique among federal agencies. Disregarding the newness of OSM and the customary growing pains which hamper any new bureaucracy's operation, the Office of Surface Mining has displayed zealotry.

The agency's senior staff, composed of those likeminded personnel consistently opposed to coal surface mining, has promulgated regulations far in excess—both substantively and in volume—of the 1977 Act. The Act itself contains an unusual level of specificity—115 environmental performance standards to serve as a national baseline for reclamation. These standards are detailed and in many instances contain a level of specificity found only in regulations. But the Carter Administration, with its environmental constituency and complete exclusion of developmental interests, proceeded to draft 500 pages of *Federal Register* small print to interpret the law. The preamble and regulations have been viewed by Governors, engineers, coal companies, and by the U.S. Senate in two separate votes as far exceeding the intent of Congress.

The degree of zealotry shown by the OSM incumbents in protecting its regulatory excesses was illustrated quite clearly by OSM lobbying activities against the Senate bill, S. 1403. The bill would return the lead role of reclamation enforcement

and planning to the states, as stated by the Act. The Comptroller General has reported on the potentially illegal lobbying activity by OSM employees and has suggested that the Department of Justice further investigate these improprieties.

To return the Office of Surface Mining to its intended role of facilitating an early transfer of reclamation planning and enforcement activities to the states will require the incoming President and Secretary to make an example of OSM and its regulatory excesses and to place high priority on an early transition to a State lead concept.

Since the courts have reversed significant portions of this Administration's onerous reclamation regulations, an immediate review of other rules which are contested or which are seen to be unnecessarily stringent should be conducted with proposed changes issued within the first 90 days. Abridgement of civil rights through warrantless search, excessive, punitive, and inconsistently applied in-field fines, and restrictive blasting and bonding requirements represent just a few of the areas of concern.

The incoming Secretary, if held to the March 1981 date for approval of state reclamation programs, should eliminate petty OSM squabbles now prevalent and expedite the approval of those State plans.

Cognizant of the priority of shifting the lead role to states, the Department should move quickly to reduce OSM enforcement staff and cut budget requests significantly in the regulatory program.

Of course, the success of many of these short-term efforts depends to a great extent on the replacement of current OSM senior staff and regional directors with professionals more attuned to a rational program of ensuring rehabilitation of mined lands.

Longer Term Policies and Legislation

To facilitate a more complete review of OSM regulatory processes, a longer term regulatory reform effort should be initiated to examine all current OSM rules. The states should play a major role in this longer term review of regulations. Regulatory reform efforts should include a cost analysis to identify rules which unnecessarily burden domestic coal development.

Oversight hearings on the 1977 Surface Mining Act have produced requests, based on safety and engineering rationale, to revisit those parts of the Act which may have been too

tightly constructed. The Act's requirement that mined land be reclaimed to the "approximate original contour" rather than to a productive use in conformity with a land use plan appears to unduly restrict private land holders. For example, with the scarcity of flat lands in certain parts of the Appalachian coal region, the approximate original contour requirement may prevent the development of acreages for farmland, homes, hospitals, and other necessary social infrastructures.

Other legislative remedies which should be considered by the incoming Administration include revision of prime farmlands and alluvial valley floors provisions, the "Rockefeller amendment" of S. 1403 (which Congressman Udall has refused to act upon), and freeing up state use of the mined land reclamation fund to reclaim "orphan" mined lands.

U.S. Geological Survey

Authority and Mission

The USGS was established by the Act of March 3, 1979 (43 USC 31), with the Director to be appointed by the President with advice and consent of the Senate. USGS jurisdiction includes all lands in the control of the United States, and such "other areas" determined by Secretary to be in the national interest and authorized by law (43 USC 31(b)). This includes the subsoil and sea bed of the Outer Continental Shelf (OSC) (43 USC 1332(a), 1340).

The basic mission of USGS includes: undertaking research and mapping with respect to federally-owned natural resources, geologic processes and hazards and the classification, evaluation and supervision of mineral operations on federal (including Indian) lands. It includes specific authority over easements and rights of way relating to power generation and coordination with land managing agencies outside of Interior.

Its responsibility for supervision of mineral operations on public lands is now circumscribed by OSM responsibility with respect to surface mining of coal. This is reflected in proposed amendments to its basic organic rulemaking, presently found at 30 CFR 211.

By Secretarial Order, it is responsible for the determination, in effect, the enforcement of economic aspects of alienation of public resources through leasing. It determines the value of federal resources, and recommends the level of royalties, bonuses and other economic returns to the government to be derived from leases. With respect to onshore minerals, it

proposes to exercise responsibility for the development of "logical mining units" (LMUs).

Problems and Opportunities

Whatever happened to the U.S. Geological Survey? Under the minerals nonadvocacy posture of the Carter Administration, the "Survey" seems to have receded into the secluded forests of its Reston, Virginia, national headquarters. The geologic and topographic scientific preeminence of the USGS is tacitly riding out the temporary absence of rationality under the Department's current energy and minerals leadership. While the professionalism and morale of the USGS has been negatively affected by this malaise, a rejuvenation of *esprit de corps* can be promptly restored. Emphasis at the Presidential and Secretarial level should be placed on the selection of a replacement Director and other senior officers which should result in: significantly increasing the viability of the USGS in policy analysis and recommendations, and promoting domestically and internationally the expertise of the Survey.

Many of the USGS's deficiencies which should be addressed in the short-term are contained within the Conservation Division. The AS/EM should immediately initiate a review of mineral resource evaluation procedures utilized by the Conservation Division in assisting the BLM to derive fair market value determinations for the sale of onshore and OCS minerals. Current procedures by the Survey, particularly those planned for coal lease sales, will most likely tend to maximize returns to the government rather than encourage development of domestic resources.

The AS/EM should also promptly examine classification and evaluation procedures of the Conservation Division. Too often a lack of classification and evaluation activity by the USGS has caused leasing delays. For example, near Rock Springs, Wyoming, where many prospecting permit applications for sodium have been filed with the BLM, the BLM has refused to issue the permits because environmental problems may occur later which would partially or wholly invalidate ripening of the prospecting permit into a preference right lease. The Geological Survey could, through classification of these lands for competitive leasing, avoid the delays in sodium leasing, and at the same time, offer tracts through a competitive bid process—the preferable mode of leasing in this instance with the many overlapping prospecting permit applications pending in the area.

The Conservation Division should review its mineral resource mapping and information support for the Bureau of Land Management's land use planning with a view toward the production of maps and narratives more useful to BLM land use managers. Mapping efforts at present, specifically the coal resource occurrence/coal development potential maps, should not be contracted since quality control of contracted products has been inadequate.

Longer Term Policies and Legislation

The USGS should initiate an aggressive policy of providing encouragement and financial incentives, within the existing statutory framework, for private exploration on the public lands. Federal exploratory efforts remain appropriate for regional geological assessments and mapping, but site specific, detailed geological investigations in support of federal mineral leasing programs should be sharply curtailed.

Serious review should be given and, as appropriate, legislative recommendations made to create incentives to the private sector for access to and exploration of public land resources (e.g., creation of the economic functional equivalent of a preference right lease, or reimbursement or bidding credits for expenses incurred by explorers not rewarded with mineral grants). Such efforts by the private sector would free significant budgetary resources of USGS and Department for upgrading the other USGS responsibilities.

The Topographic Division should intensify efforts to complete nationwide coverage of 1:250,000 geologic maps. The United States is one of only a few developed countries without such basic geologic map coverage.

The incoming Secretary should give consideration to moving the Survey's "stepchild" Conservation Division to the Bureau of Land Management. This rather controversial suggestion offers two major advantages. First, the Bureau of Land Management's neglected minerals management responsibilities receive a huge boost in sorely needed professional expertise. Second, the USGS primary charter of research and mapping becomes clearly stated once again, with the day-to-day demands of mineral leasing support.

As a corollary to the suggestion of strengthening the minerals perspective of the BLM by adding the Survey's Conservation Division, the Secretary should also give consideration to moving the OCS resource evaluation function of the USGS to a single Assistant Secretary—logically the AS/LWR.

Since early 1977, the current Administration has engaged in a systematic curtailing of the availability of public lands for mineral leasing. In February 1977, the Secretary of the Interior decreed that no mineral leases could be issued without his personal approval, except for onshore oil and gas and geothermal leases. The restriction applied as well to issuance of prospecting permits, adjustment of outstanding leases, and granting of licenses. The result was a shut-down of all mineral leasing activity for two years, a shut-down which did not end until the order was lifted on March 4, 1979. The Secretary retained sole approval authority for all offshore oil and gas and all oil shale leases. During that two-year period less than ten mineral leases, other than oil, gas and geothermal were issued. Those few leases required in every single instance over a year of effort in Washington, D.C., simply to justify to the satisfaction of the Department the leasing action proposed.

Requiring the Secretary's personal approval on single lease issuance was a procedure undertaken long before the Secretary's principal advisor on mineral leasing, the Assistant Secretary for Land and Water appeared on the scene. Nonetheless, even after the Assistant Secretary assumed his position, he failed to counsel the Secretary to re-delegate this authority to the BLM. In fact, there was not a single advocate within the Secretariat for immediate return to the time-honored and tested system of vesting within BLM exclusive authority for lease issuance.

Yet even before officially taking office, the Secretary had alienated an entire industry by characterizing the activities of those who operate in accordance with the statutory provisions of the General Mining Law of 1872 as "rape, ruin, and run". The 3 Rs became the battle cry of the Administration culminating in the ill-conceived and ill-timed proposal to repeal the mining law and substitute in its place a leasing system. The "rape, ruin and run" characterization of the Secretary was a near-death blow to planned regulation of activities on unpatented mining claims, painstakingly drafted by Department professionals over the last three years of the previous Administration. As well, when efforts were undertaken to administratively update the General Mining Law by requiring recordation of unpatented mining claims—mandated under the Federal Land Policy and Management Act (FLPMA)—and by regulating activities on mining claims, efforts which seemed

achievable without serious alienation of an entire industry, political appointees demanded the use of overkill tactics in hopes of permanently destroying the mining law and replacing it with a leasing system.

The Secretary likewise engaged in careless, knee-jerk characterization when he described the 5-year Outer Continental Shelf (OCS) leasing schedule he inherited as "a piece of paper someone must have scribbled out at the breakfast table. It was a list of arbitrary dates that no one was prepared to meet." The months of deliberation and compromise which went into the final product was scorned and ridiculed out of hand without a shred of evidence. The June 1980 "Andrus" schedule provides for a total of 36 sales through June 1985 (7 sales per year), compared with an inherited "scribbled" schedule in January 1977 calling for 25 sales through 1980 (6 sales per year)—a grand increase of one sale per year.

Near the end of the first year of the Carter Administration, a federal court judge struck down the programmatic environmental impact statement for the coal leasing program prepared by the Ford Administration. Notably, the judge found the EIS lacking in only two areas: (1) failure to allow the public to have a chance to review and comment on a modified system for leasing—referred to as Energy Minerals Activity Recommendation System (EMARS)—a system that was modified between the draft and final EIS to such an extent as to necessitate another EIS to fully discuss the change; (2) failure of the EIS to include a "no further leasing" alternative. Despite the fact that these two deficiencies appeared curable with a minimum of effort—requiring at most six months—the Department reinvented the wheel with a comprehensive up-grading of the final EIS twice the length of the entire original. That effort which required establishment of a separate coal office at both the BLM and Assistant Secretary levels staffed by over 40 people—8 were previously attached to the BLM's Energy and Minerals—consumed nearly two years, further delaying the resumption of long-term federal coal leasing. Notwithstanding Administration "emphasis" on coal and the expenditure of millions, new coal leasing has yet to commence—now fully ten years after imposition of a coal leasing moratorium. Long-term lease sales are now finally scheduled for early 1981.

During the first year of the Carter Administration, another non-leasing decision was made on oil shale, reversing the decision of the previous Administration to expand the prototype oil shale leasing program initiated in 1974. That program,

whose first lease sales in 1974 resulted in the sale of four tracts—two each in Colorado and Utah—two tracts offered in Wyoming attracted no bids—was designed to test surface mining and underground room-and-pillar mining techniques. When the Utah tracts became involved in litigation given the previous selection by the State of Utah of the lands in satisfaction of its "in-lieu" state selection rights, the leases were suspended. Ultimately the Colorado leases were found more amenable to a modified *in situ* process of mining. Since no pure *in situ* tracts were leased in the 1974 sales effort—the Wyoming tracts had been expected to be *in situ*—the Department had decided to expand the prototype program. As a result, industry was requested to nominate tracts. The nominated tracts were then narrowed to four, and an EIS team organized to start work on an EIS so as to permit a Secretarial selection of two tracts to offer for sale. This entire effort was stopped by the current Administration by the disbanding of the EIS team. Finally, nearly three years later in 1980 in the closing days of the Carter Administration an oil shale program was initiated to expand the prototype program with the first sales not scheduled until 1983.

On-going oil and gas programs likewise were tampered with by the Carter Administration. Entering office with an obvious prejudice and bias against the simultaneous oil and gas leasing program, the Carter Administration fostered and encouraged, for its own political purposes, characterization of that system as a lottery, a characterization consciously and consistently shunned and contradicted by every administration since 1960 when the program began. Despite evidence that the 20 year old program was infinitely more fair, manageable and workable than what existed prior to 1960, the Administration systematically orchestrated opposition to it.

The formation of filing service companies which, much like preparers of income tax returns, assist would-be lease applicants in filing applications and which reached a peak in the first years of the Carter Administration, was viewed by the Administration as undesirable. Departmental opposition to such companies extended to an accusation that the BLM was running a lottery which preyed upon "widows and orphans" by offering worthless leases each month at drawings and by inviting the unsuspecting public to file—at a cost of $10 per lease. To reduce the control of filing service companies the Administration published proposed rule changes on September 28, 1979, which disguised its real goal and objective—the

adoption of new legislation. A month earlier, in fact, the Administration had introduced in the Senate legislation to drastically overhaul the oil and gas leasing system by dramatically increasing the amount of land to be leased competitively, thus reducing the lands available for non-competitive leasing. Currently, 18 million acres of public lands are classified as Known Geologic Structure (KGS) lands producing oil and gas and must be leased competitively. The Administration's proposal would add at least 40-50 million acres to the competitive leasing system, reducing by at least 50% the amount of all federal land leased noncompetitively. The Secretary has taken additional action to handicap the existing system.

Since introduction of the legislation in August 1979, the Secretary:

- imposed a moratorium (still in effect) on further leasing of lands in military and naval reservations (7 million acres);
- cancelled 33,000 acres of non-competitive leases on a military base issued under authority of a 1976 amendment to the Mineral Leasing Act, after receiving notice that he was being sued to enjoin the very action he subsequently took;
- ordered rejection of several hundred applications filed after the Mineral Leasing Act was amended to specifically permit such applications but before a six-word regulatory prohibition, inconsistent with the legislation, was routinely removed from the regulations as a mere housekeepling chore to remove a nullity created by congressional action;
- solely on the strength of a 60-day BLM internal investigation which uncovered one confirmed instance of fraud in leasing under the simultaneous system, an "imagined judgment" that 70-80 percent of all filings were fraudulent—shut down—by moratorium the entire non-competitive leasing program (98 percent of all leasing by the Department) a moratorium that was lifted after 3½ months; and
- did not oppose and acquiesced in an amendment in a Senate Committee making the proposed legislation an all-competitive system (allegedly opposed by the Department but which most in the Carter Administration favor).

The most recently authorized mineral leasing law—the Geothermal Steam Act of 1970—has been further delayed. The leasing program in the only known commercial area—California—is a disaster. Six years after the BLM began accepting applications for non-competitive leasing, only 22 leases have been issued. None have been issued in well over a year. In California, the average age of all pending applications

is 50 months. Streamline leasing procedures including the utilization of phased environmental assessments limited to assessing the stages of the lease, have not been utilized in California.

The Carter Administration inherited a just-completed Departmental report prepared pursuant to the Mining and Minerals Policy Act of 1970, which supplemented and supported an earlier BLM study, identifying and confirming the magnitude of the cumulative effect of formal and *de facto* withdrawals of public lands from operation of the mining law and the mineral leasing laws: Of 824 million acres of public lands subject to mineral leasing, 321 million acres, or 39 percent, are closed to leasing. An additional 81 million acres are highly restricted from development even if they were leased. Together these classifications account for nearly 50 percent of all public lands. Of the 800 million acres subject to operation of the mining law, 271 million acres, or 34 percent, are closed to location of mining claims while an additional 48 million acres are highly restricted from development even if a mining claim is located for a total of 40 percent. The initial reaction of the incoming Administration to that report was to include within it a disclaimer as not representing the Carter Administration. No effort was made to at least verify the report and if correct undertake remedial action. Despite the fact that FLPMA enacted on October 21, 1976, provided for a comprehensive withdrawal review program in order to restore withdrawn lands to operation of the mining and mineral leasing laws, the Administration undertook no action. In fact, the Secretary has stated on numerous occasions that the Department, rather than restoring land to free access, would continue to withdraw land from operation of the mining law so long as that law was not changed. The Secretary made withdrawal the main argument for his legislative proposal to repeal the mining law indicating that if he had a leasing system for hardrock minerals, he would stop withdrawing lands and would comply with FLPMA.

The Carter Adminstration asserts that its inventory of withdrawn lands has revealed 165.6 million acres, of which 56.7 million acres are segregated, at least to some degree, from mineral development under the mining and mineral leasing laws. This figure which differs markedly from the figures cited above of 321 million acres withdrawn from mineral leasing and 271 million acres withdrawn from mining claim location does not appear to include lands withdrawn in Alaska. Still no

appreciable amount of land has been restored to mining and mineral leasing. Yet while the Administration ignored FLPMA's reinstatement language, it embraced the review of lands for possible wilderness designation required by Section 603 of FLPMA. That effort was initiated by the Solicitor's initial interpretative opinion of March 22, 1977, followed by six more opinions of September 5, 1978, until all were superceded by the opinion of subsequently supplemented on August 7, 1979, and February 12, 1980. The restrictive and extremely narrow interpretation of "valid existing rights," "grandfathered rights," "manner and degree" and "nonimpairment" contained in these opinions clearly thwarted the intent of Congress. The BLM further interpreted the Solicitor's Opinion and finalized an Interim Management Policy for activities permitted in Wilderness Study Areas (WSAs) on December 12, 1979, allowing only very limited "non-impairing" activities. At present, over 25 million acres are included in such WSAs or are likely to be included. A decision to review all public lands, even those not meeting minimum FLPMA requirements of at least 5,000 acres in size and roadless, delayed the clearing process by several months although belatedly, an effort was directed at concentrating the review on potential energy minerals lands, such as the Overthrust Belt in the West.

The Department appears opposed to making public lands available for mineral development or, at the very least, severely limiting the amount of such land. This policy has created artificial scarcities of mineral resources. It has dramatically driven up bonuses paid in the few instances where lands are offered for competitive leasing, and has artificially increased the value of outstanding federal, state and private lease lands. The results are increased prices to the consumer caused by a government policy of withholding from the public the federal lands and their mineral resources and of refusing to make such lands available in a timely and orderly fashion and at a reasonable price. The federal government, America's largest and most powerful land owner, is also the nation's most powerful energy and minerals monopolist—a monopolist whose policies and programs have created artificial scarcities, inflated prices and national vulnerability to foreign powers.

Mineral Leasing

Outer Continental Shelf (OCS)

During the past four years, OCS oil and gas leasing has not

been recognized as an important component of short-time domestic energy supply, and thus, as one of the most vital tools the U.S. has to reduce or minimize OPEC supply interruptions and price pressures in both the short and medium range. While the contribution that OCS leasing can make to the nation from 1981-1983 has been predetermined, to some degree, by the policies set in motion by the Carter Administration, some major changes in orientation can still be made. Deficiencies include:

• Adoption of a timid OCS schedule of 36 sales for the next five years. The June 1980, 5-year schedule is not a bold and aggressive announcement equal to the threat posed by OPEC: high potential areas are not included or are not frequent enough; procedural steps in holding a sale are unnecessarily drawn out, maximizing delay, needless consultation and excessive paperwork; innovative use of the EIS process is ignored yielding delays.

• Needless expenditure of millions of dollars and months of delay to do geohazard studies. These studies yield little information of consequence in a leasing decision. More importantly, the lessees are required by regulation to conduct a more intensive study before any structure is placed on the OCS.

• Limitations on the scope of sales held or to be held. For example, when Sale 42 (North Atlantic) was held, at the last moment the prime acreage was deleted. Just prior to the California presidential primary, the Secretary of the Interior deleted the most prospective acreage off Central and North California (Sale 53). In addition, artificial constraints are allowed to dictate the size of sales in the Gulf of Mexico where 90% of OCS production occurs.

• Fragmentation of authority among the competing federal agencies. The National Oceanic and Atmospheric Administration (NOAA), for example, was allowed to pursue an aggressive, self-serving policy of proposing marine sanctuaries that prohibited oil and gas development. EPA was allowed to obstruct the program by issuing ocean discharge permits (NPDES) that contained needless restrictions and by utilizing dilatory tactics to delay development. Essential authority such as that regarding bidding systems and diligence requirements, was transferred to the Department of Energy, further fragmenting implementation of a bold program.

• Allowing the OCS program within the Interior Depart-

ment to remain in disarray by dividing authority among four program Assistant Secretaries.

Short-Term Options

1. Issue a new proposed 5-year leasing schedule. There is no chance to have a lasting and immediate impact on OCS production unless a new proposed schedule is issued within 30-60 days. As a result of statutory requirements of the OCS Lands Act Amendments, a minimum of six months is needed to finalize a new schedule. It took 20 months to finalize the present schedule which changed little in the last 12 months. Immediate initiation and quick finalization of the process is crucial since no sales can be held in 1982 unless they are already on the June 1980 schedule. Six sales are currently planned for 1982 (plus one reoffering sale). It might be possible to add as many as four more sales in 1982 by quick action. This will require that no EIS be done on the leasing schedule and that no delays occur within the bureaucracy.

2. Reverse decisions that limit the size or composition of 1981 and 1982 and future sales. The following decisions must be revised immediately in order to have an impact in the short run and to have a chance of increasing oil and gas production in the mid-range:

- Sale 53 (Central and North California)—proposed notice of sale should be issued in October 1980 and be pending for state comments in January 1981. A quick announcement that the omitted areas are now in the sale would ensure that the statutory obligations can still be met and the sale held as scheduled.
- Sale 68 (South California) and Sale 67 (Gulf of Mexico)—Both are now scheduled for 1982 but should be advanced to 1981. To do so requires completion of a new 5-year schedule in the minimum time. Also required will be the shortening of EIS time, decision process, and DOE review. These steps are feasible and should be instituted as standard practice in the 5-year program. This will shorten the entire process by 5-6 months. Moving these sales to 1981 would signal a major shift in short term policy.
- Sale 68 (South California)—Highly prospective areas in Santa Monica Bay are not in the EIS process even though nominated by industry. These tracts should be added now in order to allow for an adequate EIS.
- RS-1 (Reoffering Sale 1)—This sale, scheduled for June 1981 and consisting of leftover tracts that industry did not want

the first time around should be cancelled in order to conserve administrative resources.

3. Terminate geohazard surveys/studies. This would save millions of dollars for needlessly duplicate studies already required of all lessees.

4. Order NOAA to cease work on prohibitions of oil and gas operations in marine sanctuaries.

5. Increase size of sales in the Gulf of Mexico. The Call for Nominations will have just been made of Sales 72/74. The average size should be increased from 1.2 million acres to 2 million acres or more.

Medium-Term Options

1. Introduce legislation to transfer EPA authority over ocean discharge permits (NPDES) to Interior.

2. Introduce legislation to return all DOE functions over OCS leasing to Interior.

3. Finalize a new 5-year leasing schedule, featuring:

- more sales offering larger acreages (nominations calls to cover entire basins and reefs);
- faster sales in high prospect areas;
- more repeat sales in high prospect areas;
- reduce administrative steps;
- creative use of streamlined EIS process in repeat sales.

4. Consider the reorganization of OCS authority in the Interior Department under one Assistant Secretary. This would contribute substantially to the formulation and timely execution of an aggressive OCS schedule. Present organization only encourages turf battles, a lack of accountability, and bureaucratic cartwheels for day-to-day functioning.

Coal

Unsuitability Criteria

Section 522 of the Surface Mining Control and Reclamation Act (SMCRA) provides for the designation of lands "unsuitable" for surface mining of coal. The Department, by regulation (43 C.F.R. 3461) made the proscription against mining "unsuitable" lands applicable to leases issued prior to passage of SMCRA.

Many of the unsuitability criteria adopted by the Department are of extremely questionable legal validity. Many others have been declared illegal as beyond the intent of Congress. While the unsuitability provision of SMCRA was designed to

ensure the protection of sensitive and valuable features of federal lands, in practice the criteria provided by the Department needlessly impede the production of coal by destroying the lease. Retroactive application of the criteria to pre-SMCRA leases poses serious Constitutional questions for the Secretary.

A Solicitor's opinion should be prepared holding that the unsuitability criteria do not apply to leases issued before enactment of SMCRA and that retroactive application of such criteria constitutes an unlawful taking.

Advance Royalty Payments

Leases issued prior to 1976 authorize lessees to pay advance royalty payments in lieu of continued operations. Section 207 of the Mineral Leasing Act of 1920, pursuant to which leases were issued prior to the Federal Coal Leasing Amendments Act of August 4, 1976 (FCLAA) provides:

> The Secretary of the Interior may, if in his judgment the public interest will be subserved thereby, in lieu of the provision herein contained requiring continuous operation of the mine, provide in the lease for the payment of an annual advance royalty.

Thus each pre-1976 coal lease allows the lessee to suspend operation and pay the advance royalty.

Post FCLAA regulations now require payment of significantly higher royalties than those rates set forth in the original pre-1976 leases. Those changes have taken place without any statutory authorization and without the consent of the lessee. Since the regulations also impose new diligent development and continued operations requirements upon pre-FCLAA leases (2½% production by 1986 to achieve diligence, and 1% production each year thereafter to meet continued operations), and because the 40-year mine-out provision of FCLAA has been made applicable to pre-1976 leases, lessees must pay advance royalties based on a production figure as high as 3¼%. (Under these new requirements, 2½% production is required before June 1, 1986, leaving 97½% production for the remaining 30 years of the 40-year mine-out period from June 1, 1986 to 2016. That production over 30 years equals 3¼% production per year.) Such an advance royalty rate is not authorized by statute and is clearly excessive in light of the fact that post-FCLAA lessees are required to pay advance royalties based on a 2½% production figure. As well, continued operations require only 1% production per year after diligent development is achieved.

A Solicitor's opinion should be issued holding that regulations regarding the payment of advance royalties in lieu of continued operations can be imposed, if ever, only at the time that pre-FCLAA leases come due for readjustment. Such a ruling seems in order in light of the fact that there is no statutory authority for the Secretary to alter advance royalties once a contractual agreement has been reached. Since Congress granted the Secretary the discretionary authority to allow the payment of advance royalties in lieu of continued operations, and for that decision to be incorporated in the leases, once such a provision is included in the lease, the lease controls until the lease is due for readjustment.

Preference Right Leases

Section 2(b) of the Mineral Leasing Act of 1920 authorized the Secretary to issue prospecting permits for the discovery of coal deposits where deposits were not known to exist. If the permittee could demonstrate discovery of coal in commercial quantities, he would be entitled to a preference right lease, without competition, to mine such deposits.

While preference right leasing was statutorily terminated by the passage of FCLAA in 1976, there are today 182 preference right lease applications (PRLAs) still pending, all of which originated between 1965 and 1971. In fact, most PRLAs have been pending for a decade. Incredibly the Department does not plan to complete processing of these applications until 1984. In the interim, the Department issued regulations regarding diligent development and continued operations, advance royalties, logical mining units, and maximum economic recovery.

The government has thus delayed for a decade the granting of many preference right leases for which a showing of entitlement has been made. At the same time, the Secretary has changed the economic terms and conditions applicable to PRLAs—to the disadvantage of the preference right lease applicant. Such action will effectively destroy the value of the coal already discovered and is completely without statutory foundation.

Short-term Options

A Solicitor's opinion should be issued holding that the test applied for determining "commercial quantities" should be the test in use at the time the permit was issued, or that it was in use when the permit was extended.

Ample evidence exists for the Solicitor to conclude that the economic terms and conditions existing at the time of the preference right lease application and not the terms and conditions imposed by subsequent laws or Departmental regulations, are controlling for the PRLAs. The Secretary has no authority to impose new economic terms and conditions upon PRLAs, particularly given the unreasonable government delay in processing applications.

Additionally, the Solicitor's Opinion of August 2, 1977, concluding that conflicting 1872 Mining Law claims existing at the time prospecting permits were issued, made the permit null and void *ab initio*, should be applied prospectively only, if at all. Arguably the "unclaimed" requirement at the time of issuance of the prospecting permit refers to 1872 Coal Lands Act claims, not 1872 Mining Law claims.

Logical Mining Units (LMUs)

Post-FCLAA regulations declare that every federal coal lease shall "automatically" constitute an LMU on the effective date of the lease or June 1, 1976, whichever is later. Included in that declaration are the requirements of diligent development and continued operations, the payment of advance royalties in lieu of continued operations, a 40-year mine-out of LMU reserves, and maximum economic recovery (MER), since each of these concepts applies to every LMU.

Section 5(b)(5) provides that with the consent of all lessees leases issued prior to FCLAA may be included in such LMUs. However, the Secretary has neither determined MER nor provided the opportunity for public hearings on LMU consolidations. Moreover, no consent to include leases in an LMU has been sought or received. The regulations contradict federal law by imposing obligations on the lessee which would not otherwise be applicable: diligence, MER, advance royalties, and the 40-year mine-out provision.

A Solicitor's opinion should be issued holding the 1976 regulations to be inapplicable to pre-1976 leases and that such application is without statutory basis. The opinion should hold that the statute does not grant the Secretary the authority to automatically declare each lease an LMU, and that the Secretary has no authority to require the formation of a LMU until lease readjustment, or until the lessee voluntarily consents to such formation.

Post-FCLAA regulations require pre-FCLAA lessees to produce 2½% of the LMU reserves before June 1, 1986, and 1% of LMU reserves each year thereafter. Failure to comply with the former will subject the lease to cancellation.

The regulations fail to recognize the problem inherent in requiring an arbitrary level of production at a time certain, such as the supply and demand aspects of a free market economy, and the long lead-time necessary for permitting and constructing synthetic fuels plants and mine-mouth electrical generating facilities. Time consuming licensing and permitting processes as well as the time required to adequately plan for and construct large-scale operations, render the 10-year diligence period unrealistic. Insistence on compliance with such an arbitrary standard thus frustrates the objectives of increased coal production. The regulations ignore the fact that diligent development, as applied to pre-FCLAA leases was based on individual circumstances of each lease under a common law test of what constitutes development. The Secretary was clearly denied authority to modify the rights acquired by lessees under leases issued under the 1920 law.

Lease cancellations would be contrary to national energy policy since existing leases represent a valuable national asset. By establishing an arbitrary date for production of an arbitrary amount of coal the Secretary will prevent the orderly development of existing leases. In addition, small companies, in order to avoid lease cancellation, may be forced to assign their leases to companies with cash reserves sufficient to permit operation at a loss causing an anti-competitive concentration of leases.

A Solicitor's opinion should be issued holding diligent development and continuous operation regulations to be inapplicable to leases existing at the time the regulations were issued. This would allow lessees to bring leases into production in a more realistic fashion and in accordance with commitments of their customers. The Secretary has no authority to change production requirements of individual leases until the lease terms are due for readjustment.

The Federal Coal Leasing Amendments Act of 1976 was enacted at the height of the so-called environmental movement. Initially vetoed by President Ford (a veto which was subsequently overridden with the help of westerners whose chief concern was an increase in the federal royalty returned to the states from 37½% to 50%), the Act contains numerous

burdensome, complex and in many cases experimental concepts which inhibit coal development.

These requirements, including diligent development, logical mining units, extensive land-use planning and numerous studies and reviews, must be careully examined for potential legislative recommendations. While immediate action is not necessary nor even possible, such a recommendation should be prepared and forwarded prior to Congressional recess in late 1981.

Coal Lease Sales

The moratorium on new coal leases initiated in 1971 continues in force today, nearly a decade later. While that moratorium could well have ended in mid-1978 or early 1979 with a favorable ruling from the U.S. Supreme Court followed by lease sales in mid-1979, the Carter Administration refused to appeal and condemned the nation to nearly four years of more studies, reviews and statements. That lengthy process will finally end in early 1981 with the first scheduled lease sale.

America's need for development of its coal resources clearly outweighs the administrative and regulatory deficiencies of the Carter Administration's coal program. Hence, the new Administration must permit the 1981 coal lease sale to take place and attempt to guarantee its immunity to challenge.

The new administration must protect the viability of the initial sale by the preparation of a Solicitor's review of the coal program. Any legal deficiencies must be immediately remedied by the most expeditious action possible.

Subsequent to the initial lease sale, the new Administration must issue regulations instituting specific changes in the coal management program including: deletion of the requirement that only high and medium potential coal lands be evaluated; retention of all coal lands through the process despite declared applicability of the various screening criteria; elimination of the "threshold development" concept; restriction of the "unsuitability" criteria, as well as numerous others.

Oil and Gas

Record Title Lease Assignments

The Secretary may lease public lands for oil and gas development under the Mineral Leasing Act of 1920 and the

Mineral Leasing Act for Acquired Lands of 1947. Lands situated on a Known Geologic Structure (KGS) of a producing oil and gas field may be leased only by competitive bidding; lands not so situated may be leased to the first qualified applicant. Non-competitive leases account for over 95% of the 117,710 outstanding leases embracing 103.3 million acres. Transfers of interest in these leases average 50,000 annually.

A Departmental investigation initiated in late 1979, revealed various schemes to enhance an individual's chances of winning and thus acquiring leases, including a practice by one of paying other parties to sign blank applications which were then filed on selected tracts. If one of those applications won, he assigned the lease to himself. The result was a Secretarial Order dated February 29, 1980 declaring a moratorium on all non-competitive leasing, a moratorium which was lifted June 16, 1980, and establishing a task force to study the problem and recommend actions to curb abuses.

Emergency regulations published May 6, 1980, require the use of pre-numbered assignment forms, rendering unusable all pre-signed forms not filed on the date of the regulations. Additional regulations issued May 23, 1980, require a 60-day "cooling off" period before the assignment of leases. This limitation unnecessarily delays exploration and development.

The regulations apply to all leases, regardless of the date of issuance, whether issued competitively or non-competitively, utilizing the over-the-counter (OTC) system or the simultaneous procedure (SOG), whether in producing status or not. The regulations fail to accommodate those situations where corporate reorganizations or mergers are involved requiring mass assignments. The pre-numbered form must be used for each lease, and the lease for which it is to be used must be identified on the form. An error by either BLM or the assignee necessitates a new form. Previously, assignment forms could be reproduced, saving printing costs and considerable time in document preparation.

An immediate regulatory change should be undertaken to discontinue the use of a pre-numbered form or, at least, exclude certain leases because of age, because of the number of previous assignments, or if they were issued competitively or in a producing status. This could be accomplished quickly since no comment period would be necessary. As well, the 60-day cooling off period should be eliminated. Regulatory changes adopted in May 1980, such as requiring use of personal address on applications, negate the need for a cooling off period.

Termination and Expiration of Leases

The Mineral Leasing Act of 1920 provides that failure to pay the annual rental on or before the anniversary date on any lease on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate that lease. While the law provides for up to a two-year extension of a lease where actual drilling operations are being diligently prosecuted, it does not waive the requirements for payment of advance annual rental.

While the 1972 amendment provided for continuation of oil and gas leases where the rental was not paid timely but due diligence was exercised in attempting to pay timely and rental was received within 20 days of the anniversary date, strict application of this relief provision has thwarted the intent of Congress and is inconsistent with the spirit of the law.

Recently several lessees sought relief legislation where drilling operations were diligently prosecuted passed the expiration date resulting in producing wells yet the leases were terminated for failure to timely pay the advance annual rental.

As a practical matter, had the lessee made timely payment and subsequently completed a producing well, the rental would have been credited against any royalties due for the year in which production was obtained. The failure to pay rental is often an oversight, with the lessee assuming that actual drilling operations preclude the need to pay rental.

It is recommended that 30 U.S.C. 188 be amended by placing a period after the word "rental" at the end of subsection (d), and by eliminating the words, "provided the conditions of subparagraphs (1) and (2) of subsection (c) of this section are satisfied."

It is further recommended that the law be amended to permit successive extensions following the initial 2-year extension as long as the lessee is actively drilling and diligently prosecuting such drilling. It is better to encourage and reward diligent drilling than to allow the lease to expire and possibly wait another 10 years before drilling occurs again.

Finally, regulations should be issued providing that all annual rental payments received within 20 days after the anniversary date and mailed before the anniversary date automatically meet statutory requirements.

Leasing on Military Lands

The Mineral Leasing Act for Acquired Lands of 1947

excluded from mineral leasing lands acquired and set apart for military and naval purposes. Subsequently, the Federal Coal Leasing Amendments Act of 1976 opened these lands to leasing. Soon thereafter, several hundred lease offers were filed on the various military bases. However, the regulation prohibiting leasing on such bases was not removed from such prohibition until September 22, 1978.

A protest filed against the issuance of non-competitive leases on one base resulted in a Departmental position that all applications filed prior to the regulation changed were premature, therefore invalid and subject to rejection. While this position is being challenged in court, the Secretary by an order dated November 1, 1979, has placed a moratorium on all non-competitive leasing of lands within military bases. The moratorium is still in effect.

This moratorium withholds from oil and gas exploration and development about 7 million acres. A similar situation took place with regard to lands withdrawn for military purposes when those lands were reopened in 1946. No formal opening order or regulation was required to make the lands available for leasing. Thus, in fairness to all applicants, the moratorium should be lifted immediately, and all applications reinstated to their order of priority of filing whether before or after the effective date of the regulations, and no action should be taken to reject any application until the litigation is finally concluded.

Leasing in Wildlife Refuges

The Mineral Leasing Act of 1920 does not exclude oil and gas leasing on lands withdrawn, acquired or set aside for wildlife refuges and game ranges. In fact, until 1976, game range lands had been open to oil and gas leasing under the joint jurisdiction of BLM and FWS. The National Wildlife Refuge System Administration Act Amendments of 1976 placed game ranges in the National Wildlife Refuge System, under the sole administration of the FWS. Wildlife refuges were then closed to leasing by regulation except where the lands are being drained of their oil and gas deposits by development on adjoining lands.

At the time of discovery in 1957 of oil and gas on lands in Alaska's Kenai Moose Range, the Department issued regulations precluding oil and gas leasing on wildlife refuges. These regulations are still in effect, thus closing a substantial portion (31.1 million acres) of federal land to oil and gas leasing. This

situation even precludes geophysical exploration permits on refuge lands, thus eliminating the possibility of determining the potential of the underlying oil and gas resource.

A review of this matter should be initiated immediately since the withdrawal review being conducted by BLM under Section 204 of the Federal Land Policy and Management Act is not likely to address this particular matter. At a minimum the National Wildlife Refuge System lands should be opened immediately to geophysical exploration.

Geothermal

Since the Geothermal leasing program was implemented in January 1974, the BLM has demonstrated a lack of commitment to lease issuance with the notable exception of the Nevada BLM State Office. Competitive leasing of known geothermal resource areas has been exceedingly slow. Even allowing for a "gear-up" time of a couple years, the program should have taken off in January 1977. Before 1977 a total of 40 lease sales offering 405 tracts were held involving 782,520 acres resulting in issuance of 204 leases embracing 322,395 acres. Since then only 26 lease sales offering all tracts were held involving 656,290 acres yeilding 101 issued leases embracing 224,269 acres.

The non-competitive leasing program is not much better. Since January 1974, 8,000 applications have been filed of which 2,500 were withdrawn before any action was taken. Of the remaining 5,500 applications—certainly not an insurmountable workload since BLM issued 56,576 non-competitive oil and gas leases for 62,840,000 acres during the period 1974-1978—only 1,571 non-competitive leases embracing 2,640,000 acres were issued in 6 years. A total of 2,200 applications remain pending.

The average age of an application is 28 months for BLM lands and 54 months for Forest Service lands. There has been no firm and positive direction given to the program, in fact, individual BLM State Offices have been allowed "to do their thing" with California the most notably example. Since 1974, 10 sales have been held in California, with six of them occurring before 1977. Only 22 non-competitive leases been issued, with 535 applications still pending with an average age of 50 months.

Short-term Options

BLM should be ordered to issue leases by the end of 1981 on

all applications filed before 1980 with no exceptions. BLM should make maximum use of its authority to do phased environmental assessment.

Sales should be scheduled on all remaining known geothermal resource areas not previously offered for sale with all sales to be completed by the end of 1981 without exceptions.

The Administration should endorse adoption of legislation such as H.R. 6080 as passed by the House of Representatives during the 96th Congress.

Mineral Impact Review

Surface Management Regulations Policy

Since 1976, the Department has advocated regulations for unpatented mining claims located on public lands under BLM jurisdiction despite adamant universal opposition from user groups. Proposed rules were first published in December 1976 eliciting an unprecedented number of negative comments. In March 1980 the rules were re-published with major concessions and modifications. Again, the opposition was overwhelming. The mining community has the impression that no amount of negative comments will make any difference—that the Department has already made up its mind to issue final regulatons essentially unchanged from the proposed rules.

No set of proposed rules has generated so much adverse comment. Still, the Department has not seen fit to try a fresh approach despite acceptance by the mining community of the regulations issued by the Forest Service in August 1974.

If no final regulations are in force before 1981, a Federal Register notice should be issued immediately advising that the proposed rules of the Carter Administration are scrapped. This should be done well in advance of the start of the 1981 mining season ending five years of uncertainty.

If final regulations are issued late in 1980, these regulations should be immediately suspended by *Federal Register* notice. Such action would be justified since the publication in late 1980 was politically motivated, and not the result of deliberation, honest debate and consideration of all comments, especially in light of the generally perceived notion of the mining community that the Department had already made up its mind.

The regulations are necessary for several valid reasons including the fact that similar regulations have been in place for over 100 million acres of public lands within national forests since 1974. As well, such regulations will eliminate the

need in the future, when withdrawing public lands, to prohibit operation of the Mining Law of 1872.

The Forest Service regulations should be adopted by the Department. This would have the salutory effect of having uniform regulations applicable to all public lands. There is no justification for differing sets of regulations governing like activities on similar lands. This approach would give effect to a policy announced at the adoption of the Forest Service regulations in 1974. In a letter from the Secretary of Interior to the Secretary of Agriculture, dated August 14, 1974, Interior promised to issue a compatible set of regulations in the near future with the view to eventually having a single uniform set of regulations applicable to all public lands. Issuance of such regulations should state clearly that the Department intends to actively pursue the enforcement of such regulations in a fair and equitable manner on *all* lands where the Department has jurisdiction.

In the past several years, the Department has abrogated its statutory authority over mineral resources on Forest Service lands. The Department's responsibility over mineral resources is clearly enunciated in the Forest Service Organic Act of 1897 as well as its own Organic Act of 1849. While it is true that the Bureau of Land Management's minerals capability is currently limited, efforts should be initiated to restore this capability. Minerals professionals should be recruited to replace those professing to be such by up-grading the grade levels at which they are hired and by creating a meaningful career ladder on a par with other resource professionals. Efforts should also be initiated to curtail the continuing growth of minerals professionals within the National Park Service. The fragmented utilization of minerals resources professionals throughout the many agencies and bureaus of the Department has created ambiguity and uncertainty for those who have an interest in developing mineral resources on federal lands.

The Bureau of Land Management's minerals expertise must be expanded so that mineral patent applications, many of which have been pending for over 15 years, may be expeditiously processed to completion. There is currently an inexcusable number of mineral patent applications pending because of an unwillingness on the part of land managers to issue a patent since that means the government will no longer have control over the lands covered by such patent and because many of these land managers believe a leasing system would be superi-

or. The Congress, however, has soundly rejected the concept of a leasing system in lieu of a patent system on several occasions in the past. Therefore, the policy direction of a new administration must be to honor the "right" granted under the Mining Law of 1872 to receive a patent if the requirements of that Act have been satisfied.

One modification is desirable, if not essential, given BLM budgetary constraints and limited manpower to enforce regulations. The Forest Service regulations require, with certain minor exceptions, that the mining claimant file a notice of intent in all cases where activity is proposed on the mining claim which might cause disturbance of the surface resources. This is necessary to make a determination if the activity would constitute significant surface disturbance and thus trigger the need to file a formal plan of operations.

A certain level of surface disturbance should be permitted before a notice of intent is required to be filed with BLM. The threshold of activity which would trigger the requirement to file a notice of intent would be spelled out in the regulations.

Wilderness Study Area Policy

The Solicitor's opinion of September 5, 1978, sets the ground rules for the current Wilderness Interim Management Policy (IMP) announced December 12, 1979. The opinion may well exceed congressional intent because of limitations on leasing and hardrock mining on lands under wilderness review:

1. *Valid Existing Rights.* Locatable interpretation: Mining claims located before October 21, 1976, represent a valid existing right if a valid discovery had been made on the claim by that date. Leasable interpretation: Rights of the lessee is conditioned on the terms of the lease form and stipulations attached.

The lease grants the exclusive right and privilege to drill for oil and gas and to construct any structures and roads necessary to the full enjoyment thereof.

The Solicitor defines impairment as it relates to prospecting and development, as an impact that cannot be reclaimed to the point of being "substantially unnoticeable" by the time the Secretary is scheduled to report to the President as to the suitability of the areas for preservation as wilderness. The Solicitor holds that any leases issued without the requisite lease language have valid existing rights, and are not subject to the

non-impairment criteria. However, most leases have such language.

The Solicitor clearly erred in that Section 2(p) of the standard lease severely limits what restrictions the Secretary may impose.

Section 2(p) can be interpreted to mean that lands under wilderness review are a form of segregation not consistent with the use of the land for the purpose of the lease—oil and gas drilling—the dominant use. For oil and gas leases issued prior to 1978, nothing has been stipulated separately concerning wilderness protection. Thus, the dominate use, the drilling for oil and gas, cannot be stopped.

Contrary to the conclusion of the Secretary all oil and gas leases issued without the special stipulation for wilderness protection (those issued before 1978) have valid existing rights. Other types of mineral leases with similar wording likewise have valid existing rights.

By Federal Register notice the Department must immediately suspend enforcement of the valid existing rights portion of the Solicitor's opinion and the Wilderness IMP for all outstanding leases and permits issued prior to October 21, 1976, and for all mining claims located prior to October 21, 1976, and subsequently recorded timely with BLM. Holders of these leases, permits and mining claims would be considered to hold valid existing rights, and thus would not be limited by the non-impairment criteria.

Both the Solicitor's opinion and the Wilderness IMP should be reviewed. Section 603 of FLPMA should be re-interpreted regarding "valid existing rights". A more liberal interpretation, consistent with the spirit of FLPMA, seems desirable in order to maximize the number of leases, permits and mining claims which are not subject to the non-impairment criteria.

2. *Grandfathered Rights.* So-called Grandfathered rights from the wording in Section 603 of FLPMA which states that mining and mineral leasing activities may continue in the same "manner and degree" in which they were being conducted on the date of the Act.

The Solicitor's opinion interprets "manner and degree" very strictly concluding that that term applies not to the type of activity on-going on the date of the Act but to the specific activity of a particular individual. Thus a company conducting pre-drilling exploration may not proceed to drilling since that is different in "manner and degree" despite the fact that

another company in the same area may be drilling. The Solicitor has further determined "manner and degree" to contain a geographic limitation.

If valid existing rights are extended to leases that were issued prior to FLPMA or prior to attaching the special wilderness stipulation, and to all mining claims located prior to October 21, 1976 and timely recorded with BLM, grandfathered rights become a moot point since the lessee or mining claimant would be able to proceed. Nonetheless, the Solicitor's interpretation of "manner and degree" should be revised.

3. *Non-impairment Criteria.* This concept is overly restrictive because of the timing involved. There are very few mining companies who would be capable of spending time and money on a project knowing that the area would have to be reclaimed in one to seven years not knowing until sometime in the 1990's whether an area will be designated as Wilderness by Congress. A much more meaningful and fair concept of the non-impairment criteria is the definition in the draft wilderness IMP that required reclamation, but not until five years after congressional designation. The main deficiency in the current definition is that every manager may have a different opinion as to what constitutes impairment and the time necessary to reclaim the area to the point of being "substantially unnoticeable."

The present non-impairment concept is clearly too restrictive and must be revised.

Exploration of Wilderness Lands

The Wilderness Act of 1964 clearly provided for continued mineral exploration and development as well as mineral leasing of lands within the wilderness system. Wilderness lands were to remain open until 1984 in order to fully ascertain the mineral wealth of such lands.

Unfortunately, for sixteen years those provisions of the Act have been administratively frustrated and circumvented with the result that little more is known of those lands today than was known in 1964. As well, since that date, numerous other areas have been added to the wilderness system but the 1984 date remained unchanged thus shortening the time allowed for mineral exploration as provided for in the 1964 Act.

Short-term Options

The new Administration should issue a Solicitor's Opinion

revising and clarifying the exploration provisions of the Wilderness Act declaring that such exploration constitutes the dominant use of such lands.

Long-term Options

The new Administration should recommend legislative amendment of the Wilderness Act to provide for exploration of wilderness system lands until the year 2000 and for wildernesses created after 1980, for a period of 20 years.

Withdrawals and Withdrawal Review Policy

Withdrawals of public lands from operation of the Federal Mining Laws of 1872 have been justified on the grounds that there is no discretion on the part of the Secretary to control activities on mining claims. The result is a Departmental policy to withdraw lands from location, entry and patent under the General Mining Law of 1872. The position of the Secretary is that so long as the 1872 law is not replaced with a leasing system, then withdrawals from operation of the 1872 law still continue unabated. Of the 800 million acres of public lands subject to operation of the 1872 mining law, 320 million acres are withdrawn or severely restricted.

Short-term Options

A policy should be announced immediately by Executive Order that there will be no net increase in lands withdrawn by the Executive Branch from operation of the mining and mineral leasing laws. In no case, where mineral evidence is lacking, should a withdrawal preclude operation of the mining and mineral leasing laws.

The initial inventory under Section 204 of FLPMA of withdrawn lands which may be restored and returned to operation of the mining and mineral leasing laws should be re-evaluated. Only 5% of all lands withdrawn were found to be available for consideration for restoration to operation of the mining and mineral leasing laws. Announced policy should be that at least 10% of existing withdrawals will be restored to operation of the mining and mineral leasing laws by 1983.

Medium-term Options

Assuming that surface management regulations regulating activities on unpatented mining claims are in place, all pending withdrawal applications which propose to withdraw lands from

operation of the General Mining Laws should be reviewed, and the restriction against operation of the General Mining Laws should also be reviewed. Adequate protection of the purpose for the withdrawal will generally be assured by reason of the surface management regulations, and regulated mining activities will generally be compatible with the purpose of the withdrawal.

Review of existing withdrawals required by SectionA 204 of FLPMA must be accelerated and concentrated where mineral potential exists or is likely to exist. Lands without mineral potential should generally be reviewed last. A schedule of review should be developed based upon a consensus of government and the mining industry as to what withdrawn areas have mineral potential.

Lands

Eastern States Office (ESO)

ESO is responsible for administering public lands and interest in lands in the 31 states adjacent to and east of the Mississippi River. ESO manages 60,000 acres of surface resources, with 75% of that in Minnesota. Mineral management responsibilites, however, embrace, 39.7 million acres, of which 38.1 million acres underlie surfaces controlled by other federal agencies—primarily the U.S. Forest Service. Most of the surface acreage is isolated, fragmented, and difficult to manage. A great deal of the federal mineral estate is without surface title and is surrounded by other landlords.

Coal trespass has been highly publicized of late and a great deal of which has been generated by BLM. However, the results suggest that more money was spent than will be collected in damages. Each application for a mineral lease requires an environmental assessment regardless of the isolation of the tract, the opportunity of adjoining non-federal landowners to develop mineral deposits, and the size of the tract. In many cases, lands valuable for oil and gas leasing have not been posted on a simultaneous oil and gas list for years. In many cases lease issuance takes years.

Short-term Options

A policy announcement should be made immediately that where oil and gas lease applications involve reserved mineral estates with private surface, and the parcel is surrounded by

non-federal mineral estates, no environmental assessment will be made if the well-spacing requirements exceed the size of the tract applied for. Likewise, no environmental assessment will be done for applications for fractional mineral interest leases.

The coal trespass program should be reviewed early on. In many instances the cost of prosecuting coal trespass has exceeded the damages received. A policy should be announced that only significant coal trespass will be prosecuted. Money will be more wisely spent on monitoring activities to encourage cooperation between coal operators and BLM and USGS field representatives to avoid trespass situations in the future.

All fractional federal mineral estates, i.e., where the federal government owns less than 100% of the reserved minerals, should be sold to the private holder of the other fractional interest. A policy announcement to this effect should be issued after a preliminary study confirms the wisdom of this course and corroborates this conclusion. Where applicable, Section 209 of FLPMA should be used. All lands (60,000 acres) where the government owns surface and subsurface, and which are determined not essential to a minerals management program, should be disposed of immediately. Priority may be given to other federal agencies and state governments, but only where they demonstrate a need for the land to the satisfaction of the Secretary of the Interior.

ESO should be ordered immediately to post all available lands on the simultaneous oil and gas lists before the end of 1981, without exception.

Longer Term Policies and Legislation

A new adminstration should:

1. Consider implementing many of the recommendations contained in "One-third of Our Nation's Land", a report to the President and to the Congress by the Public Land Law Review Commission, June 20, 1970;

2. Review the apparent disparities in the various land payment programs which compensate states and counties for lost tax revenue due to the presence of federal land in a given state. There are two good documents addressing this issue. First, the General Accounting Office report PAD-79-64, "Alternative for Achieving Greater Equities in Federal Land Payment Programs". Second, "The Adequacy of Federal Compensation to Local Governments for Tax Exempt Federal Lands", a report by the Advisory Commission on Intergovernmental Relations (July, 1978);

3. Review its role in "managing" rural communities within or adjacent to federal areas. The General Accounting Office and many within civil service in DOI and DOA strongly believe such towns and communities should be exempt from federal management. If at all possible such boundaries should be redrawn, within existing DOI Secretarial authority, to exclude such communities from federal management;

4. Require agencies to make their land acquisition and management presentation, regarding old area expansion or new area expansions or new area designations, in site maps which identify improved and unimproved properties, area maps reflecting topographical and ecological units and markings. All appropriate information and data integration material needed for decisions on land management must be presented in visual aids to congressional committees and national decisions makers. The problem now is that in most cases site maps are used which do not provide the broader-overview necessary in decision making.

Further, a "State of Emergency for Resource Identification and Development" plan should be developed by the new Administration to provide appropriate decision alternatives to the President in the event of exogenous shocks requiring domestic resource identification and development under national security considerations.

Water Policy

The Carter Administration's initial foray into western water policy was an assault against an area long considered the prerogative of western governors and Members of Congress. Days following the inauguration, Carter listed numerous western water projects considered by the Administration to be unjustified. Unfamiliar with the nature of western water and hearing only the strident opposition of environmentalists, the Administration sought to kill all such programs. In the end, nearly half of the projects were given congressional and executive go-ahead but the critical *quid pro quo* had been destroyed removing projects from the realm of those affected to the jurisdiction where categorical opponents could subject the proposals to delay and death.

During the first summer of the Carter Administration, the Department, ostensibly under Court order, proposed and finally promulgated new regulations under the Reclamation Act of 1902. Long a focus of environmental outrage, the Administration reversed 50 years of Interior Department pol-

icy and pronouncements regarding that Act by establishing new acreage, leasing and residency rules. In the end, the efforts of the current Interior Department to administratively repeal the Reclamation Act and fundamentally change the face of western agriculture was prevented by a court-ordered Environmental Impact Statement. Nonetheless, the Department has continued to threaten to veto current congressional efforts to rewrite and update the Reclamation Act.

In mid-summer 1977, with the Carter Administration less than 6 months old, the Department of the Interior moved boldly forward with a National Water Policy which threatened to reverse, not the administration of a federal act in the West, but western water law itself. The Department proposed to utilize waters reserved to the federal government, water held in trust by the federal government and water in federally financed water projects to force upon western states water policies deemed by the federal government to be superior to existing State law. Chief among the objectives enumerated in the *Federal Register* was that of "conservation" and end allegedly neglected under western water law. Although forced—as the result of united western opposition to such proposals—to significantly abbreviate their application or significance, nevertheless the Administration's orientation was made clear.

On June 25, 1979, the Solicitor of the Department of the Interior released the Department's broadest assault upon western water law. In a 72-page opinion, the Solicitor sought to reverse not only the thrust of the legal commentators conclusions on federal-state relations in water law, but the efforts of Congress and the recent rulings of the U.S. Supreme Court. While the Solicitor's brief for the Department ignored many fine legal distinctions regarding the "reserved rights" doctrine and thus filled with uncertainties an area of open dispute, his greatest disservice was that concerning so-called "unappropriated water". The Solicitor fashioned out of little more than whole cloth, a heretofore unknown doctrine giving to the Department the right to take western water without observing either State substantive or procedural law. Thus for the first time, the Solicitor viewed the Department as having the authority to take any unused western water for application to any purpose enumerated in the Federal Land Policy and Management Act (no possible purpose appears deleted). That power, if utilized, would effectively destroy the ability of any western state to make any decision regarding its water and thus

necessitate that states proceed to the Department of the Interior to utilize water claimed by the federal government for critical state or local undertakings.

That Opinion was openly condemned by westerners and was the subject of numerous meetings between western Governors and Interior officials. While Secretary Andrus has recently sought to mollify westerners, he has yet to repudiate or renounce that opinion. His only assertion is that the Opinion will not be used unless Interior's goals cannot be achieved by means of bilateral agreement.

Short-term Options

A new Administration must return to westerners a confidence in the role of the federal government in western decisions. On no issue is that change more crucial than regarding water law.

Western water law is the result of nearly one hundred thirty years of development and distillation. It is a law which grew out of the circumstances, needs and realities of the West. No one is more aware of the importance of, nor the need for, the wise use of water than westerners. As a result, it is critical that a recognition of the vitality and the strength of state water law be made by a new Department of the Interior and that past federal policies which threatened these laws be repudiated and abandoned. A new Administration must recognize that the hand on the faucet of the West must be a western hand. Western water law as recognized by the various states must remain inviolate.

1. Solicitor's Water Opinion—The new Administration must repudiate the June 25, 1979, Opinion and request of the new Solicitor a reexamination of the issues involved. Any new opinion must recognize past congressional actions as well as recent U.S. Supreme Court decisions regarding western water. Such an opinion must truly be the Secretary's lawyer's legal analysis of existing law and not highly theorized conjecture as to the most extreme expanse of possible federal power. States must be assured that a repudiation and review of the Opinion has taken place.

2. National Water Policy—There is little question but that water is a crucial element of energy development in the West. As a result a "national" water policy providing unified federal policy toward water is required. However, any national water policy to be evolved in the new administration must recognize the fact that a water policy—national in scope—must recog-

nize existing state water law. The vast majority of western water *is* state water and ignorance of this fact will doom any "national" policy. Conservation, for example, is a matter primarily within the scope and purview of the western states and not the Department of the Interior. Western water law has proven flexible enough in the past and will be so in the future. It is essential therefore that the federal government continue to permit the operation of state water law and the free market system which is its foundation. The new administration must announce the involvement of state and local representatives in the creation of any national policy in a truly issue development role. Unlike the Carter Administration, that involvement must be substantive and not merely procedural.

3. Reclamation Law and Projects—A long tradition of western agriculture has grown-up in the west as the result of the Reclamation Act of 1902 and the projects financed thereunder. It is not a tradition which can or should be reversed or repudiated in the course of an administration. Congress is now in the process of carefully crafted revisions of that Act. It should not be the role of a new administration to second guess the will of Congress in that regard. However, at this stage in our national history with agriculture commodities constituting a large part of our exports, it would not seem wise to attempt a major restructuring of the long tradition of western agriculture.

Long-term Options

It will fall to the new Administration to develop a creative approach to reclamation projects. Once sacrosanct in the Congress, such projects are now openly criticized and opposed not only by environmental groups but by certain Members of the Congress. New projects will thus be subjected to increasing scrutiny. The Administration should not oppose such projects universally as the current Executive has but must instead make water projects more relevant to today's needs and be aware that certain water project benefits are not quantifiable.

As well, given growing energy concerns, the new Administration should recognize that the nation possesses vast hydropower potential in new projects as well as in incremental increases in existing projects. This potential could well double hydroelectric production. The new Administration must move to assist in the upgrading and revitalization of existing projects while preserving the ability of private enterprise to provide that increase in capacity.

The initial work of the new administration will be that of promulgating regulations under the new Reclamation Act. That effort, and the development of a new "principles and standards" document, will necessitate close and real involvement with State and local representatives.

FISH AND WILDLIFE AND PARKS

Deficiencies of Existing Policies

The Office of the Assistant Secretary for Fish and Wildlife and Parks has, through its constituent agencies, caused more disruption to other programs with the Department than any other in government. This disruption has occurred primarily due to policy decisions formulated with a mind-set of preservation and enhancement instead of conservation and multiple-use. The preservation and enhancement mind-set is certainly not confined to this Assistant Secretary but instead is typical of all sub-cabinet posts within the Department and indeed throughout the current Administration.

Key examples of the constituent agencies under the direction of the Assistant Secretary and the attendant preservation mind-set attitude can be found in the Fish and Wildlife Service (FWS), National Park Service (NPS), and Heritage Conservation and Recreation Service (HCRS).

The Fish and Wildlife Service is a limited purpose agency which primarily addresses only the preservation and enhancement of fish and wildlife resources. The existence of this single inflexible purpose has caused the service to take actions which are not in the general public interest, but in fact, seriously damage the general welfare of this country's citizenry.

The National Park Service administers its programs with a narrow, if not nonexistent, view of multiple uses authorized for public lands under the Multiple Use and Sustained-Yield Act even though many such uses would be compatible with maintaining national park resource values and purposes. In addition, the National Park Service believes there are few compatible uses of private lands which abut park lands. National Park Service action of the Carter Administration has been based on this philosophy and has resulted in infringement of private property rights and denial to the public of full enjoyment of national park resources.

The Heritage Conservation and Recreation Service is yet another agency which has injected itself into the land use planning role within the Department, which is already in a

state of disruption and virtual stagnation in terms of decision-making. One of its primary functions has been the administering of the Land and Water Conservation Fund. This has been the tool used most effectively by HCRS in diminishing state and local land use prerogatives over their own lands by tantalizing them with the promise of federal funds *if* they adopt a federally approved comprehensive outdoor recreation plan. The result has been possible enhancement of the environment but a marked diminishing of social and economic values as well as personal freedom. Moreover, HCRS is now attempting under the guise of the National Natural Landmarks Program, to identify entire mountain ranges managed by the U.S. Forest Service as areas that have potential to be protected as national natural landmarks. If successful, this would inject HCRS into the Forest Service land management practicies—a role that HCRS has no authority being involved in at this time. Clearly, redirection is needed by a new administration *if* HCRS is to continue as a viable agency within the Interior Department.

Creation and Constituent Agencies

Fish and Wildlife Service (FWS)

FWS was originally conceived as a means of supporting the commercial fishing industry, 16 U.S.C. §§ 7424-7454, but its modern objectives have had a single purpose — preserving and increasing the nation's fish and wildlife resources. It seeks to do so by acquiring and regulating the use of land preserves and refuges in which wildlife may breed and exist in relative safety. FWS also operates various funding programs for state projects.

FWS is responsible for the administration of the National Wildlife Refuge System, 16 U.S.C. §§ 668dd, *et seq.*, which provides for the issuance of permits for use of FWS lands if not inconsistent with the purposes for which the land was acquired under this responsibility, FWS operates two types of land conservation programs. The Migratory Bird Program, 16 U.S.C. §§ 715, *et seq.*, seeks to study and control migratory bird habitats through national wildlife refuges. The refuges are federally owned and operated. FWS also maintains a Mammal and Nonmigratory Bird Program, 16 U.S.C. §§ 671, *et seq.*, which sets up game and bird preserves again through acquisition and regulation of land. In addition, FWS has the responsibility for listing all endangered or threatened species, 16 U.S.C. §§ 1351, *et seq.*, which has the impact of minimizing significantly

any activities which may occur in any listed species or critical habitat area 16 U.S.C. 1536 (a)(2). This one function of FWS may have the *greatest* impact on the development of public and private lands of any law currently on the books. Moreover, FWS's implementation of the Endangered Species Act appears to depend on the Carter Administration's subjective view of the federal project that is impacted.

The building blocks for FWS's program are found in 16 U.S.C. §§ 666d-667 which proved for acquisition of land by FWS. It is authorized to classify such land according to its most beneficial use for carrying out the Act's purposes and to lease the property, transfer it to another state or federal agency, or otherwise to provide for the achievement of that use, including merging the land into existing migratory waterfowl management areas, refuges, reservations, or breeding grounds.

While FWS is authorized in administering its own refuges and preserves to allow other factors to be considered, such as recreational and commercial uses of the land (16 U.S.C. §§ 671, *et seq.*), to the extent that they are not incompatible with wildlife values, nowhere is FWS authorized to engage in comprehensive planning of lands within their jurisdiction.

National Park Service (NPS)

In 1916 NPS was created, 16 U.S.C. §§ 1, *et seq.*, and charged with the responsibility to:

> promote and regulate the use of national parks, monuments and reservations and to conserve the scenery and natural and historic objects and the wildlife therein and by such means as will leave them unimpaired for the enjoyment of future generations.

Parks are created by individual congressional enactments. Though NPS was seen as a mechanism for uniform coordination, individual statutes creating parks have often vested each park with unique powers or limitations on the use of the park.

The Secretary clearly views very few of the multiple uses authorized for public lands in the Multiple Use and Sustained-Yield Act, 16 U.S.C. §§ 1601, *et seq.*, to be compatible with maintaining national park resource values and purposes. 45 Fed. 47092 (1980). Moreover, the Secretary also believes there are few compatible uses of private lands which abut park lands. NPS action of this administration has been based on this philosophy and has resulted in infringement of private property rights and denial to the public of full enjoyment of national park resources.

Heritage Conservation and Recreation Service (HCRS)

On January 25, 1978, the Department of Interior was reorganized creating HCRS. This new agency assumed much of the responsibility of the Bureau of Outdoor Recreation, while some duties went to NPS. For example, NPS now administers the National Trails System (16 U.S.C. §§ 1271).

HCRS is concerned with conservation/recreation measures and its most important function appears to be the administration of the Land and Water Conservation Fund (16 U.S.C. § 460(1)-(5). The fund offers states 50% matching grants for the acquisition and operation of land and water conservation areas, provided the state has adopted a federally approved comprehensive outdoor recreation plan. The fund is also available to other federal agencies for land acquisition, e.g., NPS, FWS, United States Forest Service, and the Bureau of Land Management and totals over $580,000,000 for fiscal year 1981.

The administration of the Land and Water Conservation Fund has put HCRS into a major land use planning role which has pitted private/local control against national/central control. By tantalizing states with the promise of federal funds, this program has diminished local land use control. The result has been possible enhancement of environmental values but diminishment of social and economic values as well as personal freedom.

The National Natural Landmarks Program was transferred from the National Park Service to the Heritage Conservation and Recreation Service on January 25, 1978.

The National Natural Landmarks Program was established in 1963 by the Secretary of the Interior "to encourage the preservation of areas that illustrate the ecological and geological character of the United States, to enhance the educational and scientific values of the areas thus preserved, to strengthen cultural appreciation of natural history, and to foster a wider interest and concern in the conservation of the nation's natural heritage."

Public or private lands may be designated by the Secretary of Interior after being studied and recommended by the Heritage Conservation and Recreation Service. The Service registers and monitors National Natural Landmarks.

Following the designation of an area by the Secretary as a National Natural Landmark, the owner(s) or manager (if public lands) is "invited" to enter into an agreement with the Heritage Conservation and Recreation Service indicating a willingness

to adopt "management practices which protect the landmark's nationally significant values." Of concern for the report is the potential for further multiple-use restrictions on the public lands under the guise of this program. Entire mountain ranges which are managed by the U.S. Forest Service have been identified as areas that are potential national natural landmarks. It would thus appear to be inappropriate to have the Heritage Conservation and Recreation Service negotiating and monitoring the U.S.F.S.'s management practices. Moreover, it appears that the National Natural Landmark Program could be managed in a grossly unbalanced manner in favor of preservationism.

Short-term Problems and Opportunities

The Endangered Species Act under FWS

The Endangered Species Act (ESA) is a concern to those in favor of balancing environmental preservation with other social needs. The current Act and its implementation has two major problems. First, it is being used as a cudgel to slow or stop development, regardless of the threat to any endangered species. Second, ESA impedes the prudent balancing of the utility of federal projects, such as hydroelectric dams, with the environmental concern for endangered species.

Fish and Wildlife Coordination Act Regulations

Published May 18, 1979, by the USFWS, these rules and regulations govern uniform procedures for the Fish and Wildlife Coordination Act.

The basic premise is that wildlife mitigation and enhancement procedures, required by the FWCA, have equal right with all other project purposes. In a real sense, under this proposal, they get better than equal weight.

The full cost of implementing mitigation and enhancement *and* all costs of operating and maintaining (management) the wildlife habitat acquired for these purposes are to be factored into individual projects as a "cost". The rationale is that mitigation is a cost with no "benefit" other than achieving status quo. Enhancement must be an extra "perk" because any benefits from it cannot be counted on the benefits side of the b/c ratio. It, too, is only a cost.

The only exemptions from such procedures involve the Tennessee Valley Authority and the Small Watershed Program of the SCB, unless there is stream channelization involved.

Short-Term Options

It is recommended that the new Administration should require an immediate and complete revision of these rules and regulations.

In addition, The William O. Douglas Arctic Wildlife Range in Alaska's northeastern limits is under the juridiction of the Fish and Wildlife Service. Although geologists from the U.S. Geological Survey have cited the Range as perhaps the most prospectively valuable location for oil and gas in North America, the current administration refuses to allow seismic activity. Allowing exploration activity is clearly within the FWS prerogative, however the Service has abdicated its role to the Congress. The incoming Secretary of the Interior should immediately initiate planning necessary to begin intensive seismic activity in the Wildlife Range. If seismic and other exploration does not result in positive conclusions about the oil and gas potential, then the Range can be maintained in a wilderness status and complete protection of the caribou and other wildlife would be insured. If exploration activity leads to positive findings, then phased development drilling could begin with protective wildlife stipulations.

Medium-term Problems and Opportunities

Acquisition of Public and Private Lands

NPS, FWS and HCRS are all given acquisition responsibilities under a number of laws and regulations, some applying to more than one agency and others to only one. The Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 460, is cited as the beginning of a large-scale, concentrated federal program of land acquisition. Under this Act, the Land and Water Conservation Fund is divided between state and federal programs on a 60 to 40 ratio, respectively, with HCRS being charged with responsibility for coordinating the use of the federal portion. Over the remaining 11-year life of the Land and Water Conservation Fund state and federal projects could divide close to $10 billion with up to $4 billion for earmarked federal acquisition.

Fish and Wildlife Service

In addition to the Land and Water Conservation Fund (LWCF), FWS relies on funds from the Migratory Bird Conservation Act of 1929, as amended. This Act provides funding

from revenues received by the sale of duck stamps and the Wetlands Loan Act.

FWS's current acquisition policy states that land should be acquired only when other means of achieving program goals are not available or effective. Realizing this as the stated policy, implementation of this policy has been inconsistent.

Agencies of the Department of the Interior are acquiring too much land in fee simple (full title), as opposed to protecting lands by alternative methods such as scenic easements, zoning and state and local controls. This practice results from the failure of the Department of the Interior agencies to adequately consider alternatives to fee title. By failing to adequately consider and thus report on various alternatives to fee acquisition, the agencies have presented insufficient information both to Congress and to other agencies responsible for administration of acquisition funding. Congress has traditionally granted agencies considerable discretion in determining the manner of protecting an area. This broad grant of discretion has resulted in the inefficient use of federal funds because FWS and NPS have traditionally purchased more fee simple land than was necessary to achieve a project objective. HCRS, on the other hand, is not an agency which acquires lands or a land-management agency; however, it is equally guilty for FWS and NPS abuses, based on its failure to enforce its existing policies designed to assure consideration of alternatives to fee simple acquisition.

The three DOI agencies—FWS, NPS, and HCRS—have policies which encourage full consideration of alternatives to land acquisition, including zoning and easements. However, land managers at the project level are very reluctant to use alternatives or to try to convince Congress that alternatives can be effective. In practice, NPS and FWS have assumed a mandate to buy as much land as possible within project boundaries. The prime criteria for acquiring land appears to be availability of funds and opportunity to purchase, rather than a critical determination of need.

Alternatives to full-title acquisition are feasible and should be used by federal agencies, where appropriate. It is recognized that some lands must be purchased, but there appears to be no plausible reason why everything must be owned. Further, an overall federal policy is needed to provide direction, establish standards and guidelines, and set priorities for federal land acquisition.

It is recommended that the Secretaries of the Departments

of Agriculture and the Interior jointly establish a policy for federal protection and acquisition of land. The Secretaries should explore alternatives to land acquisition and provide policy guidance to land-managing agencies on when lands should be purchased or when alternatives should be used to preserve, protect, and manage national parks, forests, wildlife refuges, wild and scenic rivers, recreation areas, and others.

It is also recommended that the need to purchase additional lands in existing projects be evaluated. This evaluation should include a detailed review of alternative ways to preserve and protect lands needed to achieve project objectives.

Longer-term Policies and Legislation

Particular attention should be placed on the dramatic increase in National Park Service land area and mission alterations. Of fundamental significance is the publication, *Final Report to the President and the Congress of the National Parks Centennial Commission.* In this report there are concerns and recommendations expressed which should be reviewed.

A national inventory is needed of those recreational areas within the purview of the Departments of Interior and Agriculture which should remain under direct federal management. Those that are not of "National Treasure" value or significance should be reviewed for eventual transfer to state or local government control reflecting their recreational utility. This action would do much to raise morale within the National Park Service and has the quiet support of even the present Director of the Service. Even the present Assistant Secretary for Fish, Wildlife and Parks will agree that many of the areas presently under his authority have little *national* significance and should be transferred to appropriate local governments with some transitional federal assistance.

In addition, the new administration should:

Introduce legislation to amend the Land and Water Conservation Fund allowing the enhancement programs with federal side funds to offset present "Threats to Parks" problems. There is no reason why the Land and Water Conservation Fund (LWCF) should not be used to preserve existing parks rather than only for the acquisition of more and more land with little chance of real increase in direct general fund appropriations for construction and operation of present areas;

Increase its management oversight of DOI and DOA land areas, particularly those in recreational designations. This

should involve a total review of each area at least every five years with specific recommendations to Congress. Rather than having a "park-of-the-month" club, DOI should have a "park-review-a-month" club;

Review attempts by the National Park Service to alter its charter form a dual responsibility of providing public recreation resources and protection of the resources to only preservation of the scenic landscape. This effort is best reflected in the new master plan for Yellowstone.

INDIAN AFFAIRS

Summary of Principal Deficiencies of Existing Policies

When the 1980 census is completed as many as 1.3 million Americans will have claimed American Indian or Alaskan Native ancestry. About 800,000 of these people live and maintain tribal relations on or near 267 reservations in 24 states and in 218 villages in Alaska. The other half million generally reside in urban areas, principally in the west and midwest. The largest numbers of Indians are found in Arizona, New Mexico, Oklahoma, California, Montana, South Dakota, Washington and Minnesota.

The unique nature of Indian tribes' relationship with the United States Government, their important roles in national and regional political and economic issues, and their increasing political sophistication make Indians and their concerns important far beyond their relatively small voting number.

The historical and legal relationship between American Indians and Alaska Natives and the federal government is grounded in the Constitution and in 270 treaties, defined and interpreted in a full book of federal statutes and in more than 2,000 federal court decisions. In this relationship the United States is the legal trustee for more than 53 million acres of Indian lands and resources, and deals with some 500 Indian tribal entities as partners in what are essentially government-to-government relationships. By law, the United States has a legal responsibility to perform a wide range of duties and obligations to Indians.

The Executive Branch agencies principally charged with administration of Indian law and programs are the Bureau of Indian Affairs (BIA), Department of Interior, and the Indian Health Service (IHS), in the Department of Health and Human Services. In fiscal year 1980 these agencies employed a combined total of more than 23,000 people and expended $1,634

billion. Other federal agency programs funding Indian-related projects brought the total FY '80 expenditure to around $2 billion, or less than .05% of the federal budget in that year.

Existing Policy Issues

Indians and Alaska Natives are key players in a number of international, national and regional political and economic issues. For example, the manner with which the government deals with Indians is an international issue in that the credibility of the United States as an advocate of human rights, minority rights, and fair and honorable dealings among peoples is affected by perceptions of the government's treatment of its reponsibilities to Indians. This treatment was recently given much attention by the Helsinki Commission on Human Rights. Similarly, the federal government's positions on issues such as international whaling and sealing accords must be considered in light of the interests of Alaskan Eskimos.

Domestically, Indian interests are critical elements in significant political issues affecting various states and regions in the United States. Indian water rights are a major factor in more than 40 major pending lawsuits involving virtually every river basin in the western states. In the East, unresolved Indian tribal claims to land and for damages against States, cities, counties and private individuals have a proven potential for social, economic and political disruption by casting clouds on the title to vast acreages. In the Northwest and in the Great Lakes regions, questions as the nature and extent of Indian treaty fishing rights have been major issues for several years and are not completely resolved. In California, on the Klamath River, failure to resolve an Indian dispute has severly hampered effective management of what was once one of the state's finest salmon fisheries. The new Administration, as trustee for Indian tribes, faces difficult legal and moral questions, including conflict of interest, in seeking fair and workable settlements to these disputed issues.

In addition, Indian tribes are significant potential contributors to the effort to meet national needs for energy resources. Indians own more than 53 million acres in the contiguous 48 states. These lands contain more than a third of the nation's strippable coal west of the Mississippi, and include significant amounts of oil, natural gas, uranium and other minerals. Alaska Natives will eventually possess title to 44 million acres of land under the terms of the Alaska Native Claims Settlement Act, making them the state's largest private landholders. Thus,

any administration has an interest in helping Indians develop their natural resources, to assist them in their effort to achieve economic self-sufficiency and to further the nation's effort to achieve energy independence.

However, the Carter Administration has done little to provide this interest. Indian disenchantment with the Carter Administration springs from the large gap between promises and performance.

The Carter Administration has acquired the distrust of Indians for its handling of other matters such as water rights, energy and budgeting for Indian programs.

When Mr. Carter announced a major study to determine the future of federal water policy, Indian water rights were lumped in with federal reserved rights. Because Indian rights are in effect private rights held by the United States as trustee and are quite distinct from federal reserved water rights, the announcement triggered a furor in Indian country over the ignorance of the trustee about the status of a critical Indian resource. Although Indian water rights was subsequently made a separate task force study, the Administration's credibility was seriously injured.

The Administration's reputation for adeptness with symbols was not enhanced by the failure to include any Indian representative at the famous Camp David energy conclaves that featured hundreds of industry types meeting to discuss American energy policy. This despite the existence of the Council of Energy Resources Tribes (CERT), whose 27 member tribes control major amounts of energy resources, coal and uranium in particular.

Indians have been unhappy with the Carter Administration's budgeting for Indian programs since 1977. Although allowances have been made annually for inflation, the Administration proposed budgets for Indian programs and projects have consistently underestimated inflation and have provided no noteworthy initiatives. What changes and increases have occurred have been largely the result of actions by congressional authorizing and appropriating committees.

Although the Carter Administration is apparently not well regarded by Indians, the Secretary of the Interior, Cecil Andrus, and his deputy, James Joseph, have been sensitive to their role and responsibility as agents of the federal trust reponsibility. The position of Assistant Secretary of Indian Affairs was finally established within the Department and headed by Forrest Gerard, an American Indian. He was

selected after extensive consultations with the Indian communities. The administration of Indian programs has been essentially scandal-free, and the Administration has made modest efforts to try to achieve negotiated settlements to Indian fishing rights controversies in the Northwest and land claims in the East. On balance, however, the record of the Carter Administration on Indian Affairs is lackluster at best.

Short-Term Options/Recommendations

• *Initiate* contacts with key congressional leaders. Indian organizations and tribes to discuss candidates for BIA posts and items of general concern.

• After consultation, appoint a new Assistant Secretary for Indian Affairs early. Delays in finding qualified Indians to fill key positions have led to poor representation of Indian interests in DOI budget preparations.

• Reaffirm the present policy of self-determination.

• Pledge cooperation with Congress in acting on Indian legislation particularly efforts to achieve economic self-sufficiency and resource development.

• *Initiate* contacts with key congressional leaders.

Medium- to Long-Term Options/Recommendations

• Review the platform submissions of the National Congress of American Indians.

• Review the existing programs for Indian economic development which are presently uncoordinated and scattered throughout Executive Branch agencies. Recommend legislation to establish a more coherent and effective economic program.

• Prepare a policy on Indian land claims. The federal government has a clear responsibility to help settle major Indian land claims in New York, South Carolina, Maine and several other states. To settle these cases there needs to be clear policy direction to the government's own negotiators and additional staff and resources to have a reasonable chance of arriving at acceptable settlements.

• Consider a similar policy on Indian water rights. When speaking to the question avoid use of the words "negotiated compromise" which in the Indian lexicon are equivalents of "sellout" and "giveaway". Since Congress must enact legislation to ratify any agreements to settle water rights or land claims (passage of which usually requires Administration sup-

port), support for "legislative settlements" where possible would be appropriate.

• Maintain and cultivate a continuing liaison with Congress.

TERRITORIAL AND INTERNATIONAL AFFAIRS

Summary of Principal Deficiencies of Existing Policies

After nearly four years of the Carter Administration, federal programs towards America's offshore area continue to be uncoordinated. It took until February of 1980 for the Executive Branch to formulate and announce a major Presidential policy statement for the territories. At the same time, the first efforts aimed at reorganizing the bureaucracy were delineated. Given both the historic and current strategic, economic and political importance of the insular areas, it is imperative that immediate and detailed attention be given to all aspects of U.S. territorial policy including in particular a review of the federal organizational scheme and an assessment of current and alternative economic assistance programs.

The formulation and implementation of territorial policy has had mixed results in both this and previous Administrations. As a generalization, under U.S. directions, inhabitants of the territories enjoy a standard of living which is above that of the world average, but below that of the mainland. However, it has been the tendency to make such comparisons which has been part of the problem. Particularly with respect to Pacific policy, the United States has followed the path of "Americanization" in the course of encouraging political self-determination. While "Americanization" is not in itself inappropriate, the method of effectuating the policy has proven counterproductive. The end result has been sought primarily through massive injections of federal money concentrated in the public sector without adequate coordination and without proper focus on the long-term goal of territorial self-sufficiency.

The poor progress toward economic viability can be attributed in large part to lack of U.S. sensitivity to cultural differences in territorial societies, inadequate emphasis on training programs aimed at self-sufficiency, inadequate assessment of resources, arbitrary application of U.S. laws, and inherent difficulties in the administration of a widely dispersed geographic area. Moreover, capital improvement projects are often poorly designed to cope with the prevailing weather conditions or to meet cultural mores. Insufficient funds are

generally allocated for maintenance of these facilities, and inadequate efforts are expended to recruit and train local manpower to perform important housekeeping functions. As a result, the infrastructure to support economic growth in the territories remains on a shaky foundation.

The necessity of an effective policy toward the offshore areas is important not only from an economic standpoint, but from a strategic one as well. The Pacific Islands have historically been a key factor in global military strategies. Currently, Guam is the only U.S. outpost in the Western Pacific. While the present military installations on Guam are considerable, little flexibility remains for further expansion. Alternatives for additional bases have not been aggressively pursued by the Carter Administration.

For example, the United States has thus far failed to exercise its option to lease 18,000 acres of land on the island of Tinian, NMI, despite the site's near ideal characteristics (flat topography, low population density) for a variety of military mission requirements (amphibious, aviation, logistics). The Administration has also been less then diligent in taking measures to assure the security of the Kwajalein Testing Facility in the Marshalls. Although the facility is crucial to the maintenance of America's strategic ballistic missile deterrent, the Department of Defense has relied complacently on the local government to prevent disruption of base operations by the local citizenry. In the face of local political volatility, this situation must be addressed and corrected as soon as possible.

Obviously, it would be unfair to blame the Carter Administration for all the failures of U.S. policy toward the territories. The failures have resulted from years of mismanagement under changing occupants of the Executive Branch. At the same time, it would be unfair to give this Administration much credit for improving the United State's role. It was not until February of 1979 that the President's Domestic Policy Staff was directed to undertake a review of U.S. territorial policy. In February of 1980, the President announced a new policy which resulted from that review and subsequently began implementing organizational changes.

The broad outlines of the new policy embody needed changes in direction, however, evidence has not yet demonstrated the Administration's commitment to actual implementation. For example, in an effort to coordinate federal programs administered by no less than 19 departments and agencies, President Carter established an Assistant Secretary for Terri-

torial and International Affairs within the Department of the Interior. To date, however, insufficient funds have been allocated to adequately staff the new office for this clearinghouse role. Moreover, despite the contemplated reorganization, the Office of Micronesian Political Status Negotiations itself remains an interagency office and not an integral part of the Interior Department, notwithstanding the fact that it is improperly staffed both qualitatively and quantitatively. In addition, the elevated interest and involvement of high level officials on the Domestic Policy Staff, while perhaps politically expedient, has caused confusion as to who is actually responsible for coordination. Some dissension within the Executive Branch itself has resulted.

Finally, the Carter Administration has yet to adequately consult and coordinate its policies with Congress. Congress as a whole is mandated plenary power for the territories under the Constitution. In practice the current responsibility for territorial affairs in both the House and Senate are delegated to a relatively small number of Members who, in a "bi-partisan" manner, control both authorizations and appropriations. The Carter Administration has done very little to cultivate a working realtionship with this group even though it would require a minimal but diplomatic effort to do so.

Until such an effort is made on a consistent and continuing basis to form a meaningful liaison between the Executive and Congress, undoubtedly insular policy and practice will remain uncoordinated and inconsistent.

Short-Term Options/Recommendations

- Identify and appoint a key person to head the Office of Territorial and International Affairs within DOI who has both administrative experience *and subject matter background.*
- Abolish the Office of Micronesian Political Status Negotiations as an interagency office and incorporate it under the Office of Territorial and International Affairs.
- *Initiate* a meeting with key congressional leaders.
- Delineate the roles of White House staff and DOI staff.
- Implement necessary measures to enhance the security of the Kwajalein Testing Facility in the Marshalls.
- Aggressively pursue funds to exercise the lease option for a military facility on the island of Tinian, NMI.
- *Institute* meeting with territorial officials to discuss areas of concern and commitment.

Medium to Long-term Options/Recommendations

- Review overall policy toward the territories emphasizing methodology changes to implement established goals.
- Continue monetary support of the capital improvements progress but include elements emphasizing maintenance of existing facilities and training programs.
- Review and revive economic assistance policies to encourage self-sufficiency and lessened reliance on public sector funds.
- Review roles of the various federal agencies to eliminate multiplicity of programs and jurisdiction. Use cost savings to adequately fund and staff DOI as the central agency.
- Review inconsistencies in the general application of U.S. laws to the territories and recommend changes.
- Establish and maintain a meaningful relationship with Congress.

POLICY, BUDGET AND ADMINISTRATION

Deficiencies of Existing Policies

The Office of the Assistant Secretary for Policy, Budget and Administration has gained considerably in stature since its inception in 1974. The increase in stature, however, has been closely followed by a perception of increased remoteness of the constitutent offices to the realities of the Department's programs.

In addition to the budget function, which coordinates budget directives and preparation for the Department's agencies, the AS/PBA has major areas of responsibility through the Offices of Outer Continental Shelf Program Coordination, Environmental Project Review, Policy Analysis, Personnel, Acquisition, and Aircraft Services.

Major criticisms have been levelled at the Department for delays precipitated by its awkward organization of Outer Continental Shelf (OCS) responsibilities. While the Office of OCS Program Coordination was designed to provide a focal point for offshore leasing activities, its function has generally served only to lengthen the already lengthy leasing process.

Another significant deficiency of Interior's PBA function is the obstructionist attitude of the Environmental Project Review Office. Among its other notably infamous contributions, this Office oversaw preparation of BLM's 17-volume, 9,000-page Environmental Impact Statement on the Alaska Natural Gas Pipeline.

The ivory tower modelling mentality and the voodoo economics exercised by the AS/PBA's Office of Policy Analysis has demonstrated with some facility the Carter Administration's bias against timely resource development.

While the PBA personnel office has traditionally kept a low profile, the subdued nature of its role has failed the minerals and materials professionals in Interior's land management and energy and minerals functions. The personnel office could become more involved in obvious scarcity or high turnover categories to mitigate this minerals function deficiency.

Short-term Problems and Opportunities

The incoming Administration should take all necessary measures during the transition period to insure the integrity and security of official Departmental files and decision papers. Added physical security should be initiated immediately with appropriate precautions and debriefings applied to outgoing senior staff.

The Office of OCS Program Coordination should be given a directive to promptly begin a review of the multi-agency participation in OCS leasing process. The office should consider within the review options to reduce the number of involved agencies and to reduce the time required for the sale process.

The Office of Environmental Project Review should be directed immediately to revisit the Council on Environmental Quality's guidelines for preparation of environmental impact statements, as required by the National Environmental Policy Act of 1969 (Section 102(2)(C)). The incoming Secretary should direct the office to inform Department of Interior agencies of these guidelines and monitor the office's performance closely through the AS/PBA. It is the undisciplined activity of the Environmental Project Review Office which has continued the offensive habit of some elements of the Department in preparing excessively long and detailed environmental statements which consider options clearly lacking in common sense.

Longer-term Policies and Legislation

The Department's existing OCS program is fragmented over four Assistant Secretaries. Interior agencies which have responsibilities in the OCS program include the U.S. Geological Survey, Bureau of Land Management, Fish and Wildlife Serv-

ice, Office of OCS Program Coordination, Office of Policy Analysis, and the Office of Environmental Project Review. As a result, some offices perform tasks performed by others. The incoming Secretary should consider consolidation of all OCS activities under a single Assistant Secretary. The logical choice would be the Assistant Secretary of Land and Water Resources since the leasing action itself is performed by the Bureau of Land Management. Such a reorganization would improve efficiency, reduce review times, eliminate time-consuming resolution of competing and self-serving objectives. It is estimated that the length of time to complete OCS sales could be reduced by as much as four months or more by incorporating the spectrum of Interior's OCS activities under a single Assistant Secretary.

The AS/PBA should give serious consideration to returning aircraft services to each of the Assistant Secretaries. The currently centralized Office of Aircraft Services within PBA offers few economies of scale and generally is perceived as inefficient and a hindrance to responsive travel needs of the Department's staff.

Over the longer term and with direct linkage to efforts within the Congress and the Office of Management and Budget, the Department should take steps to simplify the budget process by restructuring the budgets of the agency, the President, OMB and the Congress so that formats and inputs are the same. Eliminating crosswalks and simply using similar vocabulary would greatly improve the budgetary process.

AS/PBA and the Budget Function

Organizationally, the potential for making major policy changes within the Department of Interior is greatest within AS/PBA. In terms of the management of day-to-day activities, the impact of AS/PBA has been obvious during the last four years, particularly as evidenced by the previously alluded to activities of the Environmental Project Review Office, the Policy Analysis Office, and the Outer Continental Shelf Program Coordination effort.

This agency represents the staff extension of the official policies of the Secretary, and the potential for insertion into the nuts and bolts events of the various Interior agencies is almost unlimited.

Just as this agency has been the embodiment of the various policies that have characterized the Carter Administration, so

is it possible for any new administration to utilize the agency in the same fashion.

AS/PBA also has significant potential for coordinating Department activities with related congressional activities. Perhaps this is nowhere so obvious as it is within the Budget Office where almost daily contact with congressional committees occurs.

The interrelationships and overlapping jurisdictions between the various agencies of the Department are complex and oversight activities of the authorization and appropriation committees in both Houses of Congress are necessarily extensive. The organization of budget accounts has been carefully designated by the Interior Appropriation Subcommittee and unlike many other appropriations subcommittees, both the House and the Senate require specific approval in writing by both the Chairman and the Ranking Minority Member of all budget reprogrammings between budget accounts.

SOLICITOR

Deficiencies of Existing Policies

Under the Carter Administration, the Solicitor's Office in the Department of the Interior has been used extensively to further the objectives of single-use preservationist philosophies regarding land use throughout *all* programs in the Department. Through its multiple legal services, the current Solicitor's office has done much to cast doubt upon the integrity of those providing such services. There have been abuses by the Solicitor's office in providing legal opinions concerning the manner, scope, and extent of authority, rights, and duties possessed by the Department.

Examples of how the Carter Administration has tried to use the Solicitor's Opinion to help effectuate policy are legion, but one prime example concerns the application of the 1902 Reclamation Act and 1926 Omnibus Adjustment Act to the Imperial Irrigation District. For 35 years the Department of the Interior issued opinions and informal letters holding that normal reclamation law limiting farms to 160 acres if supplied by reclamation water, did not apply to Imperial. In 1964, the administration disagreed that opinion finding no exemption. (71 I.D. 496). Years of litigation followed.

The appellate court gave the opinion significant weight and found no exemption. *United States* v. *Imperial Irrigation* District, 559 F. 2d 509 (9th Cir. 1977). Later the Supreme Court

overruled the Ninth Circuit allowing the exemption. *Imperial Irrigation District* v. *Yellen,* 48 U.S.L.W. 4726 (June 16, 1980). In the final analysis, because of the great weight given a Solicitor's Opinion, it took 16 years before the court clarified Imperial's water rights.

This office will, as it is today, be of key importance to a new administration's efforts to further its goals and objectives.

Office of the Solicitor

The Office of the Solicitor performs all of the legal work of the Department with the exception of that performed by the Office of Hearings and Appeals and the Office of Congressional and Legislative Affairs. The Solicitor's office also includes five associate solicitors for the Conservation and Wildlife Division, Energy and Resources Division, General Law Division, Indian Affairs Division, and Surface Mining Divison.

In addition, the field organization of the office is divided into eight regions, each of which is headed by a Regional Solicitor.

As a Presidential appointment, the Solicitor functions as a policy maker and implementer. Accordingly, the Solicitor of the Department of the Interior plays a valuable role in ensuring the accomplishment of an administration's natural resource and land management policies through a multitude of legal services he provides. The most important services policywise are providing legal opinions concerning the manner, scope, and extent of authority, rights, and duties possessed by the Department of the Interior and drafting regulations to implement laws the Department is administering.

Short-term Problems and Opportunities

The key factor to the utility of the Solicitor's office is the political philosophy of the leadership in the Solicitor's office. This includes not only the Solicitor but the five associate solicitors for the Conservation and Wildlife Division, Energy and Resources Division, General Law Division, Indian Affairs Division, and Surface Mining Division. The make-up of the people who filled these positions under the Carter Administration made it possible to begin implementing its single purpose natural resource/land management philosophy. The top staff has been drawn extensively from national environmental organizations and it is only natural to see environmental preservation leap to top priority status within the Solicitor's Office. Major opinions and regulations with significant impact which have

emanated under the Carter Administration bear the unmistakable stamp of giving top priority to preservation of public resources as opposed to the productive, but benign, use of our natural resources. This single purpose philosophy has, therefore, served to enhance Administration policies for utilization of the public lands. Any new administration should likewise regard the Solicitor and his top associates as very important personnel who can provide tremendous assistance in advancing administration policies.

Opinions

Among the Opinions which a new administration should review and reissue within the first year are *all* those which negatively impact productive development of the public lands and those which curtail or diminish private property rights. These include, but are not limited to:

- M-36889, May 1977. Considers the effect of failure to record timely under Section 314 (b) of the Federal Land Policy and Management Act (FLPMA).

- M-36895, July 14, 1977. Considers the applicability of the mitigation concept to federal agencies' activities which adversely affect the critical habitat of listed endangered species.

- M-36914, June 25, 1979. Considers non-reserved water rights—specifically the federal water rights of the NPS, FWS, USBR, and BLM.

- M-36893, August 2, 1977 (and supp., November 19, 1979). Considers effect of mining claims on Secretary's authority to issue coal and phosphate prospecting permits.

- M-36894, July 21, 1977. Considers Secretary's authority to grant extensions of outstanding coal prospecting permits under the Federal Coal Leasing Amendments Act of 1976.

- M-36905, July 19, 1978. Considers requirements for cumulative impact analysis under Section 7 of the Endangered Species Act.

- M-36910, September 5, 1978 (86 I.D. 89). Charts a general course for interpreting Section 603, the wilderness study requirements of FLPMA. M-36910 (Supp.), August 7, 1979 and February 12, 1980.

- The June 25, 1979, memorandum of Leo Krulitz, Solicitor, to the Secretary of the Interior Andrus on federal water rights of NPS, FWS, USBR, and BLM.

Longer-term Policies and Legislation

Specific issues of a longer term nature requiring action by the Interior Solicitor include:

- Participation by top Solicitor's office staff in the regulatory reform efforts of the Department, particularly in the regulatory review of surface mining rules and federal coal leasing regulations.
- Problems within the U.S. Department of Justice and its role in land acquisition via condemnation, including civil rights questions, attorney fees, case law questions and problems, and conflict of roles between acting as counsel to federal agencies and protecting the rights of citizens under condemnation.
- The replacement Solicitor should review the impact of national preservation groups on the daily management of federal lands and attempts by some in Congress to more directly involve such groups in the selection, acquisition and management of new federal areas.
- The Solicitor's office should review the role and conflicting responsibilities of the Department of Justice in its representation of federal agencies in condemnation actions and at the same time in protecting the civil and constitutional rights of American citizens.
- The Solicitor should draft legislation to amend the Uniform Relocation and Assistance Act and Real Property Acquisition Act (Title III), and to amend the Land and Water Conservation Fund restricting the use of that fund to willing sellers except in proven resource threats.

9

THE DEPARTMENT OF JUSTICE

Michael E. Hammond*

A PROPOSAL FOR REORGANIZATION

Structure

The Department's structure should reflect a clearer chain of command. At present, the Justice Department's Deputy Attorney General is, in fact, second in command and functions as the chief operating officer. But this is not reflected in the organizational charts.

We recommend that the Deputy Attorney General position be elevated to a position on the organizational charts immediately below the Attorney General, so that most of the Department reports directly to the Deputy.

The line responsibility over criminal matters currently exercised by the Deputy should be transferred to a new associate attorney general, a position which must be created by Congress. In the interim, an assistant attorney general can be designated by the Attorney General to fulfill those line functions.

We recommend that the Executive Office for U.S. Attorneys be directly under the Deputy Attorney General, who should be directly responsible for coordination and control of those offices. Conflict with Main Justice is probably inherent in the semi-autonomous nature of the Office of U.S. Attorney. Within certain limitations, however, this new structure will enable

**Author's Note:* The preparation of this report was a collective enterprise involving many individuals. Robert Cynkar, Joel Mandelman, Tom Parry, George Ramonos and Charles Wood deserve particular mention. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

the Deputy to resolve conflicts between the U.S. Attorneys, the divisions of the Department, and the special strike forces insofar as possible.

The Office of Intelligence Policy and Review, the Justice Management Division, and the Office for the Improvement in the Administration of Justice should also be directly under the Deputy Attorney General.

We also recommend that certain units of the Department remain directly under the authority of the Attorney General. They are the Solicitor General, Office of Legal Counsel, Office of Legislative Affairs, Office of Professional Responsibility, and Office of Public Information.

Changes within various divisions should improve the efficiency of each division. Certain divisions such as Antitrust and Land and Natural Resources have been physically or organizationally fragmented into numerous sections that could be consolidated, thereby reducing the number of high salary administrative personnel.

The responsibility of the Department to legally represent and advise the government requires a structure that recognizes the high degree of specialization mandated by complex legal problems. The present structure, which divides the Department into substantively-centered litigating units is an acceptable way to achieve this end.

As indicated, we believe some changes are in order. Those changes are designed to concentrate control, to achieve better performance and coordination, and to avoid conflicts between positions taken by various divisions. But structural changes must be accompanied by new procedures for policy and quality control.

Policy and Quality Control

The Justice Department is not alone in its difficulties in assuring that basic policies are adhered to. The need to obtain a common policy in the case of Justice is enhanced, however, by the particularly severe potential consequences of inconsistent litigating postures in different legal actions. Attachments A and B are information report sheets of the California Department of Justice. These sheets are initially prepared by the attorney assigned to a case prior to any action being taken by the California Attorney General. They are sent to a Special Assistant to the Attorney General, who reviews them to determine whether or not there is a major or significant issue

involved in the case and to assess the potential impact upon the general public. If, in his determination, the case is significant, a duplicate case file is established in his office. Duplicates of all pleadings are sent to him as soon as received. He also makes the determination as to the manner in which the case shall be processed, i.e., whether the attorney who is assigned to the case will have independent judgment in proceeding with the case or whether preclearance by the Special Assistant is a requisite to any filing. In addition to being supplied with copies of all the pleadings in the major cases, there is a requirement that at regular intervals, a written report on the status of the case be supplied to the Special Assistant. A calendar of these special cases is maintained by the Special Assistant.

Of course, the federal government is not California, either in terms of caseload or in terms of traditional centralization of prosecutorial discretion. Nevertheless, an enhancement of the Department's centralized system for monitoring major litigation, together with the appointment of top personnel to policy-making positions, would be a major step toward establishing a more consistent departmental litigative posture.

Personnel Reorganization

All employees must be made conscious of their duties and responsibilities to the people of this nation. Personal interests and the desires of special interest groups must be purged from consideration when in conflict with the good of the people as a whole. Those who cannot adhere to these standards have no place in the Department.

The quality and competence of personnel obviously plays a major part in performance of the Department. At the present time, many inexperienced individuals have been employed throughout the Department, often in leadership roles they are incapable of performing. Coupled with this, many very able attorneys have been transferred to areas where they have no competence or interest. Such practices have caused many outstanding attorneys to resign. Those who remain are functioning at a rate of efficiency far below their training and capability. The result is very poor representation of the federal government in numerous cases.

Morale of the staff has deteriorated as a result of the incompetence of the leadership and the maze of internal barriers established to control attorneys' performance. Strong positive leadership is required to implement any reorganization and to revitalize the staff.

Mechanisms for Achieving Reorganization

Congressional Authority

Congress retains the ultimate legislative authority to reorganize the Justice Department. The Constitution provides that all federal legislative powers shall be vested in Congress, and that Congress may make laws necessary and proper for carrying into execution the powers of the federal government, its departments and officers. (U.S. Const. art. 1, §§ 1, 8(18). In the case of the Justice Department, it has chosen to exercise this power at 28 U.S.C. §509 *et seq.*

Congress also can and has delegated organizational powers relating to the Justice Department to the President and other federal officials.

Presidential Reorganization Authority

1. The Executive Reorganization Act of 1966

Reorganization under the Executive Reorganization Act of 1966 may extend to:

(a) an "executive agency" or part thereof, which means any executive department (*see* 5 U.S.C. § 101), government corporation (*see* 5 U.S.C. § 103), and independent establishment (*see* 5 U.S.C. § 104); and

(b) any "office or officer in the executive branch," except the General Accounting Office and the Comptroller General (5 U.S.C. § 902(1)). (The Act does not define "office or officer," but "officer" is not limited to the definition in 5 U.S.C. § 2104. 5 U.S.C. § 902(3))

The President is therefore authorized to reorganize the Justice Department, subject to Congress' right to disapprove. (Executive Reorganization Act of 1966 (Act), 5 U.S.C. § 901, *et seq.*)

Justification Requirement: The Act requires that the President periodically examine federal departments to determine necessary organizational changes. (5 U.S.C. § 902(d)) If, in the case of the DOJ, the President finds reorganization necessary to promote better execution of laws, more effective management, or more expeditious administration; to reduce expenditures and promote economy; to increase efficiency; to coordinate and consolidate agencies and functions; to reduce the number of agencies; or to eliminate duplication and overlap (*see* 5 U.S.C. § 901(a)), he may prepare a reorganization plan. (5 U.S.C. § 903(a)

Scope of Reorganization: Reorganization pursuant to the 1966 Act may accomplish:

(a) transfer of part of the Department or its functions to another agency;

(b) abolition of all or part of a function of the Department (providing that no enforcement functions or statutory programs are abolished);

(c) consolidation or coordination of part of the Department or its functions with another agency or its functions;

(d) consolidation or coordination of part of the Department or its functions with another part or function of the Department;

(e) authorization for a departmental officer to delegate any of his functions. (5 U.S.C. § 903(a))

The reorganization plan, however, may not provide for or have the effect of:

(a) creating a new executive department, abolishing or transferring the Department or all the functions thereof, or consolidating the Department or its functions with another executive department or an independent regulatory agency;

(b) continuing any part of the Department beyond the period authorized by law for its existence or beyond the time when it would have terminated if the reorganization had not been made;

(c) continuing a function of the Department beyond the period authorized by law for its exercise or beyond the time when it would have terminated if the reorganization had not been made;

(d) authorizing the Department to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress (*United States* v. *Fresno Unified School District,* 592 F.2d 1088 (9th Cir. 1979));

(e) increasing the term of an office beyond that provided by law for the office;

(f) dealing with more than one logically consistent subject matter (5 U.S.C. § 905); or

(g) abolishing an enforcement function or statutory program. (5 U.S.C. § 903(a)(2))

2. Contents of President's Reorganization Plan

The President's reorganization plan should allude to the statutory findings that are conditional to its implementation. These include:

(a) promotion of the better execution of the laws, the more

effective management of the Department, and the expeditious administration of the public business;

(b) reduction of expenditures and promotion of economy to the fullest extent consistent with the efficient operation of the Department;

(c) increase in the efficiency of the operations of the Department to the fullest extent practicable;

(d) coordination and consolidation of Departmental functions;

(e) reduction in the number of programs by consolidating those having similar functions under a single head, and abolition of unnecessary programs and functions; and

(f) elimination of overlapping and duplication of effort. (5 U.S.C. §§ 901(a), 903)

Of course, the reorganization plan must specify the reorganization the President finds necessary, and it should have an identification number. (5 U.S.C. § 903(a))

If it changes the name of a program affected by a reorganization or the title of its head, it must designate the name of the program resulting from a reorganization and the title of its head. (5 U.S.C. § 904(1))

The reorganization plan may provide for the appointment and pay of the head and/or officers of any program (including a program resulting from a consolidation or other type of reorganization) if the President finds, and in his message transmitting the plan declares, that by reason of a reorganization made by the plan, the provisions are necessary. (5 U.S.C. § 904(2))

The plan must provide for the transfer or other disposition of the records, property, and personnel affected by a reorganization. (5 U.S.C. § 904(3)) It must provide for the transfer of unexpended balances of appropriations, and of other funds, available for use in connection with a function affected by a reorganization, as the President considers necessary. (5 U.S.C. 904(4)) It must provide for terminating the affairs of the programs which are abolished. (5 U.S.C. § 904(5))

The President must submit a declaration with the plan. The declaration must state that he has found that the reorganization is necessary to carry out a policy which furthers one of the purposes of the act as set forth in 5 U.S.C. § 901(a).

In transmitting the message in his plan, the President must specify with respect to each abolition of a function included in the plan the statutory authority for the exercise of the function. The message must also estimate any reduction or increase in

expenditures (itemized so far as practicable), and describe any improvements in management or delivery of federal services, execution of the laws, or efficiency of government operations, which it is expected will be realized as a result of the reorganization included in the plan. (5 U.S.C. § 903(b))

The President must deliver the reorganization plan to both Houses on the same day and to each House while it is in session (5 U.S.C. § 903(b)), but no later than April 5, 1981. (5 U.S.C. § 905(b))

3. Congressional Consideration of Reorganization Plans

No more than three reorganization plans may be pending before Congress at one time. (5 U.S.C. § 903(b))

The President has the right to amend any plan within thirty days of its submission, or withdraw it within sixty days. (5 U.S.C. § 903(c)) If the plan is not withdrawn or amended by the President, it becomes effective sixty days after its submission unless either House passes a resolution disapproving it in accordance with the provisions of 5 U.S.C. §§ 908-912. (*See Young* v. *United States*, 212 F.2d 236 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 1015 (1954) (under a similar provision in the Executive Reorganization Act of 1949, a reorganization plan becomes effective after sixty days unless either House disapproves it)) However, a plan may specify that it takes effect at a later date, or may take effect at an earlier date if both Houses defeat resolutions disapproving it. (5 U.S.C. § 906(c))

Executive Orders

Because most of the organization of the Department of Justice derives from executive orders, most of the recommended reorganization, with the exception of the creation of a new Associate Attorney General, can and should be accomplished through the same mechanism.

Unless they can be justified on constitutional grounds, executive orders from the President derive their validity from statutory authorization. A general authorization of executive orders sufficient for reorganizing DOJ appears in 3 U.S.C. § 301 (which allows the President to delegate to any department head any function which is vested in the President or which such officer may perform only with the approval of the President).

In addition to this general authorization statute, specific statutes may provide legislative support for orders. Because 28 U.S.C. § 503 *et seq.* is so general in terms of its organizational specifications for the Justice Department, the courts would

almost surely find implicit reorganization authority of this sort. This is because, in judging the extent of congressional delegation, most courts will examine congressional intent and the purpose of the statute, as well as express statutory language. (*See Chrysler Corporation* v. *Brown,* 441 U.S. 281 (1979)) There is also some support for treating executive orders as valid where Congress has implicitly ratified them by subsequent legislation. (*Hirabayashi* v. *United States,* 320 U.S. 81 (1943))

Executive orders may not supersede a statute, although the general nature of 28 U.S.C. 503 *et seq.* would make such an express contradiction difficult in the case of Justice. (*Marks* v. *Central Intelligence Agency,* 509 F.2d 997 (D.C. Cir. 1978) (if an executive order authorizing a Central Intelligence Agency surveillance of employees conflicts with a statutory ban on such activities, the statute prevails)) But where an executive order is valid, it has the full force of law. (*Association for Women in Science* v. *Califano,* 566 F.2d 339 (D.C. Cir. 1977))

Most Justice Department reorganization would be accomplished through the express repeal of earlier orders. Just as a statute can amend or repeal an earlier statute, an executive order can amend or repeal another. Congress may also repeal executive orders, just as it may repeal a statute. (*See Feliciano* v. *United States,* 297 F. Supp. 1356 (D.P.R. 1969), aff'd, 422 F.2d 943 (1st Cir. 1979), *cert. denied,* 400 U.S. 382 (1970)) But the repeal of a statute authorizing an executive order does not necessarily repeal the order itself. (*See Feliciano* v. *United States,* supra at 1358)

Departmental Authority

Courts have long recognized that department heads are generally responsible for the administration of their agencies and do not need an explicit statutory basis for all of their actions as long as they reasonably advance the legislative objective of the department. (*United States* v. *MacDaniel,* 32 U.S. 1 (1833)) 1.5 U.S.C. § 301

Congress has granted department heads substantial control over the organization of their agencies. Department heads may prescribe regulations for the government of their departments, the conduct of their employees, and the distribution and performance of their business. (5 U.S.C. § 301)

2. Specific Reorganization Powers

(a) The Attorney General

In addition to the general authority given the Attorney General under 5 U.S.C. § 301, the Attorney General is given specific powers over reorganization under 28 U.S.C. § 510. Section 510 authorizes the Attorney General to make such provisions as he considers appropriate, authorizing any other officer, employee, or agency of the Department of Justice to perform any of his functions.

Since "all functions of other officers, agencies and employees of the Department of Justice (with minor exceptions) are vested in the Attorney General" (28 U.S.C. § 509), the Attorney General has substantial authority to delegate his powers or the powers of any officer, agency, or employee to another officer, agency, or employee. Reorganization in the Justice Department, therefore, often occurs through the delegation of authority.

The scope of the Attorney General's authority under these statutes may, however, be limited by pre-existing or subsequent law. The Attorney General is free to delegate his power only insofar as it does not contradict the statutory scheme, i.e., where the scope of the delegation is not expressly addressed and the legislative history does not suggest that only the Attorney General or other specified officer is allowed to exercise that function. (*United States* v. *Cuomo*, 525 F.2d 1285, 1288 (5th Cir. 1976)) Finding no contradiction to the statutory scheme, the court in *Cuomo* held that 28 U.S.C. § 510 permitted the Attorney General to delegate the authority to certify alleged juvenile delinquents to U.S. Attorneys—even though 18 U.S.C. § 5032 gave this authority to the Attorney General. (But *cf. United States* v. *Giordano*, 416 U.S. 505 (1974) (the Attorney General could not delegate his authority to authorize wiretap permits under 18 U.S.C. § 2516(1), to anyone other than his designated Assistant Attorneys General))

(b) Officials Under the Authority of the Attorney General

Reorganization may also be initiated by officials under the Attorney General. The head of each Office, Board, Division, or Bureau within the Justice Department may propose the establishment, transfer, reorganization or termination of major functions within his or her organizational unit as he may deem necessary or appropriate. (28 C.F.R. § 0.190) The proposal must be evaluated by the Assistant Attorney General for Administration and thereafter submitted for approval to either the Deputy Attorney General or the Associate Attorney

General or both (depending on the functions to be affected). If the proposed changes are determined to affect the overall structure of the Department's organization, they must be forwarded to the Attorney General for final approval. In such cases, they are effectuated by order of the Attorney General. (*Id.*, see also 28 C.F.R. § 0.128 (procedural requirements for orders))

Judicial Appointments

A conservative administration can expect to encounter strong criticism of its more important judicial nominees. Much of this opposition, to be sure, will be politics-as-usual, but a number of factors suggest the possibility of a major political brouhaha:

1. The federal judiciary has never been more powerful, nor, perhaps, has it ever been so controversial. In 1980, as in 1968, the question of judicial power has become at least a minor campaign issue. Certain expectations, whether justified or not, have been generated among friend and foe alike. Everyone will be talking about the desirability of "merit" selection, but lurking very near the surface will be a concern over the future ideological make-up of the federal bench. The simple truth of the matter is that a judiciary which exercises substantial authority over so many sensitive social and political issues cannot expect the philosophy of its prospective members to be excluded from political debate.

2. The next four years will almost certainly produce a number of Supreme Court vacancies. Given the age and infirmity of certain sitting Justices, it is even possible, although unlikely, that as many as five vacancies could occur. Nixon and Ford between them appointed a majority of the present Court (four and one, respectively), and however diverse the record of their appointees in fact, liberals will not quietly tolerate conservative appointment of the rest.

3. Liberals and their allied interest groups have understandably come to regard the federal judiciary as a protected enclave of liberal values. They will convince themselves, if they haven't already, that conservatives are just itching to appoint a long line of junior-grade Harold Carswells to the bench. The demagogic outbursts of Patricia Harris and the canards now being put forth by the so-called Committee for an Independent Judiciary may be a harbinger of worse things to come.

4. Whatever may or may not occur in the way of Supreme

Court nomination battles, the Republican Platform language (calling for the appointment of judges "who respect traditional family values and the sanctity of innocent human life") virtually guarantees that any new administration's judicial selection process for lower-court judges, whether Republican or Democrat, will be subjected to extraordinarily close scrutiny. Any change in current procedure by a conservative administration, however well-intended, will be eyed suspiciously as a back-door effort to impose an ideological litmus-paper test.

Recommendations

• Senators regard federal judicial posts as first-class patronage and, accordingly, act as if the Constitution had vested the appointment power in them rather than in the President. No change which comtemplates any substantial reduction in the Senatorial role, especially with respect to District Court judges, will succeed.

• President Carter's novel experiment for selecting nominees for the Circuit Court of Appeals—under which screening commissions were appointed by him in each of the several circuits—was advanced in the name of "merit selection." While opinions vary on the efficacy of the overall system, there seems to be general agreement that fewer pure political hacks have slipped through than in the past. But the system has also served as a screen for the insertion of strong ideological and partisan preferences. That is to say, even while the President and his Attorney General were busy singing the praises of "merit selection," they were busily engaged in encouraging the appointment of liberal ideologues and partisan Democrats. Perhaps for that reason, this new system has been praised by the academic and media elites who define the terms of debate on the issue. It is at least questionable whether any such system would have been instituted, much less praised, had it occurred under Republican auspices. Nevertheless, the precedent has now been established, and a new administration could do worse than to retain it—to be sure, with new personnel on the current commissions. The importance that Carter attached to the new system is signified by the fact Hamilton Jordan personally selected the membership of the commissions.

• The delicate and difficult role of the Justice Department—it tries to execute the President's will while at the same time trying to be an honest broker among Senators, sitting judges, the American Bar Association, and ideological interest groups—has been faulted for many things and may no doubt

be improved at the margins. But it is hard to think of any major change in its role that will not forego some important interest that it now tries to accommodate. The system works in such a way as to insulate most lower court nominations from political controversy. With certain conspicuous exceptions, most of the controversy is eliminated before the President makes the nomination, and from the President's prespective that is a very considerable good.

• Supreme Court nominations, of course, are a special case, and so varied are the circumstances which make a nominee successful or unsuccessful that one would be hard-pressed to lay down any general rules.

• As the ravages of inflation take their toll into the '80's, it may become increasingly difficult to attract worthy candidates away from the bar to the bench. This was already something of a problem during the Ford years and has no doubt gotten worse. A new President may therefore want to consider the advisability of proposing pay raises for judges.

• Whatever liberals may think about the real or imagined predilections of would-be conservative appointees, a new administration should not blush at nominating men and women who understand and can articulate the limits of the judicial function. A well-developed sense of judicial restraint, far more than a particular disposition on particular issues, will go a long way toward moderating the judiciary. Ironically, it is also the best way to maintain judicial independence. The answer to liberal activism on the bench is not necessarily an equal and opposite conservative activism. The late Justice Harlan, to many minds the best Supreme Court Justice of the past generation, was a social liberal on many issues. But he was first and foremost a master of the judicial art. He was unable to stop a runaway Warren Court on numerous issues, but there is no doubt that his mere presence on the Court exercised a strong moderating influence and—perhaps equally as important—gave to a generation of law students and professors some sense that there was more to the law than was dreamt of by the Warren Court majority. He may not have won many battles while on the Court, but by the time the 1980s come to a close, it may be discovered that he won the war.

Control of Litigating Authority

The Justice Department has experienced great difficulty in recent years in controlling litigation brought on behalf of the United States. The Department, of course, enjoys a monopoly on the criminal side, but the growth of the federal establishment over the past decade or so has also brought a growth in the tendency to vest litigating authority elsewhere than in Justice.

The reasons for this dilution are partly bureaucratic. Other departments and agencies claim that they know more about the subjects under their purview than does the typical U.S. Attorney who may be called upon to litigate the case. When pressed, they will conjure up real or imagined horror stories about this or that occasion when Justice "blew" a case that the other department or agency might have won if it had had its way.

A second bureaucratic reason is the control of one's own litigation makes it easier to attract better quality lawyers to other departments and agencies.

But the reasons are also partly ideological. Especially among the newer agencies (such as EPA), it is felt that the influence of the Department of Justice is inherently conservative and that if an agency wants to break new ground, it will have a better chance of doing so successfully if it can only free itself from the shackles of DOJ. In this, the more "progressive" agencies have enjoyed a good deal of success in lobbying Congress to provide them with one degree or another of ligitative independence. Indeed, one of the favored parlor pastimes among agencies and departments is to try to sneak a litigation-independence clause somewhere into an omnibus bill affecting their basic statutes.

The problem has become particularly pointed at the trial stage because of the special relationship between the U.S. Attorneys' offices and the federal district courts. It sometimes happens that Agency X is arguing a particular theory of law in one context, while the "United States" (represented by the U.S. Attorney's office) is arguing just the opposite theory in a different context in the same court, or even before that same judge. This is not only annoying and confusing to federal district judges and U.S. Attorneys (who, to be sure, like to control everything that goes on within their bailiwicks), but creates needless problems at the appellate level, where, on the whole, Justice tends to exercise greater control.

Quite apart from the problem of confusion, loss of litigative control tends to reduce the Attorney General's overall authority in dealing with other departments and agencies. Despite the prestige of the office, he is fast becoming "just another lawyer" on many issues over which he should rightly exercise control. The loss of litigative control over issues X, Y, and Z may not appear to be critically important, but it has a way of affecting adversely control over issues A, B, and C, which may be critically important. While it is true that the Attorney General could not and should not control all litigation stemming from Washington, a President is ill-served by having too many agencies and departments making inroads on Justice's litigative authority. Litigation, after all, is one of the principal ways in which a President can attempt to control the broad outlines of federal policy—and one suspects that that is precisely why Congress has been so generous in recent years in divesting Justice of its massive control.

The congressional mood, however, may be changing. A Congress which speaks favorably of de-regulation and "sunset" laws may be more disposed than in the past to the restoration of a more coherent control over federal litigation.

Recommendation

In addition to seeking statutory change, a new administration should undertake at an early stage to make clear: (a) that it wants no more litigative independence without the consent of the Attorney General, and (b) that absent express legislative language to the contrary, other departments and agencies should enter into good-faith negotiations with Justice to reduce the current level of independent mischief. A fairly interesting and potent constituency for this purpose could probably be put together among sitting judges and present and former U.S. Attorneys. Whatever the outcome, it is clear that the war against the Department of Justice must be brought to a halt.

DIVISIONS OF THE DEPARTMENT

The Justice Department is headed by the Attorney General, assisted chiefly by an Associate Attorney General and a Deputy Attorney General. The table of organization is contained in Appendix C.

Speaking in general terms, the Deputy is responsible for issues relating to criminal prosecution and national security. The Associate assumes general responsibility for management and civil litigation, including the Divisions of Land, Antitrust,

Tax, and Civil Rights, and the Civil Division.

There are eleven Assistant Attorneys General, not including the Solicitor General, who is responsible for approval or management of all cases on appeal. Some of the Assistants report directly to the Attorney General. These include the Assistant AG—Office for the Improvement in the Administration of Justice, the Assistant AG—Legislative Relations, and the Legal Counsel. An additional Assistant Attorney General, created by the Bankruptcy Act, has not been appointed, although there are indications that the Carter Administration intended to use this slot to coordinate the activities of the United States Attorneys.

In addition, a number of bureaus, offices, programs, and agencies append to the Justice Department in relationships ranging from subservience to semi-autonomy. These include the Federal Bureau of Investigation, the Immigration and Naturalization Service, the Bureau of Prisons, the Office of Professional Responsibility (which monitors ethical compliance within the Department), and the Office of Justice Assistance, Research and Statistics (which administers the Law Enforcement Assistance Administration).

Although few of these areas can be considered as genuinely "non-controversial," some have performed their functions with less controversy than others. Thus, the Tax Division and the Office for the Improvement in the Administration of Justice are not areas in which a new administration would have to swiftly abate festering controversies or make bold policy initiatives.

We have made a judgment to focus on some particularly controversial issues and programs, to the exclusion of others which we view as somewhat less controversial. Legislative questions and cases on appeal by the Solicitor General are dealt with in connection with substantive areas, although this does not necessarily reflect real approval of recent trends to decentralize appeals and legislative relations functions within the Department. To the contrary, many team members adamantly favored a centralization of legislative relations in a single division, although most recognized that this would not be practical in some instances.

Legal Counsel

The Assistant Attorney General and Legal Counsel is responsible for assisting the Attorney General in the fulfillment of his function as the legal advisor to the President of the United States. In addition, he advises the executive depart-

ments and the agencies on questions of law submitted by them.

The Legal Counsel prepares opinions for the Attorney General, and renders informal opinions on a wide range of constitutional, statutory, and other legal questions arising from the operation of the executive branch. He also advises other units of the Department of Justice on legal questions submitted by them.

Much of the Legal Counsel's function involves esoteric matters of a highly complex nature. These have normally been accomplished under the Carter Administration with a modicum of skill. However, from time to time, the Legal Counsel is called upon to render an opinion on a highly politically charged issue. In these cases, the opinions of the Assistant Attorney General John Harmon have not always reached the conclusions which statutes and cases would seem to suggest. In many cases, briefs have not been particularly well thought out.

The Political Question Doctrine

Background: Traditionally, courts have abstained from adjudication of issues which (1) were not "cases and controversies," and therefore could not constitutionally be heard, or (2) although within the constitutional purview of courts, did not seem to be appropriate for judicial determination.

The "political question doctrine" is one of the bases for voluntary abstention by courts from deciding a case where they have formal jurisdiction.

It reached its high point in 1939, when the Supreme Court, in *Coleman* v. *Miller,* 307 U.S. 433 (1939), refused to consider the validity of a state's ratification of a constitutional amendment. Said the court:

> In short, the question of a reasonable time would involve, as in this case it does involve, an appraisal of a great varieity of relevant conditions, political, social, and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to whch it would be an extravagent extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified.

Since *Coleman,* the political question doctrine has been virtually eliminated, first by the Supreme Court's reapportionment decision in *Baker* v. *Carr,* 369 U.S. 186 (1962), and then by the Court's decision to intervene in the House's affairs in *Powell* v. *McCormick,* 395 U.S. 486 (1969).

In 1978, Justice Department Legal Counsel John Harmon held that the political question doctrine as outlined in *Coleman* v. *Miller* precluded court intervention in the question of

whether Congress can constitutionally extend the deadline for ratifying the Equal Rights Amendment. He did this without discussing whether *Coleman* v. *Miller* has been overturned *sub silentio* by *Baker* v. *Carr and Powell* v. *McCormick.* Pursuant to this opinion, the Justice Department challenged attempts by Western states to rescind ratification and win a declaration that the ratification period had ended in 1979.

Recommendation: A Legal Counsel in a new administration should prepare a memorandum giving comprehensive guidance to federal agencies concerning the ambit of the political question doctrine. He should do this professionally, and with an objective view to the cases, and without any view toward manipulating the doctrine in order to achieve substantive ends.

Intervenor Funding

Background: "Intervenor funding" is a generic term loosely applied to a set of programs designed to reimburse participants in federal agency proceedings for their costs of participation. The concept received its impetus when the first major intervenor funding program was enacted in connection with the Magnuson-Moss Warranty Act of 1975. It has now been extended to other agencies, including the Department of State and the Environmental Protection Agency's Toxic Substances Program. In addition, the Consumer Product Safety Commission is permitted to fund "offerors" who assist the commission in developing regulations.

Most intervenor funding programs are intended to fund those who would not be able to participate but for the availability of funding. In practice, however, programs—particularly in the Federal Trade Commission—have channeled money into liberal interest groups, such as the Sierra Club ($6,473,418 in revenues in 1976), the Consumers Union ($10,000,000 in assets in 1977), the Environmental Defense Fund, Inc. ($1,788,309 in revenues in 1976), and the Americans for Democratic Action.

In addition, agencies without statutory authorization to establish intervenor funding programs have proceeded to do so on the basis of the "implied powers" derived from their organic statutes. An effort to require the Federal Power Commission to establish an intervenor funding program on the basis of its implied powers was held unlawful under the decision of *Green County Planning Board* v. *Federal Power Commission,* 559 F.2d 1277 (2nd Cir. 1977), *cert. denied,* 434 U.S. 1086.

Issue: Should agencies which do not have statutory authority

to establish intervenor funding programs be encouraged to do so under their "implied powers"?

Citation: In a 1978 letter to the Department of Transportation, Legal Counsel John Harmon held, on behalf of the Justice Department, that the *Green County* case should be limited on its face to the Federal Power Commission and that other agencies should be free to examine their own organic statutes for implied authority to fund public interest intervenors.

Recommendation: The Legal Counsel of the Department of Justice should immediately issue a legal opinion rescinding the Harmon brief and forbidding the establishment of public interest intervenor programs not specifically authorized by Congress.

Legislative Veto

Background: One of the more significant by-products of the growth of the administrative state is the rise in the incidence of the legislative veto, the device by which Executive policy cannot be implemented without the passive or active consent of one or both Houses, or, in some cases, of congressional committees. The device first came into vogue during the New Deal, when Congress now and again sought to pull back on some of the authority it had so freely delegated to the Executive Branch. Since that time, the legislative veto has grown in popularity among congressmen, although efforts to impose it systematically did not achieve marked success until the Nixon presidency. Nearly two-thirds of all legislative veto devices enacted during the past 50 years (which is virtually all there are) were enacted since 1969. Each new Congress sees a new spate of bills employing the technique, and during the past five years, a serious effort has been mounted to establish a generic legislative veto covering all Executive Branch regulations.

The device is ideologically neutral in the sense that both liberals and conservatives in Congress may be found strongly supporting the idea. Liberals see it as an effective means of circumscribing the "imperial" presidency; conservatives see it as tool for controlling the regulatory output of agencies possessed of excessive regulatory zeal. Those of less ardent ideological commitment see it simply as a means of enhancing congressional power *vis-a-vis* various interest groups.

Pro: In recent years, the legislative branch has delegated broader and broader authority to executive and independent agencies to issue rules and regulations which go beyond merely

implementing a carefully defined legislative mandate. It is now a standard legislative drafting practice to establish a general legislative purpose for a new program and to delegate the ability to "promulgate such rules and regulations as (the agency) shall deem necessary" in order to implement the purpose.

Particularly alarming is the tendency to delegate the authority to define criminally unlawful conduct, and the enforcement of various agency proscriptions through "civil penalties" running up to $10,000 per day of violation and invoked by "preponderance of the evidence" standards of proof.

While it is certainly no panacea to shift a small bit of oversight authority over *de facto* law-making back to Congress, it would provide a wee bit of enhanced public accountability.

Con: But some would argue that the device is ideologically neutral in the context of the separation of powers. The cumulative effect of legislative veto devices enacted to date is said to cut back rather substantially on large areas once thought to be pretty much within the unqualified discretion of the President. And if anything like a generic legislative veto system were to be enacted, they say, it would dangerously tilt the delicate balance of powers among the political branches toward Congress.

The Justice Department has long argued that as a matter of formal constitutional law, the legislative veto is unconstitutional. Even when he is forced for extraneous political reasons to sign a measure containing a legislative veto, a President will typically assert that his approval of the bill does not imply approval of the offending device. All recent Presidents have groused about the growth of the practice—Carter is no exception— and sooner or later, the issue may have to be resolved by the Supreme Court. There are now some 200 laws on the books which employ the device.

Agencies do not always mind having the device imposed upon them. There are even instances in which agencies have complied with congressional veto provisions despite express presidential directives to the contrary.

Criminal Division

With 836 attorneys in 1980, the Criminal Division exercises general supervision over criminal laws not reached by the Antitrust, Civil Rights, Land and Natural Resources, or Tax Divisions. The Criminal Division is responsible for civil litiga-

tion arising under federal liquor, narcotics, counterfeiting, gambling, firearms, customs, agriculture, and immigration laws, in addition to dealing with alleged investigative misconduct, writs of habeas corpus from the armed services, legal actions by or on behalf of federal prisoners, and legal actions related to national security issues.

The Justice Department has not been notably successful recently in areas of traditional federal government concern, such as organized crime. Nevertheless, it seems to be making a major new initiative in areas of traditional local concern, such as white collar crime, adding $849,000 to its budget for that purpose in its submission for fiscal year 1981.

Criminal Code Recodification

Because the Criminal Code Reform Bill, S. 1722, seeks to reenact the entire body of federal criminal law, it has become a focus for virtually every criminal law issue.

Should a new administration decide to reintroduce it, there are dozens of issues that need to be resolved prior to its resubmission to Congress. Even if a new administration should choose not to advocate recodification, many of these issues could crop up separately as bills or amendments.

Labor Union Extortion

Background: The Hobbs Act, 18 U.S.C. 1951(a), makes it a felony to "obstruct, delay or affect the movement of any article or commodity in commerce, by robbery or extortion . . . ." Section 1951(b)(2) of the Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced *by the wrongful use of actual or threatened force, violence, or fear. . . .*" In *United States* v. *Enmons,* 410 U.S. 396 (1973), a bare majority of the Supreme Court held that this prohibition did not reach otherwise extortionate acts when those acts were committed by a labor union during the course of a strike.

Writing for the Court, Justice Stewart held that the word "wrongful" limited "the statute's coverage to those instances where the obtaining of the property would itself be wrongful because the alleged extortionist had no lawful claim to that property." (396 U.S. at 400) He went on to hold that "the literal language of the statute will not (support) the government's semantic argument that the Hobbs Act reaches the use of violence to achieve legitimate union objectives because in that type of case there has been no 'wrongful' taking of the employer's property." (396 U.S. at 400)

Justice Stewart based this tortured conclusion on a complete misreading of the legislative history of the Hobbs Act. During the original debate, in the 78th Congress, Representative Walter commented that the bill did not, "interfere . . . with any legitimate labor objective or activity," and Representative Sumners made similar comments.

But nowhere in the debates is there any justification for holding that "legitimate labor objectives or activity included large-scale destruction of property for the purpose of forcing bargaining concessions." The point of the debate was to make it clear that a strike, in and of itself, could not constitute extortion under the Hobbs Act, and not that any conduct, however egregious, would be excluded from the scope of the statute if it occurred during a strike. In short, the phrase "legitimate activity" has been taken out of context by Justice Stewart, in order to justify his conclusion.

That he has done so is further shown by his misinterpretation of a colloquy between Representatives Hobbs and Marcantonio. Marcantonio asked whether a simple picket line assault, occurring during a strike, would be covered by the bill; that is, would that "become extortion under this bill"? Representative Hobbs replied that it would not be covered.

Unfortunately, a simple picket line assault was not the gravamen of the *Enmons* case; arson was. The defendants were accused 1) of having blown up a transformer substation; 2) of having fired high powered rifles at the company transformers; and 3) of having drained all of the oil from another company transformer. There is a significant difference between violence aimed at a fellow employee, in the heat of the moment, and a premeditated systematic felonious course of conduct directed at an employer, and his property. Justice Stewart refused to recognize this distinction.

If this opinion were taken to its logical end, it would then be equally permissible for an employer to use violent means to compel a union to abandon lawful collective bargaining demands. Applied in other contexts equally absurd results would occur. For example, a seller of goods would not be guilty of extortion if he dynamited a customer's store because the customer had not paid a bill. There would be no "wrongful" taking of the customer's property since the seller was legally entitled to be paid for the goods that he sold. Thus, consistent with the majority's tortured reasoning, no Hobbs Act violation crime would have been committed.

Recommendation: As a practical matter, even if the exemp-

tion were totally repealed, a U.S. Attorney would still be reluctant to prosecute, as a federal offense, minor crimes such as simple assault, minor trespasses, or relatively inconsequential property damage. Therefore, the reach of the extortion laws in a union context could be limited to a specified list of serious felonies without significant practical curtailment of the ability to prosecute in labor union cases. This approach also has a certain political attractiveness.

Endangerment

As originally drafted, Section 1617 of the 1979 recodification bill was entitled "Reckless Endangerment." That section made it an offense to "engage in conduct which places another person in danger of imminent death or serious bodily injury." The offense carried a five year prison term if the conduct "manifested an extreme indifference to human life," and a two year prison term in all other cases.

Federal jurisdiction existed if 1) the offense occurred in the commission of any other crime, 2) the offense occurred in the context of a violation of any other federal law designed to protect the public health or safety, or 3) the crime was committed within the special jurisdiction of the United States.

By virtue of paragraph (2), any violation of any consumer product safety law, of any environmental law, or any of the food and drug laws, among others, would effectively become a felony, in virtually every case.

The concept of reckless endangerment was derived from the reckless endangerment provisions of the New York Penal Code. However, those provisions were never intended to reach the types of conduct described above. They were intended to reach, for example, the situation where someone made a bet that they could fire a gun into a crowd and *miss* everyone; or where someone made a bet that they could drive down Constitution Avenue at 100 miles per hour and *not* have an accident. Since there would be no intent to cause an injury, any accident that might occur could not be prosecuted as an assault. The requisite intent—the intent to injure—would be absent.

The Code's drafters have taken that concept quite a bit further. In order to meet the objections that were subsequently raised by the business community, the jurisdictional reach of the amendment was drastically cut back. Under the revised section 1617, now entitled "Endangerment," federal jurisdic-

tion will exist in three sets of interrelated circumstances:

- if the offense is committed within the special jurisdiction of the United States, i.e., on a federal reservation, on the high seas, or aboard an aircraft that is in flight;
- if the offense occurs during the commission of another crime covered by the Code, except by cross reference;
- if the imminent danger is caused by a violation of a) the environmental pollution laws, b) the Federal Mine Safety and Health Act, c) the Occupantional Safety and Health Act, d) the Federal Hazardous Substances Act, e) the Public Health Services Act, or f) the Federal Food, Drug and Cosmetic Act.

Despite the drafters' disclaimers, it is still theoretically possible to bring a violation of the Consumer Product Safety Act under the ambit of the endangerment section, should an ambitious, or irresponsible, federal prosecutor seek to do so.

For example, the crime of manslaughter is committed when a person engages in conduct that causes the death of another person (section 1602). Federal jurisdiction over this crime exists, *inter alia*, if the offense is committed against a United States official (*e.g.*, a Member of Congress, a Cabinet official or a Supreme Court Justice) or against an employee of the FBI or the U.S. Probation System.

Hypothetically, suppose the Ford Motor Company knew that there was a significant danger that the gas in the Pinto's gas tank might explode in a rear end collision, yet marketed the car anyway. If someone were killed under those circumstances, Ford would probably meet the criteria of "engaging in conduct which caused the death of another," and could therefore be prosecuted for manslaughter. It would thus be both manslaughter and a violation of the endangerment section.

Assuming that all of the foregoing facts existed, except that no one had yet died, the crime of attempted manslaughter occurs as soon as the Member of Congress gets into the Pinto. Thus, the Consumer Product Safety Act, which is not supposed to come within the jurisdictional reach of the endangerment section, could easily be brought there by a skilled prosecutor and a willing federal judge.

Recommendation: A new administration should take a careful look at attempts to expand felony penalties to violations of simple regulatory statutes. Already, liberals have successfully added one of the many permutations of the endangerment language to the Resource Conservation and

Recovery Act. If other attempts such as this are made, the Justice Department should be prepared with a response.

Organized Crime—Labor Union Exemption

Background: A problem raised by recent judicial decisions is the application of the Racketeer Influenced and Corrupt Organization Act (RICO) to labor unions. In *United States* v. *Thodarson*, the U.S. District Court for the Northern District of California held that the RICO Statute did not apply to labor unions, regardless of the underlying violation of law. The rationale for this decision was the Supreme Court's ruling in the *Enmons* labor extortion case, discussed above.

Most conservatives would argue that there is no justification for creating another special interest exemption for labor unions and their officials. Offenses committed by them should be treated in the same manner as when they are committed by any other person or organization.

Recommendation: It is recommended that an appropriate amendment to Chapter 18 be offered to reverse this decision.

Aircraft Hijacking

Background: Section 1631 of S. 1722 is the aircraft hijacking section. The problem with section 1631(c)(2) is that it gives the United States jurisdiction to prosecute any hijacker, no matter where the hijacking took place, or on whose plane, or whose citizens were taken. In other words, if a French citizen hijacked a BOAC plane in London, and took it to Italy, where the plane and all passengers—none of whom were American citizens— were set free, the United States would still have jurisdiction to prosecute the hijacker, should he subsequently come to the United States, even if he were only on a vacation.

The drafters contend that this provision merely incorporates the provisions of an international anti-hijacking treaty that was ratified by the U.S. That may well be true, but it does not remove the constitutional defect of the section's provisions. There is no constitutional basis, under the Due Process Clause of the Fifth Amendment, for the exercise of federal jurisdiction over such a crime. It would be perfectly proper for the U.S. to arrest such a person and extradite him, to France, England, or Italy. But it would almost certainly be constitutionally impermissible for the U.S. to prosecute such a person.

Apparently, the Code's drafters never read *International Shoe Co.* v. *Washington;* no one ever told them about the "sig-

nificant contacts" requirement enunciated by the Supreme Court in that case. Even under the New York Court of Appeals' wildly expansive notions of civil jurisdiction, as set out in *Seider* v. *Roth,* and affirmed in *Simpson* v. *Loehmann,* the constitutional exercise of criminal jurisdiction could never be sustained in this situation.

The real problem posed by Section 1631(c) is, of course, that if it is accepted in the context of aircraft hijacking, there is nothing to prevent it from being carried over to other sections of the Code. For example, the environmental pollution laws could be amended so that anyone building a factory in another country, even a foreign national, could be prosecuted if that factory failed to meet the standards of the Clean Air Act.

This is not a far-fetched theory. In 1980, the Senate Judiciary Committee approved the Energy Anti-Monopoly Act. One critical objection to that bill was that it banned overseas mergers by foreign corporations, simply because those firms happened to have a subsidiary operating in the United States. It requires no great leap of faith to see how this concept could easily be extended to include disapproved acts of a foreign company that did not own an American subsidiary.

No one has ever answered the question of how the United States government would respond if another country attempted to exercise criminal jurisdiction over American citizens for criminal acts committed wholly within the United States.

Protecting Identities of CIA Agents

Background: No effort has been made by the Carter Administration to prosecute any of the persons responsible for intentionally disclosing the undercover identities of CIA agents. Similarly, no effort was made to prosecute the persons who unsuccessfully attempted to publish the identities of DEA agents operating undercover in the Washington metropolitan area a few years ago.

It has been alleged that the present espionage provisions of Title 18 do not reach these problems, even when it comes to disclosing the identities of current CIA staff operating overseas. Rather than continue the dispute, many conservatives have pushed for new provisions in the Code that expressly cover this type of conduct.

Some libertarians have raised the First Amendment arguments in opposition to this type of law. Proponents rebut that disclosing such information, even in a so-called "academic study," is not protected activity under the First Amendment,

any more than is treason, inciting a riot, publishing fraudulent prospectuses for securities, or printing a libelous newspaper story.

Recommendation: A new administraton should consider whether legislation to explicitly make it illegal to disclose the identities of American agents acting abroad under certain circumstances should not be enacted.

Sentencing—Guidelines and Procedures

Background: S. 1722's sentencing commission and guideline procedures ought to be reexamined. The proposed sentencing commission and guidelines go only part of the way toward alleviating a problem to which there will never be a satisfactory solution. If all offenders are punished similarly, for a given offense, then there are objections raised that the procedure is rigid, that it does not differentiate between first offenders from "good homes" and repeat offenders from "bad" ones. On the other hand, flexible sentencing inevitably leads to the often valid argument that a poor boy who steals $1,000 goes to jail while a rich stock broker who steals $10,000,000 goes home on probation.

Recommendation: One alternative approach might be a modified form of determinate sentences, allowing a specified range up or down from a base sentence. For example, the base sentence for bank robbery could be set at 15 years, with no parole. If it were the defendant's first offense, the Court would have the discretion to impose a 7½ year sentence; if it were a second or subsequent felony, the Court could raise the sentence to 22½ years. Suspended sentences or probation could be prohibited except in cases involving substantial mitigating factors, and completely excluded in the case of repeat offenders.

Many other mechanisms for balancing the need for judicial discretion with the desirability of more determinate sentencing should be explored.

A new administration will also have to decide the priority it wishes to place on reinstituting the death penalty for offenses classified as Class A felonies in the Criminal Code Reform Act.

Bail Reform

Some constitutional means of keeping dangerous criminals off the streets, away from witnesses, victims and the community must be devised if we are to restore a degree of credibility to our local and federal criminal justice systems.

There have been far too many cases of defendants, freed on

bail, who subsequently commit additional crimes while awaiting trial, or while they are free on bail pending resolution of their appeal.

The presumption of innocence means that the prosecution has the burden of proving that the defendant is guilty, beyond a reasonable doubt. Some scholars—not all of them liberals—have argued that this presumption narrowly circumscribes or eliminates the availability of pre-trial detention. The response of most conservatives would be summed up by one Senate staffer who said, "The presumption of innocence does not compel society to pretend that it is not aware that the defendant may have a long history of having committed violent crimes; nor does it require us to ignore the fact that the defendant may have injured the victim in the past, or that he has threatened to do so in the future. No one is constitutionally compelled to ignore as a judge, what he knows as a human being to be true. Nor should judges be compelled to impose those burdens on the community at large."

Recommendation: A new administration should consider the possibility of using a mechanism other than the current unlawful (but widely practiced) imposition of money bond as a means of keeping dangerous persons off the street.

In order to pass constitutional muster, such a proposal ought to be limited in applicability to a specified list of violent crimes, or to cases in which the defendant is a multiple offender.

The Exclusionary Rule

Background: In 1914, the Supreme Court in *Weeks* v. *United States* barred the use in federal prosecutions of evidence obtained in violation of the Fourth Amendment (concerning unreasonable searches and seizures). The Court in *Mapp* v. *Ohio* (1961) applied such exclusion to state prosections.

However, over the past decade, judicial enthusiasm for the exclusionary rule had been waning. In 1971, the Court in *Harris* v. *New York* permitted the admissibility of evidence obtained in violation of the Fourth Amendment for impeachment purposes. That same year, Chief Justice Burger in his dissent in *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics* suggested that instead of the judicially created exclusionary rule, Congress provide that Fourth Amendment violations be made actionable under the Federal Tort Claims Act.

Senators Laxalt and Dole have already proposed legislation

to provide such an alternative remedy, and are apparently prepared to add it to the earliest available legislative vehicle. Specifically, such a provision would contain:

- abolition of the exclusionary rule in all federal prosecutions;
- an amendment to Federal Tort Claims Act to allow as an exclusive remedy:
  (1) that any victim of a search or seizure in violation of the Fourth Amendment who is not convicted of any offense for which evidence was seized may recover damages from the U.S.,
  (2) that any victim of a search or seizure in violation of the Fourth Amendment who is convicted of an offense for which evidence was seized may recover damages from the United States except for any loss of any confiscated property, imprisonment, fine, or attorneys' fees related to the conviction, and
  (3) that a certain maximum ceiling be put on the amount of recovery to be imposed (for instance, $25,000 plus attorneys' fees and costs);
- a requirement for all federal law enforcement agencies to impose sanctions against their investigative or law enforcement officers for illegal searches and seizures, including, but not limited to, suspension without pay, and outright dismissal.

A new administration could be faced at an early stage with the need to establish a position of this issue. Given the senators involved, a prudent administration would not allow its Senate supporters to unknowingly commit themselves to an activist course of action which would put them publicly at odds with the President.

Pro:

Those senators supporting curtailment of the exclusionary rule argue that:

- the judicial system should not suppress valid evidence;
- the rule allows the guilty victim of an illegal search to go free, but never provides the innocent any compensation for injuries suffered;
- there is usually no question of the reliability of the evidence illegally seized, making it unlike coerced confessions excluded under the Fifth Amendment;
- the U.S. is the only Western nation with the rule—other countries having provided tort remedy;

• studies are inconclusive as to whether there is police deterrence from wrongdoing as a result of the rule.

Con:

Groups such as the National Rifle Association have tended to oppose any cutback on the exclusionary rule. In a May 20, 1980, letter to Senator Robert Dole, the NRA stated:

> We also strongly oppose (the) amendment . . . which provides that evidence otherwise admissible in a Federal criminal proceeding shall not be excluded solely on the grounds that such evidence was obtained in violation of the Fourth Amendment of the Constitution. It is our position that the exclusionary rule is necessary to deter government misconduct, to protect the integrity of the judicial proceeding, and to give vitality to the constitutional guarantee against unreasonable searches and seizures. We feel that remedies other than exclusion of unconstitutionally obtained evidence are illusory and that the exclusionary rule should be preserved to prevent the Fourth Amendment from being reduced to "a form of words," the concern expressed by Justice Oliver Wendell Holmes in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920).
>
> Gun owners would be particularly vulnerable to the excesses which would occur in the name of enforcing so called gun control laws, should the exclusionary rule be eliminated. In an article published in the October 7, 1977, *Wall Street Journal* by Judge Malcolm R. Wilkey of the United States Court of Appeals for the District of Columbia, the enforcement of gun control laws was cited as a reason for abolishing what he has termed the 'unique American exclusionary rule.' If that is the attitude of the disinterested magistrate presumably possessed of judicial temperament concerning laws unrelated to misuse of firearms, I am naturally reluctant to contemplate the animus of the agents and police who would conduct searches and seizures unencumbered by the exclusionary rule.

Prosecutorial Discretion

Background: Would-be reformers of criminal procedures have long argued that federal standards government prosecutorial discretion ought to be made uniform. It is inherently unfair, they argue, that conduct which would almost certainly trigger a prosecution in Bailiwick A may seldom if ever be prosecuted in Bailiwick B. With 95 U.S. Attorneys' offices throughout the land, the argument concludes, simple justice requires that prosecutorial standards be the same everywhere.

The counter-argument is that unifomity and justice are two different things; that, whatever prosecutorial standards may say, the infinite variety of particular circumstance will invariably require exceptions; and that publication of uniform standards may simultaneously reveal too much to criminal defend-

ants and provide their counsel with a new series of weapons to use against the government.

While this battle has raged with varying degrees of intensity over the past decade, it fell to the Civiletti Justice Department to bite the bullet. Accordingly, in July of this year, the Department for the first time in its history published a uniform set of standards ("Principles of Federal Prosecution") governing such matters as the initiation of a prosecution, plea-bargaining, the use of *nolo* pleas and agreements not to prosecute in return for cooperation, and whether and to what extent the U.S. Attorneys should participate in sentencing decisions.

What is important at the moment is perhaps less what the guidelines say about particular matters than that they were published at all. Some reports indicate that the decision to publish was hotly debated within the Department.

Recommendations: Given the novelty of the decision to publish, a new administration may—emphasize *may*—have an opportunity to reassess the issue.

Among the factors that will need to be taken into account:

1. Is support in Congress strong or weak? What is the sentiment among prosecutors and federal judges? Can the "Principles" be rescinded without the appearance of mean-spirited retrogression?

2. Now that publication has taken place, the inevitable tendency on the part of those who supported the effort will be to press for greater and greater detail. Will greater detail not tilt the balance in criminal matters too much toward the defense?

3. Although the "Principles" publication expressly states that no party in litigation with the U.S. can seek to enforce them, that declaration will not deter the defense bar from attempting to do just that. Nor will it deter a federal judge from ruling in favor of defense motions based on putative violations of the standards. If such occurs, will an operative pre-condition of publication have been breached? Would rescinding publication cure the problem, either prospectively or retrospectively?

Such questions are sufficiently troubling that a new administration ought to take counsel at an early date with past and present U.S. Attorneys and other career officials experienced in criminal law enforcement, as well as with judges. Is the drive for uniformity so strong that other interests must yield to its demands? Is there a better way, short of published standards, to cure the worst mischiefs thought to be characteristic of the pre-publication system? Unless the new administration is satis-

fied that publication serves a valuable public interest, it ought to be prepared to reconsider.

Dismissal for Reasons of National Security

Background: In recent years, the problem of "leaks" has escalated into a torrent. Given the desire of a new administration to treat the compromise of sensitive information with immediate dismissal, the statutory ability to do that becomes a question of considerable interest.

Traditionally, 5 U.S.C. § 7532 is the provision of federal law dealing with "dismissal for reasons of national security." The term "national security" is not defined in 5 U.S.C. § 7532. The Supreme Court, however, has held that the term was clearly not meant to be so broad as to encompass all activities of government:

> We think it clear . . . that that term was intended to comprehend only those activities of the Government that are *directly concerned with the protection of the Nation from internal subversion or foreign aggression*, and not those which contribute to the strength of the Nation only through their impact on the general welfare. *Cole* v. *Young*, 315 U.S. 536, 544 (1956) (emphasis added)

According to the Court in *Cole*, whether an employee's retention would create a risk of injury to the national security as defined would depend on:

> the character of the employee and the likelihood of his misconducting himself and also of the nature of the position he occupies and its relationship to the national security. *Id.* at 542

Thus, only employees having access to classified information, the release of which could adversely affect the national security, and whose positions would therefore be considered "sensitive," could be dismissed under section 7532. *Id.* at 551

Applying these factors, the Court in *Cole* held that the discharge of a food and drug inspector employed in the Department of Health, Education and Welfare was improper even though he was alleged to be closely associated with Communist organizations—a charge which was not denied. The employee's position, the Court concluded, was not one in which he could adversely affect the national security. *Id.* at 557

The Department of Justice is considered a "sensitive" *agency* insofar as it deals with matters which affect internal security of the nation. (*See* 5 U.S.C. § 7531) Exactly which of its *employees* would be considered "sensitive" is not completely clear, however. No cases have been found which deal specifically with a Justice Department employee.

However, a conversation with Mr. Jerry Robino, the Direc-

tor of the Security Programs Staff at the Department of Justice, may shed some light on the identity of these employees. In his opinion, some 600 Justice employees, including division heads, lawyers, and secretaries, occupy positions which are considered "sensitive." Specific examples he cited were: all employees in the Office of Intelligence Policy and Review, Civil Division employees involved in litigation concerning requests under the Freedom of Information Act, Criminal Division employees involved in espionage cases, and Antitrust Division employees involved in actions against corporations which have national security contracts with other agencies or military departments (the AT&T case, for example). He also cited the recent ABSCAM operation leak, which disclosed the bribery of public officials by undercover FBI agents posing as Arab sheiks, as an example where section 7532 could be invoked.

All of these employees have two things in common. First, they are involved in areas of national security, as defined in *Cole;* and, second, they have access to confidential information which, if released, would undermine that security.

Recommendation: The Justice Department should propound an interpretation of section 7531, either through litigative guidelines or an opinion of the Legal Counsel, which would broadly define the scope of "national security."

The Civil Division

The Civil Division represents the United States government in general civil litigation not falling within the jurisdiction of other divisions and departments. The division defends in cases of civil litigation brought by or against cabinet members or other federal officials in their official executive capacities. At the end of 1979, the Civil Division was representing 98 government agencies and offices in over 22,000 cases involving roughly $64 billion.

Because of the routine nature of much of the Civil Division's work, moderate-to-liberal Attorneys General under the Carter Administration have felt comfortable staffing it with an Assistant Attorney General considerably more liberal than themselves. In cases with an ideological component, such as the *Snepp* case, they have laid out the case centrally at a Department level and presented it to the Civil Division as a *fait accompli.*

The Freedom of Information Act

Background: The Freedom of Information Act, originally

enacted in 1966, is a disclosure statute which requires that all executive department and agency documents be made available to the public. Nine exemptions from these mandatory disclosure provisions attempt to maintain the confidentiality of documents ranging from those involving national security matters or law enforcement records, through agency records containing private commerical information. These exemptions are discretionary; that is, they permit, but do not require, an agency to withhold exempted information. The FOIA does not apply to Congress, the federal courts, or the Chief Executive.

Current Issues

In 1974, the FOIA was extensively amended to provide for broader disclosure in response to a perceived public need for unprecedented access to government records. The last six years of experience under the FOIA have revealed that its expanded provisions have produced what many have called "openness excesses." These excesses are centered on the disclosure of two categories of information: first, law enforcement and foreign intelligence or counterintelligence information, and second, private confidential commercial information.

Disclosure of Law Enforcement and Intelligence Information

Unlike the Privacy Act, which limits its application to citizens and permanent resident aliens, anyone anywhere in the world can make an FOIA request. In addition, the exemptions which apply to law enforcement data or national security information have been given a narrow scope by Congress, especially in the 1974 amendments, and by the courts. As a result, much of this sensitive information has been exposed to disclosure under the FOIA. Furthermore, the effective protection of this type of information is often weakened by the crushing burden of attempting to respond to thousands of requests within the ten-day period mandated by the FOIA.

Compounding these difficulties, the policy-makers of the institutions which should have the strongest interest in protecting this sort of information have embraced a strongly pro-disclosure policy. In 1977, for example, the Attorney General sent letters to all agency heads which declared, "The Government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. . . . The Justice Department will defend Freedom of Information suits only when disclosure is

demonstrably harmful, even if the documents technically fall within the exemptions in the act."

The usefulness of the FOIA is not lost on criminal suspects or imprisoned felons, judging by the number of requests filed by such persons. Forty percent of the Drug Enforcement Administration's FOIA caseload, for example, involves requests from imprisoned felons or persons under active criminal investigation. It is not uncommon for organized crime figures, even while in prison, to find out the names of informants through the FOIA. Even claiming an exemption can be damaging to law enforcement interests, as, for example, citing the investigatory records exemption can tip off a formerly unsuspecting target that he is under investigation.

In addition, many records of law enforcement agencies which are not strictly "investigatory records," and so not within the narrow exemption provided for such documents, can be damaging to law enforement interests if released. Internal procedure manuals, instructions to investigators, and the like can be requested under the FOIA, giving felons a blueprint of law enforcement methods of operation.

Though the exact impact of the excessive disclosure of law enforcement information probably cannot be demonstrated in precise statistics, an FBI canvass of its field divisions revealed significant effects on various FBI operations. These ranged from the increasing reluctance of informants and other sources to aid investigations, through the refusal of various organizations, including such disparate bodies as a union and the Travelers' Aid Society, to provide information without a subpoena, to prominent judges and attorneys refusing to be interviewed by the FBI concerning government job applicants.

National security and foreign intelligence data in the hands of the CIA has not been subjected to outright disclosures as often as domestic law enforcement records, due in part to the non-disclosure provisions of the Central Intelligence Agency Act of 1949, and in part to judicial reticence to order the disclosure of internationally sensitive records. Most FOIA litigation involving the CIA has focused on whether the CIA sufficiently demonstrated that a particular record is within an exemption, rather than whether the agency had the authority to withhold the record.

Nevertheless, American intelligence agency officials note that the "competition"—the KGB and Eastern bloc countries—makes FOIA requests regularly. Whether inadvertant disclosures or the release of apparently harmless data have contrib-

uted to the intelligence of foreign adversaries has not been documented.

One unexpected abuse of the FOIA regarding foreign policy information has involved the selective leaking of sensitive materials by American government officials through the FOIA mechanism. The FOIA can provide a legitimate cover for efforts to use confidential information to embarrass an opponent or pressure an ally.

Disclosure of Confidential Commercial Information

While the FOIA has dramatically opened government files to public scrutiny, those same government files have been absorbing an unprecedented amount of information from the private sector. Much private data must be submitted to the government in reports required on a regular basis or in response to administrative inquiries or investigations, often involving agency subpoenas. Additionally, contractors competing for government procurements submit much private commercial information to various agencies.

The FOIA makes no provision for protecting the rights of the submitter of private information contained in government records. Not only is an agency free to respond to an FOIA request without notifying the submitter of the requested information, but even if the submitter discovers an imminent disclosure of its information, the FOIA does not provide the submitter with a cause of action to contest an agency's decision to disclose in court.

The exemption for confidential commercial information that is provided in the FOIA has proven to be ineffective protection due to the uncertain judicial application of the exemption and the variety of information which can be competitively harmful. The exemption was designed to protect information which, as the legislative history indicates, "would customarily not be released to the public by the person from whom it was obtained," suggesting a relatively predictable application. However, the courts have imposed a gloss on the statutory provision, applying the exemption only if the disclosure of private commercial information is likely to cause substantial harm to the competitive position of the submitter, or if such disclosure would impair the ability of the government to obtain necessary information in the future. Because this test requires a court to delve into the murky areas of a particular business's "competitive position," it has generated much confusion and costly litigation.

These weaknesses in the FOIA and its application have attracted business competitors, investors, disgruntled employees, adverse litigants, and a host of others to use it to obtain information regarding private enterprises which, but for the FOIA, would not be available to them. It has been estimated that three out of every five FOIA requests are filed by the business community, not by crusading journalists or enterprising scholars. The Food and Drug Administration reports that 85 percent of its 33,000 annual FOIA requests come from industry. The use of the FOIA for "industrial espionage" has become so extensive that businesses have been organized for the sole purpose of making blanket FOIA requests and selling the information gleaned from the released records.

This access to otherwise nonpublic information has not only cost businesses of all kinds lost profits, but has inhibited the flow of information to the government and hindered technological development and innovation. This last point was of special concern to the 1980 White House Conference on Small Business, which recommended that "existing Federal research and development procurement assistance, and tax laws and policies . . . be modified and new laws enacted to . . . prevent the Federal Government from disseminating proprietary information."

Recommendations

Administrative Guidelines and Executive Orders

Executive orders, Department of Justice guidelines, Attorney General memoranda and the like can have only limited remedial effect because the law governing this area is statutory, or based on judicial interpretations of a statute. They can, however, serve as temporary measures while legislative changes are sought.

1. The Attorney General, through guidelines or memoranda, should give serious consideration to the establishment of a policy for the Justice Department attorneys handling FOIA matters which broadly defines the elements of exemption 7, dealing with investigatory records. For example:
   - The concept of "investigatory records" could be given an expanded reading.
   - The meaning of disclosure which would "interfere with enforcement proceedings" could embrace disclosures which would tend to interfere with law enforcement.
2. Executive Order 12065, setting out the basis for classifying national security information, should be amended to

exclude all non-citizens not only from access to classified information, but from access to summaries of such documents and from information concerning the maintenance of such records. High-level officials could be authorized to grant exemptions.

3. An Executive Order should be promulgated:
   - establishing an agency-wide procedure for giving notice to private submitters of information when disclosure of that information is requested under FOIA;
   - establishing an agency-wide procedure for allowing private submitters to challenge a contemplated agency disclosure in writing and, perhaps, in a proceeding before the agency.

Statutory Modifications

1. The FOIA should be limited to apply only to citizens and permanent resident aliens. The Department should consider the question of whether felons can and should be excluded from the Act.
2. The time periods for disclosure of records should be lengthened and set according to the volume of material requested.
3. Exemption 7 should be modified to:
   - apply to all records, not only investigatory records, collected or maintained for foreign intelligence, counterintelligence, terrorism, or law enforcement purposes;
   - exempt any disclosure which would tend to reveal the identity of confidential sources;
   - exempt disclosure which would tend to reveal the existence of an ongoing investigation into organized crime or offenses of similar seriousness or compromise such an investigation in any way;
   - exempt disclosure to persons who would use the information to threaten the safety of any person, not just law enforcement personnel; and
   - allow a court to examine requested records *in camera* and to keep any submission such as summaries and affidavits sealed.
4. An agency receiving a request for records containing private information should be required to give the submitter notice of such a request. The submitter should be given the right to submit written objections to the agency and to request an informal hearing before the agency.
5. A procedure, mirroring that now available to requestors,

should be established giving a submitter access to the federal courts for *de novo* review of his case.

6. The following amendments to exemption 4 should be reviewed and evaluated:
   - whether information which "would not customarily be released to the public by the person from whom it was obtained" should be specifically exempted;
   - whether information which the agency in good faith has obligated itself not to disclose should be exempted; and
   - whether exemption 4 should be mandatory, with appropriate exceptions where submitter agrees to the request.
7. The Trade Secrets Act, 18 U.S.C. § 1905, should be amended to be brought within the FOIA exemption for other statutes precluding disclosure.

The Division of Land and Natural Resources

The Division of Land and Natural Resources has been accused of being one of the two most politicized divisions in the Department. It is responsible for conducting litigation in the areas of environmental protection, hazardous waste, wildlife management, land acquisition, Indian resources, and Indian claims. Most of this litigation is carried on at the behest of the Departments of Interior and Agriculture, the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, and the Army Corps of Engineers.

The monetary amounts in controversy have totalled over $14 billion.

Controversy around the Land Division has centered around what is perceived to be a pro-environmentalist bias, resulting in failure to raise issues such as standing against environmental groups challenging government policies.

Standing

Background: "Standing" is a doctrine by which courts have traditionally shut their doors to parties with very little pecuniary or other substantive interest in a case.

Problem: It is the policy of certain divisions of the Department to not raise the defense of standing to sue when the plaintiff is an environmental organization or a public interest group with which the division head was previously associated or whose views are shared by the division head. In at least two cases, *National Wildlife Federation* v. *United States,* F.2d (D.C. Cir. No. 78-1976), and *Health Research Group & Public*

Citizen v. *Donald Kennedy* (D.C. Dis. No. 77-0734), courts have noted this failure to raise the question.

The Assistant Attorney General in charge of the Land and Natural Resources Division in a 1977 memo ordered his staff in any case where standing was questionable to contact the plaintiffs and obtain affidavits establishing standing. The truth of such affidavits was not to be questioned unless evidence established their falsity. Only in such an event would the defense be raised.

Recommendation: This practice should be changed. It results in the abandonment of a valid defense. It subjects the government to needless trials and unnecessary expenditure of manpower and resources.

"Sweetheart" Litigation

Background: When an outside group brings a suit against the federal government to require a specific action on the part of the government, the person or group which would be adversely affected by that governmental action is generally not a party to the litigation. It may be that the NAACP is suing to require the federal government to desegregate a state's system of higher education. Or an environmental group may be litigating to compel expenditure of taxpayer money. In either case, the state or taxpayer, not being a party to the suit, must rely on the Justice Department to vigorously represent its interests.

In certain cases, the Department has not vigorously represented the interests of the people, but has instead entered into stipulated judgments that have seriously injured the people.

A classic example is *Simer* v. *Olivarez* (N.D. Ill., Div. No. 79 C 3960). In that case, public interest law firms filed a complaint in federal district court in Chicago in September 1979, against the Community Services Administration (CSA). The complaint alleged that nine plaintiffs "and all others similarly situated" had been deprived of CSA energy crisis assistance payments because of arbitrary requirements imposed by the CSA. In particular, the suit alleged that $18 million of the $200 million appropriated for fiscal 1979 to help poor people cope with soaring energy prices had gone unspent. The suit contended that a provision that such unspent funds would have to be returned to the United States Treasury violated the Administrative Procedures Act and other "due process" laws. However, the Office of Management and Budget had insisted on a

termination date of June 30, 1979, to make certain that the program would confine itself to winter emergencies.

A pretrial settlement was reached between CSA and the plaintiffs. It provided that the plaintiffs would each receive an amount equal to the maximum allowable under the energy crisis payment program, or $250. However, no attempt was made to identify "all others similarly situated"—the poor on whose behalf the class action was instituted. The majority of the $18 million, originally appropriated to pay for heating emergencies for the poor, has been diverted to other purposes. Specifically, $4 million was granted to local groups to fund advocacy efforts on behalf of elderly and/or low-income persons with regard to energy issues affecting them; the National Consumer Law Center received $1.8 million; $5 million went to the National Consumer Law Center for expert witnesses and consultant fees in regard to energy and utility problems affecting low-income groups; and $200,000 went to the Citizen Labor Energy Coalition. Moreover, any additional monies returned to CSA in excess of the $18 million allocated by the court order will not revert to the United States Treasury, but will be utilized pursuant to the judgment.

Recommendation: It is unconscionable for the Department to stipulate a judgment that is in conflict with the law. This practice must be halted.

The Immigration and Naturalization Service

The Immigration and Naturalization Service is responsible for patrolling international borders, inspecting persons entering the United States, investigating the status of aliens, and processing and deporting those aliens found to be in violation of law.

The INS's most serious problem is that it is an agency without any real policy guidance. The Carter Administration has vacillated between the political exigencies of a freer immigration policy—at least with respect to certain countries' nationals— and seemingly contradictory efforts to find a solution for the large resource drains imposed by illegal populations in some states.

There is no clear "conservative" position on the immigration problem, and no "conservative" solution. Some conservatives would view the entrance of illegal aliens as a necessary response to the unwillingness of Americans to perform certain tasks at the market price. Others would feel that the infusion of

a large unassimilable foreign culture could only end up placing unsustainable burdens on American culture and social services.

Immigration Policy

Introduction

The Select Commission on Immigration and Refugee Policy will be issuing its final report in March 1981. The Select Commission's work has been the most ambitious and extensive such effort in 70 years. The final report will cover every area of immigration policy and will contain extensive legislative recommendations. Most of the members of the Select Commission are very liberal, and this will be reflected in the report.

A new administration could choose to respond to all aspects of the Select Commission's report. The new administration might prepare alternatives. The discussion below covers some of the areas where major policy decisions will have to be made.

Background

Level of Immigration: Legal immigration for fiscal years 1977-80 totaled, respectively, about 425,000; 530,000; 560,000; and 650,000. The 1980 figure does not include the 130,000 Cubans and Haitians given special status by President Carter. Estimates of illegal immigration range from 100,000 to 800,000 per year, although all estimates of illegal immigration are unreliable. Whatever the level of immigration, there is no doubt that it will add millions to U.S. population.

Population growth, including that arising from immigration, creates certain problems: greater use of oil and other natural resources, much of which must be imported; higher grain consumption, leaving less available for exports; burdens on government services, especially in older urban areas; environmental degradation; etc.

The Select Commission is likely to propose substantially higher legal immigration levels. In part, this is intended to "rechannel" illegal immigration. Critics have pointed out that the illegal immigration problem cannot be solved by changing the legal status of the human beings involved. To do so would be to adopt a *de facto* policy of nonenforcement which amounts to allowing immigration levels to be determined by demand abroad, rather than by the will of the American people and the national interest.

In addition, the Select Commission may recommend aboli-

tion of the "per country" limit, which is intended to prevent a few countries from dominating immigration. At the present time, immigrants from a single country, excluding refugees and the closest relatives of Unites States citizens, cannot exceed 20,000 per year.

Admission of Refugees and Asylees: In fiscal years 1977-1980, refugee admissions have totaled, respectively, about 31,000; 52,000; 131,000; and 231,000. Again, the 1980 figure does not include the 130,000 Cubans and Haitians given special status by President Carter. The Administration proposal for fiscal year 1981 is 217,000, and includes 168,000 Indochinese refugees to be admitted pursuant to President Carter's commitment to admit 14,000 per month. Refugee admissions in the years 1969-1976 totalled, respectively, 17,000; 22,000; 26,000; 29,000; 31,000; 33,000; 66,000; and 126,000. Thus, in ten years, U.S. refugee admissions have increased tenfold. Yet, estimates of world refugees have remained in the 11-17 million range throughout this ten year period. No congressional approval is required for the proposed level of influx under the Refugee Act of 1980, although the "normal" level is statutorily set at 50,000.

The enforcement challenge posed by mass applications for asylum, such as the recent influx of over 120,000 Cubans, deserves special mention. It illustrates the enforcement problem that is posed by application of the "reasonable fear of persecution" standard in asylum cases. Even if a person leaves his country for purely economic reasons, once he has actually left he may be subject to persecution if he returns. Thus, if he is successful in reaching the United States, it becomes difficult to send him back.

The Select Commission may propose that any maximum immigration limits which are established not cover refugees. Opposition to this position has been expressed. Critics have also suggested that if the Executive desires to exceed a normal limit for refugees, he should obtain affirmative approval from Congress, except possibly under emergency conditions.

It has also been suggested that efforts be increased to involve other countries and to encourage and facilitate repatriation when it becomes possible.

Admission of Relatives versus "Independent Immigrants": Under existing law, a very high proportion of immigrant visas is issued on the basis of kinship with United States citizens or legal residents. Only 10-15 percent of all immigrants are

individually selected on the basis of skills or other attributes that would benefit the United States as a nation.

The Select Commission is likely to propose that certain kinship relationships be accorded a lower priority for immigrant visas so that a greater number of independent immigrants can be admitted (although proposals for a system like that of Canada or Australia, which allocate visas on the basis of points which are given for various desirable traits, may be too "elitist" for most of the Commissioners).

Illegal Immigration; Enforcement of the Immigration Laws; Employer Sanctions; Amnesty: There are at present millions of illegal aliens living and working in the United States. Conditions in their home countries are unsatisfactory, usually because of high unemployment and low wages. Many U.S. employers are eager to obtain their labor. In general, employers are not subject to sanctions of any kind for employing illegal aliens. Moreover, even if an illegal alien is caught, either at the border or inland, he is usually subject only to being returned to his home country. No penalty is enforced. Thus, an illegal alien has a considerable economic incentive to come to the United States and no significant disincentive not to come.

An additional incentive is provided by constitutional law: all persons born in the United States are U.S. citizens, even if the parents are illegal aliens. A constitutional amendment would be required to change this.

If an alien decides to cross the border illegally, he can usually do so without great difficulty due to a lack of adequate Border Patrol staff. The Border Patrol Supervisors Association has claimed that if the Border Patrol were expanded from 2,100 to 5,000 agents, at an additional cost of $122,000,000, 90-95 percent of illegal border crossings could be deterred or stopped. The extent to which this self-serving statement is true is subject to debate.

Those strongly in favor of curbing illegal immigration contend that jobs are taken from citizens and legal residents, and that wages and working conditions are adversely affected. Competition for low skill jobs, frequently with the very groups with highest unemployment, such as black youth, may lead to social unrest, even riots. The latest Cuban influx into Miami was apparently an element of the recent riots.

Also, the frequently low degree of assimilation of illegal aliens can retard the assimilation of legal immigrants from the same country of origin.

Finally, efforts of the Census Bureau to include illegal aliens

in the 1980 census and to suspend INS enforcement activities to encourage census participation, may result in higher representation in the House of Representatives, as well as higher federal assistance, for areas with many illegal aliens. The issue is being addressed in both Congress and the courts.

With respect to the millions of illegal aliens now in this country, the Select Commission is almost certain to recommend a generous amnesty program for most of them. Most of the Commissioners believe that this must be combined with better enforcement, so that less illegal immigration will occur in the future.

It is generally recognized that effective control of illegal immigration requires an elimination of the incentive which access to U.S. employment provides. Consequently, sanctions against employers who hire illegal aliens will probably be recommended, along with some form of work authorization card or computerized call-in system. Strong opposition will probably be expressed by civil liberties organizations and possibly by business groups (unless a temporary worker program is established).

Critics have pointed out that an amnesty program should not be imposed immediately if employer sanctions are to be established. If employer sanctions are effectively enforced for a period of time, many illegal immigrants will leave the country. Therefore, a subsequent amnesty program would be less extensive.

In order to satisfy employers who claim that they cannot find U.S. workers to do needed work (at wages and working conditions the employers choose to provide), it is possible that an expanded temporary worker program may be proposed. Critics have observed that many of Europe's guest workers have not turned out to be very temporary. Such a risk is particularly great if the temporary permits can be renewed and if family members are allowed to join the workers. Furthermore, the possibility of unemployment, depressed wages, or less favorable working conditions for U.S. workers, which has already been discussed in relation to illegal aliens, exists as well for a temporary worker program which is not very carefully designed and administered.

Recommendations

Because the Select Commission will issue its report within two months of the inauguration, some administration response must be developed during the first ninety days.

Clearly, an approach which would be politically safe in the short-term would be one of continued study and examination.

In due time, a new administration might want to consider whether tightened identification procedures, tougher border guards, and a limited amnesty would be an appropriate response to the illegal alien problem.

As for refugees and asylees, obviously a strengthened effort to enter into cooperative efforts with our allies would be welcome.

The Civil Rights Division

Together with the Land Division, Civil Rights is one of the two most radicalized elements of the Justice Department. In the past, attorneys in this division have used the threat of widescale resignations to intimidate conservative administrations into moderating thier anti-affirmative action policies. This cannot be allowed to happen again.

The Assistant Attorney General for Civil Rights must be someone who is willing to "take the heat" for policies intended to reverse the use of discrimination to end discrimination. He must understand from the beginning that he may be forced to resign.

Given this understanding, the President's position should be a refusal to intervene in ongoing litigation by the Department in this area.

Civil Rights Policy

Background: During the past 20 years, the federal government has adopted a plethora of laws, executive orders, and rules regulating who is hired, fired, promoted, or awarded government contracts. These rules have all centered around eliminating racial and other forms of discrimination. However, the remedy has gotten so far out of hand that it has become mandatory to discriminate in order to end discrimination.

The question boils down to a distinction between equality of opportunity and equality of results. Efforts at employment regulation are premised on the belief that members of favored groups must be guaranteed an equal share of society's economic rewards, regardless of individual ability or accomplishment. The result has been reverse discrimination in job hiring and promotion, discriminatory awarding of government contracts, and quotas in medical and law school admissions.

A new administration should base its civil rights policy on the notion that every person has an inherent right to obtain

whatever economic or other rewards he (or she) has earned, by virtue of merit, and that it is inherently wrong to penalize those who have earned their reward by giving preferential treatment and benefits to those who have not.

Recommendations: To the extent that an incoming administration is willing to go beyond a less radical litigative posture in its efforts to modify civil rights policy, the following changes could be accomplished by legislation or Executive Order:

- Section 202(1) of Executive Order 11246, issued by President Johnson, as amended by Executive Order 11375, could be repealed. This is the order that not only requires all government contractors and subcontractors to hire and promote on a nondiscriminatory basis, but also requires them to "take affirmative actions to ensure" nondiscriminatory treatment. This language has been used to justify all of the hiring programs based on reverse discrimination which are now in existence.

In its place, a new §202(1) would be issued stating that: "No contractor shall discriminate because of race, creed, color, sex, religion, or national origin. No contractor shall give any preferential treatment to any applicant or employee based on any of the foregoing factors, nor shall the contractor enter into any agreement with any labor organization to do so. No contractor shall maintain any records indicating the race, creed, color, sex, religion, or national origin of any applicant or employee."

- Section 203 of E.O. 11375, relating to maintenance and submission of compliance reports, could be repealed.
- Employers covered by E.O. 11375 could be prohibited from using the phrases "affirmative action employer" or "plans for progress employer" in their advertising.
- The SEC could be asked to discourage or prohibit corporations from using racial or sexual employment statistics in corporate annual reports.
- A new clause could be inserted in Section 209 of E.O. 11375 stating that: "No complaint or recommendation shall be filed by the Secretary of Labor with the Equal Employment Opportunity Commission or with the Department of Justice unless the Secretary makes a written finding, based upon substantial evidence, that an employer has engaged in unlawful discriminatory practices. Such findings shall be based only on a finding that the employer has intentionally engaged in an unlawful discriminatory practice and shall not be based on the results of a statistical sample or census of the employer's work force."

• President Carter's E.O. 12086 could be repealed or modified. This order transferred to the Labor Department enforcement authority previously placed in other departments and agencies. This centralizes enforcement power in the Labor Department, which tends to be a very liberal agency. That power ought to be redispersed.

• Sections 101 to 105 of President Carter's E.O. 11246 could be repealed. Section 101 ordered all federal agencies "to promote the full realization of equal employment opportunity through a *positive continuing program* in each executive department and agency." This language has been used to justify reverse discrimination, quotas and affirmative action.

• Reorganization Plan Number I of 1978 could be repealed and the equal employment opportunity enforcement authority that was taken from the Labor Department and the Civil Service Commission and given to the EEOC, could be returned to those agencies. From a conservative viewpoint, it is safer to have it reside in these agencies than at EEOC, which has traditionally been even more liberal than the Labor Department.

• 29 U.S.C. § 793 could be repealed. This section requires government contractors to take "affirmative action" to employ handicapped persons, as defined by 29 U.S.C. § 706(6).

• E.O. 11914, issued by President Ford, could be modified. This order, relating to the employment of handicapped persons, could be amended to include language prohibiting any reverse discrimination. Similar modifications could be made in President Carter's E.O. 12106.

• On a much more ambitious level, § 2000 *et seq.* of Title 42, U.S.C., could be amended to reverse *Fullilove, Inc.* v. *Klutznik.*

• So much of President Carter's E.O. 12067 is inconsistent with the foregoing that it would also have to be amended.

• Executive Orders could be issued to the Departments of Justice, Labor, and Education directing that:

1. No "pattern of discrmination case" may be filed *unless there is clear proof of an intent to discriminate,* based upon substantial evidence other than a) evidence of non-intentional discriminatory impact or b) statistical or census evidence that shows unequal results, unless there is also substantial evidence of discriminatory intent.

2. The Civil Rights Division file *amicus* briefs opposing any effort by a private party to obtain equitable relief requiring any form of preferential treatment for any minority group, be it called a quota, an "affirmative action program," a numerical

goal or any other euphemism for reverse discrimination.

• An Executive Order could be issued forbidding all executive branch agencies from collecting ethnic, racial, or sexual data about their employees.

• Federal agencies could be prohibited from using euphemisms such as "affirmative action" or "plans for progress" in their employment advertising.

• An Executive Order requiring that no federal agency terminate funding to any private or non-federal public program unless there is clear proof of discriminatory intent could be promulgated.

• S. 575, Senator Hatch's Freedom From Quotas Act, could be endorsed and pushed.

• 29 C.F.R., Ch. XIX, Section 1608 through 1608.12, relating to affirmative action under Title VII of the Civil Rights Act, could be repealed.

Existing Enforcement Authority

The Equal Employment Opportunity Commission and the Department of Labor share their enforcement authority with the Civil Rights Division of the Justice Department, as follows:

• With respect to Title VII of the 1964 Civil Rights Act (Employment Discrimination), and related Executive Orders, EEOC has authority to file civil suits alleging employment discrimination against any private employer or any no-federal public employer, and against any union. The Department of Justice has concurrent authority to bring civil cases only against non-federal public employers.

• In the case of Title VII of the 1964 Civil Rights Act as it applies to federal contractors, and related Executive Orders, the Office of Contract Compliance of the Department of Labor operates pursuant to Executive Order 11246, and may terminate a federal contract after an appropriate administrative hearing. No court order is needed. The Department of Justice has concurrent authority to investigage, and exclusive authority to litigate and to seek equitable relief. Also, only DOJ can represent OCC in court. Thus, DOJ can effectively kill an OCC case by refusing to file it.

FISCAL YEAR 1982 DEPARTMENT OF JUSTICE BUDGET

The proposed Fiscal Year 1982 budget for the Department of Justice represents roughly a 9 percent decrease in funding from anticipated Fiscal Year 1981 funding levels. These savings are achieved through the elimination of the Office of Justice Assistance, Research, and Statistics. Department of Justice activities are personnel intensive; the proposed Fiscal Year 1982 budget assumes consolidation of enforcement personnel and administrative efficiencies in program operating expenses necessary to offset the effects of inflation.

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THE DEPARTMENT OF LABOR

Robert P. Hunter*

INTRODUCTION

A significant redirection of the Labor Department's focus is needed to align it more closely with its mission to promote and develop the welfare of wage earners. Throughout the years it has allowed a general bias to develop in favor of organized labor, which represents only approximately one-fifth of the total labor force; this bias is also reflected in the Department's general mistrust of the motives of business. This attitude is a reflection of attitudes built into the legislation which is delegated to the Department to administer. In some instances, a redirection of the Department's focus must be accompanied by changes in legislation.

Three administrations within the Department of Labor in particular require attention by a new Secretary of Labor on a priority basis. They are the Employment Standards Administration, the Labor Management Services Administration, and the Employment Training Administration. These are large offices which are poorly managed and which have strayed particularly far from their mission, and are seen to be particularly biased toward imposing pro-labor decisions. The full report sets out in detail the specific areas which must be immediately addressed.

**Author's Note:* The preparation of this report was a collective enterprise involving many individuals. John Casciotti, Wayne T. Elliott, Andy Hare, John Reed, Ira Shepherd, Carolyn Sladek and Timothy D. Smith deserve particular mention. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Summary

The purpose of OSHA is to promote the safety and health of American workers on the job. The present OSHA statute contains sufficient flexibility to permit building an effective program.

The main deficiency has been the policeman's orientation, which has resulted in an ineffective program, illustrated by the 25 percent increase in serious injuries since OSHA was created.

Short-Term Problems and Recommendations

In the first 90 days, the Assistant Secretary should appoint several task forces from OSHA staff to develop new policies to redirect the Agency's program from an adversarial one to a cooperative one:

- OSHA should focus major emphasis on encouraging cooperative programs involving government, business, and labor, including incentives for implementation of advisory safety committees and expert consultation programs in workplaces, shift in the awarding of OSHA education and training grants to stimulate formation of joint labor-management programs in significant industries, reconstituting the National Advisory Committe on Occupational Safety and Health to give it meaningful policy input.
- OSHA enforcement activities should be redirected to target workplaces with poor safety records and high injury rates. There should be better better targeting for health inspections on workplaces where demonstrably hazardous processes are involved.
- OSHA should revise the standard setting approaches by shifting to cost-effective, performance-based standards, by prioritizing needs for new standards so as to deal with the gravest hazards, and by simplifying and streamlining existing reams of standards.
- OSHA's approach to state-OSHA programs should be revised to adopt a meaningful commitment to making the states full partners in implementing the overall program.

Budget Recommendations

The recommendations above contemplate stable appropriation levels.

Long-Term Problems and Recommendations.

The long-term thrust should be to refine and institutionalize the above policy changes, including statutory amendments as needed.

Basic Policy Assumptions

Each year, millions of American workers are injured, disabled, or killed on the job. In 1978, for example, there were nearly 5,000 job-related deaths, and almost 5.8 million occupational injuries, of which nearly 2.5 million resulted in time off work, for a total of over 39 million lost work days. The impact of occupational disease is also substantial, as evidenced by the list of 2,415 potential occupational carcinogens published by the National Institute for Occupational Safety and Health, and the Department of Labor's estimate, although widely disputed, that there are almost two million workers severely or partially disabled from occupational disease. It should be the goal of all concerned to cooperate in significantly reducing these numbers.

In addition to the human costs, the job-related injuries and illnesses also involve monetary expenditures and losses in the billions of dollars, including workers' compensation and other disability program payments, lost wages, medical expenses, lost productivity, and other expenses. Therefore, both in human and economic terms, the goal of reducing worker injuries and illnesses is of compelling importance.

In framing OSHA, Congress cast the government primarily in the role of a policeman, giving OSHA the authority to establish mandatory standards, conduct inspections of workplaces, and assess civil penalties for employers not in compliance with the standards. Ten years of experience under the Act show the policeman's model is not the most effective approach.

Summary of Deficiencies of Existing Policies

Resources have not been effectively targeted to reach the most hazardous workplaces. Instead, the Agency has relied on the fear of inspection to coerce employers into action. In addition, in order to simplify enforcement, precise compliance specifications have been dictated, rather than performance requirements with flexible options for reaching them. Furthermore, the preoccupation with regulatory enforcement has

resulted in too little attention to efforts to facilitate cooperative programs among employers and employees in the workplace.

Evidence is plentiful of the ineffectiveness of this policeman's orientation and the policies which have evolved from it. For example, Bureau of Labor Statistics data show that since OSHA, the serious injury rate (injuries resulting in time off work) has increased by 25%. In addition, many analyses, including those by President Carter's Inter-agency Task Force on Workplace Safety and Health, President Ford's OSHA Task Force, the U.S. General Accounting Office, and the National Safety Council, have found serious limitations in OSHA's approach and policies, and recommended fundamental changes.

Short-term Problems and Recommendations

The following discussion relates to four primary issues of OSHA policy: emphasis on cooperative programs, better targeting of enforcement activities, more practical safety and health standards, and a more positive relationship with state OSHA programs.

OSHA should focus major emphasis on encouraging cooperative programs involving government, business, and labor.

The Assistant Secretary should appoint a task force, to be chaired by the Deputy Assistant Secretary, to develop new initiatives concerning the following subjects:

Safety Committees. The goal is to develop a program to encourage the implementation in workplaces of advisory safety committees of employees and representatives of the employer, or of employees only. The function of the committees is to make recommendations and assist in carrying out programs designed to reduce worker injuries and illnesses. The program should include some incentives for establishing the committees, such as a reduced schedule of civil penalties (not including those for willful or repeat violations) for the employer. The program should include only minimal structural guidelines to insure meaningful employee input and adequate information to the committee members. Establishment of, and participation on, the committee must be voluntary for both the employer and the employees.

Expert consultations. The Safety committee initiative should be coupled with a program to encourage employers to avail themselves of expert consultation services, either from in-house personnel or outsiders. Attention should be given to

involving safety and health consultants employed by workers' compensation insurance carriers. As with the safety committees, the incentive should be reductions in penalties. Basic competency standards for the consultants should be established, and provisions should be made for the consultation reports to be shared with the safety committee.

Training grants. New criteria should be developed for the awarding of OSHA training grants. In fiscal year 1980, $11 million was awarded to 90 organizations, including labor unions, employer associations, and educational institutions for the development and dissemination of safety and health information. The goal of the new criteria should be to award most or all of the grant funds to projects administered by joint employee and employer or employee-employer-academic direction. There should be special emphasis on using the training grants to encourage implementation of industry-wide safety and health initiatives on worker safety and health.

NACOSH. The task force should also develop a framework for a reconstituted National Advisory Committee on Occupational Safety and Health (NACOSH). NACOSH is composed of 12 members, selected among representatives of management, labor, safety and health professionals, and the public. NACOSH has not been in recent years a meaningful participant in policy development. Mechanisms should be established to insure this valuable resource is used. The task force should also develop a list of possible appointees.

Demonstration programs. The task force should develop a series of demonstration projects to lay groundwork for future implementation of cooperative programs. One such series of demonstration projects should experiment with the concept of self-certification of compliance with most OSHA requirements by a joint labor-management team in the workplace. OSHA would defer to the team, except in cases of imminent danger and where the team is unable to resolve a problem. Such a demonstration project has been successfully conducted by California-OSHA on a construction industry work site. More such projects should be demonstrated in various industries and regions.

OSHA should redirect its enforcement activities so as to target, as precisely as possible, work places with poor safety records.

In addition to placing the major emphasis on encouraging cooperative safety programs, OSHA needs to develop effective policies for dealing with workplaces with poor safety records.

To date, OSHA has not developed policies to effectively target inspections, as evidenced by the fact that in 1979, two out of every three OSHA inspections found no serious hazards. With an inspection force capable of reaching only about 2% of all workplaces annually, those inspections must be targeted to reach the greatest hazards. An additional task force should be appointed to develop new targeting procedures. It should be appointed by the Assistant Secretary and chaired by the Director of Federal Compliance and State Programs.

New targeting procedures developed by the task force should include the following components:

General schedule safety inspections. These inspections, often referred to as "routine inspections", should be predominantly targeted to individual workplaces with poor injury rates. To obtain necessary data, a procedure should be developed to permit certain categories of employers to file affidavits with OSHA to establish their better-than-average injury rates. Those workplaces within the designated categories which do not file an affidavit will be targeted for inspection. Generally safe industries, such as retail sales, insurance, finance, real estate, and the like, need not be included in the affidavit system. The good safety record test should be that a workplace had fewer lost-workday injuries than the industry average during each of the past three years. Some general schedule safety inspections should be reserved for special problems which may not be forewarned by injury data, such as the recent rash of grain elevator explosions, and for nonstationary worksites, such as in the construction industry, where past data do not adequately suggest present circumstances on different sites. Not only would this targeting system most accurately focus on hazardous workplaces, it would also establish a clear incentive for workplaces to achieve good performance.

General schedule health inspections. Unlike safety inspections, health hazard inspections cannot be targeted on the basis of past illness data, due to the lack of reliable data, long latency periods, and the like. However, priorities can be developed for health inspections based on identifying the industrial operations which utilize substances regulated by health standards. The task force should develop a priority list of those processes and the methodology for targeting the workplaces in which they are used.

Complaint inspections. These inspections, conducted in response to complaints, generally from employees, have been

roughly equal in number to general schedule inspections. According to a 1979 General Accounting Office report and President Carter's 1978 Task Force report, complaint inspections seldom detect serious violations. Both the GAO and Task Force recommended revisions in the complaint inspection policy to attempt to deal with most complaints without inspections by contacting the employer involved and requesting a report. If the report satisfies OSHA that there is no hazard, or that it has been corrected, no inspection will be conducted. Immediate inspections were recommended by GAO only for complaints involving serious hazards, and by the Task Force only for those involving imminent dangers or serious mobile-site hazards.

Following these reports, OSHA changed its policy with respect to *oral* complaints to conduct immediate inspection only in cases of imminent danger or extremely serious hazard, and to attempt to handle others through written correspondence with the employer. However, all written complaints continue to receive immediate inspections. Preliminary OSHA reports have been that the new policy for handling oral complaints has been successful.

The task force appointed to deal with enforcement targeting should develop a new complaint policy to conduct immediate inspections only cases of imminent danger or other apparently urgent problems. Every other complaint should be handled with the letter procedure. In workplaces not targeted for inspection under the general schedule inspections targeting policies, the complaint inspection should be generally limited to the subject matter of the complaint. This new policy will permit the proper focusing of limited inspection resources on workplaces with poor records or serious potential health hazards and with unresolved employee complaints.

OSHA's approach to state OSHA programs should be revised.

In an effort to facilitate a positive federal-state cooperative effort on worker safety and health, the statute permits each state to administer the OSHA program within its borders, with 50 percent federal funding, if the state program is approved by federal-OSHA. At present, 23 states operate state plans on a probationary basis. No state has received final approval from OSHA. Most state plan administrators have complained of a lack of commitment by federal-OSHA to the Act's policy of state involvement, including complaints about the criteria developed for approval of state plans, the lack of recognition

of differences among states in safety and health needs, and of a lack of access to top OSHA administrators. With OSHA programs in nearly one-half the states under the jurisdiction of state governments, federal-OSHA must make those state programs no less than full partners in the total OSHA effort. The Assistant Secretary should appoint a task force, chaired by the Director of Federal Compliance and State Programs including several state plan administrators, to develop a policy framework for fully integrating the states into the overall OSHA program.

Medium-term Problems and Recommendations

The thrust of the Administration's program during the first year in office should be to implement the policy changes developed by the respective task forces recommended above. For most of these policies, it will be desirable to seek additional input before full implementation, including comments by NACOSH.

Budget Recommendations

Considering the enormity of the task of substantially reducing worker injuries and illnesses, OSHA appropriations, which in fiscal year 1980 were approximately $183 million, have not been lavish. The above recommendations contemplate stable appropriation levels. No rescissions or supplemental requests for fiscal year 1981 are recommended. For fiscal year 1982, overall government budget policy guidelines of no growth or limited growth could be easily accommodated.

EMPLOYMENT STANDARDS ADMINISTRATION

Summary

Wage and Hour Division

The Wage and Hour Division administers provisions of the Davis-Bacon Act, Service Contract Act, Public Contracts Act, and the Contract Work Hours and Safety Standards Act. While criticism has been leveled at each of these statutes regarding both their substantive provisions and administration, this report focuses principally on the Davis-Bacon Act. The Act calls for the payment of "prevailing" wage rates to laborers and mechanics engaged on federal and federally-assisted construction projects.

According to former Attorney General Griffin Bell, however, Davis-Bacon tends "to remove the element of labor costs from the competition to be low bidder on a government contract." Also, the wages determined by DOL to be prevailing are often significantly higher than those actually prevailing. Several studies have found that for these reasons and because the Act cannot be effectively, efficiently or equitably administered, Davis-Bacon has unnecessarily raised the cost of construction throughout the United States.*

Office of Federal Contract Compliance Programs

Executive Order 11246, the Rehabilitation Act and the Vietnam Era Veterans Readjustment Act provide that federal contractors and subcontractors must take affirmative action to employ and advance in employment minorities, women, handicapped persons and Vietnam Era veterans. Whereas none would quarrel with the concept of equal employment opportunity for all Americans, there are growing concerns over whether this affirmative action concept as now practices by OFCCP is proper.

Equal Employment Opportunity Commission

EEOC has jurisdiction over Title VIII of the Civil Rights Act, the Equal Pay Act and the Age Discrimination in Employment Act. The Commission also has authority under Executive Order 12044 to coordinate EEO policies of most federal agencies. While Chairwoman Eleanor Holmes Norton has improved the Commission's case handling machinery, EEOC in several respects has failed to enforce the laws under its jurisdiction in the manner prescribed by Congress.

Short-term Problems and Options

Wage and Hour Division (Davis-Bacon Act)

DOL has proposed a major revision of its regulations implementing the Davis-Bacon Act. The proposal would substantially enlarge the compliance burden for federal contractors and, in particular, would increase the number of union wage determinations. If finalized prior to January 20, 1981, a new administration should stay application of the regulations until, at a minimum, an economic impact statement has been prepared.

*For a comprehensive description of the Davis-Bacon problem, see, A. Thieblot, *The Davis-Bacon Act* (University of Penn. 1975).

The President is authorized by the Act itself to suspend its requirements during a national emergency. The present double digit rates of inflation clearly demonstrate the existence of such an economic emergency and constitute grounds for the Act's suspension. President Nixon did order such a suspension during a similar emergency in 1971.

To insure better administration of the Act, enforcement responsibilities should be decentralized and contracting agencies given final authority to resolve disputes under the Act.

In order to halt the constant escalation of wage rates, a moratorium should be imposed on the issuance of amendments to prevailing wage determinations.

DOL should be barred from requiring non-union contractors to use union work rules and classifications on federal work.

DOL should include a "helper" or "trainee" classification in its determinations in order to encourage labor market entry of minority and youth employees. The Department's present regulations constitute a substantial barrier to these job applicants.

The burdensome paperwork requirements which presently produce reams of data which no federal contracting agency has the capacity to review should be reduced. Weekly payroll reports are required of each contractor and subcontractor which reflect wages, deductions, and contributions. The statute calling for the reports, however, requires only a submittal of a "statement" regarding wages paid.

Steps should be taken to insure the wage scales determined in larger, municipal areas are not applied to rural counties where the true prevailing wage is generally much lower.

Office of Federal Contract Compliance Programs

With respect to Executive Order 11246, questions have been raised regarding the scope of the Order's coverage, its affirmative action concept, administration of the nondiscrimination requirement and due process protections afforded contractors alleged to be in violation of the order.

Jurisdiction

Because the size of the contractor universe exceeds 275,000 companies, little is gained by extending coverage of the order's complex affirmative action and reporting requirements to small companies. OFCCP simply does not have the resources to conduct compliance reviews of all federal contractors, and

it is questionable whether the social engineering mandated by the present program is an effective use of taxpayer dollars when applied to small groups of employees.

- Contractors should not be required to include in their affirmative action programs minority groups which are represented in the labor force in such significant numbers that affirmative action efforts would not be meaningful.
- A contractor's "labor force" for a particular job should be limited to qualified individuals located in the reasonable recruitment area for that job.
- Contractors which employ women and minorities in their aggregate workforce at a ratio equal to at least 80% of their availability in the labor force should be exempt from preparing AAPs.
- Contractors should not be required to perform a utilization analysis for any job group which has so few incumbents that the results would not be statistically significant.
- In calculating "availability" figures, contractors should only have to consider individuals who are qualified for, and interested in, a particular job.
- Contractors should be deemed underutilized only when women and minorities are not found in job classifications in reasonable proportion to their presence in the qualified labor force.
- Goals and timetables should be voluntary and constitute only one method of demonstrating good-faith efforts to ensure equal employment opportunity.
- Contractors should be entitled to hire the most qualified applicant for a particular job.
- Training programs should be voluntary and constitute only one method of demonstrating good-faith efforts to ensure equal employment opportunity.
- Alternative recruitment sources should not be required to be utilized if female and minority applicant flow is sufficient to generate qualified applicants for job openings.

Affirmative Action

OFCCP's current approach to enforcement of the affirmative action obligation is to force contractors to achieve statistical parity in employment and salaries even in the absence of intentional wrongdoing. A more appropriate standard would be the requirement that contractors take good-faith affirmative efforts to employ women and minorities in those areas of the

workforce where they are not currently employed in reasonable proportion to their presence in the qualified labor force.

Nondiscrimination

Questions have also been raised as to OFCCP's enforcement of the Executive Order's nondiscrimination requirement. Here, a contractor's nondiscrimination obligations should be defined in accordance with the standards applicable to Title VII. Secondly, OFCCP should be barred from affording retroactive relief to aggrieved individuals as a condition of government contracting. Complainants seeking such relief should rely on Title VII's broad equitable remedies. Finally, OFCCP should have no authority to impose remedial quotas.

Due Process

- Information submitted to OFCCP pursuant to a complaint investigation or compliance review (e.g., AAPs, EEO-1 forms, support data, etc.) should not be disclosed to third parties, including charging parties, employees or other government agencies without the written consent of the party submitting the information.
- Administrative requests or rulings requiring the production of witnesses or documents involving allegedly confidential information should be subject to immediate judicial reviews.
- Violations of E.O. 11246 should not be predicated either directly or indirectly upon conduct which occurred during a period of time encompassed by a letter of commitment, conciliation agreement or consent decree.

Serious problems have also arisen concerning OFCCP's regulations governing construction contractors. For example, federal construction contractors are required to take and "adequately" document 16 affirmative action steps to meet specific minority and female employment "goals." These "goals" are currently being enforced as quotas, and OFCCP rarely finds a contractor's documentation to be adequate. Also, the goal for female employment in construction has no statistical basis and was arbitrarily established. Contractors have not been able to find women willing or able to work in construction and are, therefore, regularly found in noncompliance for failure to meet goals. Accordingly, a numerical goal with respect to female employment in construction should be replaced with a standard requiring only that such contractors engage in good-faith efforts to employ women in construction.

Equal Employment Opportunity Commission

All existing and pending regulations should be reviewed to determine whether they implement, rather than broaden, Title VII as enacted by Congress.

Medium-term Problems and Options

Wage and Hour Division

As recommended by the General Accounting Office in 1979, the Davis-Bacon Act should be repealed. GAO concluded that "the concept of issuing prevailing wages as stated in the Act is fundamentally unsound."

If the Act is not repealed, then a comprehensive review of its implementing regulations should be made. Such a review should include a careful examination of the methods used by DOL in making wage determinations.

Office of Federal Contract Compliance

Executive Order 11246 should be reviewed to determine whether, in light of the remedial authority established by Congress under Title VII of the Civil Rights Act, the program should be continued. Here, the question should be answered whether the federal government should be permitted to deny contracts to companies entirely innocent of wrongdoing, but who have failed to structure their workforces in accordance with racial and sexual criteria mandated by OFCCP.

If, however, the program is to be continued, then the executive order and its implementing regulations should undergo a thorough review. The remedies available under E.O. 11246 deserve careful attention. Its enumerated sanctions are directed towards correcting two distinct types of wrongs—breach of the government contract and harm to the victims of past employment discrimination. Although the latter type of wrong is properly corrected through Title VII's equitable principles as established by Congress, OFCCP has taken the position that the executive order gives it the authority to seek "appropriate relief" for persons determined to have suffered past discrimination. Also, OFCCP has begun to debar from federal contracts companies who clearly are not engaging in discriminatory conduct but who disagree with the steps to be taken in meeting the affirmative action obligations.

Equal Employment Opportunity Commission

The following legislative changes are recommended:

• Reform the Commission's regulatory procedures. Under present law, EEOC is authorized to issue guidelines to aid those persons subject to its requirements achieve compliance with Title VII. EEOC officials, however, candidly admit that the guidelines are drafted to conform with their view of what they think the law *should* be, not what it really is. Distressingly, the courts often defer to these guidelines when deciding Title VII cases. In fact, the Supreme Court has stated that EEOC guidelines are to be accorded great deference.

The Commission's authority to issue interpretive guidelines, therefore, should be clarified and standards established governing their development. Also, the right of a person affected by such guidelines to challenge their validity in court *prior* to their enforcement should be authorized. Standards by which courts will review such actions should be specified, including a requirement that they do *not* have a presumption of validity.

• Revise class action procedural rules. EEOC regularly attempts to bring broad class action suits and engage in discovery without adequately defining the scope of its investigation. As a result, an employer has no real protection against an investigation which is nothing more than a fishing expedition.

• Strengthen protections against improper disclosure of employee data. Present law provides no clear guidance on the degree to which EEO data compiled by employers is to be disclosed to third parties. Whereas Title VII bars EEOC from releasing to third parties information which it obtains in an investigation, the NLRB has ordered employers to provide such information to their employees' collective bargaining representative. Similar orders have been issued relative to EEO data submitted by federal contractors to the Office of Federal Contract Compliance Programs, even though the Trade Secrets Act may prohibit such disclosure. Because of the uncertainty found in existing law, several cases dealing with this issue were recently argued before the District of Columbia Circuit Court of Appeals.

• Establish procedures for electing remedies and encouraging resolution of Title VII claims through binding arbitration. Under present law, a person aggrieved by unlawful employment discrimination may seek relief simultaneously in several different forums (e.g., Title VII, Executive Order 11246, 42 U.S.C. Sec. 1981, a collective bargaining arbitration clause, and state fair employment practice laws). The number of such forums should be reduced in order that judicial and

administrative resources will not be wasted in processing the same cause of action in several different forums.

• Define the extent to which third parties harmed by actions taken by persons in reliance on Commission guidelines may seek relief from EEOC itself. EEOC has proposed guidelines prohibiting employers from refusing to allow women of child-bearing capacity to work near certain toxic substances. Because such substances may harm the unborn fetus, some employers presently bar such women from workplaces using these substances. EEOC, however, considers this practice to *prima facie* evidence of unlawful sex discrimination. If EEOC prevents employers from taking action to protect the health and safety of workers and their offspring, then the Commission and not employers should bear the cost of any resulting liability.

• Establish in law that any action not prohibited by Title VII cannot be made unlawful through an Executive Order. Presently, when the EEOC fails to convince the courts that a particular employment practice is unlawful under Title VII, OFCCP often declares the practice in question to be prohibited by Executive Order 11246.

• Insure that no liability will attach for actions taken in reliance on Commission rulings. Under present law it is not clear whether actions taken by an employer in reliance on EEOC guidelines, rules, opinion letters, etc., will absolve the employer of liability if the Commission decides to reverse its position.

• Liberalize the present standard used to award attorney's fees to the prevailing party in Title VII litigation. Under present law, plaintiffs receive such fees as a matter of course, but prevailing defendants must show the plaintiff's suit was vexacious or brought in bad faith. This double standard impinges unfairly against small employers who must defend themselves against such suits, particularly those involving broad class action allegations involving large discovery costs.

• Clarify procedural rules regarding discovery. Title VII should be amended to define more precisely the scope of discovery when the Commission investigates an individual complaint or brings a Commissioner's charge against an employer. The scope of discovery with respect to individual claims is overly broad under existing law.

• Statute of Limitations: Clarify existing law to state that a complainant must file a charge of employment discrimination with either the EEOC or a state 706 agency within 180 days of the discriminatory act. Require also that any suit brought in

federal court must be filed within two years of the filing of a charge by a private party. In addition, require that a private plaintiff Title VII suit be filed within two years of the time from which the plaintiff was eligible for a right-to-sue letter. The latter rule would apply regardless of the status of the EEOC investigation.

• Consent Decrees: Clarify Section 713(b) of Title VII to make clear that when an employer relies upon the provisions of a consent decree entered into with the government, such actions cannot form the basis of later Title VII liability.

• Pregnancy Discrimination: Adopt amendments correcting the problems caused by the guidelines issued by the EEOC under the Pregnancy Discrimination Amendments to Title VIII.

LABOR MANAGEMENT SERVICES ADMINISTRATION

Labor Management Standards Enforcement

This area exists because of the Landrum-Griffin Labor-Management Reporting and Disclosure Act of 1959. While the Act supposedly creates "union democracy" and exposes racketeering, neither has been accomplished and much harm has been done. Specifically, the internal union election investigation power has been currently used to tie up the department in the candidacies of radical union leaders.

Short-Term Administrative Recommendations

• By administrative fiat, shift the investigation focus from organizing campaigns and internal union elections to racketeering. This action must be coordinated with the Justice Department.

• Revoke the rule exempting certain unions with "small" budgets from LM-2 reporting requirements.

Short-Term Legislative Recommendations

More likely to reduce union racketeering is the provision in the proposed criminal code reform bill closing the union loophole that the *Enmons* decision put in the Hobbs Anti-racketeering Act which basically exempted union violence if committed in furtherance of a collective bargaining dispute.

Medium-Term Recommendations

• Repeal Landrum-Griffin except for LM-2 and LM-3 financial reports by unions.

• More likely to reduce union racketeering is elimination of union special privileges and immunities which make unions such an attractive target for power-seekers and racketeers:

1. Repeal those sections of the Landrum-Griffin Act which force government intervention in private labor and trade associations. Repeal those National Labor Relations Act provisions which establish collective rights as paramount to individual rights, (29 USC 151 *et seq.*). Repeal the arbitrary feature of NLRA Section 14(b) (see also 157, 158(a)(3)); as well as the federal promotion of compulsory unionism in the Railway Labor Act, (45 USC 152(11)), providing that existing contracts be left unaffected. Repeal the exclusive representation feature of the NLRA, (29 USC 159(a)), and the Railway Labor Act, (29 USC 152(4)), to alleviate the union's burden of the free rider.
2. Amend the Constitution to prohibit discrimination on the basis of membership or nonmembership in a labor or other organization. Amend the exclusive representation provision in the Postal Service Act, 39 USC 1203, to allow minority unions composed primarily of ethnic minorities to bargain collectively for themselves. Amend the Railway Labor Act, (45 USC 151 *et seq.*) to allow deauthorization elections by employees who do not want to be fired for lack of union membership. Amend the NLRA to eliminate compulsory hiring hall arrangements (29 USC 158).

• Enact a Student Right to Work bill which sets a minimum age below which compulsory unions could not be imposed. This would allow students, at a financially difficult period of life, to obtain employment and not be fired for failure to join a union. Enact a Free Press Right to Work Bill for broadcasters and journalists who do not wish to be influenced by having to join a labor union.

• Apply the laws to union officials as they would apply to anyone else. Curtail federal preemption of state civil and criminal laws, *International Union* v. *Russell* (US SCt, 1958), 356 US 634; *United Construction Workers* v. *Laburnum Construction Corporation* (US SCt, 1954, 347 US 656. Apply equally the laws of agency for state torts, *United Mine Workers* v. *Gibbs,* 383 US 715, 86 SCt 609 (US SCt, 1966), 53 LC ¶11, 135.

• Eliminate the union exemption in the Hobbs Anti-Racketeering Act, 18 USC 1915-1954 (1920); *United States* v.

Emmons, 410 US 396 (US SCt, 1973), 70 ¶13,425; *United States* v. *Local 807 International Brotherhood of Teamsters,* 315 US 521 (US SCt, 1942), 5 LC ¶51,131. Eliminate the judical anti-trust exemption for union anticompetitive monopoly power, 15 USC 17; 29 USC 52, 104, 105, 113; *Connell Construction Co.* v. *Plumbers and Steamfitters, Local 100,* 421 US 616 (US SCt, 1975), 77 LC ¶10,873; and *Local 189, Meat Cutters* v. *Jewel Tea Co.,* 381 US 676, 85 SCt 1596 (US SCt, 1965), 51 LC ¶19,755.

Eliminate the new judicially-created exemption from punitive damages against union officials, *Foust* v. *IBEW,* 442 US 42, 47 USLW 4600 (US SCt, 1979), 86 LC ¶11,308.

• Pensions under collective bargaining agreements should be equally free from union retaliation for unfavorable representation votes as they are now free from employer retaliation, *Baltimore Rebuilders, Inc.* v. *IBEW,* 442 US 42, 47 USLW 4600 (US SCt, 1979), 86 LC ¶11,308.

• Because the public employee work-force is different for a number of reasons from the private sector, including the "essential" nature of the services and constitutional implication of such employees not working for but against the taxpayers, the public sector cannot be subject to the direction of third party union officals. Consequently, strikes, compulsory arbitration, political activity and political spending have no place if the government is to remain for the people (*Abood* v. *Detroit Board of Education,* 431 US 209, 975 SCt 1782 (&S SCt, 1977), 81 LC ¶55,041; see also *National League of Cities* v. *Usery,* 426 US 833, 96 SCt 2465 (US SCt, 1976), 78 LC ¶33,390).

Budget

It would do no harm to eliminate this entire administration by deleting *all* funds. Realistically, funds could be deleted for the most offensive labor-management standards, services, policy, and construction industry departments. At the least, funds should be deleted for the purpose of investigating union organizing campaign pursuant to Landrum-Griffin § 203b.

Personnel

At present, the staff of the labor-management departments is pro-union and political in presentation. They refer to Right to Work proponents as "the enemy". A complete house-cleaning is required.

Construction Industry

This area of Labor-Management Services continues to be of prime importance to the construction industry. Despite Congressional rejection of so-called "common situs" secondary boycott picketing measures, promoted by the construction unions to enhance their power base in the industry, there are many areas remaining in need of administrative or legislative attention.

Initially, a serious question is raised concerning the need for a policy position by the Executive Branch on so-called "common situs" picketing legislative proposals of the construction unions. Similarly, other problem areas exist in which the need for correction or modification have been demonstrated; namely:

- The increasing pro-labor union decisions of the National Labor Relations Board, despite a continuing increase in the number of NLRB decisions rejected by the various U.S. Courts of Appeal.
- The seeming activist role assumed by the U.S. Department of Labor in its regulatory and enforcement responsibilities in support of the aims of organized labor, rather than efforts to achieve a true and meaningful application of those laws in the labor-management sector.
- Violence and property destruction continues in the construction industry, closely associated with local construction union organizing drives. Civil enforcement authorities are not equipped to handle such occurences, due in great part to the interstate mobility of those elements that usually commit such acts. There should be fostered a specific enforcement program under the jurisdiction of the U.S. Department of Justice to eliminate the criminal and racketeering influences in the construction industry, especially that which is demonstrated to control the policies of local construction union leadership.

Short-Term Problems

The most important step for a new administration is the appointment of personnel to appropriate policy positions in the U.S. Department of Labor to effectuate needed changes in policy and application of programs, especially in the labor standards sector.

Proposed revised Labor Department regulations on application and enforcement of the Davis-Bacon Act are pending.

They have been widely criticized as an effort by the U.S. Department of Labor to expand application of the Act beyond the actual intent of the Congress in enacting this law. An effort should immediately be made to halt this agency power expansion effort.

There are continuing reports of misused jointly managed trust funds in the construction industry (i.e., civil suit in U.S. Dist. Ct. in San Francisco concerning laboe-management trustees' administration of union vacation fund). The Labor Department and the Justice Department should have an ongoing inspection and compliance program underway under provisions of the applicable sections in the ERISA statute to protect the interests of contributing employees and workers. (Ref: ERISA, Sections 504, 506)

Pending measures for criminal code reform lack the needed provision to overcome the effect of the past U.S. Supreme Court decision in the *Enmons* case, giving the unions *carte blanche* authority to commit violence and extortion under the guise of the existence of a labor dispute. Other features of the pending measures raise many questions about compliance in the construction industry, especially those dealing with the concept of agency liability and responsibility for possession of stolen construction equipment. Other provisions seem to have anti-business overtones. Any final legislation should be carefully considered for rejection unless such provisions have been corrected.

Medium-Term Problems

Legislative reform measures which should be considered:

- The National Labor Relations Act should be specifically amended to make so-called "hot cargo" agreements unlawful between unions and governmental agencies and authorities. (NLRA, Section 8(e)). This is extremely important in the construction industry where all responsible and qualified construction firms should have an opportunity to bid for performing public works construction.
- Pre-hire Labor Agreements in the construction industry should be abolished. The construction employee's freedom of choice should be protected and made subject to the selection processes of section 9 of the NLRA.

Pension and Welfare Benefit Programs

Federal retirement policy has usually been conceived of as a "three-legged stool"—personal savings, Social Security and

private pensions. As taxes and inflation have forced people to stop saving, and as the Social Security system lurches each year towards bankruptcy, individuals, and policy-makers, have come more and more to lean on the country's private pension system as a means for providing for retirement.

Private pension plans now cover half the nation's private sector employees. In 1977, private pension assets were 27 percent of GNP, and, in 1978, they totaled $320 billion. It is estimated that pension plans hold 25 percent of the country's equity securities and 40 percent of its fixed income securities. Based on union misuse of large sums of money to bludgeon Manufacturers Hanover Trust Bank in the J.P. Stevens battle and Seattle First Bank, the real motive for union control of this capital is ominous.

In the last few years, a new weapon has arisen in the liberal politician's/labor leader's artillery: using the vast reserve of pension funds to further political or ideological needs. These proposals have argued using these funds to "reindustrialize" certain parts of the economy; build low-income housing; revitalize sick industries in the Northeast, etc. One proposed way of doing this is to give labor unions *total* control over the pension assets of their members. Persumably, labor leaders would use these assets in ways that would "help" the community. Clearly there are serious economic (and moral) problems involed in this type of strategy. They include:

- Past experience of control of pensions funds by union leaders has not provided any reassurance that union leaders will invest the funds in order to provide the financial security demanded by their members.
- Moreover, the concept of using the hard-earned savings of workers to revitalize industries that are not profitable or competitive gives union leaders the permission (with the general approval of the government) to squander away the earnings of their members.

The current system, built around large defined benefit plans (i.e., plans which provide for a fixed stream of income at retirement), managed by large institutions (big unions and big corporations), presents some serious problems:

- While coverage is fairly broad, many employees are not employed by an employer long enough to earn benefits (and as the work force becomes more mobile, this problem is exacerbated). Those employees that do earn benefits find them quickly wiped out by inflation.
- Private pension plans, particularly multi-employer plans

operated by union boards of trustees, are seriously underfunded.

• ERISA, while making it easier for an employee to earn a pension and requiring employers to fund properly, has imposed massive administrative burdens on employers, particularly small businesses, thereby discouraging their continued use of pension plans.

Short-Term Recommendations

The most important thing that can be done to solve these problems is to strengthen the personal savings "leg" of the "three-legged stool", through the expansion of the availability of Individual Retirement Accounts (IRAs). This would take a lot of the pressure off of private pensions and would make possible the second important change, the paring down of ERISA and the streamlining of the Department of Labor's administration of it.

Proposals for the expanson of the availability of IRAs and the reduction of federal regulation are discussed below. The IRA proposal is discussed even though it is a legislative project, because it provides the basis and justification for the retreat from federal regulation.

Given the enormous complications of ERISA, the current flood of federal regulation was inevitable. Listed below are proposals which would help stem the tide, but it must be emphasized that the only long-term solution is the undoing of the work of the last six years.

• IRS projects expanding regulation of plan content (e.g., proposed Treas. Regs. A1.411(d)-1(d)) must be stopped. Current regulations under Code Section 410 and 411 should be reviewed with a view to simplification.

• DOL disclosure regulations emphasizing cumbersome "three volume novel" style summary plan descriptions should be revised, permitting more flexible, face-to-face communication of benefit plans. Reporting requirements should be reviewed (are the reports even read?) with a view to permitting more self-administration.

• Regulations under the new and enormously complicated Multiemployer Plan Bill should be promulgated providing reasonably inexpensive methods for administering those plans.

• Regulations should be promulgated (by DOL) prohibiting the "social investment" of plan benefits, which necessarily and inevitably results in a loss of financial equity over what would have accrued had strictly financial criteria been employed by pension managers.

IRAs provide a tax deduction for personal retirement savings. Currently you can contribute to an IRA up to 15% of your income, to a maximum of $1,500, if you are not covered by a pension plan. There are two problems with the current system. First, the contribution limitation ($1,500) is too low and is not adjusted for inflation. Second, the limitation of IRSs to taxpayers who are not participants in a pension plan prevents many employees from providing for their retirement, even though they never earn a benefit under the plan which covers them.

Over the past four years, there have been several proposals to expand the use of IRAs and to allow employees to make tax deductible contributions to pension plans in which they participate. It is absolutely essential that some such proposal, including an increased, inflation-adjusted, maximum amount, be adopted. With double digit inflation and the current tax structure, it is impossible for people to save without a tax deduction. Moreover, it is grossly unfair to give employers tax deductions for saving for their employees' retirement and not give the same deduction to the employees.

It is hard to exaggerate the benefits that would flow from this approach. With IRAs, there are none of the problems of employees failing to earn benefits or employers failing to fund them. Every penny an employee puts in, he will get back at retirement regardless of how long he works for any employer. Administrative burdens on the employer are reduced because the employee is administering his own benefit. Perhaps most importantly, the employee has the opportunity to manage his own pension investments, thereby bringing individuals back into the country's capital markets.

The Carter Administration has been opposed to the expansion of IRAs because it wants to keep up pressure on the private pension plan system, which it regards as a form of transfer payment—in order to have a private pension plan, you must provide benefits to your lower paid employees as well as your higher paid employees. The Carter Administration's position, that retirement savings should be undertaken and administered by large institutions (big corporations, unions and the federal government) and that personal retirement savings should be discouraged, is antithetical to traditional American principles. To the extent that transfer payments are necessary, they should be treated as such and handled through the Social Security system or some other welfare system, rather than through a distortion of the private pension system and the discouragement of personal savings.

EMPLOYMENT AND TRAINING ADMINISTRATION

The Employment and Training Administration is currently one of the poorest managed, confused, and directionless agencies in the government. The agency pursues three sometimes contradictory missions—social, economic, and political—and constantly shifts direction in response to the changing whims of Congress. It is an agency that flies by the seat of its pants, and does even that poorly. Major changes are required in the legislation that provides the agency its mandate; in the agency's administrative personnel (from top to bottom), and in its management techniques.

Basic Policy Assumptions

As noted above, the agency pursues numerous sometimes undefinable missions. Some of this is not the agency's fault but comes from almost two decades of Congress' shifing focus. Essentially, the agency has sporadically followed economic, social, and political goals:

Economically, employment and training policies have alternatively been designed to either offset recessionary rises in unemployment largely through massive expenditures in local public jobs; to solve structural unemployment and improve the nation's productivity by upgrading, through local contracts, the skill level of the unemployed.

Socially, employment and training dollars have served the goals of equal employment opportunity by attempting to break down racial and institutional "barriers" to employment and targetting resources on the most severely economically disadvantaged.

Politically, ETA devotes large resources to political pay-offs to various special interest groups.

The new administration, Congress, and the Department must set a long range mission and establish a long term legislative and administrative objective to meet the goals of this mission. There is one mission for ETA: to use federal employment and training resources to enable individuals who lack skills to enter the labor market in a way that fulfills private sector needs without displacing the available labor supply and in a way that is compatible with the overall economic strategy of the new administration.

Summary of Principal Deficiencies of Existing Policies

- Existing policies are confused, contradictory, and have no clear cut goals.

• The authorizing statutes, particularly the Comprehensive Employment and Training Act of 1973 (CETA), Wagner-Peyser (The U.S. Employment Service), the Work-Incentive Program, are chiefly responsible for the confusion. The statutes are not clearly conceived. For example:

1. *CETA* theoretically combines "structural" training programs with countercyclical jobs programs, and does neither very well. Eligibility requirements are inconsistent, paperwork requirements horrendous. Based on local control, but with so many strings that there is no flexibility. Concern that local elected officials are not in a position to run a good objective program. Need to reexamine CETA as the framework of delivering employment and training.
2. *WAGNER-PEYSER* establishes U.S. Employment Service. Again with no mission. U.S.E.S. in constant identity crisis. Whom does it serve: Everyone? Just the poor? Employers? Does it have enforcement responsibilities? Training? How does it tie into the unemployment insurance system? CETA?
3. *WIN*—Work Incentive Program-Serves welfare clients, but again, who, what, when, and why? What does WIN accomplish without effective work requirements?
4. *TRADE ACT*—Trade Adjustment Assistance—Is it just glorified UI, or is it a retraining effort?
5. *WELFARE REFORM*—What is the role of ETA in putting able-bodied welfare recipients to work? What happens to Job Search then?

These are just a few of the statutes that help cause ETA's distress. The agency has great difficulty choosing among its roles and determining which one it can do best. Finally, all these statutes are poorly administered.

Short-Term Problems and Options

The key elements required to reform ETA are the following:

- Establishing an agency mission
- A competent Secretary of Labor
- A manager as Under Secretary
- An experienced manager/policy person as Assistant Secretary for ETA, who has had both local and national experience
- A crack manager as Deputy Assistant Secretary
- A firing of all existing top level personnel
- A good Congressional relations person

• Establishing clear lines of responsibility and authority within the Department

Medium-Term Problems and Options

Administrative

As noted above, an entire revamping of the Administrative structure of ETA is needed. This includes, in addition to those outlined above:

• Replace all top level people with people of sound management credentials.

• Clearly delineate lines of responsibility.

• Provide clear missions and goals for all departmental personnel. Performance goals and standards must be set up at all levels.

• Restore sound management practices at all levels: 1) goals/missions; 2) planning; 3) executing; 4) review and 5) replanning.

• Reexamine the role of National Office vs. Field Offices. Under past Republican Administrations, field offices had power, based on notion of local control and varying economic conditions—the national office issued general guidelines, but left responsibility for implementing them up to the regions. Presently, no one knows who is in charge.

• Public Relations, particularly to encourage private sector participation, is non-existent. The Department is incompetent in "selling" its wares.

• Office of Management Assistance. This office was supposed to provide high quality technical assistance. It is now an operational office. This is not what it was meant to be.

• Audit Evaluation, Enforcement is one of the most glaring problems in the agency. It needs greatest attention. Audit procedure and enforcement procedure currently have no rhyme or reason. Performance and fiscal audits are done by individuals who aren't qualified to do either.

• The Office of Inspector General needs evaluation and must have qualified individuals. The IG office can have an important enforcement and audit role. It must be staffed by a professional.

• Upgrade Field Reps (now GS 11-12s). Field reps are the key link between DOL and local governments. There is too much turnover, too little experience. Field reps serve too many roles.

• Coordinate Policies and Regulations among all ETA's

agencies. Each is currently its own fiefdom: CETA, the ES, WIN, UI, Youth Programs, National Programs, although they should be compatible. Policies and regulations are needlessly contradictory and make efficient use of ETA resources all but impossible.

• The Management Information System must be upgraded. ETA is consistently unable to respond to Congressional inquiries about the status of its various programs. The Carter Administration has been caught redfaced much too often (at one time it overestimated public job levels by 200,000 or nearly $2 billion worth).

• The Office of National Programs must be cleaned out, and all CETA Title III programs reevaluated.

• The Office of Youth Programs should be consolidated under CETA.

• Reevaluate ETA's enforcement role and the relation between ETA's employment and training responsibilities and the negative effects of ETA's EEOC and other enforcement responsibilities. ETA operates under 30 separate statutes, some of which are chiefly enforcement.

Legislative Agenda

Attention to these items cannot be delayed if the Administration is to have any policy impact in the 97th Congress:

• *CETA REAUTHORIZATION—Expires Sept. 30, 1982.* The Administration must be prepared to submit a CETA reauthorization bill no later than the end of the first session of the 97th Congress. There is a good deal of talk on Capitol Hill about replacing the entire system with something else. The growing suspicion is that local elected officials have too many agendas to run such an effort. Any such submittal must be considered in light of the agencies' long-term mission, and be drafted to be co-directed with other possible legislative submittals (Wagner-Peyser, Welfare Reform, Private Sector Initiative, etc.)

• *PRIVATE SECTOR INITIATIVE PROGRAM (Title VII of CETA).* This is one of the more popular programs in the Congress because it allows industry to actively participate in designing employment and training programs. It might be looked at as possible alternative to CETA, once its effectiveness is proven.

• *WAGNER-PEYSER*—(U.S. EMPLOYMENT SERVICE). The Act which establishes the U.S. Employment Service is perpetual and has not been revised since 1933. But it has

been "amended" by dozens of other statutes. (Various unemployment insurance statutes, WIN). There is a need to separate these out and reevaluate them.

• *WELFARE REFORM.* This is an issue that fails to go away. President Nixon tried and failed. President Carter tried twice and failed. ETA's role is to provide private or public jobs and training to able-bodied welfare recipients. The Carter Administration started some very interesting job search programs (with strong work requirements) that House Republicans liked. Perhaps this is why those were terminated.

• *CETA TITLE III—National Programs.* CETA Title III provides the Secretary of Labor with over $300 million in largely discretionary dollars, most of which is used to pacify various political interest groups. Title III should be reexamined.

• *TRADE ADJUSTMENT ASSISTANCE.* Authorized under the Trade Act, there is evidence that Trade Adjustment Assistance is little more than "glorified" unemployment insurance and does little retraining or relocation. Possible policy change in this area is warranted.

• *OTHER LEGISLATIVE AREAS: Kemp-Garcia Enterprise Zone Act.* The role of ETA in developing a legislative policy tied into a broader economic development package, such as that outlined in the Kemp-Garcia bill, will have to be considered.

Personnel Management

Management Plan and Staffing Philosophy

We have touched already on the key elements needed to restore management proficiency to this bungling agency. These are a competent Secretary of Labor, Undersecretary and Assistant Secretary who have management expertise. Staffing must follow suit. "Policy" types should not be put in operational capacities, a problem that is endemic in ETA today. (The Department is overloaded with policy types). Clear lines of authority and accountability must be established; job descriptions must be developed for all personnel along with performance standards. The wage scales of GS 17s and above must be reviewed in light of GS 15s and 16s. Field reps must be upgraded and turnover reduced. Quality audit teams must be established. Long range planning must be instituted, followed by implementation, review, and replanning. The policies of all the agencies must be coordinated through a strong Deputy

Assistant Secretary for ETA. Each agency cannot be allowed to go by a different drum. The role of the regional offices must be established. Audit and Management capability has to be reshaped and upgraded.

Staffing Levels

Surprising as it might be, ETA is understaffed. For all practical purposes, it has the same staff it had when it had a budget 1/5th the size of the current budget. It is a bitter pill, but government programs have outstripped the government's ability to manage them. One of the answers is to reduce the size of govenrment programs. But at current program levels, staffing, in number, competence, and placement is weak.

Consultants and Other Contract Management Services

DOL is in a hotbed of outrageous, wasteful, sweetheart contracts with a variety of consultants. It should be noted that this does not mean there aren't any worthwhile consultants and management services—just too many suspiciously bad ones. Tens of millions are spent on studies and evaluations that will never affect any departmental, Administration, or Congressional policy. And there are too many groups that appear to have an inside track on new contracts, who seem to thrive on this kind of governmental largess. All of these should be evaluated up front to determine whether or not this makes one difference in developing policy. There is strong suspicion that little, if any of it, does.

Long-Term Problems and Opportunities

As repeatedly stated, the Department has to establish a definitive mission and the long range goals needed to accomplish it. Its budget, administrative and legislative agenda in all spheres has to be coordinated to meet the goals. This requires buisiness-like planning and qualified people to do it.

The opportunities for ETA are immense. It can serve as a catalyst for bringing together competing interests such as management and labor to improve the nation's productivity by upgrading the skill level of the nation's workforce. It can serve to bring a coordinated approach to solving the nation's intractable youth unemployment problem. It can help individuals (particularly welfare eligibles) to learn how to look for and obtain work. And it can do so without putting everyone on the public dole.

This will require a major overhaul of the agency—perhaps reestablishing its entire administrative structure along functional lines. This will take time, considerable planning and patience.

If the Administration can establish a mission for ETA and staff it with people of strong leadership and management ability, this is all possible.

OFFICE OF THE SOLICITOR

The Solicitor's Office ("SOL") is made up of the Solicitor, Deputy Solicitor, ten divisions (each headed by an Associate Solicitor) and sixteen field offices (headed by Regional Solicitors or Associate Regional Solicitors). Its primary functions are to act as legal advisor to the Secretary and the various Administrations and Offices of the Department of Labor ("DOL") and to provide court and administrative enforcement of various laws administered by DOL. This latter function is perfomred primarily by the field staff. However, certain aspects of SOL's organization and workload distinguish it from other offices of DOL and give it the potential for taking on broader functions.

One of the major distinctions of SOL is that, unlike many Departments and Agencies, all of the practicing lawyers within the Department of Labor report on substantive matters to the Solicitor and are subject to the Solicitor's administrative control (hiring, firing, promotions, adverse actions, etc.). Although the various Administrations and Offices of the Department are provided legal service by the various SOL divisions, none have either substantive or administrative control of their lawyers who are, thus, more independent of their clients than is the case in other Agencies.

Another factor which, in this case, distinguishes SOL from the rest of DOL is that other than the Secretary and Undersecretary, the Solicitor is the only officer of the Department who deals on a daily basis with all of the various programs and laws of the Department. In addition, unlike the Secretary and Undersecretary, the Solicitor has a large staff to assist him or her. As a consequence, the Solicitor is in a unique position, depending upon the desires of the Secretary, to coordinate the various programs of the Department and to become significantly involved in the substantive decisions of the Department and its various Administrations and Offices.

Deficiencies and Problems

The primary deficiency of the present Solicitor's Office would seem to be its expansive attitude toward governmental control of the workplace. Presumably this direction has been encouraged by Secretary Marshall.

Another aspect of the Solcitor's Office, which might be termed a deficiency but is probably a blessing, is the fact that the Solicitor, either by direction or personal inclination, has become so involved in the intricacies of each law suit, new proposal or program that decisions are slowed substantially and the Solicitor's roles in advising on broad policy and coordinating Departmental programs have suffered.

Opportunities

There are two major opportunities having both short and long term consequences. First, the appointment of Associate and Regional Solicitors sympathetic to the labor goals of the Administration can set the groundwork for short and long range changes in the way in which DOL interprets and enforces existing and new laws. These appointment opportunities will normally arise only through attrition, but the new appointee can be reasonably assured of tenure until retirement.

Second, the legal interpretation given existing and new legislation and Executive Orders has both a short and long range impact on the Department's activities. This is particularly true of new laws where the Courts give greater deference to DOL's initial interpretations than they do to later changed positions.

MINE SAFETY AND HEALTH ADMINISTRATION

Both procedural and interpretive changes made by the agency and statutory changes made by the Congress are needed to change the thrust of the agency's focus from an adversarial one to a cooperative one.

Basic Policy Assumptions

It is MSHA's charge to protect the health and safety of the miner. Its basic policy assumption is that compliance with standards assures health and safety and is induced through imposition of penalties of sufficient magnitude.

Major Deficiencies

Provisions of the law do not leave enough room for administrative flexibility. In addition, interpretation and application of terms and regulations by MSHA have been termed "tortured," indicating inflexibility of MSHA's enforcement policy. The underlying cause, however, can be traced to the statutory language.

Summary of Recommendations

A study commission with a one-year term should be appointed by the President. Its charge should be to examine and recommend changes in the statue and in MSHA's application of regulations and standards, with the aim of redirecting the agency's focus from an adversarial one to a cooperative one between government, mine operators and miners in protecting miners' safety and health. The commission should be comprised of eleven persons representing MSHA, mine operators, and miners.

Short-Term Recommendations

During the first 90 days, The commission should be appointed, make its study, and develop recommendations for statutory and administrative changes.

Medium-Term Recommendations

The new Commission should make recommendations to the Congress for statutory changes; agency should implement administrative changes recommended by Commission. The Commission should then monitor progress of implementation of administrative changes and progress of efforts for statutory change. Year-end report should be made to President with a copy to the Congress.

BENEFITS REVIEW BOARD

Summary

There are fundamental institutional shortcomings inherent in the Board's placement within DOL. The Board's dependence upon the Secretary gives rise to conflicts of interest and politicizing of the compensation appeals process. Administratively, this condition is partially correctable but a permanent solution requires legislation.

Significant increases in Black Lung caseload expected over

the next few years requires immediate review of Board personnel requirements, followed by appropriate budgetary initiatives for FY 1981 and FY 1982.

Over the longer run consideration should be given to an evolving role for the Board, assuming added responsibilities already performed elsewhere in the Federal government or which might be conferred by Congress in new workers' compensation legislation.

Basic Policy Assumptions

The Benefits Review Board was created in 1972 with passage of the Longshoremen's and Harbor Workers' Compensation Act Amendments, to assume jurisdiction of claims previously appealed from Deputy Commissioners to U.S. District courts under this Act and the Black Lung Benefits Act. Appeals from Deputy Commissioner orders are to the Board which may, on its own motion or at the request of the Secretary, remand a case to an administrative law judge, while assuring subsequent appeal to the Board. Appeals from the Board are to the circuit courts of appeal. The Board is comprised of three members, appointed by the Secretary for unspecified terms and serve at the Secretary's pleasure. The Chairman of the Board is designated by the Secretary.

Against the back drop of a growing U.S. District court caseload, the Board's creation was intended to relieve case backlog and facilitate timely decisions.

Policy Deficiencies

The policy deficiencies are not so much Board-created as they are Department-imposed. The Board operations are circumscribed by overall Department policies. To wit: Case processing priorities and personnel decison are a function of a budget approved by the Secretary within a context of competing budgetary demands. Furthermore, litigation before the Board is at the ultimate direction of the Secretary—in practice the Solicitor, whose responsibility is advancement of the Department's legal position, not protection of the Board's judicial integrity. It is precisely this conflict which is the foundation of the Board's problems within DOL.

The purpose of the Board, having assumed the initial appellate review previously accorded the district courts, is adjudication of employer and employee claims. Any appellate body, including the Board, will retain the respect of these

parties only to the extent it retains its judicial integrity—a belief by the parties the Board's decisions are well-grounded in precedent and its procedures fair to each.

The purpose of DOL traditionally has been vindication of what it perceives to be workers' interests. Vindication of the interests of one group, however, is fundamentally incompatible with impartial judicial review and elementary notions of due process. Yet, it is this tension between conflicting philosophies which permeates the Board, representing in effect an institutional schizophrenia—the form of judicial independence with the substance of total dependence upon its political creator.

If the Administration is to accept the principle of judicial independence of compensation appeals, it must view the present placement of the Board as presenting a conflict of interest and a politicizing of the appeals process.

Short-Term Problems and Options

Caseload

The Board's caseload is expected to increase dramatically over the next few years, as Black Lung cases reviewed pursuant to the 1977 Amendments, reach the appellate stage. Indeed, this trend is already underway.

Recommendation: During the first 90 days the Under Secretary should review the Board's personnel requirements, particularly the capacity of a three-member board to continue processing the surge of appeals in a timely manner. If then-current and—expected backlogs warrant, immediate consideration should be given to expanding the Board temporarily pending legislative solution. While the statute calls for a three-member Board, so too does the statute creating the Employees' Compensation Appeals Board. Yet, the Secretary has occasionally approved temporary expansion of the ECAB.

Compensation Appeals Process

The compensation appeals process in DOL smacks of conflict of interest and a resultant politicizing. This stems in part from regulations issued pursuant to those sections of the Longshore Act establishing the Board which grant the Secretary of his designee—the Solicitor—on behalf of the Director, Office of Workers' Compensation programs, standing in cases appealed to and from ALJs, the Board and some circuit courts

of appeal. The Solicitor almost invariably appears or appeals on behalf of the claimant.

The Secretary's authority to appeal is predicated on 20 CFR 801.2(a)(10), defining "party in interest" to include the Secretary or his designee. This regulation is pursuant to the Act's section 21(b)(3) authorizing any "party in interest" to appeal decisons to the Board. Authority to appear is found in 20 CFR 802.202, granting any "party" the right to "appear before and/or submit written argument to the Board . . ."

The Solicitor also cites the Act's section 39(c)(1) for authority to appear. This section affords claimants the right to legal advice "upon request," although "upon request" of whom is not specified. DOL has interpreted its rights hereunder broadly, holding that "legal advice" encompasses appearances by the Solicitor on behalf of a claimant, and has arrogated unto itself the decision when to do so. It is unclear whether a claimant has ever requested the Solicitor to appear on his behalf.

20 CFR 802.410 designates the Director, OWCP as "the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA Jappeals to the board!."

Recommendation: The Under Secretary, pursuant to his authority under 20 CFR 801.104, should initiate proceedings for rulemaking redefining "party" and "party in interest" as the "employer, employee, or insurance carrier." The Director, OWCP's status relative to 20 CFR 802.410 should be deleted. Third, the practice of appearing based on section 39 (c)(1) should be ended, with a regulation defining the limits of "legal assistance" and under what specific conditions it is to be undertaken.

Medium-Term Problems and Recommendations

Legislative initiatives during the Administration's first year should address the fundamental conflict of interest aspects of an appeals board dependent on the political demands of competing Departmental entitities.

Presently, the Board is hostage to the policy whims of the Secretary (through the Solicitor) and competing budgetary demands of the Socitor and OWCP. OWCP's Longshore and Black Lung Divisions are responsible for initial claims processing, and the Solicitor, as explained above, may practice before the Board. Additionally, the Board's members serve unspecified terms at the pleasure of the Secretary.

Recommendation: Serious considerations should be given to separating the Board from DOL, establishing it as an independent agency, whose members are nominated by the President and confirmed by the Senate for specified terms. The Board should be provided authority to assign its own ALJs. As an independent agency, the Board would be afforded authority over its own budget and personnel and, consequently, would be free to set its own case processing priorities without the explicit or implicit interference of the Secretary.

Depending on the results of the Under Secretary's review during the first 90 days, consideration might also be given to permanently expanding the Board's membership to five or seven.

Importantly, consideration of legislation relative to the Board should proceed within an overall context of amending the Longshore Act.

Budget

Pending review of the Board's personnel requirements during the first 90 days, the Secretary may request a supplemental FY 81 appropriation to provide for temporary appointment of additional judges and staff to meet the increasing caseload. Assuming that need for additional judges in FY 81, budget authority for continuation of their temporary service should be provided in the FY 82 budget.

Long-Term Problems and Opportunities

Consideration should be given to an evolving and expanding role for the Board—once its independence is assured. There are numerous compensation appeals board within the federal government deciding veterans, Social Security, and Federal Employees' Compensation cases, for example. Is there merit in a unified compensation appeals approach?

If Congress approves legislation involving the federal government to a greater extent in workers' compensation including occupational disease, where the Board is viewed as a vehicle to assure a federal-level appeal of workers' compensation orders, questions over the size, independence, and role of the Board grow in significance.

THE BUREAU OF LABOR STATISTICS

A few housekeeping changes and some restructuring of

responsiblities among agencies will help insure that reports and statistics on the nation's labor force are free from political influence. Long-term data audits and benefit-cost analysis can improve the reliability of statistical reports and decrease their cost.

Basic Policy Assumptions

BLS should be a service bureau with responsibility for centralized and professional gathering and release of statistics on subjects connected with labor, including manpower requirements, labor force, employment and unemployment, hours of work, wages and employee compensation, labor management relations, productivity, occupations safety and health, and the international aspects of these issues.

To be effective as an objective data source, BLS must maintain political independence consonant with its posture of scientific integrity. Neither the contents of its statistical reports nor the timing of their release should be subject to political influence. The structure and administration of the Bureau should reflect this.

Summary of Principal Deficiencies

BLS is generally respected as the most objective division of the Department of Labor. It directs the production of several extensive surveys and maintains, analyzes, and releases routine and special reports on matters relating to labor and a few which properly belong elsewhere. Much of the collection work and dissemination of information is performed by the Bureau of Census or other divisions of the Department of Commerce.

The principal deficiencies of the Bureau are these:

- Despite its respected reputation, at least some portions of the BLS output are subject to charges of pro-labor bias, and others to charges of politically-influenced bias in both the structure of data-gathering surveys and in the interpretation and timing of release of their results.
- The objectivity or fairness of the Bureau's policies and activities are not subject to review outside the Department of Labor.
- Several of the major statistical series maintained by BLS are more closely related to the functions of departments other than Labor.
- Several data-gathering activities within other administrations of DOL seem more suitably located in BLS.

• The Bureau's budget of more than $100 million annually seems excessive in light of its output.

Short-Term Problems and Options

In the first 90 days, the President should appoint a Federal Commission on Statistics—similar in concept, though not in design, to that established for evaluation of paperwork—to insure that the public's confidence in the impartiality of economic and labor statistics is maintained. Under the Commission, a BLS Task Force should evaluate, among other things, the following:

• Applicability of SES career-reserved categories to all program chiefs charged with developing, maintaining, or analyzing labor statistics should be reviewed.

• The United States Code, (29 U.S.C. 1), does not charge BLS with responsibility for statistics on consumer or producer prices. These, along with preparation of cost-of-living indices and commodity and import and export statistics, are more closely related to functions of the Department of Commerce. Furthermore, under present structure, both the Consumer Price Index and the monthly employment and unemployment statistics—the two most politically sensitive statistical indices—are prepared by BLS. Prudence suggests that objectivity would be better served by separating the administration of these two critical series.

• BLS now publishes biennially the *Directory of National Unions and Employee Associations,* compiled from the voluntary responses of union officials to a six-page BLS questionnaire, Form 2441. The voluntary response to this form has been shown to produce inherent inaccuracies and an upward bias in union membership figures. (Thieblot, *An Analysis of Data on Union Membership,* Center for the Study of American Business, Washington University: 1978.) The survey might well be replaced by data already being derived from an annual question in the Current Population Survey (CPS)—which is conducted by the Bureau of the Census for BLS to generate other labor force, employment, and unemployment statistics. Other questions now asked on Form 2441 might be transferred to Form LM-2, *Labor Organization Annual Report,* administered by the Office of Labor-Management and Welfare-Pension Reports. (The legislative intent of the Landrum-Griffin Act, which required the report, could also be better served if the information, now collected on Form LM-2 but neither compiled nor released, were disseminated by BLS.)

• The Department of Labor's Employment Standards Administration now collects and issues wage rates in the construction industry for Davis-Bacon purposes. ESA's collection procedures and methodologies are antiquated and haphazard, often leaving it open to charges of favoritism or gross inaccuracy in determining "prevailing" wages in various parts of the country. (Comptroller General's Report to the Congress, *The Davis-Bacon Act Should Be Repealed*, 1979.) BLS is a perhaps more objective and certainly more sophisticated collector of information of this sort.

Budget

BLS is budgeted at over $100 million for 1981. Although is is undoubtedly over-staffed and over-funded, the degree is difficult to measure. Nevertheless, some savings could be anticipated even from the changes suggested above. The Bureau of Census, which currently conducts the Current Population Survey and disseminates the final reports of the Consumer Price Index, could probably administer the Cost of Living surveys as well—at a cost substantially less than the $38 million now budgeted for the purpose by BLS.

Moving collection of wage rate and fringe benefit information for the construction industry from ESA, where it is estimated to cost $12 to $16 million annually, to the Productivity and Technology program of BLS, which now duplicates much of the information sought by ESA with a budget of $3.7 million, would produce obvious savings.

A publications and data audit would help identify other areas for long-term savings.

Long-Term Opportunities

Statistics on labor and the conditions of the workforce are increasingly important, not only politically, but also because they condition policy decisions and public expectations of the state of the economy and the strength of the nation. To insure that the statistics themselves being generated are useful and are efficiently collected, an independent publications and data audit should be considered. The form of many of the statistical series reflect job and industrial structures which have changed dramatically during the 100 years since BLS was established. In addition, a cost-benefit analysis of legislated but possibly antiquated provisions should be conducted, and new enabling legislation prepared.

Summary

There are eight major recommendations which are designed to improve the NLRB's efficiency, impartiality and expertise in order to achieve the goals articulated by the United States Supreme Court in the *Universal Camera* case (discussed below) and those enunciated by Congress in the legislative history of the National Labor Relations Act. The goal is to insure that the NLRB will re-establish itself as the independent federal agency with real and practical expertise in labor relations which will command the continued respect of both labor and management and the deference once accorded to its decisions by the United States courts of appeals. The NLRB must be seen as an impartial, professional body with true expertise in labor relations and collective bargaining. The first two recommendations are designed to upgrade the labor relations expertise of Board members and Administrative Law Judges (ALJs). The next NLRB chairman, future Board members, and 50 percent of the future ALJ appointments should have substantial experience in counseling, advising, participating and/or representing private sector parties in labor relations matters. The third recommendation would improve the Board's continuing ability to hear actual labor-management problems and deal with them in something other than an academic "ivory tower" fashion, by the requiring the Board to hear oral argument in certain cases. The fourth and fifth recommendations deal specifically with improving the Board's decision-making process through procedural changes which will enable the Board's Administrative Law Judges to find facts and render expert legal decision more efficiently, and insure accurate credibility findings. Discovery procedures should be adopted and witness sequestration rules be uniformly applied. The sixth and seventh recommendations involve streamlining the Board's administrative procedures in order to promote the use of the injunctive powers granted the Board in section 10 of the Act, enabling the Board to enjoin offending parties to labor-management disputes and halt continuing violations of the Act. The last recommendation is that the Board regionally adhere to adverse decisions of the U.S. courts of appeals.

Basic Policy Assumptions

The National Labor Relations Act, as passed in 1935 and

amended in 1947 by the Taft-Hartley Act and 1959 by the Landrum-Griffin Act, is an attempt to balance the rights of employees to organize and select a union or to freely reject such representation. Once employees organize, the Board is required to insure that the free collective bargaining process continues and that *both* sides come to the bargaining table in good faith. The National Labor Relations Act is designed to prohibit either side from embarking on a course of violence, destruction of property, or coercion of management or bargaining unit employees. In sum, the Act was designed to facilitate nonviolent resolution of collective bargaining negotiations.

The NLRB was intended by Congress to be "One of those agencies presumably equipped with experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of expertness which the Courts do not possess and therefore must respect." *Universal Camera* v. *NLRB*, 340 U.S. 474 (1951). The job of the NLRB is to delineate the practical requirements of the law to enable the parties in collective bargaining to negotiate and satisfy their needs within a framework which would allow peaceful settlement of labor disputes in order to benefit our economy and society as a whole. The key ingredient to success in this matter is real and practical expertise in labor relations. This expertise must be recognized by and have the respect of labor, managment, and the United States court system.

NLRB Deficiencies

National Labor Relations Board statistics show that the percentage of cases fully affirmed by the United States courts of appeals has declined dramatically, from 74 percent in 1976 to 64 percent in 1979. This decline is a direct result of numerous decisions by the various U.S. courts of appeals indicating that the NLRB has strayed from the neutral role between labor and management which legislative history of the National Labor Relations Act indicates the Board was designed to fulfill. The courts, in many instances, no longer view the Board as the independent federal agency possessing specialized labor relations expertise of the caliber to which the courts of appeals have deferred for many years. Unfortunately, in many cases, the Board has adopted an "activist" stance, manifested by an anti-business, pro-labor bias.

Moreover, the present Board bias and "ivory tower" ap-

proach has permeated the attitude of enforcement field officials throughout the NLRB's Regional Offices. These field officials assigned are the individuals who deal directly with labor and management in the resolution of unfair labor practice disputes which come before the Board. The perception of the Board among the business community is that the Board's enforcement and investigatory efforts are slanted against business. Such a perception is harmful to the Board's continuing ability to function as an independent agency having the respect of both parties in delicate and complex labor-management relations.

Development of pracitical expertise in labor relations, and the public perception that the NLRB continues to maintain such expertise, is crucial to the Board's success in operating as an agency which can successfully achieve peaceful resolution of labor-management disputes. The perception of the Board's practical expertise in labor relations by the courts of appeals, and by labor and management, is at an all-time low. This is largely due to the fact that the present Board members have developed their experience largely as government bureaucrats, none having represented a private sector client, be it labor or management, for any substantial period of time during their career in private sector labor relations and/or collective bargaining. Without actual experience on the firing line, the expertise of Board members must be, at best, academic with an "ivory tower" slant. Such is the perception of the Board by labor and management and by the various United States circuit courts of appeals.

Recommendations

Recommendation 1. The new chairman of the NLRB and all future Board members should have substantial experience in actual head-to-head labor-management relations in the private sector. The Board is presently composed largely of career government bureaucrats who have not had substantial experience participating in the rigors of private sector parties in collective bargaining or before the Board. In order to regulate labor relations efficiently and effectively, the new chairman and future Board members must have substantial private sector experience.

Recommendation 2. The second recommendation is designed to correct a situation which has developed in the NRLB's complement of ALJs. The vast majority of ALJs have

directly from the Board's field offices, specifically the general counsel's office. In order to correct this imbalance, the Board should be required to fill 50 percent of all future ALJ position with individuals possessing private sector experience who have practiced before the Board representing private sector clients. Only by bringing professionals with practical and real experience in private sector labor-management relations and collective bargaining to the ALJ level will the expertise of the Board improve.

Recommendation 3. The third recommendation is that oral arguments take place before the full NLRB one week during every calendar quarter. Thus, the major cases and issues coming before the Board will be decided in a more judicious fashion after adversarial oral argument. Presently, as a practical matter, the Board rarely, if ever, hears oral argument of any of the major issues it decides. Under present procedures, the Board may not hear oral argument even once a year on any case, no matter how major the issue. We recommend a new procedure which would require the Board to meet quarterly for a week of oral argument. The procedure provides that in order for a case to be heard for oral argument, two Board members must affirmatively request that the case be put on the oral argument calendar. This recommendation will enable the Board to hear, as do the courts of appeals, the practical merits of important issues thorugh the time test procedure of appellate oral advocacy.

Recommendation 4. The fourth recommendation requires the development of a new administrative procedure to facilitate the smoother handling of trial before Administrative Law Judges. Presently, parties come to such hearings without the ability to discover the opposition's evidence or prepare a case relating to the evidence which the other side will introduce. This "trial by surprise" was eliminated many years ago in the federal district courts with the adoption of the Federal Rules of Civil Procedure, which provide for a system of pretrial discovery through interrogatories and depositions. Other federal administrative agencies have included discovery in their administrative procedures, most recently the Mine Safety and Health Review Commission. Through the discovery procedure, both sides are better prepared to streamline their ultimate presentation to the ALJ. Through interrogatories and depositions, many cases are settled prior to trial with one of the parties discovering the major elements of the other side's case and determining that there is no need to go forward with a

hearing before an ALJ. Trial by surprise is an anchronism in present day adversarial proceedings and should be eliminated in Board proceedings. The elimination of trial by surprise will result in a greater number of settlements and streamlined and efficient presentation of ALJs.

Recommendation 5. The fifth recommendation also relates to the trial of cases before ALJs. It is recommended that a consistent rule on witness sequestration be applied by all ALJs. Presently, notwithstanding some NLRB direction through case law, ALJs randomly decide rules on witness sequestration based on their own specific biases. Since a large percentage of Board decisions relate to the credibility of witnesses, either with regard to what was said in collective bargaining or to allegations of discrimination, credibility findings are extraordinarily important to the administrative process. Witness sequestration has long been used in federal district court litigation to test the credibility of witnesses. A single rule on witness sequestration designed to make the trial of labor relations cases consistent is needed.

Recommendation 6. The sixth recommendation deals with section 10(l) of the National Labor Relations Act, which requires the Board to initiate proceedings in federal district court to seek an injunction where the Board determines that it has probable cause to believe that a union is committing an unfair labor practice in violation of either section 8(b)(4) of the Act, the recognitional strike provisions of section 8(b)(7) of the Act, or the "hot-cargo" provisions of section 8(e). Under the legislative history of the Act, sections 8(b)4) and 8(b)(7) violations were deemed to so obstruct the peaceful resolution of labor relations disputes that the Board was mandated by section 10(l) to seek an injunction where it "has reasonable cause to believe" that a violation of these sections is occurring. This is extraordinary power.

The present procedure utilized by the Board under section 10(l) creates substantial delays in many cases. Even where probable cause of a violation of section 8(b)(4), 8(b)(7) or 8(e) is shown, the Board's procedures are so slow that union activity in violation of the law continues for days and, in many cases, weeks until the Board determines that it will go into federal district court to provide an employer with judicial relief. This is highly prejudicial because the employer may not seek injunctive relief independent of the Board's procedures. Even where the Board has decided to initiate proceedings to provide an employer with relief, in many cases it will only seek a

preliminary injunction enforceable after another 30 day wait, rather than an immediately enforceable temporary restraining order. It is recommended that the procedures to be utilized by the NLRB in carrying out its mandate under section 10(l) be streamlined.

Recommendation 7. The seventh recommendation deals with the Board's discretionary power under section 10(j) of the Act which gives the Board the power to go seek an injunction in federal district court when the Board has probable cause to believe that either side, labor or management, is in violation of the Act. Presently, the Board rarely uses its discretionary power under section 10(j) of the Act, notwithstanding cases of substantial violence and destruction of employer property in violation of section 8(b)(1) of the Act. Section 10(j) relief under present procedures is largely ignored by the Board. The Board rarely, if ever, utilizes its discretionary power to restrict violence by unions, deferring to state courts to issue mass picketing injunctions. The Board design specific affirmative guidelines mandating the use of its powers under Section 10(j) of the Act.

Recommendation 8. The eighth and final recommendation concerns a requirement that the NLRB defer to the decisions of the U.S. circuit courts of appeals when a circuit court of appeals reverses the Board in the region covered by that circuit. It is a waste of agency time and money to continue to ignore circuit court decisions within a region in which that circuit court applies the law. Presently, the Board chooses to ignore circuit court decisions until a Board ruling is reversed by the Supreme Court. This unfairly prejudices employers and unions located in a circuit in which Board policy conflicts wth the circuit court of appeals decision. In those cases, the parties are put to extra added expense of appealing an NLRB decision to the courts of appeals who have already reviewed the Board's policy.

BUREAU OF INTERNATIONAL LABOR AFFAIRS (ILAB)

ILAB presently has principal responsibility for the Department's international programs, plus a mixed collection of activities which pertain only tangentially to the general purposes of DOL. These latter need to be stripped not only from ILAB but also from DOL and either redistributed or diminished in importance. It is more subservient to outside control and influence than are other DOL divisions.

Basic Policy Assumptions

The fundamental policy assumption of ILAB is that the labor policies of the United States have international dimensions running in both directions, i.e., they affect and are affected by labor (and general economic) policies of other countries or regions. It is the task of the Bureau to advise the Secretary regarding these dimensions and to administer such aspects of labor policy which have an international organizational framework.

Principal Deficiencies in Current Policies

The principal deficiencies in current policy affecting ILAB are two: First, by informal arrangement, ILAB's work is excessively influenced by external nongovernmental agencies. Second, it is given responsibilities for activities which do not belong either to ILAB or to DOL. Examples of the former include seeking expressly and exclusively the opinions and viewpoints of those groups which speak for the organized segment of American labor, and even then only a segment of that subgroup (e.g., Executive Order 12216 of 1980 designates the President of the AFL-CIO as a member of the President's Committee on the ILO, thus failing to provide input from either nonunion labor or nonfederated unions). An example of the second deficiency is ILAB's (and DOL's) responsibility for U.S. participation in the OECD, a function which clearly is more appropriate to the Department of Commerce.

Short-Term Options

It is difficult to judge the availability of administrative versus legislative short-term options in the abscence of information as to the source of authority for ILAB's actvities. To the extent the issue is whether ILAB should or should not be doing something, the options are purely administrative in that ILAB has no statutory authority at all: it derives authority and mission solely from the Secretary. To the extent we are talking about something *neither* ILAB *nor* DOL should doing (e.g., controlling U.S. participation in OCED), the answer lies in White House leadership.

Executive Order 12216 needs revision. It is not clear how precisely the "employee" representative to the ILO is determined. Given the structure of how members are represented in

the ILO (the tripartite form), there is nothing particularly wrong with the basic *idea* behind 12216 (though, there is no compelling reaons for the Secretary of Commerce to serve on it as a separate party), but the designation of the AFL-CIO president as the *sole* representative of American employees is grossly unfair and a distortion of reality.

The AFL-CIO has the advantage of being the biggest: therefore apart from dropping Commerce from the Committee the membership should consist of the Secretaries of State and Labor; a designate from the Executive Office (Assistant to President for National Security Affairs is not necessary); the heads of the U.S. Chamber and the National Federation of Independent Business; and two labor representatives named by the President (one being a union president and one being an employee with clear-cut credentials as a worker and a nonmember of a union). In other words, a seven-man committee should be created with only three identified by title or position: the other four would be identified only as representing employers and employees, named by the President.

Medium-Term Options

Problems and options in the first year (medium-term) include opposition from entrenched bureaucracy to any changes a new administration might want to make in the area of trade policy and foreign assistance. Note should be made of ILAB's claim that its "close cooperation with organized labor . . . contributed materially to the passage of the Trade Agreements Act of 1979 . . . ." Needless to say, ILAB was also a leader in efforts to rejoin the ILO. May it also be noted that ILAB (like DOL generally) is one of the most heavily and vociferously unionized agencies of government.

ILAB needs trimming. Its organization chart presently shows eight offices (with appropriate sub-offices). In fact, it needs only five: (1) international labor organizations (ILO, principally, but also the other groups to which the U.S. belongs, plus responsibility for keeping track of what the organizations are doing of which we are not a member); (2) a foreign representation group (responsible for participation in the labor attache program, plus relations with foreign labor ministries and foreign labor organizations); (3) a research group (responsible for data and analyses regarding foreign labor conditions, plus information on U.S. labor conditions of interest overseas); (4) an exchange group (responsible for formal/informal visits

of labor leaders in both directions); and (5) a trade group (responsible for analyzing the impact of trade on employment). "Foreign financed programs" (e.g., in Saudi Arabia) are precisely that, foreign financed, and should not be administered by ILAB (or DOL). If the Saudis desire a manpower training program, or anything else for that matter, there is no need to contract with a U.S. government agency to obtain it. "Trade adjustment assistance" is likewise the responsibility of neither ILAB or DOL (except in an advisory capacity). At the very least, it is not the task of ILAB to investigate and certify the disemployment effects (if any) of foreign trade. In general, DOL (and ILAB) engage in too much which is removed several steps from the issue of American workers and their well-being.

Budget

ILAB's budget is not different from that of any other agency in that it includes straight line allocations, transfers (e.g., its research program on trade is funded from ETA), collecting from all over the Department, passthroughs (e.g., from AID, ILO, World Bank), foreign sources (a major manpower project is administered by DOL in Saudi Arabia and funded completely by the latter), and what ILAB itself considers "soft" money (e.g., its publication program was rejected by OMB but is carried on anyway using funds from who-knows-where). Oddly enough, the very things which most clearly fall to ILAB are precisely the activities which the ILAB has described as having the most "tenuous" statutory authority, while the domestic activities (which should be performed elsewhere—outside ILAB or outside DOL) have the strongest legal basis. The Department-to-Ministry program, for example, has been undertaken through budgetary sleight-of-hand and by robbing various budgets within the Department, yet it seems precisely the sort of thing which ILAB ought to be doing. Out of 402 ILAB employees (July 21, 1980), 217 are allocated to trade and trade-related functions: 126 employees worked in the area of reciprocal international labor policies (of which 20 are paid out of the " S and E funds," whatever that means, and the balance are *non-budgeted*—funds are derived from AID, ICA, and the Saudi program). The priorities are all wrong.

Personnel Management

The personnel management problem is fundamentally no different from that experienced elsewhere in DOL—except

that ILAB is more subservient to external influences. Having no data on the career patterns of ILAB personnel prior to their joining the Bureau, nevertheless, the impression is that many of the higher echelon people (directors of offices and up) are former unionists. It is safe to say that ILAB is overstaffed by 20-25 percent. If the trade adjustment and foreign aid activities were assigned elsewhere, ILAB could reduce its present 402 employees to approximately 100. The "staffing philosophy" ought to emphasize foreign experience/background as well as competence in the activities to be undertaken.

11

THE DEPARTMENT OF STATE

Jeffrey B. Gayner*

FOREWORD

The study of the State Department and the conduct of foreign policy is a study of paralysis and inertia. How this has come about and the major modifications suggested over the years are reviewed in detail in this study. No department has been studied as extensively as State and this relatively short study finds that in the end it is the President and his own determination to control the Department of State and foreign policy that becomes paramount. Thus, regardless of the structural operations of foreign policy and how the DOS coordinates with other cabinet departments and the National Security Council, the ultimate success of the conduct of foreign policy resides in leadership and direction. This report provides a guide to both the administration of policy and recommended policy directions that should be pursued by a conservative administration.

THE CONDUCT OF FOREIGN POLICY

Development of the System: State, the NSC and Foreign Policy

The manner in which U.S. foreign policy is made, and the personalities which make it, often occupies as much public attention as the actual policy itself. The media seems, at times,

**Author's Note:* The preparation of this report was a collective effort involving many individuals. Clet Di Giovanni, Jr., Alexander Kruger, Ernest Lefever, William Scully and Jack Tierney deserve particular mention. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

more fascinated with the style of a Kissinger or a Brzezinski, and their internal clashes with the State Department, than with the results of their diplomacy.

This should come as no surprise. Not only is the public more interested in style than substance, but the style itself has, indeed, often been the chief issue of foreign policy. Nor is the reason hard to come by. John Campbell's description of the State Department as a "fudge factory"* might well be hyperbole, but only slightly. The fact remains that foreign policy-making in the American democracy is, at best, a slow, often painful, process easily dominated by a strong personality. It is a tedious and frustrating business on a regular basis, and to the general public foreign policy is a largely unknown arena of suspicion and elitism. The system was no better, and probably no worse, under Jimmy Carter than it has been for decades. During the last presidential campaign, columnist James Reston labeled the foreign policy process this way:

> There have been so many puzzles here over the conduct of American foreign policy in the last couple of years that the notion is getting around that the President and Congress can't agree on anything, but this is not precisely true. On at least one thing they are in total agreement: that the present decision-making "system," if that's the right word, is an incoherent mess, excessively irritating to both branches of the government and dangerous to the national interest.**

The fact that the Carter Administration only added to this apparently eternal "mess" was hardly surprising. Why should we have expected Jimmy Carter—a one-term Georgia governor—to improve upon a policy apparatus that has defied repair for decades. "Here we go again," wrote Philip Geyelin in the September 22 *Washington Post*, "with one of the hardiest perennials in the whole field of foreign policy making. After four months or so of on-the-job training, Secretary of State Edmund Muskie is putting it about that (surprise) the system doesn't work."***

The question at the beginning, is, what "system" are we discussing and how—at least theoretically—is it supposed to function?

The Constitution

Under the Constitution, foreign policy authority is divided between the Executive and Legislative branches. Only the

*John Campbell, *The Foreign Affairs Fudge Factory*, (N.Y.: Basic Books, 1971).

**_New York Times_, February 1, 1976.

***Page A-15.

President can appoint and receive ambassadors, but only the Senate can ratify treaties and confirm top presidential appointees. Only the President is Commander-in-Chief of the Armed Forces, but only Congress can declare war and appropriate funds for the military.

This duality of authority is at the basis of the American system of law, but it is also the root of the perennial problem with foreign policy-making. Both Congress and the President "share" in the constitutional functions of foreign policy, but the peculiar circumstances of foreign policy-making and the historic growth of the federal government have made the modern President, at times, a foreign policy dictator.

Under the Constitution, the President is in charge of foreign policy. The role of Congress was seen as complimentary, but clearly secondary. The President is constitutionally the nation's ranking diplomat and Commander-in-Chief. Only the President can negotiate diplomacy and sign treaties. The legislature, furthermore, is inhibited from policy-making by its own definition. Congress is a reactive and defensive body in foreign policy due not only to the complexity, information and speed required for modern foreign policy, but due also to the size and composition of a 535-man assembly. By its very nature, foreign policy-making has to be centralized in the executive department, in a system described by one expert as the "intrinsic authoritarian necessities of foreign affairs."* In this system, the President is the "authoritarian."

The President

Aaron Wildavsky has described the modern American President as, in reality, two persons: the "domestic" President and the "foreign affairs" President.** Of the two, the second role is much stronger, more important historically, and has preoccupied much more time for modern Presidents than the "domestic" role. Since 1945, most Presidents have given foreign policy primary attention, and their foreign policy decisions have had a more pronounced impact upon their careers, and upon the life of the nation, than their domestic decisions. Lyndon Johnson, for example, passed more social legislation than any other President in history, but fell from power because of the Vietnam War. Jimmy Carter's domestic record has been abysmal, but he was able to steer the Panama Canal

*Paul Seabury, *Power, Freedom and Diplomacy*, (N.Y.: Vintage Books, 1967), p. 196.

**Aaron Wildavsky, "The Two Presidencies," *Trans-Action*, December 1966.

Treaties to a successful conclusion in spite of massive public opposition. *The next administration will find, as past ones have, that foreign policy issues will dominate public life.* Within this domination, the President will continue to be the central figure; indeed, his authority can only grow.

Furthermore, even if he desired isolation and a removal of the foreign policy burden, the demands of his role would force the modern President into this responsibility. It must be constantly borne in mind that the American President has been since 1945, and will continue to be for the indefinite future, *the central figure throughout the entire world, a position he owes exclusively to his control over the foreign and military policy of the United States.*

Not only do Presidents derive most of their prestige and global influence from their foreign policy role, but their greatest personal and legislative attainments have come from this also. Wildavsky has summarized this record of success as follows:

> In the realm of foreign policy there has not been a single major issue on which Presidents, when they were serious and determined, have failed. The list of their victories is impressive: entry into the United Nations, the Marshall Plan, NATO, the Truman Doctrine, the decisions to stay out of Indochina in 1954 and to intervene in Vietnam in the 1960's, aid to Poland and Yugoslavia, the test-ban treaty, and many more. *Serious setbacks to the President in controlling foreign policy are extraordinary and unusual.**

The Presidency has inherent advantages over the Congress in foreign policy. Information which comes from the executive branch is always more timely and authoritative than other information. Furthermore, the President initiates policy, and it is his staff that molds and directs it from beginning to end. He appoints the top levels of both diplomatic and military command. In crises, his voice is the one the public will follow, and since programmed policies are governed by a small bureaucratic elite, the President and his staff are the only officials able to influence this process on a daily basis. Indeed, the President needs only to lead by default, since neither Congress as a body nor the public as a whole has the interest or the expertise to conduct foreign policy. Neither, of course, does the President as an individual. To speak of presidential leadership, therefore, is to speak of the executive branch and the advisers a President chooses. This is the heart of the American foreign policy "system."

**Ibid.*, pp. 7-8.

The Foreign Policy Government

The National Security Council

The inner core of the "foreign policy government" since 1947 has been the National Security Council (NSC), established in that year by the same bill which created the Defense Department and the CIA. Described by foreign affairs expert I. M. Destler as "the most exalted committee in the federal government,"* the NSC was formed to counsel the President on all national security issues, especially as a vehicle to integrate and centralize the foreign policy machinery which, at that time, was almost wholly in the State Department. Members of the NSC are the President, the Vice President, the Secretaries of State and Defense, the Director of the CIA, and the Chairman of the Joint Chiefs of Staff (JCS). The President may, and usually does, invite other aides to attend NSC sessions, such as the Attorney General, the Secretary of the Treasury, the Director of the Office of Management and Budget (OMB), the Chairman of the Council of Economic Advisers (CEA), etc. As is true of most foreign policy operations, the NSC machine is used—or not used—at the President's discretion.

Serving as the support arm of the NSC is its staff, which currently numbers 98, of which roughly a third are professionals. The NSC process may be used by the President in several ways. It can be a forum for discussion and action on long-range matters, it can serve as the center of a crisis situation or it can be used as a mechanism to develop policy options. It can even be ignored or circumvented; there is no statutory obligation for the President to use it. Under Presidents Nixon and Ford, for example, the NSC met 125 times in eight years; under President Carter it has met officially only ten times (as of May 1980).

Nevertheless, every President has left his own mark on the operations of the NSC. The dominant roles of the two most important recent "assistants" to the President (NSC Staff Directors) for National Security, Henry Kissinger and Zbigniew Brzezinski, testifies to the importance of the NSC, irrespective of the number of formal meetings held. The NSC staff, in addition, is a constant source of memoranda and policy options which reach the President's desk. President Nixon's National Security Study Memorandum system (NSSM), for

*National Journal, October 15, 1977, p. 1597.

example, was the forerunner to President Carter's Presidential Review Memorandum (PRM) approach. Regardless of how it is used by the President, the NSC is still the inner circle of U.S. foreign policy. As such, it is, and has been since 1947, the main rival to the traditional inner circle, the Department of State.

The State Department

In its broadest aspects, national security policy involves many areas of the government and private business, the CIA, Defense Department, Commerce and Treasury Departments, etc. In the strict definition of foreign policy, however, and in diplomatic and consular service, the Department of State is the nation's established sphere of authority. Until the end of World War II, it was the *only* major voice (beside the President) for the United States in overseas affairs. It must now contend, however, with a host of rivals, not the least of which is the Department of Defense.

The State Department today has 17,061 employees (not including AID) situated both in the Washington bureaucracy ("Foggy Bottom") and in the U.S. diplomatic and consular posts abroad. The FY 1979 budget for the State Department was $1.3 billion. This compares with 3.3 million employees of the Defense Department, and a DOD FY 1979 budget of $129 billion. Clearly, the State Department is a small agency by government standards. (HEW had 151,000 people and a $184 billion budget in the same year). Yet, it directs the daily operations and communications with nearly 150 foreign countries and scores of international agencies. If the NSC is foreign policy's "inner sanctum," the State Department is its visible "eyes and ears": the official and authoritative American agency for the conduct of foreign relations. Under the President's direction, the State Department is responsible for the general condition of relations between the U.S. and all other international bodies and governments.

The Secretary of State is the ranking officer in the Cabinet. Under him, the State Department gives direction and coordination to U.S. foreign policy in several ways. Other foreign affairs agencies of the government, principally the Agency for International Development (AID) and the Arms Control and Disarmament Agency (ACDA), are under the direction and guidance of the State Department. The State Department must approve the initiation of all negotiations with foreign governments, and all agreements concluded—no matter how remote or profound—must pass State Department approval. State also

gives direction to foreign policy through the presidential requirement that all speeches, articles and other material by governmental officials must be cleared by the Department before delivery or publication. Although U.S. ambassadors are the President's personal representatives, they direct their communications to the Secretary of State and conduct daily business with the Department. With the exception of "political" appointees, almost all the career ambassadors and diplomatic officials are State Department employees in the Foreign Service.

The Secretary of State looks to several key aides in the department bureaucracy for principal assistance in the execution, formulation and coordination of policy. These presently include the Deputy Secretary, the Special Advisor, various Under Secretaries (Political, Economic, Security Assistance Management), the Director of the Policy Planning Staff and various ambassadors-at-large. Most of the daily business of the Department of State is administered by the five geographic bureaus, each of which is headed by an Assistant Secretary of State. In addition, the Department includes a wide range of related offices, such as the Bureau of Administration, the Office of Congressional Relations, the Bureau of Public Affairs, etc.

The two related agencies (AID and ACDA) operate autonomously, but receive policy guidance from the State Department. AID was founded in 1961 to administer the non-military portions of U.S. foreign assistance programs. It presently operates on an annual budget of $3.8 billion, with 5,600 employees. ACDA, also founded in 1961, is responsible for the formulation and implementation of U.S. arms control and disarmament policies, such as SALT, MBFR (mutual and balanced force reduction), and CTB (comprehensive test ban). ACDA's budget is currently $17.5 million, with 226 employees.

Congress

Congress represents the "fourth layer" of the foreign policy government, on the outer edge of the foreign affairs concentric circle. The interesting point about congressional power in foreign affairs is the gap which exists between Congress' formal authority and its actual influence. Legally, both houses must approve all foreign policy legislation and must appropriate all monies concerned with foreign policy. Resolutions of either or both houses may support or obstruct the foreign policy of the executive. The President has, however, much greater *actual*

power in this area than the Constitution allocates. Conversely, Congress has much less than one might judge from its legal rights.

In reality, the role of Congress is essentially passive: it accepts, modifies or rejects policies to the extent that it can act in a unified way. As mentioned earlier, the President is almost supreme in important foreign policy decisions handed to Congress. Rarely does Congress reject a major presidential foreign policy move. As a rule, Congress "modifies" foreign policy. It amends it in some marginal fashion, it increases or decreases appropriations to an extent, but it seldom alters policy in a substantive way. Even during the height of domestic protests against the Vietnam War, Congress remained almost singularly behind the President. It was not until after the Paris peace agreement, when all U.S. forces were being withdrawn, that the Congress passed legislation to restrict the President's hands.*

Despite signs of a congressional "resurgence" since Vietnam (e.g., the War Powers Act, passed over the President's veto, which requires congressional approval for the use of force after sixty days), the problem of the role of Congress in foreign policy is *institutional,* and thereby unlikely to change fundamentally over time. The President is the national spokesman, while congressmen represent local interests. The President is capable of instant action, Congress must deliberate. The President sends information, Congress is usually *dependent* upon its information from the executive. The President can (and often does) act secretly, Congress is—by comparison—an open institution almost incapable of keeping secrets.

Moreover, Congress is crippled by disorganization, particularly in recent years with the demise of the seniority system. At one time, several important committee chairmen could, in effect, "speak" for the Congress. But with the proliferation of authority, such as a special committee on intelligence, and frequent dissent from committee chairmen's views, no single committee or group of Congressmen can provide prompt legislative support to foreign policy decisions. Thus, because foreign policy requires instant communication and tight discipline, only the executive can provide true leadership.

The foreign policy "system," therefore, is essentially a function of the executive branch. Yet, as the first pages of this

*An important exception to Congress' usually passive role, it could be argued, would be the congressional refusal to fund aid for Angola in 1975.

section stated, the system is chronically described as in a "mess"; that it "doesn't work." Before we investigate the problems of the system, we should briefly glance back at *how* it has functioned in modern times.

The System Since World War II: A Historical Sketch

A historical sketch of the foreign affairs bureaucracy ("system") is a large task. It is more difficult to be brief than to elaborate. Nevertheless, there have been features of each successive administration since the end of World War II—when "modern" American foreign policy began—which have "stamped" the system as it has evolved. Each President, in other words, has left his own mark on the conduct of American foreign policy. A review of how each one used, or didn't use, the machinery of foreign affairs will help tell us a good deal about why the system is so readily abused and criticized today, whether or not this criticism is worthwhile, and what, if any, constructive changes can be made for the 1980s. These issues will be the main focus for the next section of this paper. For the moment, let us see how successive administrations have consulted and implemented the machinery of government in foreign policy.

Truman

During the Truman Administration, the basic system for the conduct of foreign policy for the modern American superpower was devised in the 1947 National Security Act. This established the National Security Council, which was the first organized American effort to establish a top-ranking body to formulate and coordinate foreign policy. The NSC was a direct outgrowth of the American wartime experience, especially the Standing Liaison Committee of the early 1940s and the State-War-Navy Coordinating Committee established in 1944. Its prime exponent was James Forrestal, his conscious model was the British War Cabinet, and his principal motivation was to avoid a repetition of the highly personalized, *ad hoc* decision making process of Franklin D. Roosevelt. (NSC was known then as "Forrestal's Revenge.") Since that time, according to the most authoritative study ever conducted on the U.S. foreign policy system, "White House machinery for the resolu-

tion of major foreign affairs issues has remained remarkably stable."*

President Truman welcomed the NSC as a "badly needed new facility,"** but, like his predecessor in office, he refused to bind himself to policy-by-committee. As a result, he attended only 12 of the 57 NSC meetings held prior to the Korean War. During the war, however, he upgraded the status of the NSC, missing only nine out of seventy-one meetings held until the end of his administration. Nevertheless, President Truman kept the NSC at arm's length. According to Dean Acheson, "President Truman looked principally to the Department of State in determining foreign policy and—except where force was necessary—in executing it."***

The NSC in the Truman years was kept small. Policy papers were considered advisory only, a vote was only "procedural" and the NSC Staff Director was a nonpolitical "administrative assistant" for national security. While Truman had a "disinclination to make full use"**** of NSC, it was still vigorous as both a discussion forum and as a medium for drafting position papers.

President Truman preferred to rely upon a few key men in the Cabinet, especially Secretaries Marshall and Acheson, for his policy advice. His style was centralized, decisive and personalized. "To him," Acheson wrote, "the heads of departments were secretaries of state and members of his staff . . . . He made the ultimate decisions upon full and detailed knowledge, leaving to lieutenants the execution."*****

Eisenhower

Under President Eisenhower, execution of foreign policy began shifting away from the old Marshall-Acheson State Department. The NSC was strengthened and uplifted as the prime vehicle for policy and inside the White House, Secretary of State John Foster Dulles became the *de facto* architect of U.S. foreign policy.

Eisenhower brought to the White House the soldier's predi-

**Report of the Commission on the Organization of the Government for the Conduct of Foreign Policy*, (GPO, June 1975), p. 4 (hereafter cited as *Murphy Commission*).

**Harry S. Truman, *Years of Trial and Hope*, (N.Y.: Doubleday, 1956), p. 59.

****Present At the Creation*, (N.Y.: W.W. Norton, 1969), p. 735.

****Walter Millis, *et al.*, *Arms and the State: Civil-Military Elements in National Policy*, (N.Y.: 1958), p. 182.

******op. cit.*, p. 733.

lection for orderly and structured staff work. He expanded the system begun under Truman and made it more formal and comprehensive, utilizing the "chain of command" concept. By 1960, the informal, almost casual, body sporadically consulted by Harry Truman, had been reorganized into a highly complicated, but smooth mechanism for implementing basic U.S. national security policy.

The heart of Eisenhower's NSC, the Council itself, met regularly on Thursday mornings. In addition to the statutory members, the President often invited as many as a score of others, such as the Secretary of the Treasury, the Budget Director, the Attorney General, etc. Under Eisenhower, the NSC was reorganized threefold. Truman's Senior Staff was made into the Planning Board, which met regularly on Tuesday and Friday afternoons. An Operations Coordinating Board was established as the basic coordination agency, and the Interdepartmental Intelligence Conference and other *ad hoc* subcommittees were set up to facilitate the new structure and purpose.

The Eisenhower NSC system was highly formal and regulated. "If Harry S. Truman to a large extent limited the role of the National Security Council," one expert noted, "in policy formulation and integration, Dwight D. Eisenhower may be said to have institutionalized it."* The Eisenhower NSC was the brains of his foreign policy system. His national security assistant described this whole process with a simple, but revealing metaphor. NSC, Cutler said, was at the top of the "policy hill." Policy recommendations moved up one side where they were "thrashed out and submitted to the President." Once approved, they would then move "down the other side of policy hill to the departments and agencies responsible for its execution."**

Although John Foster Dulles, as Secretary of State, dominated the foreign policy process, his role and importance stemmed from his personal relationship with the President, and not necessarily from his Cabinet position. Unlike Acheson before him, Dulles never bothered to penetrate the inner workings of State, choosing instead to represent his own views before Eisenhower. Under the Eisenhower presidency, the prestige and morale of the State Department sunk to new lows. An embittered Acheson described this as follows:

*Stanley L. Falk, "The National Security Council Under Truman, Eisenhower and Kennedy," *Political Science Quarterly*, September 1964, p. 417.

**Ibid.*, p. 423.

> Marshall policies survived, but the Marshall State Department did not. Senator Joseph McCarthy, abetted by men who should have known better, led a crew bent on its destruction, and Secretary Dulles offered no defense. The sack and massacre of the Department occurred, like Cromwell's at Drogheda and Wexford, after the assault had succeeded and, perhaps, for the same reason, to warn opponents against prolonging hopeless resistance. Many survivors were dismissed or sought more congenial employment.*

The chief difference between the Truman and Eisenhower State Departments is that both Secretaries Marshall and Acheson delegated authority and utilized the Department as an institution in the execution of policy. Dulles did not, and under Eisenhower, the State Department conducted routine business but seldom entered the mainstream of policy formulation. Under Truman, Assistant Secretaries actually conducted foreign policy in their areas of responsibility. Under Eisenhower, they were chiefly administrators in an era when the State Department was under intense political attack.

Both Truman and Eisenhower, however, relied heavily upon a few close advisors, including members of the Cabinet, for the initiation of policy. Neither was willing to delegate this power much beyond his own "inner circle." Under both Presidents, the NSC played a largely formal role, and the NSC "special assistant" had little more than administrative tasks. George Ball has described the Eisenhower system as follows:

> Accustomed to the military tradition, General Eisenhower liked the tidiness of the National Security Council and established a superstructure of formal coordinating committees in connection with it. But he did not regard the Council as a place to make policy any more than he considered the Assistant for National Security Affairs as a man of substantive responsibilities. He left large areas of decision to Secretary Dulles, who strong-willed and intolerant of bureaucratic interference, personally dominated not only the shaping but the execution of policy, so that, while the Council met formally, decisions were largely codifications of Dulles' own views.**

Kennedy

When John Kennedy entered office in 1961, he inherited a highly structured system of foreign policy through a formal chain of command. Under President Eisenhower, policy was initiated at the Cabinet level, especially in the person of Dulles, and the NSC had become a form of "superdepartment" above the State Department and other executive agencies.

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*"Eclipse of the State Department," *Foreign Affairs*, July 1971, p. 602.

***Diplomacy for a Crowded World*, (Boston: Little, Brown), p. 198.

Kennedy stressed foreign policy as the top priority (e.g., his Inaugural Address) for his administration, and immediately began restructuring the machinery set up by his predecessor. "President Kennedy," one specialist noted, "simply did not find the formal processes, large meetings and relatively Presidential passivity that had characterized the Eisenhower system compatible with his personal and activist approach to the Presidency."*

Under his leadership, the Eisenhower NSC system was dismantled. Less than a month after taking office, Kennedy abolished the Eisenhower-created Operations Coordinating Board. Other NSC sub-groups were also abolished. NSC meetings became less frequent, in an effort made by Kennedy to move away from the rigid programming of the Eisenhower era. His NSC Special Assistant McGeorge Bundy, stressed "increased reliance on the leadership of the State Department. . . . The President has made it very clear that he does not want a large separate organization between him and his Secretary of State."** Under him, the NSC continued to meet at least every two weeks, but, in the words of one staff member, it had become "little more than a name."***

The activist nature of the Kennedy Administration refocused foreign policy away from the comprehensive planning process of Eisenhower to a day-by-day concentration on current events. His top advisors were frequently close friends, including his brother. Under these, Kennedy relied on a more traditional structure for policy execution, and on *ad hoc* and informal methods of coordination.

An important Kennedy innovation was the creation of various *ad hoc* groups and other interagency "task forces" to help manage crises and current problems. These were intended to serve the President rather than any of the agencies themselves. During the October 1962 Cuban crisis, for example, Kennedy met daily with the so-called "Executive Committee" of the NSC—which was, basically, the core element of his foreign policy decision-making process.

As the White House staff grew in stature, it acted more and more as the principal coordinating agency for policy. In this regard, friction between State and the White House developed

*Robert H. Johnson, "The National Security Council: The Relevance of its Past to its Future," *Orbis*, Fall 1969, pp. 717-718.

**Quoted in Falk, *op. cit.*, p. 431.

***Quoted in I. M. Destler, *Presidents, Bureaucrats and Foreign Policy*, (Princeton University Press, 1972), p. 100.

toward the end of the Kennedy era. For the first time, for example, the NSC "Special Assistant" became an advisor equal to the Secretaries of State and Defense, with an active staff and with easy access to the Oval Office.

"Kennedy took the route of Roosevelt before him," I. M. Destler wrote, "creating a new institution (the personal staff) to perform a needed role rather than seeking to reform the existing one (State)."*

Johnson

There were many similarities between the Kennedy and Johnson foreign policy systems. Johnson kept Kennedy's three top foreign policy officials and he displayed the same penchant for Kennedy's informal and loosely structured decision-making system rather than rely upon institutions like the NSC. His major attempt at structural remodeling, like Kennedy's, was an effort to delegate greater responsibility formally to the State Department for coordination of policy. In March 1966, he established a system of interdepartmental committees, chaired by Assistant Secretaries, who were to coordinate broad policy goals and report to a Senior Interdepartmental Group, chaired by the Under Secretary of State. This "reform," however, produced limited results. Under Johnson, foreign policy became more of a White House endeavor than ever before.

For the Johnson presidency, Vietnam was the dominant foreign policy issue. To the extent that Johnson used an institutional approach to deal with the war and related issues, it was the highly informal device of the regular Tuesday lunches, held each week with the Secretaries of State and Defense, the NSC Special Assistant (Walt Rostow), the CIA Director and the Chairman of the JCS. For the President and his top advisors, this device was highly useful. But as a foreign policy system, it became too secretive and selective. There developed, therefore, a deep communications gap between the President and the main elements of the foreign policy government. The system began operating in semi-isolation, from the top down.

Under Johnson, the NSC staff became little more than a "monitoring" vehicle to serve the President with in-house advice and support. Coordination of policy at lower levels occurred without much presidential interference, except on an *ad hoc* informal basis. The Johnson system has been accurately

*Ibid., pp. 112-113.

described as "a mixture of tight personal control and loosely structured organization."*

It was a legacy of incoherence and demoralization in foreign policy-making, therefore, that Richard Nixon inherited when he took office in 1969. And like all other Presidents that were elected before him, he intended to sweep clean through the foreign policy government.

Nixon-Ford

Richard Nixon, unlike Johnson, considered himself to be especially competent in foreign affairs. He began his administration with an aggressive attempt to end what he called the excessive "informality" of the Kennedy-Johnson system, without a repetition of what he described as the "illusory concurrences" of the Eisenhower staff system. During the 1968 election campaign, Nixon promised to "restore the National Security Council to its preeminent role in national security planning." He even blamed U.S. foreign policy reverses of the 1960s to "catch-as-catch-can talk fests" between the President and a few selected advisors.

One month after his election, Nixon named Dr. Kissinger as the "Assistant for National Security Affairs," with a mandate to reestablish the Eisenhower NSC system, minus the "concurrences." Kissinger quickly assembled a high-level staff of more than 28 professionals, and developed a new set of formal institutions and procedures designed to enhance the NSC as the chief governmental foreign policy agency. The President then assigned the NSC bodies a comprehensive set of studies covering most of the national security problems then facing the country. Thus was born Nixon's NSSM system (National Security Study Memorandum), a process which reflected his intention that policy papers submitted to him offer practical "options" from which he might select.

During the first six months, 69 of these studies were ordered. To support and strengthen the renewed NSC role, a network of interagency committees were established. These submitted option papers to an NSC "Review Group," chaired by Kissinger. After proper revision, the most important papers were presented to the President at full NSC meetings. The State Department protested vigorously against this breach of the chain of command, but the Kissinger-dominated NSC had immediate access to the President's office.

*Chester Cooper, *Lost Crusade: America in Vietnam*, (N.Y.: Dodd-Mead, 1970), p. 414.

Although this system appeared on paper as a coherent and rational procedure, it quickly dissolved into exactly the opposite of what its original intentions were. Both Nixon and Kissinger began to disregard the advice they received from the broader system. Foreign policy by programmed, government-wide committees narrowed into foreign policy by Nixon and Kissinger.

The NSC grew into a staff-bureaucracy synonymous with Henry Kissinger. By 1971, he had brought in over 50 full-time professionals—about triple the size of Rostow's staff. There also came to be a proliferation of new groups chaired by Kissinger himself, such as the "Special Actions Group," all of which extended his reach as prime actor in the foreign affairs bureaucracy. Kissinger's strength, furthermore, was derived in part from Nixon's preference to work through only a handful of highly-trusted aides. In foreign affairs, this aide was Kissinger. In essence, the system became a two-man show, with a professional NSC supporting cast and with State Department largely bypassed. The internecine "struggle" between Secretary of State Rogers and Kissinger was turned into a rout. In 1973 Kissinger became the Secretary of State.

Although he still retained his NSC position, Kissinger gave priority to the Secretaryship almost immediately. This gave him even greater public leadership for "shuttle" diplomacy and served to shield him from the Watergate-plagued White House. With Kissinger residing in State, the daily operations of the NSC were handled by his deputy, Brent Scowcroft. But with most of Kissinger's aides secured in State Department positions, the center of power quickly shifted away from the NSC.

President Ford kept the Kissinger-dominated system largely intact. In November 1975, he named Scrowcroft as National Security Assistant, but the staff never returned to its former power. Nevertheless, the brief Ford Administration continued to employ the NSSM procedures; 35 studies were completed during Ford's first 21 months in office. Under Ford also, use of the NSC as an advisory forum was slightly revised, but with Kissinger over at State, the NSC was largely bypassed as a policy activator.*

In retrospect, the Nixon Administration fared no better than any of its predecessors in establishing a workable, long-lasting and coherent policy procedure based upon government committee. It began with the best of intentions and even got off to a

*I. M. Destler, "National Security Advice to U.S. Presidents: Some Lessons from Thirty Years," *World Politics*, January 1977, *passim*.

good start. But the excess of paperwork and committee structure quickly faded into insignificance compared to the focus of power which concentrated in the person of Henry Kissinger and the "superstaff" which he created. Like past administrations, the foreign policy "government" became quickly revealed as a medieval monarch, with all the privileges and responsibilities inherent in the concentration of power within a select handful of "barons."

There are scores of reasons why the "foreign policy government" has been the subject of numerous studies, reforms and investigations since its modern inception in 1947. Not the least of these is its inherent "undemocratic" nature, despite the honest efforts of most of its practitioners to open it up. More important, however, are the gaps in performance which have been visible over time. Some of these are personal, some institutional, some procedural, and others are simply the unavoidable pitfalls of the Washington bureaucracy. In 1980, the foreign policy system remains a "mess," crying out for change.

The next section of this report will summarize the main issues and the larger attempts to improve the foreign policy machinery of government up until 1975, when the *Murphy Report* was published. A later section will then cover the Carter Administration, and recommend choices open to the Administration taking office in 1981.

Reforming the Foreign Policy System: Lessons from the Past

Since 1951, the foreign policy system has been the subject of at least 66 major studies. Legions of scholars and administrators have cranked out thousands of pages, all of which have tended to arrive at "remarkably similar conclusions."* There have been reports by several "Rockefeller Committees," by the Brookings Institution (at least three in the 1950s alone), by the Wilson Foundation, by both Senate and House Committees, by Presidential appointment, State Department appointment, university studies, "Task Forces," "Reports," and private scholarship. The latest, and the most comprehensive, is the *Murphy Commission Report* (chaired by former Ambassador Robert Murphy). Submitted to the President and Congress in 1975, the Murphy Report contains a summary and seven volumes of

*Robert Pringle, "Creeping Irrelevance at Foggy Bottom," *Foreign Policy*, Winter 1977-78, p. 133.

testimony. Under review in 1980 is the "National Security Policy Integration" study requested by President Carter and written by former NSC official, Philip Odeen.

All of these widely differing studies have at least two things in common: 1) they have used a lot of paper, ink and time, and 2) they have had practically no major effect upon the way in which each administration has chosen to conduct its foreign policy. "The most significant thing about the endless string of studies," an experienced Foreign Service Officer wrote, "is that little serious effort has been made to implement them and virtually none have resulted in major change at State."* George Ball, perhaps this country's ranking diplomat-in-residence, has watched these reports come and go for three decades. "I do not know of a single study," he concluded, "that has had serious effect on the way we have designed or administered our relations with other nations."** The nation's top scholar on the foreign policy bureaucracy, I. M. Destler, has made this warning in a recent article on the NSC:

> The story of the [National Security] Council offers a sobering object lesson to would-be procedural reformers. Its proponents sought to constrain the President, to bind him more closely to his senior Cabinet advisors. But their creation ended up freeing him and lessening his dependence upon these advisors.***

If the studies are not only irrelevant, but can actually be counterproductive, one is tempted to discard the notion of reform once and for all. The central reality of foreign policy-making remains the personality and style of the President himself, the advisors he feels comfortable with and the way in which he chooses to use—or not use—the machinery at hand. No set of reforms and no amount of carefully packaged studies can alter this fundamental point. Even with the best of intentions, Presidents have wound up seeking their own "system" through trial and error. "Every newly elected American President over the last 20 years," Leslie Gelb has written, "has expressed the belief that he must vest the authority for making the nation's foreign policy clearly and firmly in the Department of State. . . . But none of these Presidents, from Kennedy to Carter, has ever followed through."****

**Ibid.*

***Ball, *Diplomacy in a Crowded World, op. cit.*, p. 194.

****Destler, in *World Politics, op. cit.*, p. 146.

*****"Muskie and Brzezinski, The Struggle Over Foreign Policy," *The New York Times Magazine*, July 20, 1980, p. 26.

The Role of Organization

Effective organization will always be a necessary component of decision making, even if a President relies primarily upon a few key advisors.

Organization must provide information, analysis of alternatives, implementation of decisions, etc.* Yet, the way in which organization performs will differ greatly from administration to administration. It is essential, therefore, that a particular President find—and use—the organizational type which fits his own style. That point, in fact, is a main reason why efforts to revise the foreign policy system have been made so often: every four years (or so) it has to prepare for a new personality. This is also the reason why no consensus has yet developed on the "best" bureaucracy, any more than there is a consensus on the best President.

Another important feature of organization is its relationship to policy. Organization determines who will handle the problem, at what time, and at what level of bureaucracy. This will have direct bearing upon ultimate decisions and broad foreign policies. As Allison and Szanton have written in a major study:

> . . . it is essential to recognize that organizational reform is hard and uncertain work, and to understand why. One reason is that any pattern of organization advantages certain viewpoints and disadvantages others. It focuses attention on some problems and slights others; makes more probable the emergence of some policies rather than others; strengthens certain officials and weakens others. That, of course, is why organizational reforms are so often proposed and so bitterly resisted: there is something important at stake.**

Indeed, divorced from the real world of foreign policy, an organizational reform is an empty and meaningless administrative chore. Past efforts to "revitalize" the State Department, for example, have often been little more than political science or public management abstractions; "shell game" attempts to relocate and re-name the boxes on the Department's organizational chart. The real business of reorganization depends upon how the system is able to respond fully, efficiently, and timely, to the demands of the policymaker. It must implement decisions coherently and effectively and it must enroll the best executors of policy within the system. All of this will depend upon the weight and direction of policy chosen by the President and his advisors.

**Murphy Commission, op. cit.*, p. 23.

***Graham Allison, Peter Szanton, *Remaking Foreign Policy: The Organizational Connection*, (N.Y.: Basic Books, Inc., 1976), p. 17.

Like a computer, an organization can do no better than what goes into it. During many years, for example, the State Department was "run" by its geographic bureaus. During recent years, however, policies involving multilateral economic, scientific, environmental and organizational affairs have increased the importance of the "functional" bureaus. In the Carter Administration, the weight of "human rights" diplomacy has "upgraded" that bureau far beyond its original importance. Policy, therefore, is still more important than organization, but organization is still important. We need both.

What follows is a review of how earlier problems have obstructed decision-making in the foreign policy government, highlighting what has been feasible and what has been desirable.

The Problem

The problem of foreign policy-making has been simply stated by many of those who have had experience inside the system. As Dr. Kissinger put it after two years as NSC Special Assistant: "The nightmare of the modern state is the hugeness of the bureaucracy, and the problem is how to get coherence and design in it."* Many years before, Walter Lippmann made the same complaint. "Our foreign relations," he wrote, "are not under control, . . . decisions of the greatest moment are being made in bits and pieces without the exercise of any sufficient overall judgment."** President Harry Truman knew the frustrations well by the time he was leaving office. While commenting upon the incoming Eisenhower Presidency, he noted, "He'll sit there and he'll say, 'Do this! and Do that!' Nothing will happen. Poor Ike—it won't be a bit like the Army."***

The problem is how to get coherence, direction and purpose into foreign policy. The means must be balanced toward the ends; decisions must be carried through the appropriate channels; communications must be open both ways; and the government must speak with "one voice." This may sound simple, but the record indicates that we are as far from these goals as we ever have been.

The problem of the foreign policy system comes out in public on occasion. There are the reported policy clashes on

Washington Post, August 23, 1970, p. B-3.

**John Fischer, "Mr. Truman Reorganizes," *Harper's*, January 1946, p. 28.

***Richard Neustadt, *Presidential Power*, (N.Y.: John Wiley & Sons, 1976), p. 77.

Iran before the fall of the Shah, with the State Department, the Ambassador to Iran and the NSC going in several directions at once. There is the U.S. Ambassador at the United Nations, casting a vote on Israel apparently in direct contradiction of the President's actual decision.

The scope of the problem is even larger than the bureaucracy itself. It involves qualitative issues of long-range planning versus expediency, of the appropriate level or agency to utilize, and of the degree and extent of the President's actual control. Most Presidents, after all, have little more time than to involve themselves in the larger issues of the day. In the meantime, the foreign policy system operates simultaneously on scores of different levels, each semi-independent from the other.

In 1980, the foreign policy system is undergoing another of its periodic "reviews." Regardless of the election outcome, 1981 promises another "search" for a superior foreign policy machine. Before we get there, let us go back and review—in brief and summary manner—what issues have arisen, and what solutions have been advanced, to upgrade the conduct of U.S. foreign policy.

The Issues

There have been two major summaries, both published in the 1970s, which have attempted to categorize the efforts made to reform the American foreign policy government. Destler lists eleven main areas of attempted reform,* while a study requested from the Library of Congress by the House Committee on International Relations recognizes six "themes."** There have also been several private, scholastic recommendations made since 1975, plus the Carter Administration's official inquiry, now under review. The latter will be included in the final section of this paper. For the present section, we will group the three major issue areas into summary categories, highlighting the more important problems in policy-making over a twenty-year period. We must bear in mind, however, the warning given by I. M. Destler eight years ago:

> Bureaucrats and academics alike have tired of the subject of foreign affairs organization. Both question the relevance of past studies to

op. cit., 1972, 1977.

***Survey of Proposals to Reorganize the U.S. Foreign Affairs Agencies, 1951-1975,* by the Congressional Research Service, Library of Congress, prepared for the Subcommittee on International Operations, Committee on International Relations, U.S. House of Representatives, (Washington: GPO, June 6, 1977). (Hereafter cited as CRS Study.)

present problems. Both wonder whether organizational reforms affect policy-making in anything like the intended ways. Both have doubts about the utility of "another study" to turn over ground already so amply plowed.*

The Presidential Level

Although the NSC is the locus of White House foreign policy machinery, it is not the only body involved. The Executive branch actually has several concentric circles, with the President and his Cabinet innermost, next to the NSC. Other major units are well known: the Office of Management and Budget, the Council of Economic Advisers, the Office of Science and Technology, etc.

The growth of the Executive Office of the President since 1960 has parallelled the growth of government generally. In President Eisenhower's years, it had 1,175 persons. When John Kennedy died, it had nearly 1,700, while today it numbers over 5,000. In addition to this bureaucracy, each President is able to appoint several hundred "third level" secretaries, under secretaries and assistant secretaries, along with their deputies. Most attempts to change the foreign policy government, therefore, have begun at the White House level.

Although the NSC within the White House has gone through several changes, the basic structure since 1947 has remained fairly intact. Yet this has not prevented considerable variation among Presidents in their use of the NSC staff and Special Assistant in the conduct of foreign policy. The power of this individual in the persons of Henry Kissinger and Zbigniew Brzezinski has, in fact, been the single most important area of controversy in foreign policy-making for the past decade. Reforms of the NSC, however, predate Kissinger by a long shot.

When President Kennedy took office, the NSC system was being criticized for being too "institutionalized." The most sustained and important contribution to NSC reform came with a series of hearings and reports begun in 1959 by a subcommittee of the Senate Committee on Government Operations, chaired by Senator Henry M. Jackson. The Jackson Committee labelled the NSC as a "sterile and cumbersome" vehicle. Meetings had become too routine and too mechanical; policy papers had failed to provide meaningful guidance.

The Eisenhower system was also criticized for deliberately

*Presidents, Bureaucrats and Foreign Policy, op. cit., p. 16.

separating policy "formulation" from policy "planning," and using the White House machinery as a way to control daily operations. The system bogged down, as both NSC and the State Department went separate paths. State Department agencies treated decisions on their own terms, without relevant advice from the NSC.

Under McGeorge Bundy, the NSC "deliberately rubbed out the distinction between planning and operation."* But under the Nixon Administration, the NSC of Dr. Kissinger sought to use policy studies (NSSMs) to guide the foreign policy bureaucracy as a whole. Kissinger thus attempted to combine the role of Eisenhower's Special NSC Assistants (institutional planning) with the role of the Kennedy-Johnson Assistants (coordination of information and decisions from the President on down). The Murphy Commission recognized several forms of weakness in the structures and offered many recommendations. For instance, when Kissinger combined his NSC role with the Secretaryship of State and the NSC went into a period of relative decline, the Murphy Commission (1975) delicately suggested that direction of the NSC staff should ". . . be performed by an individual with no other official responsibilities."**

The Murphy Commission also recognized, for the first time, the increasing role of economics in modern foreign policy. It recommended that NSC statutory membership include the Secretary of the Treasury, and that its jurisdiction should embrace international economic policy.

Structurally, it suggested a Council of International Planning, modeled on the Council of Economic Advisers, to serve at the White House level. In addition, the Commission recommended several new "sub-structures" of the NSC machinery to reflect a greater emphasis on economic policy.

The Murphy Commission, which was the most comprehensive review of the foreign policy system since the Jackson Committee, recognized, inevitably, that "the exact manner in which the NSC is used must be left to presidential decision."*** The NSC should be used primarily as a "deliberate body—the highest forum in the executive branch where the major issues

*U.S. Senate, Committee on Government Operations, Subcommittee on National Policy Machinery, *Organizing for National Security*, (GPO, 1961), Vol. I, p. 1338. (Hereafter cited as *Jackson Committee.*)

***Murphy Commission, op. cit.*, p. 33.

****Ibid.*, p. 35.

of foreign policy are aired and debated, prior to presidential choice."

The State Department

The Department of State has been the focus of more foreign policy studies than all of the other agencies combined. The reason is not hard to find. For over three decades, State has had a chronic "identity problem." As the traditional first (and only) agency of U.S. foreign policy prior to World War II, it found itself relegated to second and third roles in the years since.

A wide variety of organizational steps have been proposed to "uplift" the functions of the State Department. In eleven major proposals on foreign policy-making between 1949 and 1970, seven have urged the State Department to play the primary role in policy "coordination" below the White House.* The Jackson Committee was explicit on this, with a strong recommendation against the creation of a "super-staff" in the White House that would smother State's traditional role.** None of this has taken hold. In the great foreign policy "bouts" of the 1970s, the Secretary of State has been "knocked out" twice by the NSC. In 1980, the fight goes on, with the issue still unsolved.

The eclipse of the State Department did not come by design; it was the dual result of cumulative presidential frustrations with State's bureaucracy and the natural gravitation of decision-making power into White House hands.

The Kennedy Administration had the best of intentions to fully integrate State into the foreign policy system. According to Theodore Sorenson, however, Kennedy "was discouraged with the State Department almost as soon as he took office. He felt that it too often seemed to have a built-in inertia which deadened initiative and that its tendency toward excessive delay obscured determination. It spoke with too many voices and too little vigor."*** Before the Jackson Committee, Richard Neustadt agreed: "So far as I can judge, the State Department has not yet found means to take the proffered role and play it vigorously across the board of national security affairs."****

Candidate Richard Nixon promised to cure the problem in

*Destler, *Presidents, Bureaucrats and Foreign Policy*, *op. cit.*, p. 2.

**Jackson Committee, *op. cit.*, Vol. III, pp. 9-24.

***Kennedy, (N.Y.: Harper & Row, 1965), p. 287.

****Jackson Committee, op.cit., *Administration of National Security*, 1965, p. 81.

1968. "I want a Secretary of State," he declared, "who will join with me in cleaning house in the State Department. We are going to clean house there. It has never been done."* He then appointed William Rogers as Secretary of State and proceeded to insulate him from the Kissinger NSC staff.

Dissatisfaction between the White House and the State Department has been, therefore, a two-way street. This mutual frustration was described by the famous conversation between President Kennedy and career diplomat Charles Bohlen. "What's wrong with that goddamned department of yours?" the President asked. "You are," Bohlen answered.** Nevertheless, there has been a pattern of presidential complaints about the performance of State which have cut through successive administrations. Criticisms of the State Department, moreover, have come more from within the government than from outside. "The strongest attacks," Richard Holbrooke has written, "have come from former high-ranking officials of State and the White House staff, people who were in an unusually good position to observe the problem."***

The problems with the State Department cover the full range of the bureaucratic spectrum, as have the proposed solutions. The Department has been accused of weak management, inconsistent direction, poor planning, ineffective performance, insulation, a lack of responsiveness, resistance to change, over-cautious attitudes, incoherence, etc. For more than a generation, the State Department has been estranged from the centers of political power, and, as a result, no administration in recent history has trusted it as the "first line" of foreign policy.

During this same period, scores of administrative and bureaucratic overhauls have been forwarded, but to little or no avail.**** "Such reforms as it has adopted," a retired Foreign Service Officer of thirty years service wrote, "have been minor, concluding that if its professional competence were only accepted, our foreign relations would be in good hands."*****

Revamping the State Department was, for over two decades, the "easiest game in town." But the fact remains that, of all the

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*_New York Times_, October 14, 1968, p. 1.

**Arthur Schlesinger, _A Thousand Days_, (Boston: Houghton Mifflin, 1965), p. 431.

***"The Machine That Fails," _Foreign Policy_, Winter 1970-71, p. 67.

****For a review of the major bureaucratic "solutions" to the State Department dilemma, see Destler, _Presidents, Bureaucrats and Foreign Policy_, _op. cit._, Chapter Six, _passim_.

*****John Krizay, "Clientitus, Corpulence and Cloning at State—The Symptomatology of a Sick Department," _Policy Review_, Spring 1978, p. 40.

proposals and "blue-ribbon" reports since 1949, the only one which affected real change was the 1954 integration of the Washington bureaucracy with the diplomatic corps. This reform of personnel (called "Wristonization" after commission chairman Henry Wriston) was so ill-received by the Foreign Service that its memory still evokes continued resistance to change from the Department's "old hands."

The Murphy Commission took a different approach to the State Department than its predecessors. Instead of insisting on the obviously futile demand that State take control of U.S. foreign policy, its recommendations lowered the Department's horizons, in conjunction with what it defined as ". . . the deepening and necessary involvement of many other agencies in foreign policy. . . ."* Below the White House, it concluded, the dual responsibilities of the State Department should be: a) the central coordination of the broader national interest against the interests of other departments (Defense, Commerce, etc.) and b) a leadership "advocate" of the interests of friendly foreign governments in Washington.

To implement these newly defined functions, the Murphy Commission recommended a series of organizational reforms to sharpen the economic and political skills of State personnel and to deal with both domestic issues and other U.S. agencies. Four new bureaus were outlined, two new under secretaries were created, an outside "advisory committee" was recommended, the "human rights" secretary was suggested, and a "Foreign Affairs Executive Service" was advocated.** The result was a major restructuring of the State Department's management and operations. Some of these recommendations have been implemented by the Carter Administration, but the overall change directed by the Murphy Commission—if carried out at all—will take years. Like so many reports that preceded it, ". . . to date the overall impact of this study has not been great."***

Congress

Since the passage of the War Powers Act in 1973, there has been considerable attention given to the congressional role in foreign policy. Despite the obvious institutional handicaps for a pronounced congressional "voice" in foreign policy, succes-

*Murphy Commission, op. cit., p. 39.

**Ibid., Chapter Four, passim.

***CRS Study, op.cit., p. 47.

sive administrations have complained about the way in which Congress has "hampered" or "frustrated" policy-making. Also, despite the apparent upsurge in Congress' "authority," many Members of Congress still feel slighted by their relatively low priority on the foreign policy scale. The Murphy Commission found that 76 percent of the Representatives and Senators desired changes made in liaison and consultation with the Executive branch.

On balance, the record of the Executive in dealing successfully with Congress over the past several years has not been out-of-step with the history of American foreign policy. Setbacks have occurred, and the Congress has "won" certain battles, notably the denial of aid to Angola in 1975. Nevertheless, even the Carter Administration, with its nascent and amateurish approach to Congress, has gotten practically everything it sought. The Administration won its tests on Rhodesia, on Taiwan, on MFN trade status to Peking, on the sale of jet aircraft to Saudi Arabia, on rejection of the B-1 bomber, on the Panama Canal, on the weapons embargo against Turkey, on aid to Nicaragua, and, most recently, on the sale of uranium to India. Its foreign aid program may have been sliced, budgetary requests may have been disputed and delayed, and SALT II has not been passed, but these issues hardly constitute either a congressional "rebellion" or a major change in executive-congressional relations.

Why, in light of this evidence, would Thomas L. Hughes, president of the Carnegie Foundation, ask: "Can a responsible foreign policy survive the continued congressional assault on presidential powers?"* Why, also, would the Murphy Commission state that "a new era of cooperation between the executive and legislative branches is vital to the security of our nation and to the peace of the World?"**

Although the congressional "challenge" to the executive since 1973 may have been overstated, the so-called "lessons" of Vietnam and Watergate have, in fact, opened a renewed era of congressional "activism" in foreign policy issues. Congress, in short, may not change the system, but it is no longer a silent partner.

Changes in the composition of the legislative branch have encouraged this activism. Congressional staffs now outnumber the total personnel of the State Department. Members are

*Quoted in *The Washington Post*, October 6, 1980.

**Murphy Commission, op.cit., p. 195.

younger, more educated, more travelled and more interested in world problems. The decline of a domestic consensus on foreign policy has opened new avenues for congressional involvement. The communications "revolution" has given Congress newer opportunities, and the sharp polarization of many issues has heightened Members' interest in, and use of, foreign policy as a political platform.

These factors indicate that increased involvement of Congress in foreign policy is certain, regardless of the form it takes. The President will continue to lead, but, in the future, he will have to pull harder to bring Congress with him. This opens up both dangers and opportunities.

Major efforts to change or reform the relationship between the President and Congress have been far less frequent than studies on the Executive branch itself. Most of them, furthermore, have come since the Vietnam War. The Murphy Commission has recognized the potential of Congress' new activism, and has proposed ways in which the process of communications and operations might proceed more constructively. Its suggestions include procedures on coordination between the two branches of government in the use of armed force, joint provisions for the declaration of "national emergency," processes for the resolution of policy disputes and a comprehensive overhaul of the access of information process.*

Few of these reforms have yet been made into law, and it is uncertain if others ever will be. A recognition of the necessity to improve and streamline the process of congressional-executive relations, however, is the first necessary step toward a more coordinated foreign policy. Furthermore, as one specialist has written, ". . . a wise President will welcome more active participation by Congress as the most effective means of assuring the electorate that suitable procedures to safeguard the exercise of power are being followed."**

After this review of problems, issues, reforms and studies, we can state this much: *The problem of foreign policy is primarily a problem of direction and leadership.* As stated earlier, the real problem of American foreign policy is *not* structural. The foreign policy system can behave no better than the direction it is given by the White House. *Qualitative*

*Ibid., Chapter Thirteen.

**Alton Frye, "Congress and President: The Balance Wheels of American Foreign Policy," *Yale Review*, Autumn 1979, p. 5.

aspects of policy will always take precedence over the *quantitative* and *bureaucratic* issues that have periodically arisen.

In essence, the central questions of foreign policy-making are still with us. Reduced to basics, they remain:

1. What role should the White House and the NSC adopt in foreign policy?

2. How should this role be coordinated with the Department of State?

3. How should foreign policy be integrated throughout the government and with Congress?

Leadership—coordination—implementation. These are the three crucial elements of bureaucratic decision making. But, the 1980s still finds the U.S. foreign policy government as far removed from perfecting these goals as it ever has been.

The final section of this report will review how the Carter Administration has responded to these issues, and what major correctives can be addressed by the administration which takes office in 1981.

Institutional Recommendations for the 1980s

A *New York Times* article of October 6, 1980, noted:

> Edmund S. Muskie has let it be known that he wants major changes in the way foreign policy is managed if he stays on as Secretary of State in a second Carter Administration, his closest aides said today.
>
> At the moment, his associates say, Mr. Muskie, the former Senator from Maine, intends to remain as Secretary if President Carter wins next month and asks him to do so. But they add that there is no question that Mr. Muskie is unhappy with the growth of the National Security Council's staff in size and power and that he would seek in a second term to get Mr. Carter's agreement to curb its functions.*

Five months into his job, Secretary of State Muskie added his name to the long roster of those who have sought to change the American foreign policy system. The issue which he raised has a history that stretches for decades in the making of U.S. foreign policy.

Any study on U.S. foreign policy-making must note the long record of frustration on the part of those who have sought to bring coherence and reform to the bureaucratic machine. The first major study, the 1949 Hoover Commission, urged that the State Department should serve as the "focal point for coordination" of foreign affairs. Thirteen years later, the Herter Committee gave basically the same advice. Both recommenda-

**The New York Times*, October 6, 1980, p. 1.

tions were officially endorsed by the administration of the time. Neither of them, however, has had any significant impact upon the way in which foreign policy is made. Nor have any of the other sixty-four official studies, reports and proposals which have been submitted since the early 1950s. The 1975 Murphy Commission was the most comprehensive study of all with a six-volume report written by hundreds of experts. It recommended at least twenty-five major changes in the organization and administration of U.S. foreign affairs, plus scores of minor reforms. The few changes that have been made have not been major, and none have gone to the root of the problem, as Mr. Muskie must surely know by now.

The main questions of foreign policy-making are still unanswered. They can be grouped around the three key elements of bureaucratic politics: leadership, coordination and implementation. Specifically, how can the White House most effectively manage the foreign policy government? What role should the State Department play? How should it be organized? How can the most important issues be brought before the top decision-makers? How can decisions be carried out in the most efficient and rational manner? Is the existing "machinery" adequate, or are new institutions required?

These and scores of other questions have been the subject of sixty-six studies on U.S. foreign policy making since 1949. They are also the subject of this particular report. The assumption underlying this report, however, acknowledges no one "solution" will ever be possible, or universally accepted, and that a set of the most realizable options for the future is the most that can be expected of any inquiry on decision-making. The ground has been plowed over so often, that there seems to be little soil left. The remainder of this essay, therefore, will review the foreign policy system as it developed under the Carter Administration, concluding with a set of the most realistic and feasible options to improve foreign policy decision-making for the new administration.

The Carter Style

The Carter Administration has fared no better than its predecessors in streamlining foreign policy making. If anything, it has succeeded in exacerbating the central question left in the wake of the Kissinger years, namely, "Who's in charge?" The tension which has existed between the NSC and the State Department over policy leadership has dominated the public and private debates on this issue since Mr. Carter came in. The

resignation of Secretary Vance highlighted this problem, and the succession of Senator Muskie to his post has accelerated it.

Under Jimmy Carter, the vagueness in actual policy itself has been accompanied by a lack in decisiveness in the administration and processes that govern the conduct of U.S. foreign policy. Clearly, the system seems headed for a showdown. If President Carter is re-elected, one reporter noted, he "will eventually have to choose between Mr. Brzezinski and Mr. Muskie."*

This point deals with the branches of the problem, however, not its roots. Regardless of the outcome of the November elections, the next President will have to clearly decide on whom he wants to govern his foreign policy, and how he wants it governed. Under the circumstances of a diminished and retreating American global authority, and a dramatic fall in relative military strength, this issue may take on crisis proportions in the years immediately ahead.

While the national press corps has focused for over three years on the personality clashes between Zbigniew Brzezinski and Cyrus Vance (and now Edmund Muskie), a quieter but more pronounced battle has been fought among the inner layers of the U.S. foreign affairs bureaucracy. The public battle came to a head last spring when Secretary Vance told reporters that Brzezinski's usurpation of "traditional" State Department authority had created "confusion as to what the policy of the nation is."**

In the meantime, a study ordered by the President in 1977, conducted as part of the President's Reorganization Project, addressed what its author called ". . . a widespread perception that the Administration lacks coherence in foreign policy." Citing, ". . . a number of organization and procedural weaknesses that reduce the Administration's current effectiveness,"*** the report pictured the NSC as so preoccupied with the *making* of foreign policy on a day-to-day basis that it neglected its value as a planner, advisor and coordinator. The author of the report, Philip A. Odeen, with thirteen years of experience in the NSC and DOD, interviewed over eighty top foreign policy officials in an investigation which took nearly six months. His conclusions pointed to a differently structured NSC, and a White House staff that would have to balance its personal

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Ibid.

**National Journal*, May 17, 1980, p. 814.

***National Security Policy Integration*, report of a study requested by the President under the auspices of the President's Reorganization Project, September 1979, p. 1.

advisory role to the President with its institutional duties in the management and coordination of decisions.

Under Jimmy Carter, the role and prestige of the NSC staff has, in fact, been increased after a brief eclipse during the Ford years. In the style of John F. Kennedy, Carter has preferred an open and active decision-making process centered in the White House. He has encouraged relatively liberal and free procedures as opposed, for example, to the institutional rigidity of the Eisenhower system. Although the NSC as a formal body has met only ten times (as of May 1980) under Brzezinski, Carter has decentralized the advisory process as a substitute. NSC staff members meet with him informally more often than in past administrations. He is briefed each morning by Brzezinski, and he receives daily memoranda from the Secretaries of State and Defense.

Carter, like all past presidents, has relied more upon his White House advisors than either his official Cabinet or the State Department. In terms of roles, the NSC under Brzezinski has been given direction for the day-to-day management of national security affairs, and for the drafting and submission of policy studies. The State Department has been responsible for negotiations, implementation and representation. The lines of authority, however, have been crossed so often that the personality clashes between Brzezinski and Vance-Muskie have dominated the public debate.

Brzezinski has kept the NSC staff well below the 200 reached during the Kissinger years (the level in October 1980 stood at 98). But the continued concentration of power inside the White House, with easy access to the President, has made the NSC shift toward policy implementation nearly inevitable.

A good example of the policy divergence between the NSC and the State Department is the issue of the American hostages in Iran. The State Department argued from a long-term perspective that if we did not alienate the new regime there would be a reasonable chance that Iran would move back into the U.S. orbit and that the hostages would be released. The NSC and the White House staff argued, on the other hand, that the President should take firm and quick action against Iran or else U.S. credibility would decline and his re-election chances would suffer. The issue came to a head when Secretary Vance opposed the commando raid. Seeming to stand almost alone against the President's action, Vance felt he had no choice but to resign.

The conflict between State and NSC is both institutional and

personal. The lines of authority between the two must be defined once and for all. But the proper role for each body is also a function of presidential style. If the new President wants the Secretary of State to be paramount in foreign policy, he must take decisive steps as Eisenhower did, to give the Secretary such power. If, on the other hand, the NSC and the White House staff is to govern, as under Kennedy and Nixon, then this also must be made clear.

President Carter has done neither, and the crisis in foreign policy leadership has grown worse under him. As a former Carter insider has written, "by failing to do either during Mr. Vance's tenure, President Carter invited total disarray—a disarray that still lingers although in more muted form now that Mr. Muskie is Secretary of State."*

Under the three guidelines of leadership, coordination and implementation, therefore, what options are realistically available for a new administation in the conduct and control of U.S. foreign policy?

Both the Murphy Commission (1975) and the Odeen Report (1979) made numerous proposals for reorganization of the foreign policy machinery. The Odeen Report made fifteen separate recommendations to change the NSC procedures and staff. The controversy surrounding this report alone is a subject in itself, and has contributed to both the delays in its submission and in the fact that most of its recommendations have either been deferred or sidetracked. "We had to fight like hell to keep this study alive," one official said. "Now we have to wait and see if the reform movement is sustained." If history is any guide, progress will be slow, if it comes at all. The very existence of such a study itself has opened a new storm of controversy, and has served only to highlight the continuing discord within the foreign affairs community. Odeen himself is less than fully optimistic. "It was interesting exercise," he noted, "but I'm still not sure how fruitful it was."**

It would be both redundant and unnecessary to list all of the reforms suggested by either the Murphy Commission or other studies on foreign policy-making. Such "shopping lists" are in the public domain, and are already well known within the foreign policy community. Instead, this paper will make a brief but pointed assessment of the most manageable options readily available for the new administration to consider at the outset.

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*Gelb, *op. cit.*, p. 40.

**_National Journal_, May 17, 1980, *op. cit.*, pp. 818, 816.

These are the immediate and obvious areas. For the longer run, future issues will have to be taken up on a variety of lesser problems and in the lower echelons of the the foreign policy government. These areas are important, but any recommendations which overburdens the decison-maker with countless minor bureaucratic proposals would be both self-defeating and futile. First things first, and the most immediate issue is to clarify the glaring lack of leadership in U.S. foreign policy.

The recommendations which follow are based upon a thorough review of three decades of foreign policy decision making, incorporating the best advice that has been given to seven administations.

Presidential Leadership

Dean Rusk has summarized the real nature of the leadership problem, and it is an issue of character and quality, not of bureaucracy: "The real organization of the government at higher echelons is not what you find in the textbooks or organization charts. It is how confidence flows down from the President."*

Only the President and the White House can assume real leadership in foreign policy. A coherent congressional leadership role is impractical. All past efforts to create leadership from the State Department have failed miserably, and almost immediately. No bureaucracy can wield the President's power to make decisions, implement them and resolve competing departmental differences. In an age when foreign policy-making must necessarily embrace a host of domestic, military and economic elements and agencies, presidential leadership is essential, and unavoidable. Basing foreign policy leadership and coherence around the President, therefore, is the only serious choice open. The central question of how to manage his leadership, however, is still open and will be, in the final analysis, dependent fully upon the way in which he feels most comfortable and with the officials he trusts the most.

What, therefore, is to be recommended?

First is an option which can only be decided upon by the next President. There are three main choices:

a) he can rely primarily upon the White House staff and the National Security Assistant (the Nixon style); or

b) he can rely primarily upon the Secretary of State (as Truman and Eisenhower did); or

*Quoted in Allison and Szanton, *op. cit.*, p. 69.

c) he can balance his staff, the advice he receives and manage the foreign policy system through an efficient, streamlined and coherent use of *both* men and their institutions.

Option (c) is the route which should optimize the U.S. foreign affairs bureaucracy. This would give the State Department leadership in foreign policy, but would also leave the NSC with an important role. It is the choice suggested by this report.

This choice will be the most important and irreducible decision that the next administration must take, and it must be taken prior to inauguration. This decision will set the entire direction and tone of the foreign policy process, and it must be followed by the necessary procedural and organizational steps which will help guide the President's style and will return coherence and balance to the foreign policy machinery as a whole.

A variety of proposals can be implemented to bring coherence to the decision making process in foreign policy. The deficiencies in the process have spanned several administrations. The remedies devised, therefore, are institutional. They rise above style and personality, although there is an obvious relationship between institutions and their particular use. The reforms recommended below, however, respond to the most frequent problems and criticisms of the foreign policy system as it has evolved over time.

The Scope of the NSC

There is by now a remarkable consensus in the foreign policy community as to what the NSC Assistant and his staff should, and should not, do. Drawing from this consensus, the future direction of the NSC should be confined to the following roles:

1. concentrating on presidential staff work;
2. bringing a broad range of information and policy analysis before the President;
3. coordinating presidential decisions through the departments; and,
4. monitoring their implementation.

Equally (or, perhaps more) important is what the NSC should *not* do:

1. not act as a chief advocate of policy;
2. not conduct personal diplomacy;
3. not insulate the President from other agencies; and,

4. not become overly involved with public controversies or with the media.

The NSC, therefore, should perform primarily as a foreign policy *clearinghouse* at the top of the bureaucratic pyramid. The best role for the NSC is an essential, but limited and balanced, engagement of issues and decisions. Summed up brilliantly by Professor Hoffmann of Harvard, the NSC staff should be:

> . . . the watchdogs of coherence and consistency, the guardians of balance, and the sentinels alerting the departments to problems the bureaucracies failed to pick up. But they would not be the shapers of content; the substance of policy would be the responsiblity of each department, under the control of the President. . . . The assistant and the staff would help the President prepare his decision—no more. The assistant's role would be one of discretion, administrative efficiency, and analytical talent—not advocacy, and certainly not activism.*

Four of the last five NSC Assistants were prominent professors and writers on international relations. The one exception was General Scrowcroft under President Ford. Yet it was Scrowcroft whose performance conformed closest to the model outlined above. There have been, in addition, numerous proposals advanced to "adjust" and "modernize" the White House machinery. Among the most attractive and feasible are:

1. require Senate confirmation of the NSC Assistant and make him accountable to congressional inquiry;

2. appoint to the job a true administrator, in the Eisenhower tradition;

3. eliminate the Assistant's title, and change the job into an "Executive Secretary" of the NSC, who would work under the Deputy Secretary of State; and,

4. merge the two White House staffs, foreign and domestic, into a single staff with the NSC Assistant serving as a "counselor" on foreign policy.

Whether or not the President opts for these, or other proposals, will depend entirely upon his own style. As the Murphy Commission noted, "the exact manner in which the NSC is used must be left to Presidential choice." The Commission, however, remained firm in its contention that a strong NSC should be "the highest forum in the executive branch where the major issues of foreign policy are aired and debated."** It recommended nine separate reorganizational steps, while the Odeen Report urged fifteen changes in NSC proce-

*Stanley Hoffmann, *Primacy or World Order*, (N.Y.: McGraw-Hill, 1978), pp. 238-239.

**_Murphy Commission, op. cit._, p. 35.

dure. These may or may not be adopted in the future, but firm guidance and direction for the NSC is an essential beginning for a more effective and coherent foreign policy process.

The Role of the State Department

Whether or not a future President leans heavily on the Secretary of State for advice will not *fundamentally* change the character of the State Department's role in U.S. foreign policy. The issue of bureaucratic politics goes beyond the issue of presidential preference, although both are central to foreign policy coherence.

A system of exclusive foreign policy dominated by the State Department, and centered in the person of the Secretary of State has, however, been advanced by some reformers.* This would move the system away from the so-called "Cabinet" style of policy that has been in ascendance since the NSC was first created.

Nevertheless, both past experience and the demands of modern foreign policy cautions against a "resurgence" of the State Department as the single decisional body. The consensus of expertise on this is overwhelming. As the Murphy Commission put it, ". . . we do not believe any agency can assume such authority for the resolution of foreign policy issues. The State Department cannot be expected to direct the Defense Department, or Treasury, or Agriculture, Commerce and the Energy Agency . . . simply because foreign policy considerations are involved."**

Even when Dr. Kissinger was Secretary of State, the Department was still not the fountainhead of policy. The same was true under Secretary Dulles. No modern President has, in fact, relied heavily upon the Department for policy advice and execution. "Cabinet diplomacy," centered in the White House, will, and should, continue to dominate the style of U.S. foreign policy. To base a strategy around the White House, of course, is not to argue for a return of the Nixon system of centering all important matters inside an insulated set of advisors. Quite the contrary, the system needs serious de-centralization. But a "revival" of the State Department as the exclusive agent is not the answer. The reasons lie in domestic and bureaucratic realities.

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*Notably, Destler in *Presidents, Bureaucrats and Foreign Policy*, *op. cit.*, Chapter Nine.

**Murphy Commission, *op. cit.*, p. 39.

Presidents have discovered that the State Department seldom has its ear to the ground on the important domestic considerations that they should be attuned to continually. The needed domestic political advice that a President must rely upon for his foreign policies will seldom be derived from State. The State Department's interests are bilateral and long-term, involving relations with many other nations and geographic regions. Presidents have evidenced little patience with this relatively low-keyed, quiet approach, and, soon in office, they have characteristically stopped looking to State for guidance.

The State Department, furthermore, is simply not big or powerful enough to orchestrate the myriad interests and agencies needed to direct a modern foreign policy. The direction for this has to come from the top. Consequently, all Presidents have come to rely upon the NSC or their personal associates in the White House for leadership. When bureaucratic infighting has taken place, moreover, State has usually come out second best, especially against the Pentagon.

Most of the structural reforms which have been suggested concerning the State Department over the years have been intended to make State the dominant arm of U.S. foreign policy. Few of these have had any effect, and none have addressed the central question of how the State Department could compete with other interests and agencies. The Murphy Commission, appropriately, has recognized the need to define a coherent and effective mission for the State Department within the realities of U.S. political life and bureaucracy. The Commission proposed a series of structural reforms which would "streamline" the State Department to fulfill its three chief functions in foreign policy, namely:

1. as the central locus for information on countries and conditions overseas;

2. as the principal agency to monitor, oversee and influence the foreign activities of other agencies; and,

3. as the principal agency in the conduct of relations with other countries and in the representing of the United States abroad. This function, ". . . the essence of diplomacy," the Commission called it, "will continue to be the primary responsibility of the Department's geographic and functional bureaus in Washington."*

The organizational changes recommended by the Murphy Commission in pursuit of these three "missions" are sweeping.

*Ibid., p. 45.

Most have not been implemented, but they are still available for the new administration. Structural reform at State, in any case, is a decidedly long-term consideration. The immediate issue is to decide on a proper and balanced mission for the State Department, then to structure the Department accordingly. The real mission of the State Department, it is argued here, is to *analyze*, to *synthesize* and to *represent* U.S. foreign policy to the President, to the public and to the Congress. This does not "diminish" State's role; to the contrary, such a system would make superior use of the expertise of both the Washington bureaucracy and in the overseas missions. It would give the Department a greater integration in the preparation and implementation of policy than has been the case so far, and it would move State clearly out in front of the NSC as the prime vehicle of U.S. foreign policy.

The following suggestions, therefore, are the most immediate ones that might be considered by a new administration:

1. increase State's economic capabilities in foreign policy. The Murphy Commission was explicit on this, and suggested several new bureaus and procedures to bring the Department greater emphasis on what it considered the enhanced role of economics in foreign policy. (The Commission urged reform in the White House on this same issue also);

2. increase the importance of the Secretary of State. This is a qualitative and judgmental "reform" that has virtual unanimous endorsement by the foreign policy community. "Weak" Secretaries, such as Rogers and Vance, became so because the President wished it. A "strong" Secretary is necessary; one who shares the President's confidence on at least an equal basis with the NSC Assistant. To institutionalize this step, the following suggestions could be managed;

a) allow the Secretary to make, or at least veto, all high-level appointments and dismissals;

b) strengthen the role of the Deputy Secretary as the Secretary's "first agent";

c) strengthen the roles and responsibilities of the Under Secretaries, as well as their deputies;

d) make greater use of ambassadors-at-large, under the Secretary's jurisdiction, for special negotiating problems;

e) place more stress on the management of the Department, with the Secretary and his deputies given support and guidance from the White House;

f) place important ambassadors on the Secretary's personal team and improve consultation with them;

g) generate more consultative processes between the Cabinet and sub-Cabinet levels and the assistant secretarial level of the State Department.

h) place particular emphasis upon bringing into the State Department a large group of policymakers sympathetic with and dedicated to the general philosophical view of the Secretary of State.

3. reform the system of Foreign Service appointments. Former Ambassador Silberman, for example, has written that, ". . . the frictions that have arisen almost continually between the Service and successive Presidents (and their political appointees) have their roots deep in the system of appointments itself—and they lend themselves to constructive remedies."* These remedies will take time, since the problems are deep. Nevertheless, this is a serious and nagging long-term issue. The most important areas of reform, however, should include:

a) a regularized process to distinguish between "career" and "political" appointees;

b) easier entry into the Service for highly-qualified "outsiders";

c) expansion of specialized training at the Foreign Service Institute and the universities;

d) an improved system for career promotions;

e) a review of assignment patterns for particular regions and functions.

4. provide better and increased opportunities for Foreign Service officers to spend significant periods of time in domestic private and governmental agencies. (There are a variety of proposals on this issue, the object of which is to "instruct" more FSOs on domestic economic and political realities.);

5. assign policy-making and policy directing responsibilities in such manner as to reduce the Department's tendencies to view issues bilaterally, and to emphasize global considerations;

6. increase the number of personnel to the storage, collection and analysis of information, thus limiting the policymakers responsibilities in this area;**

7. in order to improve the planning process in the State Department, create an "outside wing" of specialists that would be appointed as consultants to appraise planning papers,

*Lawrence H. Silberman, "Toward Presidential Control of the State Department," *Foreign Affairs*, Spring 1979, p. 872.

**For structural proposals on these last two issues, see Krizay, *Policy Review*, *op. cit.*

suggest priorities, propose agendas and otherwise assist the Department in its crucial policy planning operations;*

8. as part of another "outside wing," the State Department should make maximum use of the "wise old men" in foreign policy, those with greatest experience and knowledge who due only to their age cannot serve in a full-time capacity;

9. move swiftly to instill new leadership throughout the department so that new policy direction can be implemented with minimum friction and maximum impact.

Most of these reforms would require further study; many of them would take considerable time to implement. There are, moreover, any number of other ideas which have been advanced to streamline the interior functions of the State Department bureaucracy. A balanced and integrated role for the modern State Department, under a capable and confident Secretary unafraid of being "usurped" in authority, is an essential long-range task for the future. A fruitful area of reform for the immediate future, however, is executive/legislative relations. This will be the final topic of this section.

Congress

To improve the "partnership" between the Congress and the executive branch in foreign policy has been called by one authority ". . . the central question of American foreign policy."** Be that as it may, the question will grow increasingly important in the years immediately ahead. This area might also be the most politically productive and the most easily effected one for a new administration to consider. It is an area which receives a great deal of public attention, and it is one in which the Carter Administration was extremely vulnerable.

In dealing with Congress, reforms are obviously highly political. Any changes or even attempts at change, would be both welcomed and publicized. They would also effect, if successful, a much easier and regulated process of communication and implementation of the President's foreign policies than has been true so far.

Because of the presidental prerogatives in foreign policy, it is incumbent upon the executive branch to initiate and develop an improved pattern of behavior and procedure. Congress, however, has its own responsibilities to improve the process.

*Lincoln Bloomfield, "Planning Foreign Policy: Can It Be Done?," *Political Science Quarterly*, Fall 1978.

**Frye, *op. cit.*, p. 3.

Areas of reform which might be initially considered, therefore, would include the following proposals:

1. The Murphy Commission has recommended a number of changes in the executive/legislative machinery, in particular:
   a) a concurrent resolution that the use of armed force can only come from action taken by both the executive and legislative branches;
   b) the termination of declarations of national emergency by concurrent resolution, if the President does not do so;
   c) establish procedures to regularize the process whereby Congress requests, and receives, information;
   d) legislation to provide for a comprehensive system of classification;
   e) the creation of a Joint Committee on National Security, to perform a similar service for Congress similar to the one that the NSC performs for the President. Such a "supercommittee" has been advised by other studies as well.* It would act as a clearinghouse of information and provide access to the executive branch over and above the normal legislative duties of the standing committees. This has, in fact, been long advocated by such men as the late Senator Hubert Humphrey and Representative Clement Zablocki.

2. Assistant secretaries in the State Department for congressional relations should be individuals with a knowledge of and sympathy for Congress, and with strong beliefs in the value of a congressional policy role;

3. The establishment of one individual in the NSC or the White House staff as the designated congressional liaison officer for foreign policy;**

4. Presidential submission to Congress of a formal and comprehensive Biennial Statement of U.S. foreign policy, which would be used to stimulate a more active and coordinated congressional response; and

5. Attendance of congressional leaders at some Cabinet and State Department policy meetings.

In conclusion, it must be reiterated that any improvement in the channels of communication, processes and structure of the foreign policy government depends exclusively upon the next

*Frye, *op. cit.*; Allison and Szanton, *op.cit.*, Chapter Five; Bayless Manning, "The Congress, the Executive and Intermestic Affairs: Three Proposals," *Foreign Affairs*, January 1977.

**Frans R. Bax, "The Executive-Legislative Relationship in Foreign Policy: New Partnership or New Competition?," *Orbis*, Winter 1977.

President of the United States, his style and personal choices, and his dedication to improvement. Nothing can change this fundamental point.

Many of the reforms advanced here have been proposed before, although possibly in somewhat different form. They represent the best minds and dedication of more than three decades of foreign policy experience, and of the collective will of hundreds of professionals. Only four of the proposals advanced in recent years have been implemented. But a wholesale definition of the several foreign policy agencies and their respective roles, therefore, has yet to occur. The nation is still waiting for an administration both willing and able to finally bring coherence, management and precision to the operation of the U.S. foreign policy system.

CRITICAL POLICY OPTIONS

Bureau of Human Rights

The use of the term human rights first emerged as an integral public element of American foreign policy with the advent of the Carter Administration. In his inaugural address, President Carter asserted that "our commitment to human rights must be absolute." In subsequent actions in the area of foreign policy, the human rights issue has often come to the forefront of discussion of relations with other countries and has led to altercations with both traditional allies and adversaries.

Previously, the Johnson, Nixon, and Ford Administrations preferred to use so-called quiet diplomacy in order to accomplish human rights objectives. Nonetheless, the Congress interjected itself into the human rights issue, especially after 1974, and sought more direct actions by the United States to allegedly improve the status of human rights considerations in the pursuit of foreign policy.

Through various pieces of legislation passed by the Congress human rights has taken a larger role in the manner in which the U.S. deals with other nations. Under the legislation passed by the Congress, the State Department is the principal vehicle for carrying out the human rights mandates. Section 116 of the Foreign Assistance Act of 1961, as amended, sets out specific restrictions on various U.S. programs. In particular, the Act provides in Section D that:

> The Secretary of State shall transmit to the (Congress) . . . by January 31 of each year, a full and complete report regarding

1) the status of international recognized human rights
A) in countries that receive assistance under this part, and
B) in all other foreign countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this Act; and
2) the steps the Administrator has taken to alert United States programs under this part in any country because of human rights considerations.

This reporting requirement has been fulfilled each year by the State Department in coordination with U.S. Embassies overseas and other agencies of the U.S. government. This report has constantly grown in both size and detail until the present edition (February 4, 1980), covers every country of the world and runs a total of 852 pages. The report forms a substantial basis of U.S. governmental attitudes toward other countries and has precipitated conflicts with many of them.

With the publication of the first report in January 1977, four governments in Latin America (Brazil, Argentina, Guatemala, and El Salvador) repudiated their mutual defense agreements with the United States and indicated they would look elsewhere to purchase military equipment. They contended that criticism of their internal political policies constituted an unwarranted intrusion into their domestic affairs. Thus, frequent criticisms of American financial imperialism in Latin America may be giving way to new charges of moral imperialism.

Under the Carter Administration, much greater emphasis has been given to the role of human rights in the conduct of U.S. policy and the role of the State Department in pressing the policy. Prior to 1978, the State Department had a "Coordinator" for Human Rights and Humanitarian Affairs, a mid-level position in the Department. But, with the support of the Carter Administration, the Foreign Relations Authorization Act of Fiscal Year 1978 [under section 109(a)(2)] provided that an "Assistant Secretary" for Human Rights and Humanitarian Affairs be created to oversee and carry out policy. This legislative provision simply ratified the increased authority which the Carter Administration had granted to the human rights area. With an Assistant Secretary, the Human Rights Bureau attained the same rank as the major regional bureaus. In fact, often the recommendations of other bureaus have either been overruled or substantially modified by the decisions of the Bureau of Human Rights. No part of the State Department has created as much controversy as this depart-

ment and its expanded role in the overall operation of U.S. foreign policy.

Organization of Department

As is the case with several other bureaus of the Department of State in recent years, the head of this particular bureau has assumed a far larger role in policy-making than had originally been envisioned for the position, even as it rose in official status from coordinator to Assistant Secretary. This is particularly true in the case of this department as it has been granted the authority by the Carter Administration to often exercise a veto power over actions and proposals of other departments.

Rather than being simply a coordinate branch, it attained a superior position in an entirely negative sense. Proposals for assistance to some nations could receive strong support from both regional bureaus, the economic bureau and related positions in the Commerce Department or our representatives in the international financial institutions (IFI), but in the end, the Bureau of Human Rights has been able to stymie various projects or compel our representatives at the IFIs to oppose particular loan programs. Rather than a smoothly flowing decision-making process, the current system creates the impression that some program or decision is moving forward, and then, only at the last minute, human rights considerations may be arbitrarily invoked to alter a decision.

Furthermore, even within the Human Rights Bureau itself, conflict has existed between its officers. For example, the economic officer or international organization officer may disagree with the regional human rights officer. From the welter of conflicting reports, the Assistant Secretary often must make a final determination. A substantial amount of the criticism has been leveled at the judgment of the present Assistant Secretary, whose views have been characterized by a particularly rigid ideological position. Possibly another official in that position could reduce the friction both within the State Department and around the world, but in the opinion of this report, the concept itself has been seriously flawed and more substantial changes are in order.

The Assistant Secretary in the Bureau of Human Rights and Humanitarian Affairs, with the support of the Carter Administration, has failed to recognize severe limits to what any external power can or should do to advance human rights in other sovereign states. This flaw betrays a profound confusion between domestic and foreign policy. We have no political or

moral mandate to reform other societies. This has led to more resentment than reform.

Further complicating this, the "human rights standard" has been selectively and arbitrarily applied. More criticism has been directed against a few selected friendly governments than against our implacable enemies. Related to this there is a great confusion between authoritarian regimes, which observe limited civil and political rights, and totalitarian regimes, which deny virtually all rights for all citizens.

The elevation of the human rights concern within the State Department to the status of an Assistant Secretary tends to deal with the issue symbolically rather than substantively, confuses the purpose of foreign policy, and invites charges of conspicuous virtue and hypocrisy.

The purpose of U.S. foreign policy should be to maintain the security of our country and its allies and to develop a world order conducive to peaceful change and adaptation. The principal concern of American policy toward another state is that state's foreign policy, not its domestic practices. On both moral and pragmatic grounds, the U.S. security requirements must take precedence over the desire to reform the internal policies of a friendly government.

Policy Recommendations on Human Rights

A broader and more sophisticated approach must be taken to deal with human rights to enhance effectively both the status of human rights and maintain our own vital interests. Four ways in which a conservative administration can restore the human rights concern to its proper place are listed below. These simple proposals should contribute to more consistent policies toward our allies, friends and adversaries:

1. Reaffirm our fundamental commitment to human rights at home and thus continue to serve as an example to all who are in a position to emulate us. Example is more effective than moralistic preaching or punitive measures, which are often viewed as arrogant or hypocritical.

2. Through quiet diplomacy we should nudge friendly and allied regimes in the direction of greater respect for civil and political rights. This is more likely to take place if we are viewed as allies rather than adversaries.

3. Strengthen our commitment and increase our aid to allied states under siege by totalitarian states or subjected to severe internal challenges. Our greatest contribution to human rights would be to help prevent a democratic or an authoritarian

state from being conquered or subverted by totalitarian forces.

4. Recognize the totalitarian threat as the principal threat to human rights in the world. This would mean focusing our primary attention on those countries which are the major violators of human rights, such as the Soviet Union, China, Cuba and Vietnam. They not only violate such rights in their own countries, but attempt to export a system predicated upon the denial of *all* basic human rights.

Policy Options and the Future of the Bureau

A conservative administration must substantially change the present operation of the Bureau of Human Rights and Humanitarian Affairs. In the short term, this could most easily be accomplished through the appointment of a director who has a better understanding of both the meaning of human rights and how to integrate that one element into the complex matrix of foreign policy-making.

In the longer term essentially three options exist to deal with the Bureau:

1. Elimination: As a substitute for only a bureau dealing with this issue, the President should seek to abolish the human rights office because it has trivialized the objectives it was established to serve by segregating "human rights" from the mainstream of policy, by applying the rights standard capriciously, and by inviting charges of interference in the domestic affairs of friendly states. At the same time, the President should issue an Executive Order making human rights a concern for *all* bureaus and offices of the State Department, noting that this concern is one of several considerations that must be taken into account in formulating policy. In order to make this change, Congress would have to amend the Foreign Relations Authorization Act of 1978 to eliminate the "Assistant Secretary" position in this area.

2. Restore the *status quo ante:* The President could seek to return the Bureau to its previous status as a less prominent part of the State bureaucracy by once again making the person in charge a "Coordinator" rather than an Assistant Secretary. This would also require congressional action. The Bureau would continue to influence policy, but not in such a strident or conspicuous manner.

3. Maintain the structure: The President could name a prominent figure to head the Bureau who has a sophisticated understanding of human rights. Human rights would continue to play a large role in the conduct of foreign policy but in the

future, principal public attention would be devoted to exposing the most serious human rights violations in totalitarian countries and at the same time work with more authoritarian governments to liberalize their system with the assurance of U.S. support against terrorist and totalitarian threats of their independence.

Regardless of which option is taken by a conservative administration, the U.S. should continue to champion the substance of human rights, although it may take several years for the restoration of meaning to the term itself.

In international forums dealing with human rights, we should constantly put the totalitarian regimes on the defensive and vigorously defend our own society and policies as authentically reflecting any serious meaning of the term human rights.

Finally, a conservative administration should seek to eliminate the public annual report on the status of human rights in the world. This pontificating report has done far more damage to our relations with other nations than enhancement of human rights. Such reporting should be left to private organizations which do not have to deal with the extraordinary complexity of modern diplomacy.

Law of the Sea Conference

The United Nations Conference on the Law of the Sea (UNCLOS) affects two vital dimensions of international stability—economic and military. Fishing, mining and shipping are affected, and in the military sphere the right of passage of ships and the right of airspace. Many times the alignment of nations on these issues makes strange bedfellows. The United States and the Soviet Union are often in agreement on critical points in resisting the claims of smaller nations because they have the most at stake.

The UNCLOS was convened because of the rapidly expanding coastal-state claims over ocean space and the encroachments on traditional freedoms of maritime travel, as well as the movement of military peacekeeping forces. The old alliance among peacekeeping powers, the global peacetime mobility of military forces, and the universal system of ocean law have all been disintegrating. Their renewal, with appropriate revisions reflecting modern conditions, is the essential task of the conference.

Many questions have been settled since the start of the

UNCLOS in 1958. The once varying claims to territorial waters have been fixed at a uniform 12 miles offshore, with an exclusive economic zone reaching 200 miles from shore. The principle that all states, coastal and landlocked, should have access to the sea and its riches has also been accepted.

Yet many critical issues remain to be settled. One of the prime issues concerns resources. During the original negotiations of the UNCLOS, the world was not so resource-dependent. The minerals lying on the ocean floor are vital to the world economy and, as the demand for minerals and raw materials increases, all nations naturally seek to protect and enhance their access to world resources. This is also true with the transportation of resources, especially oil. Thus, one of the areas defined in the Conference negotiations is the right of passage of innocent ships through straits. Whoever controls the straits controls the sea. If resources cannot be moved to the nation needing them, that nation will suffer both economically and militarily.

The "resource war" can be analyzed in several ways: East vs. West; North vs. South; the "have nations" vs. the "have-not nations"; and friend vs. foe. Due to the fact that once any agreement in the Conference is made it will be law, with little likelihood of revision for decades to come, it is necessary to consider how to handle the Soviet Union, which has used the UNCLOS very astutely.

The Territorial Sea—Soviet Use of Ocean Law

The Soviet government does not carry out its obligations under the 1958 Convention on the Territorial Sea and its Contiguous Zone (to which it is a party). One example concerns the right of innocent passage of warships, and another the taking away of the ancient right of immunity of state merchant ships. Soviet statute allows for the permanent closure of parts of the territorial sea to all foreign shipping. Britain must allow Soviet ships the right of passage through her territorial waters but the Soviets claim that their waters are known as "Historic Bays and Straits," and thereby exempt from the Convention. A special right of "internal waters" is specified by Soviet statute. No right of innocent passage is held to exist in such waters, so foreign shipping may be excluded or strictly controlled. This principle applies also to airspace.

The vast areas of the adjacent seas will grow in importance to the Soviet Union over the next few years. In their current five-year plan, the Soviet authorities are giving the Northern

Route high priority. In the new age of ice-breakers and navigation and meteorological satellites, the importance of the Arctic for international shipping is considerable. It is an extremely promising route from Western Europe to Japan, as well as to and from ports being constructed along the Siberian Coast. Eighty percent of Soviet energy resources are east of the Urals, and the development of the Arctic Route is closely related to their intended exploitation.

Additionally, the Soviet Union has been achieving a dominant position in carrying ocean freight and developing a sea route through the Arctic, to which she makes claims to having a monopoly. The West, which may play a large role in technological and financial investment in exploiting Siberian oil and gas, should not acquiesce to Soviet claims of monopoly in the Arctic Ocean. The Soviet Union is the best example of a nation taking advantage of provisions of the UNCLOS negotiations and laws already in effect. It is utilizing the laws of the Conference to play by its own rules, to capitalize on its unfair military advantage in a resource war, and to control the territorial sea.

Seabed Mining—The Third World Takes a Stand

Several bills related to seabed mining are working their way through the United States Senate and House. A successful resolution of some extremely thorny issues regarding seabed mining will require patient negotiations by a new Ambassador, with appropriate consultation with congressional leaders.

Among the many issues that have already been settled is a proposed system that would allow state-operated and private companies from industrialized countries to mine in competition with the special mining project called "Enterprise." This project will be funded largely by industrialized countries, but will act as a mining company on behalf of the Third World nations. The "Enterprise" will extract the minerals and developing countries will receive the profits. The UNCLOS set up this project as a concession for the countries of the Third World to establish their rights to the fair share of the seabed riches and minerals.

But certain sticky issues remain, such as production limits to protect Third World countries from competition. These same countries are already extracting metals from land-based mines and want to extend their mining operations to the seabeds. Another potential stumbling block is the issue of how

voting power will be distributed among members of the governing body of the proposed international seabed agency called the "Authority."

The U.S. Ambassador to the conference tried to represent the views of Congress by inserting a grandfather clause into the treaty. This clause would protect the interests and investments of the American mining companies already in operation. The U.S. companies also want language guaranteeing them a profitable return to pre-treaty investments in underwater mining sites.

The economic ramifications of the Seabed Mining Treaty are staggering. As a country with the most developed technology in this field and a nation in need of raw materials, especially nickel, cobalt and manganese, the U.S. is in the unusual position of being both a "have" and a "have-not" nation. The Geological Institute warns that "without certain critical minerals on which the U.S. is currently dependent (on other nations), the United States would probably be the loser in a military confrontation of magnitude." The House Merchant Marine Committee reports, "The United States has learned through the OPEC experience, that dependence on other nations for supplies of essential resources makes our nation vulnerable to the uncertainties of international politics."

A "resource war" is very much a possibility when one considers the power the Third World is trying to assert. Third World nations are now challenging the United States' position in seabed mining. They are pressing for a treaty governing how and at what price materials are sold, and even whether a particular nation has a right to mine. In a political system where the Third World has many member nations and every nation has one vote, the U.S. is certain to be outvoted when self-interest overrules common sense.

According to a recent analysis published in the *Defense and Foreign Affairs Daily*, "Scores of states, many in the Third World, now control the coastal waters through which U.S. flights and ships must pass. These nations likewise have military forces capable of interfering with U.S. passage, thereby increasing the risk of conflict between the U.S. and other states." Because only the U.S. is developing undersea mining knowhow, the world's access to the seabed resources would be delayed if the impasse in the Conference forces U.S. consortiums to suspend operations.

Conclusion

Our future well being and security depend on the results of the negotiations with the United Nations delegates to this Conference. The international laws that will result will have the same standing as other existing treaties such as the SALT I agreement, and could have just as profound consequences for our national security.

A new bill passed by Congress this summer authorizes U.S. companies to mine after 1988. At this time, the U.S. is getting ready for commercial recovery of minerals in the seabeds. Plans for the actual operation of any mining sites are in the early stages of development.

If the Conference collapses, the U.S. should negotiate a seabed "minitreaty" with other industrial countries that plan to mine the ocean floor. This could be done with developing countries which want to participate in joint ventures.

There is still time for the negotiators to wrap up a comprehensive treaty—and thus sidestep a showdown. Publicly indicating impatience with "Third World" posturing and moving forward with discussion of options outside the UNCLOS framework could break the deadlock.

By conceding too much to the so-called Third World in recent years, we have sacrificed our ability to engage in tough negotiations that protect our vital interests. A tough but fair stance on the UNCLOS could dramatically break the U.S. from its posture of excessive acquiescence. As with so many other issues involved in development, mining minerals of the sea will benefit all nations and only an incentive system will allow that to happen.

Central America

Although the Carter Administration was correct in believing that certain changes were necessary in Central America, a major mistake has been made in turning to the "passionate leftists" (as the U.S. ambassador to El Salvador calls them) for solutions. By the time the Administration realized that these "passionate leftists" were armed Marxist revolutionaries interested only in exploiting these problems, a Marxist government had been installed in Nicaragua, potentially mortal wounds had been inflicted on El Salvador, an insurgency had gained momentum in Guatemala, and terrorism had started in Honduras.

In the near future, the U.S. must revert to a more traditional

view of Central America if the spread of Marxism is to be contained. The Carter Administration has behaved with support to the left and hostility to the right, and this alone has generated many of this region's problems. One of the more potentially serious of these problems is that the Soviets may begin to believe that the U.S. would not react forcefully to their incursions in this area. The Soviets appear to have tested the water cautiously so far; thus, actions by the U.S. in the next six months must be taken to project the correct image to all parties in the conflict, including the Soviets, to preclude their attempting dangerous and perhaps irreversible maneuvers. The tempo of events now unfolding in Central America is so rapid that decisive policy alterations must be effected immediately. The expected economic low points in El Salvador and Nicaragua, with profound internal and regional security implications, will occur at the end of the harvest season in the spring of 1981.

Fundamental differences exist in the people and problems of these three countries. Communism is the common threat to all three, and as long as it exists in any great strength in any one of them, the others will be in danger. Thus, although the Marxist government in Nicaragua might fall eventually of its own failures, the security of El Salvador requires the acceleration of the removal of the government in Managua. Significant weakening of the communist guerrillas in El Salvador would add to the pressures now building up against the Nicaraguan government. The guerrillas in Guatemala receive material and moral support from the communists elsewhere in the region, and any setbacks experienced by the enemy in El Salvador and Nicaragua would not only weaken the insurgents in Guatemala, but might also convince Mexico to reassess its current complacency toward communist guerrilla use of its territory in support of activities in Guatemala. The problems now in these nations are different but interdependent, and the solutions are the same.

This study briefly examines the current situation in each of these three countries and then suggests potential policies which can effectively promote the continued independence of the nations in the area and protect the vital interests of the U.S. as well.

Nicaragua: Economic Problems

The Marxist Nicaraguan government (consisting of the Sandinista Directorate and its subordinate Junta), in power

since July 1979, is losing popular support because of its inability to cope with serious economic problems and to deliver on its promises to the broad spectrum of Nicaraguan society which supported its revolution. Economic shortcomings will become more serious by December 1980 and might provoke at least limited civil unrest by the end of the current harvest season (May-June 1981), when the nation will have an acute shortage of money unless it receives massive amounts of foreign aid.

The Carter Administration advocates financial support to the Sandinista government in the belief that an economic crisis within the next two or three years would "radicalize" the revolution and make it more difficult for the relatively weak democratic forces to dislodge the Marxist Sandinista leadership. The financial aid given by the U.S. since the July 1979 revolution (approximately $125 million disbursed or being disbursed), makes the U.S. the principal contributor to the Sandinistas.

NICARAGUAN AID

Development Assistance	$ 18,062,000
Reconstruction Assistance	15,000,000
Title I	15,000,000
Title II	1,590,000
Economic Support Fund	75,000,000
	$124,652,000

At a June 1980 party, the Soviet ambassador to Nicaragua commented that Nicaragua was an interesting experiment because it may be the first socialist revolution aided by the local private sector and funded by the United States. For all of its aid, the U.S. has received little credit among the Nicaraguans. The U.S. Embassy in Nicaragua states that the Sandinista government tries to minimize publicity of U.S. funding, and leading private sector representatives believe that one of the many mistakes our government has made is to soft pedal our aid to Nicaragua; they say that the Nicaraguans hear more about the money the U.S. has not given than the money it has given. Moreover, private Nicaraguan economists believe that the level of foreign support has prevented the nation's population from feeling the true effect of the country's deteriorating economy.

While mismanaging the economy, the Sandinista government is building up its political indoctrination programs and its

security, military, and police forces, although they are still weak because of lack of organization and low morale. Moreover, local intelligence sources in Guatemala and El Salvador believe the Sandinistas are also providing logistical and moral support to insurgent forces in those two countries.

Rising Discontent in Nicaragua

This attachment of the Nicaraguan workers to the revolutionary movement can be expected to weaken as the economy deteriorates. There are even some indications despite the recent civil war, of growing broadly based support to take to arms to overthrow the Sandinista government. There already have been locally brewed, small-scale armed uprisings against the Sandinista government, and parts of the Nicaraguan countryside have become openly hostile to visiting government representatives.

There is no question these discontented Nicaraguans could be aided in an armed struggle against the Sandinistas by former national guardsmen now in exile. But the acceptability of the guardsmen by Nicaraguans will depend on how well the guardsmen, without Somoza, are able to overcome their reputation for corruption and brutality.

Sandinista Disunity

In addition to their other problems, the Sandinistas are also beginning to show signs of internal disunity. Initially, Tomas Borge, the Interior Minister, and Sergio Ramirez, Junta member, were the key leaders. They have been replaced in terms of power by the Minister of Defense, Humberto Ortega, and his brother, Daniel, a Junta member. Minister of Agricultural Development Jaime Wheelock's star is also rising, and one of the heroes of the revolution, Eden Pastora, has lost considerable influence.

Furthermore, the Sandinista army, initially rankless, has acquired a rank structure and the trappings of protocol, much to the dismay of the young revolutionaries who fought in the hills against Somoza and now believe they have been misled. However, any fight among the leaders and members of the Sandinistas, unless influenced by non-communist Nicaraguans, might well result in a replacement of one communist government by another one.

It will not be possible to dislodge the current communist government of Nicaragua, regardless of the degree of popular

unhappiness, except through military action. Under the proper circumstances, the Nicaraguans themselves are prepared to initiate that action, and any U.S. military or parliamentary involvement would be unnecessary and even counter-productive.

Opposition Forces

The Catholic Church and many political parties, from moderate left to conservative right, are united in their opposition to the Sandinistas. The Church and these political parties plan to protest the recent announcement by the Sandinista government that elections for a new government might be held in 1985—two or three years later than they had expected. There is one free newspaper in Nicaragua, *La Prensa*, influenced by a very brave young man, Pedro Joaquin Chamorro, son of its former owner.

Free labor unions are competing successfully for the loyalty of workers who are beginning to lose faith in the Sandinista-sponsored unions. The private sector is united under an umbrella organization, COSEP, which must work within the parameters set by the Sandinistas. It does carry influence because of its economic expertise in a nation managed by an economically incompetent government and because of the worker's increasing loyalty to it.

Human Rights

Finally, among the free democratic forces in Nicaragua is the Permanent Commission on Human Rights, headed by Jose Esteban Gonzalez. This man received considerable attention from the U.S. Embassy and the international press when he was reporting human rights violations under Somoza. Since the Sandinistas came into power, he has received little attention, despite the fact that the government's human rights record is miserable. Gonzalez receives daily 50 to 60 persons who are concerned about missing or imprisoned relatives. He has no money to support his work because his former benefactors have withdrawn their support (the U.S. Council of Churches, for example, stopped funding his office when the Sandinistas came into power because the Sandinistas promised to honor human rights). He is now so harassed by the Sandinistas that he must sleep in a different place each night.

Meanwhile, the Sandinista government, recognizing the need to project a good human rights image, has established its

own human rights office to present a white-washed account of its record, to diminish the influence of the Permanent Commission, and to serve as liaison with international organizations, such as Amnesty International and the OAS Human Rights Commission, which it has just invited to visit Nicaragua. This is human rights in practice, under the Carter formula.

Nicaragua: Policy Recommendations

The United States should aid the aspirations of the Nicaraguan people to achieve the free society they have long sought. With regional security uppermost in our minds, we should be less concerned about the precise nature of that society and its government than about the inclinations and ability of that government to serve as a continuing source of support for Marxist revolutionaries elsewhere in Central America. In a well orchestrated program targeted against the Marxist Sandinista government, we should use our limited resources to support the free labor unions, the Church, the private sector, the independent political parties, the free press, and those who truly defend human rights. We should discontinue subsidizing a bankrupt government which clearly is planning on remaining in power through its police and security forces and whose interests are inimical to those of its neighbors and the U.S. The longer that government remains in power, the stronger its security apparatus will become, and the more difficult it will be to dislodge it. We should not abandon the Nicaraguan people, but we must abandon the Sandinista government.

Furthermore, The U.S. should terminate large-scale funding of the Sandinista government in order to send a clear signal to Central American revolutionaries that it does not plan to support leftist movements in the region, and to discourage the Soviets in their attempts to establish another communist country in this hemisphere.

Sixty percent of the funds in the recently released $75-million aid bill is slotted for the private sector. The private sector doubts it will see all of this money, and whatever it does receive will have to be spent within parameters set by the Sandinistas. In any event, the remaining 40 percent will be used to help bail out the Sandinistas from their economic problems. Even to receive these funds under these restrictions, the private sector has advocated U.S. financial aid to the Sandinista government because the Carter Administration has not put forth any alternative formula of support for the private sector.

As long as private sector support has been linked by President Carter to Nicaraguan government support, the Carter Administration has assured its policy of private sector blessing—which the Administration has attempted to portray as private sector endorsement of the Sandinista government. Appropriately channeled assistance to the democratic institutions in Nicaragua could be far more effective and far less expensive than our currently structured official U.S. aid program for the Sandinista government.

The Nicaraguans did not want Somoza, and they do not want the current Sandinista government. Despite its show of arms, that government is still weak and could be dislodged through a determined, coordinated, and targeted effort. But to assist the Nicaraguans in achieving that goal will require a much more realistic understanding about regional Marxist threats than the Carter Administration exhibited.

El Salvador: Current Economic Situation

The rapid deterioration of El Salvador's economy, if unchecked, could help the leftist guerrillas achieve the victory they have thus far been unable to obtain militarily or politically. As in Nicaragua, the crisis will begin at the end of 1980 and will become acute at the close of the harvests in the spring of 1981. Unemployment is officially acknowledged at 30 percent, but is probably higher. There is an acute shortage of working capital essential to the maintenance of agricultural production and to the reactivation of industry. Foreign banks are unwilling to restore traditional lines of credit; letters of credit are now issued only against advance cash payments.

The government has prepared a National Emergency Plan for 1980 which involves a consolidated public sector deficit of $541 million; internal financing is projected at $343 million. If the Plan is actually carried out and this amount is financed through Central Bank credit, the result would be a substantial acceleration of inflationary pressures.

A major component of El Salvador's financial requirements over the next four to five years is the financing of the agrarian reform program; the USAID Mission estimates this financial requirement at over one billion dollars between 1980 and 1984. The U.S. Embassy in San Salvador has estimated that El Salvador would need a $200 million FY 81 Economic Support Fund and/or program loan to provide balance of payments assistance.

This grim picture has occurred in a country which only a couple of years ago was economically viable and well respected in the international money markets. The economic deterioration has resulted from the nation's escalating violence as leftist guerrillas push the nation closer to civil war and their goal of a Marxist revolutionary government. It has also resulted from the Carter Administration's experimentation with El Salvador's principal means of livelihood: its heretofore efficiently run farms, which produced the primary cash crops of coffee, sugar, and cotton. This three-phase agrarian reform program began in March 1980 with the nationalization of all farms over 500 hectares. (The former owners of these farms have, thus far, received no compensation.)

A discrepancy exists between the U.S. Embassy and the Salvadorian government estimates of the economic success of the first phase of this program, and the assessment by the farmers themselves. They tend to be pessimistic and charge that the local government managers do not know what they are doing, and as a result, the land is not being utilized properly.

Phase II properties (100 to 500 hectares) are still in private hands. These farms are even more important to the nation's economy than those nationalized in Phase I because the bulk of the nation's cash crops are grown on Phase II land. (For example, 92 percent of El Salvador's coffee is grown on farms under 500 hectares.) The present owners of these farms, however, anticipating nationalization of their land, are investing little money in them to fertilize the soil and to control the coffee rust disease (roya). They are also not beginning nursery seedlings necessary to insure future coffee trees, and they are cutting down shade trees to increase this year's harvest, but at the expense of future harvests. The result of these acts is that El Salvador's future coffee production may suffer.

The embassy, the Salvadorean government, Professor Prosterman, and private agriculturalists all agree that Phase II land should not be nationalized until proper management techniques can be devised, lest the country's primary foreign exchange source be seriously, perhaps fatally, damaged. Private agriculturalists would like to see Phase II cancelled altogether.

Phase III, covered by Decree 207, calls for the deeding of land to the campesinos who have rented and tilled it. Although the amount of land involved in Decree 207 is small and of

marginal cash crop productivity, the number of campesinos who would benefit from the decree would be about 900,000, nearly one-fifth of the nation's population. Therefore, this phase of the agrarian reform program does have high political impact, does carry minimal economic risks to the nation, and is favorably supported by private agriculturalists in El Salvador, as well as by the government and the U.S. Embassy.

The banking reform, enacted at the same time as the agrarian reform, appears to have the potential of achieving its purpose of extending bank credits to small and medium-sized businessmen, who traditionally have had difficulties in obtaining loans for expansion of their businesses. The objection raised by some private sector members now in exile is that these smaller businessmen are not credit-worthy and might default on their loans. However, Salvadoreans are industrious, imaginative, and hard-working people, and it seems unlikely that so many of these smaller businessmen would default on their loans as to endanger the integrity of the banking system.

The Military Situation

An even more significant source of support for continuing the reforms enacted thus far comes from the strongly anti-communist leadership of the Salvadorean military. They contend that certain reforms have now become part of reality in El Salvador, and to dismantle them would run the risk of creating such civil and political unrest as to be unrealistic and, hence, unacceptable to them.

Though these military men do not necessarily favor these reforms they realize that the reforms already enacted are here to stay. What must be done, they agree, is to improve the management of Phase I of the agrarian reform program, continue with Decree 207 and the banking reform, and seriously consider modifying or even cancelling Phase II of the agrarian reform.

The current military and security trends in El Salvador are favorable. The leftist guerrillas and their front organizations have lost much popular support; observers believe the Junta's popularity has been broadened at the expense of the leftists. It is more likely that the leftists have lost popular support because the population is fed up with violence, but this loss of support for the left does not necessarily translate into increased support for the Junta.

The Salvadorean military forces have a combined strength of about 15,000; the armed leftists total about 5,000. Salvadorean military leaders are optimistic that they can control and eventually eliminate the bulk of the leftists if the enemy remains at present levels of manpower and equipment. Should, however, enemy forces be augmented through large numbers of foreign "volunteers" and/or should the enemy receive more sophisticated equipment than it now has, the Salvadorean military, by all estimates, would be in serious trouble. For this reason, reports that Nicaragua has recently received large numbers of armored vehicles, long-range mortars and rockets, automatic and semi-automatic weapons, and certain aircraft – all far in excess of Nicaragua's internal defense needs – are particularly worrisome to El Salvador's military leaders.

U.S. military assistance in FY 80 has amounted to $800,000 in the form of communication gear, tear gas grenades, gas masks, generators, and ambulances. More offensively-oriented equipment has been offered but with human rights-related strings which the Salvadorean military has found unrealistic. The military command and the Junta acknowledge that excessive force is used by low-ranking military units in the countryside. It is a failure of command and control.

The unity of the Salvadorean military is a critical issue. Most observers believe that it is divided into two camps: one, pro-left, constitutes about 30-40 percent of the forces, and the other, pro-right, about 60-70 percent. The degree of commitment that the pro-leftists have to their cause is a subject of speculation; most local Salvadorean observers believe that this segment's greater loyalty is to the military as an institution and that it would not split away from the rightists if such a split threatened the survival of the armed forces.

Any attempt to displace the Junta now or in the near future would generate unnecessary political turmoil and disrupt continuity of the government at a time when continuity is needed. All responsible elements within the private sector residing in El Salvador and within the military now appear content to let the Junta remain in power until elections are held sometime in 1982 or 1983; these elements believe that any attempted rightist coup would fail and would yield major benefits to the leftist guerrillas. The neutralizing of Colonel Majano's influence is a delicate matter and is best left to the Salvadorean military leadership to handle, in order to avoid splitting the military forces.

Business and Church Groups

For the first time in recent memory, the Salvadorean private sector is united, and its spokesman is an umbrella organization called the Productive Alliance. It is a workable and essential organization, and it has the respect and cooperation of significant members of the private sector. Without such a broadly based organization representing diverse segments of the private sector, rather than just an elitist element, the private sector in El Salvador could not become a potent force in the reconstruction of the country.

The Catholic Church appears to have become less of a divisive factor in El Salvador's political equation following the assassination of its controversial leader, Archbishop Romero. Although Romero received international publicity as archbishop, his strident criticism of the government and of the right was representative of only the minority of his bishops. His replacement, who has not yet been confirmed as archbishop, is less vocal, more moderate, and more representative of the Church than was Romero.

El Salvador: Policy Recommendations

Present levels of U.S. aid could be reduced and greater efficiency injected into the management of the nation's economy if the role of the Salvadorean government were reduced and that nation's private sector allowed to rebuild and expand its activities. With key members of the private sector now united and determined to move ahead with plans beneficial to the nation as a whole, the private sector in El Salvador has become a viable force in the reconstruction of that country. EX-IM Bank financing and international private sector loans, as well as U.S. private sector loans with OPIC support, should be explored as possible ways of channeling funds into the Salvadorean private sector for maximum benefit.

The agrarian reform program cannot be dismantled without risking political turmoil and the anger of even the strongest anti-communist elements within the Salvadorean military. The program, however, can be better managed and attenuated. Phase I management should be turned over to the private sector, preferably to those with agricultural experience, but, at the very least, to persons who understand efficient business practices, who would work together with the campesinos and eventually train them or their sons in certain managerial techniques. Decree 207 land reform should be allowed to

progress because of its major political impact and minimal economic significance.

Fair compensation should be paid to the owners of Phase I land over a realistic period of time in order to maintain the credibility of the government and to recruit these owners to put their skills and talents to work for El Salvador. Phase I land owners represent a valuable talent pool which the country cannot afford to lose, but it will be lost unless the government makes a genuine effort to begin resolving this dispute.

Phase II properties, given their importance to the nation's economy, should not be confiscated by the government. Instead, Phase II should be cancelled so that the present land owners will resume proper care of the land and its crops before further deterioration occurs. However, since more abuses of campesinos have taken place on these smaller farms than on the land covered in Phase I, Phase II owners should be required to: pay their workers certain minimum wages; explore some form of profit sharing; provide adequate housing, health care and education; pay just taxes to the government; and maintain an acceptable standard of production. These modifications of Phase II would be supported by key Salvadorean military leaders.

The best signal that the U.S. government could send to the Salvadorean military would be to supply it with the military equipment it needs for offensive warfare without human rights and other strings. The military needs helicopters, arms and munitions, communications equipment, armored vehicles, and an upgrading of its military medical facilities and intelligence capabilities. Much of this needed assistance is currently blocked because of legislation, but a strong executive so disposed could influence the Congress and, in other ways, explore avenues of assistance to the Salvadorean military.

With the Junta at long last moving in the proper direction, our embassy in San Salvador should withdraw its backing of Colonel Majano and allow the moderate anti-communist tendencies within the military leadership to continue their correcting influence on past government initiatives. As long as these favorable trends continue, the Junta should continue to enjoy the support of the U.S. government until elections can be held in the next two or three years. One of these favorable trends which should be encouraged is the emerging cooperation between the private sector and the Junta; the country cannot make progress unless representative members of the

private sector assume key responsibilities within the government.

Regardless of the outcome of our November elections, the Salvadoreans should be encouraged to form alliances with their neighboring countries of Guatemala and Honduras and also with other nations in the hemisphere that have economic and military strength and the inclination to use their resources to prevent the spread of communism within Latin America. Having seen the results of our aberrant foreign policy in Central America over the past three years, we should find such alliances to be in our own long-term security interests as well as in the security interests of other nations in the region.

Guatemala:

Carter Administration criticism of Guatemala's human rights record has severely strained relations between the two countries. It has prevented Guatemala from receiving military equipment at affordable prices. It has been falsely blamed by Guatemalan meat exporters for the recently imposed U.S. restrictions on the importation of Guatemalan meat into the U.S. (The real reason is the high concentration of DDT in the meat.) It has prompted the Guatemalan government to ignore the nomination of a new U.S. ambassador. (The previous ambassador, a popular man in Guatemala City, was pulled out prematurely because Washington considered him too soft on the human rights issue.) It had prompted serious and responsible Guatemalan leaders to speculate about the possibility of severing diplomatic relations with the U.S., had President Carter won in November, to prevent the U.S. Embassy from serving as a seat of subversion in Guatemala, much as a Soviet embassy might.

On the other hand, it has done nothing to improve Guatemala's human rights record, a policy failure acknowledged even by Guatemalan Christian Democratic leaders and some State Department officials, who now have judged the policy to have been counterproductive. The shrill attention to human rights has obscured the very real progress the Guatemalan government has made in its social, educational, health, agricultural, and labor programs for its citizens, particularly the 60 percent of them who are Indian. The fine quality of this progress has been recognized by the State Department—but in a very low key.

Guatemala is still a nation almost at peace. Its economy has not undergone the wrenching dislocations that have afflicted

El Salvador and Nicaragua. Its insurgency, although gaining momentum, is still containable by its military and security forces. The armed guerrillas number about 1,500 and are assisted, in the opinion of key Guatemalan military leaders, by Cubans, Sandinistas, and Argentine Montoneros. The Guatemalans are certain that the guerrillas use training and logistical support bases located across the Mexican border which are staffed by Cubans and Sandinistas. Over the past year, the Guatemalan military command has noted an improvement in the quality of guerrilla arms: they now have G-3s and automatic weapons, whereas a year ago they did not.

Despite the still favorable military picture in Guatemala, the Guatemalan leaders have seen what has happened to El Salvador and Nicaragua under current U.S. policies and are determined to avoid being the next Central American country to fall. Accordingly, they have instituted social and economic improvements needed to defuse certain of the leftist claims while, at the same time, they have instituted necessary security measures to protect themselves. They realize the current conflict has to be won in El Salvador, lest it be extended to Guatemalan soil, and they are prepared to form mutual protective alliances with El Salvador and Honduras. They appear realistic about the need to extend these alliances to include other nations in the hemisphere which could contribute to their security needs.

The Guatemalan private sector has not been subjected to the bitter class warfare experienced by their associates in El Salvador. The private sector in Guatemala is united among itself and is also united with the military government. This unity with the government has been strained by various decrees and tax laws and by charges of corruption within the military, but the private sector leaders are determined to let nothing come between them and the military while the country is experiencing guerrilla warfare. They recognize what happened in El Salvador and in Nicaragua when the government lost the support of the private sector, and they do not plan to let that happen in Guatemala. Nevertheless, there is a strong feeling within the private sector that a civilian president will have to replace the current military president in the 1982 Guatemalan elections.

The integrity of the Guatemalan government was not weakened by the recent resignation of its vice president, Francisco Villagran Kramer, an opposition politician who was brought onto the ticket with President Lucas Garcia in an

attempt to obtain inter-party unity. The vice president's duties were limited and minor. He had been at odds with the president and many members of the Congress since taking office and had little following within the country. He received publicity primarily from his frequent threats to resign, and when he finally did quit, he obtained the attention he had long sought, particularly from the international press. He has faded from the scene, and his absence has not been missed in the government.

The Catholic Church continues to be divided in Guatemala, but its leader in Guatemala is conservative and speaks strongly on behalf of the Church. The National University of San Carlos, a seat of leftist activity (generated by only a small number of students and professors), put out feelers to the government and the private sector in early August about beginning a "healing dialogue" to return the university to the business of education. Over the past few months, the university lost its rector, who decided to reside outside of Guatemala, and several militant leftist leaders at the university have been killed.

The petroleum picture in Guatemala has significantly improved in the past four months, thanks to a saner government policy toward the private oil companies—especially toward the one private company now exporting crude. Crude export production by December 1980 is expected to be 15,000 barrels per day (or 5.5 million per year), with the government getting 55 percent of the sale price. Guatemala currently uses about 12 million barrels per year. The bulk comes from Venezuela, with finished products from Aruba, Curacao, and the Bahamas. The Guatemalans have no desire to buy from Mexico, regardless of so-called favorable terms as part of the recently signed Mexican-Venezuelan agreement to share the supply of oil to the Central American countries. As one Guatemalan put it, "Terrible oil, terrible prices, terrible politics."

Guatemala: Policy Recommendations

Whether Guatemala becomes simply a good friend of the U.S. or the centerpiece of American foreign policy in Central America, its protection is essential to regional security. Human rights criticisms have to be muted in order to give responsible leaders in that country a chance to work out their own problems according to their own ground rules and outside of the glare of a U.S.-focused spotlight.

Technical help should be given to assist the Guatemalan military in blocking infiltration routes of enemy supplies and personnel from Mexico, Honduras, and El Salvador. Technical advisors are also needed in rural development civic action programs, the literacy program, and community health programs. The Guatemalans also need arms and ammunition at reasonable prices, helicopters for defense and for the civic action program, spare parts for helicopters and other equipment, and trucks. The Guatemalans also seek relaxed trade restrictions so that their export markets to the U.S. can be expanded. A serious effort should be made to meet these requests promptly, given the important security role Guatemala plays in Central America.

Conclusion

The Carter Administration has prided itself as being a champion of human rights, but it is truly depressing to see the degree of human misery that its policies have brought to all of the people of these countries—from campesinos and laborers to oligarchs —who want to live their lives with some measure of physical and economic security and without communism. Restoring a semblance of order to these people's lives and bringing greater security to this region should be the objective of a reconstructed foreign policy for Central America.

Imaginative leaders in the public and private sectors of Nicaragua, El Salvador, and Guatemala have, over the past five or six months, analyzed their nations' economic and security problems and have become determined to beat them both rather than to flee to safe havens abroad. What they all say they need for their nations' survival is forceful U.S. government leadership. With it, they might make it.

South American Policy

Introduction

Latin American nations have traditionally looked toward the U.S. when encountering a communist threat. Under the Carter Administration, the U.S. has not only withdrawn support from its allies in this battle against communism, but has, in some situations, actually promoted Marxist elements in Latin America. Latin American nations have adjusted to this new U.S. policy and are now trying to build their own defense mechanism against the communist threat. The threat is not

academic. Two countries have already joined the Soviet-Cuban bloc (Nicaragua and Grenada), and three others have moved closer to Cuba (Mexico, Panama, and Guyana). In a sense, Jimmy Carter has done one good thing for Latin American countries: he has forced them to unite for their mutual defense. This section of the report reviews some of the critical strategic problems of South America and recommends policy initiatives for a conservative U.S. administration.

The Marxist Challenge

The most serious threat facing South America in the near future is Cuba. With a small number of determined people, Cuban-supported Marxist movements can exacerbate and exploit long-standing problems of South American countries and attempt to foment revolution. This has occurred in Central America and now in South America. Cuba is supporting and training terrorist groups, helping finance local communist parties, promoting and increasing labor unrest, promoting anti-U.S. propaganda and influencing local educational systems.

In meeting this Cuban challenge, the U.S. should be prepared to stick by its anti-communist allies, to recognize that U.S.-style democracy may be inappropriate or at least premature for some South American countries, and to do nothing that would strengthen or lend respectability to the so-called liberation movements. At the same time, the U.S. should encourage responsible private and public sector leaders in these countries to effect whatever political, social, and economic changes are necessary in their countries to prevent these shortcomings from being exploited by the communists. Further, the U.S. ought to recognize Cuba as the enemy it is and not try to normalize diplomatic relations with it, as the Carter Administration pursued as one of its early high priority goals. Instead, the U.S. should take those political, economic, and paramilitary steps necessary to contain Cuba's activities and influence to its own island.

The Security of the Region

Carter's reduction in the flow of weapons into South America has adversely affected the United States, while it has fostered South American skepticism of the U.S. as a dependable ally. These nations have not reduced their arms purchases, but have turned to other weapon markets without the U.S.-imposed restrictions and regulations, primarily the Western European

countries, and at times even the Soviet Union. South America has also developed its own arms industries in Brazil and Argentina to diminish the dependence on foreign purchased weapons, and both these countries have sold weapons to nations undergoing the U.S. arms embargo. Most requests for arms purchases turned down by the Carter Administration have been replaced by non-U.S. suppliers. This U.S. policy has not encouraged South American countries to reduce the arms build-up, or to stop human rights violations, as Carter expected. Instead of this, it has moved these countries farther apart from Washington. The U.S. private enterprise has accidentally become the target of these Carter policies, and it is U.S business which has lost the South American arms market.

The U.S. through its military training programs for the South American armed forces had influenced, and received the confidence of many South American military men. Yet the Carter Administration has reduced these programs to average only $7 million per year for all of Latin America. In South America, several countries have withdrawn or have been excluded from these programs, and those still participating in the programs have seen them diminish in the last few years. The opportunity for other countries to replace the role of the U.S. in South America still remains; unless the U.S. takes prompt and firm action to return to their traditional relationship. The Soviets have grasped this alienation that the South American nations feel toward the U.S., and they have capitalized on the opportunity by purchasing wheat from the anti-communist government of Argentina during the U.S. grain embargo, and improving relations with them.

While the Administration should discourage the purchase of unnecessary weapons, it should try to encourage them to be U.S.-made in the event such purchases should occur. Security and military programs should be increased, and all nations in South America should be encouraged to participate in these programs.

The Role of Private Enterprise

A less expensive and more effective U.S. aid program for South America could be achieved if our aid program were designed to promote the growth of the region's private sector rather than the region's governments. Certain functions now in the hands of governments could be assumed by the local private sector with improved quality and lower costs. Local businesses, small as well as large, should be able to expand. To

facilitate this expansion, the U.S. may wish to structure its aid program to qualify private businesses for loans. If a business needs equipment for such expansion, the loans should be channeled through the EX-IM Bank, thereby giving an incentive to purchase U.S.-made equipment. The U.S. should increase its funds for the EX-IM Bank, and decrease the present interest rates charged by this agency. The U.S. private sector should also be encouraged to participate with their private sector counterparts in South America by providing loans through the Overseas Private Investment Corporation. The U.S. should also export U.S. management technology to allow foreign businesses to improve their methodology and efficiency.

To acquire greater control over the utilization of U.S aid, the Reagan Administration should reverse the Carter Administration's trend of increasing our funding of multilateral lending agencies while decreasing our influence in them.

Energy

The future petroleum picture looks favorable for Venezuela and Ecuador, both petroleum exporters. Venezuela's PETROVEN has handed out a bid to begin further exploration in and production from the large proven reserves in the Orinoco Basin. Ecuador recently found large new petroleum fields and is expected to raise its petroleum production from its present level of 200,000 barrels per day. Peru will remain self-sufficient in its petroleum requirements for the next decade. Argentina expects to become self-sufficient in petroleum by 1981 and perhaps become a petroleum exporter soon thereafter. Bolivia is also currently self-sufficient, but its proven reserves are diminishing.

In addition to petroleum, major hydroelectric projects have been completed or are under construction throughout South America. Presently, Brazil and Argentina have three nuclear power plants, and both countries expect to increase this potential energy source. Nevertheless, some South American countries are still energy dependent and cannot afford to divert increasing sums of money away from internal development programs in order to finance their oil bills. As Mexico moves closer to Cuba, it may try to buy political influence in South America with its oil exports; it is already trying to do this in Central America.

The U.S. should encourage Venezuela to continue to take a leading role in supplying oil to its neighbors under favorable

terms and should also explore the possible cooperation of Canada, Ecuador (if its production can be increased significantly), and perhaps the more moderate OPEC nations. In addition, the U.S. should provide to the South American nations its research into alternate energy sources, energy conservation, and encourage the development of energy sources. The multilateral lending organizations should set as a priority expanding their energy related projects aimed at making all South American nations self-sufficient in energy.

Impact of Cultural Programs

The Cubans have demonstrated well in Nicaragua the greater impact which cultural programs based on person-to-person contact have than the U.S.'s high-funded, low-visibility projects there. We should learn from this expensive lesson and insist not only that every U.S. dollar expended in foreign assistance be publicized and every school built and every truck given be recognized by the population, but we should also place greater emphasis on person-to-person contact through U.S. emissaries who represent the best the U.S. has to offer and who are responsible enough to serve in that role. High quality athletic exhibitions and cultural programs have great impact, and the loaning of medical, educational, agricultural, and other professional and technical personnel to local development programs would pay off. The Hispanic minority in the U.S. should take a role in representing the U.S. in all aid-related programs in South America.

Re-defining Human Rights

Recognizing the importance of human rights to the Carter Administration, leftists have infiltrated the human rights movement, drowned out the voice of objective reporters, and have sought to manipulate public opinion and the opinion of our Congress. As a result, legislation has been passed which prohibits the U.S. from selling badly needed arms and munitions to Latin American countries now under seige by internationally sponsored Marxist movements. These countries are now purchasing their arms at higher prices from France, Israel, Argentina, and Brazil.

The Carter Administration has permitted human rights violations to occur in leftist countries, without imposing on them, the same harsh measures imposed on the conservative military ruled countries. Nicaragua, a Marxist country, where tortures, executions, and disappearances are regularly reported,

has received all the benefits of the Carter Administration, including aid and support. In Argentina, a conservative anti-communist military ruled country, the cases of human rights violations reported have drastically decreased, but this has not prompted the Carter Administration to improve relations with them. Thus Jimmy Carter discredited the concept of human rights among Latin Americans by turning it into a political tool. The Reagan Administration should discontinue this hypocritical use of a humanitarian principle.

Survey of Country Problems

The Andean Pact was formed in 1969 by Chile, Bolivia, Peru, Ecuador, Colombia, and Venezuela as a regional common market. Since then Chile has withdrawn and the Pact has transformed itself into a potent political body. Some of its members—Venezuela, Ecuador, and, most recently, Peru—moved peacefully from military to elected civilian governments. As such, it has international prestige and represents the most democratic nations in South America. With a more reasonable human rights policy under a new administration the Andean Pact organization could remain a forceful, vital, useful, and needed ally of the U.S. in South America.

Colombia: Terrorism, internal political party disputes, and inflation are the three facts of life in Colombia these days. Liberal Party President Turbay has received no aid from Carter in his attempts to control the several Cuban-sponsored terrorist groups active in his country. The major terrorist organizations, M-19 and FARC, have stepped up their attempts to destabilize that country's democracy and to install a Cuban-style government. To try to deal with this problem, the Turbay government has been forced to concede more and more power to the military. In doing this, he has received the condemnation of international human rights organizations. The Reagan Administration should reject these condemnations and should support the Colombian government in its attempts to survive.

On the political scene, both the Liberal Party and the opposition Conservative Party have deep internal divisions which may cause each some problems as the 1982 presidential elections approach, but since all likely candidates of both parties are pro-U.S., the new U.S. administration need not view these Colombian elections with alarm.

Inflation, and its possible political results, represent Colombia's most serious internal threat. Inflation is currently

running at an annual rate of 35 to 40 percent, and the excess supply of money is coming from Colombia's booming drug business. Colombia is the principal processing site for marijuana and cocaine which originate in the southern Andean chain and are destined for the United States. Because this business draws a large number of people, drug money is spread around the country. Nevertheless, not everyone shares in this money, and as the cost of living goes up, poorer people with stable wages are striking and demanding economic relief. They are leaderless and disorganized at this point. Should they acquire a leader, they could become a disturbing factor in Colombia's political equation. A vigorous joint Colombian-U.S. drug control effort is required. We should also work with responsible rightists in the private and public sectors in their attempts to control inflation and the growing militancy of their poor.

Venezuela: The increasing cost of living and an alarming rise in the rate of crime are weakening popular support of Venezuela's Christian Democratic president, Herrera Campins. He also has to contend with sniping from that faction of his party headed by former president Caldera. In addition, Herrera Campins and his COPEI party are constantly under attack by the opposition Democratic Action (AD) party and its last president, Carlos Andres Perez. The support given by the AD party to the Marxist Sandinistas in their attempts to overthrow Nicaraguan leader Somoza and Andres Perez's overt displays of continuing and increasing loyalty to the Sandinista government are disturbing to many observers who had considered AD as an essentially centrist party.

The concerns of these observers are increased by signs that AD may join with Venezuela's two communist parties, MEP and MAS, in opposing Herrera Campins' attempts to support anti-Marxist measures in Central America. These measures have included financial support of the Christian Democratic leadership in El Salvador, plans to reduce the cost of petroleum to poorer Central American and Caribbean nations, and proposals to finance regional energy development projects. It would not be advantageous to the U.S.—or Venezuela—for the AD party to continue its leftward migration. Its history is one of strong anti-communism under such nationalist leaders as Leoni and Betancourt, an abandonment of this philosophy would be unfortunate.

The recent friction between Venezuela and Cuba over the Cuban airplane bombing trial and the Herrera Campins Ad-

ministration's concern over the growing Marxist threat in the region should be capitalized on by the next U.S. administration in its aim of ending the Marxist offensive in Latin America. The U.S. should do what it can to shore up anti-communists within the two major parties, and take a supportive role in Venezuela's petroleum exploration projects.

Ecuador and Peru: Ecuador and Peru have recently replaced military governments with popularly elected civilian governments. In Ecuador, President Roldos, although campaigning on a center-left platform, has, since taking office, demonstrated more moderate tendencies and is now generally accepted by the military and the business community. Peru's President Belaunde has been known as a center rightist, and he has begun implementing investment incentives for the private sector designed to aid the recovery of that country's economy. Despite these favorable beginnings, democracy in both countries is young and fragile. He, like Belaunde, must contend with Marxist movements, particularly within labor, which are attempting to generate unrest. U.S. policies should be designed to assist both governments in their desires to promote free enterprise, expand foreign investments, and develop still further their petroleum exploration technology.

Bolivia: On July 17, 1980, Bolivia's unstable democratic system experienced another setback when General Garcia Meza overthrew President Gueiler before the leftist president-elect Siles could be inaugurated. Although claiming it staged the coup to prevent the government from falling into the hands of leftists, the Garcia Meza faction has been charged by the U.S. Department of State with complicity in that country's lucrative narcotics business. It is unlikely that any U.S. administration could bring stability to Bolivia's political system, but our policies should be designed to preserve the country's pro-U.S. orientation and to maintain the country under responsible leaders who will bring some measure of economic progress and political respectability to it. Furthermore, given the importance of Bolivia to the domestic U.S. narcotics problem, the U.S. must work with the Bolivian authorities in the control of drugs.

Paraguay: In marked contrast to Bolivia, Paraguay has had the same president since 1954. President Stroessner, a national hero for his outstanding role in the Bolivian-Paraguayan war of 1932-35, is neither particularly old nor ailing. It would be prudent for us to anticipate who might follow Stroessner should something befall him or should he decide not to seek

re-election in 1983. If opposition leftists are to be denied the presidency, we should assist the young and bright members of Stroessner's own Colorado Party.

Guyana: Guyana's Prime Minister Burnham, elected to office in 1964, describes his party's ideology as Marxist-Leninist. Since 1964, he has won all elections by a majority, although there have been charges of fraud in each of them. Recently, a new constitution was enacted in Guyana whereby Reid, Burnham's Vice Prime Minister, was promoted to Prime Minister and Burnham created a new powerful post for himself, the Executive Presidency. Through this post, Burnham has gained control over the armed forces and the Parliament. Executive President Burnham has promised to hold elections prior to January 1981.

Guyana has an openly communist government. It is on the Caribbean shore, only about 400 miles from the Cuban-supported communist government of Grenada. The potential danger to the security of the Caribbean islands and to our vital shipping lanes by this spreading Marxism is a legitimate worry which is not reduced by some recent friction between Burnham and Castro. While maintaining a presence in Guyana and remaining alert to possible internal unrest there, the Reagan Administration should be particularly watchful of any attempts by the Cubans or Soviets to use Guyana for military or strategic purposes. Should such attempts occur or should Guyana be used as a staging area for the exportation of communism to other nations in the region, the U.S., alone or in concert with other hemispheric nations, should take effective action, including military action if necessary, to stop such activity.

Southern Cone: The Southern Cone nations, particularly Argentina and Chile, have been criticized by international human rights organizations and the Carter Administration for their continuing military governments and the measures these governments have taken to control internal subversion. In the case of Chile, much of the so-called human rights criticism has come from Chilean Marxists whose contacts with the Cuban Intelligence Service were exposed at the time of former Chilean Ambassador Letelier's death in Washington in 1976. What the Carter Administration has chosen to overlook is that all three countries came close to losing their freedom in the recent past because of Marxist-inspired terrorism (in Uruguay and Argentina) and an actual Marxist government (in Chile). The governments of these three countries have more practical

experience in recognizing and defeating communism than Jimmy Carter and his advisors. The new U.S. administration should realize that these Southern Cone countries know what they are doing and let them do it. It would hardly be in the security interests of the U.S. to let the Southern Cone again become threatened by communism.

Futhermore, as the result of Carter's own strange policies in the hemisphere, Central American nations now under communist attack are turning to the Southern Cone for assistance in their battles for survival. Argentina, in particular, appears well-qualified, prepared, and willing to help. It is in the interest of the U.S to encourage the Southern Cone nations to provide such security assistance in protecting the hemisphere, and the U.S. should be willing to provide them with the technical and material support required to perform such tasks.

At the same time, the Southern Cone nations are culturally and industrially advanced and are ideal candidates for increasing democratization as their own internal security situations improve; the U.S. should encourage this process in a low-key and constructive manner. In this regard, the appointment of Argentine General Viola to replace General Videla as president would be prudent since both are pragmatic moderates.

Another reason for optimism in the Southern Cone is the growing rapprochement between Argentina and Brazil—a rapprochement which the Chileans might find beneficial in their own historical territorial disputes with the Argentines if the Brazilians could be counted upon to moderate the occasional flareups of Argentine temper. Apart from other reasons, one of the more important advantages of such a rapprochement could be a stilling of the unspoken competition for nuclear weapons technology in both Argentina and Brazil, the two South American nations with relatively advanced nuclear technology. It is clearly in the interests of the U.S. to channel the nuclear resources of these two nations into the peaceful uses of nuclear energy, and one of the more constructive ways it could do this would be to provide the appropriate technical skill and equipment, with proper safeguards and unilateral inspections.

Brazil: The military government of President Figueiredo has begun a democratization process by granting amnesty to all politicians, permitting all political parties with popular support to register, and calling elections for Congress and governors for 1982. President Figueiredo's administration, in its concern over growing Cuban adventurism in Africa and Latin America,

has banned the communist party from participating in this electoral process.

Brazil's major problem stems from its dependency on imported petroleum which has increased foreign debt by $12 billion. The government of Brazil is trying to reduce this growing cost by developing alternative energy sources such as coal, hydroelectric power, nuclear energy, gasohol, and pure alcohol fuel.

The Reagan Administration should cooperate with the Figueiredo government in its program aimed at increasing political and social stability in Brazil. As mentioned earlier, the growing cooperation between Brazil and Argentina is a positive development worthy of our support.

Conclusions

At no time since the Cuban revolution have the Cubans and Soviets had such opportunity to expand their interests in our own hemisphere. The policies of the Carter Administration which have created this opportunity have to be changed, and the first change which the Reagan Administration should make is to send a clear signal to friend and foe that the U.S. does view Latin America with special interest and will resist Soviet attempts, made directly or by Cuban proxy, to expand its strategic interests in this hemisphere. Muting human rights criticisms, encouraging trade and the expansion of the private sector, and supporting responsible rightists who seek social progress in their countries under their direction are tactics long overdue in U.S.-Latin American relations.

Africa: General Problems

Africa can be divided into three great regions, each of which is, of course, remarkably different in religion, culture, race, and economic outlook. The northern tier of Africa, extending from Somalia on the east to Mauritania on the West, and running through Egypt, Libya, Tunisia, Algeria, and Morocco is largely Muslim and Arabian in culture. And while conditions vary from country to country, it appears that the northern tier of Africa is stable in the broadest sense of the word, with ancient and advanced cultures, and an economy that has been linked firmly with nations of the Western world since the time of the ancient Pharaohs and Phoenicians.

This contrasts sharply with the very fragile nature of the veneer of Western civilizations that is to be found in parts of

the Central tier of Africa. In this broad belt extending from the Sahara to Southern Africa, civilization as it is generally viewed by Westerners is actually retreating in many places. Obviously, there are conspicuous exceptions, among which are Kenya and Malawi. But the outlook in many countries is grim, with chronic political instability, violence, falling food production, staggering debt problems, and bitter tribal rivalries that constantly tear at the fragile national fabric.

Southern Africa, the third tier, represents the most productive and economically important part of Africa from the point of view of the West, although troubled by racial issues that complicate internal and external relationships.

Though it is important to bear in mind the regional context when considering Africa, the common problems are sufficiently general to warrant a broad treatment of them as continental phenomena.

Tribalism

For the vast majority of African countries, the concept of nationhood is artificial and foreign to the average citizen. Boundaries were drawn quite arbitrarily across tribal lines by 19th Century colonial powers. And, in the larger African nations, the national entities contain many diverse tribal units, including those which were deadly and ancient enemies in the pre-colonial days.

Over the course of the half century or more of colonial domination, a tiny European and missionary educated Westernized elite grew up. With the changes that came at the end of World War II, the training of an elite was both accelerated and expanded, and individual members were taken into the colonial administration to serve as understudies to the colonial administrators at every level. When independence arrived, this Europeanized elite governed by instruments of power—such as the police and national armies—which were originally set up to check the traditional tribal powers.

With the coming of independence, tribal tensions rose to the surface in a number of countries, overcoming the national instruments of unity and power and resulting in the vast slaughter of ancient rivals in Ruanda, Burundi, Nigeria and other countries. Elsewhere, tribalism has been kept in check either by carefully doling out patronage among the tribes, by ruthless application of state power, or by a combination of the two. But tribalism lurks only beneath the surface in almost

every nation in Africa, with the exception of a few racially homogenous Mediterranean countries such as Egypt.

Economic Development

Because of the internal political instabilities in many African nations, and the largely uneducated tribal populace, democracy quickly collapsed throughout most of Africa after independence.

Nor has Africa been kinder to its would-be philosopher kings than has much of the rest of the world. Survivability in much of the African context often requires more muscle and ruthlessness than highmindedness. Under these circumstances, it is not surprising that Marxism has attracted a number of African leaders, with its heavy emphasis on rigid state control of the means of production. State control also means patronage jobs for the ruler's friends and allies which serves to cement the ruler's power base.

Herein lies a problem. For although Africa has a number of world class lawyers, poets, economists, and statesmen, their numbers are few, and little infrastructure of competent middle management exists. Africa lacks the necessary numbers of geologists, engineers, foremen, farm managers, production superintendents, clerks, and the myriad of other cadres that collectively form the backbone of a modern economy. Part of this was caused by deficiencies in the educational system that produced more lawyers than competent agronomists. But whatever the cause, the lack of these skills severely handicaps economic development. And when poorly trained, corrupt, and incompetent civil servants replace the businessmen (both local and from the multi-national corporations), expatriate plantation farmers, and mining engineers, the results are almost inevitable. The economy begins to sag. Machinery rusts, farm production drops, and the people suffer.

One narrow class benefits from the change from private ownership to state ownership: the new ruling class. But at a staggering cost to the ordinary peoples of Africa.

Not surprisingly, food production, per capita income, and other measures of economic circumstances have steadily declined throughout much of Africa.

The lack of private capital, technicians, and incentives has caused modern agriculture to disappear in some areas, replaced by infinitely less efficient peasant agriculture or by incompetently managed state-owned collective farms on the other.

At the same time, population has soared, as modern medicine has reduced infant mortality and the epidemic illnesses like small pox which formerly cut deeply into the population periodically. Elsewhere in the world, the danger of population outracing food supply has been handled by application of advanced agricultural methods on one hand and various forms of birth control on the other.

When these problems are compounded by political instability and violence, or by natural disasters like African droughts and locusts, it spells utter catastrophe for hundreds of thousands, even millions, of people.

Within the next ten years, millions of Africans may either starve to death or die of malnutrition-induced diseases unless large parts of Africa now in the throes of political violence or experimenting with various forms of inefficient Marxism, profit from the successful examples of Malawi, Kenya, and parts of Francophone Africa. Here a degree of freedom and free enterprise has made it possible for the people to feed themselves and prosper. Tragically, the trends in Africa appear to be going in the other direction, toward more Marxism, more state control, and more economic decline.

The Debt Problem

One of the specialized problems of the African economic scene is the vast problem of debt, both to public and private international lending institutions. The problem is compounded by the high price of oil, and the decision taken in 1974 by the United States to enable many developing countries to continue pre-OPEC patterns of imports and growth by means of large loans cycled through the private international banks.

Debt piled on debt has reduced many African nations, like Zaire, to the state of technical bankruptcy. Now if this were merely a problem for the nations of Africa, then one might view the situation more dispassionately. However, American banks are now so heavily embroiled in the Third World, that large scale default in Africa or elsewhere could easily bring down the entire Western dollar-based banking system. A number of prominent American banks are particularly vulnerable, the collapse of which would be a colossal disaster for the American economy and workers. The question is what to do about this situation.

Proposals by Third World leaders that this debt simply be written off are impractical because of its huge size. Nor do

suggestions that the American and European taxpayers shoulder the burden make sense. For one thing, it is a political impossibility. For another, it would have disastrous implications for the future of international banking and international development.

Africa can only become solvent again if there is a major international program to stabilize the African continent, both politically and economically, and make it congenial once again for private investment and economic growth. Once African countries begin to grow again, the living standards of the people will gradually rise, and the loans can be gradually repaid out of earnings.

But this is going to require a concentrated and sustained effort, not only by the United States, but also by our allies who have had traditional ties and experience in Africa, as well as by enlightened African leaders. Those from outside who arm dissident tribesmen and foment the war, revolution, and instability which brings death to people and ruin to the economies will have to be checkmated by a very systematic allied program.

Basically, the task facing the West as a whole is to provide a shield over those parts of the Third World where such operations are practical. The allied effort to deal with the Shaba invasion can serve as a model for this. Our task must be to do in key parts of the Third World what we did in Europe after World War II: namely to act in such a way that subversion and international terrorism is opposed and destroyed, thus providing a stable, predictable environment in which long-term investment and growth is possible.

This is not an act of charity on the part of the West. Africa is an important part of the Western economic commonwealth, providing critical raw materials and markets. A stable, growing African economy will contribute to the prosperity of all of us. Africa lapsing into anarchy not only means death and starvation for millions of Africans, but also increased unemployment in Detroit, Cologne, and Tokyo, which is precisely what the Soviets have in mind.

The organization of this shield over key parts of the Third World is not the subject of this paper, although it should be noted that a great deal of analysis has already gone into the project by many thoughtful, experienced people who concern themselves with these matters. Rather, the details of this project must be ironed out on a classified basis after the

election in consultation with our major allies and thoughtful representatives from Third World countries.

South Africa's Race Problems

Racism is unattractive and unfair wherever is appears. Equality of opportunity based on individual merit is the standard which most civilized nations have come to accept as the ideal for which to strive. Increasingly, opinion in South Africa is moving in this direction.

American policy has been to encourage this, but often through the idea of using direct and indirect pressures to force such changes in South African policy.

In response to the international pressure on South Africa, the nation has moved to make its economy less vulnerable to international assaults. They have built their economic development program on the basis of artificial oil produced from coal, and on gold exports. They have also moved closely within striking distance of having nuclear weapons, and have forged tacit alliances with such nations as Israel and Taiwan.

The response of the White tribe of South Africa to the threats of an internationally imposed system of one-man, one-vote has been defiance, based not merely on prejudice or greed, but also on fear of having South Africa disintegrate into chaos and anarchy—where much of Central Africa headed after the advent of one man, one vote.

Various suggestions have been raised as to possible new forms of pressure that could be imposed upon South Africa to accelerate racial progress. Economic sanctions have been mentioned. Investment boycotts have been proposed. Some have even proposed that the Soviets be given a free hand to arm and train "liberation forces" for South African service.

These measures, it seems, will be utterly counter-productive if a conservative administration were to pursue any of them. Friendly advice is one thing; but strong arm tactics in a situation such as that faced in the matter of South Africa's racial policies simply will not work. The opposite result is more probable.

Fear, not prejudice, is the major impediment to racial progress in South Africa today. The U.S. would be well advised to adopt policies to resolve these fears. What are these fears?

For instance, many South Africans fear that if they open their societies to increased black political participation, that the most radical forces, aided by the Soviets, will turn to

violence to expedite the pace of developments. They also fear that one-man one-vote will eventually lead to a situation where whites completely lose their position—an increasing fear in Zimbabwe. South African whites are concerned that the politics of envy, where whites are rich and blacks are poor, will lead to advocacy of Marxist policies by black leaders, since it will be white jobs and white-owned assets that are up for grabs. And in a one-man one-vote situation, the results will be inevitable.

With Soviet- and Cuban-trained forces on the borders of South Africa, these fears are not unfounded. Moreover, there are living in South Africa today hundreds of thousands of former white residents of Mozambique, Zimbabwe, the Congo, Zambia, and Angola who are visible and vocal reminders to South African whites of the dangers of uncontrolled political developments.

South Africans will understandably resist changes that have led to disaster in other parts of Africa. Nor should the West view with indifference the possible demise of South Africa, with its critical raw materials, strategic location, and important market and production centers. South Africa needs both time and a sense of security. Even Americans could not erase the legacy of centuries of racial feelings and prejudice overnight.

If the Soviets and the Cubans and the radicals are allowed to spearhead the pace of political developments in South Africa, then chaos will eventually result. Hundreds of thousands of people will be killed in the hostilities, and many more will suffer from unemployment and economic disintegration that will inevitably result. This is truly contrary to the real interests of all the people of South Africa, black and white.

This is not to suggest that the United States condone racism in any form or in any place. It does suggest that we take a longer and a broader view of the situation in Southern Africa than the Carter Administration has done. We must continue to give friendly advice, but should not add gasoline to an already highly combustible situation. Rather, our policy should be one of taking practical steps to facilitate change by helping South Africans deal with some of the insecurities, real and imaginary, that today stand as a barrier to progress.

The progress that is likely to emerge in South Africa will not be as rapid as most Americans would really prefer. The South Africans may move gradually in the actual sharing of political power—much as our own country did in its earliest days with the franchise carefully limited to those with an understanding

of the workings of a modern society, and therefore, capable of voting intelligently. It is likely to be a uniquely South African solution.

Other General African Problems

Urbanization: As populations have grown, and pressures on the rural land increased, Africa has seen a dramatic population shift to the cities, much of which is concentrated in vast sprawling shanty townships surrounding the old cities built by the colonial powers as centers of commerce and government.

These vast pools of young, rootless, and often unemployed urban dwellers are political dynamite, explosive centers of discontent, crime and disorder. More jobs, training and food are urgently needed. The more people concentrate in the cities, the greater the pressures on governments to adopt policies to feed them that come often at the expense of rural farmers. Unrealistically priced food, while beneficial to the urban poor in the very short run, is also one cause of low food production and rural poverty, which contributes to the rural exodus to the cities. It really is a vicious circle.

There are no easy answers to the situation apart from creating conditions in which industrialization can take place to employ usefully the urban poor, and make possible the gradual return to fair market price incentives to increase local food production and rural prosperity.

Fluctuating Commodity Prices: Most Third World countries are producers of various raw materials, mineral and agricultural. These prices have fluctuated considerably in the past as demand and supply have varied due to weather conditions, political unrest, wars, new technological developments, substitution, and, most importantly, the state of the industrialized economies.

This creates problems for Third World economic planners, since they are never sure what price they will receive for their commodities in any given year. While some economists have advocated that the United States help countries in the Third World establish cartels like OPEC to enable copper, tin, coffee, bauxite, and other raw material producers to obtain consistently high prices. Almost all past attempts to establish commodity agreements and produce cartels have failed, many of them expensively. Other analysts urge Third World countries to rely on what they already know of the markets, and borrow from banks during the years of low prices, and repay

the loans when the inevitable upturn in commodity prices takes place.

Flight of Educated People: Tragically, in a continent as short of educated personnel, there exists a constant drain of trained personnel, fleeing to higher paying and more secure jobs outside Africa. This is true even of Egypt, which exports thousands of its most skilled young people to countries which are already rich, either because of industrial or oil resources. In Central Africa, the same situation prevails, and includes both black and white technicians, experts, businessmen, and modern farmers.

There are two policies which should be pursued to reverse this situation. The United States should discourage emigration of the educated and trained elite from Africa except in extreme situations. The West should also adopt policies to help stabilize Africa both economically and politically to encourage Africa's most able, skilled and energetic people to live and work at home in security and build their own prosperous futures. In colonial days, Africa was a place where able and energetic Europeans were able to break out of Europe's rigid and repressive class structures and rise to the levels of their own innate competence. It was these people who built the farms, railroads, mines and cities of Africa. If Europe, the U.S., and the enlightened leaders of Africa work together, Africa could recover its colonial reputation as the land of opportunity for the able and energetic, not only for whites but also for Africa's educated and trained citizens.

Furthermore, such stability would also give to multinational corporations the security and the incentive to invest time, money and technology in Africa. Collectively, this would permit that continent to experience a new burst of growth and development. Money and talent will go where it is given scope to operate profitably and everybody benefits. And, conversely, it has the ingenuity to flee places where it is shackled or threatened, whether by Marxism or by violence.

The Pacific-Asian Region

Introduction

During the 1980s, the Pacific-Asian region will be a particularly volatile and critical region. This sector, which contains almost half the world's population, has exhibited discordant political, social and economic trends. While some nations in the region have demonstrated high levels of economic growth

and a relative degree of political stability, others have experienced economic stagnation and violence at various levels of the spectrum. Generally, the nations of the Pacific-Asian region fall into one of three categories: (1) those with sufficient resources to support economic development and growth, as, for example, Japan, South Korea, Taiwan, Singapore, Malaysia, Australia, and New Zealand; (2) those with somewhat fewer resources which could conceivably make reasonable and steady progress but just as conceivably could run into serious obstacles and stagnate or regress, as in the case of China, Indonesia, Thailand and the Philippines; and (3) those whose survival is at stake whether because of the unavailability of resources or because of gross mismanagement by political elites, as in Vietnam, Kampuchea, Laos and Burma.

Cognizant of the above and given the fact that by the beginning of the 21st century one is likely to see a significant shift of the economic, and possibly political, balance in the world towards this region, it is imperative that the United States should *now* reevaluate and redefine its role in the Pacific-Asian region.

Recent Policy Problems

During the past four years of the Carter Administration, we have witnessed the precipitate decline of America as a world leader. President Carter's foreign policy has rested on a vision of the world in which "plenty will replace scarcity, harmony will replace conflict, peaceful competition will replace war, and reason will replace power as the operative method for conflict resolution."* The realization of such a vision has become the operative goal of the Carter foreign policy. However, such an idealistic or pollyannish approach to international affairs belies reality and proffers an infantile and myopic view of the future.

Carter's foreign policy, particularly his approach to Pacific-Asian issues, is seen to be deficient in several respects:

Breaking Agreements: Many Asian and Pacific leaders decry the confusing and oftentimes contradictory statements regarding U.S. policy in the region. An example of such was the abrogation by Washington of the civil air agreement with Taiwan, despite explicit promises to the contrary at the time the U.S. unilaterally broke diplomatic relations with Taipei.

Consultation: Most regional leaders, likewise, complained

*Jeane Kirkpatrick, *The Washington Star*, November 18, 1979.

about abrupt U.S. initiatives with no prior consultation. A case in point was our failure to consult with Indonesia and Japan, the two largest non-communist nations in east Asia, regarding the diplomatic recognition of the People's Republic of China and the derecognition of Taiwan by the U.S.

Human Rights: Many Asian and Pacific leaders, particularly those among the ASEAN states, strongly disapprove of Carter's human rights policy, which they have termed "moral imperialism," and resent the aggressive application of this policy to the ASEAN states, specifically the Philippines and Indonesia.

Soviet Expansionism: Asian and Pacific leaders, as a whole, sense an abandonment by the United States of this critically important region, particularly in light of the gradual but significant Soviet military expansion there. The weak American response to the Soviet invasion of Afghanistan and the rapid Soviet naval buildup at Danang and Cam Ranh Bay (Vietnam) have given these leaders cause to worry. The Soviet Pacific Fleet presently registers three times the tonnage of the U.S. Seventh Fleet, which operates in the Pacific and Indian Oceans.

Korean Withdrawal: Many Asian and Pacific leaders have been concerned about the regional ramifications of the proposed American withdrawal of its ground forces in South Korea.

Unreliability of the U.S.: Finally, many Asian and Pacific leaders estimate American commitments in the region, especially those of a defensive nature, as either of limited value or as valueless and are uncertain about future American intentions and capacities. Obviously, the perception of America's role as a world leader in this critical Pacific-Asian region has seriously declined over the past four years. Can anything be done to reverse this trend?

The Foundation of a New Policy

On a more general level, what is needed in the Pacific-Asian region is a comprehensive, coherent and flexible American foreign and defense policy, which would both reassure our allies and enable a reassertion of U.S. influence in this sector of the globe.

We must be prepared to defend, with force if necessary, our vital and strategic interests, to undermine those of our opponents, and to reassert once again the initiative in this geopolitically strategic zone. Such a strategy implies a creative use of military force where deemed necessary.

Likewise, we must be willing to apply the leverage of power, whether it be economic or military, when dealing with allies and foes alike. Reciprocity would be the hallmark of such a strategy. Continued support of our allies would be forthcoming, but there would be an obligation, on their part, to support American initiatives elsewhere.

Our ideological adversaries, and this includes the PRC, would be served notice that favors and concessions granted them would require matching and concrete concessions on their part. Such an overall strategy would enhance America's reputation and enable us to reassert our influence in the Asian-Pacific region.

More specifically, consideration should be given to the following recommendations:

Increased Military Presence and Assistance: U.S. air and naval forces in the Pacific should be numerically increased to obtain parity with our forces in the Atlantic and Western Europe. Such an increase would allay the fears of Asian and Pacific leaders that the United States is withdrawing into a neo-isolationist position. It would also serve notice that the United States no longer holds a "half-war" strategy for Asia. Such an upgrading of American forces in the Pacific would assure our allies of our commitment to keep open, at all times, the Straits of Malacca, thus insuring safe access to the Indian Ocean.

American decisions to provide military assistance in the region should be made on the basis of U.S. foreign policy objectives. Such assistance need not imply complete approval of a regime's domestic policy, as in the case of the Philippines, Korea and Indonesia. Slashes in military aid to Indochina only led to the imposition of totalitarianism.

Korea: The U.S. should continue to upgrade the Korean armed forces. There should be a greater coordination in the planning and execution of military operations between the U.S. and South Korea. The proposal for an American troop withdrawal should be revoked indefinitely and Washington should decline to enter into bilateral discussions with the North Koreans on the issue of reunification. Only a Korea confident of American support can move in a more democratic direction.

ANZUS: The United States should reaffirm publicly its security commitments to Australia and New Zealand in the ANZUS Pact. Washington should also encourage greater

Australian participation in combined military maneuvers in the Indian Ocean.

Thailand: The United States should likewise pubicly reaffirm its 1962 defense commitment to Thailand and increase military assistance to Thailand. In fiscal year 1981, the Thais will spend almost $1.36 billion (27 billion baht) on defense. This represents 19.8 percent of their total national budget, and indicates an increase of over 23.8 percent in the previous budget. Some $355 million (7.3 billion baht) will also be allocated to internal security measures. This represents 5.2 percent of the national budget—an increase of over 20.2 percent than in fiscal year 1980. Such a commitment on the part of the Thais, as well as increased military assistance from the United States, will help the Bangkok government to effectively combat the communist insurgency in the north and northeast, the Moslem secessionists/separatists in the south and the ever-increasing incursions by Vietnamese regulars in the east.

Japan: The United States should encourage Japan to raise its defense spending from the present level of 0.9 percent of its gross national product. The present compromise of a 9.7 percent defense budget increase for fiscal year 1982 is insufficient to deal effectively with the critical problems faced by Japan's Self-Defense Force. Presently, the Maritime Forces, which have been termed "slightly insufficient" by Rear-Admiral Osuke Fukai, are incapable of protecting the strategic Soya, Tsugaru and Tsushima Straits. General Goro Takeda, of the Joint Staff Council, states that Japan would be unable to repulse a large-scale enemy attack even if the goals of the next five-year (1980-84) defense plan are achieved. The Army and Air Force have only a limited defense capability.

The U.S. should establish a regular parliamentary exchange program with Japan as the U.S. currently runs with Western European parliaments.

Indochina: The American government should be steadfast in its opposition to recognizing the Vietnamese puppet regime of Heng Samrin in Phnom Penh, Kampuchea. Moreover, much greater assistance should be provided to displaced refugees in Thailand.

Similarly, the U.S. should oppose recognition of the Vietnamese government, as this would not only enhance the prestige and image of that government, but would also create undue problems in Sino-American relations. The U.S. should also oppose the Vietnamese subjugation of Laos and Kampuchea.

The threat posed to Southeast Asia by growing Vietnamese

hegemony sustained by Soviet navy presence and massive assistance, must be countered more effectively. The ambivalent attitude of the United States towards the growing power of both the Soviet Union and Vietnam in Asia undermines the credibility of any effective united response of the states in the area in concert with the U.S. As with Afghanistan and Iran, we should vigorously press the Vietnamese imperialism issue before the United Nations and work much more closely and comprehensively with ASEAN and other nations in the region on a broader range of cooperation.

This is also a fruitful area for effective Chinese cooperation. Similarly, Japan should be willing to make a much more vigorous aid effort in the area to deal with the combination of refugee and economic problems, particularly affecting Thailand.

Hanoi has dangerously over-extended its dominion through the occupation of South Vietnam, Laos and Cambodia and should be forced to suffer the full consequences of her actions (at considerable cost to the Soviets as well). International economic sanction must be sought against Hanoi in a formal manner, but otherwise voluntary efforts, such as those already implemented by the Japanese, must be encouraged.

ASEAN: ASEAN leaders have criticized the Carter Administration for what appears, in the wake of the Vietnam debacle, to be an abandonment of the region, lack of support for its organization, and the absence of an explicit and coherent policy for Southeast Asia. The fear of a hostile and expansionary Vietnam, unchecked by an American presence, has spurred the ASEAN states to strengthen their regional resilience through a variety of measures, mostly economic. The United States should further encourage a greater measure of economic cooperation among the ASEAN nations, particularly in terms of preferential trade arrangements.

In the economic sphere, ASEAN seeks aid, investment and market access; market access being the most important because trade is the major source of foreign resources. Present policies and congressional restraints have limited the capacity of the United States to grant special preferences to these developing countries. This policy and the restraints imposed should be reversed.

In contrast to Japan, the United States also does not have a policy of supporting American private investments here, except for the subsidies provided by such agencies as the Export-Import Bank. Again, a more equitable arrangement should be found. ASEAN warrants American support for a

variety of reasons. It is a stabilizing influence in a region of admittedly moderate economic but great geopolitical significance. ASEAN also represents a significant group of developing market economies which is now competing, economically and politically, with the planned economies of the socialist states.

Finally, ASEAN with continued and increased support from the industrialized nations, specifically the United States, could make the region a showcase of progress that clearly establishes the superiority of the free market system.

The United States should also encourage and support the various bilateral joint military exercises that various ASEAN states have recently initiated. We should encourage broader regional military exercises (ASEAN as a whole), as well as consider the possibility of an ASEAN defense treaty.

China: Our relations with China must be predicated on the practical realization that the Soviet threat in both Asia and around the globe is such that we should cooperate in our own mutual interests. But the cooperation must be mutual: just as the PRC has properly complained that the U.S. has failed to sufficiently recognize and deal with the Soviet threat, Peking must realize that the United States cannot abandon an ally (Taiwan) as the price for securing PRC cooperation against the Soviet Union. If the PRC really believes the principal threat to their own security comes from the U.S.S.R., then they must be willing to exhibit genuine conciliation towards the Republic of China. If their principal objective in the immediate future is the "re-integration" of Taiwan into the PRC, then the U.S. must consider abandoning its entire working relationship with Peking.

Moreover, if the United States unabashedly pursues a policy of detente, and if, perchance, the Sino-Soviet rift were to end, then the United States would find itself in an extraordinarily compromising position in the Pacific-Asian region. To that end, the United States must move very cautiously, if at all, to strengthen the PRC's military position through the transfer of advanced military equipment and computer technology.

The Republic of China (Taiwan): Even though it may not be wise or appropriate at this point to re-establish full diplomatic relations with the ROC, the sliding status of the ROC must be halted. We must reject a normalization *process* that means the eventual demise of the ROC as a viable economic, social and political entity. Thus, a conservative administration must adhere strictly to the terms and intentions of the Taiwan

Relations Act as passed by the Congress and genuinely maintain all forms of relations beyond the formal diplomatic ones.

Thus, the United States should reaffirm its commitment to the people on Taiwan that any attempt at forced subjugation by the PRC would be appropriately met by Washington. The use of force, in this instance, would not be discounted. In the meantime, the United States should approve the sale of the military equipment Taiwan is seeking from Washington, including the Harpoon anti-ship missile, a long-range reconnaissance aircraft (RF-4E version of the Phantom), and the FX fighter aircraft.

Conclusion

American interests would be best served in Asia by a balance of power and good relations between the United States and all Asian countries. While this statement seems a truism, it is a simple goal which has eluded the Carter Administration, not only in terms of accomplishing, but also in terms of grasping, the fundamental idea. United States national security requires that no nation dominate either the Eurasian land mass or the Pacific Ocean. Thus, Soviet or Chinese ascendancy in the heartland would be disastrous.

The Carter Administration's dependence on China to solely bear the Soviet burden in Asia, in return for American recognition and abandonment of Taiwan suggests a bankrupt policy which can be redeemed only by a more realistic administration, which is willing to reverse past policies and take new initiatives.

The United States can pragmatically work with China, but our principal partners in the area must be Japan, Korea, Taiwan and ASEAN states. They provide the most durable and reliable economic, political and military force in the area.

TRANSITION: TAKING CONTROL OF FOREIGN POLICY

The previous sections of this study dealt with the development of the present foreign policy process, and major recommendations for a conservative administration have been outlined. But beyond the possible institutional problems at the White House and the State Department, a more pressing task awaits a conservative administration. To take full control and then to refashion foreign policy in the most effective and expedient manner possible requires actions that must precede

any institutional rearrangements and to some extent work within the existing bureaucratic structure.

As indicated in the previous section of this report, both the size and organization of the National Security Council largely derive from the preferences of the President and his national security advisor. But the organization of the State Department remains relatively constant and the preponderance of its personnel remain from administration to administration. For these reasons, this section is devoted only to how one can most effectively take control of the present State Department so that it can serve the foreign policy objectives of a conservative administration.

Latitude of Action

Being a comparatively small department, it should be theoretically easy to alter the direction of the Department of State. However, bureaucratic inertia, particularly reflected in the high proportion of career officers, renders any substantial changes in policy difficult to implement. It is not so much that directives are contradicted, although at times they clearly have been, but rather changes in administration have not effectively imposed their directives upon the DOS and consequently the void has been filled by the continuation of previous policies or initiatives taken by some senior officials who are benignly neglected by their supervisors. Thus, an administration which desires to change direction of policy must immediately change key leadership positions within the department to force alterations down on the existing apparatus.

This study identifies these key positions, almost all of which can be filled at the complete discretion of the President and his Secretary of State. Although only about 550 out of 17,000 positions in the DOS can be filled by so-called "political" or other non-career personnel, using maximum latitude of even this allowance should greatly facilitate making effective changes. Thus, unlike other departments, an actual augmentation of personnel may be temporarily necessary at the DOS. However, routine retirements coupled with general federal government hiring freezes would mean that DOS employment would decline eventually.

Dismissal of Present Employees

Previously, when efforts have been made to change the direction of policy of the State Department, even elementary changes in personnel have not been carried out. While, as

noted below, much valuable expertise can be tapped within the existing foreign policy establishment, a meticulous review must be made of those currently holding any position of possible influence.

A general assumption can be made that nearly every non-career employee, particularly those appointed to their position by the Carter Administration, supports the present foreign policy thrust of the Department. As Senator Moynihan noted at the time of the Afghanistan invasion, if President Carter desired to change his policy to reflect his attitude toward the Soviets, he would have put new personnel in the relevant positions of the State Department. But no such changes were made at that time. Thus, the single most important sign of the advent of a conservative administration would be a thorough "housecleaning" of existing political and other non-career appointments who can be removed at the discretion of the President.

Existing State Department Personnel

To exercise maximum discretion in the elimination of potential adversaries to a new policy direction among non-career positions at the State Department, means that over 90 percent of the personnel pool will remain intact.

The earliest possible evaluation of the strengths and weaknesses of these individuals must be made, preferably during the transition period from November to January. In this way, one can decide immediately upon taking over authority at State how personnel should be re-assigned to utilize their abilities in accordance with the new directions of foreign policy. Often someone working in one capacity who has promoted policies detrimental to the national interest may be able to channel the same energies and devotion in a constructive manner. For example, staunch human rights activists in rightist regimes in Latin America may be able to assist on monitoring compliance by the East European nations to the Helsinki agreement.

At the same time, maximum leeway will be necessary to retain personnel in existing bureaus, if not slots. This will be necessary to maintain continuity of procedural operations even when policy changes. The "clean sweep" notion has more appeal than can ever be justified by the existing structural realities of the State Department. Existing Foreign Service Officers must be treated as professionals willing to serve their government and not be initially distrusted for simply having

carried out previous policies. Judgments must be more finely rendered or the complete foreign policy process will plunge into turmoil.

Genuine recalcitrance can be dealt with through transfers and tacit demotions. In this manner, even career FSOs may deem continued service unacceptably denigrating. President Carter has established recent precedents in which experienced career diplomats were transferred to less important posts for failing to selectively press the human rights dogma in Latin America. (Assistant Secretary of State Terence Todman was "promoted" to the U.S. Embassy in Spain, and Frank Ortiz stripped of his Ambassadorial post in Guatemala and made a simple political advisor to our military representatives in the Panama Canal Zone.)

Power Points at State

In order to take control of the machinery and maintain it, certain positions must be given immediate careful attention. These positions involve the flow of material, information and authority. Generally, this means positions within the Office of the Secretary of State and the Policy Planning staff.

Monitoring memos and cable traffic must have one of the highest priority assignments. Personnel at these stages make the initial decision on both the direction and priority assigned to requests and information. Where material moves and who handles the most important information can often determine the eventual character of policy.

This same pattern of influence appears in each subdivision of State. The Assistant Secretary or Bureau Director should each have a particularly reliable aide who will monitor all reports and information flowing in the department head's direction. That person will then have the critical responsibility of characterizing the substance of material through the final short cover memo. This notation and its guidance often will determine the degree of gravity and influence a particular study will ultimately have on policy. Keen eyes and ears at this point can, through rejection, or specific recommended changes, force analysts to supply material and options that they otherwise might be reluctant to provide.

Thus, several key people in each bureau and the chain of command in the Secretary's Office, Policy Planning, Intelligence and Research or elsewhere can, through careful persistence, derive from State information valuable in constructing a conservative foreign policy.

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THE DEPARTMENT OF TRANSPORTATION

Frank S. Swain*

The following is a necessarily brief presentation of the current structure of the Department of Transportation (DOT) and how its organization can be changed, both administratively and legislatively, to make it more efficient. These changes are of both a radical and nonradical nature, and accordingly must be viewed as short-term and long-term. Moreover, some of the alternatives are inconsistent, but are set forth in order to provide different possibilities for a new administration. It is manifest that there is no absolutely correct way to organize or reorganize the Department of Transportation. Depending on the people administering the agency and the then-current political situation, differing choices might, and probably should, be made.

DOT's Organizational Structure

The Department of Transportation was established in October of 1966 to "assure the coordinated, effective administration of the transportation programs of the federal government."** The Department was organized by joining elements from eight other departments and agencies resulting in eight operating administrations*** whose heads, though reporting to the Secretary of Transportation, have highly decentralized authority. These eight administrations are basically modal in nature and

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**Author's Note:* The preparation of this report was a collective enterprise involving many individuals. Lloyd Aubrey, Dan Harrant, Mary Jo Jacobi, Matt Scocozza and Joe Tymczyszyn deserve particular mention. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

**49 USC Section 1615(b)(1).

***The U.S. Coast Guard, the Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), Federal Railroad Administration, National Highway Traffic Safety Administration (NHTSA), the Urban Mass Transit Administration (UMTA), the Research and Special Programs Administration, and the St. Lawrence Seaway Development Corporation.

accordingly are devoted to one particular type of transportation such as highway, rail, air, transit, etc.

In order that these modal agencies function effectively in developing an overall transportation policy for the nation, Assistant Secretaries are in charge of various functional categories over areas such as administration, policy and international affairs, budget and programs, etc. Most of the eight administrations have representatives in the ten regional districts throughout the country. Of course, the Office of the Secretary of Transportation (OST) also maintains representatives in each of these ten regional headquarters.

The following sections deal with the types of changes that could be made in the Department of Transportation in order to improve its performance.

Recommended Organizational Changes in the OST

As noted above, the Office of the Secretary of Transportation is headed by the Secretary of Transportation who has a Deputy Secretary as well as a number of Assistant Secretaries. The Secretary also has several special assistants working directly for him. The office is set up along functional categories so that intelligent, inter-modal decisions can be made with regard to the eight administrations that make up DOT. If this basic structure is not tampered with, (i.e., a super bureaucracy organized along functional lines in order to oversee specific modal administrations) then the administrative problems are relatively minor and only a few recommendations can be made with regard to the Office of the Secretary of Transportation.

If no radical changes are to be made in DOT's structure, then the most important point is making sure that the right people are placed in the right jobs. Running DOT then is more a personnel and management problem than an organizational one. But it cannot be emphasized enough that the success or failure of DOT in meeting its goals will be dependent on the quality of the people recruited.

It is difficult to make specific suggestions for reorganizing the office of the Secretary, because any changes will have to be compatible with the personality of the new Secretary. Certainly the Secretary should use as few special assistants as possible because these officials tend to become another bureaucratic layer through which agency heads must maneuver. Moreover, the Secretary should carefully pick his Assistant Secretary for Administration in order to ensure that all his energies can be devoted to policy formulation and implemen-

tation. In any event, the organizational structure must be one that will emphasize and maximize communication between the Secretary and the various administration heads. Otherwise, the opportunity to impose policy control will be lost.

The Secretary should also emphasize intergovernmental relations as was done during the first part of the Carter Administration. To ensure this, the Secretary should choose his Regional Representatives in the ten regions based on their abilities, and not on political considerations. While local control should be emphasized (in line with conservative principles), there is still a need for effective coordination which can be accomplished by the Regional Representative.

The changes recommended here are not particularly far-reaching, but really represent good management practices. However, with an agency as decentralized as DOT, it is imperative that the Office of the Secretary of Transportation be as tightly organized as possible so that effective control can be maintained over the various administrations.

Short-Term Administrative Changes in DOT

Short-term administrative changes that can be made in DOT would be accomplished through Executive Orders. Of course, this involves both existing Executive Orders that should be changed and new ones that should be promulgated by the new President. In any case, there are a number of Executive Orders applicable to the Department of Transportation which should be reviewed by the new administration.

Executive Order 11490, as amended, deals with various aspects of the national emergency preparedness functions of federal departments and agencies including DOT. With a new emphasis on defense, alteration of this Executive Order might be in order. As an example, it is often pointed out that the Soviet Union has emphasized civil defense matters more than the United States. Should the new administration wish to upgrade this aspect of our national defense preparedness, then the instant Executive Order would need to be revised along the lines of such a new policy.

Executive Order 12044 deals with improvement of government regulations. It is expected that the new administration would want to deal with the regulation problem in a different manner than the way it is currently being handled. To the extent that this Executive Order imposes requirements of a cost-benefit analysis, those procedures should be improved and vigorously enforced. Moreover, the new administration

might want to eliminate the massive paperwork required of local authorities, substituting a certification process with spot checks by a team of auditors. Such action would be consistent with the paperwork budget procedure required by the Paperwork Reduction Act.

Executive Order 12138 requires the Department of Transportation to take affirmative action to use women's business enterprises in procurement and other activities of the department. While there is no doubt that women's business enterprises are a tiny fraction of the business community, still, such a policy smacks of Minority Business Enterprise-like quotas which should be promulgated, if at all, only by Congress and not by Executive Order.

Executive Order 12196 deals with occupational safety and health problems for federal employees, mandating that executive agencies comply with the standards issued under OSHA. There has been a great deal of criticism leveled at OSHA in its attempts to improve worker health and safety in the private sector. While certainly we don't want to backtrack on the commitment to health and safety, there are more effective ways to ensure federal worker health and safety which are not so expensive as the private sector standards have proven to be. The federal government could serve as a laboratory to show that less expensive alternatives can accomplish the purpose of the Act.

To the extent that there is not a massive reorganization of the Department of Transportation (see *infra*), serious consideration should be given to the issuance of an Executive Order which would name the Secretary of Transportation the lead federal official on all matters of transportation in the federal government. The National Transportation Policy Study Commission (NTPSC) made this recommendation after determining that there were 64 agencies with transportation responsibilities in the federal government alone, and more than 1,000 policies and programs administered by these agencies. Of course, many of these programs are duplicative and could be more effectively coordinated. With public transit becoming more and more important, efforts to effectively manage government transportation activities are imperative.

Long-Term Structural Changes in DOT

In any restructuring of the DOT one of two philosophies would have to govern: the changes would be either non-radical, involving mere tinkering within the department, or

radical, involving a fundamental reorganization of the functional and modal aspects of the department. The above two sections dealt with non-radical changes that could be made in the short term without the necessity of congressional action. Accordingly, they would be the easiest to implement and should be given the most serious consideration. However, the changes suggested in this section, whether radical or non-radical, would require congressional action which might be difficult to obtain. In any case, the types of changes suggested are inconsistent and before any changes are made, it would have to be determined which philosophy is to be followed.

If in fact the changes are to be non-radical, then there are several possibilities for legislative changes that could make DOT more effective. At the present time, FHWA and NHTSA are independent administrations, though their activities clearly overlap. NHTSA was originally concerned with highway safety and had not assumed for itself the role of consumer advocate. By deemphasizing the importance of NHTSA and making it part of the FHWA, perhaps past unfortunate experiences with NHTSA could be avoided. However, politically this would be very difficult to accomplish and perhaps a similar result would occur if the proper person was chosen to head NHTSA.

Another possibility is to merge the FHWA with UMTA. Most observers concede that UMTA is the least effective of any of the administrations within DOT, while FHWA is probably one of the more effectively run administrations. Moreover, if these two agencies were merged, it would provide an inter-modal basis for determining the transportation needs of a particular urban area. The resulting administration could mesh public transit needs with the necessity for construction or maintenance of existing highways and roads. This would also be an opportunity to return local control to the states regarding the manner in which the monies are spent. However, such a merger would have to be structured so as not to be perceived as a raid by UMTA on the highway trust fund monies.

Finally, with the current emphasis on deregulation, it may be appropriate, in the not to distant future, to consider eliminating the independent regulatory agencies such as the Interstate Commerce Commission (ICC), Federal Maritime Commission (FMC), and the Civil Aeronautics Board (CAB). As these agencies' powers and involvement in transportation are diminished, consideration should be given to the creation, over the long-term, of a single, federal transportation commission to perform the residual, regulatory duties of these bodies.

The above incremental changes are evidence of the fact that if one accepts the philosophy that the current DOT structure along transportation modal lines is rational, then the changes that should be made by a new administration are relatively minor in nature even though they would require legislative action.* However, if such an organization is not accepted, then certain radical changes could be made which could perhaps lead to a more integrated federal transportation policy. Such a suggestion was made by William T. Coleman, Jr., Secretary of Transportation in the Ford Administration.**

The problem, as Coleman saw it, was that with the modal setup of the Department of Transportation, inter-modal choices were not being made. Each administration within the DOT had a constituency —both in the general public as well as on Capitol Hill—which fought effectively for its own share of the budget. Such an organization of DOT did not allow the Secretary to make a reasoned or judicious inter-modal choice between competing forms of transportation.

Accordingly, Coleman recommended setting up DOT along purely functional lines so that the competing forms of transportation could be analyzed intermodally and appropriate budget allocations made. The Secretary recommended three administrations. An Interstate Transportation Administration would include funding for highways, railroads, airports, pipelines, ports and inland waterways—basically assistance programs which have an interstate or federal character. The second program would be the Local Transportation Administration involving such matters as UMTA monies and some local FAA responsibilities. However, these monies would be distributed on a block grant basis permitting the local authorities to have more control over allocation of funds to meet local needs. Finally, Coleman also recommended setting up a Motor Vehicle Administration which combined the motor vehicle activities of the FHWA, NHTSA, and other agencies spread throughout the government. The underlying premise of the Coleman proposal is a unified trust fund account out of which monies could be spent depending on the importance accorded to each mode of transportation.

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*Even if the changes made are non-radical, note the above-mentioned recommendation that an Executive Order be issued making DOT and the Secretary of Transportation the lead federal agency and officer for implementing and coordinating federal transportation policies.

**_Reorganization of the Department of Transportation and its Programs._ U.S. Department of Transportation, January 19, 1977.

Coleman's proposal was, of course, a very radical change in the way the federal government administers its transportation programs and although provocative, would require major legislative action. The chaos of reorganization might be more counterproductive in the short-term than the long term benefits that could be realized, and accordingly such a reorganization is not strongly recommended.

Conclusion

The foregoing discussion of various alternatives to reorganization of the Department of Transportation has been all too brief considering the complexity of the issues. The various recommendations made are inconsistent and necessarily so because they are based on differing, underlying philosophies. However, a new administration should be management-oriented. While there are political constraints in any reorganization attempt, to the extent that streamlining can be effected, it should be done. Certainly, with our current deregulatory atmosphere and a belief that government is overly intrusive in the lives of Americans, this is the perfect opportunity to effect change that will lead to more effectively coordinated and administered federal transportation policies.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

The chief purpose of the National Highway Traffic Safety Administration (NHTSA) is to promote traffic safety. Its main functions fall into the following broad categories:

Motor vehicle safety: NHTSA sets motor vehicle safety standards under the National Traffic and Motor Vehicle Safety Act of 1966, as amended, 15 U.S.C. Sections 1381, *et seq.* It also determines whether safety-related defects exist in vehicles currently on the road, and is empowered to order manufacturers to recall such vehicles and repair them. Under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. Sections 1901, *et seq.*, NHTSA has taken a number of actions, such as establishing bumper standards, which relate more to consumer protection in general than to safety in particular.

Highway safety: Under the Highway Safety Act of 1966, as amended, 23 U.S.C. Sections 401, *et seq.*, NHTSA administers national standards for state highway safety programs and supervises federal grants for these programs. (Activities relating to highway design and construction, however, are the respon-

sibility of the Federal Highway Administration rather than of NHTSA.)

Fuel economy: NHTSA administers the fuel economy program established under 15 U.S.C. Sections 2002, *et seq.* NHTSA determines interim average fuel economy standards for passenger cars in order to achieve Congress' 1985 model-year goal of 27.5 miles per gallon. NHTSA sets similar standards for light trucks as well, and is considering what further fuel standards to impose beyond 1985.

55 m.p.h. speed limit compliance: Together with the Federal Highway Administration, NHTSA monitors state compliance with the national speed limit under 23 U.S.C. Section 154. States which fail to meet the criteria for establishing compliance may be denied federal highway funds.

Research and demonstration projects: These projects, together with data collection programs, are conducted under most of the above areas. Examples of specific research areas are experimental safety vehicles, vehicle crashworthiness, and drunk driving.

Overview

The scope of NHTSA's responsibilities, coupled with specific actions which it has taken in recent years, have made NHTSA the most powerful and controversial unit within the Department of Transportation. Several safety standards have provoked widespread public debate, and both safety standards and motor defect proceedings (such as the Firestone tire recall and the pending Ford automatic transmission case) have had significant financial impact. NHTSA's actions in the fields of both safety and fuel economy regulation have been blamed as causing, in large part, the financial problems which domestic manufacturers such as Chrysler and Ford have recently encountered.

The controversies stirred by NHTSA result largely not from any congressional directives to the agency, but from specific policy decisions made by NHTSA in exercising its administrative discretion. It is these policy decisions, rather than any structural reorganization, which must be addressed in considering the agency.

Motor Vehicles Safety Standards

Two of NHTSA's most controversial standards—ignition interlocks and passive restraints—were established not to

increase the safety potential of automobiles, but to overcome the refusal of many car occupants to use an existing safety device—seat belts. Ignition interlocks were introduced in 1973, but popular opposition to them grew so quickly that the standard requiring them was overturned by Congress less than one-and-a-half years later. In 1977, NHTSA mandated passive restraints for front-seat occupants—once again, on the basis of the low rate of voluntary belt usage. In response, manufacturers now plan to install many automatic belts, rather than the air bags which NHTSA had envisioned for a majority of new cars. It is likely that the 97th Congress will legislate a solution (probably requiring limited air bag availability) thus taking the matter out of NHTSA's hands. The result of all this will be cars which in all likelihood will be no safer, but (in the case of air bag equipped vehicles) much more expensive, than current models containing conventional seat belts utilized by the occupants.

While the air bag episode is far from over, one lesson seems abundantly clear—NHTSA should concentrate on improving the safety potential of cars, rather than attempting to override the individual choices of the public on whether to utilize the safety devices contained in cars. Performance rather than design should be the key to standard setting.

The recommendations which follow stem from a number of considerations. NHTSA is, first of all, not the sole force behind automotive safety, and it is probably not the predominant force either. Market forces, such as competition and product liability, led to the introduction of numerous safety features prior to their being required by NHTSA. Yet NHTSA has sometimes assumed an attitude of self-righteous urgency in moving to impose its view of safety on the public, disregarding the possiblity that it itself may be fallible. In mandating passive restraints, the agency scrapped a real-world demonstration program and proceeded essentially on the basis of laboratory tests, while at the same time concealing adverse findings from the public. In *Paccar v. NHTSA*, 573 F.2d 632 (9th Cir. 1978), *cert. denied*, 439 U.S. 862 (1978), NHTSA's truck brake standard No. 121 was judicially overturned, in part on the ground that the agency had failed to respond to evidence that devices mandated by that standard were unreliable and potentially hazardous. (A revised brake standard proposal will be an early NHTSA issue for the new administration.)

Precisely because NHTSA is a government agency, exercising wide-ranging power and not legally liable for errors in

judgment, it must act with considerable caution in setting standards which lead to the introduction of new safety devices.

• NHTSA should have evidence from real-world experience, rather than just from laboratory testing, that proposed safety standards will be effective and reliable. Real-world data should form the basis for NHTSA's estimates of safety effectiveness and for its cost-benefit evaluations. The use of demonstration projects to provide this data should not be rejected for the sake of speedily implementing new standards. NHTSA should abandon the view that it need only demonstrate the technological feasibility of proposed standards before implementing them.

• NHTSA's consideration of possible standards should be supported by publicly available documentation at the earliest stage possible. This documentation should contain specific characteristics of the safety problem NHTSA is addressing, the consideration given to alternative solutions, a full review of the research carried out to date on the problem by NHTSA, a description of the future research NHTSA intends to conduct, and cost-benefit evaluations of the proposal and alternatives. The availability of such documentation at the time of the advance notice of proposed rulemaking will improve the public awareness of what issues to raise in future notices.

• Proposals for new standards are often issued without an indication of when NHTSA expects to take its next step in the decision making process. This can bring private development in an area to a standstill, as manufacturers wait for NHTSA's response to public comments without knowing when to expect such a response. Within a specific time, such as six months, NHTSA should publish some statement of whether, and how, it intends to proceed.

• Rulemaking materials contained in the public docket should be reorganized to make them accessible to the public. They should be indexed by specific subject matter within the docket, and material in *other* dockets on related matters should be cross-referenced.

Safety Defect Recalls

Defect proceedings do not involve the introduction of new vehicle equipment pursuant to agency requirements. Nonetheless, the issues of effectiveness and cost are present here as well and should be analyzed in a manner similar to their treatment in the area of safety standards.

• To the greatest extent possible, NHTSA should make its defect determinations on the basis of collected traffic data, rather than on the basis of individual complaints.

• NHTSA should adopt the formal use of cost-benefit analysis in safety defect proceedings. It is likely that NHTSA's use of such analyses is allowable under the existing statutory scheme. Such analyses may be difficult, if not impossible, to perform in certain cases involving accident avoidance (where estimates of deaths or injuries caused by the defect may be unobtainable); but in other cases, especially those involving crashworthiness, such analyses should be easier to develop.

• Cross-examination by interested parties of persons offering evidence in defect proceedings is not currently allowed. While this procedure is not mandated by statute, NHTSA should allow cross-examination in these proceedings as a means of testing the evidence presented and improving the information available to the agency for its final determination.

Data Collection and Utilization

While NHTSA's data collection has greatly improved in recent years, its continued expansion should be *the* highest priority for the agency, even to the extent of displacing certain research programs. Reliable accident data are the key to identifying safety problems and to verifying the effectiveness of implemented solutions. In view of the national scope of safety standards, they should rarely, if ever, be imposed on any lesser basis such as administrative intuition or engineering judgment. New safety requirements should be held to a standard similar in principle to that imposed by the Food & Drug Administration on new drugs.

Data which precede the implementation of a safety standard are essential to establish a baseline against which to evaluate the effect of the standard; imposing a standard in the absence of such a baseline may forever destroy the possibility of evaluating that standard. Budget allocation within NHTSA should reflect the importance of this function.

• NHTSA should continue its recent policy of de-emphasizing the in-depth investigation of a small number of accidents while expanding the collection of adequate data covering large samples. It is only the latter type of information which can serve as a basis from which to draw general conclusions regarding traffic safety. The newly-instituted National Accident Sampling System (NASS) will obtain information on

about 20,000 accident cases per year; NASS should itself be expanded, and consideration should be given to instituting a second system which would utilize less detailed data but would cover up to 500,000 to 1,000,000 cases annually.

• The agency should, to the greatest extent possible, separate its data gatherings and regulatory functions. Consideration should be given to moving the former totally outside of NHTSA, perhaps as a new unit within DOT which would gather data for both NHTSA and the Federal Highway Administration.

• NHTSA should use data to find and define safety problems in advance, rather than to support proposals which have already been made.

• NHTSA frequently issues reports on the basis of newly collected data not yet available to outside users. In such cases, the agency should assure that this data becomes available in time for it to be of use to those seeking to respond to NHTSA.

Fuel Economy Standards

It is unquestionable that NHTSA's fuel economy standards, coupled with Congress' own mandated 1985 goal of 27.5 m.p.g., have contributed to the high fuel efficiency of vehicles now being manufactured. The fuel economy program, however, raises two basic questions of policy: (1) The program does not focus on socially optimal fuel economy, but on maximum feasible fuel economy. It is thus possible that social resources are being used inefficiently to produce cars whose higher initial costs will not be fully offset by savings in fuel consumption; (2) the speed with which manufacturers are required to meet fuel economy goals has caused severe problems to particular manufacturers in raising the necessary capital for retooling, and may itself produce wasteful inefficiencies.

• NHTSA should give greater consideration to the issue of feasibility in setting fuel economy standards. The contribution of NHTSA's interim (pre-1985 model year) standards to the "Detroit crisis" indicates that feasibility has not been adequately considered by the agency.

• More importantly, the recent steep rise in gasoline prices has produced a clear trend toward manufacturers competing and advertising on the basis of greater fuel economy. In determining whether to go beyond Congress' 1985 fuel economy mandate and establish even higher requirements for the 1986 and succeeding model years, NHTSA should first deter-

mine whether market forces alone would not supply sufficient impetus towards fuel-efficient cars, given current and projected gasoline prices.

Research

• Basic NHTSA research decisions should be opened to public comment and evaluation. NHTSA has, for example, begun an extensive and heavily publicized crashworthiness test program for cars involving 35 m.p.h. collisions into fixed barriers (equivalent to a 70 m.p.h. car-to-car collision). The use of this test speed, rather than the 30 m.p.h. barrier collision employed in the occupant restraint safety standard, was chosen by the agency with no opportunity for public comment, even though the results of this test speed may produce significantly different results. NHTSA's publicization of the test results may effectively create a *de facto* standard without any of the open decision-making procedures required by law for safety standards.

• Similarly, NHTSA should regularly review and evaluate past agency research, as well as ongoing projects and future plans, in publicly available reports.

• NHTSA should reduce its funding of demonstration projects, which are aimed at familiarizing the public and local safety agencies with NHTSA activities. The projects are costly, of doubtful effectiveness, and tend to focus on what is possible rather than what is practical. For the sake of its own credibility, NHTSA should also avoid the appearance of turning research programs into politically opportune demonstration projects. Examples are recent crash tests which allegedly showed domestic cars to be safer than imports (and which took place soon after President Carter announced his program to aid Detroit), and the Research Safety Vehicle program, which has, in certain respects, become an air bag demonstration project. Technological advancement, whether involving safety or other goals, should not be the direct responsibility of a federal agency.

FEDERAL HIGHWAY ADMINISTRATION (FHWA)

Background and History

The Federal-Aid Road Act of 1916 created the Bureau of Public Roads, which eventually became the Federal Highway Administration (FHWA). In 1966 the 89th Congress created

the Department of Transportation and transferred to the Secretary under Public Law 89-670 general responsibility for the administration of U.S. highway transportation laws. These duties are vested in the FHWA.

The importance of the U.S. highway system should not be understated. Our roads handle nearly 90 percent of all intercity passenger travel and about 25 percent (approximately 628 billion ton miles) of all domestic freight movements. The Nation's highway freight bill in 1978 totaled over $147 billion.*

Of the 3.9 million miles of roadways in the country, the federal government owns and maintains about 6 percent. Less than half of the estimated $31.8 billion spent by the government for highway purposes in 1978 went for construction, approximately one-quarter for maintenance and services, and the rest was used for traffic safety, administration, policing and debt service. While the lion's share of these expenditures was carried by the states, the federal government spent $818 million and distributed an additional $7.3 billion in aid to state and local governments.

Mission of the FHWA

The Federal Highway Admininstration has overall responsibility for the nation's highway system, including administration of the Federal-Aid Highway Program of financial assistance to states for highway purposes; development and administration of a program to promote highway safety, including financial aid to the states; administration of highway beautification and federal territorial lands highway program; and coordination and funding of research and development programs on a wide variety of highway problems.

Administration and Budget

The FHWA is a three-tiered organization consisting of Headquarters in Washington, D.C., 10 regions and 52 division offices, one in each state capitol as well as Puerto Rico and the District of Columbia. Headquarters and the regional offices provide guidance to the division offices, which are the primary contacts with state and local transportation agencies. The division offices review and approve projects, monitor the states' programs, and provide technical assistance.

The FHWA employs approximately 4,600 individuals na-

**Transportation Facts and Trends*, Transportation Association of America, 1979.

tionwide, with 1,244 serving at Washington headquarters. The Administrator is appointed by the President with the advice and consent of the Senate. Four hundred seventy-eight positions are assigned to administrative support, 314 at headquarters and 164 in the field. This large number is justified on the basis that FHWA provides payroll, system and programming, training and direct construction services for certain other agencies. The total manpower requests made by the FHWA for FY 1981 were the same as for FY 1980. In testimony, the Administrator pointed out that these levels were a net reduction from 1979 levels.

In FY 1981, the FHWA submitted a total budget estimate of $194,002,000; the 1980 appropriation was $193,300,000. The House allowed $190,705,000 (H.R. 7831), and that amount was increased by the Senate Appropriations Committee to $191,882,000. The justification of that increase was to enable the FHWA to complete its project to modernize its management and fiscal information system. The Senate Committee recommended $14.35 million for motor carrier safety, $9 million for highway safety R & D, $7.2 million for highway beautification, and $17.5 million for highway-related safety grants. The Committee also recommended a liquidating cost appreciation for the Highway Trust Fund of $7.5 billion, the full amount of the estimate submitted by the Transportation Department.

The Federal Highway Administration is generally regarded as an agency whose goals are clear and whose management has been generally effective.

There is one management issue confronting FHWA which should be noted. In April 1980, DOT issued final regulations fixing percentage goals for contract preferences for minority business enterprises. This is clearly a department-wide issue, but the first clear challenge to the regulations has been to the FHWA. Local contractors and the state of Alabama persuaded a federal district court to rule the challenged regulations were improper, absent a clear congressional authorization to require race-conscious preference.* DOT is appealing the decision.

• Regardless of the eventual court decision, an administrative review of the minority business enterprise regulations as well as FHWA enforcement policies should be commenced immediately. We do not suggest the regulations be totally

*_Central Alabama Paving vs. James_ (M.D. Ala; Oct. 10, 1980).

scrapped. But flexibility, and common-sense are not at odds with a minority enterprise policy.

FHWA Programs

The Federal-Aid Highway Program constitutes the largest of the FHWA's programs. It consists of three groups of federal highway assistance projects:

System Related Programs

- Interstate system composed of the 42,500 mile interstate highway system and financed on a 90 percent federal, 10 percent state basis;
- Primary system (271,000 miles) made up of rural arterials and urban extensions vital to interstate, regional and statewide movements;
- Secondary system (390,000 miles) comprised mainly of feeder and county and local roads; and
- Urban system, a network of supplementary roads serving local urban transportation needs.

The primary, secondary, and urban systems are generally financed on a 75 percent federal, 25 percent state contribution basis. All of these activities include bridges and "3R" programs—resurfacing, restoration, and rehabilitation activities.

National Purpose Programs

These programs are directed at problems common to all the systems and include the Bicycle and Carpool/Vanpool programs authorized by the Surface Transportation Assistance Act of 1978 but not presently funded; bridge replacement and rehabilitation; highway safety, including signing, pavement marking, and rail-highway crossings; highway esthetics; promotion of economic growth centers through improved highway access; emergency relief; routes through public lands and national forests; and highway planning and research.

Special Purpose Programs

These programs consist of federally-assisted projects focusing on specific areas, such as improvements to highways in the U.S. territories.

The Highway Trust Fund

The Highway Trust Fund created by the Highway Revenue Act of 1956 (70 Stat. 387), is the funding mechanism for the

federal share of expenditures in federal-aid highway projects. Monies for the Trust Fund are collected via excise taxes on motor vehicles, fuels and oils, and on tires and retread rubbers, use taxes on trucks and inter-city buses of over 26,000 pounds, taxes on the manufacturer's sale price on new trucks and trailers, and taxes on truck parts and accessories. Thus, the basis of the Fund is that the user pays.

The user-charge revenues are returned to the states according to a series of formulas, not on the basis of the amount of taxes each actually pays. Some states are subsidized at the expense of others.

The FHWA allocation program has led to conflict with the states, creating an issue that must be dealt with in the near term. The conflict arose in April 1980 when the Secretary of Transportation announced cutbacks of about $1.15 billion in federal aid for highway construction to comply with the Administration's anti-inflation program.

Eight states filed suit and several managed to win injunctions or restraining orders to halt the cutbacks. In Arkansas, U.S. District Court ruled that the cutbacks were arbitrary and capricious and that the first-come, first-served FY 1980 allocation method contradicted congressional intent.

The legal action was effectively put to rest by the Congress by approving the Supplemental Appropriations and Rescission Act of 1980 (P.L. 96-304). In the Act, the Congress approved a reduced obligational ceiling of $7.8 billion for federal-aid highway construction for FY 1980. The U.S. Court of Appeals for the Eighth Circuit decided on August 4, 1980, that because of the congressional action, the Arkansas case was moot.

As the states continue to compete for funds from a shrinking Trust Fund, the Secretary and FHWA Administrator must examine and evaluate the entire formula structure so that funds are distributed to the states more equitably and efficiently to reflect regional and nationwide benefits to be gained from the expenditures. The Fund and existing taxes were extended through September 30, 1984, by the Surface Transportation Act of 1978 (P.L. 95-599). Most federal-aid highway programs expire in FY 1982.

Since the Highway Trust Fund is based on user charges, and with the impact of recent inflation, the Fund is now found to be in major difficulties. According to the FHWA, the annual rate of increase in Trust Fund revenues for the 1979-1984 period will be about 1.5 percent, or from $7.189 billion in 1979 to $7.728 billion in 1984, with a decline to $6.934 billion in 1980.

As of September 30, 1979, the Trust Fund had an unexpended cash balance of $12.564 billion, with total liabilities of $18.967 billion and unfunded liabilities of $6.4 billion.

The Senate Appropriations Committee, in its report (S. Report 96-932) on the DOT FY 1981 appropriations measure noted that "revenues into the Highway Trust Fund are declining to the point where, in the near future, they may be inadequate to support the obligation ceilings established by the Committee."

It is estimated that 1,634 miles of the still unfinished interstate system require major improvements, 30,351 miles require minor improvements, and 60 to 80 percent of the paved surfaces of the primary system will require replacement in this decade. This fact is critical. Every year of deferred maintenance means more extensive maintenance problems when the task is finally confronted. But highway repair is expensive and growing more so. The composite price index for highway construction rose by 16 percent in 1979.

This poses the key policy question for FHWA planners and the Congress. Should the current generous reserves in the trust fund be tapped for an immediate and extensive interstate highway refurbishment program? Or, with a longer term outlook of declining revenues for the trust fund, should the fund assets be retained to cover ensuing leaner years?

Thus, in the near term, decisions must be made on how to manage the current Fund revenues. In the longer term decisions are required on how additional Fund revenues will be generated and used. The trust fund terminates in 1984.

- To compensate for revenue losses to the Fund resulting from reduced gasoline tax revenues due to the decline in gasoline consumption and the gasohol tax exemption, consideration should be given to such options as increasing the user tax; expanding the tax base by increasing or indexing fuel taxes; or creating new types of user taxes.
- Ultimately, the Administration and the Congress will have to decide the fate of the Trust Fund: whether to allow it to expire in 1984 and provide highway funding from general treasury revenues or to reformulate the Fund to alleviate shortfalls from inflation and declining tax revenues. The Highway Cost Allocation Study could be of great value in making these decisions.

Highway Cost Allocation Study

Sec. 506 of the Surface Transportation Assistance Act of

1978 (P.L. 95-599) requires the Secretary of Transportation to conduct a study of costs of highway construction and maintenance on which to base decisions on future user taxes. Specifically, the study covers:

- The costs of the design, construction and maintenance of federal-aid highways by different vehicles classes;
- Estimates of the share of the costs attributable to each vehicle class;
- Evaluation of the need for long-term roadway deterioration monitoring; and
- Recommendations for alternative tax structures to distribute the tax burden more equitably on highway users.

Progress reports to the Congress are required by January 15, 1980 and 1981, and the final report is due January 15, 1982. The first report was submitted on March 12, 1980. The preliminary findings of the study will be filed in 1981.

- The Cost Allocation Study should proceed on schedule since it will provide critical information for determining the structure of future highway taxes from which revenues for the Trust Fund will flow and on which federal-aid highway program reauthorization decisions must be based.

FHWA Regulatory Issues

The Bureau of Motor Carrier Safety, the principal regulatory arm of the FHWA, is responsible for administering laws governing the safe operational practices of motor vehicles transporting passengers and cargo in interstate commerce. The BMCS develops vehicle safety regulations and conducts compliance inspections of vehicles and drivers.

The Highway Safety Act of 1966 (23 U.S.C. 401 *et seq.*) established a national program to reduce motor vehicle accidents, injuries and deaths and to improve highway safety programs at all governmental levels. In FY 1979 approximately $400 million was obligated for specific highway programs. In FY 1979, $200 million in federal grants went to help states conduct highway safety programs. Some confusion exists in the area of safety, however, due to overlapping involvement by both the FHWA and the National Highway Traffic Safety Admininstration.

For example, both NHTSA and FHWA have funding authority pursuant to Sec. 403 of the Highway Safety Act of 1966 for highway safety research and development. However, the agencies do not coordinate their research efforts, nor do they employ any mechanism to determine where and how the

results of the research are used. The result is that neither agency can ascertain how effective its research has been nor how to improve its research efforts.

Pending Regulatory Issues

Pursuant to Sec. 30 of the Motor Carrier Act of 1980 (P.L. 96-296), the Congress required the Secretary of Transportation to prescribe minimum levels of financial responsibility covering public liability, property damage, and environmental restoration for certain motor vehicles with a gross vehicle weight rating of 10,000 pounds or more. Those mimimum levels scheduled to take effect of July 1, 1981 unless the Secretary acts would be $750,000 for the interstate or foreign for-hire transportation of general freight; $5 million for the intrastate or interstate transportation of certain extremely hazardous materials; and $1 million for intrastate or interstate transportation of other hazardous materials. The Department has discretion to phase in minimum levels over a 2-year period.

On August 28, 1980, the Bureau of Motor Carrier Safety published for public comment an advance notice of proposed rulemaking on the determination of whether a phase-in of the levels set by statute is appropriate and, if so, how the phase-in should operate. The ANPR also requested comments for use in preparing the report to Congress required by Sec. 30.

Without discussing the relative merits of the ANPR or the legislative requirements from which it resulted, the Department and the FHWA are to be commended for their handling of the issue in two areas:

1. The Secretary recognized that because of the inclusion of hazardous materials transportation there was overlapping jurisdiction with DOT's Materials Transportation Bureau, and he required close coordination between BMCS and MTB in the development of any phase-in plan and in preparing the report to Congress. He also invited the participation of the Environmental Protection Agency because of the inclusion of the transportation of hazardous wastes.

2. The Secretary determined that this is a significant regulation pursuant to Executive Order 12044, "Improving Government Regulations" (3/24/78; 43 FR 12661), and a draft regulatory analysis was prepared and made available for public inspection pursuant to DOT's policies and procedures implementing the Executive Order (2/26/79; 44 FR 11034).

• The Executive Order requiring that regulatory analyses of major rules be performed should be extended because it

gives the public the opportunity to review how the DOT/FHWA (and other agencies) came to the decision to undertake a regulatory proceeding while requiring the DOT/FHWA (and other agencies) to seriously consider the ultimate objectives of the regulation before it takes effect.

• The Secretary of Transportation or his delegate—in this case, the FHWA—should be required by Executive Order to review the potential for overlap and duplication in considering rulemaking and should encourage the cooperation and participation of other agencies who may be affected.

There are lurking two other BMCS regulatory proceedings of much greater controversy. In response to a legal action initiated by a Teamster-inspired group, BMCS is considering revision of rules limiting hours of driver service and prescribing rest periods. This issue is highly controversial, as any new DOT prescribed work rules could be tremendously costly for truckers, shippers and ultimately consumers. There may be clear reasons and justification for reducing various driver recordkeeping and paperwork requirements, such as trip and service logs.

• Any change to shorter work rules must be justified by clear and complete cost data, indicating the source and extent of any savings FHWA feels will result from the new rule and contrasted with the inevitable increased labor and service costs.

Another FHWA regulatory proposal with a very expensive potential impact is a rulemaking on the minimum size of truck cabs. There are no current FHWA regulations in this area. Any proposal in this area would, in requiring a minimum cab size, impinge on the question of truck length, an issue which the Congress and the states have traditionally addressed.

• Inasmuch as the new Congress will probably address the national size and weight issue, the cab size rulemaking should definitely be deferred for the new Congress and Administration.

The FHWA is also attempting to expand their regulatory authority of "on premise" signs. Such signs (as distinguished from billboards) are commonly used by small businesses to identify their establishments. "On premise" signs are statutorily exempt from regulations, but FHWA has issued a notice announcing an inquiry into the advisability of this exemption and the need for federal regulation.

• This proceeding by FHWA is a good example of the trend of federal encroachement on the private sector which the new administration should stop.

FEDERAL RAILROAD ADMINISTRATION (FRA)

Like DOT itself, the Federal Railroad Administration is an amalgamation of various not-closely related responsibilties, having as a common theme some relation to rail transportation. Except in the safety area, the FRA is not a regulatory agency with responsibility for monitoring day-to-day rail activity. The FRA has no connection with rail rates, mergers, or terms of service. This type of economic regulation of railroad is vested in the Interstate Commerce Commission (ICC). (With the passage of the Rail Act of 1980 (P.L. 96-448), the role of the ICC in regulating railroads should in fact diminish dramatically over this decade.)

If the FRA has any one theme, it is that of an economic development agency, charged with studying, planning and administering various programs to develop and improve rail service, both the railroad physical plant and the planning and promotion of sound traffic patterns.

Basic Policy Assumptions

If the broad policy responsibility of FRA is economic promotion of a sound rail system, then FRA's ability to carry out this function has been hamstrung by three problem issues attendant with any discussion of railroad policy. First, the rail system, perhaps more than any other American industry, suffers from an aging, immovable physical plant, with replacement carrying very high capital and labor costs. Secondly, rail transportation, more than any other mode, has been a favorite object of political attention and promotion. Just as the ICC is the object of political vilification when a railroad seeks to lessen or abandon service to a particular area, the various FRA programs are ready targets for intense lobbying, especially from state and local political officials eager to see rail service to their areas developed with federal monies. Thirdly, the traditional economic power wielded by railway labor can never be discounted. Any consideration of the effectiveness of any FRA program must factor in the economic costs of traditional railway work rules and the political sensitivities of the rail unions, to which Congress has had no traditional resistance.

These negative factors may be counterbalanced by an emerging awareness by the shipping and political public that fuel efficient rail transportation merits greater attention and nurturing. The recent level of federal support for FRA pro-

grams has been generous. More importantly, railroads themselves seem to be turning a corner from declining traffic and revenues. The Staggers Rail Act (P.L. 96-448), authorizing railroads a much greater degree of ratemaking freedom, should accelerate the economic recovery of the railroads. The responsibility of the FRA, then, will be to fulfill its statutory mandates and complement a naturally occurring revitalization of American rail service, but not to, through unnecessary regulation or misdirected development activities, create economically unsupportable barriers or programs.

Principal Deficiencies of Existing Policies

The Federal Railroad Administration operates pursuant to several statutes. Three FRA activities are worthy of particular attention in this paper. The FRA's regulatory responsibilities over rail safety and health present a classic example of important regulatory activities which should be influenced by conservative management principles. The Northeast Corridor project, an ongoing physical refurbishment of rail facilities in eight politically powerful northeast states, has shown an inability to avoid pork barrel influence and a bumpy precedent-setting record of procurement policy disputes. And the Amtrak program, a politically sensitive and very expensive federal involvement in the rail passenger industry, will be coming up for reauthorization in the 97th Congress, which DOT and FRA must be prepared for.

In 1965, the safety function for the railroad industry was taken from the Interstate Commerce Commission and deposited with the new Department of Transportation. It was hoped at that time that a fresh approach would cause railroad safety regulation to be streamlined. Unfortunately, the Department of Transportation, under successive administrations, has burdened the railroad industry with cumbersome and extremely restrictive safety regulations. Congress has made some attempts to streamline the railroad safety laws most recently the Federal Railrod Safety Act of 1980 (P.L. 96-423). However, the FRA, the agency responsible for promulgating and overseeing railroad safety is the only entity which can truly streamline railroad safety regulations and make them more responsive to the actual problem. A General Accounting Office report recently concluded that very few of the railroad safety regulations in force today actually have any relationship to the majority of railroad accidents and derailments that occur daily.

The Department of Transportation seems to have been preoccupied with highly technical aspects of railroad technology and has also chosen to unduly involve itself in the day-to-day operations of the railroads. The FRA is required to submit to Congress, by January 31, 1981, a system safety plan setting out DOT activities in carrying out the rail safety law, as well as a plan for determining frequency and priority of safety inspections. These reports should be the initiative for a new administration's emphasis on targeting inspections and safety regulation on those areas and types of problems where the greatest safety risk exists. Performance standards should be used not only to judge the cost and benefits of current regulations, but also to asses the efficacy of FRA and state inspection and enforcement programs.

A longer term and more significant solution would be a shift of the primary responsibility for rail safety from the federal government to the railroads. Railroads could design their own rail safety program, submit them to the Department of Transportation for approval and implement such programs. It is clear that rail safety considerations vary with different geographic terrain and railroad operations. Accordingly, each individual railroad could be charged with drafting its own particular rail safety program and the federal government would monitor its implementation. Penalties could be assessed on those railroads where the safety plan was not adequate. The performance of the private sector, rather than federal standards, would become the essential benchmark for rail safety. Such a shift in the regulatory function would, of course, require legislative changes in the Rail Safety Act of 1970 and related laws.

Another longer term recommendation is for the DOT to encourage uniform state safety regulation of railroads. Conflicting regulations and sometimes less than able state inspection programs are a problem over which DOT has no direct control. A shift to railroad-originated safety programs might make the state programs and problems more obvious. Pursuit of uniform state safety laws should be a high priority.

The Northeast Corridor is composed of approximately 600 route miles between Washington, D.C. and Boston, Massachusetts by way of Philadelphia and New York City. The system also includes a 166 mile segment between Harrisburg, Pennsylvania and Philadelphia. Although the Northeast Corridor system is developed essentially for rail passenger traffic there is

a substantial amount of freight being shipped on the Northeast Corridor going into New England from the south.

The Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210) (4 R Act) authorized the federal funding of $1.75 billion to establish the Northeast Corridor as a modern high speed passenger corridor. Subsequently, FRA requested and received authorization for $750 million in additional monies to complete the program. Any review of FRA administration of this program must focus the important issue of the sensitivity of the program to local political influence.

Rapid completion of the Northeast Corridor is desirable, however, as it enables the AMTRAK system to run its most cost effective routes. The eventual AMTRAK system will almost inevitably be focused on the Boston-Washington route with its high traffic density and generally consistent business passenger demand for service. The expensive experience with the Northwest Corridor should not be lost on DOT and USRA planners who will have to decide on future track refurbishment on other lines.

The biggest challenge facing the FRA next year will be the new AMTRAK plan. Congress has required that the present routes be operated until October 31, 1981. At that time, AMTRAK will have to recommend which services should be dropped. Critical management decisions involving routes of service, frequency of service on routes now served, level of fares and level of maintenance will have to be made.

Long-Term Opportunities

Some long-term policies must be articulated. Will AMTRAK continue to use regional balance as a factor in maintaining routes, or will the Congress bite the bullet and allow the biggest losing routes to be dropped. Currently three long distance routes are not meeting mandated passenger/mile levels, Chicago to Texas, Salt Lake City to Portland, and Washington, D.C. to Chicago through West Virginia. The new administration should prepare a phased rationalization of AMTRAK services, emphasizing frequent service on the most densely populated route, the cost effectiveness of routes providing relative standards. A self-supporting rail passenger system is not foreseeable. But the administration should not be timid in proposing a paring down of AMTRAK service to reflect current fiscal realities.

The necessary congressional reauthorization of AMTRAK in 1981 will present DOT/FRA officials with a new opportunity to walk the narrow line between and among political considerations of powerful legislators, service needs and capacities of various sectors of the nation's rail labor costs and rules, and the limits of Federal financial involvement in maintaining a rail passenger system which clearly cannot be self-supporting in the near future. Rigorous application of cost benefit analysis will not work in considering the Amtrak system. DOT and Amtrak officials must have both business and political acumen so that the Amtrak system can move toward greater rationalization and diminished federal support.

URBAN MASS TRANSIT ADMINISTRATION

Basic Policy Assumptions

The Urban Mass Transportation Act was passed in 1964 primarily to stem the growing number of bankruptcies of urban transit systems. As stated in Section 2(b) of the Act, its purposes are threefold:

1. to assist in the development of improved mass transportation facilities, equipment, techniques, and methods . . .;

2. to encourage the planning and establishment of areawide urban mass transportation systems. . . .; and

3. to provide assistance to state and local governments and their instrumentalities in financing such systems. . . .

In this the Act has been outstandingly successful. The United States now has approximately 370 functioning urban public transit systems.

This objective has been met by substantial federal funding for traditional transit operations—bus and rail operations. But while the objective has been met, the funding for high-cost systems continues. It would seem very appropriate for a new administration to ask itself, UMTA and the Congress to reassess the stated objectives of federal public transit policy and the methods used to achieve those objectives. Is continued federal funding for traditional transit productive? (Fiscal Year 1981 appropriations were set by the Congress at $4.6 billion, for the Urban Mass Transit Administration.)

If the central objective were to become moving as many people as cheaply and with as little energy as possible, other methods might prove more productive and cost-effective. For example, if present transit capacity (currently approximately 6 percent of all commuter trips taken) were to be doubled, it

would cost many billions of dollars, yet save only 100,000-500,000 barrels of oil per day. The Department of Energy has estimated that approximately 400,000 barrels of oil per day could be saved if the current average automobile occupancy for commuter trips of 1.4 were increased to 2.0.

Indeed, it seems quite appropriate for the new administration to ask some very basic questions about transit. Increasing commuting capacity along a heavily traveled corridor in most cities costs one bus and two drivers, plus maintenance back-up, for every 50 riders. Under current law, 80 percent of the cost of each new bus and up to 50 percent of the cost of operating it is financed by the federal government. Ridesharing in the form of either car or van pools has very low start-up costs and meets all other expenses, including amortizing the capital outlay for the vehicle, from revenue generated. In cities such as Norfolk, Virginia, such a strategy is being used by the transit operator to reduce peak demand for commuter service, relieving the pressure of funding sources and assuring adequate resources for the system's basic public transporation service.

While subways are undoubtedly convenient and attractive and can carry greater numbers of people than any other form of transit, there is no denying the fact that they are extremely expensive. Some argue, with construction of systems in Washington, D.C., Atlanta and Baltimore and planning underway for Los Angeles, that more U.S. cities have a subway than will need one. Subways are designed, among other reasons, to avoid urban congestions. With their high cost, it is appropriate for UMTA to advocate policies discouraging single occupant auto use in congested cities, freeing existing streets for more efficient use of cost effective buses as an alternative.

Deficiencies of Previous Policies

Along with reviewing the underpinnings of federal transit policy, considerable improvement could be made in the programs carrying out that policy. In some instances, a shift in administrative approach would help; in others a change in the statute would be required.

Stability

The average tenure of UMTA administrators over the past several years has been less than 18 months. When new administrators are appointed, new priorities tend to be established, new procedures developed and a period of general

confusion often results within both UMTA and the transit community. With such short tenures, rational long-range planning by UMTA professionals and transit operators becomes difficult, if not impossible. Frequent changes and vacancies in important sub-administrator positions have also led to policy instability and lower morale within the agency.

Regulation

UMTA's regulations tend to be quite specific in what is required of a grant recipient. For example, all buses must have lifts to serve the handicapped despite many communities' desire to use other methods to provide transportation for the handicapped. In engineering terms, UMTA's regulations tend to be design standards. Such extensive regulation could be avoided if performance standards were to be used. With respect to handicapped transportation, this could be in the form of minimum standards of service mandated by the federal government with the question of how those standards are to be met left to local governments. In this way, federal resources could be focused on those instances where violations of the standards occur instead of having to review a high level of detail in each grant application each year. UMTA's inability to fashion any sort of practical solution to the issue of handicapped access has resulted in Congress seizing the initiative and attempting to legislate a solution.

Categorical grants

The current UMTA act divides federal assistance for mass transit into the categories of capital, operation, bus replacement, demonstration, planning, training, elderly and handicapped, and rural transportation. Often, when a community requests UMTA assistance, funds are not available for the category under which it would be appropriate. It is not unusual for a community to wait several years because assistance has previously been committed to other communities. Local planning revolves around bureaucratic decisons made by UMTA. A block grant, by contrast, would allow whatever federal resources are available for public transit to be distributed to eligible communities annually, allowing those communities to establish their own priorities.

Technology

In the past, UMTA has relied far too heavily on sophisticated new technology to achive some of its goals. This reliance

has given us a new, low floor bus that no manufacturer can build. It has given us subways that use more capital for labor-saving technology than the cost of the labor being replaced. In reviewing applications for new systems or in fostering new designs for old equipment, it is imperative, if the original objective is moving as many people as cheaply as possible to keep transit systems and equipment as simple and reliable as possible. Technological solutions for sociological problems have not worked for UMTA or the taxpayers who supported them or the private companies who should be the developers of transit technology.

Auto dependence

In most of the United States there is no effective substitute for the automobile. No transit system can be devised that will substitute for the convenience and versatility of the automobile. Even in the heavily conjested cities, all who can afford to do so are going to own and use one. In devising transit strategies, the overwhelming preference for the automobile should be taken into consideration. Car pools can be encouraged in lieu of expanding bus or rail service. Restrictions on the use of volunteer drivers can be relaxed instead of sole reliance on hired drivers in sparsely populated rural areas and for social service transportation programs. And where chronic congestion demands it, autos can be discouraged in favor of public transportation.

The alternative approach to public transportation briefly suggested in this outline could be implemented by a complete overhaul of the Urban Mass Transporation Act following a thorough review of the problem. Unfortunately, political reality discourages such hopes. The more effective course is likely to be through changes in administrative regulation backed up by recommendations for modest changes in the statute designed to gradually shift federal transit policy.

Administrative Recommendations

- Speedy appointment of top UMTA policy officials. In any transition, a certain level of confusion prevails. Timely and coordinated direction from policymakers can alleviate this.
- Establish a regulatory task force. Designate one individual, backed by necessary staff, to review all UMTA regulations over the next four years. If this individual were to be given all the trappings of power, such as direct access to the Secretary

of Transportation, a signal could be sent throughout the Department that the review was serious and interference might be held in check. The goals of the review would be to eliminate unnecessary regulations, simplifying those required, and discourage elaborate new regulatory schemes. UMTA's problems have been created by existing regulations, and high priority should be given to their review.

- Review all new regulations with clarity and conciseness with a view toward reducing litigation induced by regulation.
- Expand contact with the private sector. Federal transportation programs could profit if new requirements were first reviewed by those who would be asked to carry them out. In addition, many transportation services are currently provided by the private sector. If these could be woven into federal priorities, the demand for federal assistance could be reduced somewhat.
- Develop a federal paratransit policy. The Department of Transportation has been struggling for several years with this task and, to date, no final policy has emerged. This could be used as the vehicle to encourage greater use of less expensive non-traditional transit and increased reliance on private providers.
- Declare a moratorium on new rail starts, pending a review of fundamental transportation policy goals. UMTA must publicly articulate what factors—energy conservation, urban planning and fiscal responsibility —will take precedence in their long-term policy.
- Reissue regulations dealing with public transportation for the handicapped. At this writing, the Congress is considering, but has not passed, legislation to change the existing Rehabilitation Act section "504" regulations. Regulations based on the performance standards as in the House of Representatives proposal in H.R. 6417 could be use to signal a new direction for UMTA regulation.

Legislative Recommendations

- Reduce the number of categories of federal transportation assistance, with the eventual goal of shifting federal transit aid to a block grant program.
- Reduce reliance on federal operating assistance.
- Develop a program to increase the productivity of the existing street and highway network.

FEDERAL AVIATION ADMINISTRATION

Legislative Authority

The Federal Aviation Administration functions as an operating administration within the Department of Transportation pursuant to the Department of Transportation Act, P.L. 89-670.

Aeronautical services are provided by the Federal Aviation Administration under authority of several statutes, the more important of which are identified below:

- The Federal Aviation Act of 1958 created the Federal Aviation Agency and provides for the regulation and promotion of civil aviation so as to foster its development and safety and to assure the safe and efficient use of the air space by both civil and military aircraft.
- Public Law 76-674 authorized the operation of the Washington National Airport; and Public Law 81-762 authorized the construction and operation of Dulles International Airport.
- The International Aviation Facilities Act was enacted to encourage the development of an international air transportation system adapted to the needs of the foreign commerce of the United States, of the postal service, and of the national defense, and for other purposes.
- Public Law 91-258, the Airport and Airway Development Act of 1970, (as amended) authorizes expansion and improvements of the Nation's airport and airway system, for the imposition of airport and airway user charges, and for other purposes.

The declaration of policy for the Administrator, which is Section 102 of the Federal Aviation Act, summarizes effectively the objectives we wish to attain:

> Section 102. In the exercise and performance of his powers and duties under this Act, the Administrator shall consider the following, among other things, as being in the public interest:
> (a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;
> (b) The promotion, encouragement, and development of civil aeronautics;
> (c) The control of the use of the navigable air space of the United States and the regulation of both civil and military operations in such air space in the interest of the safety and efficiency of both;
> (d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;
> (e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft.

Basic Programs

To achieve the objectives set forth in the basic statutes summarized above, FAA conducts the following basic programs:

- Regulates air commerce to insure safety through the development, promulgation and administration of safety and medical standards, rules and regulations which govern airmen, aircraft, aeronautical operations and related ground support activities; surveillance of aeronautical activities to assure adherence to regulations and determine necessary changes in regulations; and the processing of enforcement actions against those who violate Federal Aviation Regulations.
- Provides for safety and efficiency in the movement of air traffic by providing air navigation services for en route navigation, access to the airway system and guidance in the approach and landing phase of flight; air traffic services to assure separation of flights in the en route and terminal areas; and furnishing pre-flight and in-flight assistance to pilots.
- Assists in the development of public airports by making grants-in-aid to localities for airport planning and construction.
- Operates and maintains Washington National and Dulles International Airports which serve the Washington Metropolitan Area.
- Carries out other activities designed to facilitate and promote the development of safe and efficient air commerce.

DOT-FAA Short-Term Problems and Options

Air Traffic Controller Strike

Barring a major air disaster, a controllers' strike will far overshadow all other short-term problems of a new Administration.

The controllers' current contract expires March 15, 1981. FAA and the Professional Air Traffic Controllers Organization (PATCO) are very far away from agreement on a new contract. In fact, the union's demands are beyond the power of FAA to grant (i.e., shorter work week, higher pay) and are in the domain of Congress.

All signs point toward an illegal strike or "withholding of services" by the controllers. (Such actions by federal employees are illegal.) This would essentially shut down our air transportation system, cost the economy an estimated $150 million per day, and therefore attract considerable media attention.

In order to avoid alienating the Congress (which has the power to meet PATCO's demands), PATCO will vent its wrath on the FAA, especially in the press. PATCO's emphasis to the press will not be wages and hours, but alleged failures on the part of FAA which endanger the traveling public—e.g., outdated and failing air traffic control computers; insensitive FAA management; lack of adequate staffing of fully trained controllers leading to excessive mandatory overtime, exhausted and demoralized controllers, etc. Since the press can easily pick up an "anti-FAA, pro-aviation safety" story, the new Secretary of Transportation and FAA Administrator will be put in real hot seats.

The new Administration should get on top of this problem well before Inauguration Day. Elements of a strategy could include:

- Keep everyone aware of the fact that it was the previous Administration which got us to the brink. Attempt to obtain an extension of the current contract for long enough to work out an acceptable solution.
- Keep everyone aware of the fact that only Congress, not FAA, can grant PATCO's major demands. Work with Congress to get them to give a clear indication that they would punish rather than reward strikers.
- Work closely in advance with the Department of Justice so that a tough stance against an illegal strike could be maintained (i.e., prove that a strike was taking place, prove which individuals were participating, and prosecute them with criminal charges. In the past, DOJ has not used criminal charges; however, they have stated in writing that they may do so in the future.).

This situation will require extreme care because a new Administration can neither afford a $150 million per day blow to the economy nor a weak and wishy-washy stance in the face of an illegal federal employee strike.

Air Traffic Control Computer Problems

Ever since about October 1979, the issue of outdated and frequently failing ATC computers has recieved significant media coverage, Congressional hearings, etc. A great deal of this attention has been generated by the Professional Air Traffic Controllers Organization (PATCO) and related unions in order to have some strike issues other than "higher pay, shorter hours." FAA has produced counterarguments showing

that the computers are getting better, not worse. However, their reporting systems have been called into question.

Although there have been several investigations into the issue, none were done by unbiased, technically competent groups.

The new DOT Secretary should immediately launch such a study. It should be modeled closely after Secretary Goldschmidt's Blue Ribbon Panel which investigated FAA aircraft certification procedures after the Chicago DC-10 crash. This study was headed by a former top NASA engineer and performed by the National Academy of Sciences. All Panel members were technically competent, well respected, and unbiased.

Such a study would give a new Administration a true picture of the seriousness of the current problem so that remedial measures could be undertaken. The study could also be used to blunt anti-FAA propaganda by PATCO and other unions. Unfortunately, the study probably could not be completed prior to the controllers' strike (about March 15, 1981) unless a temporary extension of the current contract could be negotiated, as suggested in the previous section.

FY 82 Budget Requests and the Airport and Airways Improvement Act of 1980

Most of the important and controversial items in the FAA's budget are authorized by the Airport and Airways Improvement Act (commonly known as "ADAP"— Airport Development Aid Program). This program expired on September 30, 1980, when Congress failed to pass a new ADAP bill. Since this cuts off airport operators from federal grants (which have already been paid for by taxes on air travelers), the legislation will probably come up very early in the 97th Congress.

In the second session of the 96th Congress, the budget and taxation figures in the Administration's proposed ADAP bill (H.R. 3745) were largely ignored in both the House bill (H.R. 6721) and the Senate bill (S. 1648).

Therefore it would be desirable for a new Administration to get back in the ballgame early in 1981 when the Congress again tries to come up with an ADAP bill.

Since ADAP normally covers a 5-year period, the budget request/ADAP issue will be discussed more fully in the Medium-Term Problems and Options Section.

Improve Congressional Relations

It was noted in the previous item that the Administration's

position was largely ignored in both the Senate's and House's ADAP bills (the most important avaition legislation of 1980). This points to the obvious need to improve FAA's Congressional Relations Office. At present, there is only one policy level FAA appointee in that office (who actually lobbies on the Hill). There are two others in the DOT Secretary's Office who are assigned to FAA, but their presence has been minimal (at least on the House side).

In the short term, the new Administration should beef up the FAA's own lobbying capability. Since it may take time to get full-time lobbyists on board, emphasis should be placed on having top and medium level FAA managers establish contacts with key Congressional offices in a coordinated manner.

Preparation for the Inevitable Crash.

Sooner or later in the new Administration, a major air disaster will occur. It may come sooner. The new Administrator and his top advisors should plan and prepare for this inevitable occurrence in advance so that their actions will be swift, well-organized, and decisive. Much of the criticism of Langhorne Bond's Administration stems from his handling of the DC-10 crash and subsequent grounding. His response appeared confused, and, in fact, the plane was grounded and ungrounded several times in the first few days.

Patch-Up Relations With NTSB.

For the last year or two there has been a significant amount of open fighting between FAA and the National Transportation Safety Board. This tends to attract a lot of press, which leads the public to believe that flying isn't safe and that the Administration is incompetent. The new Administration should make an early attempt to establish a more normal FAA/NTSB relationship.

DOT-FAA Medium-Term Problems and Options

Growth vs. No-Growth in Aviation

Ever since the time of the Wright Brothers, this country has followed a policy of growth to meet growing demand in aviation. However, in April 1980, DOT Secretary Goldschmidt stated before Congress:

> As to the question of capacity, the FAA has historically expanded the system to keep pace with air traffic demand. In the future, rather than build to accommodate demand, we would, if required, exercise

our authority to control demand resource constraints, and we make the same kind of decision regularly regarding other transportation modes.

At the time of Goldschmidt's statement, there was a $3.5 billion uncommitted surplus in the Airport and Airway Trust Fund. That money was paid into the Trust Fund by aviation system user taxes for the purpose of improving safety and expanding system capacity.

Past Administrations, both Democratic and Republican, have underspent on aviation system capacity improvements and allowed the Airport and Airway Trust Fund surplus to grow. This was done for two reasons: first, under the unified budget concept, a surplus in the Trust Fund money spent is counted as an expenditure in the unified budget, which is held down by a tight ceiling. So because of the way the government keeps books, the huge surplus in the Trust Fund has not been spent for its intended purpose, and aviation system capacity has failed to keep up with demand. And air travelers, who paid user taxes into the Trust Fund, have been cheated.

Options available to a new Administration are either requesting higher levels of funding from the Trust Fund, and/or removing the Trust Fund from the unified budget for bookkeeping purposes. Unfortunately, the ADAP program and Trust Fund expired on October 1, 1980, and when new ADAP legislation is enacted, it may be built around an assumption that no Administration can be "trusted" with the Trust Fund: The tax levels which feed the Trust Fund may be greatly reduced, thus the source of capacity improvements would dwindle.

However, if a new Administration did make a commitment to expanding aviation system capacity, that might have a positive effect on the outcome of the ADAP legislation, including funding levels for the next five fiscal years.

A useful exercise has been started by the current FAA Administrator. For the first time, FAA is trying to figure out what budget request should be based on actual need rather than simply increasing the previous year's budget by a small amount. This is especially important now since there have been so many deferrals of capital investments over the past years. A number of systems are already quite outdated with replacements years away (e.g., ATC computers, primary radar).

Improvement of Aircraft Certification Capability.

The Chicago DC-10 crash and grounding shook public confidence in FAA's ability to certificate new aircraft and

monitor their continued airworthiness after airline maintenance. DOT Secretary Goldschmidt launched a Blue Ribbon Panel to investigate the situation. The Panel found that the system is basically very safe now, but that certain improvements must be made if we are to avoid similar air disasters in the future.

Several of the panel's recommendations are summarized here:

- Reverse the trend of FAA's engineers falling behind in technical competence.
- Establish a centralized FAA engineering facility.
- Establish two independent technical advisory boards: one to advise the Secretary and one to advise the Administrator.
- Choose future Administrators from *technically qualified* candidates selected by the Secretary's advisory board. (The Panel felt that the FAA's job is too technical to have a political hack for an Administrator.)

We endorse the Panel's recommendations and encourage their early implementation. In addition we would add:

- Make maximum use of NASA's aeronautical engineering talents to help beef up FAA's. This could be done through employee exchanges and co-location/sharing of engineering facilities.
- Be wary of a backlash after the DC-10 crash. The problem which led to the DC-10 was too little FAA involvement. We now risk the pendulum swinging too far. In order to "cover their behinds" in the event of future problems, FAA employees may greatly increase the number of rules, regulations, inspections, surveillance, and bureaucratic delay. This would cost the industry a great deal in time, money, productivity, and competitiveness with foreign firms.

Streamline the Regulatory Process.

This is a goal of every new Administration. Unfortunately, progress is always slow or non-existent. A major problem is the fact that the rule-making specialists within the FAA are fairly isolated from the policies of the President-elect and the Administrator. They really haven't gotten the message that too many federal rules and regulations are strangling American businesses, including most segments of aviation.

Most past crashes were caused by violations of existing rules; however, most FAA responses to crashes consist of making more rules.

Two vs. Three Pilot Crews

Currently, half of the world's airlines fly 30 percent of the world's airliners with two pilots. The safety record of the aircraft with two pilots has been equal to or better than the record of three pilot aircraft. However, the pilots' union, the Air Line Pilots Association (ALPA), is currently staging a concerted effort to make FAA mandate three pilot crews in all new jet airliners. They claim it will increase safety, although they can't prove it. They rely heavily on the intuitive feeling that if two pilots are good, three are better. However, new aircraft have even more automation, and there is a serious problem of too many pilots with too little to do. Their attention wanders, and they get into trouble.

ALPA has made life very difficult for FAA over the past few years on this issue. More will come when Boeing tries to certificate their new 757 and 767 models with both two and three pilot cockpit options. ALPA will try to block the two pilot certification. This would give Boeing an insurmountable handicap in sales to foreign airlines, who would buy the competing two pilot aircraft of foreign manufactures.

The new administration needs to be better prepared than the past one to meet ALPA charges head on. This should start early in 1981 since the Boeing two pilot certification will probably begin in 1982.

The best way to handle this may be to get off the defense. Tell the public and the Congress that this is really featherbedding. It doesn't improve safety, but it does cause rising prices, inflation, and makes U.S. aircraft manufacturers less able to compete for sales abroad.

FAA's Image Needs Improvement

FAA's public image has been declining recently, partly due to air disasters. Much of this is due to lagging competence and enthusiasm in a middle-aged regulatory agency. It needs revitalization, which many of the recommendations in this report are intended to stimulate.

It should be remembered, however, that many labor unions, both inside and outside of the FAA, have a vested interest in knocking FAA's image. They tell the media and the Congress that FAA is harming aviation safety by not granting union demands for more people, shorter hours, longer rest periods, etc. It is difficult for FAA to convince the public that the issue is not safety, but union demands. However, it is essential for

FAA to fight these battles successfully against decreased productivity and higher costs.

Internationally, FAA's image is also declining as the world's aviation authority. More attention needs to be paid to this important area. Attendance at ICAO and other meetings overseas needs to be improved. The past Administrator snubbed his foreign counterparts in several instances, and these mistakes should not be repeated.

Improvement of the FAA-DOT Relationship

The problems with this relationship have been apparent to critics since the FAA lost its independent status in 1967, when DOT was formed. Normally, the effect of adding another layer of bureaucracy on top of an agency will be to bog it down, and this has been the case with FAA.

There are two possible solutions: first, take FAA out of DOT; second, improve the relationship. The latter could be done by cutting the number of officials and bureaus in the Office of the Secretary who have jurisdiction over any given FAA decision. The current policy seems to do the opposite.

A new administration should also examine the relationship between FAA and DOT's Transportation Research Center (TSC) in Cambridge, Massachusetts (under DOT's Research and Special Projects Administration). Each year FAA R&D gives TSC about $6 million for research services. There is no reason to believe FAA could get more for its money elsewhere, but DOT won't let it.

Further Civil Service Reform Legislation

The Civil Service Reform Act of 1978 didn't go far enough. There is still a great deal of deadwood in FAA, especially below the Senior Executive Service level. (The 1978 Act made few real changes below the top levels.) It is currently very difficult for FAA to attract, hire, reward, and keep good people. This is especially true in parts of the country where the cost of living is higher (a cost of living adjustment is needed). It is even more difficult to fire deadwood. While it can be done, the process is so time-consuming that little else gets done by the manager trying to do the firing.

It would be desirable to allow FAA more flexibility with Civil Service regulations for employees whose positions are directly related to safety. This could be done through legislation or possibly by executive order.

Legislative Changes to Procurement Regulations

It currently takes nine to twelve months for FAA to let a contract for services such as R&D. The one exception is a minority contractor (under Section 8a), which takes only one month. In order to respond quickly to problems (which are often uncovered by crashes), FAA is forced to turn more and more to minority contractors.

While it is desirable to help minority businesses to get a foothold, it may not be desirable to put such a high percentage of FAA's most critical safety problems in the hands of inexperienced firms. This is also unfair to the highly qualified non-minority firms.

It would be desirable to allow FAA an expedited procurement cycle when responding to time-critical safety problems. This would be done through legislation or possibly by executive order.

Improved Congressional Relations

This subject was mentioned with the short term problems. It is also mentioned here because the problem will be a continuing one.

In the past year, FAA testified at thirty-eight Congressional hearings. At least eight House subcommittees and two Senate subcommittees were involved. There is no reason to think the trend will change with a Republican Administrator.

The FAA Administrator has little time to work on aviation safety because he spends so much time on the Hill testifying at hearings on aviation safety.

Some ways for FAA to improve the situation: do a better job so there are fewer things to hold hearings on; and improve FAA's Congressional Relations Office to establish better relationships with key Congressmen.

In addition, the new Administration as a whole may want to consider pressuring Congress into decreasing the number of subcommittees which have jurisdiction over each agency and/or limiting the number of days per month that any Administration official can testify on the Hill.

Additional Areas of Concern

The following areas are listed which will require the special attention of the new Administrator due to poor FAA performance in the past:

- development of a Collision Avoidance System;
- Air Traffic Control computer replacement;
- commuter airline safety;

• post-crash safety (fire prevention and passenger seat strength); and

• Microwave Landing System implementation

DOT-FAA Budget

Problems with the current FAA budget with respect to the Airport and Airway Trust Fund were described in the sections on Short and Medium Term Problems and Options. Budget breakdowns for FY 81 and 82 are shown in Figures l and 2.

Recommended budget levels for FY 81 and 82 are those shown in the column for H.R. 6721 (the House version of the ADAP bill) except when the GOP's preferred figure is shown in parentheses.

Since the recommended figures are above those already appropriated by law for FY 81, it may be awkward for a new Administration to ask for a Supplemental Request for that year.

The same type of problem exists to a lesser degree for FY 82. However the fact that the Airport and Airways Improvements Act did not pass in 1980 gives the Administration more leeway than usual for FY 82 funding.

FIGURE 1—FY 81 BUDGET BREAKDOWN

($ in millions)

	FY 81 Admin. Request (HR 3745)	Y 81 House ADAP Bill (HR 6721)	FY 81 Senate ADAP Bill (S. 1648)	FY 81 Approp. (Public Law)
Airport Development & Planning Grants	700	875[1]	825	—[2]
Facilities & Equipment	350	525	400	350
Research, Engineering & Development	85[3]	122	90	85
Operations & Maintenance (Trust Fund)	1,300	850	350	525
Noise Abatement	—[4]	150[1]	—[4]	—[4]

Notes:

(1) Section 511 of H.R. 7765 (The Budget Reconciliation Act) requires that combined total of ADAP Grants plus Noise Abatement funding not exceed $725 million. This would require a cut of $300 million from the figures shown. The Republican preference is to cut $175 million from ADAP Grants (down to $700 million) and $125 million from Noise Abatement (down to $25 million).

(2) No funds could be appropriated without an ADAP bill signed into law.

(3) H.R. 3745 contains the figure $90 million but the Administration subsequently cut $5 million from the budget submitted to Congress.

(4) Only H.R. 6721 splits out Noise Abatement as a separate item. All other bills include Noise Abatement funding within ADAP grants.

FIGURE 2—FY 82 BUDGET BREAKDOWN

($ in millions)

	FY 82 Admin. Request (H.R. 3745)	FY 82 House ADAP Bill (H.R. 6721)	FY 82 Senate ADAP Bill (S. 1648)
Airport Development & Planning Grants	750	936	600
Facilities & Equipment	385	562	450
Research, Engineering & Development	95	—[1]	95
Operations & Maintenance (Trust Fund)	1,450	910	375
Noise Abatement	—[2]	165	—[2]

Notes:

(1) The House position is that annual authorizations are required for R&D because of its changable nature. Therefore, no R&D funds were authorized past FY 81. However, a reasonable estimate for FY 82 is about $15 million above FY 81 ($122 million), which would be $137 million.

(2) Only H.R. 6721 splits Noise Abatement as a separate item. All other bills include Noise Abatement funding within ADAP grants.

BUDGET SUMMARY

Introduction

The immediate focus of any 1981 budget decision should be the upcoming Supplemental for FY 1981. It can be expected that the Carter Administration will control submissions for that Supplemental through the end of year; for example, there may be substantial requests for AMTRAK, the Auto Use Management Program and perhaps Conrail. This section will discuss some options for managing the Department's discretionary funds and new directions for the FY 1982 budget.

Of immediate concern to the DOT is that under current law, there are several areas in the Transportation sector where broad discretionary authority exists. UMTA is a good example. Under the Urban Discretionary Grants account alone, the current Administration has existing budget authority for FY 1981 of $2.19 billion where substantial discretion can be used in making outlays between now and the end of the year. UMTA also has broad discretion under the Interstate Transfer Grants program which encompasses $800 million in budget authority for FY 1981.

Within the Federal Railway Administration there is tremendous agency discretion in administering the Section 505 and

Section 511 rail rehabilitation programs which in FY 1981 account for nearly $1 billion. $770 million of this is admittedly off-budget loan guarantee money, which is controlled by certain funding criteria, but existing administrative action in outlaying that money between now and January 1, 1981 is still a major fact of life.

NHTSA has broad discretion in the utilization of a major portion of its budget, which for FY 1981 includes budget authority of nearly $130 million. Discretionary authority for the FAA is severely limited by failure to enact an ADAP authorization.

The key point in all of this is that any immediate major administrative effort to change either transportation policy or spending practices must focus on the utilization of existing discretionary authority; just as that authority will allow the current Administration to pursue its policies, so will it allow the new administration to pursue its policies. Any significant change in the existing framework for discretionary authority will require major legislative action which cannot probably be completed before June of 1981. By that time, the new administration will already be firmly in control and major shifts within the departmental agency structure may well be under way.

Specific Budgetary Recommendations

Office of the Secretary

Obviously, the Salaries and Expense account of the OST should be tightened up as much as possible. Also, it must be borne in mind that any recommended budget actions have to be considered within the context of the existing Public Law for FY 1981 which has resulted in the enactment of specific policy directions. Any immediate structural changes in the organization of the Department will probably require major programming.

Under the OST account, a major effort should be made to keep the funding level for the Limitation on Working Capital Fund account at its lowest possible level. Any effort to do this would be in line with the Appropriations Investigative Subcommittee criticisms of planning for the enroute computer system which in the Senate bill recommended an initial reduction of $2.6 million from this fund.

Coast Guard

During consideration of the FY 1981 bill, the position of the

Senate was to cut Operating Expenses as well as the Acquisition, Construction, and Improvements account to the Budget Estimate Levels as submitted by the Administration for that fiscal year. A major consideration in funding Coast Guard accounts in the future should be the fact that the Coast Guard is now responsible for a significantly expanded responsibility in terms of monitoring the 200-mile limit as well as potential responsibility for Superfund legislation dealing with oil pollution and hazardous material responsbility. Coast Guard activities, programmatically, include search and rescue, aids to navigation, marine safety, marine environmental protection, enforcement of laws and treaties, marine science and polar operations, as well as military readiness. Prior to adoption of any new Superfund legislation, the task force would recommend a minimum of funding for offshore oil pollution compensation. Funding for this account should not make any assumptions about the need for pollution compensation, but should be conditioned upon proven liability or needs relative thereto.

Federal Aviation Administration

The major focus of any budget decisions in the future concerning the FAA will necessarily have to be on the Trust Fund. This presents a particularly difficult problem in view of the struggles that can be expected within the authorizing committee in dealing with the ADAP concept. The current authorization has expired and there is reason to believe that the 97th Congress will address the need for further authorization early on.

The fundamental problem with the Trust Fund in the past has been that the original mandate in establishing the Trust Fund to use it for airport development and increased system capacity has not been fulfilled. The new administration will have to do much more than make a commitment to expand aviation system capacity in order to get further support from the aviation community. Unfortunately, many of the states are lacking the kind of operating funds necessary to pursue a satisfactory aviation effort on a local level and, therefore, the Trust Fund has been diverted, largely for operating needs. The need for operating funds cannot be denied and the rationale behind usage of the Trust Funds seems to have been that there was such a surplus that diversion of Trust Fund money into operations was warranted under the circumstances.

No matter what happens with respect to the Trust Fund, it seems clear to the Task Force that for the present, we should

use taxes at a minimum, pursue a relatively short authorization for utilization of the Trust Fund (a one year authorization might be advisable), and use the Trust Fund for development so that the aviation community can be made aware of the good intentions of the new administration in increasing system capacity. Meanwhile, the Task Force would recommend serious consideration of removing the FAA from the DOT and consequently pulling the FAA away from the unified budget concept.

In the short-term, the recent action of the Senate Appropriations Investigative Committee cannot be disregarded as it relates to the likelihood of an upcoming PATCO strike. It would seem clear that the recent criticisms of planning for the new enroute computer system by the FAA would add fuel to any PATCO criticism that might be leveled at the FAA. It seems clear that any emphasis on punishing the strikers (who would be acting illegally) should come from the Administration and most likely from the Department of Justice. An effort should be made in FY 1982 to maintain operations at a funding level that does not greatly exceed FY 1981. It will probably be necessary to increase the Facilities and Equipment account during FY 1982. A funding level of $400 million has been proposed with that in mind. The funding level of the Research, Engineering and Development account is very closely tied to the enroute Computer Replacement Program and an attempt in FY 1982 should be made to maintain this at a funding level close to that for FY 1981. In concert with the original intent of the Airport and Airway Trust Fund, the recommended budget for FY 1982 contemplates an increase in funding to a total level of $800 million for development grants. The Operations and Maintenance Account for the Metropolitan Washington Airport should be maintained at a level similar to that for FY 1981. An attempt should be made to lower the Aircraft Purchase Loan Guarantee Program funding or at least to prevent increasing it substantially in the FY 1982.

Federal Highway Administration

The Limitation on General Operating Expenses Account should be maintained at the FY 1981 level and there should be a sincere effort to fund the Off-System Roads Programs in FY 1982. Motor Carrier Safety will require level funding for FY 1982. The Task Force would recommend level funding in FY 1982 for the Highway Research Development accounts and zero funding for the Highway Beautification account. The

Task Force would recommend a level not to exceed $20 million for liquidation of contract authorization under th Highway-Related Safety Grants account. This would be in line with a similar Task Force recommendation that forward funding by creating contract authority in the Transportation sector be avoided as much as possible in future budget activities. An attempt should be made to reduce the appropriation for Territorial Highways in FY 1982. With this in mind the Task Force has recommended a funding level of $5 million. A funding level of $75 million is recommended for the Safer Off-System Roads account in FY 1982. This account has been authorized at a $200 million level for several years and the current Administration has never adequately funded this effort. The Task Force would recommend no funding for Access Highways to Public Recreation Areas on certain lakes in FY 1982. Although the obligation limit for the National Scenic and Recreational Highway account is at a level of $37.5 million in FY 1981. The Task Force would recommend a funding level not to exceed $20 million for this account in FY 1982. It will more than likely be necessary to fund the Federal Aid Highways Account at a level of approximately $8.5 billion in FY 1982. There will be major difficulties in maintaining the Trust Fund at a level that can support these kind of outlays and consideration should be given to increasing the revenues within that fund in some fashion. Such an effort will require considerable cooperation with the Congress who will have to be responsible for any major changes in the authorization for the Trust Fund. Emergency relief in FY 1982 should be kept to a minimum level. No funding is recommended by the Task Force at the present time for the Auto Use Management program in either FY 1981 or FY 1982.

National Highway Traffic Safety Administration

The Operations and Research budget recommendation under NHTSA has been cut to a maximum recommended level of $10 million for FY 1982. The State and Community Highway Safety Account is proposed to be funded at a $25 million level in FY 1982.

Federal Railroad Administration

In FY 1982, the Administrator's budget should be maintained at a level not to exceed $8 million. There may well be major authorization changes during the 97th Congress which will

significantly alter funding levels in FY 1982 for the Rail Service Assistance account as well as for the Railroad Rehabilitation and Improvement Financing Fund account. The combined funding level in FY 1982 for these two accounts should not exceed $1 billion. Funding for the Northeast Corridor Improvement program in FY 1982 should not exceed $400 million. The task force would recommend a submission in FY 1982 for Amtrak of $900 million. Funding in FY 1982 for the Alaska Railroad should not exceed $9 million. An attempt in FY 1982 should be made to keep the Rail Labor Assistance account a minimum level. With that in mind the task force has not provided for any funding for that account in FY 1982.

Urban Mass Transportation Administration

Administrative expenses for UMTA in FY 1982 should be reduced to a level not to exceed $15 million. The Research, Development, and Demonstrations program within UMTA should be reduced to a funding level of approximately $35 million in FY 1982. The total funding level for Urban Discretionary Grants in FY 1982 should not exceed $1.5 billion. Any funding for this account or indeed for UMTA in general has to be based upon consideration of the overall Administration plans for UMTA. The whole federal mass transit effort has gotten very expensive and it deserves a major reassessment of what the federal role should be in this area. The Non-urban Formula Grants account should be funded at a level not to exceed $70 million in FY 1982. In FY 1982, the Urban Formula Grants program should be cut to a level not to exceed $700 million. No funding is recommended for the Waterbone Transportation Demonstration project in FY 1982. An attempt should be made to maintain the Interstate Transfer Grants program at a level not to exceed $700 million in FY 1982.

Research and Special Programs Administration

The total funding level in FY 1982 for RSPA is $30 million. The Task Force recommendation does not contemplate any funding for the Cooperative Automotive Research program during that fiscal year.

Office of the Inspector General

The recommendation in FY 1982 for the Office of the Inspector General is a funding level of $15 million.

DEPARTMENT OF TRANSPORATION BUDGET
(millions)

	Budget Authority FY 80	Budget Authority FY 81	Recommended FY 82
Office of the Secretary	45.5	46.5	46.5
Coast Guard	1726.4	1860.2	1859.0
Federal Aviation Administration	2606.1	2734.5	2766.0
Federal Highway Administration	400.9	44.1	103.0
Federal Railroad Administration	1556.9	1626.3	1317.0
National Highway Traffic Safety Admin.	106.0	124.5	35.0
Urban Mass Transporation Admin.	2501.3	4615.2	3020.0
Research and Special Programs Admin.	26.0	43.4	30.0
Office of Inspector General	1.3	13.7	15.0
Total	8970.4	11108.3	9191.5

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THE DEPARTMENT OF THE TREASURY

Norman B. Ture*

INTRODUCTION

The Department of the Treasury has many diverse functions loosely related to financing the federal government. Treasury's many subdivisions can be broken down into three main groups:

- Policymaking offices, such as the Offices of the Assistant Secretaries for Tax Policy and Economic Policy.
- Offices with both operating and policymaking roles, such as: the Internal Revenue Service, the Office of the Assistant Secretary for Domestic Finance, and the Office of the Undersecretary for Monetary Affairs.
- Operating subdivisions with little in the way of policymaking, such as: the Bureau of the Mint; the Bureau of Engraving and Printing; the Office of Computer Science; the U.S. Customs Service; the Bureau of Alcohol, Tobacco, and Firearms; and the U.S. Secret Service.

Our suggestions involving the policymaking subdivisions involve a substantial redirection of their efforts toward different goals and modernization of their theories about the ways in which government affects the economy. This is particularly true in the area of tax policy and economic policy, which must be expanded and coordinated if Treasury and the administration are to play a prominent role in tax policy in the future.

The "mixed" subdivisions also require redirection to focus more intensively on the policy aspects and economic conse-

**Author's Note:* The preparation of this report was a collective enterprise involving many individuals. Special mention should be given to Bruce Bartlett, Steve Entin, Bob Ferguson, Ed Gannon, Louis Gasper, William Lehrfeld, Eugene McAllister, David Meiselman, John E. Nolan, Robert Patrick, George Pritts, P. Craig Roberts, Wilson Schmidt, Howard Segermark, Stuart Sweet and Burket Van Kirk. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

quences of their operations. This will involve organizational changes to bring the IRS into closer contact with the Offices of Tax and Economic Policy. It will involve a rethinking of the need for many of the activities of the Office of Domestic Finance and the Office of International Affairs.

Our suggestion with respect to the operating subdivisions involve improved efficiency brought about either by changed procedures (Bureau of the Public Debt) or by reorganization (merger of the U.S. Customs Service and the Bureau of Alcohol, Tobacco, and Firearms.)

In general, Treasury at once does too much and too little, with no coherent philosophy or sense of purpose enabling it to concentrate its energies on the efficient fulfillment of its proper role.

TAX POLICY

The whole area of tax policy and tax theory is undergoing a sea change, and rightly so. Major errors in tax theory and practice, however well intended, have resulted in a tax code which has hobbled the economy in ways economists are only just beginning to understand. It now seems apparent that the tax code has caused large quantities of labor and capital to become misdirected or withdrawn from the market. The result has been a growing shortfall of skill and capital which is costing the economy as much as $500 billion *annually* in lost output.

This half trillion dollar shortfall of output has not been obvious. It has resulted from retardation of the growth of capacity—from smaller gains in the stock of business capital and in the supply of labor services than would have occurred in a more congenial institutional environment. These output losses far exceed the temporary but more obvious losses caused by failure to employ fully existing capacity during recessions.

To reduce the barriers to long-term expansion of total production potential, a thorough revision of the tax code should be the top priority of tax policy. Instead of focusing on business cycles and how to get GNP up to its existing potential, tax policy should be aimed at allowing potential itself to grow to the levels it could attain in the absence of tax and other policy impediments. Instead of analyzing tax changes in terms of abstract concepts of "horizontal and vertical equity," we should be looking at the economic consequences of the tax system. There is no equity in perpetually depriving the econ-

omy of several million jobs and several hundred billion dollars in output a year.

Changing Policy Targets

Tax policy needs to be redirected from the objectives on which it has been principally focused over the last several decades to the concerns of the 1980s. We need a tax policy which aims at reducing the inhibitions to those activities which promote economic growth and progress.

Over the past 40 years, tax policy has been aimed at two targets: the management of aggregate demand and the leveling of disparities in the distribution of income and wealth.

Now emerging and rapidly gaining prominence, as a result of the application of classical or "supply-side" economics to economic policy, is an alternative target for tax policy: encouraging aggregate supply by reducing the excessive tax rates which now fall most heavily on leisure and consumption. Tax policy should make the tax system more nearly neutral by reducing the tax biases and disincentives which have increased the relative benefits of leisure and consumption and raised the relative costs of work effort, saving and investing. These are the costs and benefits which affect individuals and businesses as they decide each day how much labor and capital to supply to the market.

The aggregate demand or Keynesian view focuses on how fiscal action affect spending by individuals and businesses. A tax reduction is assumed to increase spending by giving people more disposable income. As spending increases, producers seek to increase output in order to meet orders; in doing so, they use more labor and capital. It is assumed that ample amounts of capital and labor are available to meet the increased demand for these production inputs at prevailing rates of remuneration. Demand for goods calls forth supply.

The supply-side or classical view focuses on the incentives that motivate people to work, save, invest, and produce real output. Gross pretax wages, rents, interest and dividends are not the relevant rewards to effort. It is the net rewards after tax that matter. Tax reductions that increase the after-tax rate of return to labor and capital are assumed to increase the supply of labor and capital—the amounts supplied at the original gross pretax wages, etc.—and the amounts businesses want to use. With additional production inputs in use, there is additional output and an equal amount of additional real income.

Output, the real goods and services people want to buy, equals real income, the real value of the payments made to the labor and capital that produced the output. Additional real income, resulting from increases in real output, is the essential precondition for an increase in real demand.

Supply-side economics rejects the whole demand-side approach. No real increase in income can occur unless there is a change in real output. No change in real output can occur unless there is a change in the supply of labor and/or capital. Tax cuts alone cannot increase real disposable income and spending. Any such increase will occur only if the tax cuts first affect the incentives to supply labor and capital, resulting in an increase in use of these production inputs, more real output, and hence more real income.

There is another major difference between the two views. The demand-side view is that changes in tax policy are primarily useful in fighting the business cycle, the shortrun deviations of output and employment from the current capacity of the economy. The supply-side view looks at the way the tax structure has affected capacity itself, and how changes in tax structure might affect the long-term capacity by influencing the long-term supply of labor and capital.

The Keynesian aggregate demand approach and the "equity" target go hand in hand. Keynesian demand theory holds that most types of tax cuts affect the economy in roughly the same way, so that it does not matter much which type of tax change is adopted.

If this were the case, then tax reductions might as well be structured according to considerations of "fairness." This attitude has produced countless efforts to use the tax system to redistribute income from rich to poor, capital to labor, young to old, industry to industry, and region to region. Almost all these efforts have either failed, or achieved a portion of their aims at the cost of enormously expensive economic side effects. In the name of "equity," the earnings of capital have been subjected to repeated taxation at Federal, State, and local levels, both in the firm and on personal tax returns, and both labor and capital have had to face high tax rates that have discouraged their full participation in the economy.

Classical theory holds that tax changes differ markedly in their impact depending on how they affect incentives to engage in some activity, such as saving and work effort, as opposed to others, such as consumption and leisure. Tax deductions, therefore, ought to be structured to reduce the

distortions, biases, and disincentives in the current tax code against work effort, saving, and growth. Reducing these biases would restore "neutrality" to the tax code.

If taxes are applied at high rates, a significant amount of output is lost. If taxes are applied unevenly across various industries, regions, or types of labor and capital, the pattern of output will be altered. Labor and capital will flee the high tax activities and either be lost or reappear in another, ususally less productive use. Either way, efficiency and output fall.

But neutrality is not simply the closing of loopholes and a patching up of the existing income tax, as is frequently advocated by those aiming at "equity." In many cases, the so-called "tax expenditures" are attempts to reduce the multiple taxation of savings income and are steps toward neutrality. Neutrality means equal taxation of all activities, not equal taxation of all current measured income. In particular, neutrality includes the even-handed treatment of leisure versus effort and current consumption versus saving—the purchase of future income. No income tax, not even a broadly based low tax rate income tax, is neutral with respect to these choices.

Leisure is not taxed, while income earned through the efforts of labor and capital is taxed. Furthermore, income taxes fall far more heavily on income that is saved than on income that is consumed.*

Income is taxed when earned. If it is spent on consumption, it is not taxed again, except perhaps for a small sales tax.

*Norman B. Ture and B. Kenneth Sanden state:
"The tax system greatly increases the cost of saving and capital formation relative to the cost of consumption. Consider an economy in whch there are no taxes. Suppose the cost of a given amount of consumption goods is, say, $1,000, that is it takes $1,000 of current income to buy these goods. Suppose the same amount of income might also be used to buy a bond paying 5 percent or 50 percent per year for 10 years (plus the repayment of the $1,000 principal at the end of the 10th year), reflecting a 5 percent market rate of interest. On these assumptions, the real cost of $1,000 of current consumption is the $50 a year for 10 years which is foregone. Similarly, the real cost of having the $50 a year for 10 years is the amount of the foregone $1,000 of current consumption.

"Now suppose an income tax is imposed at a flat rate of, say, 50 percent. As in the case of the actual income tax in the U.S., no deduction is allowed either for the amount saved or for the future income acquired by the saving. After the tax is imposed, it requires $2,000 of pretax income to buy the same bundle of consumption goods; the tax doubles the cost of consumption. But to have $50, a year of after-tax income, one has to have $100 of pretax income. If the market rate purchase of a $2,000 bond. But to buy a $2,000 bond, one has to have $4,000 of pretax income. The tax quadruples the cost of saving." (See research study and report prepared for the Financial Executives Research Foundation entitled *The Effects of Tax Policy on Capital Formation*, by Norman B. Ture, president, Norman B. Ture, Inc., and B. Kenneth Sanden, partner, Price Waterhouse & Co. (1977), pp. 60-61.)

However, if it is saved, the earnings on the savings are taxed again at rates ranging from 14 to 70 percent, plus capital gains taxes, if any, plus State and local income and property taxes, if applicable. These rates are in addition to whatever corporate taxes were paid on the earnings before they reached the saver.

A tax which was as neutral as possible across all activities, including the choice between consumption and saving, would have to eliminate the multiple taxes on saving. In particular, either the amount of income saved each year would have to be tax deductible, or the interest, dividends, capital gains, and other returns on the saving would have to be tax exempt. The tax would fall either on income saved, or on its earnings, but not on both.*

The supply-side approach seeks to identify the distortions in relative prices and costs resulting from the tax structure and to reduce these distortions by appropriate tax changes. The principal targets, as indicated, are the biases in the present tax system against saving and capital formation and in favor of consumption and against productive effort in the marketplace and in favor of "leisure," tax-sheltered, and "underground" activities.

A tax structure which would minimize the bias against saving and capital formation would differ drastically from the present system. For this very reason, the achievement of that tax structure is not deemed to be a practicable, short-run objective of tax policy. That tax system nevertheless affords a useful guide for a realistic tax policy: proposed tax changes should be evaluated in terms of whether they will take us closer to or farther away from neutral tax treatment of consumption and saving uses of income.

*Ture and Sanden, *op. cit.*, p. 61:

"A neutral tax—one that increases the cost of saving in the same proportion as the cost of consumption, hence does not change their relative costs—must either allow a deduction for the amount currently saved from current income or it must exclude from the tax base the future income on the amount saved. In the example above, if the savings were deductible, $50 of after-tax income per year for 10 years would still require $100 pretax income each year which would require $2,000 of current saving. But if the saving were deductible, then only $2,000 of pretax income would be needed, the same amount as would be required to buy the unchanged bundle of consumption goods. Allowing the deduction of current saving from the tax base, thus, increases the cost of saving in just the same proportion as the cost of consumption.

"The same result is obtained if the current savings is included in the tax base but the returns on it (including the repayment of the principal at the maturity of the bond) are excluded from the tax base. Under this approach, to obtain $50 a year after tax requires only $50 before tax, but to buy the $1,000 bond providing that income requires $2,000 of pretax current income, just the same amount as is needed to buy the given bundle of consumption goods. This tax treatment doubles the cost of future income and of current consumption; it leaves their relative costs unchanged."

A tax system which would be completely neutral with respect to consumption versus saving and capital formation would exclude saving or capital outlays from current income and tax the full returns on the capital. Individual taxpayers' current tax liabilities would be based on their gross incomes less the amount of that gross income currently saved. Very few other exemptions would be allowed.

Corporate earnings would not face a separate tax. Instead, they would be taxed to the shareholders. The corporation would deduct all investment in plant and equipment in the year it incurred the cost for these facilities; accordingly, there would be no depreciation allowances with their complicated rules and accounting problems. Retained earnings would be counted as saving too. Dividends or other capital returns not reinvested or saved by individuals would be taxable to them. Since dividends would be taxed only once, at the shareholder's level, the present double taxation of dividends and tax bias against equity finance found in current law would be eliminated.

There would be no tax on capital gains, as such. Since the amount saved and invested in capital assets would be deductible, all of the gross returns, including the full amount of the proceeds from the sale or other disposition of the capital assets would be included in taxable income. To the extent that these proceeds were reinvested, the resulting deduction for saving would offset the inclusion of the sales proceeds.

The eliminiation of the corporation income tax, of the taxation of capital gains, and of depreciation would greatly simplify the tax structure as well as reducing the bias against saving. A collateral effect would be to reduce or eliminate the tax benefits from many of the present tax shelters. The reduced attractiveness and use of these tax-motivated arrangments would also contribute substantially to simplification of the tax system as well as to more efficient uses of capital facilities.

Moving toward the optimum tax code will require several steps. First, tax policymakers must pay less attention to short-run economic and political cycles. Second, they must recognize that taxes affect the economy through incentives instead of through rivers of money. Third, the tax code must be restructured to end the bias against saving and growth. Fourth, as taxes rise with inflation and real economic growth, the opportunity should be taken to use at least a portion of these revenues to hasten the tax restructuring process. Fifth, the

restructured tax system must stay restructured. It must be made proof against distrotion by future inflation.

Tax revisions aimed at expanding production, jobs, work effort, saving, and investment must take the form of reductions in the *marginal* tax rates on each activity. Such changes would include cuts in marginal personal income tax rates in all brackets, either on all income or on interest, dividends, and capital gains, exclusion of a proportion of capital gains or savings income from tax, with no limits; cuts in corporate tax rates, faster depreciation or larger investment tax credits. Tax changes *not* generally at the margin would include: increases in personal exemptions or standard deductions; limited savings exclusions; tax rebates; cuts in a few lower brackets only.

There are four ways that these tax changes will finance themselves without inflation. First, as suggested in 1976 in the Treasury's publication *Blueprints for Tax Reform*, the initial revenue impact of reductions in tax rates could be offset by broadening the tax base, reducing exemptions and deductions. To a significant extent, this will occur naturally, as reduced tax rates make tax shelters and the underground each economy relatively less attractive than before. Second, economic growth will provide a substantial additional amount of revenue reflows. Third, a more prosperous economy will mean reduced demands on government for spending on income security. Fourth, and of major importance, the restructured and simplified tax code will induce large increases in private sector saving. Even if net tax reduction were part of the restructuring process, the jump in saving would be enough to pay for sharply higher private investment, with enough left over to cover any additional government deficit without inflationary money creation by the Federal Reserve.

The government could help growth by reducing government spending to lower the deficit. This would reduce Federal borrowing and free up savings to finance investment. However, a tax rate increase to reduce the deficit would also reduce saving by reducing the after-tax return to saving and would be counterproductive. Contrary to the old canon, it is not the deficit per se that determines the degree of crowding out or inflation, it is the relationship between the deficit and the supply of saving to finance it without inflationary creation of new money. In fact, a tax change that induced a bigger jump in saving than it cost in revenue would produce "crowding in," lower interest rates, and less inflation.

Practical Tax Changes

Drastic overhaul of the tax system in one legislative step is impractical. However, there are many intermediate steps which could be taken which would move the tax code closer to neutrality.

Across-the-Board Personal Income Tax Rate Reductions

Reduction in marginal income tax rates on personal income would reduce the cost of working in the market system compared to nonmarket uses of a person's time and skills, and would cut the cost of saving and investing compared with consumption uses of one's income. These incentive effects would induce increases in the amounts of labor and capital services employed, hence increases in total output and income compared with the levels otherwise attained. In turn, the increases in income would lead to additional saving and capital formation. While this expansion of production would enlarge tax bases compared to their size in the absence of the tax reductions, the resulting revenue reflow would fass short of replacing the revenues lost by the reductions. Nonetheless, the additional saving undertaken in response to the rate reductions would be sufficient to finance the incremental government deficit as well as substantial gains in capital formation.

These results are in sharp contrast with those from reducing *effective* rather than *marginal* tax rates. Rebates, for example, afford no incentives whatsoever for expanding the supply of labor services or for undertaking additional saving and investing. This form of tax cut primarily is allocated to financing the deficit it generates. Increases in personal exemptions or in the zero-rate brackets, although they have modest effects on marginal tax rates, principally reduce effective rates of tax. Accordingly, they have little effect in increasing incentives for productive effort and saving.

Marginal rate reductions can, of course, be concentrated on particular brackets or income levels, but equal percentage across-the-board rate reductions avoid the ugly discrimination among taxpayers at differing income levels in pursuit of an elusive redistribution of income. Concentrating rate cuts at the low end of the income scale is not justifiable in terms of desired effects on saving and effort; any such pattern of tax reductions aims at income redistribution, not economic growth and efficiency.

Top priority in refocused tax policy should be given to substantial across-the-board marginal rate reductions. The rate

cuts provided in the Kemp-Roth bills afford an excellent model for this basic tax revision.

Personal Savings Incentives

The importance of saving is the major theme of this paper. But saving has not been treated as important in the United States. Over the last 30 years, the U.S. has viewed saving as a drag on the economy, as a luxury item to be tacked onto other income to push it into the highest tax brackets, and as discretionary income of the rich which should be redistributed to the poor.

Other major industrial nations have treated saving as a national resource. Their personal savings rates have exceeded that of the U.S. by two, three, even four to one over the same time span. Many of these nations have encouraged saving by people of all income levels with special tax incentives. The result has been increases in capital formation, productivity, wages, and industrial strength much in excess of those scored by the United States. In fact, within a few years, several Western European nations will exceed the U.S. in real per capita income.

Savings incentives may be divided into two classes—those that reduce marginal tax rates and increase incentives, and those that do not. The latter are a waste of money.

Reducing the existing tax bias against personal saving should be a top priority objective of tax policy. This objective could be served by excluding some part of personal saving from the tax base, by excluding some part of the return on saving from tax, or reducing the rate at what these returns are taxed, or both.

Reduction the Rate of Tax on Savings Income

For most individual taxpayers, returns on saving—e.g., interest, dividends, capital gains—are marginal income; as such, this income is on top of the taxpayer's principal source of income, hence taxed at the top marginal rate to which the taxpayer is exposed. This accentuates the basic bias against saving.

One way to moderate this additional bias is to decouple, for tax purposes, returns on saving from wage and salary income. Savings income should be taxed separately, starting in the 14 percent tax bracket, just like earned income. It should face a top tax rate of no more than 50 percent, just like earned income. This is the approach taken by H.R. 6400, the Brown, Rousselot, Roth bill.

Under current law, earned income and savings income are added together for tax purposes. An added dollar of either type of income is taxed at the taxpayer's top tax rate. However, earned income faces a maximum tax rate of 50 percent, while for savings income the maximum rate is 70 percent. Decoupling would move savings income down from the top brackets to start over again in the bottom brackets, and leave the marginal dollar of either type of income facing a lower tax rate.

The tax computation would be simple. Taxpayers would take their standard deductions and personal exemptions against whichever type of income was larger, or split them between the two. The taxpayer would compute the tax due on each type of taxable income and add the two taxes together.

The following example illustrates the change in tax computation and shows the resulting drop in the marginal tax rate on both earned income and savings income.

TABLE 1
EXAMPLE OF TAX COMPUTATION UNDER H.R. 6400
FAMILY OF 4

Wage and Salary Income	$25,400
Interest Income	2,200
Dividend Income	2,200
Tax Under Proposal	
Gross Earned Income	$25,400
Less 4 Personal Exemptions	4,000
	$21,400
Less Zero Bracket Amount	3,400
Equals Taxable Earned Income	$18,000
Gross Unearned Income	$ 4,400
Less $400 Exclusion	400
Equals Taxable Unearned Income	$ 4,000
Tax on Earned Income	$ 3,609 (top rate 28 percent)
Tax on Unearned Income	$ 598 (top rate 16 percent)
Total Tax	$ 4,207
Tax Under Current Law	
Gross Income	$29,800
Less 4 Personal Exemptions	4,000
	$25,800
Less $400 Exclusion	400
	$25,400
Less Zero Bracket Amount	3,400
Equals Taxable Income	$22,000
Total Tax	$ 4,761 (top rate 32 percent)

Most taxpayers have only a few thousand dollars of interest, dividends, or capital gains of year. For such taxpayers, decoupling would move their savings income down to the lowest three or four tax brackets and sharply raise the after-tax yield.

The bill would sharply reduce incentives to use present tax shelter arrangements, which would also reduce the current tendency to rearrange income to reduce tax liabilities. Current regulations prohibiting such activity would still be required, however, as would similar regulations to ensure proper compliance and enforcement under an income decoupling plan. And, of course, the details of this tax provision would have to be drawn so as to minimize opportunities for tax avoidance.

Because the bill would create two categories of income, there would exist difficulties in identifying income by type for tax purposes to minimize avoidance. For the self-employed or proprietors, some method would have to be devised to determine what portion of income should be considered "earned" and what portion "return on saving." This would also arise in the case of small corporations, although to a far smaller degree.

The bill does not seek to limit the taxpayer's choice of which income type to apply itemized deductions against, although some simple restrictions on the use of certain types of interest deductions may be advisable. In general, however, this flexibility is important to allow the taxpayer to receive maximum benefit from such socially important deductions as charitable contributions, medical costs, home mortgage and consumer loan interest, and State and local taxes.

This is a very powerful savings incentive, second only to outright exemption of all savings income, but much less expensive. The change in marginal tax rates and incentives would be very large for a small initial tax cut. It is very likely that this approach would generate savings increases substantially larger than the cost in revenues, enough to cause "crowding in," lower interest rates, and substantial increase in investment, resulting in no permanent revenue loss to the Treasury.

Excluding a Percent of Savings Income from Tax

Another revision for reducing the marginal tax rate on savings income would exclude some percentage of interest or dividends income from tax. A (say) 30 percent exclusion would be "at the margin" for all savers if there were no dollar limit. It

would lower the effective marginal tax rates or savings income from a range of 14 to 70 percent down to a range of about 10 to 49 percent. A 60 percent partial exclusion would be similar to current treatment of capital gains.

In contrast to the percentage exclusion described here, the tax code will permit limited deductions in 1981 and 1982 of small fixed dollar amounts of interest and dividends, $200 for a single return, and $400 for a joint return. Such limits sharply reduce the effectiveness of the deductions. For the vast majority of savers, who already earn more than $200 or $400 in savings income, no added incentive to save is generated. The ceilings would have to be raised to several thousand dollars for such an approach to generate substantial incentives at the margin.

Deferring Tax on Interest and Dividends

So-called "rollover" accounts would permit a taxpayer to accumulate interest, dividends, and/or capital gains without tax as long as they were reinvested and remained in the rollover account. There would be no deduction for the savings used to buy the assets placed in the account, but the tax on the earnings would be deferred, although not elminated. This too is a step toward the "ideal" tax treatment of taxing the savings but not the earnings.

Limited Deductions for Saving

In lieu of deferring, reducing, or eliminating tax on the returns to saving, some limited deduction for current saving could be afforded. The present-law Keogh and IRA plans could be liberalized and made more widely available, with fewer restrictions on the saving objectives and with higher limits on the amount of excludable saving allocated to such plans.

Increases in the present ceilings would be needed if any such tax revision were to be effective in affording incentives for additional saving. For those who already save the maximum amounts, no added incentive would be created unless the ceilings were raised. The tax rate would not be cut at the margin. However, the principle is similar to the exclusion treatment of savings under the "ideal" tax, and the approach gives incentives for some taxpayers.

Business Tax Changes

The principal focus of business tax revisions should be on

reducing the multiple layers of additional tax on the returns to capital which are imposed on the business entity. In the ideal tax system, no tax would be imposed on the business entity as such; tax liability would rest, instead, on the individuals receiving income of one sort or another from participating in one way or another in the business's activities. Short of this ultimate goal, however, business tax revision should concentrate on revision of the tax treatment of capital recovery allowances and on moderating the impact of the coporation's income tax.

Capital Cost Recovery

A major business tax improvement could be to replace the present antique depreciation system, based on the concept of "useful life," with a capital cost recovery system. Neutrality in the tax treatment of saving invested in durable assets calls for immediate expensing (first-year write-off) of costs incurred in acquiring such property. Extended write-offs, even over relatively short periods, result in raising the cost of saving and capital formation relative to consumption uses of income. Basing depreciation on useful life, even if useful life could be determined with a reasonable degree of accuracy for different assets used in differing ways by different taxpayers at different times, would serve only to accentuate the bias against saving and capital accumulation.

While expensing may be deemed to be too drastic for any near-term program of tax changes, it should nevertheless be the goal toward which tax revisions in the area should be directed. A number of current legislative proposals represent major steps in the right direction. The 10-5-3 approach of Congressmen Jones and Conable would greatly reduce the classes of durable physical capital for which separate write-off schedules would be afforded, provide far shorter write-off periods than the present "useful life" and specify highly accelerated write-off schedules for the three classes of property. The Senate Finance Committee bill specifies four classes of machinery and equipment, for each of which an open-end account would be set up, with write-off periods far shorter than those assigned to the respective property types under present law. A 200 percent declining balance method would be used to compute the annual allowance for each account. This approach would afford enormous simplication of capital recovery by eliminating "recapture" of the excess of sales or other disposition proceeds over adjusted bases of the assets, as well

as separate accounts for each year's capital acquisition as under present law and the 10-5-3 proposal. However, it would do so at the cost of incomplete write-off of the amounts invested in the property. Chairman Al Ullman of the Committee on Ways and Means has proposed a depreciation system similar to that of the Senate Finance Committee.

Each of these approaches is subject to technical modification to deal with the various relatively minor objections which have been voiced. Each, however, represents a substantial improvement over the present-law system. Without going into a detailed and extensive examination of their respective virtues and disadvantages, some such revision should be given very high priority on a tax reform agenda.

One approach to faster depreciation which should be avoided has been suggested by the Carter administration. It has proposed a complex depreciation plan with 30 categories of assets, even less complete write-off of the amounts invested, and a disturbing element of Treasury control over investment decisions. Treasury would have discretion to change the write-off periods differentially across 30 asset categories, thus potentially directing investment money out of one industry into another. There would also be a special investment tax credit for revitalizing declining areas obtainable through a "certificate of necessity," potentially directing investment money out of one region into another. The possibility of political considerations distorting economic decisions would be substantial.

Corporate Tax Rates

To reduce the corporate tax rate is to reduce one of the multiple layers of taxation of the earnings of capital. Corporate rate cuts therefore would reduce the tax bias against saving and capital accumulation in general, and use of the corporate form in particular. Corporate tax rate reduction is a strong, neutral, nondistorting tax change "at the margin."

Ideally, the corporate tax would be eliminated by integrating it with the personal tax and passing corporate income on to the shareholder. This is far more difficult if the personal tax system remains based on income than if it is remodeled to exclude net saving.

With a fully integrated income tax, retained earnings would be taxable to the shareholders even though they are a form of saving, yet the shareholders would receive no cash with which

to pay the tax. Also, retained earnings would increase the value of the shares, but since the retained earnings had already been taxed, some means would have to be found to exclude an amount equal to retained earnings from taxable capital gains when the shares were sold.

Short of total integration, it is possible to eliminate the double taxation of dividends by allowing the firm a tax deduction for dividends paid out, just as it receives for interest paid out. Alternatively, shareholders could be given a tax credit with respect to the tax paid by the corporation with respect to per share earnings. Both of these approaches have received serious consideration at one time or another in the past. To date, progress along either line has been interrupted by diverse and somewhat shortsighted objections from differently situated firms in the corporate business community. The more substantial the reductions in corporate income tax rates, the less important would be eliminating or reducing double taxation of individuals. But for the foreseeable future, this remains a serious deficiency in the tax law, and its remedy should be a major concern of tax policy.

Program for the Future

This section has presented several of the major types of tax revisions deserving of attention by the Aministration over the next four years. It is by no means an exhaustive list of desirable changes. Tax treatment of capital gains, R&D, estates and gifts, and the payroll tax are just some of the other areas of tax policy which will need attention.

In the short run, we suggest a relatively simple tax package to be presented in the next Budget Message in January. It would have three pieces:

- An across-the-board reduction in marginal personal income tax rates in each bracket of about 10 percent in 1981, with similar rate reductions in 1982 and 1983;
- A simplified capital cost recovery system along the lines of 10-5-3 or a somewhat strengthened Senate Finance Committee proposal;
- Some reduction of the corporate income tax rates.

Further tax changes which should be undertaken within the next three or four years would include;

- Targeted savings incentives to reduce marginal tax rates on savings income;
- Reform of the very high implicit marginal tax rates

facing lower income workers because of the interaction of the tax code and the phasing out of welfare and unemployment benefits as work effort and income increase;

• Indexing the income tax where appropriate to prevent inflation from increasing personal inflation from increasing personal income tax rates and overstating and overtaxing real capital gains and profits.

The next administration must take steps to insure the unquestioned solvency of the social security system. The trust funds have been operating on a hand-to-mouth basis for many years. The financing of social security requires a major review and should receive immediate attention.

Meanwhile, something must be done about economic growth. At present low rates of real economic growth and real productivity and wage increases, payroll tax rates will have to rise rapidly to unacceptable levels to maintain the present benefit structure. This makes adoption of supply-side tax changes imperative. The growth that would result may be the only politically feasible means of making the social security system absolutely sound for succeeding generations.

Once these changes are made, the resulting encouragement of personal saving in turn may reduce pressure for further rapid increases in replacement ratios (retirement benefits as a percent of pre-retirement earnings), and encourage people to do more planning for their own retirement. Indeed, enabling individuals to supplement social security income by strengthening the Nation's private retirement systems should be a major goal of the next administration. Reduced tax rates on savings income or more generous tax deductions for savings in retirement accounts would improve incentives to save. (See the section on personal savings incentives.)

For current retirees, the earnings limitation on social security recipients is a severe disincentive to continue working. Retirees are often very much in need of supplemental income, yet efforts to earn it result in a loss of social security benefits at a rate of 50 cents on each dollar of earnings in excess of the limitation ($5,000 in 1980, $5,500 in 1981, and $6,000 in 1982). For an elderly taxpayer earning just over the limitation, that is equivalent to a 50 percent income tax rate on the marginal earnings. If the taxpayer earns enough to be paying income tax in the lowest tax bracket at 14 percent, that is equivalent to a 64 percent income tax rate. Of course, the income would also be subject to the payroll tax. As senior citizens cut back their earnings because of these prohibitive tax rates, it is possible

that the tax revenues lost to the social security trust funds and the general revenues on the wages not earned are larger than the amount saved in benefit payments. While it is uncertain that the earnings limitation actually reduces total federal revenue, it is certain that the earnings limitation is a limitation on the freedom of choice and standard of living of millions of retirees.

Prohibitive implicit tax rates also apply to the lowest income Americans, the unemployed and those on welfare. As they return to work, or seek to work their way out of poverty, they face increasing tax payments and declining benefits. The two combined take away 60 to 80 cents on each dollar of additional earnings nationwide.

In certain high benefit, high tax states, counties or cities, welfare recipients face an implicit marginal tax rate exceeding 100 percent of additional earnings over wide ranges of income. Such workers are literally worse off after receiving a wage increase. These effects only begin to taper off at incomes of $10 to $12 thousand a year.

Clearly, the current tax and welfare systems produce substantial disincentives at the bottom rung of the economic ladder. A major reform of welfare and unemployment program must be a long-term goal of the next administration.

OTHER POLICIES

Treasury has many serious responsibilities in the areas of domestic finance and international monetary and fiscal policy which deserve more attention than Treasury has the staff to give them. At the same time, Treasury seems to be doing a lot of work investigating, monitoring, and manipulating markets or economic entities which do not need to be investigated, monitored, or manipulated. Part of this effort stems from tradition—the involvement in an activity because the Treasury has always done it, or because it is or was the traditional practice of finance ministries around the world to do so—even if the theoretical justification for the activity may no longer (or never did) exist. Part stems from programs enacted into law, such as aid to New York City and Chrysler. Part is forced on Treasury because of ill-considered international economic negotiations initiated by other departments, notably State. But the bulk of this work comes from a suspicion that markets need to be controlled and regulated, and that the Treasury is uniquely qualified to do so.

Large shares of the Treasury's payroll and staff go for such activities. Meanwhile, fundamental changes in the state of the economy, economic thought, tax theory, and tax policy are debated and voted on outside of and largely uninfluenced by the Treasury, which does not have either the staff or the internal coordination to meet this challenge.

Domestic Finance

The Assistant Secretary for Domestic Finance oversees the Treasury'd debt management policies (including the planning of new Treasury issues—the actual issuing of which is done by the Bureau of the Public Debt—and running the Federal Financing Bank), capital market policies (including banking legislation and capital market or corporate problem areas such as Chrysler), State and local financing policies (including the New York City assistance program and studies of local financing problems, accounting methods, and budgetary practices), and the Office of Revenue Sharing. This office can be slimmed down substantially.

Changes in Current Operations

Many personnel are engaged in studying capital and securities market "policy." The only meaning that can be attached to such tasks is that the Treasury has some kind of duty to guide those markets. We reject that view, believing that any necessary work in providing a framework of consistent, enforceable, and just laws for securities and capital instruments dealings is best left to the Securities and Exchange Commission.

Likewise, there are officers studying local municipal finance, State finances, corporate finances, and so on. We doubt that this is the proper locus for any monitoring or study of these markets, even if it may be assumed that the market should be studies or monitored by Government.

We are convinced that the special loan programs to New York City and Chrysler Corporation, which are adminstered by this office, were a fundamental mistake. Whatever the hopes earlier, it is clear that these programs involve nationalization of the entities that are "rescued." But even if one is not worried about moving in the direction of the corporate-syndicalist state that these programs point to, it ought to be questioned whether failure should be underwritten by tax funds. We think it should not.

It might then be claimed that these programs should be ended at once. We feel, however, that a contractual situation has been established that cannot justly and reasonably be abrogated on inauguration day plus one. We are aware of the political pressures that impelled these programs and that might, if thwarted in one direction, show up in overwhelming demands for protectionist tariffs, for example.

We think that the following principles should guide the administration's further handling of these programs: The government should meet the commitments it has undertaken in these loan guarantee programs; there should be no expansion or extension of these programs beyond the limits established in present statutory authority; no further such programs should even be considered. If it becomes clear that the rescue plan, in either case, has failed and that only further financial assistance can bring success, then the assistance should be provided only if thoroughly objective marginal criteria are met, i.e., there are benefits from such additional assistance clearly exceeding the additional costs, and the already sunk costs are ignored.

Instituting a Government Credit Budget

A part of the same area, it is clearly the responsibility of this office to generate a "government credit budget," which will bring government credit activities to full light and impose on them some effective controls related to overall budget activities of the government. The underlying principle that must be recognized is that federal government credit actions in the form of borrowing, loan guarantees, and credit intermediation, have important effects in directing the use of resources and the distribution of final product, just as does direct government spending for goods and services, and transfer payments. While such credit activities are not yet as great, relatively, as direct spending and transfers, they have already reached the same order of magnitude and are clearly dealt with on an ad hoc basis, so there is no overall control. While congressional decisions on a "credit budget" will ultimately be needed, it is this office that the proposals for a comprehensive budget should be formulated. Instead of having so many personnel to study private credit markets that are working fine on their own, this office should devote it resources to studying federal government credit market burdens and how to measure and control them. The immediate start of such work is urgently and vitally important.

The Office of Revenue Sharing (ORS) is located in the office of the Assistant Secretary (Domestic Finance) for administrative purposes. The revenue sharing staff consists of approximately 160 professional and clerical positions.

During fiscal 1979, $6.8 billion in revenue sharing funds were distributed to more than 38,000 States, counties, cities, towns, townships, Indian tribes, and Alaskan native villages. This brought to $42.15 billion the amount of money returned to State and local governments since the beginning of the general revenue sharing program in 1972. Total authorizations for distribution since 1972 amount to $49 billion. Since its enactment into law, many state and local governments have come to rely on the program, and it is apparent that may local taxes would be significantly higher had general revenue sharing funds not been available.

Originally, the funds had to be used for capital expenditures and for eight separate operating and maintenance categories. However, under the 1976 amendments, the funds may be used for any purpose which is a legal use of the government's under state and local law.

Revenue sharing was enacted in 1971 as the major element of President Nixon's program deemphasizing the federal government's role in the public sector by shifting decision-making authority to states and localities, funding with the financial resources to support this expanded responsibility. Ostensibly, revenue sharing would afford a net improvement in the overall fiscal system by transferring government spending decisions to the jursidictions which are closest to the citizen without at the same time increasing dependence on the allegedly inferior revenue sources of states and localities.

The achievements in these respects have seldom, if ever, been responsibly evaluated. Any such evaluation should take account of the fact that revenue sharing does not—cannot—increase overall fiscal capacity. Its benefits must be found, instead, in whether it results in more efficient use of fiscal capacity. More efficient use of fiscal capacity could result if revenue sharing resulted in substitution of state and local spending programs for federal expenditures and if the state and local programs were more productive than the federal programs they replaced. For example, revenue sharing might have evolved as a program for substituting block grants for

categorical grants. Such has not been the course of revenue sharing until now. Finally, since aggregate fiscal capacity is not enhanced by revenue sharing, improved efficiency might result from the redistribution of the given fiscal capacity among jurisdictions, provided the states and localities which are new recipients of funds make better use of them than the jurisdiction which are now transferers of funds.

Any such efficiency gains, moreover, would have to be greater than the losses resulting from the illusion created by revenue sharing that the programs it funds are less costly than if the states and localities had to finance them from their own resources. The something-for-nothing perception is not conducive to economizing on the real production inputs which the government spending programs require.

The political sensitivity of issues surrounding "revenue sharing" is not to be denied. Nevertheless, the present and prospective magnitude of this program argues urgently that top priority be given to reevaluation of revenue sharing with the view to its modification in order to induce, if not eliminate, the distortions it generates within the public sector as well as between the private and public sectors.

The Bureau of the Public Debt

In support of the management of the public debt but reporting to the Fiscal Assistant Secretary, the Bureau prepares Department of the Treasury circulars offering public debt securities; directs the handling of subscriptions and making of allotments; formulates instructions and regulations pertaining to security issues; and conducts or directs the conduct of transactions in outstanding securities.

It is difficult to believe that in an age of active and "fast" money markets the Treasury still does not auction all of its debt issues. In the corporate world, issues can be sold to a syndicate of underwriters, who then bear the risk of unsuccessful sales to investors. But the Treasury does its own underwriting, and thus assumes the risks itself of an unsuccessful underwriting that could result from a judgment error in setting the coupon, or interest rates on the issue. So long as the Treasury continues its own underwriting, the auction method would appear to be far preferable and less costly to the taxpayers. Therefore, the Treasury should move as quickly as possible to an auction method for all Treasury debt issues.

Any new administration will likely be committed to reducing inflation in the immediate future. Since interest rates can be

expected to decline in tandem with inflation rates, there seems to be little sense in the Treasury's issuing any long-term debt until those rates have declined. It would be less expensive to deal strictly in shorter issues instead of buying more expensive long-term money. It is recommended that the administration's commitment to reducing inflation be reinforced and signaled to the market by suspending all sales of long-term Treasury debt pending the reduction of interest rates that will inevitably accompany successful anti-inflationary policies.

It is surprising that more than half of the Bureau's resources are expended in managing the savings bond programs. These programs account for a relatively minor part of the debt structure of the United States Treasury.

The debt instruments involved in the savings bond programs have *historically* carried rates of interest far below the market rates. To some extent, the lower rates of interest are acceptable to the bondholers because of the convenience of small denominations, absence of brokerage fees, and connection to payroll deductions plans. Thus, savings bonds are comparable to passbook accounts at banks, while Treasury bills and notes are comparable to various managed liabilities of banks. Just as banks offer a variety of instruments and "programs" to attract funds, so can and should the Treasury.

However, there persists the disquieting question whether savings bonds really are purchased solely on the basis of their competitive appeal, or does the widespread old idea of "patriotic war debt" continue to attach itself to savings bonds? Further, there are pressures in the Armed Forces, the Federal Government and the private domain to "invest" in these low-return instruments as a patriotic duty. All such pressures are repugnant to a free society that is not at war.

It is urged that a full review of the savings bond programs be undertaken with a view to insuring that:

- They succeed because of their intrinsic investment merits and not as a quasi-involuntary tax on patriotic sentiment;
- They offer as nearly a market rate of return as is consistent with the special conveniences that they carry for investors;
- They are flexible for the investor as is possible, specifically the possibility of offering negotiable small bonds.

International Monetary Affairs

International policy is the responsibility of the Undersecretary for Monetary Affairs and the Assistant Secretary for

International Affairs. They supervise offices dealing with Developing Nations, Trade and Investment Policy, Commodities and Natural Resources, International Monetary Affairs, Saudi Arabian Affairs, the International Monetary Group, and other areas.

Two general themes dominate our discussion in this area. First, intervention in the marketplace by the Treasury or by the orgnization over which it has some control is not warranted unless two conditions can be established:

(1) There is substantial evidence of the failure of the market to provide a desirable service;

(2) There is substantial evidence that the Treasury Department or other governmental or intergovernmental agencies can do a better job than the market.

Treasury wastes far too much staff, energy, and taxpayer money in market intervention and international negotiations which seek to encourage additional market intervention.

Second, the balance of trade, the exchange rate of the dollar, and the value of the dollar as a financial asset are chiefly influenced by fundamental U.S. domestic policies regarding taxation, regulation, and money creation. International and meteorological disturbances exist, of course. But the primary determinant of the health of the dollar and the U.S. economy is U.S. policy. If that is not sound, then the many international financial arrangements in use or under discussion will not achieve stability for international trade or finance.

The Balance of Payments, Exchange Rates, and Gold

The Treasury devotes enormous amounts of energy, staff, resources, and taxpayers' money to the management of the balance of payments, the exchange rate of the dollar, and the U.S. gold stock. It should take a long vacation and ask itself what it is trying to accomplish.

Balance of Payments

The international competitive situation of the U.S., its balance of trade, and its attractiveness as a site for investment and production depend in the long run primarily on real factors affecting the domestic and world economy. These include, most importantly, the domestic tax, spending, and regulatory policies of the United States. Domestic energy policy also plays a role.

U.S. prices and tax rates are rising with inflation. Wage demands soar to keep pace. Savings and investment rates are

depressed below the levels we could achieve with a neutral inflation-proof tax system. The regulatory burden continues to raise U.S. costs of production and depress U.S. energy output. These are the true sources of U.S. trade problems. If domestic policy errors were remedied, any remaining trade deficits or surpluses would simply reflect three natural adjustments: (1) changing global production patterns; (2) the shift of the U.S. labor supply into more service-oriented work as its age and composition change; and (3) capital flows of investment money into or out of the country. (As investors seek to buy physical capital in the United States, the United States receives extra foreign exchange to spend aboard. Conversely for capital outflows.)

There is more to the balance of payments than the trade balance (or OPEC!). Capital flows can and do finance substantial trade deficits. Even here, domestic policy has an impact. The value of the dollar as a financial asset, the exchange rate of the dollar, and the value of the dollar at home all depend on the rate of inflation in the United States and the rate of creation of dollars by the Federal Reserve. Measures such as DISC, Exim Bank financing, and antitrust waivers to favor development of U.S. trading companies are no substitute for fundamental reform of basic U.S. domestic economic policies.

Exchange Rates

Prior to 1971, the United States was at least nominally on a gold standard. The Treasury was committed to buy and sell gold (although not to Americans) at a fixed price to keep the value of the dollar steady. In theory, if too many dollars were created, prices for all goods and services, including gold, would rise with inflation. Other central banks would then turn in dollars for gold, thus signaling the Federal Reserve to slow the printing presses.

For years, though, the Federal Reserve had been conducting monetary policy with little regard for inflation or the number of "unredeemed" dollars piling up abroad. In 1970 and 1971, the time came to defend the old exchange rate, as nervous foreign central banks became upset over the level of U.S. and world inflation, and newly emerging U.S. trade deficits (only 5 to 20 percent of the deficits we run today!), and threatened to demand gold or to revalue their own currrencies. In spite of conferences, currency swaps, and intervention on the foreign exchange markets, the U.S. finally decided to abandon the

gold standard and devalue the dollar, rather than risk a recession from a sudden reduction of monetary growth.

Two groups favored the move. Liberals wanted a free hand with monetary policy and interest rates, unencumbered by restraints on dollar creation. Monetarists wanted a sound currency with steady and low rates of money creation, but they knew that prices had been allowed to get so far out of line that a devaluation was inevitable. Furthermore, they wanted the dollar to "float." Under flexible exchange rates, the U.S. would be free to pursue a stable monetary policy unaffected by inflation and currency crises elsewhere in the world, with no need to suddenly change the rate of growth of the U.S. money supply.

Since then, the Treasury has seen no need to keep the whole stock of gold left over from the gold standard, and has been selling it off. This has offended those who hope to return to a gold standard (although a *large* gold stock is not technically necessary to sustain one).

Calls for return to a gold standard or other commodity standard have grown louder as monetary discipline has not been achieved and inflation has accelerated. People would like to see additional legal constraints on the ability of the Federal Reserve to create money. They want to force the Fed to make monetary policy with the price level itself in mind (as represented by the price of a commodity such as gold), rather than interest rates (which themselves are so distorted by inflation that they cannot be a suitable guide for policy) or the growth rate of money (which can vary in relation to prices if there are new financial developments such as credit cards or electronic funds transfers).

A gold standard would mean aiming for a zero rate of inflation in the United States. It would mean fixed exchange rates only if other nations also pegged to gold and achieved zero inflation. Thus, a gold standard and fixed exchange rates are not identical concepts. Other nations might not choose a gold standard, and their currencies would float vis-a-vis the dollar.

With this background, let us turn to the question of exchange rate intervention. Should the Treasury try to manage the floating dollar in the absence of a gold standard, fixed exchange rates, or monetary discipline?

Foreign Exchange Market Intervention

With U.S. exports and imports of goods and services equal-

ing 20 percent of the GNP and with gross foreign exhange transactions by American banks running $18 billion per day, the exchange rate between the dollar and foreign currencies is of enormous importance to American citizens.

The Treasury Department influences the exchange rate through the effects on its monetary and fiscal policies on the levels of interest rates and general prices which, along with real forces such as the volume of economic activity, affect the exchange rate.

In addition, the Treasury Department is responsible, through its control of the Exchange Stabilization Fund and, more importantly, its surveillance of the exchange market activities of the Federal Reserve System, for day-to-day purchases and sales of foreign currency for the purpose of affecting the exchange rate and conditions in the foreign exchange markets.

The Carter Adminstration has increased enormously the level of foreign exchange intervention. The most visible reflection of this intervention was the decision to issue "Carter bonds" in 1978 which were sold abroad for foreign currencies to be used to buy dollars in the foreign exchange market. In addition, there are "swap" agreements totaling $30 billion with *14* countries which permit us to borrow substantial volumes of foreign currencies for periods of up to six months.

There are (and have been) serious costs to our intervention policies. If we borrow foreign currency to be expended in support of the dollar and the value of the dollar falls between then and the time of repayment, the Treasury bears losses. (Federal Reserve losses show up in reduced payments to the Treasury.) The prevailing view among foreign exchange traders in banks is that when central banks intervene by buying or selling foreign exchange the traders will profit at the expense of the central bank.

Few believe that the Fed and Treasury can long hold the dollar up at a level significantly different from a level dictated by the fundamental forces influencing the market. The turnover in the dollar worldwide has been estimated at $30 to $50 trillion per year. Under certain circumstances, their intervention can affect the rate for very short periods but their resources are too small relative to the market to successfully sustain a rate different from an unfettered market rate.

In particular, the dollars pulled off the world market after a swap agreement and exchange market intervention are often dwarfed in number by the dollars created week in and week out by the Federal Reserve in its normal open market opera-

tions. Intervention is useless unless it is part of a coherent overall economic policy.

Nonetheless, the U.S. government has entered the market on a large scale, especially in recent years. Generally, that intervention has been justified to prevent so-called "disorderly markets." These are said to exist when (1) there are sharp fluctuations in exchange rates, (2) there is a reluctance of traders to insure a two-way market or widening bid-offers spreads, and/or (3) there is a tendency for exchange rate movements to accumulate in one direction. Unfortunately, these are very loose criteria, and ther is no way to control the bureaucratic interventions short of stopping them altogether.

There might be some argument for intervention if our authorities knew more than the market about the future. They then could offset the "mistakes" of private traders and, incidentally, make large profits. It turns out that there have been substantial losses. Thus, the Fed and Treasury cannot use or do not have inside information on their own policies for the future, nor the policies and reactions of other central banks. This is understandable because government intentions do not become policies until they are implemented, and when they are implemented the world can see what they are.

Turning to intervention by foreign central banks with respect to the dollar, there technically is no limit to the amount of resources they can devote to holding up the dollar because they can, if they wish, create an unlimited amount of their own money with which they buy dollars. Of course, there is a limit, in fact, imposed by the inflationary consequences of that money creation.

The problem with foreign intervention is that it often occurs when the dollar needs to adjust downward. Thus, in 1977 and 1978 when the U.S. net export of goods and services had shifted from a $10 billion surplus to roughly a $10 billion deficit, foreign central banks bought in excess of $66 billion in a vain attempt to hold up the dollar. (In 1979, they reversed themselves, selling off $15 billion.) The intervention, to the extent that it retards the decline in the dollar, slows the reallocation of resources necessary for smooth adjustment in our balance of payments. As the disequilibrium builds up, the ensuing and inevitable decline in the dollar is faster and sharper than it otherwise need be. There is very little we can do about their intervention, except to urge moderation in various international fora, including the International Monetary Fund whose charter specifically calls on it to maintain

surveillance over the exchange rate policies of the member governments.

Conversely, the dollar cannot be forced down artificially to improve the trade balance. The dollar declines to reflect higher U.S. inflation than that in the rest of the world, restoring the prices of products in the U.S. to parity with those abroad. The price of exports produced in the U.S. cannot be artificially depressed below world levels, nor the price of U.S. imports artificially increased.

Except for transport costs, wheat sold in Chicago fetches the same dollar price as wheat sold in Saskatoon and Buenos Aires, whether it is bound for Boston, Berlin or Bombay. Steel and automobiles produced in the U.S. receive the same dollar price as comparable products produced elsewhere. And as the prices of traded goods and their close substitutes rise or fall together due to inflation, so do the prices of purely domestic goods and services.

Relative prices are not affected so long as exchange rates are free to seek their own levels. Permanent improvement in the U.S. trade position must come from real adjustments in the taxes, regulations and productivity levels that underlie U.S. cost of production, not from vain attempts to alter exchange rates.

If the Federal Reserve would keep one eye on the international value of the dollar as a sort of measure of market confidence in its policies and the market's expectations of future inflation, and one eye on the rates of money creation and inflation in the U.S. (and perhaps even the interest rate futures market, which reflects expectations of future inflation), it might be able to use the best insights of all the schools of thought. The one thing it cannot do is maintain a fixed exchange rate with currency swaps while running the printing presses.

Gold

The issue is whether or not the Treasury should again sell gold in bulk on the market. Presently, the Treasury has more than 260 million ounces which, at $500 per ounce, is worth $130 billion.

After a series of international meetings in 1975 and 1976 when the nations of the world agreed to remove gold as an asset from the international monetary system, the Carter Administration in May 1978 renewed the policy initiated under Ford of selling gold from its holdings. Through October 1978,

it sold an average of 300,000 ounces per month. During the exchange crisis of that month, it increased its sales to 750,000 ounces. It then raised them to 1.5 million ounces in December. Then it reduced them to 750,000 ounces per month until November 1979 when, in a market that had been rising for six months, it ceased making such sales without any explanation. In July 1980, the Treasury began to sell some gold in the form of medallions. This program is presently not a substitute for the previous sales because only one million ounces are required by law to be struck into medallions, and only about 100,000 ounces in this form have so far been sold. Presumably, it is a less efficient way to dispose of gold than the bulk sales undertaken through November of 1979.

The case for gold sales is straightforward. Gold is a useful metal in the private sector. In the last four years, about three-quarters of the total world production plus government sales has been brought by the jewelry, electronics, dentistry, and other industries. The Government should not hoard a useful product that it itself does not employ.

Furthermore, it is a voluntary way of raising government receipts or financing tax reduction—the buyer is willing to exchange his dollars for the gold.

The case against gold sales is that, to some people, it appears to be a gimmick. Others see it as a dangerous source of funds for the Government, because the stock will run out, forcing painful adjustments in the budget later on. If we sold 1.5 million per month at $500 per ounce, the revenue would be $9 billion. At that rate of sale, we would run out of our stock in 14 years. Obviously, the adjustment would be small and long delayed.

The Substitution Account

In the monetary reform negotiations, considerable attention has been given to possibilities for the creation of a substitution facility in the International Monetary Fund through which Fund member countries would replace some or all of their existing foreign exchange reserves with Special Drawing Rights (SDRs). Fortunately, such discussions have ended for the present. They should not be revived.

Academic discussion of a substitution facility arose in the 1960s in part as a result of concern about the "overhang" of allegedly excess dollars in official holdings. The perennial fear was that a flight from the dollar to gold or other currencies would strain the par value system to the breaking point. It

could in the process destroy some of the claims serving as international reserves and the available means of creating reserves.

The problem to be solved was perceived as a tendency toward an excess supply of reserves caused by continued balance of payments deficits on the part of the leading reserve currency country, the United States. The task, then, was to sop up the existing excess and to shift the system toward a reserve medium which would have a controllable supply and which would be convertible only as needed for legitimate payments.

In other words, a key argument for the establishment of a substitution account is that further issue of the SDRs would help move the SDR to the center of the international monetary system, an agreed objective among the members of the IMF.

The difficulty with this argument is that to the extent that the SDR displaces the U.S. dollar as the world's currency for settling international transactions, the United States loses the privilege of gaining real goods and services from foreigners in exchange for issuing them currency with which to trade. This privilege is not huge, inasmuch as foreign central banks invest their dollars in U.S. Government securities on which the U.S. pays interest, but then is not infinitesimal in benefit either.

The implementation of healthy fiscal and monetary policies by the U.S. toward establishment of a positive balance of trade would eliminate the so-called problem of "overhand," and at the same time defuse the alledged arguments in favor of a substition facility at the IMF.

Taxation of Foreign Income of U.S. Firms and Individuals

There should be a full reappraisal of the premises employed in the development of U.S. international tax policy and a moratorium on the trend of twenty years of U.S. tax policy consistently directed at increasing the U.S. tax burden on the foreign operations of U.S. business and on U.S. citizens working aboard.

The underlying assumption of most proposals regarding foreign source income has been that the United States was the only source of major multinational investment, and that competition from foreign firms and the foreign tax rules applied to foreign firms were irrelevant. It was further assumed that since U.S. companies clearly dominated international business, other nations would necessarily have to follow the tax policies of the United States.

A second premise has been that foreign investment was bad

for the United States from the standpoint of the U.S. balance of payments, U.S. jobs, and the U.S. supply of capital, and that too light a tax burden created incentives for U.S. firms to invest abroad.

In addition, U.S. tax policy in this area has been characterized by excessive dwelling upon concepts of "equity" which involves fallacious comparisons between the domestic and foreign contexts in which taxpayers compete.

In the case of individuals, the United States is the only industrialized nation to tax on the basis of citizenship rather than country of residence. Most nations do not tax income earned by their nationals when working abroad. The limited exemption of foreign earned income of U.S. citizens was sharply reduced in 1976 and 1978, crippling the ability of U.S. firms to support U.S. nationals in overseas positions. This has damaged the ability of the U.S firms to compete for foreign contracts, and reduced U.S. exports. Revised limits on foreign earned income, adopted in 1978 to undo the damage done in 1976, actually made matters worse as the final regulations now stand. The Senate Finance Committee has proposed liberalizing legislation as part of its recent tax package.

In the case of firms, the pattern of U.S. policy developments since 1960 has been an almost unbroken string of proposals, legislation, and regulations to increse the tax burden on U.S. multinationals' foreign operations.

The United States, unlike most major nations, taxes the worldwide income of its corporations whether such income is domestic source or foreign source. Income of foreign subsidiaries of U.S. companies, or foreign corporations owned by U.S. persons, is not taxed, however, until repatriated as dividends except in the case of certain so-called "tax haven" activities (Subpart F of the U.S. Internal Revenue Code). This treatment, in general, of foreign subsidiaries is referred to as "deferral."

The United States also provides a "foreign tax credit" to prevent double taxation of foreign source income. This credit reduces the U.S. tax on foreign source income by the amount of any foreign income taxes which were imposed on such foreign source income. It does not reduce the U.S. tax on U.S. source income. Further, it reduces the U.S. tax that would otherwise be imposed on the foreign source income only to the extent that foreign taxes are incurred on that foreign source income. If the U.S. tax on such income exceeds the foreign tax, the excess must be paid to the United States. Contrary to the

impressions created by some critics of the foreign tax credit, the foreign source income of a U.S. taxpayer bears the same total income tax burden (foreign income tax plus U.S. income tax, if any) as domestic source income of the U.S. taxpayer.

Repeated efforts have been made by "tax reformers" over the years to restrict or eliminate deferral and the foreign tax credit. Such actons would be harmful to the competitive position of U.S. firms and would reduce U.S. exports, income and employment.

The one foreign income liberalization measure, "DISC," was enacted as an expert incentive in 1971 in a grudging and restricted manner and has been undermined by constant threats of repeal and by the enactment in 1976 of complicated "incremental" features, substantially reducing its impact as an incentive, deterring its use by small companies, and limiting the commitment of resources to the program by major companies. While it may or may not be desirable if public policy is to encourage exports, once that decision is made, DISC is an efficient mechanism which should not be loaded down with complicated restrictions.

DISC should not be viewed as serving only to encourage firms to invest in the U.S. to produce for export, instead of investing and producing abroad. While DISC is important as a stimulate to investment in the U.S., foreign investment is not a deterrent to job creation in the U.S. Overseas branches of U.S. firms have expanded U.S. jobs by placing billions of dollars of orders for U.S. exports.

In contrast, the other major developed countries have considered private foreign investment by their multinationals as beneficial to their national economic interest. Thus, Canada, France, Germany, Japan, the United Kingdom and other developed countries have introduced tax incentives for foreign investment both in domestic legislation and/or bilateral treaties. These rules are frequently targeted to access to natural resources and potential export markets, as well as operating as a tool of foreign policy. Significantly, the tax systems of other developed countries have not sought a standard of identity (equity) of tax rules for foreign and domestic income of their companies and affiliates of their companies.

There is some increased recognition today in the U.S. that the cumulative burden of U.S. tax rules can have a damaging effect on the competitive position of U.S. companies, including export performance, just as there has been a reassessment of

the effect of taxation on domestic productivity and capital formation.

While it is not necessary to endorse tax incentives for foreign investment, U.S. policy should avoid enactment of tax disincentives for foreign trade and investment. The basic objective should be to ensure that U.S. tax rules do not drive U.S investors away from the most productive investments, be they at home or abroad.

Other Export Impediments

Another useful step in any policy of export promotion, though not a panacea, is the dismantling several legal obstacles and bureaucratic impediments to exports. Current obstacles to U.S. exports that need reexamination include:

- The Foreign Corrupt Practices Act. This law, which bans bribery to obtain business contracts, discourages U.S. firms unsure of what conduct is illegal and how the law will be interpreted.
- Webb-Pomerene Export Trade Act of 1918. This law's ambiguous antitrust provisions applicable to export trade associations have discouraged the formation of trading firms and associations.
- Numerous restrictions on exports stemming from national security, human rights, nuclear nonproliferation, and environmental impact concerns.

The Export-Import Bank

The Export-Import Bank supports exports of American products by means of medium- and long-term loans, guarantees of private credits, and insurance against commercial and political risk.

In fiscal year 1979 it made loans of $4.475 billion and provided guarantees and insurance of $5 billion.

The Secretary of the Treasury guides the overall policy of the Export-Import Bank through his chairmanship of the National Advisory Council on International Monetary and Financial Policies.

The Bank, known as Exim, lends money at rates of interest below its cost of funds and private market rates. Exim estimates that it should charge between one-quarter and one-half of a percentage point over its cost of funds to cover its administrative costs and to provide reserves for defaults.

However, from March 1978 through December 1979, its average cost of funds was 9.55 percent for a total cost of 9.80

percent to 10.05 percent. During the same period, its average lending rate was 8.35 percent, or 1.20 percentage points below its average cost.

Thus, Exim has been subsidizing U.S. exports. To the extent that this subsidy permits American exporters to charge lower prices to foreign purchasers of American goods, the benefits of the subsidy are reaped by foreign consumers. On the the other hand, to the extent that the subsidies are pocketed by American exporters, the funds are a tax on some Americans for the benefit of American exporters.

The case for Exim is often put in terms of the need to stimulate American exports in order to reduce the U.S. balance of payments deficit.

This argument is seriously misguided on several grounds:

First, the U.S. operates on a floating exchange rate system so that its international accounts are, apart from exchange intervention, automatically balanced. The balance of payments, therefore, is not a real problem.

Second, to the extent that foreigners benefit from the subsidy, the U.S. gives them more goods and services embodied in its exports than it can claim back from them through imports purchased with the monies that U.S. exports gain. Thus, U.S. productivity is reduced, worsening its competitive position in world markets.

Another way of putting it is that the U.S. is lending money to foreigners at a rate of interest below the yield on capital at home, so that American real income is being reduced through low-yielding loans abroad. In short, the Exim Bank serves as an unintended foreign aid program.

Even more ironic, Exim is a very peculiar foreign aid program in that, because the recipient countries are selected by American exporters instead of the federal government, the federal government cannot hope to gain any political advantage or other benefit for the American people.

Third, and somewhat more esoteric, is the problem of additionality. Additionality means to the extent that Exim finances exports that would have otherwise been sold for cash, the U.S. balance of payments is worsened. The heavy support for sales of airplanes is a case in point. Unfortunately, the facts of additionality have been difficult to establish.

Finally, another justification not well examined is the populist claim that fairness to U.S. exporters demand that the Exim match the terms of individual subsidized credits of other trading nations.

The Carter administration has done this in approximately 20 percent of its direct loans in February 1979, charging a lower interest than the normal scale. It remains highly questionable why individual U.S. exporters should be subsidized without regard to their income, age, wealth, or economic health.

The Carter administration has recently sought to meet the fairness issue, known as the international credit war, by means of an agreement among the leading trading nations to set predetermined minimum interest rates. This effort, in reality, is perverse to improvements in real U.S. income. The best option would be for the U.S. to cease subsidizing foreign consumers through credits, and welcome any permanent subsidies that foreign governments are foolish enough to provide, thereby increasing the amount of imported goods that the U.S. could obtain for any given volume of exports sacrificed.

The U.S. may experience continued trade deficits and possibly large current-account shortfalls in the 1980s, despite the expectation of annual increases in export volume and services earnings. The reasons include the anticipation of continued slow advances in productivity, continued high inflation, and increases in oil import costs. These problems are compounded by the erosion of U.S. competitiveness stemming from its loss of a technological edge.

To solve or mitigate these problems, it is vital to encourage plant modernization and "reindustrialization" through productivity-enhancing tax reductions, stepped-up research and development, real inflation control, and a reduction in energy dependence. If the proper steps were taken to strengthen the domestic economy and to eliminate export disincentives and impediments, then there would be no need for an Export-Import Bank, or its attendant controversy.

Developing Nations—Aid and Trade

Trade issues involving developing nations have become tangled with aid questions and cannot always be handled separately. In particular, the North-South dialogues between the developed (northern) world and the underdeveloped (southern) nations encompasses several areas: multilateral loans (such as through the World Bank), bilateral aid, straightforward problems of tariffs and access to markets, and a whole range of proposals for buffer stocks and commodity agreements.

Tariffs and Market Access

The principles of free trade apply here. Access to markets should be mutual, unimpeded by tariffs and nontariff barriers. Trade should not be restricted. However, it should not be overstimulated by subsidies and dumping either, whether the subsidies are granted by the exporting nation or in the form of preferential tariff treatment by the importing nation.

International Commodity Agreements

No useful purpose can be achieved by entering into price-fixing arrangements for international commodities. Such arrangements always degenerate into efforts to restrain trade and support prices. This is a grossly inefficient form of foreign aid, leading to overreliance on the supported crops or minerals by the exporting countries. If buffer stocks are desirable, the private sector will provide them. That is the function of the commodities future markets, among the most efficient in the world. The best interests of the United States clearly lie in avoiding the cartelization of any more raw materials. Treasury should seek to bring all such negotiations to an end, whatever the feelings of other Departments involved. One OPEC is enough.

The Multiateral Aid, Institutions and Alternatives

The United States currently directs its international development efforts through a host of multinational organizations, many of which fall under the auspices of the United Nations. In addition, the U.S. participates in several regional development banks, the most recent being the African Development Bank (AFDB).

It is, however, the official U.S. foreign assistance transfer through the international financial institutions comprising the World Bank Group (the World Bank and its sub-organizations, the International Development Association and the International Finance Corporation) which receive the majority of the U.S. funding for multilateral development assistance.

The Secretary of the Treasury has joint responsibility with the Director of the International Development Cooperation Agency for U.S. policies towards and in the multilateral development banks. The United States Government appoints an Executive Director to each such bank and association.

Parenthetically, it should be mentioned that the Treasury

Department, in addition to its responsibilities with regard to the multilateral development banks, participates in the formulation of U.S. development assistance policy through its membership in the National Advisory Council on International Monetary and Financial Policies, in the Development Coordination Committee, and in various other interagency committees designed to coordinate economic assistance programs. Treasury's stated principal concerns are to promote the efficient utilizaton of development assistance resources and to assure that bilateral aid objectives and programs remain consistant with overall U.S. economic interests and with U.S. multilateral aid efforts, in particular.

The International Bank for Reconstruction and Development (IBRD), or World Bank, was founded in 1945 during the Bretton Woods Conference which reviewed postwar economic conditions.

Set up as a counterpart to the International Monetary Fund (whose purpose is to maintain global exchange rate stability), the Bank draws its members only from those nations belonging to the IMF. To date, 134 governments own the World Bank through their capital subscriptions. The U.S. has contributed almost 24 percent of total subscriptions plus supplemental resources and in return possesses 21.48 percent of the total voting power.

The purpose of the IBRD is "to promote private foreign investment by means of guarantees or participation in loans and other investments made by private investors; and when private capital is not available on reaonsable terms to supplement private investments." Additionally, the Bank's Articles of Agreement state that lending to developing countries must be both productive and stimulating to economic growth.

The International Development Association (IDA) was created in 1960 to fill a void in the World Bank's operations in dealing with the lowest income level developing nations. The IDA is often referred to as the "soft-loan" window of the World Bank because it extends interest-free credits for up to fifty years, with a ten-year repayment grace period. The only additional cost to the recipient country is a 0.75 percent annual service charge on the principal. Importantly, unlike the IBRD which borrows on the private capital market and charges near-commercial interest rates to borrowers, IDA credits are funded by taxpayer contributions and involve a large subsidy or grant element (wealth transfer).

Among the 121 members, the U.S. is the largest subscriber,

accounting for 30 percent of total subscriptions and supplemental resources while holding only 20.8 percent of the total voting power.

IDA bears the responsibility for fulfilling the basic objective of providing increased assistance toward solution of basic human needs requirements in the lesser developed countries. However, the shocking statistics show that only a little over one percent of IDA funds have been allocated for populaton and nutrition.

The International Finance Corporation was established in 1956 as an affiliate of the World Bank. The IFC's current membership totals 109, of which 88 members are categorized as developing countries. The explicit purpose of the IFC is "to further economic development by encouraging the growth of productive private enterprises in member countries, particularly in the less developed areas."

The IFC has the unique ability to make both equity and loan investments. Financing is based on commercial terms with the normal maturity dates between 7 and 12 years. The principal means of supplementing its own resources is through syndication, most often by offering sale in participation of an IFC loan at the initial stage of investment.

The U.S. share of total subscriptions in the IFC is approximately 35 percent of the total voting power. The IFC is generally viewed as a succesful operation.

The multilateral development institutions periodically require increases in their capital and the replenishment of their soft loan (low interest, long maturity) windows, requiring action on the part of the U.S. Government, including the Congress.

Additionally, the U.S. Executive Directors must be instructed on how to vote on individual loans by the institutions. While such instructions are often routine, they do often involve complex issues relative to direct U.S. interests.

Therefore, it is particularly alarming that the institutions, the World Bank in particular, have been the subject of intense Congressional committee scrutiny and criticism in respect to details of operations—including inflated salaries, suspected irregularities, loan policies, etc.

Nevertheless, compared with its bilateral assistance, the U.S. has placed increasing emphasis on multilateral sources for aid to developing countries. There is little doubt that multilateral banks are more efficient economically than bilateral aid programs, resulting from the high quality of their personnel and

the relative absence of procurement limitations such as "Buy American" requirements.

Still, hidden beneath the widespread discussion are some fundamental questions:

First, is it a wise use of the taxpayer's dollars (labor) to support the economic development of foreign nations when our Government has little or no control over the disposition of the funds? Because of their multilateral nature, the recipient governments have no reason to focus on the source of the funds, and consequently, they have no reason or incentive to relate U.S. charity to their official international policies. The question arises, if the same amount of funds distributed through multilateral sources, over the years, had instead been provided bilaterally by the U.S., would not the U.S. have gained more influence over the rest of the world?

For example, during the past decade, there has been a substantial increase in the precentage of total economic aid distributed through multilateral development banks: from 28 percent of total aid in 1969 to 51 percent in 1979. Concurrently, the level of hostility of the recipient nations appears to be a function of the increasing contributions to their development. Demands for assistance have become more vocal and brazen. This is readily witnessed in the shift of factions in the United Nations, where the recipient nations constantly speak out against any American viewpoint.

On the other side, directors of the multilateral banks increasingly tend to insinuate and openly declare that any restrictions placed on U.S. contributions would result in the immediate demise of the instititions. Such extreme appeals have been voiced by World Bank President Robert McNamara in response to Congressional restrictions on indirect aid transfers to several countries.

The challenge is to find the most effective means through which U.S. aid resources can be channeled to guarantee their optimal economic and political utilization.

Second, given the enormous growth of the international capital market in the 1970s, are those institutions really needed to funnel capital to the less developed world?

Of the 89 less developed countries to which the World Bank has made a loan, 64 have borrowed money for more than one year on the capital market during 1976-79. Such a record hardly suggests an imperfection in world capital markets.

The World Bank, after all, has never had a default and its

portfolio of loans is widely diversified, making them attractive investments.

For example, during IBRD fiscal year 1979, the Bank's borrowers repaid $978 million of principal, $843 million to the Bank and $135 million to purchasers of loans. The present return on assets is 7.8 percent while the cost of total funds has now reached 6 percent. Net income of the Bank is fiscal year 1979 was $407 million, up $169 million, or nearly 71 percent, from the previous fiscal year.

Finally, should the U.S. stop giving money to the banks for very long maturity and low interest rate loans, e.g., 3/4 of 1 percent for 50 years? Calls for such termination have surfaced upon the argument that such loans are less efficient means of transferring real resources to the less developed world than either hard loans or pure grants.

During the current period of growing austere domestic economic policies, the U.S. must rethink its commitment to foreign assistance and development efforts. Without becoming hostage to Third World demands for help, the U.S should maintain and even increase its link in these nations for their potential resource supplies and markets. However, there is serious queston whether long-term U.S. interests are better served by increasing dependence upon multilateral development banks, or by heavily reverting to bilateral assistance.

TREASURY ORGANIZATION

Tax policy and its effect on long-run growth is becoming the central focus of economic policy and theory. The Treasury must play a more active and cooperative role in this transaction in the future.

In order to implement the shift in tax policy from short-run considerations to fundamental reform of the tax code for long-run growth, and to better integrate tax policy and national economic policy, some reorganization of the Department seems advisable.

There are two Undersecretary posts at Treasury. Currently, one undersecretary is designated as the Undersecretary for Monetary Affairs. The other undersecretary oversees operating subdivisions of the Treasury such as the Mint, Bureau of Engraving and Printing, the Customs Service, Bureau of Alchohol, Tobacco and Firearms, the Secret Service, etc. These operating subdivisions do not have sufficient involvement in policy questions to require attention of an undersecretary.

On the other hand, day-to-day operating responsibility for

tax policy is now assigned to an assistant secretary. Because of the importance of tax policy and fiscal matters, these responsibilities should be given an undersecretary who also would be in charge of coordinating tax and economic policy, and the IRS. It is suggested that this second undersecretary post be filled by someone sympathetic to the need to reorient tax policy toward economic growth and neutrality rather than redistribution. In this effort, he should be supported by knowledgeable and compatible Assistant Secretaries for Tax Policy and Economic Policy.

The Commissioner of Internal Revenue (Level III), the Assistant Secretaries for Tax Policy and the Assistant Secretary for Economic Policy (Level IV) should report to this Undersecretary (Level III) rather than, at present, to the Deputy Secretary, who usually has not had previous experience in tax matters.

In addition, there are sound reasons for combining the operations of the U.S. Customs Service with those of the Bureau of Alcohol, Tobacco, and Firearms into a new agency, the Customs and Excise Service Agency. Better enforcement would result, along with substantial cost savings that, in part, can be applied to strengthen the tax economic policy staff responsible for helping the Undersecretary carry out his increased responsibilities in those areas.

These points are described in more detail in the following sections.

Organization of the Treasury Department with Respect to Tax Matters

The Undersecretaries

Since 1972, the Treasury has had a Deputy Secretary and two Undersecretaries, one of whom is designated as the Undersecretary for Monetary Affairs. When the second Under Secretary was authorized, it was contemplated that the post would be occupied by a person versed in taxes, but in recent years that has not been the case. In the Carter Administration it has been used for supervision of miscellaneous activities such as various administrative offices, the Bureau of the Mint and the Bureau of Engraving and Printing, but not for development or execution of major Treasury initiatives.

Clearly one of the principal issues facing the country, particularly at the present stage, is the modification of our Federal tax structure and improvement in tax administration.

It requires the attention of an Undersecreatry who is committed to tax policies, as outlined earlier in this paper, which are oriented toward economic growth and the elimination of the tax biases against saving, investing and work effort; policies which are aimed at expansion of GNP rather than redistribution of existing GNP. At present, these highly important matters are in the charge of Assistant Secretaries. It should be the responsiblity of an Undersecretary because:

1. The occupant of the post has the major responsibility of testifying before congressional committees, advocating enactment of the Treasury's program, negotiating concerning congressional initiatives, and dealing with the White House, OMB and other departments regarding taxes.

2. A more seasoned and experienced person can be attracted to the post.

3. A major problem that has beset federal tax administration has been the frequent inability of the Commissioner of Internal Revenue and the Assistant Secretary of the Treasury for Tax Policy, and their staff, to come to agreement on important issues. This has produced frequent delays in the issuance of regulations and rulings, and has led to a growing series of legislative amendments to the tax law to overturn IRS positions with which Treasury personnel do not agree. The Commissioner (Level III) and the Assistant Secretary (Level IV) should report to the Undersecretary (Level III). If he is experienced and respected in tax matters, the Undersecretary can be empowered to resolve the differences that have not been worked out by negotiation. At present, these differences often remain unresolved because the Secretary and the Deputy Secretary are occupied with other matters and are not versed in the intricacies of tax issues.

In view of the critical importance of improving the tax structure, the Treasury Department must take a far more active leadership role in the formulation of tax policy than it has during the past several years. To this end, the technical staffs supporting the Assistant Secretaries for Tax and Economic Policy, particularly the Office of Tax Analysis, should be expanded and strengthened.

Strengthening the competence and determination of Treasury to deal with tax restructuring and economic policy is essential for any administration which wants to influence economic policy.

But this must be done carefully. At present, leadership in modernizing tax and economic policy is clearly coming from

the Senate Finance and House Ways and Means Committees, particularly the former. Accordingly, as the Treasury Department strengthens its tax policy organization and effort, it should work closely with the principal House and Senate Members concerned with tax policy. Close coordination and a good working relationship beteen the Department and the key Committees and Members is essential if an ambitious administration tax agenda is to succeed.

Assistant Secretary for Economic Policy—An Increased Role

At present, the position of Assistant Secretary for Economic Policy is ill-defined. In theory, he is the chief economist for the Treasury Department. But in the scheme of things, he has very little impact on policy, either within the administration as a whole or the Treasury itself. He is overshadowed by the Council of Economic Advisors and economists at Commerce, OMB, and the Federal Reserve. It would be advisable for the Assistant Secretary for Economic Policy to play a more active role. His primary function should be to aid the Undersecretary in coordinating the Offices of Tax Policy and Economic Policy to forge a consistent tax and economic policy for the Department and the administration.

According to the *U.S. Government Manual*, the Assistant Secretary for Economic Policy informs the Secretary and other senior Treasury officials of current and prospective economic developments and assists in the determinaton of appropriate economic policies. He is responsible for the review and analysis of both domestic and international economic issues, as well as developments in the financial markets.

In addition, the Assistant Secretary for Economic Policy participates with the Secretary in the Economic Policy Group (EPG), which develops the official economic projections and advises the President on choices among alternative courses of action. Within the Office of Economic Policy, the staff support for EPG activities is provided by the Office of Financial Analysis and the Office of Special Studies.

With regard to international issues, the Assistant Secretary for Economic Policy develops forecasts of U.S. trade and current account balances for use by Treasury officials in formulating international trade, monetary, and energy areas. Moreover, the Office of Economic Policy produces information on flows of banking and corporate capital into and out of the U.S. and on the extent of portfolio investment by foreigners in the U.S. and by resident Americans abroad.

It would seem desirable to upgrade the office of the Assistant Secretary for Economic Policy so that some of the areas of Treasury responsibility—particularly tax policy—are managed more in line with economic reality. As it stands, the Assistant Secretary for Tax Policy and the Commissioner of Internal Revenue act without sufficient concern for the impact of tax policy on economic performance.

This objective can best be accomplished under the reform suggested earlier, reassigning the Undersecretary to an oversight role covering the IRS, Tax Policy, and Economic Policy. In this manner, technical, political, and economic issues can be fully aired before the Undersecretary who would properly give considerable weight to economic issues when adjudicating conflicts.

Coordinating Tax Law Litigation Responsibilties

Presently, responsibility for drafing tax legislation, refining statutes for administrative purposes, and litigating tax questions is diffused. There is a clear need for better coordination.

1. The Office of Tax Legislative Counsel, which reports to the Assistant Secretary for Tax Policy, has the responsibility of drafting legislation and reviewing regulations.

2. However, the Legislation and Regulations Division of the Office of Chief Counsel of the Internal Revneue Service makes certain tax policy recommendations based upon a review of court cases and recommendations from the Office of Assistant Commissioner (Technical) and the Office of Assistant Commissioner (Exempt Organizations and Employee Plans).

3. Further, the Internal Revenue Service litigates its own cases which arise as a result of the issuance of a deficiency notice and the filing of a petition in the United States Tax Court.

4. Finally, all other tax litigation is handled by the Department of Justice, including appeals of adverse Tax Court decisions. The Assistant Attorney General (Tax Division) controls the disposition of tax litigation under his jurisdiction through various branches (Trial, Apellate, Court of Claims and General Litigation). The Solicitor General of the United States has the authority to determine whether or not an unfavorable Tax Court opinion or an unfavorable District Court of Court of Claims decision will be appealed. Under exceptional circumstances or exceptional cases, the Deputy Attorney General of the United States or the Attorney General of the United States get involved in the appeal process.

Unfortunately, there is no formal consulting policy between the Department of Justice Tax Division and the United States Treasury Department. The Commissioner of Internal Revenue, the Assistant Secretary for Tax Policy and the Assistant Attorney General (Tax Division) have held several meetings in the course of the last four years, but they have been informal gatherings. It would seem logical to encourage closer cooperation among the various parties involved.

Internal Revenue Service

The Internal Revenue Service can and should become a more efficient agency for the administration and enforcement of the existing tax laws. It should be very careful not to use its regulatory or rulemaking powers to try to make new tax law.

The 90,000 personnel of the IRS represents over 70 percent of Treasury employees. They are charged with processing over 80 million individual and 4 million corporate tax returns annually, plus returns of partnerships, proprietorships, and nonprofit organizations. Given this widespread contact with the public, it is essential that the IRS operate in the most efficient, fair, and even-handed manner possible to administer and enforce the tax code.

The IRS employs its rulemaking powers to translate the Internal Revenue Code into the forms and procedures used by taxpayers to comply with the code. There have been complaints that the IRS has exceeded its authority in this area by using its regulations, revenue rulings, and private letters to enforce the code in a manner not strictly consistent with the content of the law and congressional intent. Under no circumstances should the IRS be permitted to use its rulemaking authority to act as if it were legislating tax law.

One means of smoothing IRS relations with the public and discouraging any tendency to go beyond a strict interpretation of the law is to permit more liberal awards of court costs to taxpayers who win cases against the IRS. Several bills to that effect are under active consideration in Congress.

Other Changes

Merging the U.S Customs Service and the Bureau of Alcohol, Tobacco and Firearms

Major savings in the Treasury budget can be accomplished if the U.S. Customs Service and the Bureau of Alcohol, Tobacco, and the Firearms (BATF) were merged, thus creating a new

Customs and Excise Service instead. These savings are estimated at $25 to $30 million.

The duties of the Customs Service and BATF are similar, and this is the major reason why the two organizations should merge. Customs and BATF both regulate and collect taxes on tangible property. The basic difference is that Customs oversees imported tangible products while BATF monitors mostly products developed domestically.

Specifically, Customs issues regulations for the importation of cargo, makes physical inspections, and physically takes control in supervised bonded warehouses of products coming into the country. After collecting duties and checking for the compliance of import regulations, cargo is released to the domestic purchaser.

Similarly, BATF regulates the taxation and distribution of specific tangible property, alcohol, tobacco, and firearms. Checking the flow of illegal weapons into the U.S. is a BATF function as are efforts to keep firearms out of criminal hands. This function logically should go to the Customs' Office of Investigations, along with BATF investigators trained to detect the flow of firearms. Such a transfer would permit more vigorous enforcement of laws governing the import and export of firearms and munitions at ports of entry. BATD alone does not have the staff now to do this job well.

BAFT's role in tobacco industry is limited to the collection of excise taxes. Like Custom procedures, tobacco products are first sent to bonded warehouses and taxes collected before distribution to the publc.

Regulation of the alcohol industry includes: (1) physical supervision over production facilities and operations; (2) licensing of producers and distributors; (3) control and security of alcoholic products until taxes are paid or the product is exported; and (4) on-site audits of books and records. Since bootlegging has diminished, the enforcement function of BATF in this area has fallen. This permits an increase in Customs staff, which is desirable in light of increasing foreign trade, if a merger is accomplished.

Although the transfer of BATF functions into a Customs and Excise Service would require involvement in domestic activities, there is ample precedent for doing so in many Western nations. Canada, France, and Germany all combine Customs and excise activities within a single agency.

Finally, rationalizing Customs and BATF procedures not only would lead to better enforcement of the laws, but it

generates a source of funds needed to hire additional professional staff to carry out the major reform suggested, guaranteeing that tax policy contributes to economic growth.

BUDGET

None of the recommendations contained in this report, with the possible exception of expansion of the IRS to promote more efficient administration of the tax laws, should change the magnitude of the budget requirements for the Deparment of the Treasury.

PART II

INDEPENDENT REGULATORY AGENCIES

James E. Hinish, Jr., Editor

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REGULATORY REFORM: AN OVERVIEW

James E. Hinish, Jr.

The purpose of this overview is to discuss briefly the major initiatives that should be pursued by a new administration as part of its program to reduce government regulation and improve the operation of the federal regulatory system. No effort is made to repeat or summarize all the findings and conclusions of each task force which was assigned to analyze the programs and policies of the independent agencies. These twelve reports, including the transcript of the management Roundtable, are much too lengthy and complex to be dealt with here. Rather, they should be carefully scrutinized and digested and their recommendations considered and debated on their own merits.

The Crisis of Overregulation

No task confronting a new administration is more urgent and will be more difficult to handle than the economic mess that it inherits in January 1981. One of the major factors contributing to the problem is government overregulation.

The extraordinary growth of government, particularly during the past decade, has brought mounting costs to society which, in turn, have added to inflationary pressures, reduced productivity, discouraged new investment, and increased bureaucrats' intrusion into everyday life. Government regulation itself has become a major growth industry supported by the nation's taxpayers. Regulatory costs are now running in excess of $100 billion a year, or about $1,800 for every American family.

Regulation produces many indirect, immeasurable costs as well. It restricts personal choices and tends to undermine our democratic public institutions. It has led to increased

bureaucratization of industry. Businesses cannot make ordinary management decisions without prior clearance from regulators who are less concerned with profit and loss figures or their agency's overall mission than with the complex details of each new rule or standard. By generating excessive delays and bureaucratic red tape, overregulation makes long-term investment planning more difficult. It also retards technological innovation and hinders the availability of new products on the market. In short, regulation threatens to destroy the private competitive free market economy it was originally designed to protect.

The Carter Record

During the past four years the regulatory problem has worsened. While the Carter White House, in the heat of the reelection campaign, took credit for "deregulation of the free enterprise system," the truth of the matter is that the Carter Administration and the Democrat-controlled Congress can be given credit only for refining trucking and railroad deregulation programs initiated by the previous Republican Administration. At the same time, the Carter Administration must be held responsible for establishing two gigantic new departments as a means of tightening Washington's hold on energy and education. In contradiction to 1976 campaign promises to trim the size of government, the number of federal civilian employees rose from 2.7 to roughly 3 million. The number of consultants, outside contractors and other workers paid indirectly by Washington soared to 8 million. The number of pages in the Federal Register devoted to new regulations jumped from 57,000 in 1976 to 77,000 in 1979—and will reach 90,000 by the end of 1980! The size and budget of the White House staff has doubled in four years. Thus, the new President will face a crisis situation in which excessive regulation remains a major component of spiraling inflation and continues to stifle private initiative, undermine individual freedom, and threaten state and local autonomy.

Differing Approaches to the Problem

Disagreement exists regarding the means of improving the regulatory system and the extent to which the size and scope of the federal government should be cut back. The new Administration should emphasize the role of free individuals in a free society and the importance of strengthening federalism

as well as returning powers, programs and funding to state and local government.

The Carter Administration stressed the desirability of making government more efficient and protecting numerous social programs from dismantlement.

Several reforms have been suggested which must be taken into consideration. As summarized, these proposals would:

1. Support block grants and revenue sharing as a means of returning power to state and local government.

2. Establish a Hoover-type commission to recommend ways of reorganizing and reducing the Executive Branch.

3. Consolidate agencies to end waste and eliminate red tape.

4. Deregulate the energy, transportation and communications industries.

5. Support specific reforms, including regulatory analysis, changes in the Administrative Procedures Act, and sunset legislation.

6. Reduce federal paperwork and make agencies justify forms.

7. Guarantee fairness to workers through full employment without inflation, equity in labor relations, and protection against use of dues for partisan politics. Reaffirm support for state "right-to-work" laws.

8. Support management-worker health and safety committees, curbs on OSHA and exemptions for small and safe employers.

9. Strengthen existing consumer safeguards. Oppose new consumer protection bureaucracy and intervenor funding.

10. Promote stronger political parties and full participation in electoral processes, but oppose postcard voter registration and taxpayer financing of federal campaigns.

11. Establish a temporary moratorium on new regulations, consistent with health and safety.

12. Exempt small businesses (defined in some instances as those with gross receipts of up to $100,000 or having less than 100 employees) from all regulatory and paperwork requirements, except those mandated by statute. Where exception is not feasible, small business should be subject to a less onerous tier of regulation.*

13. Reduce drastically the number of government-hired consultants.

*The "regulatory flexibility" concept, endorsed by the White House Conference on Small Business, was contained in legislation which was enacted this fall with bipartisan and White House support.

14. Require the Federal Government to provide restitution to individuals and small businesses who prevail in actions brought against an agency. The successful plaintiff should be reimbursed for attorney fees and court costs from the offending agency's budget.*

15. Simplify the procedures for persons seeking court review of agency actions. The agency, rather than the challenger, should have the burden of providing that its action was valid (the so-called Bumpers Amendment).

16. Establish a Federal regulatory budget setting annual limits on costs of compliance with the regulatory requirements of every agency.

17. Improve the oversight of regulatory and spending programs. Within the Executive Branch, coordination should be centralized under a single policy office and should be made to cover independent as well as Executive Branch agencies. Congress should also strengthen its oversight functions, in part through "sunset" and legislative veto procedures.

18. Improve citizen participation in the regulatory process. Provide adequate notice and lengthen uniformly the comment period for public citizens and groups affected by the outcome of an agency proceeding.

An Agenda for Reform

The new President has an excellent opportunity to initiate what could become the most comprehensive and far-reaching program of regulatory reform ever undertaken by any administration in the nation's history. The time for reform is ripe. Deregulation has become, after initial efforts by Presidents Nixon, Ford and Carter, a popular cause—not merely with scholars, commentators and conservative critics, but also with politicians of all stripes.

The conservative's dream of doing away with government controls and abolishing federal agencies is now more generally understood and accepted by large segments of the population, including skeptical businesses and consumer groups wielding political clout who had long favored such regulation. The intellectual case for reform was made long ago; now it has been tested, and in the case of the nation's airlines, deregulation has succeeded beyond expectations. Moreover, economic recession and inflation have provided the needed spur for

*This concept is included in the so-called "Equal Access to Justice" Act which was passed by Congress and signed into law in October 1980.

speeding up deregulation, at least in certain industries. In 1980 the 96th Congress enacted measures providing for partial or gradual deregulation in certain segments of the economy—trucking, railroads and banking. The prospects for deregulation legislation in the telecommunications field are most promising for the 97th Congress. Obviously there are many over-regulated areas badly in need of overhaul. The question is not whether deregulation or regulatory reform is desirable, but where and how soon can it be achieved.

Based on the following studies by the project task forces, it is clear that few generalizations can be made about all the agencies, that each independent commission has its own particular set of problems, and that there are no simple panaceas which can be applied uniformly to all agencies.

There are certain conclusions that can be made, however. Some major points that the Administration should keep in mind:

1. *Use the appointment power wisely. Act promptly to fill vacancies and find persons of high quality and friendly persuasion.* Because the independent agencies are creatures of Congress, the President has little leverage over their actions. To help ensure that his regulatory policies are being carried out by the bureaucracy, he should make sure that agency heads and supervisors are persons he can trust who are sympathetic to deregulation. Accordingly, his most important weapon in the war against regulatory redtape, paperwork and overkill is his appointment power. To be effective, it must be used judiciously, deliberately, and in timely fashion. The President must fill each agency vacancy and chairmanship promptly. Every candidate should be subjected to the most careful screening in the selection process, and there should be as many good candidates available for each position as can be found. Each appointee should be a person of integrity whose background and experience indicate his capacity to carry out his duties faithfully, to perform ably under pressure, and to work well with other agency employees and other members of the Administration's team. The single *most important qualification,* however, must be that the appointee share the general philosophy and outlook of the President. Thus, for a new conservative Chief Executive to place those who favor expansion of government, however talented, in positions of responsibility and authority will only lead to disaster and frustration in the President's program.

2. *Early Action: Issue Executive Orders.* Among his first acts

upon assuming office, the President should issue Executive Orders which will:

- Extend the federal hiring freeze imposed by President Carter in 1980. There is no need to add to the size of the bureaucracy.
- Impose a temporary moratorium on new federal regulations except (1) those mandated by law, (2) as required by health and safety considerations, and (3) as required by emergency situations.
- Direct each Executive Agency to adopt certain procedures to improve existing and future regulations. This directive would be the new President's own version of Executive Order 12044, issued by President Carter on March 23, 1978.

Among other things, this Executive Order should direct all executive branch agencies to review and simplify their procedures for developing regulations, to compile and review all existing rules with a view to scrapping those which are unnecessary, contradictory, or no longer effective, and to submit all proposed regulations to a regulatory analysis. Moreover, the agencies should be mandated to weigh the costs and benefits of all existing and proposed regulations. As part of his legislative package the President should request Congress to extend similar requirements to the independent regulatory commissions across-the-board.

A regulatory moratorium lasting from perhaps six to nine months will give the new administration sufficient time to (1) assemble a blue ribbon, bipartisan panel of distinguished citizens (business leaders, Members of Congress, economists, etc.) to study and make recommendations on ways to improve the operation of government, regulatory programs that should be abolished, and the like; then, based upon that group's recommendations, to (2) formulate an immediate and medium-term regulatory reform program, including plans of execution and legislative agenda. This early action by the President would signal to the Congress, the bureaucracy, and the public alike that the new administration is serious about its promises.

3. *Choose carefully the targets of opportunity.* The new President should not attempt to tackle all regulatory ills at once. Whatever reforms are needed must be requested from the Congress in any case. Certain problems are not so severe nor agencies important enough to expend the initial time and effort—and prestige—of the White House. At the beginning, the Administration should concentrate on seeking relief for hard-pressed industries (e.g., relaxation of EPA's clean air

standards), on situations which have a serious impact on business and the economy—in line with the candidate's campaign promises—and which also have the greatest likelihood of immediate success. Thus, while in an ideal climate it might be nice to abolish the Commodities Futures Trading Commission merely because it is unneeded and accomplishes very little, the Administration would be better advised to push for a temporary moratorium of major regulations (see discussion above) which would likely benefit the economy and most consumers. Moreover, successful deregulation of the trucking or communications industry would make it much easier for later deregulation of other industries.

4. *Involve Congress in the early stages of a regulatory reform program.* It is essential that the new administration consult with Members of Congress of both parties, particularly party leaders of both Houses and the powerful chairmen of the appropriations and standing committees which have jurisdiction over targeted agencies or programs. Because their support of a particular reform proposal can be crucial to its success, Democratic and Republican leaders of Congress should be made to feel part of the Administration's reform enterprise from its inception. Potential supporters on Capitol Hill should be sought out and kept well-informed of plans, while potential advocates should be identified early to carry the ball for the White House. Potential opponents should not be shunned; their opposition should be neutralized, if possible, at an early stage, and efforts should be made to meet their major objections in a spirit of goodwill and cooperation.

5. *Prepare a sound strategy; make the strongest possible case; build popular support.* As part of its overall strategy, the Administration should involve trusted outsiders in the planning and execution of a regulatory reform program. It is important that, in addition to Congressional leaders, bipartisan support be nourished among leaders of affected business and labor groups, local government, consumer organizations and other such groups. As the airline deregulation story illustrates, a successful strategy must start with the laying of the intellectual groundwork. This can be done by having Congressional leaders agree to schedule hearings on the subject during which persuasive testimony can be taken from Administration spokesmen, from scholars and experts, from business, consumers and ad hoc citizen groups formed merely to educate the public on the issue. For any great undertaking, particularly involving controversial regulatory issues, it must be remem-

bered that time and patience, together with careful planning, will be required. Most major reforms will not come easily or quickly.

6. *Deregulation should be implemented where possible: but it may not be applicable in all instances and the Administration may have to settle for showcase reforms instead.* Deregulation is working well in the airlines industry and it should succeed as well in other forms of transportation. Communications seems a likely target for deregulation, although radio should make an easier target than television and broadcasting should be less difficult to deregulate than telecommunications. Moreover, the problems of economic regulation are more amenable to deregulation efforts than health and safety regulations. There exists, on the contrary, widespread support for continued regulation of industry where health and safety conditions are at stake or where fraud might exist. Consumer and labor activist groups, while less powerful in an increasingly conservative climate, are still succeeding in convincing the public to believe that regulation is required to keep society healthy and clean. Thus, it is unlikely that there will be any considerable movement in favor of abolishing the Commodity Futures Trading Commission, the Securities Exchange Commission or the Federal Trade Commission. In fact, the industries regulated by these agencies are as much in favor of keeping the protective shield of regulation as are labor and Naderite groups in protecting the public from the excesses of "big business." It would be more prudent for the new administration to avoid taking on such sacrosant agencies as the FTC and CPSC and concentrate instead on making better appointments to these agencies and improving their efficiency.

Agency Survey

Based on the attached project team reports, the following conclusions may be made:

Transportation

Civil Aeronautics Board: Deregulation should be accelerated, with an earlier sunset of the Board.

Interstate Commerce Commission: It will take time for the Motor Carrier Act's reforms to take effect. Graduated deregulation should continue with the immediate appointment of a new chairman and additional members, increasing the agency's size from seven to 11 and giving the President a pro-

deregulation majority. Some additional reforms may be required of Congress at a later date.

National Transportation Safety Board: A candidate for abolition with an undistinguished record.

Federal Maritime Commission: A candidate for abolition, but political realities suggest that it will not be an early candidate. Reorganization, accompanied by a transfer of certain functions and a reduced budget, is the more likely alternative.

Federal Transportation Policy: A new administration should establish an ad hoc transportation policy group under White House auspices which would review all Federal laws, including deregulation statutes, governing U.S. air, rail, trucking and maritime transportation code. This code would not merely restate the economic insights of current reform statutes, but would address constitutional and procedural issues, interagency coordination and other related matters. Such a code would serve as a model for improving federal regulation generally.

Communications

While the Federal Communications Commission should be applauded for instituting certain changes designed to eliminate paperwork requirements, lessen federal controls and introduce greater competition, much more needs to be done. Communications is the next prime target for comprehensive deregulation. A new administration should give full support to enacting sound deregulation bills which, among other things would: (1) abolish all but FCC technical requirements over radio and cable; (2) reduce most regulation over television, eliminating the fairness and equal time requirements altogether and easing license renewal; and (3) open up competition in telecommunications industries, while permitting the telephone companies to enter new fields. An early success in this major regulated area—which is likely—combined with continued progress in transportation reforms, should strengthen the prestige of the Administration for other solutions to the problems of overregulation.

Other Economic Regulation

Securities and Exchange Commission: The administration should support certain legislative reforms, including the securities code revision and amendments to the Foreign Corrupt Prac-

tices and Glass-Steagall Acts. Selection of good commission members and personnel is critical.

Commodity Futures Trading Commission: A minor agency with a poor record of accomplishment. It is too new for abolition since it has yet to cause major opposition; in fact, the commodities futures industry, fearing SEC controls, wants to keep this agency alive. For the immediate time, an advisory group should be appointed to submit recommendations in the 1982 authorization and its budget should be trimmed.

Federal Trade Commission: An important agency whose policies have become very "anti-business" and "pro-consumer." Due to its political sensitivity, the FTC has to be approached cautiously. The Administration should seek certain statutory changes in the agency's enabling laws that would divest the Commission of its anti-trust functions and thus narrow its rulemaking authority. For instance, the White House could support ABA recommendations which would eliminate the FTC's much criticized dual role as prosecutor and judge in anti-trust cases (contained in two bills, S. 1980 and H.R. 6589). Here, once again, Commission appointments, staffing and personnel management are critical.

Consumer Product Safety Commission: Everyone is for "consumer product safety" and the Commission, despite a spotty record of poor enforcement, inefficiency and overzealous meddling, is not a likely candidate for deregulation soon. Since the CPSC seems unable to carry out its mandate, it should be directed to concentrate its efforts on consumer education. An effort should be made to cut its budget and eliminate much of its rulemaking and enforcement authority. However, as the CPSC is not a major agency, radical reforms should be postponed until successes are achieved elsewhere and the climate favoring *federal* safety regulation changes.

Special Cases

U.S. Postal Service and Postal Rate Commission: The Post Office is in such a mess that the new President should avoid taking charge of it. The Postal Service should be subject to more competition as a way of controlling costs. While the postal monopoly is being reviewed by the Justice Department, legislation should be sought for direct subsidies for maintaining rural and small-town service (this approach worked well in securing airline deregulation). The Postal Service should be stopped from any attempt to monopolize telecommunications services.

The Federal Election Commission: Because of the political sensitivity of the Commission's mission, there is no chance this new agency can be abolished soon. Appointments of Commission members and the General Counsel are the key to improving its performance. The Administration should also seek major changes in the Federal Election Campaign Act to close troublesome loopholes and clarify certain problems.

End the Federal Pay Freeze

If a new President wants a sure way of winning friends and influencing people in the Federal bureaucracy, he would push for an end to the current pay freeze, while retaining the hiring freeze. Most bureaucrats are professional civil servants dedicated to doing a good job and trying to make the system work, rather than being partisan obstructionists against reform. (Moreover, the new civil service reforms ensure some job protection for all but the "Schedule C" employees.) However, those in the top layers of the bureaucracy are angry and resentful at the freeze; many of the most skilled civil servants have opted for early retirement. Morever, it will be difficult for the new administration to attract new blood if those most qualified to serve are not able to serve without severe financial sacrifice. Thus, for the sake of making regulatory reform a smoother enterprise and alleviating the fears and misunderstandings of the civil servants whose ideas and energies will be needed to make reform succeed, the President should, among his earliest acts, declare his support for undoing the wage freeze. In addition, the President should direct the Pay Commission to reexamine its formula for comparing government and nongovernment salary and wage scales.

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CIVIL AERONAUTICS BOARD

James I. Campbell, Jr.

INTRODUCTION

When Congress established the CAB in 1938, it delegated to the Board four basic powers. First, the CAB could grant or deny a certificate to operate a given route and hence to get into the airline industry in the first place. Second, the CAB could prohibit any prices which were unjustly or unreasonably high, low, or discriminatory. Third, the CAB could award subsidies to bolster air service to small towns. Fourth, the CAB could immunize inter-airline agreements from the antitrust laws.

Between 1938 and 1978, the Board generally used these powers to retard competition among airlines. Price competition was discouraged, new trunk airlines were prohibited, and the shifting of routes by existing airlines was hampered. The subsidy program grew to $70 million per year, although little of this subsidy was in fact providing air service to those who would not otherwise receive it. While restraint of competition and provision of unneeded subsidies were not intended by Congress in 1938, they appear to have been the CAB's policy.

In 1979, the domestic airline industry earned $17.49 billion while producing 181 billion passenger-miles and other services. The U.S. international aviation industry earned $5.19 billion while producing 52 billion passenger-miles and other services.

Aviation Acts of 1978 and 1980

The Airline Deregulation Act of October 1978 provided for phased deregulation of most of the domestic aviation industry between 1978 and January 1, 1985, except that regulation of

essential air service to small towns was increased by enacting a guarantee of essential air service to all towns then served by CAB certificated carriers. The International Air Transportation Competition Act of 1979, enacted in February 1980, enjoined the CAB to adopt a more procompetitive international aviation policy, loosened CAB's power to disapprove fares, and eased the standards for new entry into international routes. At the same time, the international act adopted some specific anti-competitive or pro-American carrier provisions.

Summary of the Economic Aviation Policies of the U.S.

Viewing the whole history of regulation and deregulation, the major points of U.S. aviation policy, as enacted by Congress, appear as follows:

1. Except as required to ensure safety, the federal government should not prohibit any person from entering any route in domestic aviation, nor prohibit any person from entering the industry as a whole. Phasing out of existing restrictions should take place as soon as practicable.

2. The federal government should not prohibit price cutting in domestic aviation. If competition will prevent airlines from charging unjustly and unreasonably high prices, then the federal government should not prohibit the raising of prices. Congress was more reluctant and circumspect about phasing out of high-rate regulation than low-rate regulation.

3. The airlines should not be permitted to discriminate unjustly against persons.

4. The federal government should guarantee essential air service to small towns and subsidize such service if necessary.

5. The federal government must continue to regulate international aviation, but should encourage the maximum feasible degree of competition consistent with the realities of aviation economics and international politics.

SUMMARY OF PRINCIPAL DEFICIENCIES OF EXISTING POLICY

Although the role of the federal government in the aviation industry has been correctly identified by Congress, there are some significant deficiencies in the statutes and in the administration of the statutes by the CAB. They may be summarized as follows:

1. *Difficulty of Attracting Top Staff to the Board.* In too many cases, the economic and legal analysis underlying the

Board's administration of the statutes has been inadequate. In part, this is due to the fact that the Board is attempting to break new ground. But in part, this is due to intrinsic problems associated with a long, drawn out sunset. Now that the crusade is over and the Board is on its last legs, top young staff are looking elsewhere for challenge.

2. *CAB's Allowance of Large and Uneven Price Increases.* On May 14, 1980, in PS-94, the Board announced that it generally would not suspend air fares for being too high if they are less than 30 percent above the 1977 levels, as adjusted for increased costs. This upward zone of fare flexibility increases to 50 percent in markets within a 400 mile radius and unlimited in markets within a 200 mile radius. Eleven senators petitioned the Board to reconsider this decision. On September 24, 1980, the Board revised PS-94 slightly. However, there is deep, continuing unhappiness in Congress over this CAB policy. The feeling is that the CAB is deregulating more quickly than authorized and that passengers on short routes to small towns are being discriminated against by the Board. A consumers' group is appealing PS-94 in the courts.

3. *Elimination of Essential Service to Small Towns.* Many small towns and members of Congress feel that the Board has been niggardly in administering the 1978 Act's guarantee of essential service to small communities. Senator Robert Byrd (D-W. Va.), for example, held up renomination of the Chairman of the CAB for five months (until July 25, 1980), protesting the diminution of service to West Virginia.

The CAB is also pursuing other actions that may result in deterioration of service to small towns. The uncapping of prices on short routes is mentioned above. The Board also is considering repudiation of its duty to divide "joint" fares in a manner which protects the small town passenger. If joint fares are deregulated, many small towns (most plausibly, the smallest of the small towns) fear that the large trunk airlines will force up the prices of the commuter airlines that "feed" small town passengers into hub airports for connection on to trunk flights to distant destinations. The relaxation of joint fare restraints is one aspect of the Board's general withdrawal from discrimination regulation, described in the next section. In general, elimination of the restraints of unjust discrimination appears contrary to the best interests of small town residents, who are likely to be relatively unorganized and unsophisticated buyers of air transportation.

4. *CAB's Allowance of Previously Unjust Discrimination.* On

May 29, 1980, in PS-93, the Board announced that it would not prohibit personal price discrimination unless such discrimination rose to the level of discrimination violative of the civil rights laws. Historically, the CAB, in common with most other federal economic regulatory agencies, has prohibited an airline from charging different passengers different prices for substantially the same service, unless the differential is justified by transportation related considerations. Certain persons, however, are allowed special discounts by statute, including airline employees, ministers, older persons, and handicapped persons.

The legislative history of the Airline Deregulation Act of 1978 suggests that Congress was happy with the historical policy. In any case, the law on unjust discrimination was not changed. (On January 1, 1983, the prohibition against unjust discrimination in the federal aviation act will be abolished, apparently investing the Federal Trade Commission with authority to prevent unfair trade practices. The effect of the 1983 sunset of the unjust discrimination provision is unclear, however; it was added hastily in the conference report without prior consideration by either chamber or its legislative committee.)

Three recent decisions illustrate the CAB's new policy on unjust discrimination. In January 1980, the Board allowed an airline to single out passengers acting as couriers and charge them a baggage rate twice as high as that charged other passengers (this case is now on appeal to the courts). In July 1980, the CAB approved a tariff granting a special discount to a specific large buyer—the General Services Administration—notwithstanding the fact that the air service provided the large buyer is in no way different from the service offered the general public. With this decision, the Board has opened the door for special discounts for all large corporations and large unions. Most recently, on September 30, 1980, the CAB issued a proposed rule which would allow unlimited secret rebating to individual customers, effectively ending the value of publicly posted tariffs, for both domestic and international aviation.

These kinds of discounts seem contrary to basic American precepts of justice. Allowing selective price gouging, non-cost justified discounts for big customers, and secret rebates seems to favor the large organized interests with competitive alternatives at the expense of the unorganized, uneducated, or captive passenger. It should be recalled, that transportation regulation in the United States originated primarily as a reaction to discriminatory pricing by the railroads, not to their charging

exorbitantly high rates. Thus, the Board's repudiation of its duty to prevent unjust discrimination may precipitate an unfortunate backlash for re-regulation.

5. *Slot Access at Major Airports.* Some big city airports are becoming so congested that all possible landing "slots" are assigned, at least at prime times. Prior to deregulation, slots at congested airports were assigned by agreement among the trunk airlines who served the airport (the agreements were subject to CAB approval). Since the 1978 act, airports have become more crowded and new airlines, especially commuters, are demanding slots at the congested airports. The incumbent airlines are reluctant to give up their slots, particularly to competitors. (A highly visible example is the case of New York Airways which is having great difficulty getting access to Washington National Airport.) So far the CAB has not worked out any procedure to distribute slots fairly. The problem of allocating scarce slots at congested airports will probably get worse in the near future.

6. *Tie Up Loose Ends of the 1978 Act.* There are numerous confusing technical problems with the Airline Deregulation Act of 1978. For example, statutory standards are left in place even though the Board will no longer be in existence to enforce them. These ambiguities should be resolved by clarifying legislation.

SHORT-TERM PROBLEMS AND OPTIONS

The President's direct administrative control over the CAB is limited to appointment of the five members, with the advice and consent of the Senate and annual designation of one of the members as chairman. As shown in Table 1, none of the current members' terms is completed before December 31, 1982.

Annual designation of the chairman is an important Presidential prerogative. The chairman controls all staffing and generally manages the Agency. However, it does not appear that any of the alternatives to the current chairman would significantly alter the Board's current policy.

Table 1
Membership of the CAB

Person	Position	Party	Term Expires
Marvin Cohen	Chairman	Democrat	Dec. 31, 1985
Elizabeth Bailey	Member	Republican	Dec. 31, 1983
Gloria Schaffer	Member	Democrat	Dec. 31, 1984
George Dalley	Member	Democrat	Dec. 31, 1982
James R. Smith	Member	Independent	Dec. 31, 1986

Short-Term Options at DOT

In addition to his appointment power, the President can influence aviation policy through the work of the Department of Transportation. DOT's jobs in the aviation field are: (1) represent the President's policy before Congress; (2) represent the President's policy before the CAB; and (3) represent the President's policy in international negotiations and advise on other international aviation matters. DOT will have an important role to play in aviation matters in the first year because it appears that a congressional review of the Airline Deregulation Act of 1978 may be undertaken. And by representing the President's position knowledgeably and expertly to the CAB, DOT may be expected to wield substantial persuasive influence with a Board which does not itself have much expertise.

In addition, under the current law, after January 1, 1985, DOT will have direct regulatory responsibility for the domestic aviation subsidy program and for international aviation matters. (In the next section, it is suggested that DOT take over these responsibilities more quickly and the sunset of the Board be advanced to December 31, 1981.)

Therefore, it is very important that the staffing of DOT be carried out so that at least one high official is appointed who is very familiar with aviation matters, is capable of representing the President's aviation policy to Congress and to foreign governments, and, if necessary, is capable of establishing an efficient bureaucracy which is ready to take over administrative responsibility for various aviation policies.

There is currently no office within DOT devoted to aviation. Aviation matters are handled by the Assistant Secretary for Policy and International Affairs. The Assistant Secretary is advised by a Senior Aviation Adviser. The only staff devoted to aviation matters are those within the all-modes offices under the directorship of the Assistant Secretary, such as the Office of International Policy and Programs and the Office of International Policy and Programs and the Office of Regulatory Policy.

It is important that the new administration realize that appointments at DOT will have more affect on U.S. aviation policy than anything that the President can do at the CAB. Futhermore, with capable leadership from DOT, significant positive developments in aviation law are possible.

MEDIUM-TERM PROBLEMS AND OPTIONS

The deficiencies outlined in the above section will probably result in congressional hearings in 1981 on the matter of air service to small communities and the Board's administration of deregulation. Rather than allowing congressional discontent to fester with unpredictable results, the new administration should take the lead by proposing legislation to cure the deficiencies of current aviation policy. Legislation should be ready in mid-spring 1981.

The main points of such legislation should be as follows:

1. *Advance the Sunset of the CAB to December 31, 1981.* The Board's most basic power, control over entry, was abolished under the current law as of December 31, 1981. The Board today exercises virtually no control over low fares and very little control over high fares. The Board's major remaining powers are more properly under the control of the President—international aviation policy and protection of service to small towns.

As mentioned above, the Board's greatly diminished powers make it extremely difficult to attract good personnel to the CAB. Abolition of the CAB and transfer of remaining functions to DOT holds the promise of substantially improving the administration of the remaining aviation responsiblities of the U.S.

More important, by abolishing the CAB as soon as possible, the Administration will create a precedent which will make it easier to push for total abolition of other federal agencies, in the same way that the success of diminished aviation regulation has made possible the applicaton of similar measures to surface transportation and, to a lesser extent, telecommunications.

Early sunset of the Board would probably be favored by all airlines. Some senators have already suggested this idea. The consumer groups and congressional representatives of rural areas possibly may oppose this measure, however, unless the following provision is also included.

2. *Grant the Secretary Authority to Prescribe Maximum Fares and Rates in Markets in Which There is Insufficient Competition to Control Prices.* Congressional members and consumer groups are very upset about the CAB's repudiation of its responsibility to control maximum prices in small town markets. Their fears are reasonable although, probably not often justified. In cases in which a small town truly is at the mercy of an air carrier, it may be reasonably argued that maximum fare regulation is needed.

The law's bias in favor of unregulated operation of the carriers should not be changed. There is no case for federal control of entry or of minimum prices. However, in cases in which the complainant can demonstrate the lack of competitive checks, governmental decree of maximum fares appears reasonable. In practice, a maximum price power would amount to no more than the power to force an airline to lower rates from a monopolistic level to a reasonable level. If the maximum prices were set any lower than a reasonable level, the airline would exercise its option to abandon the market (or it would get a federal subsidy to compensate for CAB mandated service). Such authority must be carefully drawn, however, so that it does not appear to amount to re-regulation of the industry. The maximum price orders should probably be statutorily limited to a relatively short time period, requiring the complainant to prove his case anew before another maximum price order can be issued.

3. *Prohibit Personal Discrimination.* Historically, unjust discrimination, rather than rate levels, has been the major problem instigating transportation regulation in the U.S. Explicit reinstatement of this prohibition may be necessary to forestall a demand for re-regulation in the future. Moreover, such a prohibition is reasonable and reflects longstanding national policy. The creative task of new legislation will be to design an effective and reasonably simple mechanism for enforcing this prohibition without retreating from the pro-competitive stance of the 1978 act. Rather than a new federal agency, however, a carefully drafted procedure by which complaintants can obtain relief in federal court should be provided.

Such a provision would probably be popular with consumer groups and rural interests. There might be minor airline opposition. The most strenuous opposition would come from those who favor a public policy based strictly in economic efficiency.

4. *Provide for Allocation of Airport Slots by Open Competitive Bids.* A permanent statutory solution to the problem of allocating scarce slots at airports is desirable. Even though commuter airlines and small town passengers will generally be outbid for the most desirable landing times, the best solution is a simple open bid system for these slots. If prime time access to a congested airport is essential for a commuter airline serving a small town, then the commuter airline should be allowed to devote federal subsidy funds to the open bid process. The

funds received from the bid system should be devoted to expanding the facilities of the congested airport.

5. *Reporting Requirements.* The law is unclear whether air carrier reporting requirements for domestic operations end on January 1, 1985. While the sustantive section is not altered, the Board itself is abolished. The function of administering this section is not explicitly transferred to DOT.

The continuation of the filing of minimal reports should be considered. One of the main reasons that airline deregulation was accomplished was that good data was available concerning the industry and these data led to careful academic studies proving the case for deregulation. The continuation of reports should be valuable in allowing long-term assessment of deregulation and help to prove the case for further deregulation of the economy. On the other hand, reporting requirements are today very burdensome. Therefore, the statute should be carefully drafted to limit DOT's power to require reports.

BUDGET

FY 1981

The Carter Administration has requested $28.8 million for administering the CAB in FY 1981.

The Carter Administration has also asked for $86.3 million for subsidy payments to the airlines. Of this amount, $58.2 million goes to so-called "local service" airlines such as Hughes Airwest, Republic, and Piedmont which probably do not need subsidies. These subsidy payments are generally required by statute, but are being phased down to zero by January 1, 1986. The remaining $28.1 million supports genuinely essential air service to small and Alaskan communities. The Administration is reported to be preparing a supplemental request for more airline subsidy funds, but this supplemental has not been announced.

FY 1982

If the Board's demise is legislatively advanced, as suggested above, the Board will require minimal funds in FY 1982 to allow the windup of its affairs. If sunset is not advanced, the Board will require somewhat less than $28 million due to its continuing cutback on staff in anticipation of a January 1, 1985 termination.

The new administration should request as little as legally

possible in the subsidy for "local service" airlines. Nonetheless, given the rise in airline costs, this will probably amount to $90 to $100 million in FY 1982. A big drop in the subsidy will occur in FY 1983 when certain statutory standards are relaxed. The most desirable budget request would actually propose a reduction in the "local service" subsidy by proposing a one-year advance in the date on which these mandated standards are relaxed. Such a proposal, however, would be vigorously opposed by the local service carriers. On the other hand, from a sound political standpoint, the new administration should consider funding the true small town subsidy program somewhat more generously. As a rough estimate, it would be reasonable and politically popular to consider a 33 percent increase in this program, to about $37 million.

LONG-TERM PROBLEMS AND OPTIONS

The enactment of the so-called International Air Competition Act of 1979 did not represent a thorough revision of U.S. international aviation policy. This policy is still evolving within the constraints of a world generally not very sympathetic to competition. The CAB has generally extended the laissez faire approach of domestic deregulation to international aviation, but this is not necessarily appropriate. Economies of scale, for example, appear to be much more important in international aviation than in domestic aviation.

Aside from the general question of the appropriate level of regulation in the international field, the most important problem is the selection of carriers to serve foreign countries. In the past, carrier designation has been extremely political, with the result that the public has not always received the best carrier. The CAB appears to be headed in the direction of a bid-type system in which the designation is given to that carrier which promises the most benefits to the public. While not yet refined, this approach appears sound and probably should be codified into a statute.

Overall, the whole matter of international aviation policy requires study with a view to substantial legislative or administrative reform, probably in 1982.

16

COMMODITY FUTURES TRADING COMMISSION

Leighton Lang

BASIC POLICY ASSUMPTIONS AND SUMMARY OF PRINCIPAL DEFICIENCIES OF EXISTING POLICIES

The federal regulation of commodity futures trading began over a half century ago and has been justified on what is basically an economic fallacy. While in reality the buying and selling of commodities for future delivery on organized exchanges merely reflect conditions of supply and demand, the principle underlying the federal regulatory scheme is that futures trading somehow dictates such conditions and is therefore vested with a public regulatory interest.

Under this assumption, the agency charged with regulation has an almost impossible task. Theoretically, the agency is price neutral and wants only to maintain a fair and orderly market.

In practice, it is usually only during periods of price gyrations in a commodity that Congress and the public look to the agency to "do something". When it does do something, such as the grain embargo, it is usually at the expense of the free market. When the agency resists drastic anti-market actions, it is accused of being a "do-nothing" agency and other agencies which think they're smarter than the market, such as the Federal Reserve, SEC, and Treasury Department, lobby Congress for additional authority to control various aspects of futures markets.

It has been said that the CFTC was established as a reaction to the Russian wheat deal. With soaring food prices, the pressure was on Congress to do something; futures markets were an inviting target, since this is where the price rises in basic commodities were most visible. In 1974 Congress enacted,

and President Ford signed, the Commodity Futures Trading Act, establishing a five-man Commission in no way equipped to deal with the public's main concerns, price inflation in the case of consumers or depressed grain or metal markets in the case of of producers.

In summary, the basic policy assumption of the CFTC must be redefined. The agency and Congress must realize that price instability in commodity markets has a myriad of causes, some of them natural, such as the weather, and some them man-made, such as federal manipulation of money and credit, trade embargoes, and irresponsible fiscal policies. Futures markets may reflect these conditions but they do not cause them.

The prevention of fraud and coercion in society should be a primary aim of government. Apart from the legitimate futures industry, which has developed a high degree of self-regulation as well as federal regulation, there exists a criminal element which has used fast-moving commodity prices as a device for luring naive investors into making phony investments in various contrived commodity transactions. Millions of dollars have been lost in those schemes by unsuspecting investors. Unfortunately, the CFTC is geared primarily to regulate the established, legitimate futures industry, and its efforts to apply these regulatory tools to the fly-by-night firms has by and large been unsuccessful. The agency has shown very little interest in applying a large portion of its resources to investigating what is essentially criminal conduct, despite the fact that the public has suffered more from this type of activity than from other futures market activity. Indeed, this is probably more properly the task of the Justice Department, the U.S. Postal Service, the U.S. attorneys, the FBI, and state and local law enforcement agencies. However, since these agencies only rarely investigate this kind of white collar crime and usually defer to the CFTC because it involves "commodities," most of the crimes go unpunished. What is needed is a joint effort between the criminal law enforcement agencies and the CFTC, which does have the expertise to distinguish between bona fide commodity futures transactions and ficticious transactions that are a scheme to defraud.

All of these are among issues which should be identified in the process of forming an Administration position on the CFTC legislative reauthorization in 1982.

Short-Term Options

Because the CFTC is an independent regulatory agency

governed by a five-man commission, the President has no statutory authority over the day-to-day operations or policies of the agency.

The President can, however, exercise a powerful influence over the CFTC through the nomination of commissioners and the designation of a chairman, who serves at this pleasure.

Since its inception in 1974, the CFTC has been plagued by poor management, indecision, and a staff morale problem. This has been true under both the Republican chairman named by President Ford and his Democratic replacement named in 1979.

Admittedly, the chairman has a very difficult agency to run with an unclear mandate from Congress. Administration inattention to the workings of the agency has damaged the agency and made the Administration appear inept.

The President has the prerogative under the law to ask the chairman to step down. The President may either designate another commissioner as chairman or the commissioners themselves will elect an acting chairman until the new chairman is designated and approved by the Senate. The existing chairman would be entitled to remain a member of the commission.

There is now a vacant seat on the Commission, and the applications of several fine candidates are already on file. The President may wish to nominate such person as chairman, although he would also be free to designate an existing commissioner as chairman. He should designate a new chairman as soon as possible after January 20, 1981.

Nominations should be made without delay. The Carter Administration's two-year delay in filling the vacant seat was irresponsible.

In the short run, i.e., during 1981, there is no need for any legislative recommendations on the part of the Administration. The Administration should spend 1981 preparing for a leadership role in the Congressional reauthorization process which will begin early in 1982.

MEDIUM-TERM PROBLEMS AND OPTIONS

Unlike the other federal regulatory agencies, the CFTC is subject to a modified "sunset" provision. Under this provision, the agency's money authorization will expire with the fiscal year ending September 30, 1982, although the substantive law is permanent. This virtually assures that the authorizing committees in Congress, i.e., the House and Senate Agriculture Committees, will hold extensive hearings early in 1982 on

whether the agency should be reorganized. In 1978, the CFTC was in fact reauthorized for four additional years after substantive amendments were made in the law.

In 1978, the Administration failed to prepare for this process and last minute proposals submitted by OMB were either laughed at or ignored. Such a failure of leadership should be avoided by the Administration in 1982. Submitting recommendations either too early, such as during 1981, or too late—after the committees have done most of their work in 1982—will mean that the Administration will not be taken seriously.

Since the authorizing committees are required by the Budget Act to report all authorizing bills by May 15, 1982, subcommittee hearings are likely to commence no later than February, 1982. Staff work and possibly preliminary hearings may begin late in 1981. It is incumbent upon the Administration to have its recommendations prepared no later than January, 1982.

In preparing such recommendations, it is essential that the White House appoint staff internally to begin work early in 1981. In conjunction with this, the President should appoint knowledgeable persons from the private sector to an informal advisory group to work from the White House staff. In addition, the President should ask other interested federal agencies such as the SEC, Treasury Department, Federal Reserve, and USDA, as well as the CFTC, to submit comments on what the Administration position should be. Otherwise, there will be a tendency for the agencies to act individually, splintering and weakening the final Administration position. A splintering of opinion among these agencies has been the rule in the past.

The Presidential advisory group should consist of persons from all segments of the futures industry, market users, and farm organizations. Other individuals or groups wishing to participate should be be allowed to do so. Comments from the general public should be encouraged and accepted. It is noteworthy that even in the case of minor regulations, the law requires notice and opportunity to be heard. In the case of major legislation, however, the Executive Branch is free to make proposals in the most haphazard fashion without any public input.

While the White House should hear all views, in the final analysis there must be competent White House staff to develop final recommendations to Congress for the President's approval.

In summary, there is no need for the Administration to take a position on any legislation affecting the CFTC during most of

1981. The White House can show leadership and instill public confidence simply by being able to demonstrate that it will have a carefully prepared and comprehensive position in time for Congressional consideration in January, 1982.

BUDGET

Since the commodity futures exchanges have for many years been viable, self-regulatory organizations, the CFTC has the opportunity to mandate regulatory actions by the exchanges at a relatively small federal cost compared to what it would cost if the government itself maintained the regulatory apparatus.

In fact, the CFTC has adopted a policy of requiring the exchanges to assume more and more regulatory burdens in the name of "self-regulation." While this tends to hold down the need for increased federal appropriations, it does shift more economic costs to the private sector and the economy as a whole.

Due to this policy, the CFTC budget has remained basically static at $16 million for the last two years. Most other regulatory agencies have shown large yearly increases and much larger total budgets.

The CFTC's answer to what it perceives as a small budget has been to take the ultimate regulatory action, which is to ban otherwise legitimate economic transactions, such as exchange-traded options, on the grounds that it does not have the resources to regulate such transactions. The CFTC has also refused to regulate so-called "leverage" transactions on the same grounds, despite a Congressional mandate to do so. Such transactions are now banned for the most part. The agency has also stymied the industry's expansion into new, economically useful contracts in financial futures and other areas, saying that it does not have adequate resources to evaluate new contract proposals and approve them in a timely manner.

In the case of the CFTC, a lower budget by no means implies less regulation.

In developing its position on the 1982 reauthorization process, the Administration should simultaneously examine the budget in a thorough manner. In the meantime, the President should appoint a new chairman and commissioners who recognize the need to hold down the CFTC's costs to the taxpayer and to the economy. With proper leadership on the commission, reductions could be responsibly proposed for fiscal year 1982 in advance of a thorough overhaul of the budget to be

recommended concurrently with legislative proposals in 1982 as the facts may warrant.

A sizable savings could be incurred through the reform or abolition of the reparations process, a well-intentioned but ineffectual procedure for dispute resolution within CFTC designed to circumvent costly court action in cases such as customer complaints against brokerage firms. Reparations proceedings have proven to be costly and merely add another layer of complexity to the judicial process.

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CONSUMER PRODUCT SAFETY COMMISSION

Loc Nguyen

BASIC POLICY ASSUMPTIONS

The establishment of a consumer product safety agency was recommended in June 1970 by the National Commission of Product Safety, a panel formed by President Lyndon B. Johnson in 1968.

The national commission based its recommendation on the finding that an estimated 20 million consumers were injured annually by consumer products. Of those injured, the Commission stated, approximately 110,000 were permanently disabled and 30,000 killed. An effective agency, the Commission's chairman, Arnold Elkind, told Congress, could prevent as many as four million injuries each year.

The administration of Richard M. Nixon opposed the Commission's recommendation, preferring a voluntary and educational approach to combating consumer hazards through the establishment of a consumer safety program within the Department of Health, Education and Welfare. Congress, however, opted for an independent agency and sent a bill creating the Consumer Product Safety Commission (CPSC) to President Nixon in October 1972.

The law establishing the CPSC incorporated elaborate mechanisms for assuring maximum public participation in agency proceedings. Money is authorized to underwrite some of the costs of public participation. Through a procedure called the "offeror" process, any interested and competent outside group was invited to offer, or propose, mandatory consumer product safety standards for the agency's eventual adoption. Until 1978, CPSC was permitted to develop its own mandatory safety standards only when no acceptable outside group offered to do so.

The CPSC also is required to maintain a national injury information clearinghouse; ban a consumer product if it represented a hazard and if no standard could adequately protect the public from that hazard; and require a manufacturer, distributor or retailer of a product judged to be a "substantial hazard" to give public notice of the hazard and make it safe through repair or replacement.

The Commission has the specific mandate to:

1. Protect the public against unreasonable risks of injury associated with consumer products;
2. Assist consumers in evaluating the comparative safety of consumer products;
3. Develop uniform standards for consumer products and minimize conflicting state and local regulations;
4. Promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

Responsibility for the administration of four existing consumer programs was transferred to the CPSC from other agencies: the Flammable Fabrics Act of 1954, the Refrigerator Safety Act of 1956, the Hazardous Substances Act of 1960 and the Poison Prevention Packaging Act of 1970.

Specifically exempted from CPSC regulation are tobacco products, aviation and boating equipment, motor vehicles, food and drugs, cosmetics, insecticides, fungicides and rodenticides.

DEFICIENCIES OF CURRENT POLICIES

The obvious and stated purpose of safety regulation is to reduce the incidence of death, illness and injury resulting from unsafe products. In carrying out its mandate, the CPSC has fallen short of that goal. There are several factors which contribute to this failure:

The Environmental Factors

The regulatory task of the CPSC is complicated by three major influences present in the environment in which the agency operates. The first of these is the sheer size and scope of the product safety problem. The task of regulating consumer product safety encompasses over 10,000 products and over 1.2 million manufacturing, retailing and importing firms.

The second is that the public does not want to be regulated. Concern with matters of product safety plays only a minor role in the lives of most Americans.

The third is that businesses have resisted what they perceive as encroachment on their managerial prerogatives by a government agency.

The Determination of Regulatory Priorities

The Commission's "policy on priorities" states that "the Commission will deal first with those products which pose the greatest risk of injury to the public. The Commission will set (and will periodically re-evaluate) its priorities, taking into consideration the number of injuries associated with a particular product, the severity of those injuries, the consumer's likelihood of exposure to that product, and any other factors which the Commission considers important." The problem is that priorities are difficult to determine because the data collected through the National Electronic Injury Surveillance System (NEISS), a central, computerized data bank into which is fed data on product-related injuries via a teletype terminal from 119 statistically selected hospital emergency rooms, does not specify the cause of the injury, i.e., whether the injury could have been caused by the carelessness of the user rather than by any defect in the product.

Furthermore, major categories can go unreported since NEISS does not include incidents treated outside emergency rooms. As a result, important categories such as poisonings and burns that are sometimes treated in special hospital units are underrepresented.

In addition to the difficulties encountered in valid data collection, there are more subjective considerations in the establishment of product safety priorities. These stem from the fact that knowledge of the frequency and severity of injuries is, by itself, insufficient to determine which products pose the greatest dangers to society.

For example, during FY 1975 NEISS-linked hospitals reported 131 injuries associated with electrical fixtures with a mean severity of 125, compared with 3,059 injuries with a mean severity of 35 for injuries associated with "ladders and stepstools." This illustrates that the number of people injured by electrical fixtures were considerably fewer than the number injured when using ladders; however, the nature of the electrical injuries were far more serious. The Commission then has to make the decision of which should have a higher priority, the product whose use is associated with 100,000 relatively slight injuries and four deaths or the one associated with 10,000 moderately severe injuries.

Another problem faced by the Commission in determining priorities is the age factor. Society tends to have a greater interest in protecting children from product-related injury than adults who are presumed to be better equipped to evaluate and assume the risks of product use, thus the product that causes the highest number and most serious injuries may not rank as high as a product that may not cause as much injury but is used by or is connected with children.

A further problem is caused by Section 10 of the Act, which states in part that, "any interested person, including a consumer or a consumer organization, may petition the Commission to commence a proceeding for the issuance, amendment, or revocation of a Consumer Product Safety Rule." Should that person's petition be denied by the Commission, the petitioner has the right to file a civil suit to compel the Commission to take action. As a consequence, the CPSC's limited resources have tended to be diverted from internally established priorities towards priorities as perceived by a single consumer or special interest group.

Overlapping Jurisdiction

Because other agencies also have jurisdiction over product safety, the determination of jurisdictional boundaries have been difficult and confusing. The line between safety and environmental regulations is fuzzy since both deal with the same problems. Radiation inside a nuclear power plant is a safety issue because it is hazardous to employees at the plant, while radiation outside the plant but coming from it is an environmental problem because it affects everyone in the area. Consequently, environmental, occupational, and consumer safety regulatory activities are not always clearly distinguishable. Thus at times, the CPSC has found itself in a confrontation with EPA and OSHA. For example, both CPSC and EPA have jurisdiction over hazardous household chemicals, the former because of its administration of the Poison Prevention in Packaging Act and the Federal Hazardous Substances Act and the latter, because of its concern with the disposal of hazardous materials.

The Development of Standards

Among the first standards to be developed under the Commission were those for swimming pool slides and matches. Since matches ranked 44th on the Accident Frequency Sever-

ity Index and swimming pool slides ranked even lower, serious questions must be raised about the wisdom and effectiveness of the Commission's choice of priorities.

In addition to its questionable judgment in standards development decisions, the Commission has also taken an inordinately long time to set standards. It took the CPSC two and a half years to promulgate its first standard, the one for swimming pool slides, and this was relatively quick in the light of subsequent performance. Three years were needed to develop a standard for bicycles, three and a half for matches, and four for architectural glass. And the CPSC has only recently come up with a final decision on power lawnmowers, a product with which the Commission has been concerned since its inception.

Economic Factors

A major ongoing problem with the CPSC's approach to product safety regulation is that it does not really try to compare benefits and costs in deciding where government safety standards are necessary. Rather the Commission's decisions reflect a "safety imperative" which tends to ignore the cost side of the equation almost completely.

The impact of these safety regulations can thus add much additional cost to the products. For example, the retail price of children's sleepwear treated to meet flammable fabrics standards increased by 50 percent and it is estimated that the proposed lawnmower standards will add $40 or approximately 32 percent to the price of the average walk-behind mower.

The cost of developing a single product safety standard can also be extremely costly. For example, the Commission expended almost a million dollars to develop and set a standard for the power lawnmower.

There are also non-monetary costs arising from the activities of the Commission. These include a reduction in the selection of products available for purchase and a reduction in intra-industry competition. For example, one impact of the children's sleepwear flammability standards was a sharp reduction in the assortment of children's nightwear. Manufacturers decided to shift their efforts away from the production of these garments towards non-flame retardant clothing such as women's wear, where the profit is higher.

With respect to lawnmowers, a Stanford Research International study has predicted that the imposition of the CPSC safety standards would reduce the 60 to 75 companies engaged

in lawnmower manufacture to between 35 to 50 within five years.

Other non-monetary costs arise not from the safety standards themselves from CPSC errors. An example is the Commission's decision to ban an aerosol spray adhesive product that was suspected of causing birth defects. The ban was lifted seven months after its imposition as additional data on the matter was brought to light, but the ban had already caused irreparable damage. Two manufacturers of the product, Borden and 3M Company, lost millions of dollars and a number of women who had used the product and were fearful of having malformed children had abortions.

RECOMMENDATIONS

Short- and Medium-Term Problems and Options

The first five years the CPSC was in existence were a disaster. Their expensive and almost meaningless battle with swimming pool slides and matches was a prime example of bureaucratic overkill. Due to widespread criticism, even among its former supporters, the Commission's work has improved somewhat in the past year. It is finally beginning to do what its legislative charter required it to do. It is now paying some attention to the relative costs and benefits of its regulations and it is also trying to limit its activities to a strict priority list of the greatest hazards. For example, during 1980, the staff had been concentrating on about 14 items, such as safer installation of wood-burning stoves and modifications in CB antenna design that could prevent 200 electrocutions a year. The agency is also increasing its reliance on voluntary agreements with manufacturers in designing sensible goals and enforcement.

The most impressive cooperative action to date involves fireproofing requirements for upholstered furniture. In 1978, the CPSC staff proposed a stiff set of regulations that furniture manufacturers said would increase costs nearly $1 billion a year. After listening to industry complaints, the Commission gave the manufacturers a chance to try their own corrective action. By requiring suppliers to test their fabrics, rather than forcing all 3,000 furniture makers to test on their own, an *ad hoc* industry group came up with a plan that the commission expects will be 80 percent as effective as the original proposal at one fifth the cost.

However, the agency still has far to go to meet its mandate.

Trying to create an almost totally safe environment is an ideal that is impossible to achieve. Thus, although the situation appears to be improving and the taxpayers seem to be getting a little more for their money, many still consider the CPSC to be an unnecessary, wasteful agency.

The new administration could pursue several possible alternative policies concerning the future of the CPSC.

1. The agency could be abolished entirely by legislation. Although there is some indication of a decline in injuries associated with toys, solid evidence of a more general reduction in injuries associated with products regulated by the CPSC is difficult to find. The fact is that the agency has expended a great deal of money with little to show for it in the way of tangible results. Consumers have always had recourse to the courts in product-related injuries and the law is available to impose legal sanctions arising from product liability suits. The combination of widespread adverse publicity about an unsafe product and the threat of product liability suits have been and will continue to be a major incentive for manufacturers to supply safe products. Politically, however, abolishment of the CPSC might prove very unpopular. It is doubtful whether the Administration could find a working majority in Congress to support its abolition plan, at least in the foreseeable future, without considerable political groundwork and popular support.

2. Another approach might be to permit the agency to survive, but with its direction completely altered. Its future efforts should be concentrated toward the dissemination of information and education. Whereas the emphasis has been on standards development and enforcement activities instead of on information and education (approximately $16 million as opposed to $2.5 million), the agency's programs should be redirected toward informing and educating consumers of the possible dangers of certain products. An annual budget of some $40 million to advertise and warn consumers against defective or dangerous products should be an effective weapon in getting these products off the market. Adverse publicity of this kind in the mass media is probably a more effective deterrent to the production and sale of unsafe products that the development of mandatory standards, and at a much lower cost per product.

As to abolition of the Commission, legislation would be needed to strip the CPSC of its standards-making and en-

forcement authority. Since this could prove politically unfeasible, the Administration might better be advised to continue the agency but with drastic cutbacks in funding, permitting the CPSC to operate only as an educational and informational agency.

3. Regardless of whether either policy is adopted, at least in the immediate future, so long as CPSC's legislative mandate remains unchanged, the new administration should push for some internal agency changes. For one thing, the Commission should not try to regulate every possibly hazardous product. It should recognize that it has a very limited budget and should narrow its range to a few of the most potentially dangerous products. It should also do more in terms of evaluating costs as opposed to benefits.

One of the most common complaints about CPSC from manufacturers is that the agency is run by consumer advocates and lawyers and has no business management specialists on its staff. Perhaps the new administration should attempt to replace some of these consumer advocates and lawyers, at least at the top levels, with managers and accountants who would be better qualified to make the agency cost effective. Moreover, the agency should develop some kind of system whereby it can determine the causes of inflicted injuries. For instance, was the injury actually caused by some defect in the product or was it due to the carelessness of the user? (If it is found that the harm was due to carelessness, then no matter how many standards were set, there will always be injuries. The agency cannot play God and protect people from their own shortcomings.) The only way that an entirely safe environment can be created is for all potentially dangerous products to be banned entirely, thereby reforming us right back to the stone age. This is not what the Congress intended when it created an agency like CPSC.

Budget and Personnel

Compared to many regulatory agencies, the budget for the CPSC is not very large. For the past three years, the figures have remained at the $40 million level. For 1979, it was $42,940,000; for 1980, it was $41,620,000; and for 1981, it is to be $43,959,000.

The three major activities of the Commission are as follows:

1. *Commission policy development and direction:* This activity provides overall guidance and direction for agency actions.

2. *Product safety and enforcement:* Programs address fire and thermal burn hazards, children's and recreational product hazards. Support for these hazard programs is provided by activities such as economic analysis, hazard identification, engineering and health sciences research, information and education, compliance and enforcement, and field activities. Within each of the hazard program areas, the Commission undertakes a wide spectrum of activities ranging from of regulations and the conduct of enforcement and information campaigns.

3. *Administration and general support:* This activity includes support activities such as personnel, accounting, contracting, and services providing indirect support to all activities such as personnel, accounting, contracting, and services providing indirect support to all activities of the Commission.

The number of full-time employees has remained at about 880. About 64 percent of personnel are assigned to CPSC headquarters in Washington, D.C.; the remainder are in the 13 area offices and 21 resident parks. The largest number of employees are assigned to compliance and enforcement (39.1 percent); 21.7 percent are in administration; about 16 percent are involved in hazard identification; 12.5 percent work on regulation development; and about 3 percent are connected with hazard strategy analysis.

If converted to an educational and informational agency for consumers as recommended in this report, the largest number of employees would be split between hazard identification and public information. The categories of compliance and enforcement, regulatory development would be eliminated. Administration would be cut.

Depending on the staff necessary to design promotional materials for a media campaign (whether performed in-house or contracted to advertising agencies), the total personnel required in the CPSC would be cut up to 50 percent.

Long-Term Problems and Options

All five CPSC commissioners will come up for appointment by 1986. The new administration should see that qualified replacements whose regulatory philosophies are consistent with the President's outlook and who espouse a more limited role for the CPSC are appointed to the Commission. None of those currently serving reflect the conservative views of the new President.

18

FEDERAL COMMUNICATIONS COMMISSION

Ray Strassburger

The Federal Communications Commission was established in 1934 pursuant to the Communications Act of 1934 (47 U.S.C. 151 *et seq.*). The Commission has seven members appointed by the President with the advice and consent of the Senate. Not more than four may be members of the same political party. The term of appointment is seven years. The Chairman serves at the pleasure of the President. The agency's FY 1980 budget was approximately $76 million with provision for more than 2,150 positions; FY 1981 will be approximately the same. FY 1982 is estimated at $92 million with provision for 2,395 positions.

Carter Appointments

During his term, President Carter has appointed Commissioners Tyrone Brown (D), Ann Jones (R), and Chairman Charles Ferris (D). Brown's term expires in 1986; Jones in 1984; and Ferris in 1984. The remaining members of the Commission are James Quello (D) whose term expired in 1980; Robert E. Lee (R), whose term expires in June 1981; Abbott Washburn (R), whose term expires in 1982; and Joseph Fogarty (R), whose term expires in 1983. Four of the seven commissioners are lawyers.

Assuming Chairman Ferris resigns with the change of administrations, the new President will have the opportunity to make three appointments during his first six months in office, including the appointment of a new Chairman.

Mission

The Commission's primary purpose as described in Section 1 of the 1934 Act (47 U.S.C. 151) is to regulate interstate and foreign commerce in communications by wire and radio so as to make available to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communications service with adequate facilities at reasonable charges. The Commission's mission remains viable. However, the Commission should be given some flexibility to deregulate under specified conditions, e.g., where competition is sufficient to protect the public interest.

Jurisdiction

The Commission has jurisdiction over commercial and noncommercial broadcasting, domestic and international common carriers, cable television, and nonbroadcast radio services.

Broadcasting and Nonbroadcast Radio Services

The Commission licenses in the public interest commercial and noncommercial radio and television broadcasting stations and other nonbroadcasting radio stations such as amateur, citizens band, land mobile and maritime mobile (47 U.S.C. 307(a)). Broadcast licenses are renewed every three years; nonbroadcast licenses every five years (47 U.S.C. 307(d)).

Common Carrier

The Commission regulates telephone common carriers in their provision of interstate telephone service.* Intrastate telephone service is regulated by the appropriate state public utility commission. The FCC approves applications for construction of new facilities, regulates the terms and conditions of services through the approval of tariffs, may require the filing of contracts and other information, values property owned by a carrier and prescribes appropriate accounting methodologies. Telephone common carriers within the Commission's jurisdiction are "rate base regulated," earning a prescribed rate of return on authorized investments.

*Other common carriers within the Commission's jurisdiction include Western Union, International Record Carriers (ITT, RCA, Western Union International, TRT, French Telephone, Graphnet, Telenet), Radio Common Carriers, Maritime, Radio Common Carriers, Specialized Common Carriers, Miscellaneous Common Carriers, Domestic Satellite Carriers, Comsat. For a description of the structure of the domestic telecommunications industry, see Telecommunications Act of 1980, House of Representatives, Report No. 96-1252, Part I, pp. 41-43.

Cable Television

The Supreme Court has held that the Commission has jurisdiction over cable television because it is ancillary to broadcasting. Pursuant to this authority, in the early 1970s, the Commission erected an elaborate scheme to regulate cable television. Cable systems are not licensed by the FCC. However, local jurisdictions award franchises to cable companies desiring to serve particular geographic areas within their jurisdictions. FCC regulation has been criticized as being designed primarily to protect broadcasters. In recent years, the Commission has begun to deregulate cable, despite considerable opposition from the broadcasters.

Policy Direction Under Chairman Ferris

Charles Ferris, a former employee of U.S. Senator Mike Mansfield (D-Mont.) and House Speaker "Tip" O'Neil (D-Mass.), was appointed at the beginning of the Carter Administration's highly publicized efforts to reduce government regulation. Because of rapidly advancing technologies which increased the possibilities for competition in services that were previously thought to have natural monopoly characteristics, the telecommunications industry was a ripe area for deregulation. In addition, there had been several court decisions favoring competition and deregulation in telecommunications and, in fact, deregulatory efforts had already begun under Republican Administrations.* Those efforts, at the time, were known as, "reregulation." In addition, the Congress, since 1976, has been seriously considering legislation to rewrite the Communications Act. The underlying premise of the effort was that the availability of new telecommunications technologies was making the 1934 regulatory scheme obsolete and unnecessary.

In this climate, Chairman Ferris and the Commission have continued efforts to deregulate. In public pronouncements, Ferris, like his predecessor Richard Wiley, has advocated increased reliance on marketplace competition praising it as a more reliable and efficient regulator than the government. Under Ferris, as under Wiley, the Commission has taken several significant steps toward stimulating competition and deregulation. It should be noted, however, that all FCC decisions are subject to judicial review and, at this time, it is not certain whether any of these Commission decisions will be upheld on appeal.

*These decisions are described in the House report on the Telecommunications Act of 1980, Report No. 96-1252, Part I, at pp. 45-46.

Broadcasting

In September 1979, the Commission began a major administrative proceeding which could result in the partial deregulation of radio broadcasting stations. Specifically, the Commission is proposing to:

1. Remove itself from detailed consideration of the precise amounts of nonentertainment programming such as news and public affairs furnished by radio broadcast licensees.
2. Eliminate all specific requirements of commercial radio licensees on how to ascertain the needs and problems of their communities.
3. Eliminate all FCC policies dealing with limitations on amounts of commercial time and leave it to competitive marketplace forces to hold down levels of radio commercialization.
4. Eliminate federal program log requirements which maintain a record of their commercials and programming to make that record available for public inspection.

However, the Commission emphasized that it was not proposing to eliminate the so-called "fairness doctrine"* and that it would maintain its policies against employment discrimination and continue to investigate allegations of programming discrimination. Equal time requirements, which are statutory (Section 315 of the Communications Act), would remain unchanged. Stations would still be required to operate in the public interest.

Because the Commission's action is a combined notice of inquiry and notice of proposed rulemaking, subject to public comment and subsequent revision, there are no assurances that the Commission's final decision will adopt its initial proposals. In fact, there is considerable speculation that the proceeding will be allowed to die without favorable FCC action. One FCC official was recently quoted in the trade press as saying, "The feeling here is that after the radio regulation panels it'll just be forgotten . . . .It's (deregulation proposal) so riddled with holes that no self-respecting lawyer would take it to court." Failure to act in this area would be extremely disappointing to radio broadcasters. So-called "public interest" groups oppose deregulation.

*This doctine promulgated by the FCC, requires that broadcast licensees 1) devote adequate airtime to the presentation of controversial issues of public importance, and 2) provide an opportunity for spokesmen of contrasting viewpoints on these issues, free of charge, if necessary. Though not statutory, this rule was upheld by the Supreme Court in the *Red Lion* decision, 395 U.S. 392 (1969)

Cable Television

In a report and order released September 11, 1980, the Commission concluded that existing cable television distant signal carriage rules and syndicated exclusivity rules do not benefit the public interest and should be eliminated.* The Commission's conclusion was based on "detailed economic reports" which found that the television service received by the public would not be impaired and would in some respects be significantly improved by the elimination of these regulatory constraints.

The Commission rejected as beyond the scope of its authority a proposal favored by the broadcasters, program producers and the Carter Administration that would require cable television system operators to obtain individual permission in the form of retransmission consent for the distant television broadcast stations carried.

Mandatory signal carriage, sports blackout, and network nonduplication rules were explicitly excluded from review in this proceeding. Cable systems support the Commission's actions; broadcasters oppose it.

Common Carrier

In May 1980, the Commission released its decision in the Computer II inquiry. This decision is the Commission's attempt to distingush between enhanced telecommunications services and basic services. The Commission deregulated the former, while retaining traditional Title II regulation of the latter. The Commission summarized its actions as follows:

Common Carrier Network Services

1. Defined all network services as either *basic services* (limited to the common carrier offering of transmission capacity for the movement of information) or *enhanced services* (combines basic services with computer processing applications which provide additional, different, or restructured information).

2. Deregulated enhanced services and held that only basic transmission services were subject to regulation under Title II of the Communications Act.

*Signal carriage rules limit the number of distant television signals that cable television systems may distribute to their subscribers. Syndicated program exclusivity rules require the deletion of individual programs from distant signals that are otherwise available for carriage.

Carrier-Provided Customer Premises Equipment (CPE)

1. Accorded uniform regulatory treatment to all carrier-provided CPE and made no distinction between various types of CPE.

2. Required a carrier's offering of terminal equipment and related costs to be unbundled (separated) from its basic services and detariffed, and allowed a transition period until March 1, 1982, to allow for the orderly deregulation of CPE.

3. A federal-state joint board is to be convened to determine whether adjustments in other exchange plant allocations are warranted.

Carrier Provision of Enhanced Services and CPE

1. Eliminated current rules requiring "maximum separation" of a carrier's regulated services from its unregulated data processing services, except for carriers under direct or common control of AT&T and GTE. Thus, all other carriers are no longer required to offer enhanced services through a separate subsidiary.

2. Carriers under direct or common control of AT&T and GTE may provide enhanced services only through a separate corporate entity on a resale basis. The resale subsidiary must acquire all its transmission capacity from a carrier pursuant to tariff.

3. Carriers under direct or indirect common control of AT&T and GTE may not market, install, service or maintain CPE except through a separate subsidiary. The CPE subsidiary may not provide transmission equipment. However, CPE may be offered through the resale subsidiary in conjunction with enhanced services. Waivers of this rule for operation in sparsely populated rural areas will be entertained.

4. Stated that AT&T is not foreclosed from providing enhanced services or CPE by the terms of the 1956 AT&T Consent Decree.

Industry reaction to the Computer II decision was mixed. Among other things, AT&T opposed the provision which prohibited the resale subsidiary from owning transmission capacity, disagreed with the deadline for setting up the separate subsidiary and was skeptical that the Commission's interpretation of the 1956 Consent Decree would be upheld on appeal. (Basically, the Consent Decree, which terminated Justice Department antitrust litigation against AT&T in 1956,

restricts AT&T to offering telecommunications services subject to regulation.) IBM essentially supported the Commission's decision, particularly the distinction between enhanced and basic services.*

Telecommunications equipment manufacturers, data processors, and specialized common carriers were concerned that the FCC did not require sufficient separation of the separate subsidiary to ensure that AT&T would compete fairly.

Computer II has been appealed, and it is likely that Supreme Court review will eventually be sought. In addition, the FCC will have the opportunity to revise its decision on reconsideration. Whatever the outcome in the Courts, this FCC decision reinforces the need for a clear statement by the Congress on national telecommunications policy.

Other FCC Decisions

Despite opposition by existing broadcasters, the Commission recently took steps to increase dramatically the number of radio and television stations. It proposes to accomplish this by "dropping in" VHF television stations in markets that were previously considered technically saturated; providing for low power television stations with limited geographical coverage that would appeal to specialized audiences; reducing the frequency spacing between AM radio stations from 10 KHz to 9 KHz; and reducing the interference protection afforded clear channel stations.

These controversial actions are designed to increase the diversity of programming available to the public. Many broadcasters argue that the Commission's decisions are technologically unsupported and will result in an unacceptable loss of existing service. These actions will undoubtedly be reviewed by the courts.

Another controversial FCC decision with possible significant ramifications is the RKO case. The Commission held by a 4-3 vote RKO unfit to be a licensee because of the misconduct (wholly unrelated to broadcasting service) of the parent corporation, General Tire. Immediately affected by the Commission's decision were RKO TV and radio stations in Boston, New York, and Los Angeles. Additional RKO broadcast

*There were additional concerns expressed over the FCC's apparent expansion of regulatory authority over certain data processing services, even though the Commission chose not to regulate them.

properties valued at more than $400 million will be the subject of FCC hearings, after judicial review of the Boston decision is completed.

FY 1982 BUDGET SUBMISSION

The FCC has submitted to OMB an FY 1982 budget of $91,782,000 with provision for 2,395 positions. This is an increase of $15,702,000 and 242 positions over their FY 1981 budget.

The Commission bases its request on: 1) an increase in fixed costs which the Commission says it can no longer absorb without "severe" reductions in existing Commission programs; 2) an average annual workload increase of 5 to 15 percent per year in all its programs; 3) the need for additional application processing resources because of a substantial increase in applications; 4) the need to prepare for and attend various international meetings and planning conferences resulting from the 1979 World Administrative Radio Conference (WARC).

Although these requests for increase may be justified, they appear inconsistent with deregulation, and should therefore be carefully scrutinized.*

LEGISLATIVE AGENDA

The new administration should support efforts to revise the 1934 Communications Act. No matter how well intentioned the FCC may be, there remains an acute need to provide the Commission and the Courts with up-to-date Congressional guidance.

Because of the diverse competing interests involved in comprehensive telecommunications legislation, it appears unlikely that a comprehensive bill can receive favorable consideration in the 96th Congress. It is likely, therefore, that interested Members will introduce in the next Congress a series of bills, each covering a discrete area of telecommunications policy and, perhaps, a reorganization of the FCC.

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*Commissioner Lee, in a memorandum to the FCC Executive Director, questioned the need for the budget increase in several specific areas, e.g. provision for an additional commissioner's assistant trained in economics; enlarging the Commission's staff particularly in the Common Carrier Bureau for a consumer outreach program and in the Cable Television Bureau; a $613,000 public interest group participation program, which is still in the rulemaking stage. He argued that this request "seems to be a prejudgment of that proceeding." See *Broadcasting*, August 11, 1980.

In addition, the public broadcasting authorization, which will provide an opportunity to consider public broadcasting *de novo,* is scheduled to be on the Congressional agenda early in 1981. Some members are seriously questioning the need for a continued federal subsidy and will be looking for alternatives.

The new administration should develop its proposals for telecommunications legislation in coordination with the interested Members of the House and Senate Committees, who have been considering the issues for several years. Although S. 2827 and H.R. 6121 and their predecessors provide a solid foundation for legislation in the next Congress, these bills will be revised and improved before further Congressional consideration.

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FEDERAL ELECTION COMMISSION

James Shoener

BASIC POLICY ASSUMPTIONS

Legal Source

Federal Election Campaign Act, 1971, as amended 1974, 1976, 1977 and 1979. 2 USC § 431 *et seq.* Also administers part of Internal Revenue Code 26 USC §§ 9001-9042, the Presidential funding provisions; parts of the Criminal Code, 18 USC §§ 594-607.

Other matters concerning elections *not* under the jurisdiction of the FEC are tax credit provisions, taxation of political organizations, certain bribery, vote fraud, voting rights, and civil rights statutes.

Commission Make-Up

2 USC § 437(c). Six members, two appointed by the President with advice and consent of Senate each two year cycle for terms ending April 30 of odd years. Not more than three members may be of the same political party. Next appointments are for two six-year terms commencing April 30, 1981. The two terms expiring in 1981 are Republican Joan D. Aikins (Pennsylvania) and Democrat Robert O. Tiernan (Rhode Island). Incumbent commissioners hold over until their successors are appointed and confirmed. Two *exofficio* members, one designated by the Secretary of the Senate and one by the Clerk of the House also sit with the Commission (see Legislative Recommendations). Commission membership is full-time and paid at Executive Level IV of the Executive Schedule.

The chairman is selected by the Commission and serves for a one-year term and may serve as chairman only once during a

six-year term. Vice chairman shall not be of the same political party. Present Chairman is Max Friedersdorf (Republican); Vice Chairman is John McGarry (Democrat).

Legal Counsel

The power in the FEC lies in the Office of General Counsel. The present General Counsel, Charles Steele, is a former Labor Department attorney who was former trial counsel under William Oldaker, the previous General Counsel. Steele has been with the Commission since its inception. Oldaker left the Commission to be counsel to the Kennedy for President Campaign.

Close observers of the Commission believe Steele has shown his true colors recently in several anti-Republican rulings and legal stances, particularly the position against independent expenditures by Republican Committees. Commissioner Thomas Harris (Democrat, former counsel to AFL-CIO), who also has been on the Commission since its inception, spends a great deal of time in and around the General Counsel's office and accordingly is quite influential in legal matters particularly among the newer lawyers. Legal counsel for the FEC has been criticized in a recent *Yale Law Journal* (May 1980) article for failure to follow due process requirements in treatment of respondents. The writer agrees, and although there has been an improvement in the new enforcement provisions (1979 amendments, effective January 8, 1980, 2 USC § 437(g)), further improvements are suggested herein under legislative recommendations.

The Election Law in Practice

The Federal Election Campaign Act has accomplished one of its purposes, i.e., it has restricted the effect of very rich persons on the political scene. Some few very rich still spend large amounts on "independent expenditures," notably Stewart Mott, but such spending has not proved particularly advantageous. In the case of *Buckley* v. *Valeo* (1976), the Supreme Court held that First Amendment rights to free speech and association precluded restrictions on such independent expenditures. If one man can make such expenditures alone, a three-judge panel in the U.S. District Court (D.C.) held that a *group* of similarly situated people could organize for a like purpose. Thus, the limitations on contributions and expenditures as set forth in the Act can be avoided.

Likewise, contributions to rapidly proliferating political action committees have spawned a new set of power brokers in labor union, corporate, trade association and other special interest areas. The ability of such groups to contribute up to $10,000 in an election cycle means that several closely allied PACs can completely finance a particular Congressional race. In the Senate, however, the average Senate contest requires a broader range of support, and the PACs do not have the potential clout.

In actual operation, few members will receive much more than 25 to 30 percent of their support through PACs and often will receive funds from committees of conflicting objectives, so that the concern for "buying a member's vote" is often exaggerated by the "reformers." The effective PACs are the ones that have continuous contact to the member's office and staff and not the ones that send the election time check.

The Federal Election Commission, Common Cause, and some Members of Congress (including a few Republicans) seem to be worried over the potential political power of PACs. The Obey-Railsback bill to curtail PAC contributions has passed the House but appears stalled in the Senate.

The FEC legal staff seems to delight in proving the political ignorance of the "little guy." Their activities against people who innocently have violated the law is inversely proportioned to their political and social status. Their bark, however, is worse than their bite. While they will threaten $10,000 fines and hint at imprisonment, a "conciliation" can be bought for $100 to $500 in most cases.

There is real reluctance on the part of the Commission to investigate political activities of labor organizations. When and if they do, the violations are treated extraordinarily gently. While "baiting" of unions should be avoided, they should be required to meet the line on compliance as much as corporations.

PROBLEMS AND OPTIONS

The greatest problem is the political taint of the Commission and staff. The bipartisan nature of the Commission as envisioned by Congress and carried out by President Ford received a tilt when Carter appointed at the specific recommendation of the Senate Minority Leader, a "tame" Republican to the Commission. The staff has developed (through audit, compliance and counsel's office) nit-picking attitudes, particularly toward the

conservative organizations and candidates; they seem to believe that "liberals" do not violate a law they were instrumental in creating. These attitudes will be difficult to change.

Probably statutory changes and close monitoring of Commission regulations and advisory opinions would be necessary.

BUDGET

The present budget is $9,283,000; the request for 1981 was $11,530,160. The 1982 budget proposal will be $13,259,078. Included is $1,000,000 for a new building, which can be questioned. Since this is such a small budget, it seems that ordinary inflation would justify a $10,000,000 budget at least.

RECOMMENDATIONS FOR LEGISLATION

1. The Act should be amended to get rid of the *exofficio* members. These people are representatives of the Secretary of the Senate and the Clerk of the House. They fill no function other than to assist incumbents—particularly of the majority party. Leaks of information and advance knowledge of rulings have been conveyed by these people, and in fairness, the two "ex-officio" commissioner posts should be abolished. The point of entry filing with the Secretary of the Senate and the Clerk of the House should also be abolished, and the FEC should be the place of filing of all candiate and committee reports. There is no reason to give incumbents these advantages.

2. The election law's hearing, investigation and enforcement provisions should be revised to be placed under the jurisdiction of hearing panels composed of an administrative law judge and two commissioners (of different parties). Some measure of due process as suggested in the May 1980 *Yale Law Journal* could be accomplished by such a system. Greater regard for First Amendment rights is required to prevent a political bureaucracy from developing. Appearance by counsel and oral argument by counsel should be allowed before the hearing panel. This would curtail the growth in power by the General Counsel's office.

3. The 1980 decision in *FEC* v. *Central Long Island Tax Reform Immediately* (known as "CLITRIM") indicated an FEC preoccupation with trivia ($135 was involved, yet the FEC spent an estimated $35,000 on legal expenses). At the same time, the FEC allowed Sen. Edward Kennedy's Campaign to borrow $900,000 from the Chemical Bank, secured only by un-

finished paintings by Andy Warhol and others. The refusal of the FEC to look into the Linda Ronstadt rock concert for the reelection campaign of Senator Gary Hart (D-Col.) and conduct an adequate investigation indicates a partisan "tilt" in the FEC staff.

Congress should be urged to amend the Act to allow a performer to volunteer to appear at a political rally—but not to take proceeds from a regularly scheduled concert and dump them into the candidate's campaign as was done by singer Willie Nelson for President Carter, Rondstadt for Governor Jerry Brown (D-Calif.) and Hart and Fleetwood Mac for Sen. Birch Bayh (D-Ind.). These concerts were "non-political," except as to the proceeds, in contrast to the use of performers at a political rally—such as Bob Hope and others. The same is true for Warhol, Rauschenberg and Wyeth paintings. If they are worth $35,000, they should not be permitted to be donated to a campaign any more than a Clement Stone or Stewart Mott could contribute $35,000. The Act should be amended to correct this. Also the IRS should see to it that the artists pay tax on the "gain" on these paintings (See, IRS Sec. 84).

The basic right of citizens to know voting records of members should be clarified. The publication by *any* group of voting records showing how a member or group of members voted should be considered basic *free* speech and *not* have to be reported as a political contribution so long as it does not advocate election or defeat of a candidate.

4. The FEC Act should be amended to clarify independent expenditure rules and to define the areas of permitted but unreported party committee activity. The 1979 Amendments are as confusing as the previous rules. These should be opened up to party activities so that the parties can fill their function. The allowance of 501(c)(3) charitable organizations to communicate to their members on any subject (without loss of tax status) should be granted *or* taken away from 501(c)(7) organizations (labor unions—see 2 USC § 441(b)). While some 501(c)(3) organizations, such as Ebeneezer Baptist Church, or other black churches have sponsored appearances and rallies by Carter and Kennedy, many conservative churches were chilled into political non-action by threats of loss of tax exempt status. The same rules should apply equally and across the board.

5. A report issued by the John F. Kennedy School of Government at Harvard recommended amending the law to permit increases in contribution allowances. Perhaps the infla-

tion factor should be applied as it is to committees. The 1974 limits don't make sense in 1980 and will make less sense in 1982 and 1984.

6. Uniformity of interpretation between the IRS, FEC, and the Ethics in Government Act should be required, even to the extent of requiring joint advisory opinions, if necessary. The unseemly result of conflicting concepts between federal agencies should be stopped in the election field. The Federal Aviation Administration (FAA), Federal Communications Commission (FCC), Securities and Exchange Commission (SEC), Interstate Commerce Commission (ICC) and perhaps other agencies also affect this problem. Full legislative investigation into such interactions should be make, and any conflicts should be smoothed out by law.

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FEDERAL MARITIME COMMISSION

Stephen D. Little

BACKGROUND

In the Reorganization Act of 1961, Congress separated responsibility for administration of the regulatory aspects of shipping (i.e., tariffs and conferences) from the promotional aspects (i.e., government subsidies and loan guarantees for ship construction).

The Federal Maritime Commission was created as an independent agency to handle the regulatory aspects, with the latter functions placed under the Maritime Administration (an entity within the Department of Commerce).

This separation has led to unnecessary growth in both agencies, a blurring of the distinctions between these two crucial maritime policy functions, and a general inability to enhance our U.S. Merchant Marine. In the last decade, additional activities in the maritime area which should have been lodged in other governmental agencies (i.e., DOT, U.S. Coast Guard) have been delegated to the FMC; for instance, water pollution financial certification under Section 311 of the Federal Water Pollution Control Act of 1972 and Sections 2 and 3 of the Passenger Vessel Certification Act which requires an assurance of financial adequacy for cruise vessels.

An *internal* reorganization of the Federal Maritime Commission was announced on July 31, 1980, by the Democratic Chairman, Richard Dashbach. This latest reorganization was based upon a special task force report dated April 1980. This report noted a number of management problems that should be followed-up on by the new administration.

Other Problems

In addition to a number of organization and management deficiencies noted in the task force report, the Federal Maritime Commission suffers from problems which have cropped up as a result of judicial and regulatory decisions.

Since 1916, the essence of federal maritime regulatory policy, as administered by the FMC and its predecessor agencies, has been to approve all conference, trans-shipment, joint service, pooling and other agreements filed by U.S. and foreign common carriers engaged in the foreign and domestic offshore commerce of the United States. Section 15 of the Shipping Act of 1916 provides *exemption from the U.S. anti-trust laws for carriers acting in accordance with conference agreements filed with and approved by the FMC.* This single approval function is as vital in 1980 as it was in 1916, if the Merchant Marine is to compete effectively in world trade. It must be remembered that foreign-flag carriers do not operate under comparative antitrust and regulatory constraints. Thus, they are able to take advantage of new transportation methods, technology and opportunities to the detriment of their U.S. competitors.

For nearly fifty years, it was generally believed that the antitrust immunity provided under Section 15 was an absolute one and thus provided some parity for U.S. shippers. But the U.S. Supreme Court's *Isbrandtsen* decision in 1958 signalled the beginning of judicial attempts to water down the statutory scheme which Congress had intended in 1916 and later reaffirmed in 1961.* The antitrust intrusion has gained momentum through recent decisions of the U.S. Supreme Court.** In *Sevenska* the court upheld a test that agreements otherwise violating the antitrust laws can be approved only if the parties to the agreement bring forth facts to demonstrate the agreement is "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." The court found this test to be proper despite the concerns of Congress about subjecting maritime transportation to restrictive antitrust standards.

The resulting prejudice toward U.S.-flag carriers from such inconsistent and uncertain applications of U.S. domestic anti-

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**Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958).

***Federal Maritime Commission* v. *Aktiebolaget Sevenska Amerika Linier*, 309 U.S. 238 (1968).

trust laws to international maritime commercial activities is evident.

Because Section 15 also grants to the Justice Department the authority to intervene in FMC proceedings as an interested party and to challenge any shipping agreement as not satisfying a "serious transportation need," American shipping is facing apparently inconsistent governmental policies. As a recent House of Representatives report observed: "The Department of Justice has contributed to a lack of even-handed regulation of Section 15 agreements. The Department has generally not opposed agreements under Section 15 where all the parties to the agreement were foreign carriers, regardless of the anti-competitive impact of the agreement. But the Department has opposed agreements with less anti-competitive impact where one or more of the parties were U.S.-flag carriers."*

A unique situation exits in U.S. shipping in that conferences in our foreign commerce must be "open" to any shipowner who wishes to join a conference. But, in most of the rest of the world, "closed" conferences prevail. Closed conferences, in essence, provide that entry of a new competitor depends upon the concurrence of the existing members. One result of the U.S. open conference policy is to allow foreign carriers to "dump" their excess capacity in the U.S. trade whenever they are denied membership in closed conferences. The issue of closed versus open conferences needs close scrutiny by the new administration.

In summary, a revitalized U.S. Merchant Marine, vital to the national security, requires the full restoration of the antitrust immunity of Section 15 originally intended by the Congress. The key question, therefore, is whether this vital function should be retained within the present structure of the FMC or transferred elsewhere. The new administration should also consider carefully whether other regulatory functions should be retained *or transferred to other agencies*, in light of their impact upon a sound Merchant Marine.

RECOMMENDATIONS

Option No. 1: Reorganization

One alternative to the present regulatory system that should be considered by a new administration is an FMC reorganiza-

*House Merchant Marine and Fisheries Committee Report on H.R. 6899, "Omnibus Maritime Regulatory Reform, Revitalization, and Reorganization Act of 1980."

tion plan whereby certain functions would be transferred out of the Commission which should be more properly handled by other government agencies. At the same time, the FMC's operating budget should be reduced and qualified. Conservative policymakers should be placed in key positions at the Commission.

Under Section 102(b) of Reorganization Plan No. 7, the President could designate either of two Republicans, James V. Day or Peter N. Teige, to be Chairman of the FMC. It should be noted that Commissioner Leslie Kanuk (Democrat) is now serving as Vice Chairman.

By appointing people to the FMC who share its conservative philosophy, the new administration will most likely ensure that its policy objectives will be carried out.

By reducing the FMC's operating budget, the administration could be assured that only the most vital functions of the Commission would be performed. Significant personnel changes can be expected from such a bold move.

The operating budget for the first two years of a new administration should look like this:

	FY 1981	FY 1982
Budget	$12,000,000*	$2,000,000 (Est.)
Personnel	358 authorized 318 Actual	75 (plus 20 transfers to DOT)

The functions to be transferred include those currently performed by the FMC under the Federal Water Pollution Control Act and the Passenger Vessel Certification Act. This would probably result in the elimination of much paperwork and red tape, including the filings of tariffs and environmental statements, as well as the closing or consolidation of the five FMC field offices.

This proposed sharp cut in the FMC's budget represents a viable opportunity to act in a bold and decisive manner. Its purpose is to preserve the most essential regulatory responsibilities, while cutting back on unnecessary functions and personnel.

Option No. 2: Abolition of the FMC

Another option which a new administration should consider is to abolish the FMC. The President could designate his newly

*A budget revision could be made in January of 1981 for the approximate $6,000,000 left in the FMC FY 1981 budget, less the estimated $2,000,000 needed for transfer and FY 1981 operation.

appointed Chairman, with specific instructions to establish a task force to report to him and, in turn, to the President within 120 days, according to a timetable of actions outlined below. If a sharper cut of the FMC's functions is desired, then the President should choose to immediately abolish the FMC and implement the actions outlined below by submitting to the Congress, on or about January 21, 1981, a reorganization plan. The House Merchant Marine and Fisheries Committee and the Senate Commerce Subcommittee on Merchant Marine and Tourism should be advised in advance of this action. The Congress must have proper notice so that it can pursue other legislation vital to strengthening the Merchant Marine. It must also have a firm understanding of the Administration's policies and plans for the Merchant Marine and for the direction of the FMC, as well as its governing regulatory philosophy.

The recommended steps for the administration's reorganization plan would be to:

1. Abolish the FMC.

2. Transfer all present FMC statutory authority to the Secretary of Commerce to be delegated to the Assistant Secretary of Commerce for Maritime Affairs.* The Assistant Secretary would be directed to set up under him an office entitled, "Assistant Administrator for Maritime Regulation," who in turn, would direct the Office of Agreement Review and Rates and Investigations. The Assistant Administrator would be the primary officer responsible for approval of Section 15 agreements. He would be guided by internal regulations (supplanting existing General Orders) creating categories of agreements, similar to those contained in S. 2585, which would either be "presumptively approved," or "grandfathered" in under the new structure. These agreements could receive the full study and individual attention they required at the hands of the Assistant Administrator's staff.

3. The Landis Report of 1961 feared a conflict between regulations and promotion, and recommended the split in the two maritime agencies by removing regulation from the realm of promotion. However, this fear is no longer justified today since, presumably, it would be a recognized goal of the incoming administration to foster growth and pre-eminence of our Merchant Marine. Considering the confusion that now exists in industry and in the Congress over where federal maritime policy is made and administered (MARAD, FMC,

*An office created by Section 42(a) of the Merchant Marine Act, 1970.

State, DOT or Justice), a transfer of the agreement approval and other regulatory functions of the FMC to the Maritime Administration within the Department of Commerce would be welcome as a means of providing more effective and coherent Merchant Marine policy. The conflict of regulation and promotion would disappear. Regulation could be given sole responsibility for approving Section 15 agreements. Any dispute over those agreements could then be decided before an Administrative Law Judge or in the courts. As a precedent for this action, on August 20, 1980, the FMC voted at a formal hearing to abdicate certain authority in a proceeding to the Maritime Administration and the State Department.

4. These current general orders of the FMC which entail a lot of red tape in filing tariffs, environmental statements, etc., should be repealed. The offices of the Hearing Counsel, Freight Forwarders, Certification and Licensing, General Counsel, should be eliminated, along with the Chairman, four Commissioners and their staffs. It should be noted that most of the attorneys now employed in the hearing and general counsel offices have been in federal service on an average of less than three years and could be readily terminated or transferred elsewhere.

5. The 20 employees and those functions performed under the Federal Water Pollution Control Act and the Passenger Vessel Certification Act could be transferred to the Department of Transportation. The administrative law judges and staff (10 employees) could be transferred to the proper branch of, say, the Commerce Department or their positions eliminated altogether.

6. Follow-up legislation should be required in Congress to repeal the freight forwarder licensing function of the FMC (46 U.S.C 841(b)), tariff filing on ocean common carriers (46 U.S.C. 812, 813, 187), and the Intercoastal Shipping Act of 1933 (46 U.S.C. 843-845).

7. These changes would result in an estimated reduction in staff from 361 authorized for FY 1981* to 65 employees, and a budget reduction from $12 million in FY 1981 to $2 million to perform the essential FMC functions. The new Asssistant Administrator would require a staff of approximately 10, an Office of Agreement Review would require a staff of approxi-

*The agency now employs 318 people, of which 12 are SES employees.

mately 20,* and 10 miscellaneous support and five transfers from FMC field offices to MARAD field offices. Among those FMC functions which would be abolished without transfer to other agencies would be the five Commissioners and their staffs, and the General Counsel, Hearing Counsel, Field Offices, Compliance Industry Economics and Personnel offices which presently account for 263 positions.

8. Consideration should also be given to creating an Assistant Secretary of Commerce for Maritime Regulatory Affairs, who would handle all those responsibilities outlined above. Appointment of such office would require the advice and consent of the Senate. The advantage of this option would be that the abolition of the FMC would be in one package, including transfers of authority, as well as the necessary statutory repeals. The disadvantage would be that the legislation would be subject to full and lengthy hearings, and would encounter strong resistance from the special interests. It would create within the Commerce Department a new bureaucratic structure larger than if the above approach is taken. However, there would also be the opportunity for congressional committees to formulate complementary maritime reform legislation to accompany this proposal.

*Although tariffs would no longer be filed at the FMC, they would be maintained in case of complaints or general investigatory requests by the Assistant Administrator.

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FEDERAL TRADE COMMISSION

Kendall Fleeharty and Joel Mandelman

BASIC POLICY ASSUMPTIONS

The Federal Trade Commission is an independent federal agency charged by Congress to protect against, and to prosecute, anticompetitive business practices and "unfair or deceptive" business practices, whether the latter actually result in anticompetitive conduct.

The FTC has authority to stop business practices provided they affect interstate commerce and involve a significant public interest. Enforcement is by means of cease and desist orders issued after an administrative hearing, or by injunctions issued by the Federal courts at the initiation of the FTC.

The FTC also defines and implements industry-wide "trade regulation rules" and "industry guides" to govern business practices in a general field of commerce. While the FTC itself has no authority to imprison or fine for violation of its rules or determinations, the Commission can routinely seek civil penalties of up to $10,000/day in Federal court to enforce one of its final cease and desist orders or Trade Regulation Rules. The FTC can also seek redress for those who have been harmed by unfair or deceptive acts or practices. Redress may include cancellation or reformation of contracts, refunds of money, return of property, and payment of damages.

Of all the federal agencies, the FTC has the broadest authority over domestic practices. The scope of its authority is as broad as its mandate to prosecute "unfair or deceptive acts or practices" is vague. In recent years the Commission has become a strident advocate for consumer organizations in curbing alleged abuses throughout entire business sectors. Pharmacists, optometrists, used car dealers, funeral directors,

and television advertisers have become target groups through the FTC's work to control their operations under Trade Regulation Rules. Each instance has been met with Congressional opposition and has brought the FTC's regulatory agenda under severe criticism.

The FTC has also recently sought to expand its antitrust enforcement authority by expounding new theories of antitrust violation and then seeking to force divestiture in highly concentrated sectors of the economy (cereal making, automobile manufacturing, oil companies, etc.)

The FTC's modern statutory base resides in the following 15 federal laws:

1. *Federal Trade Commission Act,* approved September 29, 1914: the act, as amended, declares unfair methods of competition and unfair or deceptive acts or practices in commerce to be unlawful.

2. *Sherman Antitrust Act* (Sections 1, 2, 3)*, approved July 2, 1890: an act to protect commerce against unlawful restraints of trade and monopolies.

3. *Robinson-Patman Act***, approved June 19, 1936: an act to prohibit price discrimination.

4. *Clayton Act,* approved October 15, 1914: the act forbids mergers or acquisitions that might substantially lessen competition trends or to create a monopoly.

5. *Webb-Pomerene Export Trade Act,* approved April 10, 1918: an act to promote export trade by permitting certain cooperative activity.

6. *Wool Products Labeling Act of 1939,* approved October 14, 1940: the act protects producers, manufacturers, distributors, and consumers from undisclosed substitutes and mixtures in spun, woven, knitted, felted, or other types of manufactured wool products.

7. *Lanham Trademark Act,* approved July 5, 1946: the act requires registration and protection of trademarks used in commerce and implements the provisions of certain international conventions.

8. *Fur Products Labeling Act,* approved August 8, 1951: the act protects consumers and others against misbranding, false advertising, and false invoicing of furs and fur products.

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*The FTC only has civil enforcement authority for these statutes. The Justice Department's Antitrust Division has both criminal and civil enforcement authority.

**By agreement between the FTC and the Justice Department, price discrimination laws are enforced only by the FTC. There is no statutory basis for this agreement.

9. *Textile Fiber Products Identification Act,* approved September 2, 1958: the act protects producers and consumers against misbranding and false advertising of the fiber content of textile fiber products.

10. *Fair Packaging and Labeling Act,* approved November 3, 1966: the act prevents unfair or deceptive packaging or labeling of certain consumer commodities.

11. *Truth-in-Lending Act,* July 1, 1969: the act requires full disclosure of related credit terms before a consumer credit account is opened or a credit transaction is completed. The act requires that, if any of certain credit terms are specified in advertising, others must be also. An amendment to the act limits the liability for unauthorized use of any credit card to $50 on cards issued on or before January 25, 1971, and no liability on cards issued after that time unless the credit card issuer takes several steps such as: notifying the card holder of limited liability, providing a postage-free means of notification of loss, and providing a means of identification such as signature, thumb print, or photograph.

12. *Fair Credit Reporting Act,* approved October 26, 1970: the act is designed to ensure that a consumer's credit report will contain only accurate, relevant and recent information and will be confidential unless requested for an appropriate reason by a proper party.

13. *Magnuson-Moss Warranty-Federal Trade Commission Act,* approved January 4, 1975: the act expands the Commission's authority to represent itself in court (including the Supreme Court), to promulgate substantive Trade Regulation Rules in the consumer protection area, to obtain civil penalties and consumer redress for violations of the Federal Trade Commission Act, and to pursue any unlawful act "affecting commerce" rather than only those acts defined as "in commerce."

14. *Fair Credit Billing Act,* became law October 28, 1975: the act is designed to provide consumers with an opportunity to dispute errors in billing statements and to require creditors to make efforts to correct such errors.

15. *Equal Credit Opportunity Act,* became law October 28, 1975: the act is designed to ensure that consumers are not denied credit for reason of sex, marital status, age, race, religion or national origin.

SUMMARY OF PRINCIPAL DEFICIENCIES OF CURRENT POLICIES

The FTC carries out its regulatory mandate in a manner markedly different from other regulatory agencies such as the Occupational Safety and Health Administration or the Environmental Protection Agency. EPA, for example, has issued rules mandating a reduction in sulphur dioxide emissions. These rules will apply to all industries whose manufacturing operations result in significant emissions of these air pollutants. The FTC will, generally, issue trade regulation rules that only seek to regulate a specific practice, within a specific industry,* although in recent years there has been some trend towards more generic industry-wide rulemaking.** For example, a typical FTC rule would have banned certain specific marketing practices within the funeral home industry; another would have had the effect of mandating that used car dealers give limited warranties on the automobiles they sold.

As most FTC rules or proposals are merely prohibitory in effect—e.g., to stop advertising on children's television programs, or to require itemized bills by funeral directors—the extent of reform that proposals such as the "Bumper's amendment" and cost/benefit analysis might have will be limited.

There is little provable economic "cost" involved in complying with rules such as those, and the "benefit" of banning children's television advertising is purely a philosophic intangible; it cannot be quantified.

Therefore, if reform is to be imposed, either from within the agency, by a change in interpretation of rules and personnel changes, or by Congressional action, other approaches must be examined.

The most critical reform is to stop the FTC's misuse of Section 5 of the FTC Act, the section making "unfair" practices illegal.

The FTC has encountered serious criticism—both judicial and legislative—for "over-inclusion" in determining unfair practices. However, the Commission has also engendered other types of criticism. By attempting to test how much elasticity is contained in the "unfair" authority, the FTC has been guilty of "arbitrary" government. "Regulation by sur-

*Rules are promulgated either pursuant to Section 6(g) of the Act or pursuant to Section 18 (Magnuson-Moss Act Amendments to the FTC Act).

**Two notable examples are the standards and certification rule making proceeding and the proposed rule banning advertising on children's television programs.

prise" might best characterize proposed FTC rules that would make advertising to children unfair; or that would make a dealer's failure to affirmatively inspect cars for defects unfair.

In the area of antitrust prosecution, the FTC is charged with preventing and prosecuting "unfair methods of competition," and "enforcement by surprise" has been attempted there as well. Cereal companies have been accused of anticompetitive behavior through cooperation in a "shared monopoly," although nowhere does this notion appear yet in law. The FTC argues that the three major manufacturers should be forced to divest pieces of their companies to artificially create more competing entities. Yet nowhere does the law confer upon the FTC any authority to force divestitures in pursuit of its new (or even its old) economic theories.

The FTC has also sought to prosecute new ideas of "price-signalling" that have come as complete surprises to the business and legal communities.

"Unfair," then, has come to characterize a great many business practices—or business "states of being"—that Congress never intended to regulate or eliminate.

The direct, legislative remedy would be to amend Section 5 of the FTC Act to eliminate "unfair" and substitute in its place *"fraudulent," "false," or some other similar definitional term.* This coupled with appropriate legislative history would end many of the FTC's abuses of its Section 5 enforcement authority. The indirect method of reaching this goal would be appropriate personnel changes, both within the General Counsel's Office and the Bureaus of Competition and Consumer Protection. As nothing in Section 5 mandated these rule-making proceedings, nothing in Section 5 would preclude a new administration from stopping them.

Shared Antitrust Functions

Several of the FTC's enabling statutes vest the agency with antitrust responsibilities that are shared—or informally divided—with the Justice Department. This bifurcation blurs the control of the Executive branch over federal antitrust policy and results in some duplication and administrative overlap. A frequent suggestion has been to abolish the FTC's Bureau of Competition and transfer its enforcement authority to the Antitrust Division of the Justice Department. The Division already had exclusive authority to file criminal antitrust cases and, as indicated above, shares its civil enforcement authority with the Commission.

From a law enforcement viewpoint there is no valid reason for continuing this dual enforcement authority. While there is an institutional agreement in dividing workloads between the two agencies, there is no formal policy coordination between the FTC and the Justice Department. The Commission has filed cases on theories not accepted by the Antitrust Division.* The only "coordination" between the two agencies is an informal clearance procedure designed to make certain that both agencies do not start investigations of the same alleged violations.

The same problem exists with respect to merger investigations. Under the Hart-Scott-Rodino Act, both agencies must be notified of prospective mergers in advance of the proposed closing so that there is sufficient time for an antitrust review. The Justice Department has promulgated merger guidelines which set out the maximum market shares that the companies involved may control without the Antitrust Division at least seriously considering blocking the merger.** These guidelines, however, are not binding on the FTC, so that it is possible that a merger which might be blocked by one agency could go unchallenged by the other. The enactment of statutorily mandated policy coordination between the two agencies would be, in effect, a further agreement in favor of a merger.

The counter argument is managerial. The Division currently employs approximately 600 attorneys, with roughly three-fourths of them in Washington. The remainder are located in seven field offices. It would create a management and logistical nightmare if the Division had to suddenly absorb perhaps 150 to 200 new attorneys who were previously employed by the FTC. It might also make the Division even less internally manageable than it already is.

Judge, Jury and Prosecutor

A second criticism leveled at the FTC (and at all regulatory agencies) is that, no matter what the organization chart looks like, the agency acts as investigatory, grand jury, judge, jury, and prosecutor, with all of the inherent unfairness entailed in that arrangement.

In developing new Trade Regulation Rules, which have the

*Again, the most visible example is the FTC's shared monopoly cereal case filed against Kelloggs, General Foods, and General Mills.

**Violation of market share guidelines does not automatically mean that an injunction will be sought. Moreover, the guidelines have no legal effect on the court hearing the case.

effect of law, the FTC characteristically proceeds in a highly adversarial manner. Agency staff conducts an investigation, proposes a severe rule, and conducts administrative hearings, generally funding consumer groups to appear in support of the rule. The hearings are supposed to be conducted fairly and dispassionately, yet the Presiding Officer occupies a status as agency employee and answers, indirectly, to the agency's General Counsel. It is difficult to envision any organizational or procedural buffer now in place to shield the Presiding Officer from implicit pressures pointing toward approval of a proposed rule. For this matter, FTC staff access to the Presiding Officer appears to be enhanced under this structure at the expense of equivalent access by business groups which would be made to bear the brunt of the proposed rule.

Similarly, FTC Commissioners themselves, who must ultimately vote to approve or deny a rule, have historically been accessible to agency staff, while access by the public, and by businesses that are targeted by a proposed rule, has been impeded. This inequality in *"ex parte"* contact has served to make the Commission—and the Commissioners—largely the captives of their staff.

NEEDED: NEW PHILOSOPHICAL UNDERPINNINGS

The FTC needs to develop a new philosophical underpinning for its fraudulent advertising cases and rulemaking proceedings. In those instances in which it would be reasonable to expect that a consumer of normal competence could readily discover the misstatements of fact in the advertising, and in which it would be an effective market place remedy for the consumer to refuse to make further purchases of the product, then the FTC probably ought not to issue prohibitory rules.

If, however, the challenged advertising claims (or the product's intrinsic deficiency) were of such a nature that a consumer lacking specific technical expertise could not discover the defect for himself, then the promulgation of prohibitory rules would be justified.

Two examples should suffice to illustrate the point. It ought not to be necessary for the FTC to tell soup companies not to put marbles in the soup bowl for purposes of filming a television commercial, or to stop putting aspirin tablets (or was it salt tablets) in a glass of beer, in order to make it foam more than it ordinarily would. In both instances the consumer could, after a single purchase, determine that the vegetable content of

the soap, or the "foaminess" of the beer were not as advertised. Their available remedy would be adequate and effective: stop buying that brand. The manufacturer would get the message very quickly and mend his ways—or eventually go out of business.

On the other side, if a "protein" bread were being advertised as having a specific level of nutritional value or a brand of mouthwash were advertised as having specific medicinal properties that it did not possess, the FTC intervention, including stiff fines and mandatory advertising disclaimers are entirely appropriate.

If the trade practice were so unfair or deceptive, and the ability of the consumer to adequately respond by refusing to buy the product were an inadequate remedy, then the issuance of prohibitory trade regulation rules would be justified. For example, there is no effective remedy available to a consumer when a funeral home refuses to provide him with an itemized bill, or when it induces a family to purchase an unwanted package of services and goods for a funeral.

In those instances, the bereaved family has no adequate market-place remedy. The discipline of the market place is inadequate when a customer's purchases are substantial, few and far between. In those cases, rules and regulations appear to be the only alternative.

22

INTERSTATE COMMERCE COMMISSION

Matt Scocozza

Because the passage of the Motor Carrier Reform Act of 1980 (Public Law 96-296) on July 1, 1980 has such a substantial effect on the operation of the Interstate Commerce Commission (ICC) and its regulatory mandate, this chapter of the report will divert from conventional format and review the new legislation with appropriate comments on effective ICC implementation.

INTRODUCTION

In 1887, Congress enacted the Interstate Commerce Act establishing the Interstate Commerce Commission (ICC); the first regulatory agency. The Commission was created originally to regulate the railroad and water carrier industries which were then still in their growing periods. Railroads had been involved in rate wars in efforts to achieve a transportation monopoly in different portions of the country. State, local communities, and shippers lobbied the federal government heavily to create a government entity to ensure that transportation services would be available to all shippers on an equitable and nondiscriminatory basis. Surprisingly, even the railroads clamored for regulation to protect themselves from each other's destructive competitive practices.

In 1935, the jurisdiction of the Interstate Commerce Commission was expanded to include the regulation of the motor carrier industry. The motor carrier operators contended that they were suffering from the same destructive operating practices that the railroads had in 1887, and feared annihilation if the government did not act to protect their territories.

In 1965, with the creation of the Department of Transportation, the Interstate Commerce Commission *relinquished its jurisdiction* over rail and motor carrier *safety regulation*. Those functions now rest with the Federal Railroad Administration and the Bureau of Motor Carrier Safety within the Federal Highway Administration.

The Motor Carrier Reform Act of 1980 which was signed by the President on July 1, 1980, (Public Law 96-296) and the Railroad Revitalization and Regulatory Act of 1976 (Public Law 94-210) were the result of efforts by Congress to streamline the procedures of the Interstate Commerce Commission and abolish many administrative and regulatory practices which were outdated and antiquated. More recently, the House and Senate agreed to a conference on a major rail reform bill named after the House Commerce Committee Chairman—the Harley O. Staggers Rail Act of 1980 (S. 1946). This important piece of rail legislation will be referred to thoughout this report as the "Rail Bill". Because the Motor Carrier Regulatory Act of 1980 and the Rail Bill are so current, this paper will specifically deal with the provisions of those two important legislative items, specifically setting out what the problem was which motivated the legislation and the legislative cure. Further, comments to each section will contain recommendations for the Administration/Interstate Commerce Commission to follow to reflect more effectively the mandate of these important pieces of legislation.

Because the functions of the Interstate Commerce Commission are extremely complex, this analysis will deal with its activities on an industry, rather than on an issue basis.

THE AGENCY'S MISSION

The ICC should ensure that entry into the motor carrier and rail carrier industry can be accomplished with minimum regulatory restraints.

The ICC should ensure that rail and motor transportation is provided on an equitable basis to all shippers regardless of size.

The ICC should ensure that rates for transportation services are provided on a non-discriminatory basis and that those shippers who are truly captive to the transportation services provided are not subject to unnecessarily high rates for the services being provided. At the same time the Commission should ensure that rates for transportation services are not artificially being suppressed in an effort to be a "guarantor" of

low cost transportation to all. Rather, shippers should be required to pay for the value of the services being rendered.

Administrative proceedings before the Commission should be undertaken with a minimum amount of regulatory delay and with a minimum of financial exposure to the carrier and/or shipper participating in the proceeding.

The ICC should ensure that motor carrier regulation is undertaken with a minimum degree of federal involvement in the transportation being provided.

The ICC should dedicate itself to the principle that only regulation which serves a rational purpose continues to stay in effect. Under the new legislative measure, the Commission should aggressively seek to eliminate regulation which does not respond to the essential needs of the shipping public nor viability and future strength of the industry.

The ICC's role in fostering and ensuring a healthy inter-city motor carrier bus industry cannot be understated. The Commission should aggressively determine what minimum regulatory restraints that industry can operate under and immediately partake a program for its implementation.

THE REGULATED RAILROAD INDUSTRY

In 1979, railroads carried approximately 858 *billion* ton-miles of freight. Note that one ton-mile is the equivalent of one ton of freight hauled by a rail carrier for a distance of one mile. Total operating revenues in 1979 were $22 billion. In 1979, railroads carried approximately 36 percent of all ton-miles of freight hauled in this country including 70 percent of the ton-miles of coal and 60 percent of grain ton-miles. Total railroad operating personnel is approximately 500,000 persons. Five motor carrier rigs are needed to move the capacity of one single rail car. It is easy to point out that if a railroad failed, a motor carrier always stands ready, willing and able to transport the particular commodity to market. However, the incremental transportation cost for a motor carrier to haul coal, for instance, would be astronomical. Many of the bulk commodities hauled by a railroad are hauled in excess of 1,000 miles.

Almost 98 percent of all the tonnage handled by rail carriers in 1979 was performed by rail carriers have revenues in excess of $50 million (class 1). In 1979 the national transportation system had 41 such railroads. Branchline railroad (class 2 and class 3) were substantially greater in numbers. Although the viability and health class 1 railroads is paramount, the impor-

tance to the national transportation system of the class 2 and class 3 railroads should not be overlooked. These smaller systems provide the feeder services from small rural areas to the more heavily traveled mainlines. Several class 3 railroads are operated throughout the nation under a subsidy program sponsored by the state and the Federal governments. Accordingly, the needs and concerns of these very small railroads often comes to the political forefront because of the state and Federal dollars invested in their operation.

Economic Development Vis-a-Vis the Railroad

In the early days of each railroad system decisions on where to build rail segments centered around the density of traffic available in the area. In numerous situations after the rail line was built, several industries and shipper locations relocated to other parts of the nation. Unfortunately, the railroad was left with a rail line and little or no traffic to support the investment. Common sense would suggest that the railroad would merely close up shop along with the shippers who left the particular area. However, because of Federal regulation, railroads had to persevere numerous administrative hearings to show cause why the public convenience and necessity "required" the carrier to discontinue rail service. Mayors, governors, senators and congressmen oftentimes appeared before the ICC to argue for continued rail service in a certain geographic location regardless of whether or not the traffic could support the rail branch line. As the years went by, the abandonment issue before the ICC literally turned into a question of economic development. The predominating question should have been whether there were sufficient resources to justify the railroads' continued operation of the particular branchline. Unfortunately, the socio-economic requirements of the particular geographic region ruled in many cases. Railroads were forced to operate parts of their system that literally could not financially support themselves. This was clearly the birthplace in the U.S. of the theory of "cross-subsidization."

In the heyday of rail transportation, before the interstate highway system was designed and built, the railroads enjoyed a generous market share and rate of return on their investment. However, in recent years diversions of traffic from the rail carrier to the motor carrier have been substantial. Cross-subsidization has literally been draining the railroad industry for close to 25 years of vitally needed resources to reinvest in

the railroad plan. Instead, these resources have been used to "cover" operating losses on unprofitable branchlines.

The "Haves" and the "Have Nots"

There are three predominant reasons for the railroad industry's present state of affairs:

First, as mentioned earlier, railroads are a fixed plant operation. They are not flexible. They cannot change their routes, as an air carrier or motor carrier can, to follow the traffic. The exodus of manufacturing industry from the Northeast and relocation in the South and Southwest is a primary explanation for the numerous bankrupt railroads located in the northeastern sector of the U.S. and the substantial health of the railroads located in the southern sector of the U.S. Throughout no fault of the railroads, industry left the populated Northeast where labor costs were higher and relocated in the South where a substantial amount of growth was available coupled with tax incentives and relatively inexpensive real estate. Another example is the Omaha-to-Chicago market which was a substantial rail market. In the early 1920's, there was a tremendous amount of agricultural movement between Omaha and Chicago that was able to sustain the health of the lines of eight different railroads. Today Class 1 railroads are having difficulty maintaining three healthy main lines between Omaha and Chicago. The change in the traffic pattern and decline of Chicago as the agricultural hub and livestock capital of the world resulted in a tremendous drop in rail freight between Chicago and Omaha.

The second major factor resulting in the present state of the railroad industry is a result of labor relations. Class 1, 2, and 3 railroads are operating under antiquated work rules that were developed in the 1800's and have been perpetuated by negotiations between management and labor unions.

The third most important factor affecting the railroads' decline in economic stability and marketshare is government regulation. Since 1887, the railroad industry has been under rigid regulation on rates, extension of lines, mergers (one of which took the ICC 13 years to approve), and abandonment of lines. In 1976, the Railroad Revitalization and Regulatory Reform Act (PL 94-210) attempted to lift the existing morass of Federal regulations affecting the railroads. Unfortunately, the ICC proved to be a stumbling block because of its hidebound of regulation and the legislation was ineffective. In 1980, the Senate and House concluded a conference on a substantial

regulatory reform# bill (the "rail bill"). It is designed to streamline existing regulation, give railroads substantial maximum rate freedom, and allow railroads to make use of contracting services, marketing device to increase their market share. Because this bill was designed to correct many of the program and policy deficiencies of the ICC, this portion of the paper will divert from the suggested format and review the railroad regulation functions of the ICC with comments for improvement either administratively or under the authority of the new law.

History of Regulation Affecting the Railroad Industry

The rail bill provides the industry with substantial rate freedoms. It is essential that the ICC aggressively move to implement its freedoms. The new administration and Chairman should make implementation of this new rate a priority matter.

A newly appointed Chairman should move as expeditiously as possible to ensure that the railroads have greater freedom in raising or lowering their rates within acceptable confines. Moreover, rates should not be suspended if they are challenged. Rather, the same custom should follow as in any other industry. If a price is considered unreasonably high after a challenge, the benefactor of the excess revenues would have to make retribution. This is clearly an oversimplification of an issue, but the railroads must have increased ratemaking flexibility in order to overcome the present system of suppressed ratemaking. Certain protections should be included to safeguard "captive shippers", i.e., those shippers without any other alternatives than one railroad for transportation services, from being price-gouged.

The ICC devised an inflationary program to actually combat inflation in the rail industry. It has literally turned into a Catch-22. The Interstate Commerce Commission grants across-the-board rate increases to counteract inflation. Unfortunately, some commodity movements are affected much more severely by inflation than the movement of other commodities. Accordingly, a general rate increase is always a common denominator so that commodity movements which do not suffer severely by inflation receive a windfall, while movements by railroads which are highly labor-intensive and suffer most from inflation never really recover the full measure of inflationary deterioration. The end result is that many

commodities begin to move at less than compensatory levels particularly those whose movements are most affected by inflation and are subject to the most competition. On the other hand, captive rates on commodities and rates on those commodities which are not labor-intensive have an inflated rate base which has a certain ripple affect on the economy.

General rate increases

The rail bill provides for a phase out of general rate increases in 3 years. It is critical that the ICC ensure that the transition period does not result in abrupt price increases to shippers nor, on the other hand, result in any loss of revenues by the carriers. There is no question about the fact that removal of general rate increases would require much more administrative work by the railroad but would certainly result in railroads pricing commodities in proportion to their actual costs.

Freight Car Shortages

Because there is a finite amount of rail cars available in the nation, during peak season demand periods severe shortages of freight cars result in different segments of the country. This problem can be alleviated with the application of contract rates for haul included in the rail bill.

The new Chairman and members of the ICC must be charged with the duty of an expeditious implementation of the new contract rate authority. The present Commission has allowed contract rates, but only after incredibly detailed administrative proceedings. To date, only two contracts have been approved. The new administration must ensure that the ICC does not frustrate this new marketing tool which is so vital for the industry.

Service Regulation

The Common Carrier Obligation

For the privilege of hauling materials across the state line in interstate commerce, a common carrier has an obligation to serve each and every shipper in its territory who requests service. The common carrier obligation was designed to protect all shippers by guaranteeing an equitable level of service to both small and large shippers. Throughout all regulatory reform measures in the railroad area and even in the motor carrier area, there has never been a thought towards

abrogating the common carrrier obligation in any way, shape or form. The railroads have clammered for relief from the common carrier obligation since they argue that it is not economic for them to move just one or two rail cars per year for some shippers on particular branch lines. The common carrier obligation has been a major factor in perpetuating unprofitable branch lines.

Solution: The ICC recently deregulated the movement of all fresh fruits and vegetables by rail. The deregulation measure was followed by an increase of 14.7 percent of the market share of the movement of all fresh fruits and vegetables by railroads. Along with this particular deregulatory measure, no common carrier obligation remained. The abrogation of the common carrier obligation in this *limited aspect* has not proven to be a hardship on shippers. Accordingly, the ICC should immediately review all commodity classes for potential total deregulation.

Car Service Orders

The rail bill provides that the ICC issue compulsory car service orders only in emergency situations. There is no question about the fact that the Commission had become involved in car service distribution situations that were counterproductive to the railroads during non-demand periods. However, during periods of extreme car shortages, special service orders by the ICC did prove to be some relief to many small shippers. Accordingly, the Commission should be charged by the Administration with retaining that particular degree of responsibility.

Car-Hire

It is not unusual to see a railroad freight train with box cars belonging to 20 or 30 different railroads from all over the country. The reason is that a commodity stays in a particular car from the beginning to the end of a trip. Also, railroad equipment is free-rolling and travels for the most part without restraints from system to system. At the end of the month, all railroads keep track of the amount of time alien railroad cars were on their tracks and pay a daily rental for the use of that particular car to the rail car owner. This daily rental charge is more commonly referred to as "per diem." In an effort to encourage better utilization of cars, the ICC has assessed an extra charge above the normal per diem and called it "incentive per diem." This particular extra charge was designed to act

as an incentive for railroads to quickly return the cars to their home roads. The end result has been that incentive per diem has encouraged non-railroad speculators to purchase cars and send them free-rolling on the railroad system and collect these incentive per diem charges. This has been an opportunity for many individuals with surplus cash to make quick investments. Unfortunately, the end result has been syphoning out essential revenues from the railroad industry into the non-railroad private sector.

The ICC should be charged with the responsibility to devise a system whereby *railroads* are encouraged to invest in rolling stock and reap the benefits of the incentive per diem charges. Further, tax incentives should be enacted to enable the purchase by railroads of rolling stock to benefit the rail carrier and act as a disincentive to speculators who invest in railroad rolling stock.

Railroad Structure Regulation

Mergers and Acquisitions

The history of the ICC's handling of mergers of two or more rail companies is riddled with horror stories. In the early 1960's, the profitable Union Pacific Railroad attempted to purchase the Rock Island Railroad which was beginning to show a decline in revenues. It took the ICC 13 years to decide to approve the merger. In the meantime the Union Pacific Railroad became disinterested in the Rock Island acquisition. In October 1979, a bankruptcy court ordered the Rock Island Railroad to totally liquidate all its assets and cease operations.

Solution: The compromise bill provides procedures to expedite merger proceedings. It is most important that the new ICC follow these procedures and develop policies that encourage the consolidations and restructuring of the industry which may be its only salvation.

Abandonments of Rail Lines

The second most important regulation constraint on the railroad industry is the abandonment program. When a rail line finds it is unprofitable and chooses to discontinue service, it must go through a tedious and expensive administrative proceeding to justify closing down a particular line. At present, contested abandonment proceedings average 2 1/2 years. In many situations, railroads choose to continue the unprofitable line merely to avoid the expense of the administrative proceed-

ing. Conrail, for example, has at least 2,000 lines which justify abandonment today. However, because of the morass of Federal regulation, that system has chosen to continue the lines.

Solution: Legislative reform to provide that no abandonment proceeding shall take longer than 9 months.

THE REGULATED MOTOR CARRIER INDUSTRY

The Motor Carrier Freight Industry has gross earnings of more than $44 billion annually. It is essentially composed of 16,000 motor carrier companies regulated by the ICC and over 150,000 motor carriers whose main function is to haul commodities not regulated by the ICC. The latter are more commonly known as independent owner/operators or exempt operators. Almost 60 percent of all motor carrier freight service is provided by non-regulated motor carriers.

There are a variety of carrier types that are subject to ICC regulation. The most common are the *regular-route common carriers* that specialize in less-than-truckload (LTL) transportation, which the ICC has generally defined as transportation of shipments under 100,000 pounds. Another large group of carriers is the *irregular route carriers* that specialize in truckload (TL) transportation of shipments in excess of 10,000 pounds. Those carriers who perform mostly LTL service had more general authority to haul a variety of different commodities. On the other hand, those performing TL operations have had generally more restrictive authority from the ICC to haul only specific and detailed commodities.

Essentially, unprocessed foods are exempt from regulation. The Motor Carrier Reform Act of 1980 (PL 96-296) made little change in this total exemption. The predominant haulers of exempt commodities are the independent owner/operators. These are basically small entrepreneurs who own and operate their own motor carrier equipment. There are many instances, however, where independent owner/operators lease their equipment and their driving services to regulated carriers who have the appropriate authority to haul a particular commodity in any particular territory.

Although the ICC does control the movement of all commodities across state lines, any individual who hauls any commodity as an incidence to his own business is totally exempt from regulation. This type of movement is more commonly referred to as "private carriage." The growth of

private carriage in recent years has been an indication that the for-hire commercial motor carrier industry has failed to meet the needs of the shipping public in many situations.

The Regulatory Structure

The 1935 Act

The Motor Carrier Act of 1935 created a regulatory structure for the motor carrier industry in the image of the 1887 Interstate Commerce Act designed to regulate the railroad industry. The Commission was charged with responsibility for regulating all freight which moved on a "for-hire" basis across all state lines and in foreign commerce. The ICC not only specifies particular types of commodities that a motor carrier is authorized to haul, but also the geographic territories in which the motor carrier is allowed to serve.

Since 1935, the morass of Federal regulations promulgated by the ICC became incredibly restrictive and protective of the existing motor carrier market. Until the present ICC developed a liberalized entry policy, it was literally impossible for any applicant to obtain a significant amount of new operating authority from the Interstate Commerce Commission. The Commission developed a tradition of protecting the existing motor carrier markets from increased competition. The theory was to protect the health and vitality of existing carriers and not to dilute their freight markets. Further, the Commission developed an intricate system of commodity authorities to further protect motor carrier markets. For example, an examination of the few pages of an old trade publication show requests by motor carriers for authority to transport glass containers, not exceeding 1 gallon capacity, between three small towns in Pennsylvania and one city in New Jersey: authority to transport skeet and trap targets from one point in Indiana to points in five states. These were merely only two examples of situations where the ICC had created markets so restrictive in nature that motor carriers could only increase their operations on a piecemeal basis.

Entry

As mentioned previously, entry into the motor carrier market was almost an impossibility before the present Interstate Commerce Commission developed a more liberal attitude towards entry into motor carrier industry. Nevertheless, the Commission was still bound by language in the Interstate

Commerce Act which stated that entry into the motor carrier market could only be granted when a motor carrier could show that the "public convenience and necessity" (an all-encompassing term which was designed to protect the interest of the shipping public and the motor carrier industry) *"required"* that the particular operating certificate be granted. Thus, if motor carriers could show that the new entrant into the market would reduce the freight markets of existing carriers and make those particular carriers weaker, public convenience and necessity would not be served if the new entrant had his application granted. The Motor Carrier Reform Act of 1980 substantially revised the entry policy of the Interstate Commerce Act. An applicant for authority now merely needs to show only that he is "fit, willing and able" to provide the service and that his application is "consistent with", rather than "required" by, the public convenience and necessity—a much more *relaxed* entry standard.

The Motor Carrier Reform Act of 1980 also made the new entry standard even easier under certain specific instances. The motor carrier applicant merely needs to show that he is "fit, willing and able" to provide the service to obtain authority to transport the following:

1. Motor carrier service to any community not presently regularly served by a motor carrier certificated by the ICC.
2. Motor carrier services which will be a direct substitute for abandoned rail service to any community.
3. Transportation for the United States Government of property other than household goods, hazardous or secret materials and sensitive weapons and munitions.
4. Transportation of all shipments weighing 100 pounds or less, e.g., United Parcel Service, Inc.
5. Transportation of food and other edible products so long as the annual tonnage does not exceed the amount of exempt tonnage haul by a particular motor carrier. Essentially this enables independent owner/operators who are in the business of hauling exempt fresh fruits and vegetables, etc. from the agricultural communities to backhaul processed foods, edible products and other specified agricultural commodities back to the points of agricultural production. The independent owner/operator must insure that his regulated tonnage does not exceed his exempt tonnage.

The House and Senate will be conducting annual oversight hearings over the motor carrier industry during which many problems are expected to arise with respect to the implementa-

tion of the new act. The Administration and the Congress should be working closely to ensure the Act is working and to rectify any shortcomings in future legislation. Without the assistance and strong leadership of the Administration, amendments to the motor carrier reform act may not be possible. Accordingly from the outset, the new Administration should take a strong stand with respect to the most optimum liberalized entry possible into the motor carrier industry.

In the 97th Congress, the Senate may attempt to amend the legislation once again to make food and edible products a total exemption for all motor carriers. This particular effort would be considered a tremendous victory for the more than 150 thousand independent owner/operators across the nation. It would also save the public hundreds of millions of dollars. Therefore, the new President should consider taking a position in favor of such an exemption.

Ratemaking

The 1935 Act as amended by the Reed-Bulwinkle Act of 1948 enabled the Motor Carrier Industry to enjoy legalized rate price-fixing with immunity from the antitrust laws. Motor Carriers have representatives who belong to "rate bureaus" which meet on regular intervals and discuss and vote on motor carrier rates. The rates that may be set are generally high enough to ensure that all carriers can make a profit on a particular movement. Obviously, the operators of inefficient carriers would certainly force the rate base to be higher than it would if the rate base were set only by more efficiently run carriers. Thus, the U.S. has had a system that had little incentive for increased productivity and efficiency. The Motor Carrier Reform Act of 1980 provided that antitrust immunity would no longer be available for discussion or voting on single-line movements. Single-line movements are those movements which are performed from beginning to end by one particular carrier. Antitrust immunity for discussions and voting on joint-line rates which cover joint movements between carriers would still be available.

The legislation set up a study commission which is to report to Congress on the probable effects of removal of the antitrust immunity. It is expected that the Commission will issue a favorable report and further will suggest that antitrust immunity also be removed for joint-line movements.

Regulation of Service

The Common Carrier Obligation

The 1935 Motor Carrier Act paralleled the Hepburn Act of 1906 which established common obligations on all interstate railroad companies. The motor carrier industry from the very beginning of regulation had to provide service to any shipper it was authorized to serve. The trucking industry argued that it was only the common carrier obligation which protected small shippers in small markets and enabled them to receive transportation services. They further argued that without the common carrier obligation in the existing regulatory structure, the motor carrier industry would not be serving small communities.

Testimony and hearings revealed that 80 percent of all the motor carrier service provided to communities located outside standard metropolitan statistical areas (population centers of 50,000 or more) was provided by non-ICC regulated carriers. The tremendous increases over the recent years in people doing their own trucking is evidence of the fact that service in many small communities was less than satisfactory. Numerous reports and surveys were made by the Administration, the General Accounting Office, and the Senate Committee on Commerce, Science, and Transportation which concluded that service to small communities was not satisfactory and that the regulated motor carrier industry was not performing the high degree of service to small communities that they were claiming. It is hoped that the Motor Carrier Act of 1980 will enable independent owner-operators who are predominantly based in small communities to fill in the gap and enhance the service to small communities. Further, the new liberalized entry policy is expected to encourage small motor carriers to commence operations in small communities.

The new Administration and the new ICC should take a detailed look at service to small communities because the common carrier obligation is still on the books. Accordingly, all carriers who have small communities within their parameters of authority from the ICC should be held accountable for adequate service in the small communities. A new ICC should determine what carriers are not adequately serving their respective shippers. The ICC has always maintained the authority to revoke the license from any motor carrier who has failed to provide adequate service to his shippers. However,

this is an enforcement tool that the ICC has used in only several very limited situations since 1935.

Operating restrictions

Historically, the ICC had imposed detailed and restrictive operating regulations on the motor carrier industry. Carriers were actually restricted to specific use of highways and routings between particular cities. In many situations, carriers were required to take a more circuitous route between city pairs. It was not unusual for the Commission also to require that a movement between city pairs could only be in one direction. This last restriction was the basis for the cliche, "One man's front-haul is another man's back-haul."

The Motor Carrier Reform Act charged the ICC with the task of immediately eliminating all circuitous and route restrictions in operating restrictions in operating certificates and implementing regulations to: (1) broaden the categories of commodity authorities on carriers' operating certificates; (2) enable carriers to serve intermediate points between two authorized points; (3) provide round-trip authority where only one-way authority is authorized;* (4) eliminate unreasonable or excessively narrow territorial limitations; and (5) eliminate any other unreasonable restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

Although the legislation paves the way for reduced Federal regulation, the Commission has a tremendous role to play in actually implementing this new deregulation policy. Therefore, a strong hand by the Department of Transportation and Congress is most necessary to ensure that the Commission follows through in eliminating these operating restrictions.

Procedural Reform

Appearances before the ICC have been extremely costly in time and money to motor carrier applicants and motor carriers applying for relief in one form or another. The Motor Carrier Reform Act of 1980 ordered the Commission to immediately begin to seek methods to expedite all proceedings before that body. Specifically, the Motor Carrier Reform Act of 1980

*Consideration should be given to a proposal to eliminate entirely the empty backhaul problem by permitting any operator carrying food and edible products as the front haul to carry any other goods on the return trip.

required that all applications for authority be handled in less than 270 days.

THE INTERCITY BUS INDUSTRY

The intercity motor bus industry provides transportation services to more than 50,000 communities in the United States. Moreover, of those 50,000 communities 14,000 communities have no other form of public transportation. There is no question that rural America relies on the essential services of the intercity bus. More than 30% of all scheduled intercity bus trips begin or end in rural areas.

In addition to the passenger service, the industry also provides an essential daily express and freight service to these communities and tens of thousands of farms throughout the country.

The Financial Position of the Industry

The intercity bus industry is suffering tremendous financial difficulty. In 1978-79, the Senate Commerce Committee held hearings on the financial condition of the intercity bus industry. The intercity bus industry depends heavily upon their private charter operations to run a profitable enterprise. About 50 percent of the revenues of the intercity bus industry comes from intercity scheduled runs while 30 percent is generated from charters and tours, 15 percent is generated from package express, and the remaining 5 percent is received from miscellaneous services performed. Federal regulation has inhibited growth of the intercity bus industry and required economically wasteful practices such as preventing buses from picking up and delivering passengers in communities that are also served by other bus operators. The end result is wasted fuel and under utilization of equipment.

If the present trends continue, a subsidization program may be necessary if the intercity bus industry is to be viable. Obviously, all that is possible should be done to alleviate regulatory constraints on the bus industry and enable it to maximize their growth potential in the private sector.

Amtrak Vis-A-Vis The Intercity Bus Industry

The intercity bus industry has estimated that in the 7 1/2 years of Amtrak existence, Amtrak has diverted more than 43 million passengers from the intercity motor bus industry. The

estimated loss to that industry is in excess of $500 million. Amtrak, of course, is a heavily federally subsidized corporation competing against a private sector enterprise that receives no direct federal subsidization. The Amtrak Restructuring Act of 1979 and recent legislation dealing with the Northeast Corridor contained a provision that requires Amtrak to immediately increase its fare structure to more adequately represent its current costs. In effect, Amtrak has used the government subsidy as a tool to beat competition by the intercity motor bus industry.

DEREGULATION BURDEN

The Common Carrier Obligation

The Motor Carrier Act of 1935 also put the intercity motor bus industry under the regulatory authority of ICC. The Common carrier obligation applies to the bus industry just as it does with the rail and the intercity motor freight industry. If a bus operator is given a certificate of operating authority, he must not deny transportation services to all persons requesting such services within his authorized zones.

Entry/Exit

Entry and exit into and out of the market are the most controversial problems with respect to intercity bus regulation. Even though 14,000 rural communities rely on the intercity bus as their only means of public transportation, these small rural communities can hardly provide enough passengers to enable the carriers to operate in an economic manner. As a result, the intercity bus operators rely on the more heavily traveled routes and on their charter business to subsidize the operating losses in rural areas.

The solution is to relax the entry standard in the motor bus industry and encourage all motorbus operators to improve their market share with innovative pricing practices and marketing techniques. Just as deregulation of the airlines created an increased rate of ridership, deregulation to some degree of entry of the motorbus industry would create more passengers. The new ICC should work to enable more carriers to enter the market and develop marketing techniques to improve their market share. As the cost of fuel rises, more and more of the traveling public may have no alternative to the intercity motorbus.

Allowing carriers to pick up and deliver passengers anywhere along their route system and abandonment of the "closed door" policy by the Interstate Commerce Commission can only be productive. Moreover, enabling smaller motorbus operators to enter the smaller markets would relieve the larger motorbus operators allowing them to operate longer hauls and seek the larger markets.

The President should also consider providing direct subsidy to maintain rural bus service in the same way that the Congress has already approved such a subsidy to protect small town airline service. (See Section 419 of the Federal Aviation Act, as amended.)

Rate Regulation

The intercity bus industry has had a tremendous difficulty in obtaining permission from the ICC to raise their rates structure on scheduled operations. The same policy should be followed as was the case with the deregulation of the airline industry. Some regulation could be maintained on maximum rate ceilings. However, below the ceilings, motor carriers should have absolute freedom to raise and lower their rates to meet the needs of their markets. Charter operations should be permitted to operate in a free market. A new administration and a new ICC could easily work in partnership with the Congress to develop innovative procedures to relieve the intercity motorbus industry with a tight rate, entry/exit, and operating restrictions traditionally imposed on the industry.

SHORT- AND MEDIUM-TERM PROBLEMS AND OPTIONS

Implementation of Legislation

The Motor Carrier Reform Act of 1980 and the new rail legislation virtually revised the whole motor and rail regulatory structure. The Commission must, of course, give priority to carrying out the new Congressional directives.

The Commission also must give attention to the problems surrounding the *intercity motor bus industry*. Failure of the industry to survive in certain geographic locations would have catastrophic repercussions. Federal subsidization of the intercity motor bus industry in portions of the country is not an attractive alternative.

Enforcement Policy

The General Accounting Office has been extremely critical of the ICC's compliance and enforcement program. When the Commission chooses to use the injunction process in the courts, its attorneys can immediately pursue a remedy. However, when civil and criminal penalties are sought the ICC must submit all of its pleadings and briefs through the Department of Justice. The General Accounting Office has indicated that the Department of Justice has created delays of up to one year on over 50 percent of all cases submitted to it by the ICC. The Administration, in cooperation with the Interstate Commerce Commission, should immediately undertake a program similar to that already in effect between the Department of Justice and the Veterans Administration where senior ICC attorneys could be designated as deputy U.S. attorneys for the purpose of processing ICC enforcement cases.

Because of the new congressional mandate to free the trucking industry from regulation, the ICC has chosen to take a relaxed attitude towards enforcement of the Interstate Commerce Act and the Motor Carrier Reform Act. Although the idea of less involvement by the ICC with the day-to-day affairs of the trucking industry is a positive step, the illegal movement of transportation can occur much more easily. The Senate Committee has already learned from ICC staff that they have been instructed to ignore violations of operating rules and operating authority.

Although the arguments on behalf of maintaining the former protective structure were given little attention during the legislative process, there is no question that regulated carriers should be protected from the siphoning off of lucrative traffic by illegal activities. The Commission is of the opinion that at least some predatory pricing and other illegal activities will result in lower costs to shippers. To the contrary, unregulated carriers sometimes fail to maintain records, insurance liability, and are many times irresponsible in their handling of the illegal freight. The new administration should review the practical effects of more rigorous enforcement of the Motor Carrier Reform Act of 1980 and either sponsor a stronger enforcement and compliance program or seek addtitional legislation to eliminate those rules which have had a counter-productive impact. However, the purpose of the enforcement program should not be to penalize carriers or to impose heavy fines. The Commission may seek an injunctive decree from any

Federal court to require a carrier to come into compliance with the law. If the carrier persists in its illegal activity, the Commission then may proceed with criminal or civil contempt action against the particular carrier. This has been shown to be a most effective tool to achieve compliance with the Interstate Commerce Act in the past.

BUDGET

Supplementals/Rescissions for Fiscal Year 1981

The ICC operates under a perpetual authorization which provides that the Commission shall be allowed "such funds as are necessary" to undertake its programs. For Fiscal Year 1981, a pending appropriation for the ICC is $82.4 million. Upon review it appears that this is the minumum the Commission needs for operating with existing staff levels and under Congressional mandate.

Recommendations for Fiscal Year 1982

It would appear that the same level of funding should continue through Fiscal Year 1982 considering that the Commission's increased responsibility under both the motor carrier and rail legislation will require substantial monitoring of the respective industries and continual revision of outdated regulations. Further, the increased entry flexibility to the motor carrier market, will ultimately result in massive numbers of new motor carrier applications being submitted for processing.

PERSONNEL MANAGEMENT

Management Plan and Staffing Philosophy

As mentioned earlier, the Commission should develop a new enforcement and compliance program designed to bring carriers into compliance. Further, such programs should be designed to ensure the integrity of the new legislation affecting the rail and motor carrier industries. Finally, policy and planning staff should be challenged to continually review and evaluate ongoing regulatory programs to ensure they are responsive to the needs of the shipping public and the transportation industry.

Staffing Levels

It would appear that through 1982 the Commission will require generally the same level of staff authorized throughout Fiscal Year 1981. However, because of its responsibilities

under the new legislation and the task of resolving the problems of the intercity motor bus industry, the Commission should use, to the maximum extent feasible, outside contractors to review existing programs and their effectiveness and develop proposals to resolve the plight of the intercity motor bus industry.

Membership

The President is authorized to appoint as many as eleven members to the ICC with the advice and consent of the Senate (See 49 U.S.C. 10301 (b)). During the 96th Congress, the Administration and Congress made a policy judgment that membership should be limited to seven members. Accordingly, President Carter refrained from appointing more than seven ICC members. Through attrition, membership on the Commission has reached six. Until the resignation of Commissioner George Stafford (Republican), the Commission was composed of four Republicans and three Democrats. Darius Gaskins (Democrat) was designated by the President to serve as Chairman effective January 1, 1980. The post of Vice Chairman, which is voted on by the Commissioners, is generally held on a rotating basis, with each member having an opportunity to serve. The office of Vice Chairman is essentially an administrative one; the office of Chairman is clearly a policy position.

The Interstate Commerce Act (49 U.S.C. 10301 (b)) provides that the President will not appoint more than six members from any one particular political party. This statutory language obviously contemplated the full Commission of eleven members and was designed to prevent any one political party of having more than a majority of six out of eleven members. Accordingly, the Carter Administration kept the same proportionate political balance on the seven-member Commission by not appointing more than four members to any particular party. Ironically, Carter nominations over the last four years resulted in a majority of Republicans on the Commission up until the time that Commissioner Stafford resigned.

The new administration would have the immediate opportunity to either designate an existing Republican on the Commission as the new Chairman and/or appoint a new Republican member to the Commission and designate that nominee as the new Chairman. Further, the new administration still has the statutory prerogative to "pack" the Commission with five additional members to reach its statutory eleven member authorization.

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NATIONAL TRANSPORTATION SAFETY BOARD

Matt Scocozza

INTRODUCTION

The Independent Safety Board Act of 1974 (49 USC 1901 *et al*) established the National Transportation Safety Board (NTSB) as an independent government agency to promote transportation safety by investigating accidents and recommending safety improvements. Under the Act, the Board was to:

1. Investigate and report on certain accidents (defined by the Act) in each transportation mode.
2. Conduct special studies and investigations on transportation safety issues.
3. Publish recommended procedures for investigating accidents.
4. Evaluate other government agencies' awareness of transportation safety and what they were doing about it.
5. Evaluate the adequacy of safeguards and procedures for transporting hazardous materials and the performance of government agencies charged with transporting those materials safely.
6. Review on appeal the suspension, amendment, modification, revocation, or denial of certain certificates, documents or licenses issued by the Federal Aviation Administration or the Coast Guard.

The Board has five members, one of whom serves as Chairman. Under the Chairman's supervision, the Managing Director coordinates and directs the Board's day-to-day operations and approves and carries out plans and procedures to achieve its objectives. The Board's major functions are carried out by a Bureau of Accident Investigation, Bureau of Technology, Office of Evaluations and Safety Objectives, Office of

Administrative Law Judges, and Office of General Counsel. For Fiscal Year 1981, the Board is authorized 390 staff positions and is subject to a budget recommendation of $18.2 million.

To place the Board's safety efforts in perspective, it is important to understand from the outset that the Board has *no regulatory authority*. Its mandate is to formulate safety recommendations to correct deficiencies and reduce the likelihood of future accidents.

BASIC POLICY ASSUMPTIONS

In light of the NTSB's limited personnel and relatively limited budget resources, NTSB must immediately set out to maximize their utility in the most crucial areas under their jurisdiction. It would follow that the agency should immediately begin to de-emphasize those specific areas of activity which they share in common with other regulatory agencies and channel all their resources to the agency's essential goals and program objectives. The following reassessment of the agency's mission would be in order:

1. The Board should immediately begin a program to de-emphasize their major investigative function of major accidents. In addition, the Board should immediately foster a program with all other regulatory agencies to ensure that their respective investigating teams are providing the Board with all the investigative material, samples, photographs, and technical backup that the Board needs to analyze a particular incident and develop its safety study models. It is also essential that the Board ensure that all safety agencies and private industry have the benefit of as much of the investigative material as possible to assist the Board in analyzing causation and the development of specific safety regulations to cure the safety hazard.
2. The Board should specifically encourage and seek expert comments from all affected agencies and representatives of private industry with regard to particular accidents which have taken place.
3. The NTSB should attempt to identify specific safety hazards that need the most immediate attention and set out to develop a short-term and a long-term program to thoroughly investigate causation and attempt to develop specific safety recommendations to cure the hazards.
4. Where legislative options are the only solution, the Board should develop, on an annual basis, legislative submissions to Congress on how existing safety laws could be improved.

5. The NTSB should specifically focus on all safety *legislation* in effect to determine if the activity under the statute has actually corrected or resolved the problem for which it was designed.

6. The NTSB should immediately analyze all safety *regulations* developed by the different safety regulatory agencies and determine if they have been effective in curing the hazards they were designed to cure.

7. Cooperate with federal and state agencies to define programs the general public needs to be informed on and encourage the various regulatory agencies to foster the development of these programs. The NTSB should not undertake the task of attempting to inform the general public of safety problems with its limited resources. However, the Board should not be derelict in its responsibility to the Congress to advise when any of the appropriate federal agencies fail their mandate in this regard.

SUMMARY OF PRINCIPAL DEFICIENCIES OF EXISTING POLICIES

Investigative Duplication

As originally envisioned by the drafters of the Independent Safety Board Act of 1974 which created the NTSB, the agency would participate in investigations on a first-hand basis and maximize the resources of the agency to develop specific recommendations to cure the transportation safety problem. This safety recommendation would then be transmitted to the appropriate safety regulatory agency having jurisdiction over the particular mode. Unfortunately, the NTSB took its investigative responsibilities more seriously than was originally envisioned. More than 70 percent of the agency's resources are devoted to the investigation aspect of their statutory mandate. It was never Congress' intent to create a duplicative investigating agency. Rather, it was envisioned that a forum independent of the safety regulatory agency was necessary to develop safety recommendations affecting all modes. Also, it was envisioned by the drafters of the legislation that one agency would have the benefit of insight into all safety related problems in the different agencies and would be able to develop recommendations that would reflect the successful programs that have been achieved by other safety regulatory agencies under similar situations.

Unfortunately, the NTSB has become preoccupied with the

"primacy" question. In its testimony before the various congressional committees, it consistently advocates the proposition that it must be the *lead* investigative agency in all major transportation accidents. Obviously, with its small contingent of only 388 personnel (not all of which are assigned to the investigative function), NTBS could hardly compete with such a vast amount of expertise in the Bureau of Motor Carrier Safety, the Federal Railroad Administration, and the Federal Aviation Administration. These various agencies have a wealth of information they could provide the NTSB in all investigative situations. It makes sense to require these agencies to be responsive to the investigative needs of the NTSB. The NTSB at present utilizes the services of a limited number of investigative personnel from other agencies. That utilization should be increased multifold. By *statute*, other agencies should be required that in an investigative activity, they must be responsive to the investigative needs of the NTSB as well as their own investigative requirements. In this manner, NTSB can devote virtually all its resources to the evaluation of the investigative statistics and the formulation of safety recommendations which should always be considered its *primary mission*. It would appear that this could only be accomplished by statute. Each administration subsequent to the formulation of the NTSB has failed to coordinate the investigative activities of all safety regulatory agencies in an effort to maximize the utilization of their respective safety inspectors.

Staff Utilization

Recognizing the limited number of staff and funding resources, the NTSB must develop a more effective staff utilization.

The NTSB indicates that arguments over stylistic changes in Board meetings has resulted in delays on individual safety recommendations of between one and six weeks. These delays in some situations could have disastrous effects. Further examination of that NTSB testimony before the 96th Congress reveals that "staff-initiated" programs and major investigations were cut off in midstream by the members because the staff work product was either not connected to the Board's mandate or simply went off in the wrong direction. These major aborted measures reflect a serious lack of direction from the members to the staff. Further, this information indicates that the Board must take a more effective look in developing its program

objectives and goals for the short-term and the long-term. Without that specific direction from the Board on areas of concentration the only result would be poor utilization of staff resources and wasted efforts with a clear negative effect on the Board's real mission.

Cost/Benefit Review

The General Accounting Office has cited the fact that a critical omission in many NTSB safety recommendations is a cost/benefit analysis of the recommendation itself. The main reason for the refusal of many agencies to implement many safety recommendations by the NTSB is the fact that they could create a severe financial burden on the individual transportation mode. A reliable cost/benefit analysis would only lend more credence on the part of the safety regulatory agency and the respect of the individual industry for which it is designed. If a particular safety recommendation fails to be cost effective, the Board could consider alternative recommendations that might be equally responsive to curing the safety hazard the Board is attempting to resolve.

Program Evaluation

The Board has no formal plans for systematically reviewing its programs. Also, Board officials said previous program evaluations were not concerned with comparing program outcomes with objectives and input. Accordingly, a priority program for the new administration would be to ensure that the NTSB establishes an effective program evaluation plan to provide the administration and the Congress feedback with the specific successes and failures of the Agency. It should be noted that the Board has recently hired *a program analysis officer* who will be responsible for developing and implementing a program evaluation plan. However, this is the Board's only program analysis officer, and many of this individual's duties and responsiblities do not even concern program evaluation. Obviously, it would be safe to assume that at the beginning of the new administration, the Board would still have no effective program evaluation in place.

The Planning Process

The General Accounting Office and other agencies have been critical of the NTSB strategic planning. The General Accounting Office alone has suggested the the NTSB should:

1. Clearly define its mission;
2. Set clear, specific goals and objectives for accomplishing its mission; and
3. Set priorities for achieving goals and objectives.

Fifteen elements of the NTSB Budget Submission for Fiscal Year 1981 under the category "Program Objectives" indicate little or no planning on behalf of the NTSB at all. Further, very few of the fifteen elements actually have any relationship to its statutory mandate or mission as developed at the beginning of the paper. Their program objectives clearly do not reflect the mission as defined in this paper under the category "Background" as set out in the statute and traditionally interpreted. It is essential that under the new administration that a new Chairman and new Board Members immediately begin to define its mission and further to develop program objectives that enhance and achieve the goals set out in the agency's mission.

At present, the agency's program objectives merely set out directives to resolve interagency squabbles over who shall reign supreme over a particular investigation and how the agency should undertake its day-to-day operations. The latter of which should clearly not be part of an agency's mission but be a flexible activity under the auspices of an administrative officer of the agency such as the managing director. More appropriately, the agency's program objectives should specifically focus on the agency's mission and the implementation of the goals set out in that mission.

Budget Process

Analyses and review of the NTSB Fiscal Year 1981 Budget Submission reveals a totally inadequate evaluation of the agency's manpower and financial resources. Although an agency's budget is not a substitute for effective long-range planning, the budget process aids effective management and planning by:

1. Outlining the agency's activities for the coming Fiscal Year.
2. Showing how and why an organization spends its resources.
3. Measuring variances between actual and budget costs in the past.
4. Establishing accountability among managers, thereby increasing productivity and efficiency.

The Board's budget *does not show the total resources the Board will devote to any one activity or program.* One of the Board's major functions is investigating accidents. The budget submission advises that the Board plans to investigate 1783 accidents and issue report on 53 of them during the Fiscal Year 1981. But the total resources that the Board will devote to these efforts are not noted in this budget.

The budget also does not show which Board activities and programs will be used, and the extent of this use, to accomplish short-term objectives. For example, the budget does not show what Board functions, activities, or resources will be required to fulfill the Board's short-term safety objectives.

The new administration, a new Chairman of the NTSB and a new Managing Director should immediately work to strengthen the NTSB's budget process by requiring that the budget show:

1. The total resources that will be used to carry out specific Board programs, activities, or functions;
2. How the Board programs and activities relate to short-term objectives; and
3. How Board programs, activities and short-term objectives relate to the long-range plan.

Obviously, the budget process, the planning process, and the program evaluation activity are all interrelated and must all be attacked at the same time. It goes without saying that under a new Chairman and Managing Director the first year of operation by the Board may result in chaos but the long-term benefits will clearly result in a more effective operation and one that more adequately responds to its statutory mission.

Section 307 of the 1974 Independent Safety Board Act as Amended

As mentioned earlier in this summary, Section 307 of the Independent Safety Board Act as amended requires any safety regulatory agency receiving a formal recommendation from the NTSB to respond in writing within 90 days even if the particular recommendation is favorably acted upon. In a situation involving a critical safety recommendation, no real problem should be realized. However, if a particular safety regulatory agency is in the midst of a detailed safety rulemaking activity and must halt in its place and take key personnel off an important issue to prepare an NTSB answer it would clearly result in the ineffective use of an agency's key personnel at a

critical time. Accordingly, the new Congress should amend Section 307 so that the Secretary of Transportation can waive this 90 day requirement if a safety regulatory agency is in the process of an important activity and delay of that activity might affect its effective implementation.

Review Existing Statues and Regulations

The NTSB should not be preoccupied with the creation of more safety regulations but must address itself to the possible ineffectiveness of existing safety regulations and/or statutes. To satisfy its obvious mission under the Independent Safety Board Act of 1974, the agency should have undertaken a massive program to immediately evaluate and access the effectiveness of all safety regulations in effect by all safety regulatory agencies and their corresponding federal statutes. In this regard, the agency to date has been a hopeless failure.

The Federal Railroad Administration recently undertook a massive study of the effectiveness of its own safety regulations. It took place only after repeated criticisms by the General Accounting Office regarding many of the nonsensical safety regulations which were in effect. The end result of the FRA re-evaluation and recodification of their safety regulations was a rewording of the previous ineffective and nonsensical regulation. The National Transportation Safety Board could be an effective, unbiased and independent voice in pointing out the unnecessary and burdensome safety regulations which have no direct relationship to the resolution of the safety hazards they were originally designed to cure. An effective role in this activity by the National Transportation Safety Board would result in additional revenues to the industry to devote to more effective safety related activities. Benefits would also take form of reduced administrative time spent by the government on enforcing or trying to achieve compliance with these regulations which can be proven to have no significant relationship to resolving the safety hazard they were designed to cure.

SHORT- AND MEDIUM-TERM PROBLEMS

The NTSB should immediately work on a program to make the most *effective use of the investigative officers* of other agencies in the event they undertake an investigation of an accident which comes within the jurisdictional responsibilities of the NTSB. The NTSB should be able to ensure through the

sister regulatory agency that each and every parcel of information needed by the NTSB in a particular matter is provided. In order for this coordinated effort to be successful, it is essential that the new administration either by intergovernmental memorandum or by Executive Order support the NTSB's coordination efforts. Further, to ensure the effectiveness of this program, the administration should support legislation which would enable the NTSB the clear statutory right to receive any and all investigative materials it considers essential in analyzing a safety problem.

The Board could improve the utilization of staff by:

1. More effective management of staff so that Board members can devote their attention to essential safety matters rather than devoting their time in Board meetings to stylistic changes in safety recommendations.
2. Developing the use of employee review boards to handle safety matters of a lesser important nature. Other agencies have been more successful in delegating matters to employee review boards which are of a low priority decision-making nature that members themselves would have to deal with.

LONG-TERM PROBLEMS

The Agency should immediately undertake a massive *evaluation of all safety statutes and Agency regulations* to determine their reponsiveness to the problems the laws/regulations are designed to correct. Such a massive program should not be expected to be completed even within the next administration. However, a clearly defined and mapped out program could prove to be an effective review to ensure the integrity of existing safety laws and regulations. This independent voice by the NTSB could prove to be a helpful tool to the Agency and the Congress in their respective efforts to upgrade safety laws and regulations to be more responsive to the safety hazards they were designed to cure.

The *NTSB should attempt to foster a coordination program* where all information gathered at an accident site is standardized so that all law enforcement state and federal regulatory agencies as well as the NTSB can achieve maximum benefit from available statistics. This would also ensure the most effective use of investigative personnel from all concerned agencies as well as state and local governments. The Agency should continue to assess its programs on a long term basis to determine whether or not its activities have enhanced the

Agency's mission and continue to implement all federal safety efforts. This should not be confused with the similar program evaluation on a short-term which is more specifically related to individual NTSB projects. The long-term program evaluation should more specifically focus on the overall effectiveness of the Agency in curing major safety areas in the different modes.

BUDGET

Supplemental/Residuals for FY 1981

It is important to note that the National Transportation Safety Board authorization which recently passed the Congress authorizes the Agency "such sums as may be necessary" to accomplish its programs. Further, it is important to keep in mind that this authorization is for Fiscal Year 1981 as well as Fiscal Year 1982. The transportation and related agencies appropriations bill which is presently the subject of the conference is expected to fund the NTSB at an $18.2 million level for Fiscal Year 1981. Fiscal Year 1982 appropriations will be dealt with in the 97th Congress.

Recommendations for Fiscal Year 1982

It is unlikely that many of the recommendations in this particular paper could be in effect and operational before the beginning of Fiscal Year 1982. Accordingly, budget savings would be negligible in the first year. However, if many of the investigative coordination recommendations, improved budget, planning, and evaluation programs were implemented, there is no doubt that substantial savings could be realized by the Agency.

PERSONNEL MANAGEMENT

President Reagan will have the opportunity within the first year of his administration to make two appointments to the NTSB which will give him a party/philosophical majority. He will also be able to name a new Chairman.

The terms of the present Chairman, James King, and Vice Chairman, Elwood Driver, both Democrats, expire on December 31 of 1980 and 1981, respectively. The new President will want to name two persons to the Board as chairman and vice chairman who share his conservative philosophy with regard to government regulation.

Faced with the dilemma of either turning around the per-

formance of this agency or asking Congress to have it abolished, the President, if he desires to make the Board function as an effective safety watchdog in government, should be careful in his choices. The President should look for professional persons who, among their qualifications, have respectable safety training, orientation and background. Small businessmen with a sensitivity to safety and to the problems of small business coping with federal regulatory requirements or corporate executives experienced in handling safety matters affecting large numbers of workers would be far preferable to professional Naderite consumer activists, safety zealots with an anti-business animus or political hacks who need a government job.

As noted earlier, better utilization of professional staff by the new Chairman is essential. A managing director who can make the most effective use of staff to enable members to more effectively respond to their statutory mission is critical to improved productivity and effectiveness of the Agency.

A new managing director should immediately set out to establish employee review boards to handle matters of lesser importance in order to free up critical time for the Chairman and the individual Board members.

The new Chairman and managing director should immediately set out to develop a cost/benefit analysis program within the NTSB structure. It would appear that additional personnel who are familiar with the needs of the Board in this regard could at least develop preliminary cost/benefit analyses for the use of Board members in determining policy directions. However, once the Board sets out to establish a specific safety recommendation which could have substantial financial repercussions on the industry, the Agency should clearly consider the need for outside contractors and consultants to provide the most reliable cost/ benefit information as possible.

POSSIBLE SUNSET OPPORTUNITIES

Duplication of Effort

As indicated elsewhere in this report, there are many situations in which the NTSB is trying to compete in an investigatory capacity with several transportation safety regulatory agencies which have infinitely more financial resources and personnel at their command. The new administration and Chairman of the Board should ensure that the agency is only enhancing efforts by other agencies.

An important omission by the NTSB so far has been its failure to review existing regulations of other safety agencies in an effort to ascertain which of those have been ineffective and failed to reduce the safety hazards they were intended to cure. This should be a major program component of the NTSB and would give its existence an important meaning. Without this essential function, the Board's contribution will continue to be limited.

Program Evaluation

The absence of an effective evaluation by the NTSB is another serious omission by that agency. It is crucial that the new administration, Chairman, and Board members immediately implement a workable and reliable program evaluation proces to ensure that the Board operates according to its original statutory mandate. Such a reform would give some impetus to the existence of the Board.

NTSB Independence

The NTSB's prime *raison d'etre* and the reason it continues to be tolerated by the professional safety advocates is the same reason which lent credibility to its creation—namely its complete independence as an agency. It is supposed to enjoy immunity from the pressures of Capitol Hill, the Administration, and the businesses it regulates. All too often, government safety regulatory agencies bow to political and industry pressures so that certain mandatory safety regulations are delayed or stopped altogether.

Because the NTSB's statutory function requires substantial activity in the aviation area, its regulation of aviation safety *vis-a-vis* the Federal Aviation Administration should be the subject of an early review by the next administration.

Prior to 1974, the NTSB submitted to the Federal Aviation Administration formal recommendations for installing ground proximity warning indicators in jet aircraft. This was supposed to function as a failsafe system to alert pilots of the aircraft's proximity to terrain in low visibility weather. Further, the NTSB notified the FAA that McDonnell-Douglas DC-10 equipment had faulty cargo doors which had a propensity to shake loose in flight, resulting in dangerous cabin depressurization. Formal NTSB recommendations to the FAA were followed by the FAA's issuance of "service bulletins" as opposed to "air worthiness directives." Service bulletins are informational only,

discussing a potential safety hazard and rely on industry's voluntary compliance; air worthiness directives have the force of law.

On March 5, 1974, a DC-10 aircraft crashed in Paris. It was conclusively determined that the cause of the accident was a faulty cargo door. On December 1, 1974, a Boeing 727 crashed into a mountain in Berryville, Va., enroute to Dulles Airport. It was determined that the accident was attributable to pilot error. However, it was further determined that a ground proximity warning indicator would have alerted the crew and acted as a failsafe device that might have avoided the accident.

Following both occurrences, FAA air worthiness directives on DC-10 cargo doors and ground proximity warning indicators were issued. These two unfortunate incidences also contributed to the underlying reasons for two FAA Administrators to resign.

Industry Pressure

In the *ideal* situation, it should be assumed that the FAA and other safety regulatory agencies should not have an NTSB watchdog over them. However, history has shown that the NTSB has made *some* effective contributions to improving safety. This particular agency is less subject to individual political pressure from Capitol Hill, the Administration, and industry. This sense of independence has enabled the industry to make recommendations which have sometimes been extremely unpopular politically and to the industry. Perhaps its ability to take such policy positions is because their recommendations are *only* recommendations and do not have the full effect of law.

Political Realities

The solution to NTSB's future is not easy. The Board has been in existence for five years, yet has precious little to show for its efforts. An objective appraisal might well be that it should be abolished, and the new President should consider that option. However, termination of the agency would be an extremely unpopular move and would be met with widespread opposition both in Congress and in the populace. Eliminating the Board could not be accomplished overnight in any case, and certainly would not be successful without the new administration's consistent support for such a long-term effort. Any plan to abolish the NTSB over a period of time should include

provision for extensive consultation with congressional allies, accompanied by a long-range propaganda campaign to justify doing away with this safety board as a do-nothing, counter-productive and unnecessary government agency, staffed by Naderites, plus a gradual decline in budgetary and personnel requests.

Changing the orientation and personnel of the staff from predominately investigative to analytical would be a step in the right direction. This would enable the NTSB to formulate safety regulations in cooperation with other agencies rather than to duplicate the investigative program of those agencies. Further, the administration and Congress must work to change the law so as to require the transportation agencies to provide the NTSB with all the investigatory materials it may require. This reform program is more likely to succeed, in the short-run at least. Anything more ambitious or radical, such as abolition, would meet with immediate failure and should not be tried by the new administration, at least not without careful preparations, congressional support, and long-range planning.

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SECURITIES AND EXCHANGE COMMISSION

Robert Kabel

BASIC POLICY ASSUMPTIONS

The principal mission of the Securities and Exchange Commission is the administration and enforcement of the federal securities laws. These laws, which were enacted between 1933 and 1940 and have been periodically amended over the last 40 years, are primarily oriented toward disclosure of information deemed material to the investment decisions of public investors, rather than toward substantive regulation of conduct.

The most obvious exceptions to this general statement are the financial intermediaries with respect to which the Commission exercises direct regulatory authority (broker-dealers, investment advisers and investment companies) or shared regulatory authority (banks, the securities activities of which are subject to the overlapping regulatory jurisdiction of the banking regulatory agencies and the SEC).

While there is no unanimity on the subject, most observers of the SEC believe that the disclosure approach of the securities laws and the SEC's role in that process have generally worked well, and that both have contributed to the strength of our capital markets by enhancing investor confidence and deterring fraud and manipulation in those markets.

SUMMARY OF PRINCIPAL DEFICIENCIES OF EXISTING POLICIES

Any enduring deficiencies at the SEC are attributable to the statutes which the Congress has given the SEC to enforce. The

most onerous of these laws is the Foreign Corrupt Practices Act which represents a clear case of Congressional overkill to a troublesome problem. The basic securities laws are dated not necessarily in their content but certainly in their form. The discussion which follows assumes that no major overhaul of the SEC's function is contemplated, but that proposals should be considered to improve specific aspects of the Commission's operation.

RECOMMENDATIONS

The issues discussed below are those which are likely to arise in the near future in the context of pending or proposed legislation. Historically, securities legislation is considered for lengthy periods before enactment, and several of the issues discussed have been the subject of debate, in some form for years.

Foreign Corrupt Practices Act (FCPA)

Background

SEC enforcement actions involving the non-disclosure to shareholders of "questionable" corporate payments was one of the principal factors leading to enactment in 1977 of the Foreign Corrupt Practices Act, which (1) prohibits bribes and similar payments by American businesses in foreign countries, and (2) requires publicly held businesses to maintain books, records and accounts which fairly reflect the purpose and nature of corporate transactions.

Since enactment of the FCPA, many businessmen involved in foreign sales have complained that its breadth has had a significant adverse impact on the ability of U.S. exporters to compete for business against foreign competitors not subject to comparable restrictions, particularly in regions of the world where commercial practices are substantially different from those in the West. In addition, ambiguities about the meaning of the Act (which was not customary in order to obtain routine governmental approvals) and the types of conduct still permitted are often cited as unnecessary and undesirable side effects of the FCPA.

On a different level, the "accounting" provisions of the Act have been widely criticized for exceeding the normal SEC policy of disclosure of "material" matters to a considerably higher standard of disclosure. This alone has placed enormous reporting burdens on affected firms.

Finally, there are those who question the SEC's involvement in the enforcement of the Act. Under current law, the Justice Department has jurisdiction over violation and civil enforcement as to non-publicly held companies. The SEC is responsible for civil enforcement investigation and actions against publicly held companies.

In response to concerns expressed about the ambiguity of the foreign bribery prohibitions of the Act, the Department of Justice has initiated a procedure whereby a company can submit confidentially, in advance, a description of a proposed transaction and, in appropriate cases, obtain concurrence that the transaction is not prohibited by the Act. This procedure may help to clear up ambiguities, but it is too early for any final conclusions to be reached. Critics of the Act have cited two potential problems: assurances of confidentiality may be difficult to rely upon (due to the Freedom of Information Act); and the Justice Department may be unwilling to go far enough in approving transactions.

It should be noted that the SEC initially indicated that it would not be bound by Justice Department approval of transactions; more recently, however, the Commission has changed its position.

Possible Action

At the outset it should be noted that any proposal to amend the FCPA should be handled with care; the Act was passed, notwithstanding considerable skepticism about its possible effects, largely because of the perception that anyone opposing its enforcement was a proponent of bribery and corporate unaccountability. This environment still prevails. A recent SEC invitation for comments about possible adverse effects of the Act and proposals to lessen those effects generated only eight comment letters, in part because of reluctance to admit that the Act is causing problems.

In this regard, a proposal to repeal the Act outright would likely become mired in debate about the transactions which led to its enactment, rather than a forward-looking discussion of methods to enhance American export interests.

An approach with greater promise would be the development of specific amendments to the Act, as well as administrative and possible diplomatic initiatives, in order to anticipate any harmful effects of the Act.* These proposals could include:

*These proposals are similar to S.2763 which was introduced by Senator Chafee on May 28, 1980.

1. Vigorous pursuit of multilateral agreements pursuant to which other industrialized countries might join in adopting a code of commercial conduct. Sponsors of the FCPA argued that such agreements would come naturally after passage of the Act, but there has been virtually no progress on this front since 1977.

2. Continued implementation of the Department of Justice review procedures described above, possibly with involvement of other departments (e.g., Commerce).

3. Targeted amendments to the Act designed to minimize any ambiguities in the Act. This effort should be undertaken in consultation with the Act's potential impact, including attorneys and accountants required to give professional opinions regarding compliance. Inevitably, some aspects of the Act will continue to be "ambiguous" in that it prohibits conduct which differs from case to case; nevertheless, it would be possible to address legitimate concerns about the Act's breadth.

4. Consideration of removal of SEC jurisdiction to enforce the Act. While it would be supported by those who believe the SEC has been overzealous in prosecuting "questionable payments" cases, it would increase the politicization and personalization of the debate (for instance, arguments would be made about all jurisdiction being in an executive department rather than in the independent SEC). On the other hand, a willingness to continue SEC jurisdiction, in light of the SEC's reputation for independence, would probably make a proposal more widely acceptable in Congress.

Federal Securities Code

The American Law Institute has sponsored a comprehensive review of the seven basic federal securities statutes, as amended, and has recommended their replacement with a single unified code. The proposed Code has received the endorsement of the American Bar Association, and in September 1980 the support of the SEC after a series of changes upon which the SEC insisted.

The purposes of the Federal Securities Code are to remove inconsistencies between the various statutes, to update them to take into account administrative and judicial developments since 1933, and to reorganize the statutory scheme into a more comprehensive format. While the bulk of the Code represents an effort to restate existing statutory administrative and judicial law, there are a number of significant substantive changes proposed as well.

Although it is not yet clear how the Code will be handled in Congress, it is widely expected that its consideration will take three to five years, and perhaps much longer. Its development under the sponsorship of the American Law Institute took over 10 years during which the Code was drafted by a working group of attorneys and law professors. Those closest to the project have urged that in order to expedite the Code's consideration and enactment, Congress rely upon their work product concerning the overall framework of the Code and the legal conclusions reached in drafting it, rather than detailed consideration of each provision. However, there are a sufficient number of important substantive changes made by the Code that detailed consideration will be inevitable. Furthermore, it seems likely that, in opening up for discussion the existing statutes and judicial opinions, the Code will serve as a basis for re-examination of the existing regulatory system.

Glass-Steagall Act Revision

The Glass-Steagall Act, passed in 1933, was part of the comprehensive banking legislation prompted by the collapse of many financial institutions. As relevant here, it mandated the separation of commercial banking (i.e., taking deposits) from investment banking (i.e., selling securities) based upon the perception that this combination of activities had led to improper conduct precipitating losses both for financial institutions and their depositors and for investors.

The basic separation of commercial and investment banking has been the subject of continuing debate since shortly after the Glass-Steagall Act was passed. The debate has great competitive significance to the participants and prospective participants in the financial services markets, as well as in its potential impact upon investors.

There are two principal issues involving the Glass-Steagall Act which have been the subject of past Congressional consideration and should be expected to arise again in the 97th Congress:

Underwriting by Commercial Banks of Municipal Revenue Bonds

Banks are now permitted to act as underwriters for federal government securities and state and local general obligation bonds; with a few exceptions, however, they may not underwrite state and local revenue bonds.

In recent years there have been several attempts to amend the Glass-Steagall Act to allow revenue bond underwriting; the Senate has passed bills to do so twice (in 1968 and 1974) but both initiatives have died in the House. This proposal is vigorously opposed by several securities groups.

Those who advocate bank underwriting of revenue bonds rely principally on the argument that bank entry into this business would improve the market for municipal revenue bonds by adding to the competition; this, in turn, would make the markets more efficient and reduce the borrowing costs of state and local governments.

Opening up competition is clearly the trend of recent banking legislation. Doing so has had the effect of blurring the lines between different kinds of financial intermediaries. Revenue bonds have become an increasingly popular means of financing for state and local governments, and now comprise about 70 percent of the local governments, and now comprise about 70 percent of the tax-exempt bond market (in contrast to a negligible percentage in 1933). As this percentage grows banks are being frozen out of the tax-exempt bond underwriting business, and the securities industry is gaining a monopoly position at the expense of investors.

Opponents of bank underwriting of revenue argue that the revenue bond market is already highly competitive, with a large number of securities firms competing for business. Any added competition from bank entry would be at the expense of other markets. For instance, in order to devote resources to revenue bond underwiting, banks would have to reduce their underwriting activity in general obligation bonds, so the overall impact on competition in the tax-exempt securities markets would be negligible. Opponents maintain that restrictions on competition are appropriate where potential market participants are in unequal competitive positions. Because of their access to low-cost capital and their extensive customer base resulting from the limited entry into commercial banking, banks enjoy competitive advantages over other entities, including broker-dealers, which would enable banks to compete unfairly. Due to these competitive advantages, bank underwriting of revenue bonds would cause many brokerage firms, particularly small and regional firms to go out of business.

Operation by Banks of Mutual Funds

The Glass-Steagall Act prohibits commercial banks from managing or selling interests to the public in mutual funds or

similar pooled investment media. As a result of this prohibition, many management activities of trust departments of commercial banks are generally limited to management of assets for fiduciary purposes such as estate planning and individual holdings. Many banks, particularly the larger ones, are actively promoting legislation which would remove the prohibition, enabling banks to sponsor and manage mutual funds in competition with the existing mutual fund industry. This proposal is vehemently opposed by the securities industry and mutual fund lobbies.

Many of the arguments made concerning this issue are analogous to those made with regard to underwriting of municipal revenue bonds. The potential enhancement of competition which might result from commercial bank involvement must be considered in light of competitive advantages allegedly held by banks. In addition, this proposal raises more fundamental questions about the role of banking institutions in the economy. For example, supporters of the Glass-Steagall Act argue that, absent the prohibition of sponsorship of mutual funds, banks would become overly dominant. By having large new pools of assets under management, it is argued, banks would be in a position to control the capital allocation process by deciding in which companies to invest as well as to extend credit. This in turn could adversely affect the whole capital formation process, by concentrating in too few institutions decisions about capital allocation, possibly leading to greater problems for small business and others not favored by institutional investors.

On the other hand, bankers and other supporters of bank sponsorship of mutual funds point out that the restrictions imposed by the Glass-Steagall Act fail to take into account the significant changes in the financial system which have occurred since the 1930's. For example, market developments such as enhanced technology, investor acceptance of new investment media (such as money market mutual funds), and greater versatility in types of accounts offered by financial institutions (such as interest-bearing demand deposits) are said to have outpaced the legal distinctions still on the books. In particular, the tremendous growth in the last two years of money market mutual funds, as well as cash management accounts offered by a few securities firms, illustrate the blurring of the formerly distinct lines between commercial banking and investment banking.

The foregoing describes the two major issues most likely to

arise. There are several other issues related to the separation of commercial banking and investment banking which have precipitated minor competitive skirmishes and could become the subject of administrative or legislative action. It should be emphasized that the dynamics of the financial services market and increased capability to provide new types of services and accounts will likely determine which issues may be most important in the future. Among these are commercial bank "underwriting" of commercial paper and similar corporate instruments; added competition (by banks, insurance companies and investment advisers) for management or retirement assets, including corporate and non-corporate pension plans; and creation by securities firms of new accounts with features similar to bank accounts.

SEC Fee Increase

The SEC collects fees which are paid to the Treasury. The Commission receives an annual appropriation from the Congress; however, as a percentage of annual appropriation, the fee revenues of the SEC have declined in recent years. For example, in 1968, 82 percent of the SEC's budget was covered by fees collected, but by 1979 only 49 percent was covered.

At the request of the Congress, the SEC has completed a study of its fee structure. The Administration should urge the Congress to take action on this effort to increase fees in order to cover more of the Commission's expenses. This could be done through one of two ways. Either increase specific fees on securities transactions or authorize the SEC to increase fees sufficiently to collect a specified percentage of its annual appropriations. The SEC protects the investing public and a convincing case can be made to require that those who benefit from the Commission's action should much of its costs, either directly or indirectly.

Corporate Accountability

The issue of corporate accountability has received considerable public attention in recent years and is likely to be a continuing issue for the foreseeable future. The roots of this issue lie in the major corporate bankruptcies of the 1970's, questionable foreign payments, alleged corporate non-compliance with certain laws. Federal legislation has been suggested to deal with this broad issue through federal chartering of corporations, federal minimum standards for boards of directors, and other mandated changes to corporate law and practices.

The SEC and the Congress both have addressed this area in recent years. The Foreign Corrupt Practices Act was passed as a direct result of Congressional and SEC inquiries concerning illegal payments abroad. Also, the SEC began an extensive review of corporate accountability issues in 1977. Hearings have been held at the Commissioner level and the Division of Corporation Finance staff has studied and reported on the issues involved.

The question is whether federal legislation to create federal chartering of corporations or federal minimum standards for various aspects of corporate structure should be strongly opposed. There is no need for federal legislative intervention in this area. State law governs the standard to which directors are held. This area of the law should remain under the jurisdiction of the states. The SEC has existing authority to engage in rulemaking in the area of shareholder communication, shareholder participation in the corporate electoral process and corporate governance. The SEC should encourage and self-regulatory organizations such as the New York Stock Exchange, to develop their own policies to improve corporate accountability.

There is no reason to believe that increased federal intervention in this area would improve corporate America. In fact, doing so would destroy the diversity and experimentation which has occurred at the state level and through the self-regulatory organizations. Certainly continued experimentation at the state level and through the self-regulatory organizations, enhanced by SEC involvement is the better course of action. Federal chartering or federal standards in various areas of corporate life would result in the development of a whole new bureaucracy in Washington. Once begun, there would be virtually no way to stop a burgeoning bureaucracy from multiplying.

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UNITED STATES POSTAL SERVICE & POSTAL RATE COMMISSION

James I. Campbell, Jr.

U.S. POSTAL SERVICE

The United States Postal Service is an "independent agency" of the United States federal government, established by the Postal Reorganization Act of 1970. It is very large. The Postal Service's projected budget for FY 1981 is $21.2 billion, or 3.4 percent of the total federal budget. It is the largest commercial undertaking of the U.S. government (as large, for instance, as the entire U.S. airline industry).

The Postal Service is directed by the Board of Governors of the Postal Service. The Board is composed of eleven members—nine "Governors," the Postmaster General and the Deputy Postmaster General. The nine Governors are appointed by the President for nine-year terms with the advice and consent of the Senate. The Postmaster General and the Deputy Postmaster General are chosen by, and serve at the pleasure of, the nine Governors. The Postmaster General is the chief executive officer of the Postal Service. The Governors also select a chairman from the members of the Board.

The Postal Service's predecessor was the Post Office Department, an executive department of the President. Unlike the Post Office Department, the Postal Service now prepares its own budget, sets its own postage rates (with the approval of another agency, the Postal Rate Commission, see below), bargains collectively with its employees, and generally operates without prior approval of either the President or Congress.

Congress has defined the mission of the Postal Service (39 U.S.C. 403) as follows:

> The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees. The Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions, and . . . throughout the world, written and printed matters, parcels, and like materials. The Postal Service shall service as nearly as practicable the entire population of the United States.

The Postal Service is further directed to give the "highest consideration to . . . the most expeditious collection, transportation, and delivery of important letter mail." (39 U.S.C. 101(e)).

This general statement of the Postal Service's duty is modified and amplified by various special obligations and constraints. First, Congress specifically directed the Postal Service to provide "a maximum degree of effective and regular postal service to rural areas" served at a loss and required the Postal Service to litigate the closing of any rural post office before the Postal Rate Commission. Second, the Postal Service generally cannot alter its prices without the approval of the Postal Rate Commission. Third, the Postal Service is required to establish a first-class letter rate that is uniform throughout the United States even though such a rate may not be commercially reasonable. Fourth, Congress has directed that certain items be carried at free or reduced rates: diplomatic correspondence; mail matter of the blind or handicapped; local, nonprofit, and classroom periodical publications; bulk non-letter mailings of non-profit religious, educational, scientific, philanthropic, agricultural, labor, veterans, and fraternal organizations and by political committees; cultural or educational matter generally; and library materials between libraries.

Congress also provides many forms of special assistance to the Postal Service. The Postal Service is granted an annual "public service" subsidy. Under the Act, this subsidy will decline to about $460 million in FY 1984 and thereafter. The Postal Service is also given a so-called "revenue forgone" subsidy which is keyed to postal rates and the amount of mail carried at free or reduced rates set by Congress. It is unclear, however, whether this revenue is, in any meaningful sense, "forgone," i.e., revenue that the Postal Service would have earned but for congressional directives. A second important benefit is the postal monopoly: criminal laws prohibit private companies from carrying "letters without payment of postage,"

a term the Postal Service argues covers all of first and most third class mail. Third, the Postal Service's revenues and bonds are exempt from state and federal taxes. Fourth, the Postal Service also has priority boarding for its freight on common carriers and gets free transportation for its employees. Finally, the Postal Service is the official representative of the United States in dealing with foreign post offices.

There is no logical connection between the special benefits given the Postal Service and the duties and obligations imposed by Congress.

POSTAL RATE COMMISSION

The Postal Rate Commission is an "independent establishment of the executive branch." It is composed of five Commissioners, appointed by the President, with the advice and consent of the Senate. Each commissioner serves a six-year term. A commissioner is designated by the President as chairman and serves in that capacity at the President's pleasure. The Postal Rate Commission is funded through the Postal Service; its budget may be reduced by unanimous vote of the Board of Governors.

The Postal Service is required to submit to the Postal Rate Commission any change in postal rates, mail classifications, or other "changes in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis." Commission should read "While postal rate changes may only be proposed by the Postal Service, the Commission may 'on its own initiative' propose mail classification changes. Individual parties may also file rate or service complaints with the Commission." *See* 39 U.S.C. §§ 3622, 2623, 3661 and 3662. The Commission must hold a public hearing on proposals originated by the Postal Service and return a recommended decision to the Governors. The Governors may approve, allow under protest, reject, or modify the Commission's recommended decision. If a decision is allowed under protest, the Governors can either submit the matter to the Commission or appeal to the courts. The Governors can also reject the recommended decision and resubmit it to the Commission. If the Governors agree unanimously, they can modify a recommended decision in any manner that the Governors deem consistent with the postal code and the revenue needs of the Postal Service. If a recommended decision allowed under protest or a recommended decision

modified by the Governors is appealed to the Court of Appeals, the Court is apparently limited to affirming the action or remanding it to the Postal Service.

With a cohesive majority under strong, imaginative leadership and with the tacit cooperation of at least one Governor and one complainant (say, the Council on Wage and Price Stability), the Postal Rate Commission could be very influential in shaping future postal policy. The Commission can virtually force the Postal Service to establish reasonable prices and mail classifications, without waiting for proposals from the Postal Service. Moreover, notwithstanding the Commission's prior reluctance, the Commission's power to disallow unreasonable costs in approving postage rates is, in effect, the power to approve or disapprove the Service's costs.

Overall, the Commission has not used its powers as aggressively as possible but it has carefully and conscientiously tried to regulate the relationship between various postage rates. In the last three years, there have been two especially noteworthy decisions by the Commission. In 1978, the Commission voted three to two to deny the Postal Service's proposed "citizens' rate mail" (which would allow household originated letters to be posted at 13¢ instead of 15¢). This proposal was generally opposed by business groups. In 1980, the Commission, again by a three-to-two vote, rejected the Postal Service's proposed entrance into the telecommunications business, a proposal strongly opposed by telecommunications companies.

SUMMARY OF PRESENT U.S. POSTAL POLICY

The postal policy of the U.S. embraces several conflicting themes, as follows (this list of basic goals would not necessarily be agreed to by Postal Service officials):

1. The basic mission of the Postal Service is the mass, regular delivery of personal correspondence. The Postal Service should deliver personal correspondence expeditiously throughout the United States.

2. The prices of postal services should be set so that the services are paid for by users, except the United States should subsidize services to small towns and other places in which postal service cannot be sustained at prices reasonably similar to those paid by large city patrons. The Postal Service's costs should be reasonable and appropriate to the services rendered.

3. Postal services should be used as a means to promote—and

indirectly subsidize—blind and handicapped persons, members of the armed forces, and readers of newpapers, magazines and educational literature.

4. Within the framework of the public interest services mandated by Congress, the Postal Service should be operated on the basis of objective, non-political, economic criteria and free from political influence on personnel selection.

SUMMARY OF PRINCIPAL DEFICIENCIES OF EXISTING POLICIES

The Postal Service's Costs Are Too High and Largely Out of Control

The Postal Reorganization Act of 1970 granted the postal unions the right to bargain collectively. Professor Douglas Adie, an expert on postal economics, estimates that "postal workers [earn] in excess of 40% higher wages than the average American and [enjoy] far greater job security, pensions, and fringe benefits." In FY 1979, the Postal Service paid an average of $21,946 in wages and benefits per work year—that is, averaging over all employees including part-time employees. The comparable figure for FY 1980 is $24,009; for FY 1981, $26,383. Moreover, the Postal Service has contractually guaranteed most permanent postal employees lifetime jobs.

Even assuming that postal workers should be paid as much as the average American and that the Postal Service actually needs all the persons currently on the payroll, this finding suggests that almost one-third of the Postal Service's entire budget is excess wages. Unless postal unions moderate their wage demands in the future, it will be very difficult to bring postal costs into line with competitive communications modes in the foreseeable future.

The Overall Price Level of Postal Services is Too High and Largely Out of Control

The prices of postal services have increased more than twice as fast as inflation in the last decade. First-class mail rates have risen from 6¢ in 1968 to 13¢ in 1975, 15¢ in 1978, and a proposed 20¢ in 1981.

Keeping the prices of postal services within reasonable bounds is the job of the Postal Rate Commission. However, the Postal Rate Commission "firmly rejects any notion that its role is that of an 'inspector general' attempting to oversee or vouch for every aspect of the Postal Service's performance or effi-

ciency." In other words, the overall level of postal prices is determined on a simple "cost plus" basis. The Commission refuses to exert any significant restraint on the level of postal prices based upon its own independent judgment as to which costs are reasonable, *despite its statutory authority to do just that.* Since only the Postal Rate Commission has authority to restrain postal price increases, there is no restraint at all, except insofar as costs themselves are restrained.

The Scope of the Postal Monopoly is Being Expanded by the Postal Service by Means of Vague and Overboard Administrative Interpretations

By virtue of an 1872 statute, the Postal Service has a monopoly over the regular carriage of "letters." There is no legislative history to suggest that Congress meant "letters" to mean anything but that which is called "letters" in everyday usage, and in the ensuing decades, the lawyers for the Post Office have interpreted "letters" to mean "current and personal correspondence."

The Postal Service, however, has issued administrative regulations stating that the term "letters" as used in the postal monopoly statutes (but not other statutes) refers to virtually any tangible object bearing information to any identifiable person or address. In recent years, the Postal Service has claimed that its letter monopoly includes such items as payroll checks, fishing licenses, Walt Disney posters, football tickets, IBM cards, blueprints, data processing tapes, computer programs, gasoline company credit cards, intra-corporate memoranda, and documents which have been electronically transmitted. As a former General Counsel of the Post Office has stated, the Postal Service now claims a monopoly over items that "no one in their right mind would have ever believed come close to the definition of a letter." Judge Malcolm R. Wilkey of the D.C. Circuit Court of Appeals summed up the situation: "[The Postal Service] has always latched onto whatever interpretation of a word "letter" which would give it the most extensive monopoly power which Congress at that time seemed disposed to allow."

Using this broad claim of monopoly, Postal Service inspectors threaten businessmen with large (but apparently unauthorized) back-postage fines for all items sent by private carriers. Business resentment over these tactics led Congress to hold hearings on the postal monopoly laws in 1978 and 1979. As a result, the Postal Service waived its claim of monopoly over

certain items about which the protest was the loudest—time-sensitive documents and advertisements included in boxes of merchandise. Still, the discrepancy between statute and administrative claim and the Postal Service's use of its regulations to intimidate businessmen remain as problems.

The Postal Service Appears Headed for Increasing Deficits.

Notwithstanding a projected subsidy of $1.6 billion, the Postal Service expects a deficit of $2.4 billion in FY 1981. This figure, however, does not take into account postal rate increases which should take effect in early spring of 1981. There are limits to the level to which the Postal Service can raise its prices. Many magazine publishers, for example, are already using private delivery services.

The Postal Service and Electronic Telecommunications

Historically, the United States has maintained a sharp line between the public postal business and private telecommunications companies. Neither was allowed to venture into the work of the other. In 1978, the Postal Service proposed to offer a service whereby it would accept electronic messages that could be converted into letters, electronically transmit them to a post office near the addressees, convert them to hard copy letters, and deliver the letters via the normal first class delivery system.

The Postal Rate Commission found that proposal anti-competitive and recommended that the Postal Service leave the electronic transmission to others and confine itself to the receipt, printing out, and delivery of electronic messages. The Commission left the door open, however, for the Postal Service to operate its own telecommunications network in the future and the Postal Service has indicated that it will press Congress for clear authority to do so.

There appears to be no public interest in the Postal Service directly engaging in electronic telecommunications operations. On the other hand, there may or may not be a public interest in allowing the Postal Service to modernize (1) by purchasing telecommunications services from private companies; that is, in effect, allowing the Postal Service to contract with a telecommunications carrier in the same way that it contracts with airlines, railroads, and trucking lines; or (2) by allowing the Postal Service to accept messages sent to it via private telecommunications carriers, convert the message to hardcopy, and place the message in the first-class mail stream.

The primary danger in permitting the Postal Service to modernize in these two ways is that the Postal Service may attempt to use its monopoly to gain a competitive edge over private competitors. If such anti-competitive dangers can be avoided, permitting the Postal Service to modernize in this manner might improve a small but significant portion of the Postal Service's operations.

SHORT-TERM OPTIONS

Overall Presidential Strategy

Early in the new Administration, the President should develop an overall, interim strategy for dealing with the Postal Service.

It is suggested that the basic elements of this strategy should be as follows:

The President Should Keep His Distance From, and Not Try to Assume Direct Control Over, the Postal Service.

The Postal Service appears headed for another round of financial troubles, congressional debate, and deteriorating service. The President today has little direct control over the Postal Service and should not try to assume public responsibility for that which he cannot control.

To gain direct control over the Postal Service would require a long legislative effort to repeal much of the thrust of the 1970 Reorganization Act. It is very unclear whether re-politicizing the Postal Service would be wise. Moreover, even if the President took over administration of the Postal Service, it is difficult to see what he could do to prevent the impending problems. Therefore, it is probably best that the President not expend the effort necessary to resume administrative control over the Postal Service.

The President Should Construe the Present Monopoly Narrowly and Propose Direct Subsidy of Rural Postal Services.

The Postal Service's costs must be brought under control for the good of the nation. There appear to be only two ways to control postal costs: either (1) by public utility rate regulation by either Congress or an independent agency; or (2) by competition. Given the pervasiveness of postal service, regulation by Congress has shown itself to be politically impossible; the Commission has failed even more emphatically to hold down

costs. The only method that holds any promise of working is the traditional alternative—competition.

While more competition might have an adverse effect on the Postal Service's financial position in the short run, it appears to be the only viable long run solution. More competition should greatly strengthen the hand of Postal Service management in the contract negotiations of 1982 since it will be difficult for the postal unions to threaten a strike or to demand much higher wages. (In this respect, it may be desirable to propose a legislative reform of 39 U.S.C. 1207 which requires binding arbitration of labor agreements). At the same time, the President should oppose proposed changes in the criminal code that would strengthen the penalties for competing with the Postal Service.

There are three possible strategies for providing more competition in the postal business: (1) announce an Attorney General's opinion that construes the current postal monopoly narrowly (short term option); (2) propose legislation to redefine or repeal the postal monopoly (medium to long term); or (3) after a majority of Postal Rate Commission members are picked, have the Commission assume authority to interpret the monopoly laws (long term). Although an Attorney General's opinion will have limited effect since it can only interpret, not alter, the current statutory monopoly, it can be issued immediately and is more controllable than a Congressional or Commission decision. Therefore, it appears to be the best option available.

A narrowing of the postal monopoly, by any means, would be widely praised by businessmen, but would be opposed by the Postal Service, postal unions, and those who think they receive a subsidy from the Postal Service (for example, newspapers, magazines, and greeting card manufacturers).

A move toward more competition must also take into account those postal services which are often said to be "public interest" in nature and might be jeopardized by increased competition with the Postal Service. First, service to rural areas is carried on at a loss by the Postal Service, although the subsidy is hidden in the general postal appropriations. Rural service is an extremely sensitive political issue. The new administration should propose to guarantee the current level of rural postal service for ten years and a *direct* subsidy to pay the Postal Service for proven losses incurred in carrying out this guarantee (See discussion below.). Second, the Postal Service carries newspapers, magazines, and educational mate-

rial at reduced rates; Congress already directly subsidizes this traffic. Given the Postal Service's financial problems and the political sensitivity of this topic, this direct subsidy should, at least for now, be continued, but only under the current statutory scheme which phases out much of this subsidy. Third, competition may endanger the uniform first-class mail rate. It is unclear, however, why a uniform first-class mail rate is in the national interest. Further, it is unknown how much, if any, more competitive rates would vary with distance. Given these unknowns, it would be best to wait and see the degree to which added competition affects the uniformity of first class mail rates and the public's reaction to such changes.

The President Should Appoint Tough-minded, Economically Sophisticated Members To the Postal Rate Commission.

The Commission has very substantial powers to control the Postal Service's prices, services, and indirectly, costs. The appointments to the Commission will need to be supplemented by a least one good appointment to the Board of Governors.

The President Should Order a Review Of the Postal Service's Role, If Any, in Telecommunications.

See discussion below.

Order the Attorney General to Issue an Opinion Narrowly Construing the Current Postal Monopoly Law.

Historically, the Attorney General was deemed the official authorized to issue administrative interpretations of the criminal laws. While the Postal Service's postal monopoly regulations were given some recognition in a recent court case, there is no reason why the Attorney General may not lay claim to a superior right to speak for the Executive on the scope of the postal monopoly in view of the following considerations: (i) the Department of Justice, not the Postal Service, is primarily responsible for enforcement of the postal monopoly; (ii) the laws creating the postal monopoly are criminal; and (iii) the Postal Service has a financial interest in interpretation of the postal monopoly laws.

An Attorney General's narrowly construing current postal monopoly law would not abolish the monopoly. However, it would provide some assurance to businessmen who need to use private alternatives and would thus provide a marginal increase in the competitive check on escalating postal costs. An

Attorney General's opinion also has the advantage that it can be issued quickly and can be controlled by the Executive.

The basic thrust of the opinion should be to interpret the term "letter," as used in 18 U.S.C. 1693-99, in accordance with everyday usage and probably the original Congressional intent. The term "letter" should exclude any document which has been electronically conveyed at some point between origin and destination. In addition, "regular carriage," as used in 18 U.S.C. 1696, might be interpreted to exclude any type of carriage service that did not exist when the law was originally enacted (1872), i.e., parcel post and express mail services (basically codifying exemptions already recognized by the Postal Service, 39 C.F.R. 320).

If it is to be issued, the Attorney General's opinion should be issued as soon as possible. While fears of the Postal Service and its employees over any change in the postal monopoly appear to be wildly exaggerated, it may that a narrow construction of the current law will give rise to competition for the carriage of non-letter documents which is somehow too zealous from a public policy standpoint. By immediately issuing a careful Attorney General's opinion, the Administration will leave itself adequate time to assess the practical impact (if any) of the opinion and to develop legislative proposals for modifying and perhaps expanding the current monopoly statute in a manner suited to the twentieth, rather than the nineteenth, century. Furthermore, immediate issuance of an Attorney General's opinion will serve as a useful signal to the negotiators who, in spring 1981, will begin to work on a new postal contract. A pro-competitive attitude on the part of the Administration should strengthen the hand of the Postal Service management in its attempt to keep down postal costs.

An Attorney General's opinion could also serve as a basis for ensuring the competitiveness of the international flow of documentary data, a policy clearly favorable to the high technology industry of the U.S. International Express Mail is established by bilateral agreements which must be approved by the President. 39 U.S.C. 407. The International Express Mail program is just getting started. So far the U.S. only has agreements with approximately 17 countries. To promote the free flow of documentary information, the President might consider withholding his approval of International Express Mail agreements unless the agreement recognizes the principle that express services—as opposed to traditional letter-post services—should be freely competitive and the information

contained therein should not be subject to duty (see 19 U.S.C. 1202 sec. 870.10).

It should be noted that the Department of Justice is the lawyer for the Postal Service. Therefore, careful monitoring by the White House and the Attorney General himself is essential to ensure that the resulting Attorney General's opinion correctly reflects the President's policy.

Order the Secretary of Commerce to Develop an Administrative Policy on Postal Service Participation in Telecommunications.

On July 20, 1979, after a six-month inter-agency inquiry headed by the Domestic Policy Advisor to the President, the Carter Administration generally endorsed the Postal Service's proposals to enter some aspects of the telecommunications business. This statement is vague and ambiguous. Much of what was then proposed has already been outdated by legal and policy decisions of the Postal Rate Commission and the Federal Communications Commission.

The Administration should immediately begin to develop a new, sounder policy of postal participation in telecommunications (if any). The task should be assigned to a Cabinet official since it will be necessary to formally present the Administration's position to Congress. Hearings may be expected relatively early in the 97th Congress. The only possible Cabinet official for this job appears to be the Secretary of Commerce. The Secretary of Commerce is the President's principal adviser on telecommunications policies (Ex. Order 12046, July 20, 1979). Furthermore, the Postal Service is primarily an instrument of commerce; about three quarters of first-class mail is bills and transactions rather than personal correspondence. (The Carter Administration attempted, without success, to "make do" with an official from the Office of Management and Budget and the Domestic Policy Advisor as the spokesmen for postal policy.)

MEDIUM-TERM PROBLEMS AND OPTIONS

Propose Legislation to Guarantee and Directly Subsidize Rural Postal Service.

The most politically powerful argument for the postal monopoly and postal subsidy is the prospect of rural areas losing satisfactory postal service. No one knows, however, how much of the direct and indirect subsidy given the Postal Service

actually is used to support rural service. Therefore, any proposal to cut back on the postal monopoly or postal subsidy is opposed by members of Congress from rural areas who fear that their district is at the "end of the line" and will be cut off first. The best solution appears to be automatic appropriations specifically dedicated to rural postal service in much the same way that appropriations are dedicated to supporting rural airline service or reduced rate postal service for educational institutions.

In order to gain needed support for legislation to end the postal monopoly, the new administration should consider proposing legislation to subsidize rural postal service directly and to guarantee the current level of service *for a finite period of time.* As a first step in the preparation of such legislation, the Office of Management and Budget should require the annual budget of the Postal Service identify losses incurred in service to specific rural areas. See 39 U.S.C. 2009. As suggested in the previous section, the legislation itself should be drafted by the Secretary of Commerce.

Appointments at the Postal Rate Commission and Board of Governors

The new President will be able to replace Commissioner Dupont immediately and designate the new commissioner as chairman. He will also be able to name a new Governor to the Board to replace Governor Wright.

BUDGET

FY 1981.

The budget appropriation for the Postal Service for FY 1981 is $1.593 billion.

The postal budget is not recalculated each year; it is set by the statutory formulae for the "public service" and "revenue forgone" subsidies set out in the Postal Reorganization Act of 1970. See discussion above.

FY 1982.

The "public service" portion of the FY 1982 budget will decline $92 million to $644 million. The "revenue forgone" portion of the subsidy will depend upon the outcome of the current postal rate case which should be concluded in February 1981. Overall, the total appropriation will probably drop slightly from the FY 1981 level.

Any attempt to revise the formula of the Postal Reorganization Act will open a Pandora's box of powerful political supplicants for postal subsidies. The new administration should take the formula of the Postal Reorganization Act as a given, adding the rural postal service subsidy program discussed above.

PERSONNEL

The implications of the above analysis on immediate personnel decisions are as follows:

1. The Secretary of Commerce and/or the Assistant Secretary for Communications and Information should have some familiarity with the issues in the debate over the Postal Service's potential role in telecommunications and should be sympathetic to the President's general policies in this matter.
2. The Attorney General and/or the Assistant Attorney General for Antitrust and/or the Assistant Attorney General, Office of Legal Counsel, should have some familiarity with the issues in the debate over the Postal Service's monopoly and should be sympathetic to the President's general policies in this matter.
3. The new President will have one vacancy in the Board of Governors to fill. The appointee should be prepared to support to the Postal Rate Commission, once it becomes dominated by members of the President's persuasion. The President also may fill one new slot on the Postal Rate Commission.

LONG-TERM PROBLEMS AND OPPORTUNITIES

Order the Secretary of Commerce to Develop a Revision of the Entire Postal Code.

The Postal Reorganization Act of 1970 has so many flaws that a complete revision should be considered. Following are some of the major issues that should be addressed:

1. The postal monopoly is based upon nineteenth century concepts which are almost completely inappropriate to today's methods of communication. The postal monopoly and related restrictions on the use of mail boxes by private parties should probably be abolished entirely. At the very least, the concept should be updated in the light of economic and technological developments since 1872, the date of the enactment of the current statute.

2. The Postal Service should probably be given greater control over its pricing policies. The postal statutes now require the pricing on the basis of fully allocated costs—a somewhat arbitrary and restrictive requirement.

3. The general public service subsidy, which is phased down to $46 million per year in FY 1984, should be phased out entirely and replaced by direct, dedicated subsidies such as the rural postal service subsidy described above.

4. All the "revenue forgone" subsidies should be reexamined and restructured so that they benefit the intended beneficiaries rather than merely support a bloated Postal Service.

5. The concept of the Board of Governors should be re-examined; it appears to be largely ineffective and a waste of money.

6. The long term future of the Postal Service should be reexamined. In a competitive age in which the telephone, not the post, provides essential communications, it is unclear why there should be a publicly owned and supported national document delivery company.

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ROUNDTABLE DISCUSSION OF THE ROLE OF THE WHITE HOUSE IN REGULATORY POLICY-MAKING

James E. Hinish, Jr., Chairman
September 5, 1980

PARTICIPANTS

James E. Hinish, Jr., Chairman of The Mandate for Leadership Regulatory Reform Project Team, acted as Chairman for the Regulatory Roundtable. He is currently serving with the Senate Republican Policy Committee in Washington, D.C.

Robert A. Anthony, Esq. is a partner with the firm of Sellers, Conner and Cueno in Washington, D.C. He was formerly Chairman of the Administrative Conference to the United States, serving from 1974 to 1979.

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Calvin J. Collier is with the firm of Hughes, Hubbard and Reed in Washington, D.C., formerly General Counsel and Chairman of the Federal Trade Commission, 1974 to 1977.

Marvin H. Kosters is the Director of the Center for the Study of Government Regulation and a Resident Scholar with the

American Enterprise Institute for Public Policy Research in Washington, D.C. He has served in the past as Senior Staff Economist, Council of Economic Adisors, 1969-1971; he has held various positions with the Cost of Living Council from 1971-1974; and he has worked in the Office of the Assistant to the President for Economic Affairs from 1974-1975.

James C. Miller, III is the Co-Director of the Center for the Study of Government Regulation, and a Resident Scholar of the American Enterprise Institute. He was formerly Senior Staff Economist, Council of Economic Advisors from 1974-1975; and Assistant Director for Government and Research of the Council on Wage and Price Stability from 1975-1977.

John W. Barnum works with White and Case in Washington, D.C., and formerly served as Deputy Secretary of Transportation from 1973-1977.

Richard B. Smith is currently with Davis, Polk and Wardwell in New York City, and has worked in the past as Chairman of the American Bar Association's Coordinating Committee on Regulatory Reform; he was also a Member of the Securities and Exchange Commission from 1967-1971.

ALSO PRESENT

Phil N. Truluck served as Host for the Roundtable. He is currently Executive Vice President of The Heritage Foundation.

Charles L. Heatherly is Director of Special Projects for The Heritage Foundation, the sponsoring organization of the Roundtable.

Craig H. Baab is Staff Director for Bar Liaison in the Governmental Relations Office of the American Bar Association in Washington, D.C.

PROCEEDINGS

MR. TRULUCK: We are involved here at Heritage in a major project looking at the Executive Branch, looking at the opportunities for new policy initiatives should a new administration take office in Janaury.

This Roundtable is part of one of the task forces we have set up to look at the federal agencies and the role of Presidential leadership in dealing with the Cabinet departments and independent agencies. Jim Hinish is Chairman of this task force.

CHAIRMAN HINISH: Article II, Section I of the Constitution states that "The Executive power shall be vested in the President of the United States of America."

It seems that each administration, whether Democrat or Republican, struggles with the problem of getting the federal bureaucracy to follow its directives, adhere to its policy decisions and carry out its programs.

Today we will deal with a part of the problem, namely the task faced by a President in executing his own regulatory reform program, especially with regard to the independent regulatory agencies.

Our discussion will, I hope, focus on these major issues: first, how does a President formulate and carry out his administrative policies? What mechanisms are available to the President for coordinating regulatory policies and programs?

What structure has existed within the Nixon, Ford and Carter Administrations and what role has the Office of Management and Budget (OMB), the Council of Wage and Price Stability (COWPS), the Council of Economic Advisors (CEA), the Administrative Conference (AC) and other such organs played in the regulatory process?

What managerial strategy would you recommend to a new administration? How can the regulatory process be improved, not merely to make the system more efficient but to ensure that some kind of justice is achieved?

To what extent should the administration restructure the Executive Branch and modify its procedures in an effort to improve the regulatory process?

How much can the next President do with regard to the Executive departments and agencies to achieve his regulatory goals?

How can he assert greater control over the independent agencies and the bureaucracy to ensure that his regulatory policy decisions are being followed?

What course should be followed by the next administration in order to achieve balance among regulatory goals while at the same time minimizing conflicts within and between different agencies and departments and between the Executive and Legislative branches of government?

As you know, the proposed reforms of the regulatory system would probably fall under three different categories: (1) substantive, like airline deregulation; (2) procedural, like requiring agencies to prepare anaylses of regulatory impact or advocating wider public participation; and (3) structural, whereby we propose to shift authority perhaps to the courts, such as by amending the Administrative Procedures Act to require *de novo* review of all legal questions or to remove the presump-

tion that regulations are inherently valid; or by shifting authority to Congress, such as through sunset mechanisms or the legislative veto; or finally, by shifting more authority to the President himself.

You recall the Ash Commission in 1971 suggested the consolidation of several independent agencies with a single administrator responsible to the President. Earlier, in 1937, the Brownlow Report had recommended that independent agencies be made responsible to and removable by the President. Now we have "Resolution A" of the American Bar Association's (ABA) 1979 Report.

I would hope our discussion would concentrate primarily on the structural and procedural reforms.

Each of you has been invited to participate in this roundtable discussion because of your own particular background and expertise in regulatory matters and because of your differing viewpoints in dealing with regulatory agencies.

Let's begin with a little background. I would ask if you could give us a brief discription and and analysis of your point of view of just exactly how the past three Administrations have approached the problem of regulatory reform, particularly with regard to the independent agencies. Let us start with the Nixon years.

MR. BARNUM: In my area of transportation, undoubtedly the demise of the Penn Central and the need to do something to solve that problem stimulated considerable thinking about less regulation of surface transportation. In our 1973 report, when we first suggested a solution for the Penn Central, we said that any kind of structural reform of the Penn Central in the form of what ultimately became Conrail would not in and of itself be enough. There would also have to be substantive change in the regulation of that form of transportation.

I do remember at the Department of Transportation, we were concerned on a case-by-case basis with the inefficiency of regulation, in particular, by the Interstate Commerce Commission (ICC).

We met a stone wall at the ICC. The reaction was: "Who are you?" and "We have been here since 1887, and you have not been here five years, you have a hell of a nerve to tell us how to regulate household movers." We were very much aware of the fact that the independent regulatory agencies in particular were populated both at the political appointee level and at the senior staff level with less than what we would have liked to have seen in those positions of authority. The eleven-man ICC

has forever been a place to which either retiring state politicians or administrative assistants of retiring senior Congressmen could find refuge, and the result was at least uniform.

There was a decided emphasis in the Nixon Administration on the importance of who got those jobs. That is something that I think was continued through the Ford days in particular, and in fairness, I think the Carter Administration, at least insofar as the agencies with which I am concerned, has continued this focus.

Certainly the ICC and the Civil Aeronautics Board (CAB) were greatly improved by one, two or three people who were put in at critical times and without regard to what was actually happening in the Congress. It made a major difference.

I think the corollary to that is the opportunity that now arises with the Senior Executive Service which gives to the political managers of these agencies more opportunity to mobilize qualified people wherever they may be in government, and put them in those agencies to carry out the policies that they as the President's appointees bring in.

The point is with good political appointees and with greater opportunities to move career people around within the government agencies, the most important single tool available to the President, in my judgment, is his appointment power and in turn for his appointees to take full advantage of moving out the dead wood and moving in people with good ideas.

CHAIRMAN HINISH: You would agree with Richard Nathan's statement when he wrote in the summer of 1976 in the *Public Interest,* commenting on the Nixon years, "The key to the establishment of some measure of managerial conduct over the Executive establishment is in one word—appointments. Managerial experience and interests are additional important qualifications but basic substantive agreement is the essential ingredient."

In that article, Nathan discussed what he called the "administrative presidency," when President Nixon decided to take a much stronger management strategy approach to the problems of over-regulation. He used such methods in shifting of personnel so that he retooled his Cabinet and put "super secretaries" in charge of whole areas of regulation. He tried budget impoundments which had limited success. He tried reorganization, such as dismantling the Office of Economic Oppportunity (OEO). He tried rewriting regulation, to see that his own people in charge would try to draft better regulations.

MR. COLLIER: My retrospective assessment of what hap-

pened in the period of 1969 to 1973 or 1974 has slightly different highlights.

It was a period when regulations increased more than any other single comparable period in the history of our nation.

Regulatory proposals for additional regulation during that period, whether they came from the Hill or the White House, dwarfed any other single period I can think about.

Implementation of new regulations that were passed in the 1960s and the Johnson Administration took on unparalleled dimensions.

There was an extraordinarily explosive period in creating the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) and pension reform bureaucracies. As far as I can tell, it was across the board.

It think that period and maybe a couple of years preceding it, gave rise to a political reaction. In turn, it created the movement for regulatory reform in the mid-1970s.

There was a Domestic Council organization. There were people assigned by areas and everybody did their own thing, and it tended not to provide any coordination.

There was a serious effort to think about regulation and that resulted in the Ash Council report which I think had a part in developing recomendations. As far as I could tell, it was not a very significant document either in terms of producing anything that was terribly useful.

During the period 1969 and prior to the election in 1972 there was a very spotty performance on appointments. There was no particular sense of policy direction. As far as I can tell, the Nixon Administration laid the groundwork for the needs for reform. I am not sure the problem was really appreciated in all of its dimensions at that time, as it came to be appreciated. From my own view, the current period really begins at about 1973. We had feedback that indicated the public was not enamored with everything it had been told would be so wonderful. There was increased consciousness in the academic community and in all quarters about what had come to pass.

MR MILLER: I agree with what both John and Cal have said. I would characterize President Nixon's approach as really being consistent with the good man theory of regulation, that is, the problems of regulation can be solved by simply appointing the right kind of person.

The Ash Council report came out and concluded that you needed to appoint the right kind of person. There was a

problem with collegial bodies and you needed to get rid of them and have administrators who had to be the right kind of person.

Since that was the perceived solution to the problems, the Nixon Adminstration did not go far beyond that in terms of substantive reforms except in the transportation area.

The appointment process is a very difficult one. My perception was that, with certain outstanding exceptions, the appointments or the quality of the appointments did not improve markedly.

Before a President appoints someone to a regulatory agency, the name is cleared with the relevant people on the Senate staff, the Senators and the Committee. The Ford White House used to send up hawks, doves and turkeys and in the clearance process everybody was struck except the turkeys.

I think President Carter has a much different experience in which he could afford to nominate really tough people and so-called "good men." The "good men" hypothesis I think works best in trying to push an agency very fast to take some changes which are arguably beyond the scope of the enabling legislation.

Take, for example, Fred Kahn's and John Robson's efforts to push the CAB to limits that were arguably beyond the Federal Aviation Act. During this period of time, some of the advantages of deregulation became apparent. As a result, the legislation that came out of the committee was stronger than even the bills originally proposed in the Senate or the House.

I would recommend to any President: appoint people at the very beginning who will use the maximum latitude to do the right thing, although even arguably beyond the authority in the legislation.

MR. BARNUM: If we are in fact focusing primarily on the independent regulatory agencies, let's remember the independent regulatory agencies are almost uniformly economic regulatory agencies and the businesses that were regulated by those economic regulatory agencies wanted to be regulated.

We are not, if we are limiting ourselves to the independent agencies, talking about OSHA or EPA. Given the background or the constituency, if you will, of the Nixon Administration, it is not difficult to see that what was regulated wanted to be regulated. It was only when those industries started seeing OSHA-type regulations coming along and the Employee Retirement Income Security Act (ERISA) and other regulatory programs that cost them money with no demonstrable protec-

tion from competiton that they became concerned over that kind of regulation.

The phenomenon of the economically regulated industry gradually recognizing it should be regulated less economically is really a mid-1970s phenomenon.

MR. FLEEHARTY: I think it is an important distinction to bring to our analysis that Nixon was interested in what I think is Executive Branch regulatory reform, not reform of the agencies, frankly because not so many existed then as now.

I think the problems he ran into are ones that he would have encountered had he been President today and attempted to do something structural with the Federal Trade Commission (FTC), the Consumer Product Safety Commission (CPSC), the EPA, or some of the other agencies.

What he tried to do with the Executive Branch agencies in addition to creating super secretaries was to effect fundamental programmatic changes, to cancel various programs or deny the funds to various programs so they were essentially cancelled.

Take the Office of Economic Opportunity: he attempted to dismantle that altogether. That agency was lodged in the Executive Branch and under statute was not subject to congressional review prior to being eclipsed.

He still ran into the kinds of congressional problems there that he encountered at the Department of Housing and Urban Development (HUD), Health, Education and Welfare (HEW) and other departments where he tried to cut off funds or severely restrict various programs.

I think the next President will have to learn what Nixon would have had to have concluded, had he survived. Regulatory reform, particularly with independent agencies, is virtually impossible in any significant way without the help of Congress.

Where Nixon was able to achieve regulatory reform in the Executive Branch, he relied very heavily on OMB. He made it such a bureaucratic process that it was almost impossible for a Cabinet secretary to implement a program without serious consideration by OMB.

What he then could not do through OMB with the independent agencies he tried to do through impoundment, so he cut off the funds either at the front end or rear end. I think neither approach was successful. Impoundment was found to be unlawful. OMB was not capable of managing agencies.

I think a President must recognize he is going to have to

work with Congress and hope he has a majority in Congress in order to coordinate the efforts that he wants to carry out.

CHAIRMAN HINISH: Let's move on to the more productive Ford years. What did we learn from that period regarding regulatory reform?

MR. KOSTERS: In terms of the interest in regulatory reform, President Ford had to his advantage something that was not all that closely related to regulation. That is inflation.

I believe inflation triggered a great interest in regulatory reform as a potential way of doing something about inflation. think it was helpful to him initially in giving regulatory reform a good name.

What was accomplished in the Ford Administration was the formation of the Council on Wage and Price Stability (COWPS) with some kind of quasi-wage and price controls or monitoring.

The notion of monitoring government activities was a very valuable component. I think it pointed the way in which administrative procedures and the clout of the Executive Branch could be brought to bear on regulatory decisions.

The other positive accomplishment I would associate mainly with the CAB where there was the willingness of an able administrator to move ahead in certain ways and influence the congressional process.

MR. CAMPBELL: It seems to me what everybody is saying is the President asks: How do I make this independent agency do what I want it to do?

There are two answers. One is appoint people of the same philosophy to the agency. The second is to propose a legislative mandate in that direction and then build a good case for it. The CAB built an overwhelming case.

MR. COLLIER: I think that is a very good focus. Those are two specific techniques, the appointment of the people and legislative recommendations. There are a couple of others.

One was the activity of COWPS and Justice Department of actually communicating policy positions and factual information to an indpendent agency within the context of its own process, making a confident presentation to the agency by participating in each proceeding.

The second was to actually get all the chairmen of the regulatory commissions in the Cabinet room for two hours and talk to them about broad objectives, as was done in the Ford Administration. Certain kinds of broad regulation objectives were laid out—reduction of paperwork, accelerating approval

applications, and other general policies that cut across usually several agencies at a time.

I thought it was a fairly effective exercise, particularly as it was followed up by requests of the agencies.

There are also some affirmative controls such as a Presidential veto on regulatory activities.

Now the legislative veto enters into the picture. One of the indirect results of that is it will give the President an opportunity to participate through the legislative process by unleashing White House lobbyists on the Hill if he does not like a regulation, to get it vetoed in Congress.

There is now this indirect route through the legislative process to work for or against a final regulation. That is a process that really did not exist before.

I would add one point. There is a mechanism within the Executive Office at the present time to decide whether to do some of those things or with what purpose or direction.

If you had a regulatory czar in the White House who was aware of all those little different strings that do exist, through whom all decisions to do things or not to things are made, I think it would be quite effective and one of the hottest seats in Washington.

In the latter part of the Ford Administration there was specific outreach to agency heads to try to get them to move in the same general policy direction.

CHAIRMAN HINISH: Were those formalized in any way?

MR. COLLIER: They were publicly announced. They were meetings not with the press invited. I recall there were two. In part of the meeting the President said, "I would like to meet you," and he went around the table and he asked each person and talked to them about their problems.

It was a good and interesting experience.

MR. MILLER: I agree very much that the rapid rate of inflation really caused people to think in other ways, to look for opportunities for reducing rates of inflation.

I think Murray Weidenbaum's book added a lot to the dialogue on this issue. In addition, President Ford really did believe that regulatory reform was something that was very worthwhile in and of itself. He was committed to it. He put a great deal of work behind it and he spent a lot of personal capital and arguably political capital on it as well.

The third thing is there was in high levels of the administration people who had a great deal of expertise on regulation.

One of the most important things was the coming to the

Council of Economic Advisors of Paul MacAvoy [Member, Council of Economic Advisors, 1975-76; now professor of economics at Yale University and an Adjunct Scholar at the American Enterprise Institute]. He was the person who was really one of the outstanding authorities on regulation. He knew who had done research on the various issues and he was able to very quickly accumulate a storehouse of information on any particular issue.

Such appointments of people with expertise in regulated areas led to many of the successes there were in the Ford Administration to regulatory reform.

MR. CAMPBELL: Let's say for the CAB, if I were President Ford and knowing what we know now, consciously trying to change aviation policy, the first step would be to try to name somebody good at the Board. The next step would be to look for some well-rounded person. In order to get good reform you have to consciously appoint people who can build a case for you in the various agencies.

Sometimes almost more important than the secretary is the assistant secretary. That person is critical. I think a President has to think carefully about that.

MR. KOSTERS: That is a very good point. It is not an accident that Paul MacAvoy was appointed to CEA at that time.

One early sign tends to be whether one successfully inserts into the President's speech some line about regulatory reform. Placing it on the political agenda is an important part and then the appointments that follow.

MR. COLLIER: I would like to move over to consideration of how you structure or build on the Carter Administration's organization in the White House, unless somebody thinks there is some other way to get at the independent agencies than those mentioned.

MR. SMITH: I do not think air transportation deregulation would have occurred absent two things, both involving the Congress. First, I do not think it would have occurred had it not been for the hearings that Senator Kennedy's Judiciary subcommittee held, to generate the kind of pressure and support for the concept.

That was a marked development to see a liberal Senator suddenly able to bring to bear the pressures and the public forum that those deregulation hearings presented.

I think there is a very important lesson in that I do not really think you can approach any kind of a deregulation subject

without addressing and involving the Congress. I do not thing it can be done by the administration alone. The problem with the reform effort undertaken by Landis in the Kennedy White House and Ash in the Nixon White House was that it was perceived by the Congress as an executive operation.

The consequences of the regulatory overburden are now so much better understood. It is a problem of such national dimension that whoever the next President is and whatever the party domination of the next Congress, there is the prospect for a real joint effort towards the three aspects of deregulation or regulatory reform that I think you have to approach.

There is no one way to achieve the ultimate objective. I think you almost have to think about it in the three different categories.

I think appointment of better personnel is something you rarely do not associate with regulatory reform and that has been an objective of good government since day one.

But you would all agree whatever structural, procedural or substantive change you make, if you have inadequate or mediocre people in the agency, nothing is going to get done. At the same time you can have splendid people in there limited by the substantive statutes, limited by procedural requirements and limited by the institutional structural framework in what they can do.

Good appointments is not the sole answer. It is a necessary foundation, however.

The way in which you approach substantive regulatory reform is to raise the question: should you regulate an industry at all or should you regulate this function of the economy at all or to what extent?

If you think it should be done to a lesser extent, that is what I would call a substantive regulatory reform. That involves statutory change and philosophical change. There is no way that can be done without a very significant congressional involvement, without the public mind wanting it to occur.

That was the kind of backfire that led to the success of air transportation deregulation. If you had a hostile Congress, Alfred Kahn would never have been able to get away with what he did at the CAB. He was able to do it because that legislation was on the way to enactment. What he was doing was going to be confirmed, and everybody knew it. It involved both Executive and Legislative branch movement.

I think if you want to achieve any really meaningful,

substantive regulatory reform, you have to think in those terms.

MR. COLLIER: I do not think it is either/or. There is so much discretion in most regulators that reform can be done without legislative involvement just as new regulations can be imposed or not imposed.

Eight-five percent or more of what the Federal Trade Commission (FTC) does is discretionary. There is very little in the statute that says they must do this or they must adopt this regulation within three years from now to protect the air and water which is the structure at EPA.

I would say a similar percentage of what the Securities and Exchange Commission (SEC) does is discretionary. They are *empowered* to do things and not *required* to do things. It is true of the economic regulatory agencies and the new agencies. They are required to do certain things and maybe a much smaller percentage is discretionary.

OSHA was set up in such a way that 80 percent of what they do is required. It just happened to be set up that way.

As to the CPSC, 100 percent of what is does it discretionary.

MR MILLER: More importantly, OSHA does not have to do things the way they do.

MR. COLLIER: Yes, 90 percent of that is discretionary.

MR. SMITH: I think these comments are well founded in terms of substantive deregulation, but I think the other two areas are equally important in approaching regulatory reform.

The second issue is procedural. There are a lot of procedural problems thought of as pretty much lawyer's work that are involved in regulatory agency practice.

This is something that the Administrative Conference talks about. There are a lot of problems in the Administrative Procedures Act. All franchising, all adjudication, and all ratemaking are categorizations that do not quite fit.

There are problems that have been created by pending comprehensive regulatory reform legislation (S. 262 in particular). The most recent draft is very close to requiring hearings on certain respects and notice of comment rulemaking.

There is also the subpoena problem that is a part of the burden which businesses deal with.

I would call the third problem structural. I know you want to keep this focused on independent agencies, but eighty percent of the regulatory output on the country's economy comes from Executive Branch agencies, and there the President's power is a good deal more explicit.

I think Executive Order 12044 under the Carter Administration is an important step for trying to develop some coordination among executive branch agencies and correct structural problems.

So many regulatory statutes have objectives that compete with each other. The Congress sees an environmental problem and they pass a statute. Five years later they pass a statute that promotes the production of energy and the statutes on each transaction conflict. There is no mechanism for balancing it, traveling back to the Congress or going to the courts which really are not equipped to make those balancing decisions.

We have no mechanism in our government for making those kinds of balancing decisions. When the President is elected, how does he coordinate all of these conflicting policies to create a national economic policy?

I think there are structural changes that are needed in our government to deal with that, and appointments, procedural reforms, and substantive deregulation cannot deal with those.

CHAIRMAN HINISH: I want to have a quick summary of the Carter Administration's program from your points of view.

How successful do you think it has been?

MR. FLEEHARTY: The President has a terrific benefit in being one of the few presidents we have discussed who has a majority in the Congress of his own political party. One would think that would make regulatory reform not only easy but quick and simple.

We find that not to be the case, more for political reasons than for any structural, procedural or any other kind of reasons that may have been roadblocks to regulatory reform for earlier presidents.

The President appears to be playing partisan politics with regulatory reform issues other than deregulation issues. He appears to be buying labor votes and consumer votes and other interest group votes by failing to act on legislation that the business community has helped to sponsor and to support.

The procedural reforms that the Chamber of Commerce has been working on, legislative veto and things like that, frankly are being stalled in Committee at President Carter's request. The Chamber has been spending a lot of time trying to unblock them on the one hand and trying to see or imagining what we would do under a Reagan Presidency on the other hand.

The Administration's regulatory reform program has to be given a lot of credit in these deregulatory areas that were begun before President Carter became President. What we

would like to do is to get procedural reforms rather than structural reforms and to see whether we can break up the kind of logjamming constituencies that have opposed regulatory reform in Congress and the White House all along. There is an iron triangle between a congressional committee, the regulatory agency and the client group of that agency, for example.

Also, we want to work towards congressional reform of various entitlement programs over which bureaucrats, presidents and Cabinet secretaries have no control other than to administer them.

MR. SWAIN: There are some very tough questions, if there is to be a regulatory reform bill, about whether or not it is appropriate to create some sort of super monitoring mechanism and what the powers of that mechanism should be, should it be under OMB, should there not be a new regulatory czar appointed?

I think when you are talking about appointments and substantive regulations, you have to bear in mind that I think there is going to be a greater hue and cry, as there should be, for some sort of supervisory monitoring role above and beyond that which we have now. There is really basically very little if any direction over the independent regulatory agencies.

Until there is some sort of super monitoring agency to suggest overall policy goals, the only way you will be able to have regulatory reform is to go after the substantive regulation and continue good appointments.

MR. MILLER: I would observe first, that the successes the Carter Administration has had were largely built on the successes of the past Republican Administrations and there is a coalition that is not too difficult to understand.

On the one hand, there are those interested in efficiency. There are those interested in getting the government out of the marketplace. Many of the liberals in Congress are enthusiastic about economic deregulation when it is a matter of fixing prices and capturing the agency. It is the populist view that if the industry likes regulation, something must be wrong with it and therefore we must get rid of it.

Second, I think Carter was well intentioned about really trying to reduce a lot of regulation but very naive about regulators and how regulation works. He was unable to move the agencies from their basic *modus operandi.*

This is connected with the next point. If you look at the appointments he has made in the social regulatory agencies—the EPAs and the OSHAs—by and large not only the top people

but the second and the third layer people have been people who are very ideological believers in regulation and the mission of the agencies, many of whom were drawn from Ralph Nader Associates.

I think Carter has played some politics and every political leader does that. But when it come to really doing something strong about OSHA regulation, he was very weak on that. He does not want to antagonize organized labor.

Many of the regulatory reform initiatives are a lot of style and not much substance. I would point to the example of the existing regulatory reform legislation that is on the Hill that requires the agencies to do cost-benefit analyses. It characterizes the need for them yet specifically at each point exempts these requirements from judicial view.

There is a lot of rhetoric there but very little substance. There is an unwillingness to really put teeth into this matter.

MR. CAMPBELL: Would you say that the Carter people have not built the case technically and intellectually, in the way Ford did?

MR. ANTHONY: I think they built a very good case for airline deregulation. I do not think their heart really is in making a strong case for reform of the social regulator agencies in the way many of us think is necessary.

MR. CAMPBELL: I would say the intellectual work for airline deregulation was done in the Ford Administration.

MR. COLLIER: I have not seen any objective in favor of less regulation in the social areas. I cannot identify any coherent policy in that regard.

MR. ANTHONY: There was some talk in 1978 when the President announced his anti-inflation program. He made a special point of saying we are going to make certain that the regulations are the least burdensome and have the least inflationary effect.

Executive Order 12044 was an important forward step despite its being simplistic because for the first time here is an effort, albeit by Executive Order rather than by statute, albeit procedural rather than substantive.

Here is a comprehensive effort across the board at least to go through the motions of considering the inflationary impact, even in social agencies.

Before all this was announced, the EPA and OSHA and CPSC and some other agencies that have a mission for health, safety and environmental protection, were outraged that they

were going to have to justify the cost of their regulations and undergo some sort of cost-benefit or other economic analysis.

They set up this phony Regulatory Council which is an aggregation of the heads of agencies, the very purpose of which was to be a counterweight to the requirement under the Executive Order, as explained by the President, for regulatory analyses, for minimizing the inflationary effect and the cost of regulations.

MR. COLLIER: What I was suggesting was that in the social regulation area there is no consensus on the difference between a good regulation and a bad one. This is unlike the economic area where it seems a consensus has emerged that those economic regulations which interfere with efficiency and raise prices are not to be tolerated, and that tends to be a kind of standard.

In the social regulation area, I do not see such a compass. There is no consensus that an analysis measuring costs against benefits is the standard for deciding whether a regulation ought to be adopted or not. There is no broad consensus on that. As a result, I do not find any real policy direction on the substantive side.

MR. SMITH: There have been a number of approaches to that problem. The heart of the Executive Order and the pending legislation is to require agencies to think about alternatives. They were not successful in that legislation is having some requirement that the least costly alternatives be adopted, but agencies now have to explain why they did not pick the least burdensom or least costly.

There is a significant question when you are talking about health and safety regulations of how you quantify the benefits.

I think more can be done about that. There is something more involved than trying to evaluate costs and benefits in economic regulation. The idea of focusing on the requirement of finding alternatives ranging from prohibition to standard-setting to giving incentives, is important.

MR. MILLER: I would predict if you were to ask the people in the Carter Administration who are in charge of regulation—the regulators and the people in the White House—to grade the administration's performance with respect to regulation, they would give themselves a quite high grade. They are quite satisfied with what they have been doing.

MR. FLEEHARTY: They have done a lot of cosmetic things that they are very proud of, the economic analysis and the coordination of regulations done through the Regulatory Council.

MR. ANTHONY: The effort to require economic analyses through the Executive Order, I think, has an enduring consequence which is to make people at least aware of the economic consequence.

The Carter Administration has tried in a very clumsy fashion to address the issue of a structure in the Executive Office of the President or at least on a government-wide basis.

The OMB and reorganization people have come forward with some kooky ideas, in my opinion, some of which were truly half-baked and on further examination proved to be unworkable.

The symbol of the effort to approach the question of regulation through a structural, comprehensive government-wide attack has been at least registered.

MR. SMITH: Executive Order 12044 is a good example of that government-wide attempt, even to capture independent agencies even though it may not have done so.

MR. ANTHONY: These are the two things, although their subsequent achievement is small and their content not terribly good in my view, that could be built on for the future. The next President should grab and build on them in a substantial way.

MR. SMITH: That Executive Order was put out only after there was a great division within the administration. There were enormous legal concerns about the ability to do it. That was a major step forward given the hesitancy about addressing this problem.

The pending legislation (S. 262) just makes an utter mish-mash of all of this.

CHAIRMAN HINISH: Gentlemen, let's assume we have had an election and we are in January of 1981 and a new President is assembling his own team.

If he were to be presented with a blueprint which would contain suggestions for a framework for regulatory reform in his administration, what kind of structural and procedural reforms would you like to see him follow so that he does not spend the first couple of years attempting to re-invent the wheel?

MR. FLEEHARTY: I guess the initial question he would have to decide is does he want a Cabinet presidency, or an administrative presidency where the White House calls the shots? How does he intend to use the machinery he will have at his disposal?

What he should try is to do what Nixon began doing in 1973 and see if he can do this for the next four years and see if that

formula would work. This is essentially not a Cabinet presidency where the Cabinet members are regarded as operating vice presidents of a large corporation. Rather it seems to be that the President would have to exercise most of the programmatic decisions himself and coordinate most of the shots through his White House staff, at least in an area as complex as regulatory reform.

This is true for quite a few reasons. It is very difficult even for a Cabinet officer to control his own agency, not to speak of agency heads in independent agencies.

The bureaucrats have the power to withhold. That is essentially their strongest power. They will not cooperate with a program if they do not want to. I do not know whether the Senior Executive Service is going to make a difference in the intransigence of bureaucrats.

The President cannot rely upon Cabinet officers and their bureaucracies in the battle but must keep most of the cannons in the White House.

The problems of congressional coordination and congressional involvement in regulatory reform also suggests to me that the power ought to reside in the White House and influence ought to be kept there to a maximum.

After a particular committee or subcommittee has had ten or twenty years of constituency relationships with a particular agency, and on top of that, after interest groups have already embedded themselves in the agency itself, the Cabinet officer has as much trouble arguing with his own bureaucrats about what a program ought to be as he does arguing for the administration's program.

It seems to me the Cabinet officer is in the wrong spot to try to exercise leadership throughout that department and that leadership has to come from the White House.

MR. BARNUM: I would like to suggest quite a different approach. I think it would be a great mistake to attempt to implement a generic program that is so important in its specifics and details by controlling it out of the White House.

I would like to build on a couple of things that have been said, concerning the impetus that inflation gave to reform and the importance of doing your homework.

If I were going to advise a new President on how to achieve regulatory reform, I think I would acknowledge that the real target cetainly for a new administration would not be so much economic regulation in the independent agencies, but all of the other regulation in OSHA, EPA, ERISA and other Executive

Branch agencies that imposes very severe economic penalties on healthy industry.

Having recognized that as the target, I would then recognize that the new administration will have to do its homework on those issues much better than it has ever been done. The President should build on the crises of the moment in the nation's economy. Certainly through the next five years both inflation and productivity will remain problems.

From the next President's vantage the starting point has to be that our economy is being crippled by these regulations. They must be modified and certainly new ones must be implemented in a way that does not adversely affect productivity, that does abate inflation.

I might even go so far as to drop the phrase regulatory reform and go to something related to productivity improvement. Regulatory reform is going to be ten years old by the time the next President gets into office.

We must also not forget the major role Congress is going to play in this arena. It is going to play an even more important role when we get into regulatory areas different from economic regulation because labor and other constitutencies are going to be more entrenched in Democratic Congress than the airlines or truck lines ever were.

This argues differently than the conclusion that you should try to centralize reform.

Assuming we have adopted the proposition that we are going to have good people in the agencies, you have to put the homework there. I think you have to put the salesmanship there. Those are the people who are dealing on a day-to-day basis on matters of great interest to the Congress, whether it be highways or new airports or whatever. They have the staff to deal with the Senate Commerce Committee and the House Public Works and so on.

I think it has to be a part of their agenda. If you put reform in the highway area in the White House and building highways in the Highway Administration, you are not going to get any *quid pro quo* for highway construction.

MR. ANTHONY: What about Brown Lung regulations in OSHA? I am posing a case where the agency goes to what may be viewed as extreme lengths to impose a strict requirement of engineering controls that would cost millions and millions of dollars to purify the atmosphere in cotton mills, where the wearing of respirators at a fraction of the cost could produce the same health result. But through a willfulness on the part of

OSHA and of the Secretary of Labor, the use of more expensive engineering controls is imposed.

Should there not be a mechanism in the White House that can intervene?

We need to have someone act clearly enough to forestall a proposed rule before it becomes very expensive and gets organized labor's backing. There should be a mechanism to come into an agency proceeding and to point out to the administrator that it is going to cost $800 million in contrast to some smaller figure and that the national policy against inflation simply must override concerns for organized labor's sensibilities.

MR. BARNUM: Let me give you an example of a problem I dealt with for years relating to OSHA. The OSHA statute lodges principal jurisdiction in the Labor Department but it also says in those areas where any other agency has statutory authority to regulate, that agency shall implement the OSHA regulations.

We had it in spades in Transportation. The Federal Railroad Administration (FRA) was regulating in railroad yards, the Coast Guard was regulating on docks and ships and the Federal Aviation Administration (FAA) was regulating aircraft.

We had a very difficult problem in drawing a line. The OSHA regulations and the Labor Department regulators apply when the flight crew gets off an airplane and the plane is being dragged into the hangar. When the flight crew is on, it is the FAA regulators who regulate it.

When the deep sea diver is in the water, he is regulated by the Coast Guard. When he gets on the float, he belongs to OSHA.

I could give you thousands of examples such as this. Who was responsible for the toilets in the towers on the railroads? OSHA got the toilets but we got the turntable.

I went to the Labor Department, to Dick Schubert who was my counterpart for a number of years. Dick and I saw that a principle ought to be drawn from this. We did not want duplication in a particular place; but on the other hand, if there were an OSHA regulation pertaining to pick-up trucks, the same regulation ought to apply to a railroad pick-up truck as it applies to a paper company's pick-up truck.

The trouble was that after Schubert and I had agreed on how it could be worked out, it would get turned over to somebody reporting to Schubert and it fell apart. We would go back three

months later and Schubert would agree again and again it would fall apart. How do you solve that problem?

MR. ANTHONY: You cannot.

MR. BARNUM: Yes, you can. They were still appointees. I come back to the starting point that unless you get not only the undersecretaries like Schubert but the person you put in charge of OSHA at Labor mindful of what the President wants to do, it is not going to happen.

MR. ANTHONY: My point was that as it originates further down in OSHA among the Senior Executive Service and Civil Service, by the time it is sort of a remand, it is going to get a hard time on the way back.

You are going to come up with an occasion where if the White House is going to try to harmonize policy for its broad purposes, it is going to have to have a mechanism to intervene.

MR. BARNUM: We are talking about harmonizing policy. We are talking about making right decisions. You have to look to the Cabinet secretary who has the army and say, this is important to me, I do not like what your assistant secretary is doing, you are not going to be around if he keeps doing it.

CHAIRMAN HINISH: How does the President first formulate policy? Should he have a formalized structure in the Executive Branch for coming up with these policies?

MR. SMITH: If I understood the question, what should the President do at the outset to organize himself to deal with regulation?

If you are talking about the first couple of days as to what he does in terms of regulatory reform, there are three things. First, I think he should reissue Executive Order 12044 in his own name with such changes as are appropriate to strengthen it and he ought to select a mechanism.

OMB has always seemed to be the right place to monitor and assure compliance by the Executive Branch agencies with the Executive Order.

Before then I would try to find out constitutionally how much further he can carry the Executive Order in terms of the reach of presidential power so as to be able to reconcile conflicting regulations or control regulations he would like to have some impact on.

I would take that reach to the constitutional limits, and I would act right at the outset so that anybody appointed to the agency knows what the policy is, and the President would have to select where and who in the White House will enforce this policy. I think it should be somebody who is nominated subject

to Senate confirmation, the Chairman of the Council of Economic Advisors, or the Director of OMB, somebody who is a strong executive and cannot be viewed by the bureaucrats as nameless guys in mid-level staff of the White House.

It has to be somebody who is up there and visible and who is acting for the President because obviously he cannot do it.

I would then consider areas for substantive deregulation and I would organize study groups with a lot of congressional participation. I would enlist the Senator Bakers and those Democrats who have strong feelings on regulatory reform subjects, and we know who they are. I would have Administration and outsiders. I would get those substantive deregulation studies going right away.

This is going to be a building process looking uitimately to legislation. That group ought to consider what new legislation is needed and what you could do and how to do it and what can be done within existing legislation to achieve this result. They may see things in the course of that study that would be workable.

I would do those two things right at the outset. I think the problems of American government are so significant that we are approaching a governmental country. So, the third thing the next President should do is create a Hoover-type commission with former President Ford as the Chairman that would really consider large issues looking to perhaps constitutional reforms. The problems are of that dimension.

CHAIRMAN HINISH: Governor Reagan did that as Governor of California. The Republican platform does call for such a commission.

MR. SMITH: Some of this might be affected by whether or not pending regulatory reform legislation is passed. I think there is a 25 percent chance that it might be. I think there has been a definite decision by the opposition to be against it and they may have the means to stop it.

MR. BARNUM: I would not want to see any super government-wide regulatory agency or council established to overview the regulations put out by the various departments.

I think the way to solve the big problem is by having somebody at OMB or at CEA or the domestic policy staff who is responsible for what is going on in a particular department.

When he sees the big red ballon go up, he does not go to some council or review group, he goes to the Director of OMB and he says, Secretary so-and-so is messing up, so stop him.

The Director of OMB or his Deputy calls the Cabinet

secretary and says, somebody down the line is messing up and the President is going to hear about it unless I understand you have it cleared up. That is the way you solve the major problems and not through any paper shuffling, super regulatory review group.

MR. ANTHONY: I could not agree more. I think it would be foolish duplication of bureaucracies to have some permanent comprehensive review group that looks at all the regulatons coming out. On the other hand, I think what is desirable is to have some structure addressing, in the name of the President, a whole range of questions about regulation including management and procedures and reorganization. It may include how you make sure a red flag is raised when some kooky regulatory proposal is on its way to publication, to reverse it or stall it before it is too late.

That is what I am talking about, some mechanism rather than some comprehensive substantive review.

MR. SMITH: Assume I am the Chairman of the Consumer Product Safety Commission. I say there should be no polyurethane insulation because it produces carcinogenic vapors. DOE, under the direction of the President, says it is great insulator and we ought to have it.

Who comes up to me at CPSC and says we will cut off your water if you do not become more cooperative? That is the harder question.

MR. MILLER: The first thing to do is to appoint first rate true believers to be head of these regulatory agencies. I do not mean zealots who just want to get rid of the agency, but people who want to do the right thing and who have some sound views and mutual trust.

These are people who will also test the dimensions of existing statutes and perhaps arguably venture into the gray area.

There are two kinds of lawyers, those who tell you why you cannot do what you want to do and those who tell you how you can do it. You appoint the latter kind as your general counsels.

These people would be trying to reform the agency and do what is right as best they can.

The second thing is that there be someone in the White House, a deputy advisor to the President not subject to Senate confirmation, who would provide a coordinating role, a person who would call together the heads of these agencies and meet with them.

This would be truly a group effort to try to reform regulation, although each one would have the responsibility for his own agency. The important thing is to do it right away. As we all know, in the honeymoon period you can get people appointed and confirmed to regulatory agencies that you could never get confirmed at a later point.

Another thing I would do is have each of these agency heads appoint a task force to begin drafting reforms of its existing statutes to right the wrongs.

Secondly, OMB should begin to work on a regulatory budget. This regulatory budget might be kicked off as an experiment at first. Maybe take one portion of an agency, an agency that does pretty good cost analysis like EPA and get some experience with the regulatory budget there.

MR. BARNUM: What do you mean by regulatory budget? Cost limits?

MR. MILLER: Gross cost limits.

I think a President might initiate a moratorium of some kind on regulations. This would draw attention to the need for reform or provide additional impetus for reforming the individual statutes.

MR. SMITH: I believe you have to address the question of White House contact with chairmen and members of independent regulatory agencies and that is a problem for the President. The Eisenhower Administration had a real problem at the SEC in that connection involving pending cases.

We now have sunshine laws and the application of *ex parte* rules to rulemaking. There is a whole area that a new President should be advised about so he does not get into a problem that is going to hang him at the outset.

I think contacts with independent regulatory agencies and their chairmen by the White House is a very sensitive and difficult issue. I think it has to be approached with a great deal of circumspection.

I myself would be in favor of statutory changes which give the White House a role with respect to all of the independent regulatory agencies but as it stands now there are real political and legal perils.

MR. COLLIER: I think it is tempting to say that the White House should have a major activist role in individual regulations.

I am very reluctant to propose any such kind of role and substantive review of individual regulations without also proposing the armies of people who would be necessary to do it well. I

think it would take several thousand people to do that kind of substantive review.

MR. SMITH: Under the Executive Order and the pending legislation, review is limited to major rules plus such other rules as OMB decides to get involved with.

My understanding is there are approximately 200 rules per year that are major rules and in only some of those do they have to get into them in-depth and the criteria for getting into them is whether they involved conflicting policies. In other words, if there are really anti-inflation problems with a particular rule, whether there is a conflict with another agency or a jurisdictional problem, I am not saying it cannot be done better; it can.

MR. COLLIER: I would not put a lot of eggs in that basket because personnel is the principal problem. Personnel recruiting responsibilities in a new administration always get confused because a lot of people do the recruiting. There ought to be crosscutting in personnel placement. Maybe a group of people who have as their duty to recruit regulators, not by different departments, but to have a group looking at the candidates for OSHA at the same time they look at candidates for FAA and EPA, and other agencies. Your are looking for a mix of skills, whether you are looking for the person to run a grant program at Labor or the person to run the ERISA program.

MR. ANTHONY: Is not a huge part of the problem the zeal of the single mission agents, if they are not restrained by some part of the government, external to that single mission agency?

I do not know what you meant by true believers, but if you mean put Joan Claybrooks in charge of all the agencies and see how far they can push their statutes . . .

MR. COLLIER: Yes.

MR. ANTHONY: There has to be some way the White House can maintain some common sense and keep the zealots from running wild.

MR. COLLIER: I think that is called firing people.

MR. ANTHONY: That comes after the fact and after the damage has been done.

I think a major component of the regulatory problem is the broad discretion given to the single mission agencies, which, when combined with the overzealousness, is injurious to our economy and productivity.

We have to confront this. It may be expensive. It may not be fun. It may step on people's toes. It may look illiberal.

MR. COLLIER: I do not know of anybody knowing the

magnitude of the job that I have ever met in my life who would be confident to undertake the task without an army of several thousand people.

You do need a back-up goalie system so that if somebody really goes off the track, you can nudge them and say you really ought to focus on this. You are going to have to personally get some of your best people whose judgment you trust to take a hard look at this question.

MR. ANTHONY: There is this big bureaucracy in all of these agencies which have a variety of missions and some command has to be exercised over it. If it is going to be done by firing people, that is great. I do not think that is good enough.

MR. BARNUM: I think Cal may have put his finger on a specific suggestion I would endorse. There are probably somewhere between six and twelve critical regulating jobs. I am not talking about Cabinets jobs. I am talking about the Assistant Secretary of Labor for OSHA, the Administrator of the National Highway Traffic Safety Administrator (NHTSA), the EPA Administrator.

MR. COLLIER: Six in each agency in Agriculture, HEW, *et cetera.*

MR. BARNUM: A dozen. The point is these people should be selected not just by the person told to fill the slot at Labor or DOT but by somebody with a committee, if you will, with some substantive knowledge in the area who is going to probe the proclivities of the people they are looking at to fill those jobs.

I recall being appalled at the level of substantive knowledge in the White House personnel office as to what the job they were talking to me about doing involved, let alone what kind of bias or background they were looking for in the candidate for that job.

I would endorse what you are saying and let's not argue about the numbers. The fact is you can identify the number of critical regulators whose actions, more than any Cabinet secretary, really affect the productivity we are talking about.

MR. SMITH: I would like to modify what you said and I totally agree. Maybe you are talking about 50 and not a dozen. Whoever is looking at that group should look at the group working together, and the way they interrelate.

MR. COLLIER: A lot of times you will get a good regulator. He might be a runner-up at one job but he might be perfect at another agency.

The President may over a one-year term have the opportu-

nity to change the miniority members of some commissions. But with the independent agencies, he may have to wait three years to put two or three new people on. The administration is not only restrained by the legal requirements, it is constrained by personnel who cannot be touched.

MR. SMITH: I wonder whether the independent agencies are important enough for the President to use his political capital. He will never get any ten lawyers to agree to what the constitutional limits are in his dealings with the independent agencies. If he did go out to whatever the limit is he will have an enormous political problem with Congress.

It seems to me if he involves the Congress in substantive deregulation and other areas, then the Congress can eventually be brought around to conclude that it is necessary for the President to have more power in dealing with all the organs of economic regulation.

EPA Administrator Costle last September said there were 21 statutes about carcinogen problems and six agencies administering them. The potential for differing viewpoints in the middle and lower level bureaucracies, not just rulemaking, but the application of rules and inspections is mind-boggling.

I think you have something at the OMB level to coordinate and eliminate conflicts and produce some kind of a consistent national policy.

MR. ANTHONY: This is what leads me to think that despite the political difficulties, we have to start conditioning people to realize that if some management is going to be imposed on the regulatory units of the government, it is going to have to include the independent agencies and somehow this problem we have addressed, political or legal, has to be overcome.

It will take a long time to condition Congress to the point that I think you would get a receptive environment.

MR. BAAB: All of the concerns that have been expressed here, some dealing with legislation, some dealing with direct supervision over the Executive Branch departments, impact on Congress.

It was suggested early on there be some consultation with members of Congress. After the election there is going to be a new Congress. There are going to be a lot of new faces there and a lot of people who have been part of the problem for many years are going to be gone but other people coming in will be part of the problem also.

Although a new administration is going to be very much in concert with a lot of people in Congress, there could well be

stepping on a lot of toes in any regulatory reform effort. It is important for the newly elected President right off the bat to consult with the committee chairmen, those people who may agree with him philosophically but do not want their turf trod upon. They have to know that he is not only interested in what they have to say but he will listen to what they have to say.

Following the election in November, in December and January there ought to be a series of meetings. Maybe the first official White House function ought to be with the leadership of Congress and those meetings should be institutionalized for the next couple of months.

If you are talking about how to get control over the Executive Branch, how to get suggestions for new appointees and more legislative initiatives, that would be the way to do it. You cannot do it a year later. The damage would have already been done.

CHAIRMAN HINISH: There was mention of a temporary moratorium on regulation.

MR. COLLIER: That would require legislation.

MR. MILLER: It would be incomplete.

MR. COLLIER: Even there you cannot do it with the independents.

MR. SMITH: You are thinking about a couple of months, not a year.

MR. BAAB: You might be thinking of four years.

MR. BARNUM: There are a lot of things, the ICC would be doing, for example, that are good.

MR. MILLER: The moratorium would have to apply to the executive agencies.

MR. SMITH: I think we would have to wait to proceed until the mechanisms are in place.

MR. COLLIER: On the appointment process, there is only a very short period of time in which to rush through the prized members of your administration no matter what level they are. Anything that would delay getting all the nominations up on the Hill on January 21st would be a terrible mistake.

In terms of congressional consultation, it is always a part of anything we do. Congress is not very well organized in this area which makes concentration a little more difficult.

MR. BAAB: Precisely. It also makes progress more difficult and to the extent to which that consultation bears no fruit, then you cannot be damned for not consulting.

MR. SMITH: To strengthen my point about consulting with

Congress, there are many administrations who get off on the wrong foot immediately.

We are thinking in terms of that kind of substantive deregulation that involves independent agencies. The recommendation should be for the President to have a lot of involvement with Congress early on rather than later.

In terms of appointment, I agree with you that he ought to go ahead and appoint his own people subject to whatever confirmation is required.

MR. COLLIER: You can always consult people or with Congress; the point is some presidents get off on the wrong foot. Eventually if you try to do anything you are going to be crosswise with some elements of Congress.

MR. BAAB: You are not going to find any agreement. With recent experience fresh in our memory, what I am talking about is consultations so that Congress knows this is an administration they can work with, whether or not they agree. This must be an administration that will return phone calls.

MR. CAMPBELL: When you have six guys responsible for the same thing, say the problem with energy and EPA, is that ultimately a legislative problem?

MR. COLLIER: You have a question of some health control on environmental control. It may be related to how an engine works or it may be related to something else. If you take that aspect of how the engine works and put it someplace else, then you have a problem with the engine.

There is no perfect way to organize the government to run all of these activities.

Are you going to take all of a certain kind of regulation in the Food and Drug Administration (FDA) and put it over in EPA when FDA is trying to regulate foods?

MR. SMITH: Some of it is inherent as Calvin has said, another part of it is just poor allocation of function. Some of it is inevitable in the sense that there will always be some tension between the environmental objectives and productivity objectives.

The problem is what kind of a mechanism can you have for making the balancing judgments that are inevitably required.

CHAIRMAN HINISH: Mr. Smith, would you summarize for us that Resolution A that ABA has recommended for seeking a legislative remedy to this problem?

MR. SMITH: In the recommendation we made but did not get enormous support for, is a proposed statute of limited duration, say a three- or four-year statute, that would authorize

the President to intervene in regulatory proceedings to rescind such rules of those independent and executive branch agencies as he deems to be rescinded or modified or changed.

He would have responsibility for coordinating that economic policy. If he did so, he would have to do so on the record and subject to the same kind of procedural mechanism for doing it as the agency has. For example, he could not force an agency to adopt a rule that is outside the agency's own statutory power.

As several people have suggested, there is a broad range of discretion in most of the agencies and it could cause them to refrain from doing what would be within their discretion.

To the extent that he did such thing, it could not be effective for 60 days and either House of Congress could pass a resolution indicating their approval or disapproval. The resolution would have no legal effect but it might cause the President to modify his actions. If the Congress felt at the end of three to four years that the President had abused his powers, that he had not observed enough of the congressional resolutions, then they simply would not renew the power. The President during this period would have a motivation to act responsibly, in light of congressional action. He would recognize this power he now has would not be continued if he simply disregarded such expressions.

MR. COLLIER: If I were the President's political advisor, I would recommend that he propose that law to take effect upon the swearing-in of his successor.

MR. SMITH: You are quite right and that is why Mr. Carter, chameleon that he is, did not want this proposal because he recognized the buck really did stop with the President and he would then be responsible for the conduct of the economic policy.

That is the problem. There is no one accountable for national economic policy. That is the very essence of this recommendation. You could not be more right. Somebody has to make this government accountable to the citizenry.

MR. COLLIER: The first thing I would say is you are recommending an assignment that is going to chew up your legs in a very short period of time, that is more important than national defense or general economic policy. It is not. I think it is simply a matter of priorities. Deregulation is not up there with protecting the country which is going to take a lot of political capital and some other things.

CHAIRMAN HINISH: What kind of recommendations would you make to the President to go to Congress?

MR. COLLIER: I have nothing further to say from what I have said.

CHAIRMAN HINISH: No legislative proposals?

MR. COLLIER: There would be legislative proposals where they are called for, where they cannot hurt administrative action. Achieve the reforms you want to achieve on a case-by-case basis.

I might not fight the legislative veto so hard. Maybe that would slow things down a bit. I suppose I would insist that it was eroding my powers as President. Nevertheless, trying to slow these regulations down a little, maybe the ends justify the means.

Apart from that, I do not see any grand design for solving all the problems that FDA raises and all the problems the Federal Trade Commission (FTC) raises and all the problems the Department of Energy raises in one fell swoop.

I do not see it as a major initiative of the new administration. I do not see a single solution that cuts across everything except sending the best people you can into each of those agencies.

MR. SMITH: I have a profound disagreement with Calvin on this. I think the problems are structural. I do not think appointment of people approaches the dimension of the problem we have. The reason I would support a Ford-type (Hoover) commission is because it constitutes a level of attention that I think that commission should be focused on.

I think the problems of government are real and I do not think you can approach these things piecemeal. Regulatory reform should be widespread. I think if the President approaches it in that soft way it would be an enormous disappointment to a lot of people who have seized upon this issue and I think that ball would then get away from us.

MR. COLLIER: I am not saying you should not put together a variety of things, nor am I saying that it will not make much of a difference to demonstrate how important you think it is that these other people do a good job. I agree with that.

But I do not believe when you have done all those things you will have revolutionized anything.

MR. CAMPBELL: Would it be possible to take a middle ground? Take one major problem area, let's say energy, then give somebody that tremendous power to sort it out, rather than try to sort out everything.

MR. SMITH: The Congress attempted to do that when they

created the Department of Energy. What did they do inside the Department of Energy? They inserted an independent regulatory agency and some other Executive Branch agencies and created a hodge-podge, with a statute that is filled with contradictions—then there is the problem of what do you do about environment which is the other side of it. If you are talking about energy and environment, how do you separate that from inflation considerations?

MR. CAMPBELL: Do we not learn a lesson from the deregulation of the CAB? It had ripple effects. Is there any way to use it as a model?

MR. SMITH: That is why I think it is important to keep in mind the distinction between substantive regulatory reform and structural or procedural reform.

To achieve substantive regulatory reform, you have to get a manageable area, air transportation, trucking, communications and approach it with a lot of congressional involvement.

But, in terms of coordination of national economic policies, you cannot approach it that way. That required some kind of a mechanism within the Executive Branch, in my judgment, to reconcile conflicts between energy and agriculture, between agriculture and environment, between environment and FDA.

It is a problem that runs through the structure of government and we have no mechanism in our government now to cope with these overlapping jurisdictions. What do you do when you have a conflict among these six different agencies dealing with the same kind of subject? Do you go back to Congress who created the problem in the first place, or do you go to the court? What does the court do? The court tries to look at legislative history of statutes passed five or ten years apart and tries to figure it all out. You are asking a court to do a political balancing decision and they are not equipped to do so.

What we need, I think, is a statutory authorization to make the balancing judgments on critical issues, with some kind of a legislative ability to respond and monitor what the President does.

MR. COLLIER: Is it more likely to be correct decisions?

MR. SMITH: It is going to permit decisions to be made now—decisions that have been hung up for years.

CHAIRMAN HINISH: What about procedural reforms, things like regulatory analysis? Jim, you have had a lot of experience with that. Do you favor that government-wide?

MR. MILLER: The only way I would favor it would be as

being a substantive answer to a lot of the problems, subject to judicial review.

CHAIRMAN HINISH: Who would coordinate this activity?

MR. MILLER: It would be done by private industry. Some private party would be harmed and could get a court injunction to restrain the implementation of that regulation and the private sector would respond on its own.

CHAIRMAN HINISH: What kind of structure within the White House would you have?

MR. MILLER: I would not touch it. Make it subject to judicial review.

CHAIRMAN HINISH: How do others feel about that? I am simply asking how would he enforce this regulatory analysis. Jim says the answer is you allow people to take it into court.

MR SWAIN: If you let lawyers handle it in court, you may be creating another EPA.

MR. SMITH: I feel very strongly that it should not be subjected to judicial review. If a court is reviewing the rule, it should be able to look at the regulatory analysis in deciding whether the rule is valid or not but the regulatory analysis itself is not separately reviewable.

It is a management tool. That is why I think something like OMB should be the coordinator and the monitor and require agencies to comply.

MR. BAAB: I think it is an issue that could end up being a serious problem if it is not resolved early on during this whole regulatory reform debate. In the past two and a half years, there has been a continuing difficulty and conflict between the domestic policy staff, between OMB and some of the agencies. I think it ought to be made very clear before the President is inaugurated as to who is in charge of whatever it is we decide they should be in charge of, not even allow the conflict to begin.

MR. SMITH: So long as you have this problem of independent agencies and a Congress that is very distrustful of executive involvement in rulemaking, the regulatory council should formalize an executive order which would be further formalized in legislation.

It gives a legitimate forum for bringing the chairmen, the regulators together with the President and the Director of OMB who can say this is what we are doing. It is not a meeting in the White House that you cannot talk about.

CHAIRMAN HINISH: Gentlemen, before we break this up, do you wish to make a final comment on the way a new

President can execute his regulatory policies so they will be complied with throughout the government?

MR. KOSTERS: It seems to me two things have come out of this meeting that go in very different directions but they are not incompatible.

One is the simple importance of personnel appointments early on; that is very essential. The other thing is really the recognition of the need for homework. I do not mean a President should not necessarily do anything early on, but I think the one lesson one learns from the airline deregulation exercise is the need for systematic homework.

We need to do a lot of homework on what we need to do here, there and elsewhere.

MR. FLEEHARTY: I think a good relationship with Congress is going to be absolutely critical. I think Reagan does not really know enough congressmen and senators to begin that task. I think of the three approaches, appointments, budget and congressional liaison, his stumbling block is going to be congressional liaison.

MR SWAIN: The White House has too many times spoken with a forked tongue on regulatory reform. It is absolutely essential that before we ask Congress to make major policy decisions, you know what you are asking them for before you go up. Somebody should decide what they are going to do before they go up there.

It is absolutely essential you have people who can work with the Congress, whether you agree or disagree. You have to be sensitive to the policies and processes up there.

MR. BAAB: I have two suggestions. One, it may end up being window dressing but I would select a special assistant to the President for regulatory affairs, a prominent well-known business person, conceivably someone who used to be in Congress, who is well-repsected and viewed as a strong executive yet sensitive to a lot of other concerns, somebody who could also coordinate congressional relations in that area.

The second point would be after Congress was in for several months, quietly submit some legislation proposing amendments to the Administrative Procedures Act that would become effective unless overruled by Congress.

MR. ANTHONY: A lot of my remarks are repetitive but I think it is worth repeating that there is a difference in approaching substantive deregulation on the one hand and structural and procedural attacks on the regulatory problems.

A question we have probably not addressed as fully as I

would have liked is whether it should not be a first order of business to consider a central structure for the full range of concerns that the administration has in trying to get a handle on regulatory policy, including regulatory management and organizations. I do not think the regulatory council is it but maybe there should be some other federation of existing organizations.

If the new President does not have an adequately equipped mechanism to get dominion over the regulatory problem, or if something is not decided early on, then by default there will be the jockeying around for power among the different elements in the administration. That would be just the opposite of what I think we want.

There is going to be uncertainly, lack of clarity, lack of coherence and the loss of the opportunity to take an initiative and attack the areas of regulatory distress that we most need to attack which—I agree with John Barnum—are in the areas of health, safety and environmental regulations. I would add equal opportunity regulation and its allied fields, like the handicapped.

MR. COLLIER: I think a regulatory policy statement should be a high priority. I think personnel is very important. I am disinclined to believe that the President would be well served by taking on the responsiblity to be where the buck stops on regulations of any sort.

I think there are good people in the agencies and the buck ought to stop in those places with some escape mechanism for letting their views be known. I think there is inevitably some of this going on, far too much than most of us would like. The best way to manage it is not to bring those decisions into the White House but rather put the best people out there to make the decision with some sort of responsible person in the White House, a COWPS type of operation, but not as many people stepping on people's toes.

I do think there are some policies you could lay out of a general objective or objectives that we ought to reach.

CHAIRMAN HINISH: Thank you very much, gentlemen.

PART III

OTHER AGENCIES

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THE SENIOR EXECUTIVE SERVICE

Robert M. Huberty and James L. Malone*

The Civil Service Reform Act which was signed into law by President Carter on October 13, 1978 is the first comprehensive overhaul of the federal personnel system in nearly one hundred years. It abolished the Civil Service Commission and established the Office of Personnel Management (OPM), the Merit Systems Protection Board, with its own Office of Special Counsel, and the Federal Labor Relations Authority. Perhaps most importantly, it created within the executive branch a Senior Executive Service (SES) of top federal managers. While SES is monitored by OPM, its 7,000 executive employees carry out the policies of the administration throughout the federal government, and generally rank just below presidential appointees in the organization charts of government agencies. According to Jule Sugarman, deputy director of OPM, the members of SES make at least 90 percent of the decisions of the executive branch.

The law enacting SES is clear, and its intentions have received wide support. But because SES only went into operation on July 13, 1979, it will take some time before its success can be adequately measured. While much is expected of SES, little at present can be said with certainty about its effectiveness.** A May 13, 1980 GAO report on SES was largely favorable, but only a change of administration will test whether SES can meet its objectives—objectives which are in a funda-

**Authors' Note:* The preparation of this report was a collective effort involving many individuals. Robert A. Anthony, James T. Hackett, James E. Hinish, Jr., Richard K. Thompson, Fred G. Karem, Richard T. Kennedy, Gregori Lebedev, Joseph Lehman, Ray Peck, John Schrote and Robert Terrell deserve particular mention. The authors alone assume responsibility for this report. No views expressed herein should be attributed to any other individual.

**For some initial evaluations see the transcript of a Heritage Foundation—sponsored roundtable discussion which follows these remarks.

mental sense the goals of political democracy. For SES must demonstrate that it can guarantee an impartial administration of existing law while it also motivates administrators to carry out new and perhaps radically different policy initiatives which voters have endorsed.

Terms of SES Appointment

Members of SES are primarily federal executives who occupied positions that were formerly paid at the GS-16 to 18 "super-grade" level. Before passage of the Civil Service Reform Act (CSRA) these positions were either within the competitive career service, or they were managerial positions excepted from the competitive service in Schedules A, B, and C, or political "plums" designated as non-career executive assignment (NEA). A very few positions on Levels V and IV of the Executive Schedule which are not subject to presidential appointment with Senate confirmation were also placed in SES.

Now that CSRA is in effect, each agency, following OPM guidelines, will determine for itself which positions will be in SES. Significally, OPM has taken itself out of the business of job selection. While retaining oversight authority, OPM has given to the individual agencies of government the major responsibility for selecting, training, and evaluating SES personnel. By law, during each even-numbered year agencies will submit to OPM requests for authority to fill a specific number of SES positions for the two following fiscal years. The agencies will identify positions by title and justify their position designation of general or career-reserved (more on this shortly). OPM will review agency decisions and, after consulting with OMB, has final authority over position allocations and designations. CSRA provides for a ceiling of 10,777 SES employees.

By law OPM is required to establish Qualification Review Boards to certify the executive qualifications of SES candidates for initial appointments. More than one-half of the members on these boards must be career SES members and their appointments must be non-partisan, "the sole selection criterion being the professional knowledge of public management and knowledge of the appropriate occupational fields of the intended appointee." (5 USC 3393) However, it will be up to the individual agencies' Executive Resources Boards (ERB) to review candidate qualifications and to recommend definite placement in a position. ERB's also plan for future executive

staffing needs within the agency. Their organization and composition is not rigidly prescribed by law or OPM regulation, but should be tailored to the needs of the agency. OPM intends ERBs to be the focal point for the management of the Senior Executive Service.

CSRA excluded some executive positions from SES: 1) those requiring Senate confirmation; 2) those within the intelligence community—FBI, CIA, DIA, and NSA; 3) the Foreign Service; 4) administrative law judges; and 5) Drug Enforcement Administration positions excluded from the competitive service. With the exception of these positions, CSRA gave incumbent civil servants in the super-grades the option to choose to retain their existing GS grade or to join SES. That 98.5 percent have joined SES is testimony to the expectations the new system has raised in the federal executive.

Proponents of SES say that it will increase individual career mobility and promote the fullest use of managerial talent by government agencies; that it will identify and reward performance excellence; and that it will make the federal bureaucracy responsive to political direction by the administration. To accomplish all this SES allows federal executives to transfer from job to job, within and between agencies. Further, it allows executives to move from career to non-career positions and then return to career status without sacrificing pay or tenure. It provides pay increases and bonuses of up to 20 percent of base pay to as many as 20 percent of an agency's executives whose job performance is rated fully successful after an annual merit appraisal. And it gives special awards of $10,000 and $20,000 to executives whose performance is judged exceptional. Executives can also be removed from SES for unsatisfactory or marginal performance. In a major departure from the old Civil Service system, an SES employee's career and salary are based on his individual *performance* and not on the classification of his *position.*

Since the 1870's the civil service reform movement has swung between two objectives: the protection of government from politics and the promotion of government's ability to administer politics. Before CSRA, civil service was most concerned with the former objective: the protection of the civil servant's position from political abuse. And critics of SES like the federal employee unions have charged that SES' emphasis on improving the political "responsiveness" of federal executives will re-open the door to such abuse. But SES is organized to minimize this possibility. It is structured to make

possible a degree of employment flexibility to encourage federal executives to achieve new and perhaps politically controversial policy goals without endangering the impartial administration of the law. This end is accomplished in part by the division of SES positions into two categories, and the establishment of four kinds of SES appointment.

Types of SES Positions and Appointments

There are two kinds of SES position: general and career-reserved. *General* positions may be largely administrative in content, or they may have a substantial policy-making role. They can be filled by four types of SES appointment: *career, non-career, limited term,* and *limited emergency. Career-reserved* positions can only be filled by a career member of SES.

A position is career-reserved if the agency head has determined that the position must be career-reserved "to ensure impartiality or the public's confidence in the impartiality of the government." (5 CFR 214.402b2) This standard of impartiality must be met if the position requires administration of day-to-day operations of government in the areas of a) adjudication and appeals; b) audit and inspection; c) civil and criminal law enforcement; d) contracts and procurement; e) grants administration; f) investigation and security matters; g) tax liability; h) scientific or highly technical matters.

OPM sets a government-wide minimum of career-reserved SES positions at 3,571 (i.e., about 40 percent of SES), and OPM may set quotas for individual agencies. OPM can review agency designations and has authority to direct an agency to make a position career-reserved or general. In addition, agencies must obtain prior approval from OPM before changing an established position from career-reserved to general or from general to career-reserved. A GAO report to Congress has found some arbitrary or inconsistent designations which OPM has agreed to review.

Career members of SES may be appointed to general or career-reserved positions. For a career appointment, an agency 1) can choose a current SES career member from anywhere within the government without competition or OPM approval; 2) it can announce a competitive position within and outside the government and obtain OPM certification of its appointee (50 percent of new SES positions have been opened up to outside competition); 3) it can choose someone in an agency SES candidate development program.

The first option encourages career mobility, and it is intended to create challenges and promote morale among SES executives. It is also intended to effect the managerial capability of agencies. By permitting inter-agency transfers, SES encourages executive loyalty to government service and management skill in general, rather than to agency perogatives and expertise. Subject matter knowledge remains important, but SES wants to foster a knowledge of management ideas and practices, and, to this end, it has established a Federal Executive Institute in Charlottesville, Virginia for all SES members.

The second option of competitive appointment to SES from within or outside the government will enable the government to tap new or specialized sources of executive talent. But the roundtable participants recognize that it is also the most liable to abuse if non-career political appointees obtain career appointments to SES by this route. There is extensive discussion of this question as participants balance the dangers of political favoritism against the rights of the prospective appointee and the needs of the agency. Perhaps as a consequence, OPM has announced that agency candidate development programs will become the primary source for new career appointments to SES.

Candidate development programs, the third option, are still in the formative stage in most agencies. They are intended to bring highly motivated GS-13s, 14s, and 15s into SES. At present, however, OPM policy undercuts its own intentions. A special Schedule B appointment authority has been established to bring into candidate development programs women, minorities, and handicapped who are insufficiently represented in mid-level management positions. OPM's argument that this need is only temporary is commonplace in affirmative action discussions. It ignores the more fundamental questions of merit staffing and equal opportunity.

SES general positions can also be filled with *non-career* appointees. CSRA permits non-career appointments to provide a mix of political direction with managment skill. For a non-career appointment to a general position there is neither competition nor tenure. Non-career appointees serve at the pleasure of the agency head. Agency heads must request from OPM authority to employ a specific number of non-career employees for the following fiscal year. OPM then sets an annual non-career SES quota for each agency. But in keeping with its prevailing philosophy of decentralization and agency discretion, OPM does not review the qualifications of non-

career appointees. No more than 10 percent of SES positions government-wide, nor more than 25 percent in most individual agencies may be non-career. But if carefully placed in key positions, non-career appointees can insure that an agency will faithfully carry out the policy mandates of the administration. While it is curious that agencies have not completely filled their non-career authorizations, the roundtable speculates that non-careerists hesitate to take political appointments in an election year.

A so far neglected but potentially significant appointment authority to SES general positions is the *limited term* and *limited emergency* appointment. CSRA provides that up to 5 percent of SES positions may be filled by limited term appointees, who can serve for up to three years on special projects, and limited emergency appointees whose positions are limited to eighteen months. These appointments are non-renewable. While agencies have made few requests for this appointment authority from OPM, the roundtable notes that these positions could be very important to an incoming administration with agency reorganization plans which required specific kinds of immediate but short-term management talent. The new Department of Education, for instance, presently has fifteen limited term appointment authorities out of a total of 113 SES positions.

Pay and Merit Appraisal

If SES is to improve the government's management ability to implement administration policy, then it must attract executive personnel whose performance can be recognized and rewarded. SES' pay and merit appraisal systems are decentralized, complex, and they are open to abuse. But the systems are carefully and rationally structured. The roundtable participants who are most optimistic about SES' success argue that any inequities which appear in the pay and performance appraisal systems can be detected and corrected as long as the systems themselves are not damaged. They regard Congress' attack on the bonus system and its pay freeze on executive salaries as the greatest external danger to SES. Other participants, less sanguine about the ability of rational structures to control action, suspect that the human propensity to favoritism and greed may undermine the process of SES personnel appraisal and bonus selection. They urge OPM to carefully monitor the agencies that administer their own SES programs.

OPM has decentralized the process of appraising SES job performance and awarding merit pay. Consequently, many regulations and procedures for performance ratings are still being devised by the individual agency Performance Review Boards. CSRA requires these review boards to consider job performance taking into account 1) improvements in efficiency, productivity, and quality of work or service, including any significant reduction in paperwork; 2) cost efficiency; 3) timeliness of performance; 4) meeting affirmative action goals. How exacting and thorough agency performance reviews can be has not yet received scrutiny. Nor is it clear how the implementation of new policy directives will be figured into the appraisal. This will be tested in a new administration. Nonetheless, this year all SES employees will have received their first performance ratings.

SES has six pay rates. The specific pay rate of an SES employee is set by his agency and can be changed only once a year. Pay may be increased by more than one rate annually, but may be lowered only one rate per year. Under CSRA, the lowest pay rate equals the first step of GS-16 ($47,889 as of October 1, 1979) and the highest rate cannot exceed Executive Level IV ($54,500). However, Congress has frozen the four highest SES pay rates at a uniform $50,112.50 for fiscal year 1980. The resulting "pay compression" is regarded as inequitable in a GAO report because those entering SES at different levels and having different levels of responsibility receive the same pay.

In addition to salary increases, SES career executives (but not noncareerists) who receive a performance rating of "fully successful" can be selected to receive a lump-sum bonus of up to 20 percent of basic pay ($10,022.50 maximum under the pay freeze). These SES bonuses were much on the minds of the roundtable participants. If the promise of bonuses promotes performance excellence among the nation's top management, then its cost to the taxpayer— an estimated $14 million—will be money well spent. Still, the discretionary apportioning of monetary rewards to as many as 1,400 of the 7,000 SES executives for "successful" job performance raises the issue of favoritism, and calls into question SES' commitment to a basic principle of civil service reform. Moreover, when the implementation of new and controversial policies is a factor in determining job performance, then the danger of political abuse, or the danger of creating the appearance of political abuse, is magnified.

CSRA originally provided that up to 50 percent of an agency's SES career members could receive bonuses. But when the first agencies to award bonuses, NASA and the Small Business Administration, took full advantage of the law, Congress cut the percentage who could receive bonuses to 25 percent. In late July 1980 OPM Director Campbell further limited the number of bonuses to 20 percent of an agency's SES positions. OPM further specified that for agencies with over 100 SES members(1) full 20 percent bonuses should be limited to no more than 5 percent of those receiving bonuses; (2) bonuses of 17 percent to 20 percent should, in total, be limited to no more than 10 percent of bonus recipients; and (3) bonuses of 12 percent to 20 percent should, in total, be limited to no more than 25 percent of bonus recipients. Campbell, no doubt, hoped by these steps to contain an adverse reaction by Congress and the public. Yet when ten out of eighty GSA senior executives received bonuses—none in excess of $5,000—the *Washington Post* headlined, "Six of Ten Recipients of GSA Bonuses Have Friends in High Places" (October 7, 1980). It may be the case, as OPM's General Counsel Margery Waxman says at the roundtable, "Very often people who are the most effective turn out to be the closest to their supervisor because they are the most capable of getting the work done." But a suspicious press can be expected to follow senior executives of any administration who receive bonuses in addition to $50,000 a year salaries. Likewise, John Irving, former General Counsel of NLRB, properly notes that senior executives gave up civil service job securities when they voluntarily joined SES expecting that the law would provide up to 50 percent of them with the chance to earn substantial bonuses. But what he regards as Congress' breach of faith with federal executives strikes others as removing a temptation for agencies to get around the pay cap by supplementing executive salaries with a bonus every other year. Indeed, an August 15, 1980 GAO report speculates that perhaps the results of pay compression are throwing unanticipated burdens on the bonus system. Because pay is nearly uniform—6,300 SES executives in the top four pay grades are frozen at $50,112—agencies may be using bonuses to make basic distinctions rather than to reward performance. The Senate's refusal in September, 1980 to grant a 9.1 percent pay increase to SES executives can only reduce the risk/incentive aspects of the SES pay system.

Besides bonuses, career executives with exceptional performance are eligible to receive from the President the rank of

Meritorious or Distinguished Executive. Up to 5 percent of SES career executives government-wide may be designated Meritorious and receive a $10,000 lump-sum award. Up to 1 percent may be designated Distinguished and received a $20,000 lump-sum award. An SES executive may be awarded the same award only once in five years. In September, $10,000 Meritorious Executive awards were given to 206 SES members and $20,000 Distinguished Executive awards went to 49 executives. Some executives may not receive the full amount of their awards because CSRA provides that the total amount an SES executive can receive in one year from basic pay, bonuses, and awards may not exceed Executive Level I pay— $69,630 at present.

Whether the stick will ever be used as often as the carrot is doubted by the roundtable. But CSRA does provide for the removal of executives whose performance is rated minimally satisfactory or unsatisfactory by agency Performance Review Boards.

An SES career executive who receives a single rating of unsatisfactory *may* be removed from SES; he *must* be reassigned or transferred. Another unsatisfactory rating during the next four years, or a minimally satisfactory rating during the next two years and the executive must be removed. Executives receiving ratings of minimally satisfactory are on probation for two years and must be removed if their rating does not rise to fully successful.

An SES executive given an adverse rating for poor performance is entitled to 30 days advance notice and a review of his rating by the Performance Review Board. More than one-half of the Board's members should be career appointees. The executive may also request an informal public hearing before the Merit Systems Protection Board (MSPB), but the Board cannot stay or reverse the action. Once removed, the executive is entitled to placement in a non-SES position at GS-15 with current SES pay, or he may retire if he has 25 years of service or 20 years of service and is age 50 or older.

To be distinguished from removal for poor performance is the SES career executive who is removed "for such cause as will promote the efficiency of the service" (5 USC 7541), the law's peculiar way of referring to dismissal for misconduct. An SES career executive who is dismissed for misconduct is entitled to 30 days advance written notice, a hearing, legal representation, and a written decision. He also has appeal rights before the Merit Systems Protection Board. (It should be

noted that over 85 percent of MSPB decisions have upheld agency actions.) For "the efficiency of the service" an SES executive may also be transferred to a different SES position within his agency, but never to another agency.

SES non-career, limited term, and limited emergency appointees serve at the pleasure of the appointing authority and may be removed at any time. They have no right of appeal to the MSPB. They have no placement rights.

OPM has recently issued regulations establishing procedures for conducting agency reductions-in-force (RIF) among SES members. Because RIFs are actions taken against positions, not employees, they ought to be regarded as legitimate tools of executive reorganization and should not be unnecessarily inhibited. These regulations on RIF, however, place roadblocks in the path of an incoming administration which is attempting to scale down or abolish agencies or parts of agencies as part of its electoral mandate. Pursuant to an RIF they prohibit the removal of a career SES member during the first 120 days after the appointment of a new agency head or the career employee's most immediate non-career supervisor. The 120 day restriction is both onerous and unnecessary. SES members would not be left unprotected without the restriction for they are provided with placement rights for two years to other positions within the agency for which they are qualified.

Besides OPM's 120 day regulation, CSRA itself provides for a 120 day waiting period after the beginning of a new Presidential administration before a performance appraisal and pay rate change may be made of a career appointee. There is also a 120 day waiting period before a new agency head or immediate non-career supervisor is permitted to reassign or transfer career executives involuntarily. Whether or not these provisions are the appropriate means of protecting career employee rights during a transition period, their effect will be to reduce CSRA's otherwise commendable renewal of emphasis on political responsiveness within top management. Those 120 day rules can only reduce an incoming administration's ability to launch its first "100 Days."

ROUNDTABLE DISCUSSION ON THE SENIOR EXECUTIVE SERVICE

September 24, 1980

Participants

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MR. HEATHERLY: The general purpose of today's get together is to exchange some ideas on what the SES is, how it's working, and how it should be viewed from the standpoint of the goals that were set for it at the inception of the Civil Service Reform Act.

There are a number of ways of approaching this. I would like to start off by quoting from a little position paper on civil service reform distributed by Congressman Edward Derwinski, who is Ranking Minority Member on the House Post Office & Civil Service Committee. It states:

> With the Act in place a little over 18 months, three of the major concepts for improving Government effectiveness show signs of success. The Senior Executive Service was created to provide a mix of career and political executives who can be assigned with flexibility to meet Government-wide needs. This corps of executives is the keystone to Civil Service reform. It is structured to alleviate three major problems of the old system:

It relieves the pay compression by permitting bonuses to one-fourth of the SES corps based on superior performance, and it permits the removal of executives whose performance is substandard.

Secondly, it enables executives to transfer from one agency to another, allowing an exceptional manager to assist in several departments over a period of time.

Third, it provides a mixture of political and managerial teams to enhance a President's capacity to produce a responsible bureaucracy.

I think we would all agree those are three worthy goals. The question is how well is the SES performing to date. How much do we know about it, given the fact that it is still new, and that some of the reforms are not fully implemented at present.

A number of people have been watching SES closely, some of them here in this room.

Why don't we just start with some general impressions on how well you think the system is working at present.

Kris, would you like to start?

MS. IVERSON: I guess the first observation—and this is a preface to any remarks we may make on the SES—is that it's been in operation only about a year. Prior to the inception of SES, senior executives were appointed to their positions under a number of different authorities operating according to different rules. There is always going to be a transition period adjusting to new regulations, new expectations. I think this is an important observation to make.

Our exposure to SES has been limited.

MR. HEATHERLY: Ms. Waxman.

MS. WAXMAN: From our perspective, the Senior Executive Service has worked very well. We feel the same way—that you can't tell yet what the future is going to be. We've only had it in place a year. We have not had a change in administrations. I think that will be a real test for whether in fact it is a system which improves the ability of an administration to manage and to get new policy objectives across, and at the same time protects the security of people who are very hard working and very caring about the government, and who have long-term government careers.

If imitation is the sincerest form of flattery, we see agencies that were left out of the Senior Executive Service who now are trying to get in or trying to create their own Senior Executive Service. The National Security Agency, the Export-Import Bank, the smaller agencies, and the ones who had intelligence functions, which we felt would not fit into the overall scheme which promotes mobility between agencies, are now seeking to become members of the Senior Executive Service.

What we've seen in the first year is a direction towards pay for performance. I think that is one of the most significant things that's happened. Not just rewarding people who have done exceptionally well, but also beginning to discipline the people who are not performing well.

The year has gone by and we have had performance appraisals for all members of the Senior Executive Service. Those few who have distinguished themselves have received awards from the President or are about to go through a process where they are receiving awards from their agencies.

The money doesn't seem very big in terms of inflation, and this concerns people whose pay is capped. But it is significant because it is indication that if you work well, there is a reward for you and it's more than just a plaque.

We've seen an increase in mobility in the Government. I think that was another purpose in the Senior Executive Service: to get those who were expert in areas to move around to share their expertise, and to provide an opportunity for individuals who want career government service to keep themselves alive. And one of the problems that people faced with a long-term government career was the possibility of stagnation in the same job with the same agency for a long period of time.

Mobility gives you an opportunity, when you've really mastered an area and have been at it for quite some time, to challenge your mind by moving somewhere else.

We've also seen a decrease in the time and an increase in the speed with which appointments can be made in the Senior Executive Service. I think that's a great benefit to agencies. One of the problems the government has had in recruiting from the outside has been that the government, unlike private industry, cannot immediately make you an offer.

We have a process to go through. It's a very open process. In the past, getting appointments to super grades, or their equivalent, used to take up to six months for a career appointment. It is now taking, for the OPM review period, about a month, and OPM only reviews to see whether the prospective appointees have sufficient management experience. The agencies have been delegated authority to review as to subject matter.

OPM's allocation to agencies of non-career appointment authorities gives the agencies a chance to make almost immediate appointments. Agencies then have the flexibility to appoint people from the outside, who are not interested for one reason or another in long-term careers in the government,

but who want to come in, particularly in a policy-making role for a short period of time.

Because jobs are not linked to individuals the way they used to be, you can move people around within the Senior Executive Service, and you can make a non-career appointment to a job that previously would have been considered a career appointment, as long as that position is not a career-reserved position. There are very few career-reserved positions. Most positions are considered general positions open to career or non-career appointment, and non-career appointments can comprise up to ten percent of the Senior Executive Service.

I think the test, as I said, in recruiting will come with a change of administrations. I think that is true whether that means a new President or the re-election of the current President. I think in either event there will be a tremendous change in personnel. And the question is whether the Senior Executive Service can respond quickly to that change and with the least amount of disruption to the career employees who will be performing at the same level as someone coming into a political job in Washington.

So we will have to wait and see what happens in November.

MR. HEATHERLY: Last December and then again this summer in Congress, there was quite a bit of controversy regarding the percentage of senior executives in some agencies who were getting top bonuses. There was much public skepticism that surely an agency can't be performing so well that 50 percent of its eligible executives should get bonuses for top performance.

What has been your reaction to that and your evaluation of the bonus system? Has it been abused or not?

MS. WAXMAN: I don't believe it's been abused. Only two agencies gave out bonuses when the law was that they could give bonuses of up to 50 percent. Those two agencies were NASA and the Small Business Administration. So they certainly acted within the law; there's no question about that.

I think that we were over-optimistic in political terms to expect that the 50 percent rule would hold. At the time the law was debated, there was talk about having a smaller percentage, but in the end they decided to make it as absolutely flexible as possible.

I think that the 25 percent rule is, in fact, much easier for agencies to live with in a number of ways, particularly at the beginning of the system's operation.

One of the concerns that managers expressed to me was, "We would rather pick out our absolutely top people than make a distinction between half of our people, so the 25 percent rule is really better for us."

There was also concern raised that the 50 percent rule would result in an attempt to get around the pay cap: you know, a bonus for me this year and you next year.

I don't think that would have happened because I don't know of any one who was willing to give up his chance of getting a bonus this year to wait for some bonus that may or may not come next year. But that was the perception in the Congress, and I think resulted in the cutback to the 25 percent.

I have found tremendous competition among senior executives to get those bonuses, really unlike anything that existed before. No one competed to get a Presidential Award, a plaque, to be a top civil servant of the year. That really didn't matter because it was just something you put up on the wall.

Well, this is money, and this is money to people who are not getting an increase to keep up with the cost of living. And I would say, in keeping with the true American free enterprise competitive spirit, they're out to get that money.

I think that's a very good sign in the government, and I'm hopeful that a continuation of the bonus system will keep that competitive edge up.

MS. IVERSON: May I make one observation? I think it might be important to bring out for the record that the only concerted opposition to Civil Service reform was from the large Federal employee unions.

One of the reasons they opposed the Civil Service Reform Act was because they feared that the bonuses in the Senior Executive Service would be rewards for people who best served their superiors.

So I think we need to talk about that just a bit. These bonuses can be used to reward performance excellence. But I think we need to address the question of political favoritism.

MR. HEATHERLY: I had a conversation with a SES member in one of the departments about a month ago—he was formerly a GS-17—and he said there are two problems with the new SES system. He said: "In the long run, it's going to be great. In the short term, the problem is, in order to get it into effect, you have to grandfather in almost everybody, give them the option of getting into the system. So you will have deadwood around for a long time. No evaluation system you set up is really going to work in the short term.

The second thing wrong with it is that the bonus system is used for political purposes."

I said: "Well, that can be taken in one of the two ways. In what sense is it political? If it's political in the sense of getting the performance out of the managers that the agency heads want, that could be viewed as a step forward."

And he said: "No, it's just that you play their games their way. And whatever their pet projects are at the moment or however they want something done, for whatever reason, if you are cooperative and if you are a team player, then you are on the list for bonuses. And if you're not, you're a trouble-maker, and you're not going to get a bonus. It's the same old system."

So that was his personal view. But it does raise the question of what are the standards for performance appraisal that are being used in handing out the bonuses? And since there is a great deal of decentralization in the system, how can this be policed from OPM or any central source?

MS. WAXMAN: Each agency is responsible for setting forth standards for its Senior Executive Service employees and for establishing a Performance Review Board which is composed at least half career appointees for the evaluation of a career employee.

The business of rewarding people politically is something that exists or is raised in every administration, and I think it is a bit overdone. What one person sees as political, another person sees as effective. And it's the same thing with rewarding people because of friendship.

Very often people who are the most effective turn out to be the closest to their supervisors because they are the most capable of getting the work done, and it becomes an excuse for someone else who has not been able to do that.

I don't see a politicization of the system, at least I haven't seen it in the awards so far. The special counsel exists—and, indeed, the special counsel plays a tremendously important role in awards in the Senior Executive Service, as well as for any personnel action within the government—to make sure this sort of thing doesn't happen. The special counsel has wide-ranging powers, and can be called in to investigate where there is an award made which someone believes was done for political purposes. And the special counsel can make a recommendation to the Merit Systems Protection Board to withhold an award or take any other action which is necessary.

As far as I know, at least at this point, there have been no such investigations. But I only know of the public investigations. When there has been a notification to the agency that there is an investigation, my office may be informed—we are not always informed.

In addition, Congress has asked us, in its limitation of the bonuses to 25 percent of the careerists, to report to Congress and to work with GAO to make sure there are no political awards given.

We have gone beyond what the Congress asked us in cutting back. We have asked agencies to give bonuses to no more than 20 percent of eligible SES executives and to structure that in a way that not all of the awards are for the maximum amount of money.

I can assure you that OPM and MSPB or the Special Counsel would not hesitate to get involved in a case where we believe there has been a political decision made.

MR. DIAZ: I would like to add some general comments to what has been said to this point.

First, I think that really what we are dealing with now almost exclusively is subjective impressions, because I don't think the system has been in effect long enough, and certainly the instruments of measurement have not been in place long enough, and some are even now being devised, to really say in any objective terms that it is working or is not working.

Now there is an argument that can be made that the Senior Executive Service turned out to be just a sweet deal for the former 16, 17 and 18 group of bureaucrats. And I refer you to an outstanding exploitation of that argument in *Washingtonian Magazine* by Leonard Reed called "The Joy of SES" (September 1980).

The logical postulates of this article are difficult to assail, and it will depend upon what the facts are. For example, we tend to concentrate on the up. I think it is fair to say that the Civil Service Reform Act intended to strike a balance of management flexibility, on the one hand, and protection of employee rights, or avoidance of the litany of real or imagined wrongs on the other.

And the question is whether that balance has really been struck in the Senior Executive Service. You can make the argument that if one looks at all the up sides, everything is working out very smoothly for the senior executive with the exception of pay compression, which I regard as a temporary phenomenon. When Congress finally cannot stand the squeeze

any longer its pay will inch up, and so will the pay of everybody else.

Under SES, the worst case scenario for anyone who successfully completes a probationary period will be that he is returned to a Grade 15 job. And if pay compression continues GS-15 pay will be almost the same as SES pay.

Now, again, I'm saying this is the argument for a more skeptical view of SES.

I think the real indicator—and this is where I agree entirely with what Margery and Kris have said—is that the test will come with a change in administrations, because a lot of these concepts that we haven't really defined are only going to become clear when there is a change of administration. When is it that an executive's performance ceases to be acceptable for policy reasons, and when are they political and when are they not political? And that's only going to be told when there is either an unprecedented change in the thrust of an incumbent administration or an entirely new administration.

I think that's when the real crunch will come.

Another measure that I would be very interested in seeing is—again talking about the down sides of SES—is the numbers of Senior Executive Service employees who are in fact found to be unacceptable performers and who are subjected to whatever can be done to an unacceptable performer. And I realize being drummed out of SES would be a very serious humiliation for most executives. Most of those I know are very sincere, dedicated and hard-working people, and that would be a serious blow.

The fact remains that unless one assumes that the old system worked well enough to produce fantastic executives, there should be some measureable change. It will be interesting to see whether there is or not.

MR. HEATHERLY: A member of OPM's Civil Service Reform Act Evaluation unit gave a paper at a recent national meeting of the American Political Science Association, and remarked that: "Before SES performance appraisal was meaningless. SES requires yearly evaluations. SES requires SES members to engage in a process of prenegotiation with their supervisors in which standards are set regarding what SES member and supervisor regard as critical elements of the SES member's job. This device should have a cascade effect throughout the Federal Government. Supervisors must know what they want done and subordinates will know in advance what is expected of them."

In other words, it appears to be an attempt at some form of management by objectives, with negotiated objectives that both parties understand and can be held accountable for.

The question you raise is to what extent can policy objectives be factored into this?

Performance standards, however, are decentralized. Each agency and each bureau within an agency can develop its own objectives to evaluate SES members. From the point of view of traditional management, that flexibility is very desirable. But doesn't decentralization also create a potential for more abuse unless monitored?

MR DIAZ: I guess, again, the problem is what does "abuse" mean? You almost have to assume that an administration has lost control of its own people. I think the performance standards process is the key to this whole thing. Any administration of any persuasion which understands that process and is prepared to deal with it should be able to direct policy through the process. And then the test will be whether or not the system works the way it's designed.

I don't think there's any more or less potential for abuse in the SES system—certainly not any more than in the old system.

MS. WAXMAN: You know, there are two sides to this same coin. More potential for abuse means more potential for policy change. And to the extent we have made the Senior Executive Service more accountable and responsive to the political changes, we have made a more responsive and accountable government.

That means that individuals who are in positions which have high policy content will have to change to new policies if they are to remain in that position. That doesn't mean they are going to lose their Senior Executive role. If they have difficulty, if they believe they cannot carry out policies of a new administration, they can still remain within the Senior Executive Service and move to positions which have less policy content.

If they believe they can stay and they want to stay, they have an opportunity to try their best for their new political appointee. There's a 120-day period in which they cannot be moved. And they have an opportunity to show that they are truly career people who are dedicated to making the government more the choice of the electorate.

I think what we tried to create in part was a system somewhat like the English system in which the high level of

career service truly works and is dedicated to work for the elected officials of the people.

That's why we have some jobs which have essentially no political content, no policy content, and those are career-reserved positions. For instance, the work of auditors must be carried out by career people. Policy is not important here, but there must be absolute confidence that there will be no political influence.

Other jobs have a mix of policy and management. I think that we will have the opportunity to see whether the system is more prone to abuse or more open for change when there is a change of administrations.

MR. IRVING: Chuck, I have been involved in personnel administration for quite a long time. I lived all through the Nixon and Ford years when "responsiveness" was a very bad term and was equated with undermining the career service.

Civil Service reform comes along and suddenly responsiveness becomes something to strive for. And I agree with that. And I am not concerned about political abuse. I think there are enough checks on that.

My only hope is that when there is a change in administrations, either in the near or long term, that everybody will remember that the responsiveness of the bureaucracy is something we want. And that it is an important and a good objective. And that sauce for the goose is sauce for the gander. And that if a Republican Administration comes in, this responsiveness does not suddenly become a bad term again.

There will be some horror stories, I suppose, but the desirable objectives, I think, are much more important.

MR. HEATHERLY: You would rather err on the side of a margin for responsiveness rather than over-rigidity?

MR. IRVING: Absolutely. The responsiveness of the bureaucracy to carry out the policy objectives of people who come into office to set policy over a very short period of time is essential. All of us would agree that in four years, you just get going and it's time to pack your bags. So it's extremely important that you be able to get your policies carried out. Those are not secret policies; when they are carried out, they become public policies and people are free to criticize the policies. But the most important thing is to be able to get those policies implemented so people can see what they are and how they work.

I think there is a tremendous amount of genius in the way the Civil Service Reform law works to promote that kind of

responsiveness. And I think to the extent that there are abuses, there are checks on them. There are no secrets. Executives know what each other's objectives are, and they are going to blow the whistle on unfairness and abuse.

The objective of responsiveness is so much more important than the possibility that somewhere there might be abuse. I would be willing for some long time to ride with the possibility of abuse and handle it through the system. Just because that possibility exists, I would not criticize the scheme.

MR. DIAZ: There are two points that I think follow naturally from what John has said.

One of them is responsiveness to what? And I think it's important that this point at least be made: that it is the responsibility of any administration to have clearly articulated policies which can then be translated into these performance standards so that the bureaucracy has something to respond to.

So there is a great deal of responsibility in the early days of any new administration to really set the ship on whatever course it intends to follow.

The second point is that I think it would be an error, and I have seen that error committed during the time I have been in Washington, to always assume that the senior bureaucracy is a hostile camp.

I think there are ways some administrations have artfully brought the senior bureaucracy into their camp, and made them feel part of the team and not the enemy. Because once you have gotten the career people into an enemy posture, it's just an endless battle and probably an unwinnable one—at most it will end up in a draw.

MR. HEATHERLY: One former member of a White House personnel team said they had actually more difficulty getting cooperation from their own political appointees in some of the agencies than the career people.

He had found the career people would attempt to carry out a policy once they understood it was legal. But getting your own people in line was a time-consuming task because they had their own interpretations and their own constituencies.

So it's certainly not a simple us-them situation.

There's another aspect of this that we haven't touched on yet. And that is the distinction between the career and non-career allocations.

I was perplexed by some current statistics that 15 to 20 percent of the present non-career allocations are not being used in cabinet departments. Agriculture has 44 authorized

and only 26 are filled. Defense has 100 authorized and only 58 are filled or being used. Fifty-four and 44 for Energy. Sixty and 50 for Health and Human Services. And so forth.

There are quite a few of these non-career allocations that are not being filled; instead, presumably, if the positions are filled, they are filled by career people.

MR. IRVING: Wouldn't you agree that those figures are probably distorted by the fact that this is an election year, and it is difficult to get people to sign up for a job that is essentially political in an election year, when, number one, they may have suspicions about how the whole SES thing is going to work, and, secondly, there's so little time left between the time they are invited and the time of the election?

MS. WAXMAN: I think there's something else, too. We tried to give agencies more flexibility than they had before in the sense of giving them more non-career appointment authority and more SES career positions, as well, than they had under the old super-grade and NEA authority. So they may not need everything that they have right now, and probably there's an attempt by agencies to "store" in the case of future needs. So they may not be filling too many now.

MR. MALONE: Chuck, I'm not quite as sanguine as some of the commentators are here today about the efficacy of the SES *vis-a-vis* the political situation. I am quite familiar with my former agency's situation, and maybe this thing is a function of size and the political content and nature of the agency's function. Of course, ACDA is very small, and the political content is very high. ACDA has 24 SES positions out of just under 200 total staff. Now, only 20 of these are filled at the present time. They have four vacancies.

But in the recent vacancy announcements that OPM puts out on the SES—and I think they are coming out about every week to ten days now—there has been an announcement of one of the fairly senior positions in the SES in this 24—and remember this is more than 10 percent of the total personnel in the agency — that ostensibly opened this position across the board to anyone who wanted to apply.

But what in point of fact is apparently going on within the agency is that they are moving to shift a person into that spot who was clearly a political appointee. There's no question about it. I think probably he himself would admit that. And for purposes of interest in the current leadership of the agency, they would like to keep him in there.

In addition to that, there have been people who have already

been moved into positions in the SES within the agency who were clear political appointees at the time their position was converted—and some of these people are very high in the agency, I might add.

So I think that there is a real possibility of abuse here.

MS. WAXMAN: In the conversion period, by law, every person in a competitive service super-grade position was converted automatically. By regulation, those employees who were not in the competitive service but were in excepted positions—and most of those were lawyers—were given the opportunity to convert if they had sufficient career histories to give them the equivalent of what would have been the competitive service.

We did that because it seemed that that was the intent of Congress: that people who had career positions convert. So some conversions were people I know in the Solicitor General's office of the Department of Justice, they were career people with Schedule A positions who had been in the SG's office for 15 years. They certainly had to be given the opportunity to convert. I don't know what happened thereafter.

I think conversion was a one-time occasion which Congress realized was necessary to make sure the Senior Executive Service got underway. OPM has been monitoring all career openings in the SES within the last four to six months to make sure that there are no political appointments made, that there is nothing happening with people who have non-career appointments being converted into career appointments to subvert the system.

I think probably OPM is bending over backwards to slow down appointments at this point.

MR. MALONE: I hope this is true. I hope Dr. Campbell is looking very closely at this because I think there remains the potential for abuse here, just as there was when it got down to the wire in an election year in the super-grades. You all recall that.

OPM, I feel, would be extremely well advised to be very sensitive and very much on-guard in connection with this sort of politicalization of the situation, if it is indeed occurring.

MR. WEDEKIND: Ms. Waxman, can a Schedule C employee become a career SES employee. Is that possible?

MS. WAXMAN: It's quite possible for anyone to become a career SES employee. A Schedule C employee would be a GS-15 or below.

The way the career system works is there has to be a published notice of a vacancy recruitment. OPM publishes every two weeks a list of every single open SES position. They are open for a period of at least 15 days, I think, but they can be open for a longer period, and usually they are open for 30 days.

It's a system very much like the competitive system basically. When all the applications come in, they are rated by a panel. They are reviewed usually by another panel. Unlike the competitive system, there are no veterans points. And that means you don't have to rate and rank people numerically. You can rate them categorically: best qualified, well qualified, qualified, unqualified.

The Best Qualified are then given to the selecting official, and there can be any number of people in that category. Unlike the competitive service, where you can only select from the top three, you can, in fact, have ten people in that group, or more than that. Then the selecting official picks his or her choice.

At that point the agency has to certify that that person is among the best qualified for the position. That means that the personnel office—and they are truly career people who are very concerned about following Civil Service laws—they will certify that person as well qualified in subject matter expertise.

At that point the person's nomination gets sent over to the Office of Personnel Management, and we have something called a Qualifications Review Board to make sure that person in fact has management experience. And the Qualifications Review Boards are composed of career people from other agencies, not the agency doing the selection, and not OPM.

MR. WEDEKIND: The reason I asked is that I have done a lot of reading on the legislative history of the Act. And it seems that what we've been talking about today was very much on the minds of Congress when they were considering the Act. And I've seen speech upon speech by congressmen talking about how this would enable political appointments to become entrenched in the Civil Service.

MR. McPHERSON: Is it fair to say that a competent, appropriately experienced person, can make the move, though?

MS. WAXMAN: Yes, that is possible.

MR. McPHERSON: There are no disadvantages imposed upon a person because he holds an important position now?

MR. DIAZ: You could make the argument that to do so would be to violate one of the very good personnel practices,

which would be to discriminate against them because of their political affiliation.

MR. McPHERSON: Has any thought been given to freezing those kinds of conversions?

MR. IRVING: They were all but frozen in 1976, and all but frozen in 1972. And when it came to within six months or nine months of the election, the then Civil Service Commission said, "Look, save them."

MS. WAXMAN: We have done exactly that. We have, in fact, issued exactly the same instructions that were issued.

MS. IVERSON: You issued those quite some time ago, did you not, at least last winter?

MS. WAXMAN: Yes.

MS. IVERSON: Restrictions on conversions?

MS. WAXMAN: Yes, that's right. So that it's been on everyone's mind for quite some time. We're getting so politically sensitive that we start worrying about it a year in advance.

MR. MALONE: Let me ask you this, just to follow up. To return to the very small highly politically visible agency like ACDA, where your appointing and your reviewing authorities for SES almost consist of the same people: what are you doing to try to monitor those situations? You don't get a lot of the built-in protection that you would normally get in a large agency with the long-term career civil servant mentality, as it were.

And further, how are you making sure that things are not going on that are untoward and that you really ought to be preventing? Are you taking some really affirmative steps in this regard?

MS. WAXMAN: We have an evaluation unit which has existed within the Civil Service Commission, now OPM, which investigates to see whether appointments are being made under the merit system. We are still doing that.

With SES we have even greater control because no career appointments can be made without our approval. So that gives us the opportunity, if a request to approve the career appointment of a non-career appointee or a Schedule C comes in—that is given close scrutiny. I think those situations are unlikely, but I can't say categorically, because there are situations in which you do have non-career people who are clearly the best qualified, and who have had substantial management experience.

But each of those situations make our people tremendously concerned. They are reviewed with a fine-tooth comb. And the

Qualifications Review Boards are from other agencies. So there have been rejections, and we send them back to agencies where we believe there has either been an attempt to make a political appointment, or—and we see more of these—cases in which there is an attempt to appoint someone who is not truly a senior executive appointee in the sense of having management experience and capability to do other things in the Senior Executive Service.

MR. IRVING: But if OPM is really only looking to see whether somebody has management competence, if the question is whether to convert somebody who is a political appointee into a career SES job, a career-reserved job, the chances are that political appointee in the agency is going to have a substantial amount of management experience. Just by the very nature of the political jobs, they will wind up at higher levels managing programs and managing other people.

And if all OPM is looking for is to see whether or not they have management competence, and after that you pull down the curtain, the chances are a lot of things will slip through. And even if you didn't want to pull down the curtain and you wanted to look further, under the current system, does OPM have the power to do so? Or does that fall into the Special Counsel's office, in the event somebody complains?

MS. WAXMAN: It doesn't get to the Special Counsel until there's a complaint. OPM does look at any appointment conversion from non-career to career. The law permits that conversion, if it can be demonstrated that that person is among the best qualified and can serve in the Senior Executive Service.

But under the rules that we have sent out, because of the closeness of the election, appointments are very carefully scrutinized, and it is highly unlikely that an appointment like that would get through.

MR. McPHERSON: What kind of role does OPM have in recruiting non-career SES people? I know they have this formal review function, but do they have any other function than that?

MS. WAXMAN: Well, we wouldn't approve non-career appointments at all. They don't even come to us. They are not becoming part of the system. They don't need to have management qualifications.

MR. McPHERSON: What role does OPM have in the improvement of career SES?

MS. WAXMAN: We make known the fact that there are openings, and we circulate those. They also have to be posted in state employment agencies. We also try to help in terms of mobility, making known openings to people within the career service, and we have a sort of brokerage function for SES members who want to move to other positions.

Beyond that we have not done very much, and I don't really think we are in a position to do very much. I read over these SES openings every two weeks, and I flip through to see what kind of jobs are open. I may know somebody for a job, or know whether some position is interesting. And I am struck by the wide variety of jobs. They may range from engineers to lawyers to financial specialists.

So I don't think OPM really could do more in terms of making the openings known.

MR. DIAZ: I'm interested in an area that apparently hasn't been used much at all. And that's the limited term appointments in SES. It would seem to me, particularly from the point of view of a new administration, a limited term appointment would be much more useful than a non-career one, and they are entirely out of the career appointment process. They might be very useful for new directions or studying, rather than the usual detailing of everybody to OMB.

MR. McPHERSON: Explain this to us a little bit more, would you.

MR. DIAZ: There are two categories of limited appointments, the number of which is restricted to five percent of total SES positions. The limited term can be for a period no longer than three years, and there's a limited emergency appointment which is for 18 months.

Now, the exercise of those authorities, if I understand correctly, has to be approved by OPM. But it doesn't get involved in approving qualifications.

MS. WAXMAN: They don't become career appointments.

MR. DIAZ: Right. OPM just says, yes, this is an appropriate use of a limited term authority. So an agency could have a special project that would only last for some period less than three years, and set up X number.

MR. McPHERSON: But it doesn't count towards your 10 percent?

MR. DIAZ: It has its own five percent ceiling.

MR. McPHERSON: Which is over and above, theoretically, the 10 percent?

MR. DIAZ: Right. Although OPM has made it very clear that this is not another political appointment route, and it would be a violation of the CSRA to use it for political appointees.

But, for example, had there been a CSRA in 1976 or '77, when the reorganization projects were instituted, rather than detailing people or burning up political appointments to run the reorganization projects, you would set the project up and then you would have limited term appointees because presumably you could reorganize the government in three years, or turn it around.

MR. McPHERSON: This is enormously useful for a new administration, or whenever you have new initiatives.

MR. DIAZ: It can be a tremendous pitfall, also, if it were perceived by a new administration as an alternative to the political and non-political structure of the SES. But I think there are very legitimate uses that can be made of that appointing authority for new projects.

MR. McPHERSON: What kind of an approval process do they have to go through?

MR. DIAZ: OPM has to approve the use of the appointing authority. It has to say that this is a proper circumstance for a limited term appointment. It can do that either by a delegation of authority or by the individual case.

MR. McPHERSON: So there is a procedure to make sure political appointees are not selected, but rather to direct appointments toward short-term projects?

MR. DIAZ: It would be a new area to explore. And that's why I thought that the reorganization projects just seemed to be obvious; these are clearly short-term. Of course, this gets us into what is political and what is not, but the appointments are not overtly political.

MR. IVERSON: From a legislative standpoint, that option has been discussed quite a bit recently in connection with ongoing debate over the use of outside experts and consultants. Many in Congress seem to feel that the use of outside consulting is excessive. And some people have advocated the use of this limited term appointment as an alternative to the extensive use of outside contractors.

MR. McPHERSON: Are these limited appointments on top of agency' ceilings? That would be a question that the agency head would ask when dealing with a contract situation or a limited appointment. One of the biggest reasons agencies

clearly use contractors is so they can have contractors work for them over and above their employee slots.

MS. IVERSON: Which is one of the precise things that Congress is arguing about. In other words, it's become an uncontrollable.

MR. IRVING: If we can, I'd just like to shift into reverse a minute and go back to something that we were talking about very early. Unless I appear to be, Jim, too sanguine about the success possibilities of the SES, I think that the most serious threat to the successful implementation of SES to date is not an internal kind of threat that relates to the kinds of positions and the number of slots, but rather the serious breach of faith with the SES people from the standpoint of both Congress and the administration with respect to bonuses.

Now, pay compression is one terrible problem. We are familiar with that. But the reduction on the percentage of people within SES who are eligible for bonuses from 50 percent originally down to 25 percent, and then OPM's reduction down to 20 percent, I think is the most serious threat to successful implementation of SES.

In fact, I think these actions take us to the brink of undermining the whole system. The people were persuaded to go into SES, and figures of 98 percent participation were touted. I think that's admirable. But those people were all lured and induced into becoming SES people by the promise of greater rewards. There were other nice things about it, too. "Maybe ten years up the road I'll get a sabbatical. But I do have an opportunity to make considerably more money if I do a really good job."

As a result, they gave up certain rights; that was part of the scheme. Then three-quarters of the way up the road in the first year, Congress, and, it seems to me, without the administration's screaming terribly much, changed the rules of the game and acted contrary to the understanding of all the people who agreed to give up their rights to go into SES. I think that that is probably an actionable breach of faith. While you may not be able to compel the Congress or the administration to give them bonuses—indeed, there isn't any money for that—it seems to me that a proper remedy could be devised to give them the option to opt out of SES and back into what they were, in the event that they chose to do that.

Indeed, at the Labor Board, my old agency, within the last two or three months they've lost 20 percent of their career Regional Directors. There are other factors that enter into

that, too, I suppose, but I know the kind of impact on morale that change has had.

MS. IVERSON: As the only legislative person here and as a member of the loyal opposition, so to speak, I can only say that in voting and considering some of these Federal employee issues, which extend not only from the SES level but all the way down to your wage grade levels, we have voted fairly consistently for keeping the promises and the commitments that had been made. And I think that what John is describing is pretty much indicative of the leadership's policy. And by "the leadership" I mean not only the Carter Administration having a less than advocate's viewpoint with regard to these bonuses, but also on some of the other big Federal employee issues that come up—cost of living increases, pay caps, pay compression, the fact that nothing has been done about it in spite of several GAO reports which have come out on these subjects.

Our office represents a state which is very heavily populated with Federal civil servants. And they complain to us constantly about broken promises: "Four years ago you took away our one percent kicker, and now you taking away our second COLA." And the list goes on.

So I think it's indicative of a policy of trying to fight inflation, trying to hold down spending, and the logical place to do it is by cutting that segment of the work force over which you have direct control.

MR. IRVING: And which is least able to scream politically.

MS. IVERSON: Absolutely. But even as a fairly conservative person, politically, who believes in the need to hold down spending, I would prefer that we develop a system by which we do reward excellence. I do favor that system and I am in general sympathy with the Civil Service reform.

I think that your remarks add to what a lot of people are saying about this particular administration and this particular Congress' viewpoint on the Civil Service.

MR. IRVING: When you're talking about harnassing up the top Federal bureaucracy to work for you and to implement your programs, the old tactic of coming in and eating them up and kicking them out and being heavy-handed just does not work and, indeed, you will be ruined by it if you try that.

You have to motivate them to work for you, and to start behind the eight-ball of distrust that stems from this broken promise syndrome, I think, puts you in a very, very difficult position.

I know if I had anything to say about it, I would say if you are going to keep any promise at all, make sure you keep your promises with your top administrators and your top executives. It may not be the wheel that can squeak the most, it may not be unionized, it may not have other ways of bringing political pressure to bear, but this is all the more reason that that important level should be taken care of and that you should keep faith with it.

MR. DIAZ: I'd like to add a technical point, if I may, because I think it's very difficult to arouse sympathy for the civil servants or the bureaucracy in terms of equity or broken promises. But there's a technical dysfunction caused by pay compression, and it has made it impossible to distinguish among performers if everybody is in an asterisk rate. And very shortly, with one more round of pay raises in the range of nine percent, a Grade GS-14 will be making the same pay as the most outstanding senior executive.

Well, something is seriously wrong with that system. Even aside from the broken promises, ten years from now when all of the promises are forgotten, if the system is the same, all of the talk about performance appraisal and carrots and sticks is going to be totally meaningless, and it is getting very close to that now.

I know people now who are 15's who say, "Why in the world would anyone want to take the risk?"

MS. WAXMAN: I think the government will never pay as much money as the private sector. And that seems to me appropriate because there are advantages to working in the government. But that trade-off shouldn't be to the detriment of your life savings or your ability to educate your children or to live in a decent way.

The fight over the bonuses, although it took place in the Appropriations Committee and was in the guise of an attempt to save money, in fact the bonuses don't come to very much money at all.

It was a fight, surprisingly, maybe not surprisingly, which was led by the House Appropriations Committee staff, I think partly out of resentment that there were no bonuses for the congressional staff. And we did fight—in fact, we fought very hard. The first move was to cut the bonuses entirely, no bonuses payable above $2,500 in amount.

We fought very hard to get back up to 25 percent with the old dollar limitation which was up to Executive Level 1.

Certainly there is no way that anyone in the Executive

Branch is going to be paid more than a congressman or senator under any circumstances. But to get up to right below that level was our object.

We are fortunate, in a sense, that the fight was over an appropriations bill, because it means it's a one-year provision. The law still remains at 50 percent. And if Congress wants to change the limitation next year, there is a very easy opportunity to do that.

I think, as John said, it is incumbent upon any administration and upon any Congress to do what it can to keep the government going at the highest possible quality and the only way to do that is to reward people who perform at the highest possible level.

So I am very encouraged by John's response and by Kris's reponse so far.

MR. HEATHERLY: Might critics or skeptics of SES be persuaded if there were evidence on the other end of the spectrum, of people being disciplined or removed for non-performance? I think there is a natural skepticism when 50 percent or 40 percent of an agency are given bonuses for superior performance, but you never hear about anybody being fired or removed.

MS. WAXMAN: I think you will never see the number of removals equivalent to bonuses that would ever make the skeptic happy. People who make it to the Senior Executive Service are going to be people who have made it through the selection process from the outside or have made it upward in the government also because of a selection process, and are going to be the best the government has to offer. So there are not going to be huge numbers who are unqualified.

MR. IRVING: Plus if they know you are going to remove them, they're not going to be around. Some might stay and fight, but most will leave rather than being thrown out of the Senior Executive Service.

MS. WAXMAN: That's right. But I think there is an obligation to inquire as to the number of people who are found less than satisfactory and what happens to them. And I think we are starting to see that in the scrutiny that Congress and GAO and OPM intend.

MS. IVERSON: Let me make one last comment for myself. I'm not speaking for my principal or anyone else.

My last thought is simply that the Senior Executive Service is the top leadership group. Next to the cabinet and the President

himself, the Senior Executive Service is going to set the example for the rest of the work force.

So, in the Senior Executive Service we must see reflected some of those very basic principles and values that we expect all civil servants to adhere to and focus on. I think that all civil servants are going pick up on the attitude they see reflected in the top staff. They don't want to work for a bunch of turkeys.

I think that we will have success in government if the Senior Executive Service can relay common sense, competence, hard work, and dedication.

But I think if that attitude can filter on down, I think people who are actually at the medium levels and the lower levels, who are actually doing the work, they are not up in the fancy offices with the carpeting, you know, they're down there, and they're pushing the papers, and they're filling out the forms, and they're processing constituent claims for Social Security or retirement or veterans' benefits—they're the ones who are putting out the notices of Small Business Administration loan programs, and so on. If that attitude goes down to them, constituents, taxpayers, will get much better service, faster service, and, who knows, maybe we can have more efficient government.

But I think if we give up on the system, then this whole exercise is superfluous. So I think if the SES can reflect that, then maybe we've got something.

MR. HEATHERLY: I think that's a very positive, hopeful note on which to end our discussion, with a promise and expectation of responsiveness.

Thank you all very much.

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THE INTELLIGENCE COMMUNITY

Samuel T. Francis, Editor*

INTRODUCTION

Forty-one years ago, the world was faced by an alliance of totalitarian regimes dedicated to world domination by intimidation, deceit, and naked aggression. World War II was unavoidable because the democracies of the world were unwilling to confront the obvious threats to the survival of their free societies. They chose, as a matter of short-sighted expediency, neither to unite, rearm, nor consider the sacrifices necessary to prevent the further spread of totalitarianism until war was inevitable. From the seeds of their appeasement, the world reaped the bloodiest conflict in its long history.

In the crucible of this conflict, the democracies of the West developed the capability to win not only the visible war of battles but also the invisible war of espionage, propaganda and sabotage. So awesomely effective did the Allies become, in the mastery of both wars, that the immense advantages enjoyed by the Axis powers early in the war were decisively overcome.

In large measure, the great victories of the Allies in World War II were possible because the Allies dominated the secret war of intelligence and resistance. In winning this secret war, the United States developed a powerful and effective intelligence organization to learn the enemy's intentions and to orchestrate effective resistance among those the enemy had conquered.

**Editor's Note:* This report was written in consultation with several knowledgable experts in the intelligence community, including former government officials, the Academic Consortium for the Study of Intelligence, and others. The recommendations in the report represent a consensus among these knowledgeable individuals. The Heritage Foundation hopes this report will form the basis for a comprehensive restructuring and revitalization of our intelligence capabilities.

Perhaps it was foolish to assume that the end of World War II would somehow allow the Western democracies to forget the techniques of clandestine conflict, to uninvent the new weapons of war and to resume life as it existed before the war began. The euphoria of peace was a fragile dream that soon gave way to the reality of tension between the totalitarian Soviet Union and its former allies in the democratic West.

Totalitarianism as a philosophy of government is bankrupt. It is a tyranny that does not work because it is based upon the most foolish of misconceptions, that human beings are malleable entities who, with appropriate indoctrination and Pavlovian controls, will voluntarily accept the mold of conformity fashioned for them by the elitist governing structure their labors support. Such measures work only to the extent that the ruling oligarchy can stifle the human spirit with a self-serving bureaucracy, a brutish police and the perversion of modern technology as an instrument of social control.

The greatest threat to a totalitarian society is the invincibility of the human spirit that refuses to be crushed by bureaucracy, technology or the threat of force. In essence, the governing structure of the Soviet Union and its puppet allies sits atop the elements of their own eventual demise, the free minds of the populations they claim to serve.

The Soviet Union fears the democratic West, not because it is particularly concerned that it will be attacked by a militarily inferior Western Alliance, but because the democracies represent the principal obstacle to the Soviet ambition of world conquest and set the example of the vitality of free institutions that is the envy of the rest of the world, to include the Communist world. The mass rebellions in Hungary in 1956, in Czechoslovakia in 1968 and now in Poland are symptomatic of the unrest that festers behind the battlements of Soviet military might. The Soviets fear that the example of freedom, moral confidence and prosperity in the West will ignite resistance and rebellions that will crumble the corrupt foundation upon which the Soviet empire is built. For this reason (as well as because of the ideological dynamic of Marxism-Leninism) the Soviet Union has always sought to undermine the democratic societies of the West and to paralyze those institutions dedicated to protecting such societies from outside interference.

In the years following World War II, the United States no longer could enjoy the luxury of isolating itself from the tensions that affected the rest of the world. It was then, as it still is today, the cornerstone of the Westen democratic

alliance. Failure to assume the economic and military leadership of the Western world after World War II could have resulted only in catastrophe for those democratic countries of the West materially weakened by their involvement in the war.

Under the umbrella of a brief nuclear monopoly and then stalemate, the United States deterred, and indeed still deters, the Soviet Union from overt aggression against the democracies of the West. Yet the Soviet Union was, and still is, entirely willing to foment conflict by proxy and to engage in a clandestine effort to weaken the West's resolve to resist its encroachments. In the face of such hostility and threats the United States was compelled to reconstitute the intelligence apparatus that it had disbanded two years earlier upon the surrender of Japan.

For the first twenty-five years of its existence this successor organization, the Central Intelligence Agency (CIA), operated in a world of intrigue and undeclared hostilities in which the weapons of secrecy were used to protect the United States and its interests. The CIA was first and foremost a spy service, and for twenty-five years conducted itself as such. The CIA enjoyed many successes, suffered some failures and in the process committed a few errors of judgment.

Few will deny that the CIA fulfilled a vital need in the first twenty-five years of its existence. But in the charged political atmosphere of the 1970s, revelations were made concerning a few of the activities of the CIA and other intelligence agencies that made possible a sensationalist congressional and journalistic investigation of the entire Intelligence Community. In large measure, the CIA was sacrificed by the past three Presidents in an attempt to expiate the political sins of every Presidential administration since Franklin Roosevelt. In spite of such occasional abuses of good judgment, and despite the disavowals of intelligence activities by Presidents in the 1970s, the CIA and the Intelligence Community acted as obedient, loyal protectors of the United States and its interests as defined by the President.

Undeniably, the CIA and other agencies within the Intelligence Community have engaged in a few activities that bring into serious question the good sense of those responsible. Such aberrations hardly qualify the Community or the CIA as a "rogue elephant." Indeed, the myth of "rogue elephant" was invented in an attempt to salvage the political reputations of a number of past Presidents and other high officials from asso-

ciation with questionable intelligence activities that they both inspired and directly advanced.

In the 1980s, the United States needs good intelligence as never before, because never before has the United States been in such danger.

Powers on the defensive especially need intelligence to tell them where, when, and how their adversaries' thrusts will come. Weaker nations especially need intelligence to compensate in part for their lack of means. Nations whose adversaries are closed societies and undemocratic groups especially need intelligence in order to learn the most elemental facts necessary to remain competitive.

In the 1980s, as a result of nearly two decades of neglect of our own means for political and military conflict, the United States and its allies are weaker than the Soviet Union, its sympathizers, and its allies. Thus, while in the 1960s and 1970s we *chose* to be a nation on the defensive, during at least the major part of the 1980s, we will be *compelled* to be on the defensive. The United States faces a world in which most nations are governed by undemocratic parties which try to emulate the Soviet Union's secretiveness. Such governments, e.g., Cuba and Libya, also arm themselves with Soviet-style apparatuses for intelligence and terrorism. In the face of our enemies' growing strength, any nation or faction may secretly prepare to act against us. Without good intelligence the United States will be unable to ward off the many dangers of the 1980s or to seize such opportunities as the decade may offer.

But as we enter the 1980s, American intelligence is in the worst condition since before Pearl Harbor. During the past twenty years, while we have built marvelous intelligence satellites, we have gone a long way toward demolishing our capability for clandestine HUMINT collection and covert action around the world. American counterintelligence has been reduced to little more than a "sign on the door"—a facade. Our reliance on our technical means has become so disproportionate that we have tended to define what we are interested in by the meager data we get through these means. Not surprisingly, our intelligence agencies' record at analyzing events abroad has been growing worse.

Despite our technical means, or perhaps in part because of our over-reliance on them, the CIA consistently underestimated the size and misestimated the scope and purpose of the Soviet Union's strategic buildup over two decades. This mistake, it must be emphasized, was not easy to make. This buildup has

involved millions of people, the marshalling of vast resources, and the production of enormous weaponry. Our record in analyzing political intelligence from Iran to Latin America has become even worse.

One of the reasons for the bad record in analysis—and indeed, for much else that is wrong in American intelligence—is the introduction of politics into what should be a wholly nonpolitical function. Over the last twenty years, Administrations of both parties have given the impression that they were more interested in having intelligence estimates that supported official views of the world than in learning the truth, and, lately, more interested in the intelligence agencies' adherence to official policies than in doing what is necessary to cope with an increasingly perilous world. Significantly, however, political leadership has been absent in two areas where it should have been present. Top leaders have failed to give the agencies clear mandates for covert actions as well as the support necessary to make them succeed. They have also failed to resolve the internal bureaucratic controversies which have contributed so much to diminishing American intelligence.

It would be comforting—but wrong—to believe that the only problems of American intelligence derive from the mid-1970s enterprising journalists, irresponsible congressional investigations, bad publicity, a few defectors, the Hughes-Ryan Amendment, and the Freedom of Information Act. If this were so, a few minor changes in the law plus a little tightening of security would make all well. Surely these things contributed to the downfall. But the decline was under way earlier. Its causes are deeper. The information which both the press and congressional committees used against American intelligence was provided to them by factions within the intelligence community intent on laying low their bureaucratic adversaries. They succeeded. The intelligence community's present state—the weakening of clandestine activities and the near demise of counterintelligence, the current state of analysis—is precisely what dozens of high officials in the community and their allies in the media, the White House, the academic community, and the legislative branch have worked for, profited from, and defend.

Under current leadership, or even if left to themselves, American intelligence agencies would surely not resume the kinds of capabilities they had twenty years ago. We now have an Intelligence Community that is reluctant to produce unbiased intelligence estimates that conflict with Administration

views, is increasingly incapable of obtaining critical political intelligence in world trouble spots, and is effectively prohibited from influencing events in other countries. In addition, the Intelligence Community has been required to all but abandon its responsibilities in countering hostile intelligence activities both within the United States and abroad.

Most sobering, even if the agencies were to become what they had been before their decline, they would not be sufficient to do what must be done in the trying times ahead of us. This is because the agencies were never really up to the level of their competition. There never was a "Golden Age." After the early 1950s, there has never been a time when we have not been losing the intelligence struggle. Lately, we have been losing faster than before.

Therefore, in order for the United States to obtain the intelligence services it needs, the agencies must be rebuilt through a combination of legislation, Executive Orders, administrative actions, and Presidential leadership. The last is crucial. Nothing has so harmed intelligence as the attitude of successive Administrations that it is not so important after all. If the President makes clear that he will hire and fire, and commit the political and material resources necessary to establish effectiveness and integrity in American intelligence, American intelligence will likely improve. But good leadership alone is unlikely wholly to overcome the ill effects of the Executive Orders, administrative practices, laws and interpretations of laws which have made American intelligence what it is today.

Admittedly, secrecy itself is a potential threat to a free and democratic society. Inherent in secrecy is the danger that excesses and abuses of officials or agencies shielded from public scrutiny can themselves undermine the very principles such officials or agencies are charged with defending. Yet to lift the veil of secrecy from intelligence operations is to render them largely ineffective as a defense against an unprincipled adversary. Thus, we have the dilemma: how can we wield the weapons of secrecy in the defense of our democratic institutions without endangering those institutions themselves?

It is the purpose of this study to examine the state of our national intelligence capabilities, to identify those circumstances that have contributed to the diminished effectiveness of the Intelligence Community, and, where appropriate, to offer programs and policies to enhance and strengthen our intelligence efforts. Considering the security and sensitivity of

the subject matter, every effort has been made by the authors to effect a complete discussion of intelligence policy without disclosing sources and methods of intelligence collection and operations not already publicly acknowledged by the Intelligence Community.

It is just as much a purpose of this study to offer the citizens of our free society an insight into the difficulties associated with the conduct of secret intelligence activities by the agencies of a democratic and open government. Those responsible for the activities of our intelligence agencies quite naturally and honestly believe that expansive scrutiny will ultimately result in a loss of security. Conversely, some citizens of this nation have expressed distrust of secrecy since it is ultimately public vigilance and scrutiny that safeguard our liberties. These differences can and must be reconciled, and it is the unequivocal belief of the authors of this study that such a reconciliation can be accomplished responsibly and effectively.

COLLECTION

The collection of foreign intelligence information is the function of many of the various departments and agencies of the federal government. The United States no longer enjoys the luxury of ignoring what goes on in the rest of the world and increasingly must contend with the impact of foreign events, not only upon foreign and defense policies, but even on what were considered strictly domestic matters until only a few years ago. Intelligence information concerning the intentions and capabilities of potential adversaries has traditionally been and will be absolutely essential to our national security. Yet in these more complicated times, effective intelligence is also essential to the protection and preservation of less vital but nevertheless important national interests.

For the past thirty years, the Departments of State and Defense have placed paramount importance on intelligence concerning the Soviet Union. In recent years, other departments and agencies of the federal government have also come to need foreign intelligence. The Department of Agriculture needs to know the anticipated crop harvests in a number of countries throughout the world in order to insure that the American farmer receives the most for his crops from international commodity brokers. The Department of Commerce needs to determine the foreign manufactured goods production rates and production policies of a number of countries

engaging in international trade in order to assist American manufacturers in effectively competing in both domestic and foreign markets. Such examples only scratch the surface of the types of information, in addition to information essential to national security, that must be acquired to preserve and protect United States interests in the world.

A great deal of foreign information that the federal government requires can be domestically collected from news sources and periodicals, by various technical means, or from diplomatic sources within the United States. But a significant amount of such information is unavailable domestically and can be acquired only overseas. The State Department has the principal responsibility of collecting and evaluating information concerning foreign events that is openly available from human and documentary sources overseas. Other departments or agencies of the federal government very often assign attachés to various embassies worldwide to coordinate the collection of open information essential to that department's or agency's foreign, and even domestic, functioning. For example, the Department of Defense routinely assigns military attachés to United States embassies, whereas the Department of Agriculture or Department of Commerce may assign agricultural or commercial attachés only in those countries whose policies have some impact on American agriculture or commerce. Every attaché, no matter from what agency or department of government he may be assigned, has as one of his principal duties the collection of open source information in their overseas location that affects their parent agency's or department's activities. In the interest of efficiency, and to insure the position of the Ambassador as the senior United States representative in any country, all attaché activities are required to be coordinated with the appropriate State Department personnel in each of our overseas embassies.

Very often the information that the United States requires to preserve and protect its interests is only openly available and, indeed, may be effectively protected from discovery or disclosure by the group or country to whom the information pertains. Occasionally, such information may be imparted to an American Embassy officer or attaché in the context of a diplomatic relationship; but, more often than not, such information can only be obtained by employing some covert technical means or by the development of a clandestine intelligence relationship with an individual in a position to acquire or impart such information.

The clandestine collection of foreign intelligence information, whether by technical means or from human sources, is absolutely essential to the making of informed decisions by policy makers in federal government. For without the capability to ferret out the truth about world events, this nation assumes the ever increasing risk of making critical decisions based upon guesswork and ignorance. In a world made more dangerous by the spread of nuclear weapons and festering belligerency, a miscalculation can have dire results and jeopardize our nation's very survival.

Unfortunately, this nation's clandestine intelligence capabilities, while remarkable in some instances, suffer from a variety of serious shortcomings. While some of these shortcomings are institutional in nature, the majority are largely the result of conscious policies pursued by the present Administration and its allies in Congress. It is imperative that the problems inherent to clandestine intelligence collection be properly addressed and that the self-inflicted shortcomings of our intelligence collection capabilities be effectively remedied.

The Clandestine Collection of Human Source Intelligence Information (HUMINT)

Since the dawn of civilization, societies have employed the use of clandestine agents and informants in an attempt to learn the capabilities and intentions of potential adversaries. Indeed until this century the use of human sources was virtually the only means available to a nation to collect protected intelligence information concerning another nation. Only in the past fifty years has the use of technical collection methods supplemented the traditional human source methods in acquiring such information.

A great deal of intelligence can be collected by technical means, but it is important to remember that such methods of collection are limited to acquiring only that information that is vulnerable to the particular technology employed. Additionally, a variety of technical and other means can be employed to protect information from technical collection, to interfere with the technical collection process, or to insure that misleading information is collected. Although a valuable tool, technical means of intelligence collection can only supplement the traditional human source means of acquiring protected information. Indeed, it would be utter folly to abandon a serious effort to obtain human source intelligence under the assumption that technical means can fulfill the needs of this nation for

protected intelligence information. There is just too much vital information that is not susceptible to technical collection and that can only be collected from human sources.

Human source agents for the collection of foreign intelligence are indispensable. The right source with the right access at the proper time can impart a windfall of intelligence information that cannot otherwise be obtained. History is replete with examples of agents whose activities have been critical to the course of world events. Would President Kennedy have been willing to force confrontation during the Cuban Missile crisis without the detailed information provided by Colonel Penkovskiy that Soviet strategic missile forces were in a low state of readiness and only marginally capable? How successful would Allied Commanders have been during World War II had not a Polish agent of the British provided the plans and internal workings of the German Enigma Coding Machine to permit the decoding of even the highest levels of German radio traffic throughout the war? How much longer would it have taken the Soviet Union to develop atomic weapons without the information provided to them by their agents within the American and British scientific communities in the 1940s?

Agents are unique human beings in that they are, for any number of reasons and motivations, willing to run unusual risks to acquire and disclose protected information or to provide an adversary with misleading information. Real ones are difficult to find, difficult to manage, and hard to protect. Most important, they must be developed and enlisted in ways that would lead no one to suspect that they might be working in a clandestine capacity.

Within the United States government, only two agencies have the authority to enlist clandestine foreign nationals in the collection of foreign intelligence information, the Central Intelligence Agency and certain military elements within the Department of Defense. The participation of the Department of Defense in human source collection operations is a relatively limited effort. Human source collection units in the military are few in number and operate overseas only in those locations where there is a significant United States military presence. The information sought is usually limited to intelligence concerning the dispositions, capabilities, and intentions of potentially hostile foreign military forces within the area of responsibility of our military commanders. Such collection efforts are coordinated with local Central Intelligence Agency

stations to ensure an economy of effort and to prevent possible conflicts in purpose.

Consequently, it is the Central Intelligence Agency that is principally responsible for the collection of protected foreign intelligence information for human sources. The recruitment of productive foreign intelligence agents is a most difficult and often frustrating task. The United States, or more specifically the Central Intelligence Agency, encounters many difficulties in its attempts to recruit foreign sources of information, some of which are common to the profession but most of which are uniquely institutional or a matter of misguided policy.

By the middle of World War II, the United States was perceived by the world at large as a powerful and purposeful nation dedicated to a world order based upon the right of self-determination and the principles of democracy. Both during and in the years after the war, many people throughout the world were more than willing to accept a clandestine intelligence relationship with the United States despite the dangers. Indeed, the United States was the only free nation on this earth with the power to preserve the freedoms of others in the face of aggressive totalitarian adversaries and it could effectively do so only with good intelligence.

But for the past several years, the United States has appeared less than willing to sustain its power in the face of a relentless, opportunistic and uncompromising adversary. If the American people appear unwilling to sacrifice their own interest, why should foreign nationals be any more willing to risk their very lives in our behalf? By its retreat in the world, the United States has robbed many people of their most valuable possession: the hope that they can achieve or preserve the dignities of individual freedom. Many people in the world now accept the inevitability of a totalitarianism that seeks to crush the human spirit in its lust to attain domination.

Of all deficiencies that plague the ability of the United States to collect foreign intelligence, none is more devastating than the apparent indifference of our government to declare by word and deed its willingness to persevere in the face of challenge. Only a commitment by this nation to pay the price for its continued freedom and to encourage others to be free as well can restore the faith of those throughout the world who would assist the United States by giving us the information necessary to protect our nation and preserve our interests.

Unfortunately, some policymakers in the United States have also, on occasion, created an atmosphere of such apparent

disregard for the lives and welfare of those who have provided foreign intelligence information as to discourage many reasonable people in the world from entering into a clandestine intelligence relationship with the Central Intelligence Agency. In the early 1960s, Colonel Penkovskiy, probably Britain's and the United States' most valuable agent within the Soviet Union, apparently was managed carelessly in an effort to expedite momentary intelligence requirements and as a result was caught and eventually executed. Most recently, two United States agents, one within the Soviet Union and another in Austria, have both disappeared and are presumed dead. The demise of these two agents has also been attributed to carelessness by United States officials. A rational individual whom the Central Intelligence Agency attempts to recruit may well be reluctant to enter into a clandestine relationship for fear of being mismanaged or, as in the case of numerous agents in Indochina, totally abandoned. Before the United States can re-establish its credibility in human source intelligence collection, it must give visible proof of its commitment to the welfare and safety of the agents who risk their lives and more to provide us with vital foreign intelligence information.

The secrecy of the human sources who provide the United States with protected foreign intelligence information is absolutely essential to ensure their continued effectiveness and safety. Almost as important is the clandestinity of the "case officers" who manage the efforts of our sources and provide the conduit through which the information is received. Incredibly the United States has no law to prohibit the unauthorized disclosure of the identities of clandestine agents and their case officers. Pending legislation to remedy this deficiency has been recently stalled in both Houses of Congress. A minority of Senators and Representatives, some of whom cannot accept the legitimacy of clandestine intelligence collection, oppose this legislation and any other legislation that will enhance the ability of the Central Intelligence Agency to operate overseas. The prognosis for the passage of legislation to protect agent and case officer identities is relatively good, although no one can be certain how much longer it may take.

The recruitment of clandestine agents to work in behalf of the United States is largely dependent upon the ability of an overseas case officer to contact, assess and develop individuals with the necessary access to protected foreign intelligence information. Case officers of the Central Intelligence Agency must operate clandestinely to recruit and protect their agents

effectively. Consequently, they must conceal their true employment by assuming the "cover" of another employment.

Case officers can assume either "official cover," as United States government employees assigned in some official capacity overseas, or "unofficial cover," as a private citizen or employee residing overseas. Many United States case officers are deployed to overseas stations under "official cover." Such cover affords the case officer a number of advantages: it simplifies administration, allows for better coordination of intelligence activities within the United States Mission, very often affords diplomatic immunity and enhances access to the diplomatic community.

Unfortunately, the "official cover" provided to officers of the Central Intelligence Agency, usually by the Department of State, is routinely inadequate to withstand all but the most cursory of inspections. Case officers are precluded, as a matter of State Department policy, from assuming the identity of a career Foreign Service Officer and must therefore assume the role of some other category of State Department employee. Such bureaucratic parochialism serves only to diminish the effectiveness of a case officer by making it a relatively simple matter to discover his or her true employment. Consequently, any foreign citizen seen with such an official is automatically suspect of a clandestine intelligence association with the United States. As one might imagine, such circumstances make it far more difficult for Central Intelligence Agency case officers to recruit agents effectively.

The CIA has never presented either the President or Congress with a list of what must be done in order for the United States to have a capability for clandestine collection on a par with that of other major nations. That is because clandestine collection is only part of the CIA's business. The CIA is responsible for the entire gamut of intelligence activities. As such, its concerns about the insufficiencies of clandestine collection are tempered by its successes in the technical field. In turn, all of collection competes rather badly for the top management's attention against the more politically visible process by which facts are fitted into estimates. Another reason for CIA's reluctance to ask for measures to improve clandestine collection is that such requests could always have opened the CIA to political attack. Even proposals merely to force all government agencies to provide "official cover" have raised the ire of the Department of State. "Civil liberties" groups have called proposals to protect the names of agents

"harbingers of a police state." Protests against improvement of the clandestine service have come from within as well. The analytical branch of the CIA historically has competed for resources with the clandestine service. Former leading members of that branch have agreed with the American Civil Liberties Union that clandestine collection should be done away with in peacetime.

Clandestine collection today is considerably weaker than it was at the beginning of the 1970s. The Administration's attitude toward this, as toward other aspects of intelligence, was conceived by Vice President Mondale and David Aaron, who had been his designee on the Church Committee's staff. Stansfield Turner and Frank Carlucci have translated that attitude into policy. That policy has consisted first of all of a simultaneous purge and reduction in force. Over 800 senior clandestine collectors were involuntarily separated. This included some of the very best the U.S. had, and made up a substantial proportion of the whole force. Then, CIA announced that it would hire three-fourths of this number of new, inexperienced collectors and promote hundreds of others into most of the responsible positions vacated. Many senior collectors who were not fired have been given less meaningful jobs. The result has been predictable: The force has become less competent and more obedient. For example, competence in languages is now grossly inadequate: recently the *New York Times* revealed that no employee of the U.S. Embassy in Kabul, Afghanistan, of all places, could speak Russian. If that is so, it would mean that no CIA man in that country could. Americans are supposed to recruit and direct spies through translators!

Both Stansfield Turner and Frank Carlucci have also testified in favor of legislative restrictions on clandestine collection—principally the requirement that collectors obtain judicial warrants before using any intrusive techniques *overseas* where there is a chance that information might be gathered on U.S. citizens. The law did not pass, but many of the restrictions are being enforced—openly and otherwise—as administrative policy. All of this has led clandestine collectors to act listlessly and unimaginatively, if at all. Today, all but a handful of clandestine reports are indistinguishable from diplomatic ones in depth and content.

Clandestine collection must be rebuilt. Presidential leadership alone can inspire the service to be more aggressive, to

focus on hitherto neglected targets, and to engage in reporting that is different in kind from diplomatic reporting.

Only by detailed acts of leadership can competent, success-oriented people be placed in charge rather than people who are merely pliant. Only leadership can direct that certain "hard" techniques now neglected, i.e., illegals, be attempted. Finally, only leadership can ensure that security actually be taken seriously.

But even the best leadership would accomplish little without a system of administrative measures that would provide the incentives necessary to move a bureaucracy in the desired direction. The foremost of these measures would be to stop treating clandestine collectors administratively as if they were just like other government employees. This sort of treatment has been justified as necessary to the collectors' careers. This is inverted reasoning. Career patterns should be arranged so that a collector does not have to move, and does not have to become an administrator in order to be promoted. A collector should be promoted as he improves his knowledge of his area and its languages, and provides good information. Intelligence collection depends on cover, a knowledge of detail, and on personal confidences. In principle, collectors should not be moved unless the move enhances one of these factors. The administration of the clandestine service should be aimed at achieving the objective—clandestine intelligence—not on fixed bureaucratic schemes.

An executive order should quickly do away with the steadfast refusal of several government agencies to allow our clandestine collectors to assume the identity of their officials abroad. The world's other clandestine services routinely use full "diplomatic cover." It is certainly deleterious to intelligence, and possibly to diplomacy, to have such a high proportion of our clandestine officers under cover of official agencies of the U.S. government. The proportion should be cut down. But those under "official cover" should have assignments and credentials wholly indistinguishable from those others in the agency in which they serve.

Thus far, all too little use has been made of "unofficial cover." Collectors who can pass themselves off as non-Americans or as "unofficial" Americans are more difficult to handle administratively, but they can accomplish things beyond the hope of their colleagues who are stuck with all the advantages and limitations of official status. Once again, personnel policy should be turned around. Non-official cover

should no longer be shunned because it is difficult to administer. Rather, the administrative system should change to accommodate this very productive kind of cover. A note of caution is in order. Collectors under such cover do not have the protection of diplomatic immunity. Their work, therefore, is far more hazardous than that of people under official cover.

It should be the policy of a new administration to increase the resources available to our clandestine collectors, and to reduce the administrative burdens which now tie them down. This means that personnel sent into difficult assignments will require more training, especially language training, and more compensation. This should be free from accounting requirements which go as far as to force a collector to justify every lunch bought by tying it to a specific item of information sought. This simply inhibits initiative. Moreover, the authority to exchange information with friendly foreign intelligence services should be returned to our chief of the clandestine service in the country involved (with the limitation that the orginator of clandestine material control its dissemination). In intelligence, as in so many other fields, one does not get without also giving. Friendly foreign services realize that the elaborate procedures established in recent years which force most decisions on transfer of intelligence to the top levels of management in Washington were established precisely to discourage such transfers. This can and must change.

Finally, by an act of policy, the new administration can restore a practice which has lately fallen into disuse but which is essential to getting the confidence of sources and friendly foreign services—the practice that the originator of the information can control decisions concerning to whom the information shall be shown. The purpose is simple: to keep other people's trust.

Executive policy alone, however, is not enough to protect our sources. To improve our cover, and to insulate the clandestine service from distraction, legislation is needed. Today, there is no law to punish someone who reveals the name of an American clandestine officer or his source. Such a law should be enacted. Today, foreign and domestic corporations which provide cover for our clandestine officers stand to suffer reprisals, but are not automatically eligible to be compensated by the U.S. Treasury for what they lost in trying to help the United States. A law creating such eligibility should be passed by the Congress. Today, the clandestine service is a minority within the CIA. In pursuit of its other, non-clandestine

goals, the CIA hampers the clandestine service. The Congress should seriously consider a law to establish what is now the CIA's Deputy Directorate of Operations as a separate agency. This would free the clandestine service from a personnel system unfit for it, would remove it from internal competition for resources, and would give the service an opportunity to argue its case directly to the President and Congress. As an independent agency, the clandestine service would no longer have to compromise with that faction of the CIA's officials who do not believe we should have clandestine collection at all.

National Technical Means of Collection

The employment of scientific devices is a supplement to traditional methods of espionage. The product of National Technical Means of reconnaissance, important as it is, frequently does not approach what can be obtained through success at traditional espionage. Often, however, scientific devices are our only sources of knowledge about important matters in totalitarian countries. But they never tell the U.S. as much about the Soviet Union as the Soviets can obtain about most Western nations even from open sources—regardless of espionage. The Soviets know more about U.S. weapons and national policies by reading a few of our major newspapers and periodicals than we can know about the Soviet Union's arsenal from many of our sources of intelligence.

The capabilities of National Technical Means have been systematically oversold during the SALT II debate. Worse yet, in the attempt to oversell these capabilities to the American public, a few irresponsible officials of the National Security Council staff and the Office of the Secretary of Defense have leaked an enormous amount of information concerning U.S. collection systems. Prior to this Administration, the very names of these systems were high national secrets. Today, both their names and functions can be read about in the *New York Times.*

Soviet gains through espionage concerning the KH-11 photo-reconnaissance system and the revelations concerning U.S. overhead telemetry collection satellites as a result of the Boyce-Lee affair have given the Soviet Union significant understanding of U.S. technical collection means. The usefulness of present and future devices has been degraded.

National Technical Means of collection, Secretary of De-

fense Harold Brown states, "covers a variety of methods for monitoring Soviet military activities, including photographic satellites and other technical collection means. These systems enable us to monitor, for example, Soviet telemetry—technical data transmitted by radio signals from Soviet missiles during tests—from outside Soviet territory. Other examples of National Technical Means include the ships, aircraft, and land-based radars used to monitor Soviet missile testing." The National Technical Means available for the collection of political, military, economic and other forms of intelligence include photography, radar, infrared sensors, COMINT collection, telemetry collection, and collection of other electronic signals. These sensors can be mounted on ships, planes, satellites, and ground sites.

Each of these media has certain advantages and disadvantages. Satellites clearly have the highest degree of access to totalitarian states but have very limited time over target unless they are put into very high orbits. But from such orbits, they can gather less data. Aircraft, unless a decision is made to overfly illegally the target country, can only operate on the periphery. Ships and ground sites also can only operate on the periphery. They can be very useful indeed, but lately, this country has shown itself unable to protect them. The U.S.S. *Pueblo*, operating in international waters off North Korea, was seized in 1968 and the U.S. did nothing—except stop using such ships for intelligence. The fall of Iran in 1979 deprived us of the very best source we had on new Soviet missiles. It is simply technically incorrect to claim that satellites 20,000 miles away from Soviet test centers can pick up as much information as the Iranian sites, which were only 400 miles away.

Commenting on a statement by Zbigniew Brzezinski to the Chicago Council on Foreign Relations that "we maintain a vast, sophisticated, and expensive array of means to detect and monitor what the Soviet Union is doing in its strategic programs . . . they are totally under our own control . . .," Senator Jake Garn (R-Ut.) observed that, "while U.S. collection systems are certainly sophisticated and expensive, the array is hardly vast . . . there is some redundancy in the collectors, but the loss of a single system can leave a gaping hole in collection capabilities . . . and the losses of Iranian and Turkish collection sites are stark reminders that every U.S. collection site overseas is hardly under our 'total control'."

At least some of the overhead collection systems that have been described in press leaks by the Administration during the

SALT II debate are systems that we have, but for financial reasons do not fly, or do not fly enough of, or are dying in orbit from old age. There exists today a requirement for a considerable increase of the number of all U.S. reconnaissance assets—satellites, ships, and planes. Indeed, most of these systems were originally designed to operate in numbers about double those that now exist. The decision to cut the planned numbers in half was not based on strategic or technical considerations. This Administration just did not want to spend the money. Emphasis must be put on the provision of very high resolution photography for technical intelligence analysis and for the development of a system capable of providing strategic and tactical intelligence during a general war. The latter is easier said than done, because the CIA and the Air Force, largely due to inadequate funds, have not yet begun to think seriously about protecting American satellites in wartime.

There is a requirement for a replacement of the Iranian collection sites. To obtain such replacements will require some basic changes in U.S. foreign policy involving a number of nations. If we do not obtain a replacement, U.S. ability to monitor Soviet missile development will not again match what we had until 1979—regardless of what happens in the next five years.

The proposed U-2 telemetry collection aircraft is grossly inadequate as a collection platform. Even in the unlikely event that we obtain the overflight rights we need to operate this aircraft, its range and time on station are inadequate. The United States should initiate the development of an advanced long-endurance aircraft with adequate time on station to collect the required intelligence. The U-2 is a product of 1950s technology. A modern aircraft using advanced engines, materials, and a sophisticated low-drag design could give this aircraft adequate time on station. Unfortunately, no such aircraft could adequately collect on all the frequencies that we have to monitor.

Photography

Photography from satellites is an effective NTM for finding out the enemy's order of battle. When available on a timely basis, photography is effective for managing a crisis or fighting a war. Very high resolution photography is useful for technical intelligence analysis. A good photograph can reveal a great deal about a weapon's capabilities.

Photography, however, has inherent limitations. Above all,

the Soviets know when our satellites are passing over. Also, one cannot photograph through clouds, smoke, or at night without an infrared system. Moreover, one cannot photograph anything which is covered up. Photographs of factories or cannisters are the stuff of guessing games. Photography cannot tell us how many missiles the Soviets have built or can build. Aside from such considerations, the principal limitation is resolution. Much distorted and misleading information has been injected into the public debate. The Washington Post informs us that "Rep. Les Aspin (D-Wisc.), Chairman of the House Subcommittee on Intelligence Oversight, disclosed earlier this year that the best U.S. satellites clearly distinguish an object one foot long from an altitude of 100 miles. Paul Bennett, arms control specialist at the Union of Concerned Scientists, says U.S. satellites may do better than that, defining an object as small as three or four inches from 100 miles." However, two notes of caution are in order. It is easy to confuse maximum resolution with average resolution. The average resolution of photographic satellites is nowhere near such figures. Moreover, resolution is defined as the smallest object that can be discerned rather than "clearly distinguished." To "distinguish" something is usually quite different from identifying it. Above all, even if we could photograph every point of the Soviet Union at any time—which we surely cannot do—we would not thereby be able to know what the Soviet Union is doing. Photography has serious inherent limits.

There is no question that photographs, when of the highest qualtiy, can be quite impressive. As Dr. Amrom Katz, former Assistant Director of the Arms Control and Disarmament Agency, has observed, "Of the several kinds of data available, photographs are most convincing to the lay person, especially if they have been interpreted first." Photograph interpreters are called interpreters for a good reason—there is a great deal of educated guesswork in photo interpretation. Even very large objects have, on occasion, been misidentified. David Sullivan, a former CIA analyst, points out that, "The Soviets actively falsified their claims of 48 subs with 768 SLBMs operational and under construction in May, 1972, in order to minimize the number of older ICBMs they would have to deactivate . . . the U.S. only discovered this fact in 1978."

Photography cannot see into a building. Amrom Katz points out that there are literally thousands of small light industrial structures in the Soviet Union of which we do not know the mission and which could be used to house a clandestine ICBM

force or to store virtually any kind of equipment of which we could know nothing. Photography allowed U.S. analysts to suppose, for fifteen years, that the Soviets did not possess the ability to reload their ICBM silos—until, in 1980, they learned otherwise. Nor can photography depict the internal configuration of a weapons system. The range dispute on the Backfire bomber is a classic illustration of this. Very high quality photography of the Backfire exists—indeed, it routinely appears in the press, since photographs of the aircraft have been obtained by interceptor aircraft and released to the press by a number of governments. As Lawton Collins, a senior researcher at the Library of Congress, points out:

> Several U.S. aircraft corporations in 1976 estimated effective ranges [of the Backfire] using different sets of data from different sources that created different conclusions. Assessments at the lower end of the scale suggested a round trip limitation of rougly 3,500 nautical miles. If correct, that would classify Backfire as an intermediate-range aircraft in the same category as Soviet Badgers and Blinders. Other analyses, however, showed Backfire with nearly twice that reach, which clearly would give it intercontinental capabilities, like Bears, Bison, and B52s.

Perhaps the most pervasive myth concerning photo satellites is that they can photograph anything at any time. For maximum resolution, a low orbit is required which means that only a limited area can be photographed on a single revolution and have access to specific geographic points only at certain times. Photographic satellites are useful. But they are both limited and vulnerable.

Telemetry Collection

Telemetry is one of the primary sources of technical intelligence. According to the Department of State, we collect "a vast array of data which is used to determine the characteristics of the new missile." This is quite true; however, it is also true, as Amrom Katz points out, "*What the U.S. intelligence analyst really wants is not what he gets* . . . he would like to have the designer's plans, his notebooks, the test records of components, data on the materials used in making the development, and access to the designer himself." (Emphasis in original).

Telemetry is simply a record of measurements the Soviets are making on their own missiles. They understand the systems they are testing; we do not. A measurement only makes sense if one knows something about the design and materials of the

systems being measured while "reading" Soviet telemetry. We are usually working on the basis of assumptions. When we make the wrong assumptions, our analysis is wrong. The process is by no means easy and simple. Moreover, we have precious few ways of determining if the telemetry we get is intentionally biased to mislead us. Telemetry can also be encrypted, and it routinely is. This increases all the problems normally associated with interpreting it.

Senator Garn writes that, "The information derived from telemetry is absolutely vital to technical intelligence analysis of Soviet strategic systems." We are currently being denied telemetry because of loss of the Iranian collection sites and because the Soviet Union encrypts between 25 and 70 percent of its telemetry. As a result, Senator John Glenn (D-Ohio) declared during the SALT II debate in 1979 that the margin of uncertainty for the key qualitative parameters of Soviet ICBMs in SALT II was as large as 50 to 70 percent.

Despite the fact that we had telemetry, it took two years to get enough data for the United States to raise the issue of the SS-19 in the Standing Consultative Commission. Here we were dealing with a very large (50 to 60 percent) increase in volume. Despite telemetry, the U.S. dramatically underestimated the improvement in Soviet accuracy in the improved fourth generation ICBMs. Former Secretary of Defense Donald Rumsfeld reports that since 1977, "U.S. intelligence estimates. . .have been found to have again underestimated Soviet efforts, progress, and capabilities. In the strategic realm, Soviet missile accuracy improvements and MIRVing rates, among other things, have been more rapid and impressive than were officially forecast."

ELINT, Radar, and Infrared Sensors

The Department of State correctly points out that we use multiple sources of information in technical intelligence and "what we learn from photographs can be checked against information from radar or telemetry monitoring." It notes that we use "detectors which measure heat from the missile in flight and radars which track the missile in flight . . . ." It is clear that the increasing denial of telemetry by the Soviet Union will make photography, radar, and infrared observations increasingly important in technical intelligence analysis—but it is also clear that these will only give us a vague picture of the performance of future Soviet weapons.

Senator Glenn's comment about our having to put up with a

50 to 70 percent uncertainty concerning key technical parameters of Soviet ballistic missiles is quite to the point. But the same point applies to other systems as well. Senator Garn notes that, "The range of cruise missiles can be verified by National Technical Means only to within a factor of two or three." Negotiations for SALT II have made clear that the Soviets could make technical intelligence even harder to come by than it is today. The Senate Committee on Intelligence reports that, "The impact of those changed practices permitted under the treaty may decrease our confidence in our ability to monitor counting provisions, and a combination of such changed practices could *greatly complicate* our task of monitoring those provisions involving qualitative limitations." (Emphasis added).

The collection of ELINT and SIGINT, or electronic and signal intelligence, from radars or other electronic emitters, are useful for the technical analysis of the radars, order of battle information, and the design of electronic countermeasures. Current U.S. ELINT collection capability has been degraded and must be restored.

COMINT

Communications intelligence is the only NTM that gives us some indication of what the foreign governments are thinking. COMINT is the most sensitive intelligence source and cannot really be discussed in public. The danger of losing COMINT sources or of being deceived by them is always with us.

The collection of COMINT is complicated by the fact that governments and even non-governmental organizations (terrorists, business organizations) often encrypt or encode their communications or use one-way transmissions or use non-electronic means of transmission. Only certain communication lines can be monitored and part of what is collected cannot be used because of encryption. There is a constant war between communications security and communications intelligence.

The difficulties involved in utilizing COMINT go beyond technical collection systems and code-breaking. Because COMINT is in foreign languages, trained linguists are needed to interpret it. Moreover, linguists are not a fungible commodity. Unlike photo interpreters who can be shifted with relative ease to other jobs during a crisis, language skills are much more limited. We have so few trained linguists in many

languages that it becomes impossible in crisis situations to analyze the information we do collect.

This situation must be corrected, or improved technical collection and code-breaking will continue to become less useful.

Nuclear Weapons Intelligence

Current capability to monitor Soviet underground nuclear weapons testing must be dramatically improved. Secretary of Defense Harold Brown recently told the Senate Committee on Armed Services that there was a factor of two uncertainty in yield estimates from Soviet underground testing.

U.S. capability to monitor Soviet testing in outer space and to collect radiological debris from underground and atmospheric testing must be improved substantially.

As of now, we know essentially nothing about modern Soviet nuclear weapons. Virtually everything we have is based upon an extrapolation of the 1961-1962 test series. Recent press reports of a substantial revision in the yield of Soviet strategic nuclear weapons is a symptom of this problem.

By way of summary, we can list the observations which the Senate Committee on Armed Services made concerning our capability for technical intelligence. These observations were made in the context of verifying the proposed SALT II Treaty, but they apply generally. The Committee concluded that we cannot have high confidence concerning our knowledge of:

1. Changes in the range/payload capability of Backfire or successor aircraft;
2. The range of cruise missiles;
3. The number of warheads actually loaded on deployed ICBMs, especially heavy ICBMs;
4. The conversion of medium-range ballistic missile launchers, which are not counted under the treaty, into launchers of long-ranged ICMSs, which are to be counted;
5. The deployment level of mobile ICBMs; and
6. The testing of "new types" of ICBMs.

Administration spokesmen do not seriously question these judgments.

The U.S. has subordinated technical intelligence collection to the collection of information relevant to crisis warning and management. Little emphasis has been placed on the development of systems that can provide strategic intelligence during war time because the United States has not taken seriously the possibility of nuclear war. Since our Department of Defense

has ignored the military problems of actually fighting a war, it is not surprising that we also ignore the problems of wartime intelligence collection.

What, then, can be done to improve our National Technical Means of intelligence collection? Above all, we must realize that no matter what we do, this is an inherently limited field of endeavor. We must get away from the tendency of recent years to restrict our thinking about intelligence to the relatively meager questions which technical means can answer. (But more on this in the subsection on analysis below).

This said, we can note with satisfaction that the technical field is one in which mere expenditures of money—much more money—can virtually ensure a radical improvement in capabilities.

The problem of coverage can be solved by building more units of the collection systems. So can the problem of exotic frequencies be solved. The problem of wartime intelligence collection can be partially solved by building armored, laser-powered satellites to defend the ones engaged in collection, by preparing ourselves to attack the Soviets' ground-based laser anti-satellite systems without warning, and by being ready to launch replacement satellites very quickly. All of this requires only money and the will to do it.

COUNTERINTELLIGENCE

Counterintelligence in the United States has never been without difficulties, but in recent years it has all but disintegrated. This is regrettable and must be remedied, because competent counterintelligence is not only necessary for protecting society, it is a *sine qua non* for the proper exercise of all the other functions of the nation's intelligence system. Neither collection—human or technical—nor analysis nor covert action can be executed safely without good CI. The events of the past decade have struck CI harder than any other function and have reinforced the traditional handicaps under which American CI had worked—fragmentation of the mission between several agencies and technical disciplines, as well as division of jurisdiction between foreign and domestic matters. New handicaps were created as well, chief among them the quasi-legal principle that no U.S. person could be investigated or even purposely observed anywhere except upon prior probable cause of criminal activity. In addition, the CI components of the several agencies lost funds, personnel and prestige. CI has always been one of the least rewarding careers in American

intelligence, but recently the rewards have virtually ceased to exist.

Meanwhile, hostile intelligence services and terrorists have increased their activities against us, so that as the need for counterintelligence activities has grown, our ability to meet those needs has declined. Today, there are probably at least three times as many Soviet intelligence officers in the United States as there were twenty-five years ago, simply because the number of Soviet citizens in the United States at any given time has increased by an even larger factor. Today, the Soviet programs for what they call *Maskirovka* (deception), are a larger part of Soviet policy than they were even a decade ago. Today, the number of Third World nationals—not only Cubans and East Europeans, but people around the world—who are willing to cooperate with Soviet intelligence is much larger than ever.

American counterintelligence will have to be rebuilt both by administrative and legislative actions.

Counterintelligence must always be the most unpopular part of any intelligence service. CI's task with respect to collection, both human and technical, is to challenge the genuineness of the information collected, to search for any reason to believe that the enemy might have devised the information just so our own people could gather it and be deceived thereby. CI must challenge the validity of the collectors' triumphs, the validity of information that is usually both hard-won and scarce. Thus, vigorous counterintelligence officers are always open to the charge of impeding the progress of collection. If CI had its way, so goes a common complaint, we would believe nothing and nobody. Intelligence would cease to be. Above all, the officers whose successes and integrity CI questions are a built-in constituency against CI.

Managers of technical collection systems also have an interest in denigrating the importance of CI. After all, these systems are inherently easier to devise than are arrangements for human collection. But the accuracy of the information derived from technical systems is often very difficult to verify. When the products of technical systems are subjected to CI analysis, they may not appear so valuable. For example, the signal associated with any given electronic emitter may indeed come from that very emitter, but may lead us to the false conclusion that such emitter is capable of no other signal. Telemetry can be biased or false. COMINT can be false. The task of conterintelligence is to check out these possibilities, but

given the information available, it can seldom reach firm conclusions, except for one: that technical intelligence tells us very little for sure. Those who manage multibillion dollar programs naturally resent such conclusions.

The same considerations apply to the function of analysis of intelligence. When facing any given question, the CI analyst begins by asking what sort of impression the enemy might be trying to give us concerning that question. The positive analyst, on the other hand, has to make sense of fragmentary information. It is very well to say that the analyst should take into account the ever present possibility that the sources of his information may not be reliable. But several factors work against his doing so. The analyst is usually assured by the captions on the reports he uses that the information is from a source which has been reliable in the past. The notion that reports from technical sources might be less than the revealed truth has probably never been uttered in his office. Analysts have limited means of actually checking out the accuracy of information, and frequently they must compare it with what is already available. Such comparisons usually end up with questions. But the analyst is expected by his consumers not to ask *questions,* but to provide *answers* to the drumfire of questions coming his way.

All of this is to say that counterintelligence is a discipline which involves analysis but which is quite distinct from it. In the Soviet Union, for example, every important product of intelligence analysis is subjected to a second look by specialists in counterintelligence. This produces conflicting perspectives. However, in the Soviet Union, the conflicts are not resolved within the intelligence community but rather by policymakers. In the United States today, counterintelligence does not contribute to the analytical product.

In covert activities, the task of counterintelligence is to protect, first by making certain that information about the planned act does not reach the enemy through the persons through whom the action will take place, and second, by assessing the enemy's reaction to our initiative. Without such an assessment, continuation of the action, or subsequent actions in related fields, become hazardous shots in the dark. Nevertheless, the few CI experts left in the CIA have nothing to do with covert action projects, and counterintelligence is not a major concern of the few specialists in covert action remaining in the CIA. In fairness to these specialties, one must note that they are entirely too occupied with meeting the

bureaucratic requirements which are now attached to even the smallest action to think aggressively about their job, or to complicate further with CI.

One of the principal tasks of counterintelligence, of course, is to identify spies and terrorists working against the United States. To this end, the counterintelligence elements of the CIA and the FBI conduct surveillance, run double agents, debrief defectors, conduct liaison with foreign security services, and analyze masses of information. Our record in this enterprise is cause for much modesty and greater concern. Not since the KGB's Colonel Rudolph Abel was discovered living in New York posing as an American, a generation ago, have our CI services had a major success. In fact, the FBI does not have (for that matter, no American has) any idea even of the approximate size of the problem posed by Soviet, Cuban, and other hostile illegals. Our surveillance of known KGB officers in the United States, never mind suspects, is all too limited.

The many developments of recent years which have contributed to this may be summarized as follows:

1. The destruction of the CIA's counterintelligence staff and the decimation and intimidation of the FBI's corps of experts in counterintelligence and counter-terrorism.

In December of 1974, a faction within the Intelligence Community which had long wanted to reduce the importance of the counterintelligence staff of the CIA apparently leaked to The *New York Times* the information that the counterintelligence staff had participated in a program of mail opening targeted against Americans believed to be conspiring with the North Vietnamese. Subsequently, the chiefs of the CI staff were forced to resign. The staff was radically reduced in size, and, foremost, assignment to the staff was made into a temporary tour of duty, where it had once been a career. The CI staff lost whatever independence it had had. Henceforth, CI was to be the responsiblity of the geographic divisions of the Deputy Directorate of Operations—it would be everyone's responsibility in general and nobody's in particular. In 1976-77, the Justice Department brought indictments or disciplinary actions against former officials and special agents of the FBI for engaging in allegedly unlawful acts of surveillance, which had always been considered legal and proper, in pursuit of the terrorists of the Weather Underground. The effect of such actions was a clear, loud signal to every CI officer of the United States: "You can't get in trouble for slacking off, but

you are likely to get into trouble if you go a single inch beyond the latest interpretation of laws and regulations by those in or about to come into power. When in doubt, do nothing."

2. The ill effects of the effort to apply the "criminal standard" to counterintelligence

The American Civil Liberties Union, the Center for National Security Studies, and similar organizations have long argued that any investigation of an individual or corporation, for reasons of national security, constitutes a "search and seizure" within the meaning of the Fourth Amendment to the Constitution, and that, therefore, in principle, no investigation of any individual or corporation should be undertaken except after a court has decided that there is probable cause that the individual has engaged or may soon engage in violations of law. This principle was statutorily applied to CI only once, in the Foreign Intelligence Surveillance Act of 1978. But because it has permeated the Carter Administration, its administrative guidelines and its appointees on the federal bench, it is being followed as if it were law. As a result, it is the FBI's policy today that even persons whom common sense would designate as dangerous may not be surveilled unless they meet the "criminal standard." This includes people with records of dangerous activities such as Puerto Rican terrorists released after 25 years imprisonment, who vow to strike again and to teach others how to shoot and bomb, and hypothetical members of foreign terrorist groups who could come to the United States and not yet have violated any U.S. law. Of course, there are spies and spy handlers who would not meet the "criminal standard" because some of the activities involved in setting up and operating a clandestine network are perfectly legal.

3. The ill effects of the bureaucratic divisions within CI between foreign and domestic matters

The division of responsiblity between the CIA (external matters) and the FBI (matters within the U.S.) was once a convenient and flexible division of labor. To be sure, almost no counterintelligence cases are wholly foreign or wholly domestic. By their nature, they usually involve both elements. That is why most countries have a single counterintelligence service. Those which have two, e.g., West Germany, nonetheless have one central repository for counterintelligence files, and constitute joint teams to pursue cases that require a joint approach.

The U.S., too, once had something approaching central counterintelligence files—in the CIA's CI staff. Once, too, in the United States, the CIA would form joint teams with the FBI and other agencies, e.g., the Department of State, Treasury, even the Post Office, and pursue cases. But after 1974, successive Attorneys General and Directors of Central Intelligence, not to mention influential members of congressional committees, have interpreted the 1947 National Security Act's prohibition of domestic law enforcement by the CIA to mean that the CIA usually may not hold information about any activity by American citizens in the United States and that no employee of the CIA may be involved directly or indirectly in an investigation of an American in the United States, except to assess his suitability as a source or as an employee. In practice, this has meant that no one in the U.S. government has the whole file on, or the whole responsibility for, most counterintelligence cases.

For example, the Puerto Rican FALN is composed substantially of Americans and commits its crimes here. But much of its preparatory activity is in Cuba and elsewhere abroad. The FBI does not have sources in Cuba, and the CIA cannot hold information on the FALN's American aspects. FBI and CIA must perform constant handoffs, being ever careful not to violate the latest interpretation of law.

By way of comparison, one should consider the Drug Enforcement Agency. DEA's job is to combat illicit traffic in drugs. To this end, it gathers information on all relevant people no matter where. One need only imagine what would happen if DEA had to split its activities into a foreign and a domestic branch, if it were not allowed to keep and analyze central case files and had to rely on ad hoc exchanges of information between the two branches. The price of heroin on the street would drop under the weight of plentiful supplies. But the foregoing situation is not hypothetical at all for the FBI and CIA. There can be no doubt that the complex system which forced CIA and FBI to handle only a part of most cases is satisfactory to hostile intelligence services and terrorists.

In order to improve counterintelligence, a wise and caring President should establish certain policies and order certain administrative measures. He should declare that the United States cannot tolerate counterintelligence services which cannot even estimate the magnitude of the threat which hostile intelligence services are posing, that he will ask the Congress to provide for dramatically increasing the number of personnel

now assigned to counterintelligence within the FBI and CIA, and that as part of an Executive Order, he is establishing the counterintelligence staff as an independent entity within the clandestine service. He should declare that better counterintelligence is vital to the nation's defenses, and that he would support all administrative and legislative initiatives to improve it. He should revoke Executive Order 12036. He should also urge the directors of CI agencies to rehire some of the officers who left CI in the period 1976-1980.

The directors of the FBI and the CIA (and of the new clandestine intelligence agency which would succeed CIA) should form separate career specialists for counterintelligence within their organizations. This would allow a body of expertise to develop, would give the CI officers the chance to rise in rank within their specialty without having to ingratiate themselves with officers who might be hostile to CI. The result would be increased competence and independence on the part of CI officers. The Attorney General should revoke the current "guidelines" for the FBI. The directors ought to declare that investigations will be initiated and pursued according to the best judgment of professional counterintelligence officers, limited only by the letter of applicable statutes. Moreover, they should arrange for the creation of central counterintelligence files and declare that cooperation between the CIA (or its successors) and the FBI should be limited only by the letter of the statutory provision against the former's direct participaton in the enforcement of law. Investigation of facts and enforcement of laws are two different things. The directors should also provide for regular interdisciplinary and independent review of their agencies' collection programs and analytical products by counterintelligence specialists. The results of these reviews should be shown to the President and to high-level policymakers.

Policies, personnel, and administrative measures will not suffice to undo the harm done to American CI in recent years, and to prepare it to meet more difficult challenges than it ever encountered when it was most effective, a generation ago. The legal climate has changed. There have been a few changes in law but many in expectations concerning what legal behavior is. Legislative action is required in order to lay an unchallengeable basis for administrative actions. For example, although Presidents (or for that matter, the directors of FBI and CIA) have the authority to order the creation of central CI files, it would be advisable to obtain legislative authority for

creating a counterintelligence office staffed by specialists from all the intelligence agencies where central files could be kept, central CI analysis carried out, and pursuit of cases could be coordinated. The Foreign Intelligence Surveillance Act should be modified to disestablish the "special court" which is constitutionally repugnant and a judicial aberration. The Executive Branch must develop criteria for the conduct of intensive investigations, and its conduct must be accountable to the Congressional Select Committees after the fact. That way lies the maximum effectiveness, both of performance and of preservation of privacy.

Legal sanctions have a definite role in shielding the public from possible abuses of counterintelligence. But by its nature, the law cannot restrict executive activity *a priori* without smothering or perverting it—especially investigative activity. The law can and should place stern penalties on anyone who misuses the products of counterintelligence activities.

INTERNAL SECURITY

Internal security functions are in many respects distinct from those of intelligence. In the first place the purpose of internal security is generally (though not always) law enforcement, whereas the purpose of intelligence functions is generally (though not always) information gathering relevant to the external security of the United States. Secondly, internal security is not encompassed in the more narrow function of counterintelligence, although there is a clear overlap. Counterintelligence is generally restricted to security against foreign intelligence services and governments, either within or without the territory of the United States. Internal security, however, includes CI with respect to foreign intelligence activities (both collection and covert operations) within the United States but also encompasses all threats to national security generated within the country, whether deriving from the secret operations of a foreign government or group or from indigenous extremist, criminal, subversive, or terrorist groups and individuals. Thirdly, internal security, unlike intelligence activities, is not the province of the intelligence community exclusively, nor of the executive branch, nor even of the federal government. A constitutional government cannot countenance an internal security apparatus that is as monolithic and pervasive as the kind that exists in Soviet bloc states. Consequently, legitimate and necessary concern for the rule of law, the civil liberties of the citizen, the separation of powers, and the

diffusion of authority demands that internal security functions be distributed among the legislative and executive branches, among a number of agencies within the federal government, and among federal, state, and local institutions.

There is a widespread misconception abroad that the internal security functions of the United States are adequate (in fact, they are virtually non-existent); that they have been seriously and irresponsibly abused in the past (in fact, the United States has probably the best record of concern for civil liberties and privacy in human history); and that there is no serious threat to our internal security today, that those who claim that there is such a threat are in reality frightened by all dissent and desire to suppress or surveil dissenters who criticize and challenge American society (in fact, the threat to the internal security of the Republic is greater today than at any time since World War II, and the number of public men who are even aware of the threat is so small as to be negligible).

It is true that the United States is a modern, affluent, highly literate, and generally stable social organism. It is therefore unlikely in the foreseeable future that the U.S. government will be overthrown by violence or conspiracy. However, those who are prepared for and who advocate the use of violence and conspiracy do exist on both the extreme left and right. While their activities may not actually overthrow or destroy the government, they are capable of inflicting considerable damage to innocent persons, institutions, and property (through assassinations, kidnappings, sabotage), of subverting and destabilizing social and political processes and thereby weakening the institutional safeguards of a free society (through propaganda, disinformation, agitation), and of covertly influencing the policies of the United States in ways contrary to the desires and best interests of the nation but beneficial to hostile foreign powers to which internal extremists may be sympathetic or allied (through infiltration, espionage, and covert action). Among the organized internal groups that could become internal security problems are the several Communist Parties (the CPUSA, SWP, RCP, CPML, CWP and PLP among others), a range of radical and New Left groups, some of whose members and leaders have expressed sympathy for North Vietnam and Cuba and who have had influence on federal policy-making in recent years (the IPS, NACLA, CED, some anti-defense and anti-nuclear lobbies and several other groups); a growing and increasingly active right wing and racist formation consisting mainly of the three Ku Klux Klan organizations

and the National Socialist White Peoples Party as well as others; a range of clandestine terrorist groups, and Iranian and Libyan organizations and networks and their support apparatuses; support groups for foreign terrorist organizations such as the IRA, the PLO, the Sandinistas, and other Latin American, European, African, and Middle Eastern terrorists; an expanded presence of immigrants from unstable and sometimes Marxist influenced states whose number may include foreign intelligence agents and agents provocateurs; and a vastly expanded presence of "diplomatic personnel" from the Soviet Union, PRC, and other Communist or hostile states whose foreign services are known to be under the virtual control of their intelligence services. The potential for a serious threat to the internal security of the United States, for an escalation in politically motivated violence and subversion, and for the penetration and manipulation of our government (and even of our private sector and institutions) therefore exists.

Prior to 1974, the United States maintained an adequate, if not superlative, internal security apparatus that was established under the rule of law and was decentralized among its components in its performance. The following breakdown shows the structure of this apparatus as well as its disintegration in the mid and late 1970s.

Legislative Branch

The U.S. Congress maintained, through its investigatory powers, standing committees for the review of internal security through the House Internal Security Committee (HISC) and the Subcommittee on Internal Security of the Senate Judiciary Committee (SISS). The former was abolished through a change in the rules of the House in 1975 and the latter ceased to exist in 1978. Although authority for investigation of subversive activities by Congress was transferred to the House Judiciary Committee and remains with the Senate Judiciary Committee, neither body has engaged in such investigations. Both HISC and SISS for many years performed invaluable services in investigating internal security threats and problems and in providing reliable information to the Congress, to other government agencies, and to the American public about such groups and activities as the German American Bund of the 1930s, Soviet espionage and Communist infiltration of the government in the 1940s and 1950s, the terroristic activities of the Ku Klux Klan in the 1960s, international terrorism, and the

subversive activities of the New Left during the Vietnam War. Moreover, much of the legislation necessary for adequate internal security originated in one or both of these two bodies. The restoration of some congressional body with similar functions—either or both of the two committees or a joint committee—is a necessary part of an adequate internal security program.

Executive Branch

The Subversive Activities Control Board (SACB) ceased to exist in 1974; the Internal Security Division of the Department of Justice ceased to exist in the same period. The former was a key institution for the determination of the Communist affiliations of organizations and individuals. The latter was responsible for the prosecution of violations of federal law pertaining to internal security; it now exists only as a subdivision of the Criminal Division of the Justice Department. The List of Subversive Organizations, which included groups of both the far left and the far right and was compiled by the U.S. Attorney General, has also ceased to exist, and prospective federal employees are no longer interrogated on their political loyalty on the standard application for federal employment. The use of the Security Research Files and its Index of the U.S. Civil Service Commission, which compiled and cross-indexed information on groups considered inimical to the interests of the United States since 1942, was terminated under a provision of the Privacy Act of 1974, which prohibited the federal government from filing information on a citizen's organizational affiliations unless he, in connection with his affiliation, engages in the actual overthrow of the Constitution or in other crimes against people or property. The U.S. Customs Service, which enjoyed liaison with international law enforcement agencies, has experienced difficulties in gaining the cooperation of such agencies because of this service's inability to guarantee the confidentiality of information received due to recently enacted public disclosure laws. The difficulites experienced by this office limit the ability of the government to control or surveil the entrance into the United States of persons with hostile affiliations and of materials used for hostile and subversive purposes.

Legislation

New legislation of the 1970s was enacted that further limits

internal security functions. Most notable are the amended Freedom of Information Act of 1974, which allows access to some investigatory files (the Act has been used by extremist groups and defendants in organized crime cases to obtain information that might identify informants against them), and the Privacy Act of 1974, which limits the government in maintaining secure information on an individual, limits the exchange of such information within the executive branch, and allows individuals to determine what records government agencies hold on them. Other significant legislation, the enactment of which has impaired the effectiveness of a national internal security program, includes the 1977 McGovern Amendment to the State Department Authorization Act of 1977, which repeals the 1952 provision forbidding non-immigrant visas to the U.S. to members of Communist Parties, and the Foreign Intelligence Surveillance Act of 1978, which provides a criminal standard for electronic surveillance of a U.S. citizen or permanent resident alien. The Criminal Code Reform Act of 1979 (S. 1722), proposed as legislation in the 96th Congress, if enacted, would not carry through, and thus repeal, the Logan Act and the Smith Act, both measures protective of internal security.

Erosion of Internal Security Law Enforcement Capability

While the above measures relate mainly to the investigative aspects of internal security, there has also been a pronounced diminution of the role of the FBI and of state and local police and domestic intelligence functions. The Levi Guidelines, formulated in March 1976, by Attorney General Edward H. Levi, severely limited the investigative authority and techniques of the FBI and other federal law enforcement agencies. Under these guidelines, the number of FBI domestic security investigations dropped from 21,414 in July 1973 to 102 in February 1978. In the same month, Director Webster stated that the FBI was "practically out of the domestic security field," and in testimony before Congress, FBI officials have admitted that the restrictions on investigation include the reading of official and public publications of extremist groups. The restrictions also limit the use of informants. As of 1978, the FBI was using only 42 informants in cases of domestic security and terrorism as opposed to 1,060 informants in organized crime cases. There has also been a general elimination of domestic security functions within the armed forces

intelligence services. Files on domestic security developed by the U.S. Army were physically destroyed. Internal security agencies are prevented from placing under surveillance such extremist groups as the PLP, a Maoist group, the publications of which announce its intentions to infiltrate and seek to subvert the U.S. armed forces.

Because of the restrictions of federal jurisdiction and its own scope and mission, the domestic security work of the FBI has always been limited. To supplement its work, much of the internal security activities of the public authorities has been carried out by state bureaus of investigation and local police intelligence units. These services were indispensable to adequate internal security, since extremist groups, almost by definition, tend to be small in size and hence very often restricted to small scale, local operations. (The size of such groups, however, does not prevent them from presenting serious threats to life, property, and national security.) However, here too there has been a drastic dismantling of state and local programs. Litigation, local police guidelines, and the underfunding or outright abolition of internal security work at the state and local level have eliminated internal security files, personnel, and capacities. While lying outside the scope of executive branch leadership, there is much indirectly that a new administration could do to encourage the restoration of these capacities at the local level.

Many of the current restrictions on internal security functions arose from legitimate but often poorly informed concern for the civil liberties of the citizen and the responsibility of the government. While these are legitimate concerns, it is axiomatic that individual liberties are secondary to the requirements of national security and internal civil order: without the latter, the former can never be secure. Moreover, much of the current legislation and administrative measures was adopted with little appreciation of the threat or the *modus operandi* of extremist, subversive, and violent groups.

In general, the new restrictions place an emphasis on limiting surveillance to *actual or imminent* violence or illegalities. However, terrorist violence does not usually develop spontaneously. It typically grows in stages, as extreme elements become increasingly dissatisfied with their organizations and come to find them "soft" or "corrupted by the system." A terrorist cadre forms, therefore, from the splinters of dissident or extremist movements. Once it forms, it typically goes underground: its members establish safehouses, clandestine

communications links, adopt noms de guerre, and begin storing arms. Once underground, it is virtually impossible to penetrate systematically. Thus, authorities must keep extremist movements under at least moderate surveillance, become familiar with their public positions and members as well as their unstated goals, adherents, and fringe elements, and be prepared to escalate surveillance of whatever groups seem likely to engage in more extreme activities. This kind of surveillance can be carried out, in its first stages, simply by reading and filing publicly available information on the observed groups, but the more serious surveillance can be carried out only by the use of such standard intelligence techniques as wiretapping, mail covers, informants, and (at least occasionally) surreptitious entries. Similarly, internal security files cannot be restricted to actual or imminent threats. Like most other human activities, violence, disaffection, and conspiracy do not spring full blown from the heads of their perpetrators. They develop, change, and escalate over time and become linked with other elements and groups. Hence, it is necessary to track their development through the cumulative compilation of comprehensive files. Nor do threats from extremists recognize the conventional juristic and bureaucratic distinctions between foreign and domestic, peaceful and belligerent, federal and state. Hence, a terrorist group may have links with foreign powers or groups. Clergymen, students, businessmen, entertainers, labor officials, journalists, and government workers may engage in subversive activities without being fully aware of the extent, purpose, or control of their activities. Diplomatic institutions may be used as stations for espionage and terrorism (the role of the Soviet and Cuban missions at the UN and in Washington in intelligence gathering is becoming well known; in the summer of 1980, the Algerian Embassy in Washington sheltered the alleged assassin of a prominent anti-Khomeini Iranian dissident). An adequate internal security program (and the society it protects) must proceed on the understanding that many conventional and legalistic distinctions are serious impediments when imported into intelligence and internal security work.

A comparatively recent problem that overlaps not only CI and internal security but also many government functions and academic disciplines as well is the rise of transnational and international terrorism in the last decade. Terrorism has shown that it can be a useful means of gaining publicity, sympathy, and a modification of government policies for the movements

that adopt it. There is little reason to expect that terrorism will diminish in the 1980s; on the contrary, it will probably escalate and spread, and its proponents may turn to catastrophic techniques (e.g., nuclear and CBW). For administrative and constitutional reasons, the U.S. government is ill prepared to deal with this threat. One overriding need is for accurate information available immediately. When a terrorist group strikes, the Departments of State, Defense, Justice, Transportation, Commerce, *et al.* need to know the profile and *modus operandi* of the group at once in order to respond appropriately. Our present capacity in this respect is very limited and should be augmented. One solution would be to contract with one or several of the many private corporations that have specialized in providing and analyzing such information, that can collect and disseminate relevant information without legal complications, and that can respond to a crisis without transgression of administrative jurisdictions. Nevertheless, any adequate internal security program must consider the threat of terrorism as not only a serious but also a unique problem and must devise special techniques for surveilling its dangers and its proponents and practitioners.

Given, then, the reality of the threat to internal security, the erosion and present inadequacy of internal security procedures, and the public will to correct these inadequacies, what can be done? The following measures would at least restore the capacity for an adequate program:

1. Revision of the Levi Guidelines and appointment of an Attorney General and FBI Director who understand the nature of the threat and the professional tradecraft of internal security work.

2. Presidential emphasis on the nature of the threat—repeated speeches on the escalation of Soviet bloc intelligence activities, the nature of the terrorist threat and its international dimensions and the reality of subversion.

3. Presidential appointment of federal judges who have an understanding of both internal security laws in the context of the Constitution and of the nature of the internal security threat.

4. Presidential opposition to and promise to veto all pending and new legislation that would further repeal or weaken existing internal security laws.

5. Exemption of the FBI from the Privacy Act and the FOIA as well as exemption of all federal agencies that hold informa-

tion pertinent to internal security (e.g., the CSC, U.S. Customs Service, etc.). This would require new legislation.

6. Restoration of the Internal Security Division of the Justice Department as an independent section. Rigorous enforcement of existing internal security laws and prosecution of violators.

7. Restoration of a capacity to investigate and protect the security and loyalty of federal employees in the executive and legislative branches. This would duplicate the functions of the CSC and other agencies (for the executive branch). The U.S. Congress should create such a function in regard to employees of the legislative branch. Restoration and updating of the Attorney General's List of Subversive Organizations.

8. Presidential support for the restoration of at least one standing committee of Congress for the investigation of internal security problems and the oversight of the enforcement of internal security laws.

9. Presidential encouragement of federal, state, and local cooperation on internal security matters. This could take the form of publicly sponsored seminars, speeches, conferences, etc. on the problems of internal security intelligence and law enforcement at the local and state level. The role of the Attorney General and the Director of the FBI would be crucial here.

10. The establishment of central files on counterintelligence and internal security (as proposed in the above section on Counterintelligence).

Yet, none of the measures for restoring and building adequate internal security will be effective unless the American public and its leaders are made aware of the need for it; of the threats posed to their freedom and to the social and political fabric by the absence of such a program; of the nature of professional internal security work at the levels of research and investigation, intelligence and surveillance, and law enforcement; and of the need for professional work in these areas. As is the case with most laws and public administration, internal security programs will not work in a vacuum. They must have the understanding and support of the society they are intended to protect, and only Presidential leadership can inform and elicit the public response to the program.

COVERT ACTION

Since time immemorial, nations have influenced the internal affairs of other nations not only by overt requests, threats, and

blandishments, but also by secretly strengthening or weakening friends or enemies in foreign countries. Prior to World War II, the U.S. Department of State, like foreign offices throughout the world, engaged in covert political and economic activity as a part of its execution of foreign policy. During the war, the Office of Strategic Services (OSS) was created in the War Department to carry out America's covert actions, with a paramilitary capacity. Representatives of the OSS were attached to American embassies around the world. After the war, the National Security Act of 1947 authorized the CIA to "perform such other functions and duties related to intelligence affecting national security as the National Security Council may from time to time direct" as its charter for covert action. The CIA also drew on the President's inherent executive powers as a source of its mandate.

Since 1947, the Department of State has coexisted with the Central Intelligence Agency. Yet a certain institutional resentment still persists. The Department of State has established its primary responsibility for the conduct of foreign policy. In the majority of instances where a covert action activity is authorized, the United States ambassador in the embassy of the country affected is briefed, just as he is on the conduct of most intelligence collection activities. In some circumstances, the National Security Council agrees that it is best that our ambassador not be briefed.

At the present time, the covert action capabilities of the CIA are consolidated within a division of the clandestine directorate that does not have a specific geographic responsibility. The functional responsibility for a covert action in any part of the world lies with the geographic division of the clandestine directorate, which is normally responsible for collecting intelligence in the area of the world where the covert act is to be undertaken. In practice, the division of the covert action assets assists particular geographic divisions in effectively planning and undertaking the covert action or actions necessary to achieve the desired objective.

The principal assets for covert action are people—usually foreigners—with whom the CIA has had a very solid clandestine relationship or has reason to believe it can have such a relationship. Therefore, it happens that the people who set up covert acts are usually the same ones who supply covert information. This underlines the importance of networks of clandestine sources. When these networks exist, one has the option of using them for covert action. If they do not exist,

then covert action may be impossible. The second element in covert action is the covert action staff, whose specialists draw realistic plans for affecting foreign situations in the interest of the United States. To draw such plans requires both creativity and experience.

The objectives of covert action are varied—to plant or eradicate impressions, to help spread calm and cooperation in certain quarters or unrest and dissension in others, to help friends or enemies of enemies, and to hinder adversaries, to shore up or to threaten governments, and to divert or to channel attention or resources. The nature and extent of the means employed, of course, depend on the nature of the objective and of the circumstances.

Until the early 1970s, the CIA maintained an extensive capability for covert action. This included the ability to influence foreign news media, publish and distribute all varieties of supposedly foreign publications, operate covert broadcast stations, channel support to friends, conduct guerrilla warfare, operate resistance networks, and put into effect unilateral special operations. The CIA, however, was never as good at covert action as it could have been, primarily because of unwillingness at the top of the government to follow through and risk providing the overt support necessary to push major covert actions to successful conclusions. Perhaps the fundamental cause for its shortcomings in its best years was the lack of a clear mandate from the President regarding what final objectives were to be achieved and the price the U.S. was willing to pay to achieve them. When such mandates were present, e.g., in Iran and in Central America in the early 1950s, covert action worked well. When such mandates were not available, e.g., Indonesia and Eastern Europe in the 1950s, Cuba and Italy in the 1960s, covert action ended in tragedy.

In the past ten years, this limited capability has diminished considerably, because of budgetary and policy decisions against the use of the clandestine service for collection of covert action for foreign policy. As a result, the pool of clandestine assets available to the United States has shrunk greatly. The pool of officers with the experience to design covert actions has also shrunk. Above all, of course, there is no encouragement from the top to be creative and successful—quite the contrary.

The CIA may still be able to undertake the relatively simple forms of covert action, but the more complex forms would require a considerable marshalling of assets and reconstitution

of institutional elements eliminated long ago or existing now only in skeletal form. Nothing can replace the expertise that has eroded away in the 1970s except new experience. Meanwhile, the CIA is unable to effect all but the simplest covert action. As each year passes, the delay and the expense associated with reconstituting both material and personnel assets increase disproportionately.

The CIA's paramilitary capability has been particularly hard hit. In the past eight years, this one group has been reduced to a handful of professional officers and a bare minimum of available equipment. The ability of this group to undertake a paramilitary mission or unilateral special mission is severely limited because trained personnel are too few and increasingly too old to withstand the possible rigors of such missions. A small paramilitary reserve program does exist within the clandestine directorate, but the participants, who are officers assigned to geographic divisions, receive minimal training initially and almost no refresher training thereafter. A paramilitary or unilateral operation of any complexity and even moderate size would have to rely upon the military special operations assets. But these military men have no training in clandestine activity; moreover, their involvement would put the operation within the legal constraints imposed upon the President by the War Powers Act.

Unfortunately, in the past decade, the Congress and successive Administrations have placed such impediments on covert action that it is no longer a major tool of foreign policy. The Hughes-Ryan amendment of 1974, amended in 1980, was the best known, but least important, of these impediments. It required reporting to eight congressional committees before any covert action could be undertaken. That requirement has now been reduced to the two congressional Committees on Intelligence. This will help covert actions, but not much.

Since the greatest impediments to successful covert action have always lain in the realm of policy, then changes in policy can do most to remedy the situation. First, it should be the policy of the clandestine service to build the largest and most secure network of clandestine agents that we can manage to build, and greater resources should be allocated to this task. Second, the management of the clandestine service should rebuild the cadre of experts in covert action and above all encourage creative thinking about the means by which the interests of the United States might be served. This might be done by doing periodic surveys of the world and drawing

hypothetical plans for advancing U.S. interests. Third, the President should communicate to the clandestine service his determination to commit the resources of the United States to the success of plans he and the National Security Council have adopted. In addition, legislation to establish what is now CIA's clandestine service as a separate agency probably would help by removing covert action along with other clandestine activities from complications of combining collection and analysis.

ANALYSIS

The analytical branch of the CIA was established at least partly because of the belief that in 1941 information had been available to indicate that Japan was about to attack Pearl Harbor, but that the various pieces of information were not assembled until it was too late. From the beginning, CIA has served as that element in the intelligence community which gathers information from all sources throughout the government and produces estimates for the President and top policymakers. From the beginning, too, the military services (and more recently, the Defense Intelligence Agency) and the Department of State have also analyzed intelligence and provided reports for the Secretary of Defense and Secretary of State, respectively. But CIA has always claimed that its products are uniquely "national" and has established successive bureaucratic arrangements to give a "national" (i.e., intelligence community-wide) flavor to its work. The two most recent ones are the Board of National Estimates and the National Intelligence Officers. Indeed, in 1978, the CIA's analytical branch changed its name to that of "National Foreign Assessment Center" (NFAC).

The "national" products of CIA (now NFAC) are characterized by the process which produces them. CIA picks the topic for an estimate and assigns a principal drafter who then tries to write a paper reflecting the views on the topic of every agency in the community. Then follow months of interagency arguments on the text. Agencies that dissent very strongly on any given point may be allowed to register a formal dissent, provided they are not dissuaded from doing so by threats and blandishments. There is a premium on coming up with a consensus. It is not uncommon for Directors of Central Intelligence to let it be known that dissents are not appreciated. Recently, the Director of CIA has taken to personally redrafting the conclusions of the estimates before presenting

them to the President, on the ground that the estimates represent his personal view. He has also rewritten the dissents, ostensibly for the sake of coherence.

The quality of American national estimates often was not good. Lately, it has become bad to a degree which is difficult to believe. The press has carried extracts of a National Intelligence Estimate on the Soviet Union in which the name of a prominent figure in Russian history was grossly and repeatedly misspelled. "What would one think of self-proclaimed experts on America, said the journalist, "who produce a paper on America full of references to Benjamin Franklin as 'Franklinstein'?" The substantive errors, however, are frequent, consequential, and not at all funny. The estimates have ignored the most elementary historical facts, and they have misread the most important developments of our time. They said the Shah of Iran was in no danger, and he is gone. They said Egypt was not preparing to attack Israel in 1973, and it attacked. They said the Arabs would neither radically raise prices nor embargo oil, and they did both. They said the Opening to the Left which, in the early and mid-1960s took place throughout southern South America and Italy, would bring social peace, progress and isolation of the Communists. Instead, it brought something close to social collapse, chronic instability, near-seizure of power by Communist parties, and a wave of terrorism which has left thousands dead. But these examples of run-of-the-mill failures pale in significance before the estimates' abysmal performance with regard to Soviet strategic weapons. As Professors Albert Wohlstetter and Richard Pipes, as well as Senators Daniel Moynihan and Malcolm Wallop have pointed out, the National Intelligence Estimates underestimated the size and scope, and misestimated the purpose, of the Soviet strategic buildup for almost fifteen years. As a result, for fifteen years, the people who have argued for significant improvement of American strategic weaponry have been met with the wrong but authoritative rejoinder that such improvement was not justified by Soviet actions. Today, large numbers of high officials in the executive branch, as well as legislators, find themselves surprised that the United States has become militarily inferior to the Soviet Union. They have the current system of intelligence analysis to thank for this. Whatever these experts argued about, they didn't argue about accuracy.

We must put the analytical systems failure into perspective, however. The system's defects were much magnified, indeed,

one might say, that they were allowed to be significant in the first place, by the attitudes of successive Presidents of both parties and their chief advisors. For at least a generation, top leaders have believed that, due to the existence of nuclear weapons, major war is impossible, and that, therefore, it is virtually impossible for the U.S. to lose a major international struggle. Given this, there has been little pressure from the top for accurate intelligence. In such an environment, intelligence estimates become valuable above all as political documents to be selectively given to or withheld from the press or Congress in order to maximize support for particular chosen policies. The importance of National Intelligence Estimates as domestic propaganda for the incumbent Administration has grown consistently. It can only be hoped that a growing sense of national danger will help to depoliticize the estimates.

The main problem lies at the top. One does not need classified Soviet documents and high level defectors or terribly sophisticated analysis to understand the basic thrust of Soviet foreign policy. As Professor Richard Pipes recently observed:

> That the President could seriously raise [questions about the Soviet Union's ultimate intentions], with the record of over six decades of Soviet history at his disposal, suggests that while he may have learned by now that the Soviet leaders prevaricate, he has yet to find out who they are and what they want.

One principal reason why the U.S. intelligence community has not found out what the Soviet leadership wants is that the answers have not been considered politically acceptable since the early 1960s. Thus, evidence which "doesn't fit" is either reexamined *ad infinitum* or ignored. A case in point is a Czechoslovak Major General who had worked on long-range Warsaw Pact strategic planning and who defected to the U.S. in 1968. The intelligence community has had access to him for twelve years and did not ask him a single question on long-range Warsaw Pact strategic planning. More recently, another defector, a Soviet General who headed the Frunze Military Academy, has not been given the attention warranted by his knowledge of Soviet military doctrine.

Sometimes, the treatment given at the top to dissonant sources appears less obtuse and more dishonest. William Beecher reports that:

> In May, 1972, in the hours immediately preceding agreement on the SALT I pact in Moscow, a conversation was intercepted in which Soviet Party Chairman Leonid Brezhnev checked with a top weapons expert to get assurances that an about-to-be concluded formula

covering permissible silo expansion would allow the Soviets to deploy a bigger new missile then under development. That interception provided the first solid information that the SS-19, as it is now known, was destined to replace the relatively small SS-11 missiles which comprise the bulk of the Soviet ICBM force. The SS-19 has three or four times the throw weight of the older missiles.

Despite this, as Congressman Jack Kemp writes, "In the fall of 1972 . . . the U.S. intelligence community was still referring to the SS-19 as the 'new small ICBM'."

Apparently, there was even more information on the size of the SS-19 available at the time. As has been pointed out by David Sullivan, a former CIA analyst, "The Soviets informally told U.S. SALT negotiators that they had two new missiles, now known as the SS-19 and SS-17, both of which were somewhat larger than the SS-11." In addition, Sullivan points out that, "In 1971, the U.S. Air Force intelligence warned of the likelihood that the Soviets would replace their small SS-11 missile with a much larger, heavier missile." So, by the time of the SALT I treaty debate in the U.S. Senate, the intelligence community had reason to believe that the Soviets were going to introduce bigger missiles to replace the SS-11, and they were quite concerned about preserving their right to deploy them. This evidence would probably have devastated the Administration's attempt to convince the Senate about the effectiveness of the SALT I agreement because Dr. Kissinger's principal selling point was that SALT I provisions "give us an adequate safeguard against a substantial substitution of heavy missiles for light missiles." Ambassador Gerard Smith, chief of the SALT delegation, also assured the Senate that, "We have put them on clear notice that any missile having a volume significantly larger than their SS-11, we will consider that as incompatible with the Interim Agreement."

Henry Kissinger still defends his policy regarding SALT I by arguing that, "We had no evidence whatever at the time because it didn't exist, that the Soviet Union would construct a missile which was sort of half way between the SS-11 and SS-9. . ..It was simply our lack of knowledge that such a missile existed or would be built."

But the evidence was there. On the basis of what was there, the intelligence estimates—read, the CIA—should well have concluded that the SS-17 and SS-19 would have throw weights mid-way between the SS-11 and SS-9, just as the Air Force did in 1971. But the estimates did not so conclude and continued to argue for several years that the Soviets were incapable of

doing, and unwilling to do, precisely what they were doing. The estimates simply ignored not only the intercept of Brezhnev's conversation and the negotiations' revelations, but also technical advances that had made big, counterforce missiles the order of the day. They did so because the Administration in power did not want to make such advances and did not want to be told that the Soviet Union was taking advantage of technology to make the SALT I agreement strategically meaningless.

None of this is to suggest that Henry Kissinger ordered the CIA's Office of Strategic Research to write certain words and omit others, although he did embargo some intelligence and leaked some other intelligence. He left no doubt in anyone's mind concerning what conclusions would please him. In the ideal world, as Paul Nitze points out, "The policy maker should eschew any temptation to influence the estimator to make a judgment contrary to the weight of the evidence. He may suggest questions other than those the estimator has addressed. He may also ask for evidence on which an estimator's judgment is based. He should always support the estimator's continued objectivity." In the world in which we live, however, the policymaker's concerns, especially if they coincide with the estimator's prejudices, can override mountains of evidence. As Donald McLachland points out in his classic history of British naval intelligence in World War II, "Career officers and politicians have a strong interest in cooking raw intelligence to make their master's favorite dishes."

None of this is to minimize the intellectual and the bureaucratic, as opposed to the political, factors that have harmed intelligence analysis. One important intellectual problem has to do with over-reliance on National Technical Means. We have already discussed the ways in which these are liable to enemy deception. But they also expose their users to self-deception. That is because these means yield information in small, inflexible bits. A very few intercepted conversations or signals out of millions of conversations or signals which are not intercepted can lead analysts to believe that there is nothing else happening in that field except what is indicated in the intercepts. Also, we can count missile silos from satellites and see a lot of interesting things. It is all too easy to become so absorbed in argument over the meaning of what we see that we cease to consider the existence of things we do not currently see, or even to look for new things by other means. National Technical Means lend themselves well to a certain kind of

engineering analysis which is all too dependent on artificial assumptions, and often ends in self-imposed blindness.

As regards bureaucracy, suffice it to say that the record shows it is all too easy for all analytical organizations—not just CIA—to fall prey to conventional wisdom, the office view of things. The Air Force, for example, while it was bullishly and correctly forecasting the growth of the Soviet ICBM force, was stubbornly refusing to acknowledge the evidence on the accuracy of Soviet warheads. The Soviets' accuracy threatens one of the Air Force's prize assets—our land-based missiles. If these missiles cease to be a viable part of our forces, the Air Force stands to lose a mission. An organization can also acquire an interest in a line of analytical judgments just by having taken that line repeatedly.

Nothing would so improve the quality of intelligence analysis as insistence, by the President and his chief subordinates, that estimates be intellectually honest. Such insistence would be manifested by a skeptical attitude toward all analytical conclusions, by demands that conclusions be demonstrated by evidence, by willingness to follow and criticize trains of thought, to read and to hear opposing arguments, to reward those who build a record of accuracy, and to demote those who prove to be consistently wrong or occasionally dishonest. This would mean that the President and his chief subordinates would have to pay more attention to intelligence than ever before in our history. But the nation's predicament and the previous record of National Intelligence Estimates demand such attention.

Administrative measures could also go a long way toward improving the quality of analysis. Throughout American intelligence agencies, the position of analyst is unenviable. Analysts are usually recruited without special knowledge or expertise. Technical analysts often know little about military and political matters, while area analysts often do not even know the languages of their assigned areas. Practically none are equipped to put themselves in the shoes of the people whose decisions it is their job to fathom. Nor are they given much time to fathom them. Because he must write a great deal, the analyst can read but little. Most of his time, however, is spent clearing what he has written "up the line," or coordinating his office's position with those of other offices. If an analyst is successful, he or she will be promoted to an administrative position. As he rises, contact with his subject matter will decrease, and his contact with policymakers will increase. As his career peaks, he will be an expert on how to handle high officials, but on little else. No

other major country treats its analysts so. Administrative policy in each of the agencies could make the position of analyst one to which talented people would aspire, one to which someone could be promoted after perhaps serving as an administrator. Perhaps we could follow the Soviet pattern and appoint as analysts only people who have already "made it" in the military, in research, or in intelligence. At any rate, the questions asked of the analysts ought to be few, and the answers ought to be their own. Those who write estimates should take responsibility for them.

Nothing causes a writer of non-fiction, including intelligence, to strive for accuracy so much as the knowledge that his reader will also be reading another product, which is likely to present a contrasting view of the subject. Recently, the leadership of the CIA's NFAC was augmented by the establishment of the "B Team," a group of independent experts who, in 1976, were given access to intelligence data and the task of seeing if the data could support conclusions different from those of the national estimates on Soviet strategic weapons programs. The "B Team" severely criticized the NIEs and noted that those analysts who had dissented from the NIEs have been right. This episode proved to be healthy, for it signalled to analysts throughout the intelligence community that dissents are not necessarily in vain, and that the bureaucratic power to stamp a set of conclusions as the official view of the intelligence community is worth little when alternate views can be argued before high policymakers. Possibly as a result of the B Team episode, the Defense Intelligence Agency in 1980, in a wholly unprecedented action, formally disassociated itself from the conclusions drawn by the National Intelligence Estimates on Soviet strategic forces. As a result, policymakers now know that, there being strong disagreement among the agencies, they cannot escape the responsiblity of making up their own minds.

But the DIA's action in 1980 is an anomaly, due in part to a bureaucratic quarrel then going on between the Secretary of Defense and the Director of the CIA. Such healthy confrontation must not require extraordinary courage or the fortuitous occurrence of just the right bureaucratic conflict. They must be encouraged to happen as a matter of course. They cannot happen routinely, however, so long as the Director of the CIA also has responsibility for DIA's budget, and so long as only the CIA has the mission of publishing national estimates.

Legislation is therefore required to end the anomalous situation in which the Director of Central Intelligence, who

serves at the pleasure of the President, is at once the head of a part of the intelligence community and the head of the whole. Legislation should establish a Director of National Intelligence in the Excutive Office of the President, but should provide for a Director of NFAC who would serve a fixed term and could not be reappointed. At the same time, legislation should give to DIA as well as to NFAC the mission of producing National Intelligence Estimates. Ultimately, elected officials cannot escape the responsiblity for peering through clouds of facts and uncertainties, and for deciding just what dangers and opportunities lie ahead. The existence of more than one National Estimate on any given subject would impress upon analysts and policymakers alike of the true importance of their respective responsibilities.

29

OFFICE OF MANAGEMENT AND BUDGET

Joe O. Rogers*

BASIC POLICY ASSUMPTIONS

The federal budget is a method of allocation of scarce federal resources. That fact has eluded recent Presidents and Congresses. Federal budgets have lately been composed of wish-lists from agencies which come to the President after sifting through OMB. This is backwards. The first step in budget development is to determine the aggregate budget limits and the basic policy objectives of the ultimate allocation of resources. The role of OMB should be to assist the President in setting these aggregates and the accompanying major policy directions.

The emphasis of OMB staff work would be the development of these policy alternatives and not the constant budget reviews which currently absorb its resources. Such budget review work should be restricted to assuring the President that the Secretaries and agency heads are following their prescribed budget limits and policies with the more detailed review and audit work assigned to the departments. This approach will require strengthening the budget review and control apparatus *within* each department and agency so that the budget management function can be successful at that level.

**Author's Note:* The preparation of this report was a collective enterprise involving many individuals. Guy Cook, James E. Dwight, Jr., Jack Howard, Jan Olson, Elise Paylan, Bruce Thompson and Jack Wimer deserve particular mention. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

PRINCIPAL DEFICIENCIES

The principal deficiencies of OMB stem from the nature of the budget process itself. Fundamental administrative and legislative changes will be required if these are to be corrected.

From the standpoint of controlling expenditures, the current budget process has been disastrous. Aggregates are now determined by summing up the constituent parts of the budget requests from the agencies. As such, the budget is merely a tool for recording spending, rather than a method of controlling spending. The President and OMB are now in a reactive posture. OMB has become a critic rather than an actor.

The present budget process revolves around departmental budget requests and policy initiatives. As such, the departments are the true policy formulators, not the President or the Cabinet. The result is a policy-making apparatus which is difficult to control and which is capable of proposing and having enacted programs which frequently do not conform to the basic philosophy of the President. Further, this dispersed policy-making results in the creation of new programs merely as justification for the existence of policy and research bureaucracies.

A second, but no less important, deficiency in the budget process is the procedure for actually managing budget expenditures. The President is given the responsibility for managing and controlling spending but has been severely restricted in the tools available to him.

The President receives no information on the actual rate and level of outlays during the fiscal year. Nowhere in the plethora of budget reports and computer runs can be found the actual expenditures of the government during a given month on anything approaching a current basis. One reason is that departments and appropriations committees of Congress record spending as authority to spend rather than actual expenditures. Funds from these appropriations may be spent at any time after obligation.

The current method of tracking the actual outlays is to make educated guesses. Over the past two fiscal years, these guesses have been far short. A new system of tracking outlays is required which maintains up-to-date data and provides the President with the tools to reduce the rate of actual outlays when budget aggregates are threatened.

While a new data-collection system can be set up by the President by Executive Order, providing tools for the actual

reduction of outlays will require new legislation amending the Congressional Budget and Impoundment Control Act of 1974.

The Budget Act strictly limits the ability of the President to control the actual obligations and expenditures of appropriated budget authority. Through deferrals he may delay obligation of funds to the end of the fiscal year. This has the effect of placing actual expenditures in later fiscal years so that they do not count against the current year's deficit. It may also be used as a means of putting off obligation pending legislative changes which would eliminate the budget authority altogether. Deferrals are an effective method of control as they are subject to congressional veto rather than requiring congressional approval. Their weakness, obviously, is that unless a legislative change is made, the funds are ultimately spent.

A potentially more powerful tool available to the President is the rescission of appropriated budget authority. Recission gives to the President the ability to curtail obligation and expenditures when required either as a change in policy or as a mechanism for maintaining fiscal restraint. The use of rescissions has been limited, however, by the requirement in the Budget Act that all rescissions be approved by the Congress. This requirement placed in law as an overreaction to the Nixon Administration, has virtually prevented any rescissions from being made. Since the Budget Act became law, only one-fifth of all proposed rescissions have been approved by the Congress.

If the President is to exercise proper management control over the fiscal resources of the government, it is necessary to amend the Budget Act to place rescissions and deferrals alike under a one-house congressional veto. This would assure that spending which the Congress genuinely favors could be insisted upon but that other unnecessary and unsupported spending would not occur solely due to congressional inertia.

On the management side of OMB, the major deficiencies stem from the sheer volume of activities which are attmepted. Through a decade-long series of Executive Orders, Presidents have delegated to OMB a substantial portion of Presidential duties. While many of these, such as standardizing statistical terminology and definitions, are clearly housekeeping chores appropriate to OMB, decisions concerning river basin commissions, science and technology policy, etc., are clearly outside the scope of OMB's mandate. These functions should be returned to the appropriate departments.

In short, the President should redirect the efforts of the

departments to administering the government and leave to the Executive Office of the President the responsibility for setting budget policy priorities.

SHORT-TERM PROBLEMS AND OPTIONS

The immediate task for OMB will be the preparation of substitute budgets for fiscal years 1981 and 1982, and this task must be completed prior to March 1, 1981. The FY 1981 budget should consist of a complete substitute and a series of appropriation deferrals. This budget should be aimed at the second half of FY 1981. The OMB staff should prepare for the formulation of the 1982 budget by organizing itself immediately into policy task forces for the purpose of relating the overall policy goals of the President to the specific budgets—and tasks—of the departments and agencies.

The 1982 budget will be the true battleground for the new administration. It is with this document that major redirections in policy will be attempted.

OMB immediately should begin work in conjunction with the Council of Economic Advisers and Treasury to establish the spending and revenue limits for the 1982 fiscal year. Concurrently, the OMB senior staff and the staff of the President's senior advisors should begin to establish the major budget policy goals for FY 1981. Further, they should prepare an initial allocation of the budget aggregates based on the relatively uncontrollable portions of the budget for FY 1981.

Once the work of the OMB task forces is completed, the President and the Cabinet will be ready to make the final allocations and send the budget to the Congress. As a practical matter, the departmental budget bureaucracies will have little if any input to this process. With the entire government in transition, their input could not be gained in a timely manner. It must be remembered that this FY 1981 substitute will serve to limit the further obligation of budget authority until a thorough budget review can be undertaken.

During the process of preparing the substitute budget, a series of appropriation deferrals should be prepared. It is recommended that deferrals be used rather than rescissions because the deferrals will require a positive act of Congress to veto them. Any deferral not vetoed will prevent the obligation of funds until the end of the FY 1981 fiscal year. It is assumed that by that time the President will have prepared rescission legislation.

As with all budgets, the first step of the FY 1982 budget will be to set the budget aggregates. In this task, the premise should be that there are *no* uncontrollable items save previously obligated budget authority and interest on the public debt. Even with these, there exists the possibility of withdrawing the budget authority by invoking escape clauses in contracts or through changes in programs. Therefore, the President and OMB are free to set the budget aggregates without being bound by previous budgets. Understanding this is fundamental to successfully reversing the growth of the federal budget.

Both the FY 1981 and FY 1982 budgets will face the ever-present problem of supposedly "uncontrollable" outlays. President Carter's FY 1981 budget submission listed $471.6 billion (76.6 percent) as uncontrollable. Of this, only $156.2 billion (25.4 percent) consisting of interest on the public debt and prior year obligations was truly uncontrollable. Many items are uncontrollable under present law, such as food stamp outlays. *These laws can be changed,* as proven in the second session of the 96th Congress when both the House and the Senate approved bills that would change current law regarding unemployment compensation and child nutrition allocation formulas in order to meet the reconciliation requirements of the budget.

Having removed controllability as a binding constraint, the budget aggregates could be set according to the amount of marginal tax rate reduction required to revive a stagnant economy and the appropriate level of government use of resources under the policy goals of the President.

The most difficult job for the President and OMB will be to articulate the policy goals in such a way as to make them useful as a screen for developing more specific program criteria. Without these goals and criteria the budget becomes an amorphous accounting ledger rather than a tool for governing the nation. Unless the philosophy of the President is translated into specific goals and criteria, there can be no basis for allocating the budget aggregates.

In the economic sphere, conservative philosophy and goals will be relatively simple to articulate and to translate into program criteria:

Philosophy. The free market, operating as vehicle for millions of individual decisions, is a more efficient allocator of resources than government and leads, therefore, to greater production and higher real income for all workers.

Budget Policy Goal. Limit or eliminate the use of federal funds for programs which interfere with the setting of prices and the allocation of resources by the free market except where the defense of the nation or the public health is endangered.

Program Criteria. Federal programs should conform to the following criteria:

1. Free market prices must be maintained.
2. The rights of individuals to buy and sell goods and services at free market prices must not be abridged.
3. The free flow of commodities must be maintained.
4. Government purchasing power and credit are not to be used to alter the distribution of goods and services except for purchases and sales required for the functioning of the government.

It will be necessary for the President to develop such a progression from philosophy to program criteria for each major public policy area. He must then gain a consensus within the Cabinet on the appropriateness of using these criteria in the budget process. It will then fall to OMB to monitor the agencies and departments for compliance with the President's policy goals.

This method of preparing and monitoring the budget would be a marked departure from recent practice. To the departments will fall the decisions of allocating the resources given them by the President. OMB will concern itself only peripherally with the intradepartment allocations but will direct its resources to assuring that the philosophical viewpoint of the President is being carried forward in his budget submission to the Congress.

The task of setting out the basic philosophy of the new administration should begin immediately. The President should identify the major public policy goals of the first year of his administation quickly so that these may be integrated into the budget process. By the time of inauguration, the senior officials of OMB should have completed their preparation of the basic criteria and be prepared to reorganize the staff for carrying out its new responsibilities.

One of the new responsibilities of senior OMB management will be the development of an improved agency analysis process for major issues. This model is crucial, since the President, the Cabinet, and OMB personnel must constantly either review or approve each other's work.

An outline for a suggested analysis process follows:

1. Establish OMB/Agency task forces in major policy subject areas.
2. Identify issues for review.
   - OMB generates this subdivision and submits to the Cabinet for approval.
   - Cabinet reviews and modifies list of issues.
3. Develop individual plan for review.
4. Establish schedule for deliverables.
5. Assign appropriate personnel to task forces on full-time basis.
6. Senior OMB staff monitors schedule and completion of tasks.
7. Periodic status reports to Cabinet.
8. Reports to Cabinet on conclusions.
9. Cabinet recommendations.
10. Presidential decisions.
11. Feed results into budget process.

Once an issue has been analyzed and the policy goals have been set, the process becomes the method by which these goals are translated into action. As previously stated, the budget process must begin with the President and OMB, rather than the President having to work with a conglomeration of department wish-lists.

An outline for proper budget process flow follows:

1. Preliminary allocation goes to agencies.
   - Base shall be the current level of operation or current law.
   - Capital outlays shall be separate.
2. Cabinet reviews allocation and the President approves. Totals are established and any modification of the basis of allocation occurs here.
3. Development of budget proposal within allocation.
   - Identify lowest priority in the base by some percentage (e.g., 20 percent).
   - Identify new initiatives and priorities in relation to lowest priority in base.
4. Cabinet conducts a review.
   - Secretarial assignment—each agency would submit through a Secretary (e.g., veterans affairs through Secretary of HHS or Labor).
   - Secretarial review and responsibility:
     —establish validity of priorities,

—seek assistance from OMB staff where necessary, and
—identify issues for review or further study.

• Cabinet reviews and recommends proposals to the President in a priorities package to permit Presidential choice and decision.

5. Presidential decision.

6. President's decision is conveyed to agencies via Secretaries.

7. Cabinet reviews any appeals or objections and makes recommendation to the President.

8. Agencies prepare budgets.

9. OMB checks totals only.

10. Budget documentation on basis of minimum necessary to meet congressional and Presidential needs.

One of the serious flaws in the present budget process is the inability to control actual federal outlays. In fact, the outlay concept is now important only to the House and Senate Budget Committees which use it for estimating the budget deficit. The Appropriations Committees and the federal departments operate solely on the basis of budget authority. Further, the President is able to rescind or defer budget authority but virtually powerless to control outlays once obligations are made.

Pending enactment of legislation making outlays a binding constraint in the budget process, the President should act to establish administrative constraints. A system of monitoring outlay levels with no more than a one-month lag should be developed by OMB. Along with this monitoring, the departments should be required to maintain a schedule of rescission and deferral possibilities which would prevent outlay overruns, should they be anticipated.

For the longer term, the Office of Federal Procurement and Contracts Policy,* discussed below, should develop standard contracts which limit the rate of outlays possible under a given obligation of budget authority. With the billions of dollars of outstanding obligations, this limitation will become effective slowly, but will enable future budgets to be written with some assurance that outlays will be more controllable.

SHORT-TERM PROBLEMS AND OPTIONS: LEGISLATIVE

Of the legislative changes which are required for strengthening the budget process, only one is recommended as a short-

*Suggested name of new agency resulting from the merger of the Office of Federal Procurement Policy and the Office of Federal Contract Compliance Programs. The new agency is recommended to remain under OMB's direction.

term initiative. Working with the House and Senate Budget Committees, the President should initiate legislation altering the rescission process. It is recommended that rescissions be placed under the same system as deferrals with the Congress having 45 days in which to veto the President's decision to rescind budget authority. This veto, like that for deferrals, could be made by one House.

The effect of this change will be to strengthen the President's management control. For instance, as the FY 1980 deficit loomed ever larger it became evident that the FY 1981 budget would not be balanced. Programs such as food stamps, unemployment insurance and Aid to Families with Dependent Children were spending at increasing rates as the effect of the recession was felt. The President, however, had no effective tool for limiting obligation of budget authority during FY 1980 which would result in outlays in FY 1981. With the Congress having approved only 20 percent of all previous rescissions (and an election looming), there was no possibility that sufficient rescissions could be made to have a significant influence on the FY 1981 deficit.

MEDIUM-TERM PROBLEMS AND OPTIONS

Administrative

The major administrative problems of the first year of a new administration will revolve around altering the philosophy of OMB and the departments regarding their roles in the budget process. While much of the readjustment will require management finesse rather than precise directives, there are several options available through Executive Orders.

Once the new budget for FY 1982 has been completed, the senior staff of OMB should undertake a reevaluation of the management role of OMB in the government. The goal of this reevaluation should be to draft a set of recommendations for the President for placing the day-to-day management of the government back into the hands of the Cabinet officers. (For example, tasks assigned to OMB by Executive Order 12039 of February 25, 1978 concerning dissemination of the results of intergovernmental research would be assigned to the Assistant Secretary for Science and Technology in the Department of Commerce, the lead agency for the commercialization of scientific knowledge.)

A major administrative change within OMB may be made during the first year of the new administration by eliminating

the Reorganization and Management section of OMB. This task group was formed by President Carter to coordinate his government reorganization initiatives.

Legislative

The legislative changes affecting OMB which can reasonably be attempted in the first year of the administration are limited. Any changes require amendments to the Budget Act itself, a difficult task under the best of circumstances. There are two changes, however, which should be proposed if only for the purpose of beginning a dialogue for further activity.

First, federal outlays need to be made a binding constraint on the Congress as well as on the Executive Branch. The current system of using estimated outlays to determine an estimated deficit and then allowing outlays to reach whatever level allowed within the allotted budget authority must be changed. Just as the President must exercise control over the spending within departments, the Congress should limit the rate of outlays available from its appropriations. Given that this issue is a congressional prerogative, it is recommended that the President meet with the appropriate members of Congress to discuss the possibilities for establishing outlay controls.

The second legislative change recommended will be significantly more controversial and should not be expected to be accomplished within the year. Specifically, conversion of the congressional budget process form one which produces a mere budget guideline—a guideline historically honored in the breach—to one which produces a legal and binding budget for the federal government.

Under the Budget Act, as currently written, all of the control and enforcement procedures are rules of the two Houses rather than Public Law. Therefore, should any limitations or deadlines be inconvenient to the Congress, they are simply ignored or altered by a simple majority vote. Examples of this abound. In 1979 and 1980, the deadlines for adoption of the Second Concurrent Resolution on the Budget was missed. Not until late November 1979 was the budget for FY 1980 adopted, over a month after the fiscal year had begun. In 1980, the budget was purposefully not acted upon until the Presidential election had taken place. The Senate leadership refused to take action on the resolution offered by its Budget Committee, and the House Budget Committee simply refused to act.

By changing the status of the Congressional Budget from

guideline to legal obligation, the Congress and the President will show themselves responsive to the demand of the electorate that irresponsible behavior be ended.

Of the non-budget activities of OMB, the most distressing problem lies with the Office of Federal Procurement Policy. This office has become an integral part of Carter's economic police state. This office has been used to harass government suppliers over racial quotas in hiring to the point of denying federal contracts to firms merely suspected of discrimination. OFPP has worked in concert with the Council on Wage and Price Stability to bludgeon suppliers thought to be out of compliance with the supposedly voluntary wage and price guidelines. OFPP should resume its responsibilities of streamlining federal procurement.

During the first year of the administration, legislation should be introduced which would combine the Office of Federal Procurement Policy with the Office of Federal Contract Compliance Programs. The new agency, independent yet attached to OMB, would be called the Office of Federal Procurement and Contracts Policy. The new agency would turn in its badge and gun used so often on federal contractors and suppliers and begin to work on establishing sound business practice policy for the management of goods and services purchased by the government. The actual administrative functions and contract compliance would be returned to the various agencies.

PERSONNEL MANAGEMENT

The management of OMB will change significantly if it is to meet its recommended responsibilities. This should not, however, have much effect on the staffing levels required or on the organizational structure. With the exception of OFPP, which operates as an appendage, and the Reorganization and Management Section, which should be eliminated, OMB is divided into two sections: a Budget section and an Administrative section. This division is suited to the new direction of the organization with few modifications.

On the management side, the major defect is weakness within the Economic Policy Section which works under the Administrative section. This group has had little input into budget decisions and has played a very minor role in overall policy discussions. If OMB is to work with the Treasury and the Council of Economic Advisors in determining the proper level and structure of federal revenues, an economic staff

headed by an economist of national reputation should be appointed. This change, along with the President's commitment to using the budget as a resource allocation tool should be sufficient to correct the existing problems.

The budget side of OMB is organized into four substantive program sections and a budget review section. To bring about the recommended reorientation in OMB, this structure must eventually be changed to combine the policy and budget review staffs. However, given the hardship of preparing two budgets in three months, this reorganization should be delayed. The initial reorganization can more easily be made by establishing policy task forces from the available slots in each section. Thus, the expertise of all groups can be brought together rapidly.

The eventual reorganization, other than the general outline of combining policy and budget review, will depend upon the policy issues which the President chooses to emphasize. It is unlikely, however, that these will differ substantially from the existing program areas given the structure of federal participation in these areas.

A more critical issue at OMB will be the selection of personnel. Obviously, the most crucial appointment will be the Director. It is assumed, of course, that the individual will be committed to the policy goals of the President. In addition, there are three criteria which should be met. First, the individual must be able to articulate the policy goals of the President so as to transcend the interdepartmental and interprograms rivalries which exist. That is, the individual must be able to carry forward on the progression from basic philosophy to program criteria without being deflected.

Second, the individual must be committed to the revitalization of the American economy through reduction in the federal claim on productive resources and in a federal interference in market pricing and allocation decisions. This means that the individual must be an individual who thoroughly understands the principles of economic growth and the impact which governmental decisions have on the ability of American workers and business to produce.

Third, and finally, the individual should be of sufficient stature before the Congress and the other members of the Cabinet to command the respect and goodwill which will be required for a difficult job.

For the senior staff, the criteria are little different from those for the Director. The most important staffing task will be to

locate people who are expert in their respective policy areas who also have the ability and desire to place their immediate policy concerns in the light of the President's overall philosophy. Most difficult will be the necessary requirement that each member of the senior staff meet criteria number two above: an understanding of the interaction of government and the private sector.

LONG-TERM PROBLEMS AND OPPORTUNITIES

In addition to making the congressional budget a binding document, two decisions in the process should be made only by a super-majority of the Congress. First, the passage of any binding budget resolution which contains a deficit should require a three-fifths majority of each House. This would assure that deficits occur only for the achievement of overriding national objectives as determined by the Congress and the President.

Second, the passage of any binding budget resolution after the Second Concurrent Resolution has been enacted should require the same three-fifths vote by each House. This is desirable to end the procession of additional resolutions and amendments to resolutions which has occurred in the initial years of the Budget Act. In only two of five years has the Second Concurrent Resolution been maintained. In the other three years, the realization that obligations would exceed the budget limits resulted in significant additions to the budget. The ease with which these changes were carried forward has made a sham of fiscal responsibility and has shown the Congressional Budget process to be little more than a catalogue of government largess. The requirement of a three-fifth majority corrects a major flaw in the process.

Although this is a long-range opportunity, it is recommended that a bill to accomplish this goal be introduced during the early days of the 97th Congress to start the debate on this proposal while the country is still feeling the effects of deficit spending by Congress.

With the above legislative change, a more important shift can take place. Government officials, from the Cabinet level down can be reoriented to consider the federal budget as an allocation of scarce federal resources and the free market to be an even more efficient allocator of our nation's resources.

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ENVIRONMENTAL PROTECTION AGENCY

Louis J. Cordia*

INTRODUCTION

Protection of health and enhancement of the physical environment require attention to controlling pollution. A national effort requires a federal guiding entity. Thus, the need for a body such as the Environmental Protection Agency (EPA) is unquestioned.

Federal agency involvement dates from 1948. Intensive effort, however, did not begin until 1965 with passage of the amendments to the Water Pollution Control Act. Air pollution control efforts date from 1963. Within the past two decades remarkable progress has been achieved in these areas.

However, accompanying this obvious improvement in the quality of the nation's air and water has been the development of a regulatory morass of controls which are not limited to the protection of health and enhancement of the environment but which infringe on policies and programs designed to improve social and economic aspects of the "total human environment." Emphasis on regulation has diverted the program from one of defined objectives and alternatives which consider social and economic impact to one of judicial challenge. This direction not only delays accomplishment but destroys local initiative and responsibility. The increasing public outcry against such federal control of decision-making emphasizes the importance of recognizing present conditions in the EPA and

**Author's Note:* This study could not have been completed without the valuable assistance of a team of fifty-six individuals drawn from the Environmental Protection Agency, congressional staffs, state government, academia and industry. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

reorienting its program in order to attain originally intended objectives without considering other national goals.

This goal can be reached only if the Agency is directed and staffed by personnel who have a demonstrated competency in environmental management and a dedicated interest in reducing federal government dictation. Proper administrative direction and not legislative remedy is an immediate need.

The stated primary objective of all environmental law is the protection of health. The secondary objective is the enhancement of the general welfare. If the regulations and standards are not predicated on an adequate data base, do not reflect credible science, and do not balance equities so the rights of all are considered, there is neither an assurance of health protection, nor a basis for enhancing the human environment.

That scenario is the actual situation. The EPA must give greater consideration to the "total human environment"—health, food, energy, jobs, housing, recreation, safety, education—of the nation. The question has to be answered seriously: can we afford to try to protect 100 percent of the people 100 percent of the time from every conceivable risk? Can we assume that such total protection is possible? No statute requires this absolutism, but the EPA regulates toward a goal which assumes an affirmative answer. However, efforts to achieve such ends directly or indirectly affect other aspects of the "total human environment." In addition, an attempt to make things perfect actually causes delay in doing the practicable.

The EPA continues to promulgate a plethora of standards of questionable validity and regulations which substitute adversary action for leadership. Worse, the standards and regulations commit resources, financial and material, for specific limited purpose objectives and divert them from other needs. With no coordination in the EPA, there is no long-term objective or priority in answering human needs. Arguing that total protection of the physical environment provides for enhancement of the human environment is fatuous.

How crippling and costly EPA regulations can be is illustrated by the red tape and paperwork involved in the cities obtaining funds for construction of a sewage treatment plant. With inflation adding about 1 percent each month to the cost and the delay in getting EPA approval (it can take 8 to 10 years to complete construction), New York State and others are telling communities they cannot afford a 75 percent federal grant.

The EPA failure to promulgate scientifically-defensible air standards and the EPA failure to approve state clean air implementation plans in a timely fashion have stalled many construction projects because building permits cannot be issued. At a time of high unemployment, such unnecessary delay is disruptive to economic recovery. In addition, a policy that postpones the installation of facilities to replace antiquated facilities only perpetuates pollution and does not achieve cleaner air or water.

Early in the next session of Congress, the Clean Air Act and the Clean Water Act reauthorizations will be under consideration. Neither statute now requires a cost/benefit or risk/benefit analysis. The timing is unfortunate, for a redirected Agency could have easily provided Congress with guidance. The dominant role of EPA decisions and programs that affect responsibilities of many agencies—federal, state and local—requires attention to the fact that air, water and land are closely interrelated; a decision on one aspect affects the others and each decision affects other agency programs. EPA policies and regulations have ignored this fact. EPA interference or influence on growth must be recognized and a mechanism must be provided to consider what are often conflicting objectives and policies. The more adequate the data base, the easier such an assessment. The more impartial the data collection, the more reliable the base.

If the desired objectives are to be achieved, there must be recognition that limited competency and bias in the EPA are reflected in the substitution of regulation for leadership. Regulation—wordy, often contradictory, and frequently lacking sound scientific basis—must be replaced by:

1. Leadership that is knowledgeable, experienced in doing the job, and trained in the engineering, science and economics required for sound diagnosis of conditions and correction of the problems. Technical competency must supercede the ineffective legalistic approach now practiced.

2. Data collection that is adequate and accurate and properly interpreted and done by agencies not involved in enforcement. The General Accounting Office (GAO) criticism of this aspect of EPA programs is well taken.

3. Research assigned to the agencies with the primary responsibility for collection of data (e.g., U.S. Geological Survey (USGS) for water, National Oceanic and Atmsopheric Administration (NOAA) for air, National Institute of Health (NIH) for health) to eliminate duplication. Research remaining

in EPA should either be transferred as well or upgraded. Applied research (e.g., pollution control monitoring or treatment devices) could, and maybe should, be contracted to the private sector.

4. Standard-setting by state agencies to reflect local needs, but based on adequate criteria which define effects of various levels of quality on specific uses, developed by panels of distinguished scientists who are not employed by the EPA or indirectly connected to the Agency via contract work. An alternative would be to have national standards which reflect various levels consistent with uses to be protected (criteria document) and a definition of the factors which must be evaluated in selecting the specific concentration standard for a given area.

5. Panels established on a regional basis to act as sounding boards for citizen understanding of the potential impact of proposed regulations on other programs affecting their way of life, and the cost to the citizen. This dialogue in effect, would be what many intended would be the benefit of the National Environmental Policy Act (NEPA). Section 101 of NEPA spells out that purpose.

6. Reduction of financing costs to cities and industries by expediting decision on needs of, and approval of, construction plans through total delegation of authority to state agencies. The federal role should be to require an adequate data base before state decisions are made on treatment requirements and review monitoring data to assure compliance after construction. The House Appropriations Committee and GAO reports document savings that would result from limiting treatment requirements, from adopting valid standards, and from attention to basic needs. An inventory could be easily developed as a basis for decision on ending the federal grant program.

Most of these suggestions and recommendations can be handled administratively. The leadership would require appointments of specific capabilities. The data collection can be transferred with appropriate funding to qualified agencies (e.g., USGS for water, NOAA for air, NIH for health, etc.). These agencies do work now for the EPA, and this idea would simply enlarge that activity. DOE could possibly make energy impact analyses. Research is also a divided activity; some at EPA centers, some by contract. Transfer of research from EPA research centers would require legislation. Standard-setting could be revised by administrative action. Criteria could be developed by outside entities, either under contract,

as is now done in part, or by transfer of responsibility to the National Academy of Science (NAS), provided that the influence of EPA be removed by having Congress fund NAS as a self-sufficient entity. If the EPA were to fund criteria development, it should be by direct funding to NAS with NAS accepting full responsibility for the membership of the panel. There is adequate authority to delegate responsibility for standards and treatment requirements, including plans and specifications; only administrative decision is necessary.

These changes would not only permit the EPA to develop policy for distribution of funds for construction and state administrative programs but also to act as an enforcement agency when states fail to accept responsibility. The record of EPA's control over state programs via program grant constraints must also be changed and, again, administrative leadership is all that is required.

POLICY INITIATIVES

Air

Background

Although significant federal legislation dealing with pollution was enacted during the 1960s, the statutory framework now in effect was established by the Clean Air Act of 1970 (CAA). That legislation was amended in 1974 to deal with energy-related questions and again in 1977 when a number of amendments were adopted with particularly important provisions concerning approval of new industrial plants.

The primary objective of the Clean Air Act of 1977 is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."

The Act is founded on the concept of achieving air quality control by specifying national ambient air quality standards (NAAQS). It directs EPA to set primary (health-related) and secondary (welfare-related) standards for "criteria" pollutants. Currently, this list includes: lead, hydrocarbons, particulate matter, sulfur oxide, carbon monoxide, nitrogen dioxide, and ozone. These standards are the foundation of the CAA and, consequently, it is important that they be properly set.

Section 107 of the Act mandates procedures to be used for the designation of those areas of the country not meeting the NAAQS (nonattainment areas) and those areas of the country

where the air quality surpassed the NAAQS (prevention of significant deterioration areas—PSD).

To obtain a permit to build a facility which constitutes a "major new source," requires compliance with different regulations, depending on whether the source is in compliance with different regulations, depending on whether the source is in a nonattainment area or a PSD area. In nonattainment areas, these requirements are part of a State Implementation Plan (SIP). All states with nonattainment areas were required to submit to the EPA revised SIPs by January 1979, and receive approval from the EPA by July 1, 1979. Failure of a state to meet this deadline could result in a prohibition of the construction of new "major sources" and the loss of multiple federal funds. Very few states (four as of November 1, 1980) have met this deadline. Until a state has an approved SIP, construction permits for new sources in a nonattainment area cannot be issued.

To build a facility which constitutes a "major new source" in a PSD area, requires compliance with different regulations, including a year of monitoring data and modeling analysis. The NAAQS are to be achieved by the end of 1982, unless, in the case of carbon monoxide and ozone, an area-by-area extension to 1987 is granted.

The Act theoretically provides broad flexibility to state government for achieving these ambient standards, but mandates EPA review and approval. Unfortunately, the EPA too often has interjected unnecessary mandatory requirements in that review, thereby limiting state initiative and flexibility. The Act also requires the EPA to provide an up-to-date summation of known health effects as a basis for justifying the air quality standards. However, the Agency has not complied with this requirement by establishing an acceptable scientific data base for the NAAQS and, therefore, the promulgated standards themselves are widely criticized as lacking validity, as being overly stringent and, as unnecessarily slowing or even stopping economic growth.

In addition to the ambient controls, the CAA contains specific levels of emission control for automobiles and trucks as well as technology-based emission standards for some specified types of new industrial plants.

Principal Deficiencies of Existing Policies

1. Lack of management and coordination among air/water/solid waste/toxics sections within the EPA. The EPA has failed to

evaluate programs in light of the total effects of its actions on individual sections of society. There is no effective coordination of individual EPA branches with overall societal objectives, such as the need for a coherent energy program or a "toxics" program.

2. Failure to provide independent peer review of EPA-generated scientific documents. EPA documents reflect opinions and knowledge of either a few people in the Agency or contractors hired by it; scientific and technical data are not routinely subject to general peer review prior to promulgation as is customary in many other government agencies.

3. Failure to delegate authority to states. Contrary to clear congressional intent the EPA attempts to use its review and approval powers to control all details of state programs and decisions, and aggressively seeks to implement permit-by-permit oversight after delegation of permit programs to the states. EPA policies and regulations are so rigid that in many cases states have almost no latitude in adjusting to local issues and circumstances. In fact, excessive and resource intensive EPA requirements discourage states from seeking authority. The motivating force behind this attitude is an apparent lack of trust by the EPA in the states' ability to develop and implement effective programs.

4. Failure to implement adequately congressional intent on research. Section 103 of the Clean Air Act mandates the EPA to provide the fundamental health effects, research, and air quality data necessary to set standards intelligently and regulate air pollutant emissions so as to protect public health, welfare, and the environment. The EPA has primarily used its research effort on short-term projects to support preconceived positions and regulatory proposals (e.g., acid rain and a "dead" Lake Erie). Congressional and General Accounting Office (GAO) reports criticize the EPA for failing to provide sound scientific basis for regulatory programs. The EPA tends to resist R & D efforts by other agencies, academic institutions, industry and/or private contractors, and to discredit research efforts that are not supported by or not consistent with existing or preconceived regulatory policy (e.g., Black and Veatch report on industrial cost recovery).

5. Preference for design-based rather than performance-based standards. The EPA tends to favor strongly the promulgation of design-based standards, which identify and mandate use of specific control technology ("black boxes"). Design-based standards actually stifle innovative technology

by limiting the flexibility and economic incentive to install the most cost-effective control technology to meet the standard; tend to create monopoly circumstances favoring existing manufacturers; and deprive the environmental community, the regulated communities, and general industry of the benefits of competition in the technological marketplace.

6. Zero discharge. This concept is mandated in many environmental areas. It represents a fundamental policy dispute that transcends specific pollutants or control measures. The advocates of "zero emissions" view the role of the EPA and the federal government as requiring continuous control on discharges and a continuing effort to further reduce emissions, towards the ultimate goal of complete elimination with little or no consideration of costs or commensurate benefits. By contrast, advocates of the approach taken in the 1970 Clean Air Act argue it is possible and proper to define through scientific means an objective level of air quality below which no unacceptable adverse effects occur and the attainment of which represents the optimum level that should properly be expected to be achieved.

7. Failure to learn from experience by not making retrospective cost/benefit analyses of regulatory programs already implemented. For example, hundreds of millions of dollars have been spent on control of vinyl chloride emissions without studies, either planned or undertaken, on the value society receives from the control program. Actually, the EPA is considering even further regulation without considering such issues.

8. Failure to balance the dual purposes of the Clean Air Act: to protect the nation's air resources and "to promote the public health and welfare and the productive capacity of its population" (Sec 101(b)(1) of the Clean Air Act). When the EPA takes positions expressed in terms of near "zero discharge" and requires complex regulatory procedures, the Agency deters development of productive capacity. The nation's economic and energy goals are in conflict with the penalties resulting from such regulation. Again, if risk/benefit tests were applied the unintended consequences could be appreciated and appraised.

9. The EPA requires its approval for each permit for modifying existing sources or construction of new sources of air emissions. By approving or denying such installations, the EPA thus uses the Clean Air Act as a tool to control land use and growth. EPA policies are leading to federal land use control and growth management. This approach is federal usurpation

of state, local and individual rights and private property assets without either compensation or equivalent public benefit.

Administrative Options

1. Implement better coordination between EPA branches. Officials in air/water/solid waste/toxics/pesticides branches should be cognizant of each other's programs, and work to avoid duplicative or conflicting regulations. There should be a mechanism by which agencies such as the Interagency Regulatory Liaison Group (IRLG) would have to be more receptive to inputs from outside groups.

2. Most SIPs have been approved provisionally or in part. The EPA continues to review and require state adoption of EPA views. In essence, even though the law gives primary responsible to the states, the EPA precludes this by controlling SIPs. Change in administrative policy could alter this situation by delegating detailing authority to the states after promulgating policy guidelines.

3. The EPA regulations requiring new instrumentation, monitoring station siting and quality assurance by the states should be seriously reconsidered and probably suspended. Direct EPA control, especially without financing, hampers the states' independent decisions on how best to allocate limited resources for monitoring controls.

4. New criteria documents for the NAAQS pollutants are under final review. This will allow proposals for changing the 1981 attainment standards. The EPA data base is questionable. There is also objection to the review being performed by the same people who developed the original criteria and standards a decade ago. Final publication should be deferred until an independent, objective internal and external review has been conducted.

5. Several states are in the process of revising their SIPs in order to be delegated the PSD new source review programs, but the EPA intends to continue to review individual permit applications. The EPA's "overview reponsibilities" should be limited to program approval, with no option for permit-by-permit review following SIP approval.

6. The EPA has promulgated final regulations to establish noncompliance penalties. These regulations are designed to collect a penalty equal in amount to the full economic benefit allegedly realized by a noncomplying facility due to failure to install control technology. These regulations omit certain congressionally mandated exemptions from such penalties.

State-approved enforcement orders are not available for exemption from the penalty and are an example where the EPA has failed to provide relief authorized by the Act. These regulations should be reviewed immediately.

7. The EPA is presently setting mobile source guidelines for diesel emissions, designed to identify components of exhausts requiring controls. The guidance and direction of this program should be carefully reviewed to evaluate its full impact on society.

8. In the absence of adequate monitoring devices and data, the EPA has relied upon water and air diffusion "models" several of which are either of questionable validity or inappropriately applied to specific areas. For example, an air model designed to measure concentration dispersion in flat terrain has in some cases been used to set levels of allowable emissions from sources in valley terrain. The EPA should sharply reduce its reliance on such models. Where models are to be used in substantiating any regulatory action, there should be independent scientific review of the adequacy and validity of the data used in calibration and verification.

9. Careful review should be made of the recommendations of the National Commission on Air Quality to Congress in developing possible amendments to the Act.

10. The EPA should modify those elements of its regulatory programs which require states to make formal changes to SIPs before a final course of action may be taken. This is necessary if there is to be an increase in the flexibility of state regulatory initiatives (e.g., adoption of the "bubble concept") and implementation without the inherent delay and complexity of legislative action at the state level.

11. The Act now requires attainment of the NAAQS by the end of 1982, with exceptions for ozone and carbon monoxide (which may be extended to the end of 1987). Areas requesting such extensions must submit additional and, in most cases, more stringent plans during 1982. EPA guidelines for the preparation and submission of these requests should be reviewed quickly so as to expedite approval of requests for additional time to the states.

12. The Act requires a mandatory review of all NAAQS in 1980-81. The EPA plans to publish revised standards for oxides of nitrogen, carbon monoxide, sulphur dioxide, and total suspended particulates. The levels of such standards, and the scientific basis upon which they are set, should be reviewed thoroughly.

13. During 1980-81, the NSPS will be revised. Changes previously adopted to increase flexibility (e.g., the averaging time for emission measurements, "bubble concept" and emission trade-offs) should be retained and, where possible, other ideas developed.

14. The EPA must propose and promulgate emission standards for heavy and light duty trucks, both diesel and gasoline powered. This regulation will be the first of such mobile sources and could have major impact on the cost of operating freight transport. New truck regulations should be predicated on scientifically credible technical data.

15. Major EPA R&D efforts will be addressed to critical areas such as acid rain, the Northeast transport of photochemical oxidants, and studies of industrial air emissions of volatile organic chemicals. The present thrust of this R&D effort is, virtually without exception, to generate a data base to support preconceived policy decisions. The strong bias of R&D towards regulatory goals should be reviewed and redirected towards more objective ends. An unbiased and adequate data base is urgently needed.

16. Final regulations to control impairment of visibility will be promulgated. The proposed regulations include protection for both the park areas (protected under the Act) and vistas which may be seen from the park. This would greatly extend the areas in which preconstruction review, permitting and the need for retrofit controls would be required and emissions restricted. It also would limit the role of the states in proposing areas of protection outside of federal Class I areas. Present knowledge on monitoring and modeling is insufficient for carrying out statutory mandates on visibility.

17. The EPA is not implementing the primary Nonferrous Smelter Order program, under which smelters may defer compliance with some emission limitations until January 1983 (and under a second phase order, until January 1988). This program should be retained and implemented and its procedures and requirements streamlined.

18. The EPA should provide a positive delineation of requirements under LAER, BACT, RACT and NSPS rather than, in effect, require the same technology with different emission requirements. The administration's decisions should be subject to rulemaking requirements of notice and opportunity for public review and comment.

19. Consideration should be given to allowing the use of tax-exempt Industrial Development Bonds (IDBs) for process

changes which reduce air pollution emissions. (Presently, IDBs can be used for financing of pollution control end-of-the-pipe technologies only). This would provide early roll-over of older facilities, and promote manufacturing efficiency.

Legislative Options

The Clean Air Act will be subject to amendment in 1981. The Administration should propose legislative change in the following areas:

1. The Act should direct states specifically to evaluate all major fuel burning sources, on a plant-by-plant basis, determine the environmental requirements appropriate to each, and set emission limitations accordingly. SIP requirements which apply to all sources within the state (e.g., fuel sulphur content limitations) should be abandoned. Limitations should be set on a source-by-source basis.

2. The Act should be amended so a Governor could provide emergency orders to extend variances for a period not exceeding five years. Such variances would be permitted from otherwise applicable emission limitations where significant local or regional economic disruption or unemployment exists and where the resulting level will not adversely affect health.

3. The Act should specifically provide that a state in computing emissions for enforcement purposes shall in all cases employ the "rolling average" concept (i.e., the 30 day emission averaging provisions that were administratively incorporated by the EPA in the 1980 NSPS power plant revisions).

4. The Act should direct the EPA to reevaluate periodically and revise the geographic boundaries of air quality regions to conform to modern data on airsheds and airstreams.

5. The Act should specifically require review of Agency criteria documents on proposed standards by scientific experts from outside the EPA. The Act should require that all determinations and judgments with respect to regulations and standards be based on objective scientific evidence which has received extensive peer review.

6. The Act should authorize the President to designate agencies outside EPA (e.g., NOAA and the National Bureau of Standards (NBS)) to review air quality monitoring and modeling activities of the EPA, and provide federal grants to other entities to develop or carry on such efforts. "Quality of life" review should be restored so agencies of the Executive Office of the President can identify, require reconsideration of, and in some cases veto, any proposed requirements deemed more

stringent than necessary to protect the public health and welfare. This would apply to the whole PSD program.

7. The Act should require the EPA to develop and implement cost-benefit (based on the loss to society) and risk-benefit analyses of all new regulatory proposals.

8. Federal funding in other agencies for research on biomedical and environmental effects relating to the burning of coal should be increased substantially.

9. The Act should provide extensions for meeting NSPS emission limitations for those existing sources which voluntarily convert to coal usage, consistent with the provisions required of those directed to do so by Department of Energy order under the Energy Supply and Environmental Coordination Act (Section 113(d)).

10. The Act should consider providing a 10-year period of protection against further regulatory change for all facilities constructed or modified to meet existing requirements. The exception would be when scientifically credible data indicate a possible toxic condition.

11. The Act should allow setting of secondary standards by the state. To assist the states, the Act should direct the EPA to reconsider the secondary (welfare-related) standards, to more accurately reflect changed circumstances regarding national economic, energy, and security circumstances since 1971.

12. The Act should allow in appropriate circumstances the use of intermittent or supplementary control strategies in conjunction with control equipment technology to achieve standard compliance.

13. The EPA should prepare and recommend to the Congress a comprehensive program of economic incentives, including expanded use of the Internal Revenue Code, to encourage the voluntary retirement and replacement of environmentally inefficient industrial facilities.

14. The Act should be amended to restrict the application of the PSD permit approval program to only those facilities whose pollutants might affect mandatory Class I areas (major national parks and wilderness areas). The remaining portions of the country where the air is presently cleaner than the NAAQS requires should be protected solely by the strict application of Best Available Control Technology (BACT) for new sources. Where NSPS exist for a source, deem NSPS equal to BACT and LAER.

15. The nonattainment provisions of the Act should be amended so the objectives of the Act can be achieved without

the present unnecessary costs, ban on growth and energy development and cutoff of federal funds. This would include a method to obviate the need for offsets and substitute for the requirement for Lowest Achievable Emission Rate and the Best Available Control Technology.

Water

Background

The EPA has failed to recognize that effective water management must consider the full hydrologic cycle—rainfall, percolation, runoff, storage and evaporation/transpiration. The land-water interrelationships must not be ignored. But they cannot be considered simplistically either, if a program is to be effective. There are many complex natural operations that change the quality of water in each stage of the cycle. Man's contribution to the change can vary from considerable to insignificant depending on the location, even when the activity is the same.

Obviously, neither the EPA nor the Congress has understood this problem. The original federal legislation to control water pollution (enactments from 1948 to 1965) did. But the 1972 enactment which transferred attention from the protection of water for predetermined uses in the best public interest to uniformity of technology undermined the potential for effective management. By arrogating congressional intent with a plethora of regulations, often in conflict among themselves and with the stated intent of the law, the EPA would argue that groundwater and surface water are distinct entities—they are not; that water supply and wastewater treatment must have separate regulatory concepts but common standards—they do not; that health and public benefit are best protected by removal of all constituents from water before discharge or consumption—they are not.

The fragmentation in the EPA that separates water from air and toxics and the isolation of these aspects from "planning and management" speaks eloquently to the fact that the Agency has effectively precluded an ability to respond effectively to the human environment and experience in the real world of water and land management.

That the federal water control program which includes the largest public works program in the nation's history, has failed to achieve the goal of providing the pristine waters envisioned by the promoters of the 1965 and 1972 enactments, and

promised by the EPA Administrators, is now acknowledged even by EPA officials. The $35 billion program (since 1972) has been severely criticized in congressional hearings, in GAO analyses and in Appropriations Committee reports. Criticism comes from cities, industries, recreationists and professionals in the field.

The efficacy of the construction grants program for municipally owned wastewater treatment plants is illustrated by EPA data. Major federal installations were 20 percent in compliance, major municipal wastewater treatment plants were 40 percent in compliance, and major industrial dischargers were 80 percent in compliance. It would seem the more federal participation, the less progress in cleaning up pollution. However, the reporting of progress in terms of percentage ignores the question of how much progress was accomplished in achieving desired water quality.

An argument for the construction grants program for municipally owned wastewater treatment plants is that the communities cannot afford to do the job. This is questionable. If people paid half as much for wastewater treatment as they do for electricity, there would be plenty of money to solve the problems at home.

Part of the trouble lies in the adoption of legislation which prescribed both an idealistic objective and detailed regulatory steps.

The Federal Water Pollution Control Act (1972 and as amended in 1977) has a stated objective to "restore and maintain the chemical, physical and biological integrity of the nation's waters." To achieve that objective, the Act established as "national goals":

- Achieving a level of water quality which "provides for the protection and propagation of fish, shellfish and wildlife" and "for recreation in and on water" by July 1, 1983; and
- Eliminating the discharge of pollutants into U.S. waters by 1985.

These goals are to be achieved using technology-based effluent limitations which establish a nationwide base-level of treatment for both municipal and industrial waste waters.

The Clean Water Act regulatory program centers around Title III, the standards and enforcement provisions, which with Title IV (permit and license requirements), establish a major substantive and procedural regulatory structure governing discharge of pollutants into the waters of the United States.

The Act sets forth the underlying prohibitions that the discharge of any pollutant is illegal except in compliance with technology-based effluent limitations (Section 301), water quality-related effluent standards for new sources (Section 306), toxic effluent standard and pretreatment limitations for discharges into Public Owned Treatment Works (POTWs) (Section 307), and National Pollution Discharge Elimination System (NPDES) permitting program (Section 402), and permitting for dredged or fill material (Section 404).

In theory, Section 303 would define the allowable waste loads a stream could accept. In practice, this section has been either not used or grossly misused.

Industrial discharges were to receive Best Practice Control Technology (BPT) by July 1, 1977 and Best Available Technology (BAT) by July 1, 1984. In addition, a nationwide discharge permit program was to be initiated, water quality standards were to be upgraded and monitoring, inspection and enforcement provisions were included.

Up to 75 percent funding for construction of municipal waste treatment plants and support for state water pollution control programs are some of the other features included in the Act. The 1977 amendments were principally aimed at prohibiting the "discharge of toxic pollutants in toxic amounts." In addition, the effluent limitations requirements for "conventional" pollutants were revised so that Best Conventional Pollutant Control (BCT) is to be achieved by July 1, 1984. This was intended to be somewhere between BPT and BAT. The Act also covers accidental spills of oil and hazardous substances and sets up a fund to clean up environmental damage.

The complexity of the legislation, together with the specific dates for accomplishment has put EPA into a very tight timetable. Predictably, many dates have been missed, many regulations have been poorly written and both industry and municipalities are questioning the need for the new bureaucratic maze.

Industry has pretty much met the 1977 BPT levels, while a high percentage of municipalities have not, due to lack of federal funding. Decisions on BAT levels for 1984 are being developed and in many cases appear to grossly exceed any reasonable cost/benefit relationship. Hence, there is a need to review the legislation and regulations in the light of where we actually are today in terms of stream quality.

Principal Deficiencies of Existing Policies

1. Policy level personnel lack training and experience in management engineering, science and economics necessary to define conditions, appraise regulatory alternatives and establish priorities.

2. Federal decisions (central and regional) and regulatory requirements have preempted and precluded state initiative and converted a program requiring data for decisions into a game played "by the numbers." The emphasis is no longer on defining needs based on water use and quality, but on distributing federal funds according to predetermined formulas and controls based on uniform technology requirements.

3. Water quality criteria and standards, particularly for the so-called "toxics," have been soundly criticized by all segments of society who are knowledgeable in this field as neither valid nor useful. The EPA at this time is issuing revised water quality criteria which have not received adequate input by peer review groups, the EPA has announced it is developing guidelines for translating water quality criteria into site specific standards. As proposed, the states will be significantly limited in ability to consider existing quality or anticipated uses (e.g., agriculture, industry, transportation). In some cases, cities and industries have been told wastewater quality must be at one-hundredth the concentration found in the natural level of their drinking water. Yet, the EPA would now require billions to be spent to achieve these levels. Failure to meet the new standard means a fine for each day the violation continues and possible imprisonment for officials of the involved city or industry.

4. The standards, developed from EPA policy on carcenogenisis and commented on under toxic substances (section 4) are ridicuously low. The Agency refuses to recognize that many of these so-called "toxics" or "carginogens" display an entirely different or no effect in minute concentrations. Essential to health, absence of these elements as mandated by the EPA would increase diabetes, heart disease, cancer, hypertension and other illnesses.

5. Federal contact with industries and to a lesser extent with cities, is controlled by the enforcement branch. The setting is an adversary one, not of leadership or mutual assistance. States have little or no role or responsibility. Violation of a permit condition means those responsible are subject to fine irrespective of whether stream damage occurs.

6. Requirements for cities and industries are taken from

"model" calculations even though the model was usually neither calibrated nor verified for the particular water body. Techniques are available to both calibrate and verify. The U.S. Geological Survey assessment of the Willamette River in Oregon cost less than $500,000, but showed the EPA mandated program estimated at $200 million would be a waste of money. A change in the river flow pattern and treatment of one plant's waste corrected the situation. Even an EPA-financed study of six "exemplary" advanced waste treatment plants by Jerome Horowitz, then with the Vertex Corporation, castigated the EPA program as ineffective and wasteful.

7. The EPA does not require adequate water quality monitoring to determine wastewater treatment needs or the quality of public water supplies. In fact, there is no evidence that the Agency can properly interpret data for there is strong evidence that the EPA data and analysis do not reflect the quality of the nation's waters. The GAO is presently preparing a report that is most critical of the Agency and of the Council on Environmental Quality for using this information in its annual report to the President.

8. The EPA definition of secondary treatment, the base for municipal requirements, has been manipulated to subvert the intent of the Appropriations Committee mandate that money should stop being wasted on municipal advanced waste treatment.

9. The EPA regulations for construction grants, monitoring, wastewater treatment for industries, etc., have become onerous, unintelligible, contradictory and quite impossible for the ordinary citizen or official, either to comprehend or to meet.

10. The zero discharge goal (which for many industrial efficient guidelines categories is a requirement) poses an impossible (at times) and inflexible (most of the time) technical task. As the degree of treatment of wastewater increases, so does the amount of solids that must be disposed of. This aspect is of critical importance in cities where land is at a premium. Now the EPA has added a leaching test (supposedly to determine the presence of toxics), and has proposed regulations that in effect prevent land disposal of the solids by cities as well as by industry. The Agency does not consider the environment in its totality, does not select the regulatory option with minimum adverse consequences.

11. The EPA has not been reluctant to support fears raised by persons on mere allegations based on, at best, flimsy scientific/technical data. Science and the public are ill-served

by "science by innuendo." Nor is the nation well-served when there are positive pronouncements by the Administrator on subjects where a cursory review of available data would permit an opposite conclusion. Lack of scientific and environmental training in the top administrators can result in an unwillingness to correct the impressions made on the gullible by persons advocating their own particular interests.

Administrative Options

1. Reorient goal-setting so there are coherent objectives with air-water-residual aspects in focus. This requires reevaluation of existing programs and revision as appropriate. To manage this program, EPA must enlist persons experienced by training and practice in environmental engineering, science and economics and who have proven managerial ability with the idea of fostering alternative treatment schemes. The Agency should stop pushing uniform techniques.

2. Focus national resources selectively on critical problem areas in municipal, industrial and non-point sources for water and for wastes which can affect water quality. As a necessary part of this assessment, utilize available verified water data in the USGS and state agency records.

3. The highest priority should be given to an immediate review and revision, where appropriate, of rules, regulations, program requirements, memoranda, and guidelines.

4. Issue ocean discharge permits under the variance provided in the 1977 amendment.

5. Require EPA staff to set reasonable deadlines (e.g., reporting, submission of plans, etc.) and to meet the same requirements of timeliness that are required of municipalities and industries.

6. Follow existing EPA rules and tell the citizens of a community the cost to them as individuals of any project to be funded through a federal construction grant. This same requirement should be applied consistently to each and every rule, regulation, guideline, etc., promulgated by the EPA.

7. Request each state to define the issues it would like resolved.

8. Redefine secondary treatment in broader terms so as to eliminate the confusion over advanced waste treatment (AWT). The congressional requirement for administration approval of AWT should not be subverted by Agency use of definitions.

9. Accelerate construction of municipal wastewater treatment plants and, at the same time, reduce costs by removing

steps I and II from construction grant eligibility and by making the state solely responsible for review and approval.

10. Initiate plans for an indepth review of Section 208 and Section 303 planning as a basis for recommending possible legislative change.

11. Establish an independent forum of scientists to recommend scientific methods for defining when and if substances should be labeled hazardous, toxic, carcinogenic or any other label.

12. There is a real tendency on the part of the EPA staff to try to make things perfect rather than to make them better. A perfect solution to a problem takes a long time. In fact, it would take forever if there were not deadlines. In the meantime, while waiting for the perfect solution, the sewage keeps going in the creek.

According to one report, there are at least 100 people on the staff of EPA who are in position to issue draft program requirement memoranda for consideration by all of the regional people. Even if these draft program requirement memoranda never become final requirements, the people in the regional offices start acting as if they were final because they may some day be final. This causes great confusion. All guidance and requirements should be cleared through an Assistant Administrator so that there is some modicum of continuity to the program and some evaluation of the impact of the proposed requirements and guidelines.

Legislative Options

The Clean Water Act may be subject to amendment in 1981. The new administration should propose these legislative ideas to increase the effectiveness of the Act in approaching desired goals most expeditiously:

1. Recognize that zero discharge, even as a goal, is not consistent with the necessity to consider air-water-land in a common frame for effective management. The Act should be changed to prevent misconceptions and regulatory initiatives that are really adverse to total environmental management.

2. Recognize that the control program to date has created many unintended consequences while not achieving the objectives originally anticipated and that these effects developed in large measure because the Congress and the Agency lacked an adequate data base from which to make projections. With several other federal agencies having demonstrated long-term competency in collecting and evaluating data on water, air

quality and health, this aspect of environmental control should be transferred to them. There should be a transfer of personnel positions as well as funding. The roles involved include necessary research on the data base development.

3. Revise the toxic pollution section (Sec. 307) to require a determination of risk/benefit in the adoption of standards.

4. Instead of prescribed Best Available Technology (BAT) deadlines for industry, and specified levels of treatment of public systems, re-establish the goals of the Act to be consistent with the earlier legislation as protection of designated water uses. In the determination of uses and the adoption of water quality standards to protect those uses, emphasize the present law's requirement of consideration of use and value. The present goal of "fishable/swimmable, wherever attainable" is ambiguous and should be deleted. EPA's present interpretation that this is the sole goal should end. The intended objective can be attained by requiring a stream assessment which evaluates the physical, biological and chemical constraints on a body of water for various categories or types of fish and forms of recreation as well as for other uses. This would permit specific and achievable goals. BAT deadlines should be delayed to permit this reassessment.

5. Recognize that the present Clean Water Act (CWA) requires protection of all the waters of the nation. This includes groundwater. Hence, no new legislation is required to protect groundwater. The Safe Drinking Water Act and the Resource Conservation and Recovery Act include groundwater protection and use. Management of groundwater adheres to the same concepts as called for in surface water management. The techniques may differ.

6. Establish funding for municipal construction grants at a predictable, uniform rate with a practical time period for completion of the program (i.e., in 1985). This would force states to allocate funds for projects which would do the most good because, after that date, forcing a community to construct would require court action and courts could question whether benefits were commensurate with costs.

7. The principal objective of environmental legislation is the protection of human health. In developing that protection, it is critically important that standards be adopted which are scientifically credible—to protect health but not cause unnecessary concern among the public. The same credibility is required for standards to protect aquatic and animal life. Responsibility for development and interpretation of data to

achieve this credibility should be transferred to the National Institutes of Health (NIH).

Solid Waste

Background

The Assistant Administrator for Water and Waste Management also has authority over solid and hazardous waste disposal. In this capacity, he implements the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), and the amendments thereto, passed by Congress in October 1980.

The major provisions of RCRA are geared toward: 1) municipal waste management through federal planning grants and technical assistance; 2) conservation of natural resources through federally-developed national and marketing guidelines (for recovered, recycled or reused solid waste materials); and 3) strict federal control of hazardous wastes through a "cradle-to-grave" manifest, with reporting requirements and stringent standards applicable to generators, transporters, and owners and operators of facilities used for the treatment, storage, and disposal of hazardous wastes subject to an enforcement system established by the EPA and implemented by the states.

The EPA spent most of its time and resources developing a regulatory system to control hazardous wastes. Its regulations are only now being issued, over two years late and following a court-established schedule. However, it is far from certain whether the Agency made proper use of the extra time as exemplified by the massive amount of litigation surrounding each new regulation.

The Agency completely ignored the RCRA mandate to spend 10 percent of its RCRA budget on "resource recovery" panels to assist communities in developing more efficient methods of municipal waste disposal, including high-technology waste-to-energy systems. It is interesting to note that the Agency convinced the congressional authorizing committee to eliminate this funding requirement.

Meanwhile, budget and resources are being redistributed to an even greater degree to respond to what is perceived as the most serious environmental problem facing our nation today—the disposal of hazardous wastes. The Regulatory Analysis and Review Group (RARG) of the President's Council on Wage and Price Stability commented that the impact of the limitation of the regulations which the EPA first proposed to control

these wastes would equal the economic impact of all the combined EPA regulations issued to date. Furthermore, RARG said that the paperwork burden imposed by the proposal would raise the EPA into first place in terms of agency-imposed paperwork to comply with the program.

The hazardous waste program is necessary to protect health and the environment, but the Agency has turned a few simple provisions in RCRA into several hundred pages of regulatory overkill, complete with detailed design standards.

Principal Deficiencies of Existing Policies

1. The EPA is trying to address the entire universe of waste at once. This approach has already led to at least two years of delay in implementing any program and protracted litigation will continue to cause delays. Cradle-to-grave regulations are comprehensive and confusing. The complexity is such that small industries must have financial and technical assistance in even understanding, let alone complying with them. Many are unnecessary.

2. Related to #1, EPA has made a fundamental error in policy by considering all potentially hazardous waste to be of the same degree of hazard. This results in unnecessarily stringent controls and high costs for wastes which present a low degree of hazard; also related is the Agency's regulatory assumption that all waste, if improperly handled, will create a hazardous situation. Apart from the excessive costs of attempting to equip every site for the most hazardous of substances is the fact there will be an acute shortage of acceptable sites.

3. The EPA has adopted hazardous waste policies of confrontation with the business community and scare tactics with the public. Shrieking press releases accompany each perceived new problem. A policy of result-oriented cooperation would be more productive. As it is, the EPA lacks credibility in the eyes of industry in its ability to enforce the regulations.

4. The strict EPA guidelines for design of treatment, storage or disposal facilities do not allow the operation flexibility in design to meet the desired performance standards. EPA has furthered the confusion by setting performance standards that cannot be achieved by its required design technology.

5. Present costs of disposal of solid waste range from $1.50 to $5.00 per ton. Experts estimate it will cost up to $75 per ton once the full regulations are in effect. This massive increase is not yet fully appreciated by industry or communities. Given the need for industries to remain competitive and communities

to combat rising costs, it is imperative that there be re-analysis of the regulations and attention to possible incentive/assistance.

6. EPA regulations requiring subtitle D facilities to meet Safe Drinking Water standards do not recognize that native groundwater often violates these limits and thus the facility cannot comply.

Administrative Options

1. A basic hazardous waste system akin to that presently in place should remain. Such a program deals with testing of wastes, notification of their existence, and tracking their whereabouts until final disposal. A number of significant issues, presently in litigation, remain unresolved and should be promptly resolved. The next set of regulations, which will contain the detailed performance and design standards should be initially applicable only to the high hazard wastes; and serious consideration should be given to abandoning the design standards in favor of flexible performance standards which reflect existing technology. This will enable the EPA to determine the effectiveness of the standards before imposing huge costs on the country without any proven results.

2. It is the government's responsibility to ensure that the public is aware of environmental situations which are likely to have a serious adverse effect on their health; a policy of that nature should be retained. It is not the government's proper role to use scare tactics and national media efforts to drive a wedge between segments of the community, or to cause support for new legislation—as has been the case for superfund legislation. A policy of factual publicity with appropriate distribution should be adopted. Publicity campaigns coordinated with litigation or investigations should be avoided; it can be unethical and create bias.

3. Efforts should be directed to further ensure that waste generators are aware of the laws and regulations applicable to their activities. State regulations and policy directions should emphasize cooperative efforts to identify and resolve problems. Where technical violations of regulations occur through misunderstanding or ignorance, solutions should be achieved without litigation wherever possible, by communicating directly with the party involved.

4. Disposal site conditions should be considered when applying methods to determine whether a waste is or may be hazardous. For example, a leachate test is not necessary or appropriate where disposal takes place in arid areas where the

evaporation rate exceeds rainfall. Furthermore, the existing "extraction procedure" for measuring the toxicity of wastes fails to assess the characteristics of various types of wastes. The EPA has consistently rejected the advice of the scientific community to develop separate tests for various waste streams. The EPA is now realizing the burden it has imposed with detailed siting requirements and design standards. During its operations to respond to hazardous waste siting incidents, the EPA has had to relocate certain hazardous wastes to safe sites. In doing so, the EPA had to comply with the regulations it imposed on all sites. They have found that they are not only onerous, but often impossible to comply with.

5. A concerted siting program should be initiated at the state level at the earliest opportunity to reduce the pressure on existing sites and the temptation to dispose of such wastes improperly in their absence.

Toxic Substances

Background

The EPA was granted broad discretionary authority to "control human health and the environment" under the Toxic Substance Control Act (P.L. 95-469). This Act was intended by Congress to be a "catch-all" law. Its purpose, as its legislative history shows, is to prevent future catastrophies such as the Kepone incident by controlling commercially produced chemical substances.

The EPA Administration has extended this role by misinterpreting the law to include regulating non-hazardous chemical substances. Its program includes limiting exposure and establishing a zero-threshold level for carcinogenic substances. Nowhere in the Act is "toxic" defined and herein lies an excuse for the broadest administration of the law.

Principal Deficiencies of Existing Policies

1. Failure of EPA officials to take natural risks into account in risk assessment. A no-risk environment is theoretically impossible. Risks to health occur from natural as well as manmade sources:

- Cosmic radiation and natural radioactive decay from the earth constantly contribute to background radiation;
- Some natural earth elements in high concentrations are toxic and/or carcinogenic such as selenium, chromium, arsenic and mercury), yet these same elements in trace

amounts can be essential to human and animal health;

- Some compounds produced by plants and animals are toxic and/or carcinogenic, e.g., aflatoxin in peanuts from molds, snake venom, and botulism from toxins generated in food which decayed in the absence of air.

2. Carcinogenic screening tests are conducted at high exposure levels in order to produce a measurable effect. The federal agencies (EPA, CEQ, and OSHA) theorize that if a substance is carcinogenic at a high concentration, it is carcinogenic at any concentration. This is the justification for the "no threshold" or "zero risk" concept. However, some materials may promote malignant growths at high concentrations but prevent disease at lower concentrations. Selenium and Vitamin A are examples.

3. Present EPA policy assumes that any material reported to have caused tumor growth (benign or malignant) in a laboratory animal is a carcinogen. The Agency policy should require reproducible effect and appraisal of the technique used in producing the tumor.

4. The Agency has adopted a policy that any single positive animal feeding carcinogenesis study makes any amount of negative data invalid. Since the positive study may be flawed, and feeding inappropriate as a route of exposure, this policy should be reconsidered. All data available, especially human epidemiological studies, should be weighed to determine the hazard.

5. The assumption underlining TOSCA is that industrial chemicals pose a substantial health threat to humans and the environment. This premise has not been substantiated. An epidemiological study to determine true incidence would aid the Agency in directing resources to their most effective use. The Agency should determine "substantial" and "unreasonable" risk based on adequate analyses in the "real world" environment where many factors not considered in laboratory testing cause different results.

6. EPA implementation of TOSCA requires redefinition of small business. The chemical industry, for example, is very capital-intensive, so that a company may have $30 million sales and only 200 employees. The EPA should define small business for the chemical industry and other affected industries so as to reflect variables such as the number of employees, the nature of their business and the sales volume.

Administrative Options

1. TOSCA's scope is so wide that any attempt to implement fully the provisions will detract from proper actions against real hazards. The Agency has been unable to promulgate all its proposed regulations in four years because they have taken this holistic approach. The Agency must set priorities and develop a simplified procedure to implement the Act. Executive Order declaration could establish regulatory priorities.

2. In spite of the EPA's recent reorganization of the Office of Pesticides and Toxic Substances, the EPA should establish outside study to assist administrative and organizational aspects for streamlining operations.

3. Since TOSCA interrelates, but cannot preempt, the air, water and solid waste regulations, the Agency should administer through only one set of regulations. (This may mean determination of acceptable discharge levels based on assimilation models and ambient air and water quality levels).

4. There is no small business assistance for TOSCA. A small business advocate should be added to the EPA's Office of Industry Assistance.

5. The EPA should establish an independent (non-governmental) team of scientists who will review contested decisions for their scientific merit—both on a regulatory and enforcement basis. This advice would become part of the record of proceedings.

6. The Agency should consider determining substantial and unreasonable risk based on actual data from comprehensive studies.

7. Premanufacture Notification (PMN) should remain an early notification procedure. Any notification of high risk should be based on several factors:

- The volume of material: large volume chemicals have been responsible for virtually all problems to date.
- Type of exposure: some consumer products could offer more risk than one used solely in industry. Also a product incorporated in a polymer such as a rubber accelerator, offers less risk than a product incorporated in a soap. Intermediates and other low risk materials should require little if any testing.
- Non-litigatory solutions to PMN needs: rather than force legal confrontation, pre-conferences discussing data needs on PMNs would be more efficient and probably eliminate most problems.

New chemicals being introduced into the market are sensitive to cost burdens and usually begin as small volume ventures. The PMN process is costly to manufacturers because the costs for compliance come before the material generates any sales. The process applies to all substances, yet only an extremely small number of substances could be expected to contribute to unreasonable risk. A manufacturer may be less likely to market a new product with an uncertain future because the costs due to regulation are too high. This economic impact could hit small manufacturers and specialty manufacturers the hardest and thus detrimentally affect innovation.

Within the Agency

8. The EPA has interpreted the exceptions to the general rule of confidentiality established in TOSCA Section 14(a) in an overly broad manner. A strict interpretation of the statute can eliminate this problem. While the EPA has a credible policy to help insure the physical security of confidential business information (CBI), the Agency still shows insensitivity to the competitive nature of CBI and the potential for damage if this commercially sensitive information is discovered by a competitor.

The specific chemical identity and processes of products are the most significant pieces of information to be protected. To insure against unnecessary specific chemical identity disclosure the EPA should recognize that certain information by its nature demands confidential treatment.

Under the present scheme, all claims for confidentiality must be substantiated in advance. If the Agency only required substantiation after receiving a Freedom of Information Act (FOIA) request, this would be much less burdensome for both the Agency and the companies.

Between Agencies

9. The EPA should establish procedures for protecting confidential information, such as those used by the Food and Drug Administration (FDA) which, by regulation, grants a presumption of confidentiality to certain types of data and information. Business shares proprietary information with the government in good faith. The Agency must develop a fool-proof system to prevent inappropriate access to this information.

On September 15, 1980, the press announced that the EPA and the Consumer Product Safety Commission (CPSC) signed

an agreement on procedures under which the two agencies will share chemical information gathered under TOSCA. This is an example of the ongoing intragovernmental process to share information gathered under TOSCA.

For example, the EPA is organizing a centralized chemical information system (CSIN) which will contain all information on chemical substances. This can be accessed by any government employee and any government contractor. (Many chemical companies are government contractors). Confidentiality might not be guaranteed under this system.

10. The testing requirements of TOSCA Section 4 must be developed in a cost-effective manner as mandated in the Act.

Extensive preliminary tests for all chemicals will create an extraordinary drain on specialized technicians needed for production activities. To optimize the use of United States testing resources and to assure continuous innovation, testing must be limited to those chemicals which require testing to insure proper risk determination.

The EPA should establish flexible guidelines and not unalterable testing protocols. The fluid and rapid innovation in areas of science could quickly antiquate any proposed protocols. The scientific community would be denied the use of their expert judgment and the introduction and use of innovative testing methods could be postponed.

11. As presently designed, Europe and the United States will be operating under toxic substances control laws that are substantially different. International harmonization should exist. These differences in intent, scope, information requirements and regulations have not been adequately addressed by the EPA and will:

- influence decisions made worldwide in regard to research, development and manufacturing locations;
- affect the flow of trade in the international chemical industry to the United States' detriment; and
- foster a shift of chemical technology away from the United States.

A key impetus to such a shift is international concerns for protection of proprietary information. There is still no international agreement on the definition of a "trade secret."

TOSCA has many far-reaching provisions and the EPA should avoid the potentially negative impacts of the pervasive issues and propose regulations which will not create barriers to innovation, impede international trade or jeopardize a manufacturer's competitive edge.

12. Present reporting and record-keeping proposals are not cost-effective for either the EPA or industry. The EPA should rethink these requirements.

Under Section 8(a) of TOSCA, the EPA has proposed that manufacturers report certain data on uses, production, volume and exposure for approximately 2,300 chemicals, including eight categories. While such data may be necessary for the majority of the chemicals in question, the EPA has not offered an adequate explanation as to the basis for selection of the 2,300 chemicals. Those affected by the rule are left with no criteria with which to judge the appropriateness of the EPA's proposal or the information they submit to the Agency. Under Section 8(c), the EPA wants to require reporting for and publication of all allegations of adverse reactions. Only substantial claims should be reported.

In the proposed TOSCA Section 8(d) rule, the EPA again proposed broad and vague reporting rules. Under Section 8(d) EPA proposed to require reporting of health and safety studies on 67 chemicals and chemical categories. The use of categories in rulemaking can significantly increase the number of chemicals covered by the rule and creates vague reporting requirements for unlisted chemicals.

Industry would be forced to make extensive searches of its files for possible candidates recognizable only by highly trained and highly paid chemists and toxicologists thereby greatly increasing the costs of the searches and unnecessarily directing critical resources.

The EPA's broad definition of "health and safety study," which exceeds congressional intent, encompasses every piece of datum in every company's medical file and all industrial hygiene information. Such unanalyzed raw data will have little, if any, utility in the EPA's decision making.

The EPA's continued attempts to propose broad and vague reporting rules will be useless to the EPA. The Agency will be inundated with paper and data which will have to be gathered and integrated. The EPA's computer technology will be used in an ineffective manner for the reporting procedures.

Legislative Options

Since most of the regulations under TOSCA have not been promulgated, it would be premature to seek major changes in the legislation at this time. Another one to two years of operating experience are necessary to determine needed change.

However, there are six major substantive issues in TOSCA which may need reconsideration:

Pervasive Issues	Specific Issues
1. Innovation	4. Testing
2. International harmonization	5. Recordkeeping
3. Confidentiality	6. Premanufacture Notification (PMN)

Limited experience precludes an accurate determination of TOSCA's impact on industry, but forecasts by the EPA and others indicate that significant adverse impacts will result from the EPA's initial proposed regulations. These costs should be determined as TOSCA becomes operational, and the impact on innovation should be weighed against the benefits of the regulations.

1. Based on these data, TOSCA should be seriously reviewed for its cost and effectiveness.

2. Unless regulations are adequate in the other areas mentioned above, legislative definition may be required within one to two years.

3. The name of the Toxic Substances Control Act should be changed to the Chemical Substances Control Act to more accurately reflect the nature of the Act. It controls all chemicals, not just toxics.

4. A scientific advisory group of non-federal experts should review contested data and regulations for scientific accuracy and interpretation. The findings of the group should be part of the record of administrative proceedings.

5. Every three years the Agency should demonstrate the effectiveness of their program in terms of environmental protection and the cost of the program.

6. Congress should mandate an independent study on TOSCA's impact on innovation, on inflation and on the industry's position in world trade. This study should be done with the cooperation of those regulated.

7. Congress should appoint one or two of its members to serve on the Administrator's Toxic Substance Advisory Committee (ATSAC). This could facilitate congressional understanding of the Act. (Congressional members have served on the commissions established to appraise the water and air acts.)

8. The Agency should be finished with the rulemaking and litigation on TOSCA and should be in an operational mode within five years.

9. The Agency should initiate a serious inspection of the

management and structure of the system. Data requirements should be reviewed for their real value vs. their cost. The actual handling and use of data should be scrutinized.

10. Industry costs of providing data and government costs of handling data should be evaluated and poor requirements vs. costs should be eliminated.

11. Real impact on innovation should be visible within five years. An analysis of the impact should be incorporated in a report at that time to the Congress.

12. TOSCA and all of the other environmental laws should be reviewed for possible combination in one comprehensive environmental statute. This would require major rethinking of environmental control concepts, but the timing might be right.

Pesticides

Background

The existing policies of the Pesticides Program are a direct result of the 1972, 1975 and 1978 Amendments to Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Pesticide Control Act. The 1972 law required that all currently registered and future pesticides be reviewed and reregistered or registered according to a new set of standards. In 1975 the standards for registering pesticides were finalized. These are a very tough set of standards. The pesticide industry and its scientific and toxicological components were unable to petition for relief or develop the basis for a lawsuit over the standards. These standards are the basis for scientific difficulties facing the registration program.

Principal Deficiencies of Existing Policies

1. A very difficult area causing interminable delays in the administrative part of the registration process was the 1972 FIFRA mandate requiring the creation of a compensation program for use of data. Another mandate of the 1972 law required that the non-trade secret basis for the administrators' pesticide registration decision be made available to the public. It took the 1975 and 1978 amendments to FIFRA to explain intent. The amendments were in response to lawsuits attempting to clarify definition of trade secrets and clarify compensation procedures.

The EPA attempted to develop a data review and reregistration program in February 1976 which was quite realistic and reasonable; however, the program quickly ended when Sena-

tor Kennedy, Congressman Moss, and the Government Accounting Office attacked the program questioning: a) validity of test data, b) a presumed need to review each of the 35,000 registered pesticide products rather than about 1,500 active ingredients, and c) concern over the treatment of potentially carcinogenic compounds as pesticides.

2. A deficiency of considerable importance, but probably insoluble is the slowness of the Agency in moving to meet the requirements of the law, as well as in meeting its own promulgated requirements. Realistically, these delays were not only the result of the law and the regulations arising therefrom, but also the inordinate complexity inherent in each part of the pesticide regulatory process.

Administrative Options

1. A possible settlement of certain FIFRA lawsuits over trade secrets and compensation for use of data, indicates the registration process mandated by the 1978 Amendments should start moving forward again. The conditional registration scheme created by EPA in response to the 1978 Amendments was working well before the above litigation.

2. Of more serious concern and the main basis for delays in the registration process are problems of acquisition and review of validated safety and health test data. This problem was created in part because of concern for test data presented to the Agency by certain contract toxicological laboratories. As a consequence, scientists within the Agency are very hesitant to approve data without the closest scrutiny and assurance that the data meet guidelines for studies leading to valid data. The EPA has attempted to ease the problem by administrative redirection. This new direction basically requires that a reviewer use his scientific judgment in evaluating data even though the strict 1980 guidelines may not have been followed. However, stating policy is one thing, implementing it is quite another.

Legislative Options

A legislative change that would further the solution of short-term problems is to change the very complicated compensation-for-use-of-data section of the law into an extended exclusivity of data used for supporting claims of new active ingredients.

The Agricultural Committees of the Congress will hold oversight hearings on FIFRA early in 1981 and an amendment

for such a change would go a long way to smoothing out the registration process in the EPA. FIFRA should be amended further to include federal preemption of state registration programs which threaten to proliferate into 50 separate—and often conflicting—sets of requirements.

As suggested earlier, the long-term problem facing the pesticide industry and the agricultural users of those pesticides focuses on the 1975 FIFRA Section 3 Regulations for Registering Pesticides. Those regulations define criteria for a determination of critical adverse effects. The issue is one of carcinogenicity potential for a pesticide as a consequence of its use. Very difficult questions must be answered: what is a carcinogen, what potency is of concern, what is acceptable from the standpoint of exposure, and how does this information fit into the risk/benefit analysis which is mandated in FIFRA. Proper resolution of this problem requires use of toxicological science in legislative and regulatory decision-making. There is also a philosophical question of involuntary versus voluntary exposure. In a three- to five-year perspective, it is questionable whether there is any opportunity for solving the problem. In fact, should the Delaney Clause be amended to allow some kind of benefit/risk analysis, the long-term concern for cancer-producing potential of pesticides probably will not be assuaged. Moreover, the regulator will still be faced with the difficult decision of how to make a regulatory decision on a benefit/risk analysis where carcinogenicity is concerned (and, of course, one could add mutagenicity, teratogenicity, and any of the other long-term potential effects arising from exposure of laboratory animals to chemicals.

Radiation

Background

When the EPA was established, it was given broad authority to establish guidelines for radiation standards for all federal agencies. This authority stems from the early powers of the Federal Radiation Council and the broad powers given to the EPA generally over all forms of environmental insults. EPA has additional responsibilities for regulation of radioactive air pollutants under the Clean Air Act (CAA), waste disposal under the Resource Conservation and Recovery Act (RCRA), and the Uranium Mill Tailings Radiation Control Act (UMTRCA), which includes setting standards for radioactive emissions and for protection from waste materials with radioactive content.

Other legal responsibilities of EPA are under the Public Health Services Act of 1970, the guidance function of the Federal Radiation Council and the Atomic Energy Act (transferred to EPA in 1970) for setting general environmental standards around Atomic Energy Commission licensed facilities.

Principal Deficiencies of Existing Policies

There have been several critiques of the EPA's Office of Radiation Programs (ORP), the most sweeping being GAO Report CED-78-27 of January 20, 1978, "The Environmental Protection Agency Needs Guidance and Support to Guard the Public in a Period of Radiation Proliferation." The report reaffirms the general observation that:

> The EPA itself was given unclear authority in 1970 regarding radiation; it cannot provide complete radiation protection guidance.
> The EPA's Office of Radiation Programs is "plagued" by jurisdictional challenges, lack of staff and resources, inability to retain competent professionals, poor cooperation with other federal or state radiation agencies or radiation research groups, and a low priority for regulating radiation within the EPA.

There have also been many surveys of radiation control problems generally; all indicate a lack of a comprehensive federal/state/local radiation control program. Examples of these studies are:

> GAO report, HRD-80-25 of December 4, 1979, "Radiation Control Programs Provide Limited Protection."
> "Report of the Interagency Task Force on the Health Effects of Ionizing Radiation," June 1979.
> "Federal Regulation of Radiation Health and Safety: Organizational Problems and Possible Remedies," Committee on Governmental Affairs, U.S. Senate, August 1978.

The President established the Radiation Policy Council by Executive Order 12194 of February 21, 1980, in partial response to the Interagency Task Force recommendations. The Radiation Policy Council is attempting an overall review and development of recommended policies for radiation priorities for all affected and participating federal agencies, much like its predecessor, the Federal Radiation Council (FRC). The FRC was blended into the EPA when the EPA was established in 1970, although much of its original authority seems to have been dissipated by the EPA's Office of Radiation Programs for one reason or another.

The radiation program was put into the EPA as a partial effort to gain some form of outside control over the then

Atomic Energy Commission's (AEC) standards-setting authority for radioactive emissions from nuclear power plants; presumably on the basis that the EPA would be more receptive to environmental points of view over the threat of low-level radiation in the environment than the AEC. However, at the time EPA was formed, federal radiation authority was primarily in AEC/Nuclear Regulatory Commission (NRC), Department of Labor/Occupational Safety and Health Administration (OSHA) and Department of Health, Education and Welfare (HEW), Food and Drug Administration (FDA), and Public Health Service (FDAPHS). A GAO report (CED-78-27) indicates this complication and the EPA's inability to develop ways to administer its limited authority in the face of antagonism by the established federal agencies; and of course, by the established state health and environmental agencies in the field of radiation.

The former Federal Radiation Council authority was also included in the Reorganization Plan that established the EPA, but its authority was limited to guidance by and to federal co-equals, with AEC/NRC being more "co-equal" than the others. The EPA did not support or staff its radiation programs with sufficient radiation professionals to be able to carry out the previously high level FRC staff work. Perhaps it was undermined at the start by lack of AEC cooperation.

1. Lack of EPA/ORP Leadership

The EPA's Office of Radiation Programs was seldom directed by persons considered leaders and professionals in the field of radiation protection (e.g., health physics). Its initial staff consisted of 551 Public Health Service-Bureau of Radiological Health staff (both civil service and Commissioned Corps, with top managers being primarily Commissioned Officers of the Public Health Service), some AEC/NRC staff (three), four earlier Federal Radiation Council staff (mostly administrators), and a few other from federal agencies affected by the Reorganization Plan. It assumed responsibility for a few FDA-Bureau of Radiological Health field environmental radiation laboratories (none from AEC/NRC). The leaders of the EPA itself were primarily "political" appointees, with some interest in satisfying the perceived pressures from the environmental movement, but who also were reluctant to take on the AEC/NRC with its still dynamic supporter, the congres-

sional Joint Comittee on Atomic Energy, on radiation policy issues.

2. Political Priorities: Media Attention

As a new agency, the EPA had to attract public and congressional support and seemed to concentrate on issues and actions that would attract political attention and media. The EPA was, to a large extent, a political creature, and so was the Office of Radiation Programs. Political groups intending to halt nuclear power (SIPI, etc.) supported first the air and water pollution program development with demands that both radiological and thermal environmental problems be controlled under standards set up outside AEC/NRC.

Hence the EPA found itself being pushed into battling the AEC/NRC for staff, funds and authority, as well as with its mother agency, the FDA's Bureau of Radiological Health. Also, the first full-time outside appointee to head the Office of Radiation Programs (and the current head) was not a radiation professional but seemed to have been selected on a basis other than radiation expertise.

3. The Radiation Policy Council

With the demise of the Federal Radiation Council authority, intentionally or otherwise, within the EPA, the lack of centralized federal agency policy over radiation was evident. As indicated above, many studies suggested strongly the need for the reinstitution of such a federal body. Since February 21, 1980, the new Radiation Policy Council has struggled to develop some form of policy analysis, but has only been created by Executive Order and has not yet received a congressional mandate (funds or personnel). It obtains its staff and resources through EPA on a hand-to-mouth basis. Its initial staff director is not a radiation professional, and seems to perceive his assignment as merely one of developing policy suggestions in the form of a report to the President. A 4-year life for the Radiation Policy Council is proposed in the still-pending FY 1981 EPA authorization legislation.

4. The National Council on Radiation Protection and Measurements (NCRP)

The Congress also chartered the NCRP, a radiation stan-

dards-setting group initially started on a voluntary basis in 1928.

The EPA's Office of Radiation Programs seems to maintain a distant relationship with NCRP. NCRP has an impressive array of expert committees and a substantial expert membership in fields of direct interest to federal agencies, but seems to have no advisory or supportive role with the EPA's ORP.

5. Internal Management Skills

Both the EPA and its ORP seem to lack management skills in the radiation field. Although ORP's inherited and acquired radiation staff does include persons with some substantial degree of national reputation in radiological monitoring and risk evaluation, its directors have not been seen to possess the necessary management skills to establish priorities, motivate subordinates, and meet standards or guidance development deadlines (even those self-imposed). The management seems to have sought to attack radiation issues that can provide adequate publicity for the Agency or the Program, recognizing that the "big" media issues (nuclear power, color TV sets, microwave ovens, medical use of x-rays, etc.) were under another agency's authority. There really was little "meat" left over. Hence the current push by EPA's ORP to look into natural background (radon in homes) to develop public support for controlling a preconceived (not necessarily a potential) health threat.

6. The Abatement and Control Program

The Abatement and Control Program is now stated to have as a principal objective eliminating unnecessary health effects by minimizing exposure to radiation sources through monitoring, risk assessment and "by establishing standards, criteria, guidance." A health effects research program on non-ionizing radiation (microwaves, radio frequencies) is underway and budgeted at $2 million.

Technical documentation of radionuclides as hazardous air pollutants under the Clean Air Act has been completed, and other EPA program offices will be promulgating standards. A significant possibility exists that insignificant, naturally-occurring trace amounts of such elements may become subject to standards and, directly or indirectly, subject to the provisions of other legislation such as the Resource Conservation and

Recovery Act (RCRA). Trace elements are found in virtually all construction waste, coal and hard rock minerals, mining overburden and earth moving. Regulation of such areas under these types of programs could incur significant expense or prohibition of such activities.

Current EPA/ORP management employs outside consultants to lead professional staff in projects designed to place the EPA into some position of radiation leadership—a position it has not been able to carve out since the FRC era ended.

The ORP staff morale seems very low, with project delays becoming more frequent, and standards development being postponed regularly. A Senate subcommittee oversight hearing on ORP consultant contracts is underway, with the present ORP director under personal attack.

Administrative Options

1. The Office of Radiation Programs administrator should be required to be technically competent in radiation and skilled in management of radiation professionals.

2. EPA leadership is needed to define the proper scope of radiation issues needing ORP actions (if any). The ORP support for the Radiation Policy Council (in transfering former Federal Radiation Council authority, funds, staff, etc.) should be in turn supported visibly and publicly by the EPA—or dropped by the EPA altogether. Perhaps EPA does not need a radiation program.

3. The Radiation Policy Council operation should be better defined, supported, and utilized within the EPA, or perhaps be established as a separate Executive Department advisory committee (or tie to NCRP). (See legislative proposals below.)

4. A new, capable, EPA ORP leadership should establish priorities for EPA's radiation efforts that are underway (if still needed) or set aside such programs. Priority needs include low-level radioactivity waste standards, high-level radioactivity waste standards, and occupational radiation guidance.

5. An early study toward establishing a *de minimis* regulatory approach to radiation should be started: what radiation problems represent such a low radiation risk that they can be left unregulated, or be deregulated? Setting aside the issue of the linear dose effect hypothesis, is the dose (and the effect) so low that federal or state regulation is unnecessary? Public confidence needs to be restored to the regulatory process through which real radiation exposures and effects are regulated. Hence, a clear federal policy, recognizing a *de minimis* ap-

proach, would emphasize for the public that not every photon needs to be guarded against, nor every atom of radioactivity isolated, nor every use of radioactivity be branded a threat to the future of the world.

Legislative Options

1. A close look is needed at the initial and subsequent EPA legislation (particularly the 1977 amendments to the CAA) to determine if radiation programs within the EPA should be strengthened (clarified) or eliminated. Perhaps a congressional review of the word "environment" would assist the EPA generally, and the Office of Radiation Programs specifically, to determine its scope and future action priorities. Is "environment": indoors, out-of-doors, occupational, patient exposures, property damage, etc.?

2. Are EPA radiation programs (if not eliminated) adequately funded/staffed/led? Should Congress define required professional level of staff training?

3. Congress should establish a new Radiation Policy Council, but consider establishing it either inside the EPA, separately, or linked to NCRP; its authority (advisory or action oriented); and staffing and resources.

4. There have been many studies of radiation/ biological effects and administrative aspects of radiation regulating agencies. Needed is an independent review of how the proliferation of radiation regulatory agencies got started. Perhaps combining the health functions within EPA with other health-related federal agencies in an overall "health" agency needs to be reconsidered and a congressional and Executive Department agreement adopted to act upon the review recommendations.

The combined "health" agency would reduce the number of federal agencies actively pursuing separate programs in occupational, environmental, and public health. It should not be seen as a new separate agency, but as a re-consolidation of several splinter constituencies that currently conflict in goals, that compete for expert manpower and scientific resources, and that cause regulatory confusion over jurisdiction and authority. The "health" agency approach would permit the health problems, including radiation, of people to be examined and, if necessary, regulated without regard to the radiation source, the regulatory agency's authority, the political climate, or the shortage of competent leadership.

5. Why was the Public Health Service (PHS) split up? Was it the physician-orientation approach to public health problems?

Perhaps that approach was a better way to establish public (and environmental and occupational) health priorities. What measures the need for regulatory action above the *de minimis* level: statistical probability of injury or death or real clinical cases above a nationally acceptable (or rejectable) level? These questions are of critical importance. A federal study panel on public health perspectives seems needed. It could be initiated by the Administration or by Congress, but the recommendations should encompass congressional action.

Certainly not all risks from high level radiation exposure have been eliminated, although most have been defined. The area of medical diagnostic (low level) and therapeutic radiation (high level) still provides opportunity for the highest real radiation exposure to the public (as patients). Hence, control over radiation policy by medical practitioners (physicians in health agencies) would still seem to represent a potential source of conflict of interest.

Yet the separately-established federal agencies (and their separate congressional constituencies) continue to proliferate radiation control efforts. Moreover, these separate agencies and their correlated congressional committees continue to seek out radiation issues relentlessly (riding potential radiation injury problems or alleged radiation damage) in a more and more tightening circle to justify the separate congressional mandates established earlier. Hence the separate agencies and their congressional supporters keep pushing for more radiation regulation (lower standards, even though experts agree only on the upper limits of risk to low level radiation); automatic compensation of certain possible radiation injuries (cancers); and, most ironically, federal agency control of nature itself (natural background or the appearance of natural radon in homes).

The current EPA argument for action seems to be: if God-created radiation levels would violate the regulatory agency proposal for lower and lower permissible limits from man-made radiations, then the U.S. regulatory agencies must regulate God-made radiations.

Hence, it is strongly suggested that serious consideration be given to establishing a Federal Health Department, with control over standards for all health issues (public, environmental, occupational) including radiation and that the combined health staff and resources of EPA, NRC, FDA, National Institute for Occupational Safety and Health (NIOSH), OSHA, Consumer Product Safety Commission (CPSC), etc., be assembled under

one federal administration and policy. The new/old agency should follow the guidelines of a federal panel on public health perspectives in approaching health issues, including radiation, with a proper role for physicians, clinical research, etc., but with policy and actions established with a keen sense of the public interest and with a fine recognition of the limits within which regulation can and should operate.

Noise

Background

The Noise Control Act of 1972, as amended by the Quiet Communities Act of 1978, establishes the overall objective of achieving an environment free from noise which jeopardizes public health or welfare. The EPA is to regulate the noise emission from newly manufactured products identified as major sources of noise. EPA is attempting to extend its authority to include standards for in-use equipment of interstate motor and rail carriers. Labeling requirements for regulated products and products sold to control noise are imposed and both financial and technical assistance to state and local governments are provided.

Occupational exposure to noise is regulated by OSHA standards, and "sound" from electronic products is included within the radiation authority of the Food and Drug Administration (under the Radiation Control for Health and Safety Act of 1968).

Principal Deficiencies of Existing Policies

There has been little guidance as to what constitutes a noise problem requiring federal regulation. Noise control remains a real problem for local government (i.e., barking dogs, loud radios or television sets, electronic amplifiers, etc.) where traditionally local ordinances provide a mechanism for local police action. As the source of the noise becomes a state or federal responsibility (i.e., state highways, state-licensed motor vehicles, airports), state or federal control action seems logical. However, what level of noise, and of what duration, constitutes a regulatory threshold?

There are generally agreed upon levels and duration of sound considered "damaging" when experienced in an occupational or environmental situation. But these levels have been established on the basis of expected real hearing loss to an individual. Noise levels irritating to some people are a subjec-

tive matter, with perception of risk in the ear (and mind) of the beholder.

Hence, existing EPA noise policies should be re-examined to determine the levels of noise, and the duration of these levels, considered to be acceptable by and necessary to the general public and the general welfare.

Administrative Options

The EPA noise regulatory programs are in place, but new emission regulations for railroad facilities, buses, automobiles, motorcycles and low noise emission products are in process. By court order, the Interstate Rail Carrier regulation must be revised. All such regulations and revisions should be reviewed for cost-benefit effects. Regulations should be limited to the statutory minimum, since available health effects studies indicate no evidence of health problems.

EPA assistance to state and local governments is expected to have in place, by 1985, 400 active local noise control programs covering 72 million people in 40 active state programs. The EPA has set administrative goals to concentrate these efforts in cities, and set additional goals of ensuring that at least 300 such programs have components to control motor vehicle noise. There has been virtually no effort devoted to cost-benefit analyses of this grant and assistance program, or of the economic impacts of state and local programs to require noise abatement. A major redirection of effort should be considered with respect to economic impacts of the program that the EPA has now adopted. Current reliance upon attitudinal survey data should either be supportable by direct evidence or omitted from future budgetary and programmatic efforts.

All federal agencies which have regulatory authority over noise sources should be required to meet regularly and pool research data toward defining a *de minimis* level of noise exposure, below which regulation is not necessary.

Legislative Options

Among EPA's current programs, perhaps a likely candidate for major legislative revision and cut-back is the noise control program. Areas defensible as regulatory targets are already under regulation, and future regulatory efforts are so overreaching as to approach silliness. Thirteen million dollars and nearly 300 EPA employees are devoted to such efforts as "a major sleep study . . . primarily to examine the health consequences due to noise-disrupted sleep" and "community survey data will be

acquired to more accurately relate human response to construction site noise." This is a prime target for regulatory elimination.

States should be provided with the necessary technical assistance to evaluate and, where necessary to regulate noise levels in the interim. The congressional recommendations should recognize the inherent difficulties of establishing federal guidelines as to standards which would resolve community-level issues arising out of intermittent noises.

Research and Development

Principal Deficiencies in Existing Policies

1. Research and development in EPA parlance in many cases has come to mean a preponderance of short-term, highly simplified studies designated to justify predetermined program needs, rather than to provide a sound scientific basis for cost-efficient regulations to improve the quality of our environment. The natural result is that regulations with major health and economic consequences are being written on the basis of seriously inadequate scientific and technical information.

2. The EPA has too often placed far greater emphasis on research to justify standards which it believes to be legally defensible than on research to discover the levels at which scientifically defensible standards should be set. It does so on the assumption that any major standard will automatically be subject to legal challenge. In other words, there is inadequate separation of basic science from social, legal and political judgments within the EPA.

3. The EPA does not balance research on problem identification with research on discovering improved methods to detect contaminants. EPA now has equipment to detect pollutants in the parts-per-trillion range, and yet it simply cannot make any meaningful estimate of risk for chronic human exposure in the parts-per-billion range; in addition, control technology lags even further behind. (It was exceedingly strange to note that the EPA's toxic control research expenditures were to decrease from 10.5 percent in FY 1980 to 4.5 percent in FY 1981.)

4. When it comes to health or defining dimensions of an environmental problem, the EPA places great emphasis on funding a battery of predictive research studies, and relatively little emphasis on funding the kind of research that could

accurately validate the predictions. For the most part, studies guesstimating the number of abandoned and inactive sites in this country, the risk of chronic human exposure in the parts-per-trillion range, and the number of contaminated ground water aquifers fall into this category. Ironically, when it comes to research on control technology, the Agency tends to take the opposite approach: testing and retesting existing technology rather than trying to improve and/or encourage innovation.

5. By using such research to justify stringent standards with exponential safety factors (standards which frequently necessitate utilization of edge-of-the-art technology), the EPA forces a very expensive form of progress toward zero risk. The costs and benefits of zero risk are not determined.

6. While having suitable, and in some cases exceptional, political expertise and knowledge of legislative and legal processes, many upper-level EPA management personnel often lack the scientific and technical expertise necessary to supervise high quality in-house research or to judge the scientific validity of contracted research. The EPA's increasing reliance on "Beltway Bandit" consulting firms is having the unfortunate side effect of decreasing the number of independent high quality scientists with enough experience to render a judgment about the conclusions drawn by their politicized cousins in the consulting world.

7. Considerable funds are shifted from program to program within the EPA and from federal agency to federal agency, frequently without more than a few supportive members of the congressional authorizing committees being aware of the volume and magnitude of such transfers. For example, when the National Center for Health Statistics got a broad mandate, but no money to study the adverse effects on human health from environmental factors, and to conduct an ongoing study of the causes of diseases, the Center "panhandled" money from EPA, the Department of Health, Eduction and Welfare (HEW) (now the Department of Health and Human Services) and others, and said that it expected to get more. For the EPA, it was an investment in its own future authority. When the EPA wanted to develop a National Ground Water Protection Strategy based on the assumption that all ground water was suitable for drinking, the monies came from regulatory and regional enforcement budgets and from a postponement of the development of scientific information for the future air programs.

8. If the information presented by Stephen Gage (Assistant

Administrator for R&D) to a recent Science Advisory Board Executive Committee session is correct, the EPA has an unusually high funding ratio. The statistics cited were that last year the EPA funded 80-85 percent of its grant applications. Even if the ratio dropped to 50 percent this year, that's a one in two shot at earning close to a million dollars, given an average grant of $90-95,000 per year.

9. Until recently, the Agency did not have a well structured "requirements system" through which planning for research would be based upon stated needs of the various operating/regulatory elements of the agency. A partial solution to this problem has been the establishment of intra-agency committees, co-chaired by appropriate Office of Research and Development and regulatory program officials. While in theory this system will work, in fact, such committee management is not a practical means of assuring that long range research strategies relating to regulatory plans and requirements will be developed.

10. Although many EPA air and water pollution, noise, toxic chemicals, radiation control, and solid waste programs have as their ultimate goal a protection of human health and the environment, the agency possesses little real expertise in the area of public health, epidemiology, and the "life sciences" as they relate to human health problems. As a result of the limited in-house public health expertise, there has been too great a reliance on published studies or contractor support studies, and in many instances, these studies lack proper medical, public health and environmental health inputs on the criticism of peer review.

11. The Agency suffers entirely too much from a "not invented here" syndrome insofar as research is concerned. There has been, almost since the inception of the agency, a marked tendency to attempt to refute scientific evidence resulting from studies in other agencies, or on the part of private sector interests, when those studies tend not to support EPA positions or conclusions.

12. Research and studies contracted to consultants on a price basis assures least experienced people doing the work, thus assuring mediocre results.

Administrative Options

1. Replace political appointees with people having technical and managerial background and experience in the field, i.e., with National Science Foundation, state environmental programs, industry research labs, etc.

2. For a "new" look at R&D, transfer these functions to and/or involve other agencies, NAS, Science Advisory Board (SAB), industry, academia, and states to focus on projects such as:

- atmospheric chemistry (ozone function);
- acid rain;
- groundwater contamination;
- hazardous waste detoxification; and
- relationship of levels of detectability and basis for standards, to health and environmental protection.

3. Define these projects and others with a view toward establishing long- and short-term priorities. Project definition should clearly describe the problem, impact, cost, value, anticipated use, and project resource and time requirements. All projects should be compared, and the most critical projects determined and initiated.

4. Ongoing R&D should be evaluated continually in light of "new" needs. Grants should be classified to fit this program and modified or closed out appropriately. Involvement of talents available in the Department of Energy (DOE), the Department of Commerce (DOC), states and others should be encouraged.

5. One of the most immediate needs for change in the EPA is a need for a comprehensive reevaluation of the role of research and development as it relates to the support of regulatory strategy. There is a need for a separation of the recognized requirements for supporting basic research on environment and health sciences, from the more pragmatic needs of regulatory program development. Such a study should have as its immediate objective a better definition of what types of studies are more properly supported by the regulatory program offices and those which should be undertaken against a long range strategy by the Office of Research and Development.

An independent outside review of research and development requirements should be undertaken at the earliest possible moment with an objective of clearly defining of the role of research, both in the development of regulatory strategies and in evaluating the success of regulatory efforts. It is ironic, for example, that there is no evidence at hand to show whether or not morbitity and mortality from air pollution-related causes has improved, remained the same, or worsened in the years since the EPA was formed. The same criticism can be made of

the failure of EPA to test river water quality after plant closures caused by EPA requirements to determine whether the promised quality was attained.

Any such study should lead to positive recommendations for restructuring the R&D function in the EPA as well as for better coordination with research elements in other agencies. It should take into account the frequent congressional criticisms regarding the EPA's research and development programs which have occurred in almost every committee report relating to this subject over the last five years. The study should recommend which EPA research functions should be transferred to other appropriate agencies.

The present committee structure, of course, should be maintained until the results of such an in-depth analysis of the R&D problem are completed.

6. Set up a "blue ribbon" group to determine the best way to administer R&D necessary for environmental improvement. The group should evaluate where the research should be done to answer the charge that EPA should not be responsible for enforcement, monitoring and R&D, because then the need for regulations can get in the way of, or change true scientific conclusions. The study group would determine feasibility and problems of putting air research under NOAA, water research under USGS, health and aquatic organism research under NIH, for instance. It may be that only limited research effort and coordination would remain with EPA. All aspects of the "new" research program proposed for the EPA should be evaluated to ascertain whether it can fit under another organization, leaving the EPA free to set regulations and be the federal enforcement authority.

7. Congress imposes deadlines which preclude use of research conclusions not already developed. Short-term immediate answers frequently become the norm and there is no way to change direction. There is a need for a mechanism in the laws and regulations which recognizes all answers are not available, and changes may have to be made in time.

8. The EPA R&D program does not value "negative" results; only positive findings are given any weight. A complete change to an impartial R&D philosophy which has no preconceived conclusion is in order.

9. Risk/Benefit/Cost parameters and methodologies must be developed for all mandates and then published for peer review. This would hopefully rectify the misconceived policy of a need

for zero discharge or zero risk in order to have an environmentally acceptable nation.

10. Review and, if necessary, revise existing regulations on the basis of the most sound scientific information available, and revoke regulations based on "quick and dirty" studies, predictive research, and/or inadequate data.

11. Eliminate the federal control of land-use aspects from major environmental laws and return unconditionally the discretionary authority for dealing with pollution at levels below those shown by good scientific research to be hazardous to health or environment entirely to the states.

12. Encourage development of greatly improved and more effective pollutant control technology, especially in the field of toxics and toxic mixtures.

13. Encourage development of less expensive tools for monitoring and/or testing.

14. Encourage the participation of independent and university labs in the fulfillment of the SAB's research "wish list."

15. In the short-term, steer a course away from promotion of the concept that pollutants are always toxic if toxic in any quantity, and, in the long-term, establish thresholds by developing scientifically defensible estimates of the ranges at which they would and would not be toxic under different sets of conditions; and work closely with industry, academia and other federal agencies to develop a matrix of the risks from chronic human exposure to toxic mixtures under different conditions.

16. Support NIH and others in in-depth epidemiological studies and other needed studies to assess the applicability of regulatory actions to protecting the public health and the environment. This could be done in conjuction with the Center for Disease Control, to evaluate annually and at intervals of not less than five years whether the objectives of legislative requirements such as the Clean Air Act, Toxic Substance Control Act, etc., are being met by validated evaulation of mortality and morbidity and other health indicators. The Agency should report annually to the Congress and the President the results of such studies.

Enforcement

Background

This is a preliminary review of Environmental Protection Agency enforcement policies and actions under the many laws

administered by that agency which fall into the general category of environmental regulation. These laws have an extremely broad range involving land, water, oceans, potable supplies, air, solid waste, chemicals and pesticides. It is safe to say that nearly every resident of the United States is directly affected by the administration of these laws even though enforcement actions are normally directed against local governmental agencies or industries. This preliminary study looks at the present status of the EPA's enforcement programs and considers the enforcement options employed by the EPA and apparent indications of the EPA's preference among the enforcement options. Based upon the present status of the EPA's enforcement programs, various problems and options which will be important for the agency to address in the coming years are considered.

Principal Deficiencies in Existing Policies

Many of the laws and administrative regulations underlying EPA's programs are extremely complex and are the result of extensive legislation or administrative action including a great deal of debate and compromise. Moreover, these programs are highly visible and have an extensive and extremely active constituency. Therefore, substantive changes to these programs are extremely unlikely on any "short term" basis. Under both Republican and Democratic administrations, the EPA has taken years to issue any significant substantive regulations. This time lag in and of itself must be addressed as a high priority issue. Many of the environmental laws included direct instructions from Congress to issue regulations within 180 days or 270 days or one year or other statutorily established time frame. Blaming Congress for setting unreasonable time requirements, the EPA has regularly ignored and violated these statutory time frames, claiming the job was too complex and difficult to achieve. Unless the process of producing substantive regulations is revitalized and made to function on much more reasonable timeframes, the program will become ossified in substantially its present form and making any changes in the program within a relatively short time frame such as three to five years will be virtually impossible.

The EPA has an internal system for producing regulations which appears to establish approximately nine months as the minimum time frame to make regulatory changes. In fact, it is the rare case where substantive regulations take less than a year to be developed. This process is well established and built

into the bureaucracy and will not be easily replaced by a more expeditious process without extremely decisive action. Any suggestion that the process be shortened for the modification of substantive regulations has and will invoke cries from EPA staff and its constituency that because of the special knowledge involved and the complexity of the program, the quality of the regulations, and, therefore, the quality of the country's environmental programs will be substantially affected by any tinkering with the process.

Concentrating on the enforcement area only, it should be noted that the substantive provisions of the law are minimal. The EPA in most situations has wide discretion in its enforcement program and it is unlikely that the scope of this discretion will change. Tightening up the laws may be desirable in terms of penalty provisions, authority for searches and subpoenas, and the utilization of grants and other support programs for enforcement purposes. However, tightening up of these provisions would not be considered a high priority need. In the enforcement area, immediate attention should be directed to appraising Agency enforcement procedures.

Administrative Options

1. Since the major impact will result from judicial orders under the EPA's enforcement program, highest priority should be given to developing a reasonable process to develop cases and decide referrals to the Department of Justice for the filing of judical actions. (This control can also be imposed from the Justice Department.) More specific priority needs would be as follows:

- Prioritize all pending and potential enforcement actions around criteria based on proven health and safety risks using combined measures for all programs. The emphasis should be on directing the main thrust of enforcement activities against proven hazards to the public health and safety no matter which program the hazards fall under. This improvement will require some centralization of the approval of the referral and filing of enforcement actions.
- For potential enforcement actions which have not been filed, a formal administrative procedure should be established for the filing of administrative complaints and the conducting of administrative adjudications prior to referral to the Justice Department. On the record, adminis-

trative adjudications will ensure that the facts have been fully aired, not only by the agency, but also by the discharger in question and that referrals are based upon genuine risks to the public health and safety, and not upon policy decisions relating to putting pressure on local officials.

- A joint EPA/Justice review should be conducted of all enforcement actions pending in the district courts to separate those actions which have been brought for various policy reasons from those which have been brought to protect direct threats to the public health and safety. Consideration should be given to placing a much lower priority on or dismissing those actions which were not brought for public health and safety reasons and referring to the violation through the administrative process discussed above.
- Conduct a special review of pending and proposed enforcement actions to identify those in which there is a substantial element of agency fault involved or in which a state enforcement action has been initiated. Before such federal enforcement actions are pursued, action should be taken to remove the confusion or uncertainty which the agency created and to attempt to resolve the case short of judicial intervention.

2. Because many discharges are caught in the gap between technology forcing national standards and peculiar facts of individual circumstances, high priority should be given to developing an effective administrative mechanism for the consideration of variances. Although truly effective variance programs would in many instances require revision of the substantive regulations, it is possible to create an administrative deferment through the exercise of prosecutorial discretion. Because of the potentiality of citizen suits in a number of the programs, this is a particularly difficult area to implement effectively. However, in many of the programs, it is a high priority need which should be given immediate consideration. Under the present situation created by the EPA, the enforcement lag has left many dischargers in technical and substantive violation of the law and regulations where, for whatever reasons, there is no intention to pursue an enforcement action. Such dischargers are, in essence, "hung out" as ripe targets for citizen suit actions. If it is not intended to refer a case to Justice for enforcement action, the EPA has a responsibility to take some final agency action which approves the existing situation.

It would appear that an administrative deferment program should be developed as a high priority to protect the person.

3. It is necessary to establish clear guidelines and criteria for selecting the appropriate enforcement stance of the EPA for each case. The present policy of seeking administrative resolution and avoiding referrals to the district courts appears to be appropriate. If a case requires referral, it will be subject to the prioritization and scrutiny mentioned above. However, the vast majority of perceived violations will not suggest referral to the Justice Department. Therefore, policies governing enforcement actions which are not intended to be referred to the Justice Department should be established. These must be clear and understandable not only to the agency staff, but also to the dischargers who may be involved. It should also be the policy of the agency to publish these standards so that those who may be subject to an enforcement action will understand the process that is being applied to them.

4. Administrative guidelines are necessary which will restrict the use and misuse of grants and planning and research funds. Funds should not be diverted to boondoggle projects merely to achieve a local agreement. Moreover, while grant conditions may be appropriate to ensure that funds are not expended for projects which will not meet regulatory requirements, lower level EPA officials should not be granted the power to withhold funds on vitally needed projects in order to blackmail local officials who have an honest dispute over regulatory requirements.

5. Actions should be taken to prohibit any activity by EPA officials or contractors working for the EPA to attempt to pressure or otherwise influence local legislators. Strict guidelines are necessary concerning requirements for accuracy and honesty in communications with local officials. While factual communications should be freely authorized, advocacy documents should be closely controlled by the agency administrator.

6. Administrative instructions should be generated directing EPA officials to narrowly construe their jurisdiction and eliminate the growing tendency by the agency to attempt to expand its activities into areas not clearly intended under its authorizing statutes. For example, the growing tendency to attempt to "pierce" publicly-owned treatment works which are complying with the requirements of the law in order to directly regulate industries which discharge into the treatment works should be stopped.

7. Enforcement procedures should be clarified and promulgated as part of the agency's official regulations. High standards should be set for all personnel involved in enforcement procedure to respect the rights of the individuals by the EPA. Any questionable activities, such as warrantless searches by EPA or its contractors, and unreasonable use of subpoena, should be prohibited by such regulations. An even more important concern is the manner in which EPA determines which cities or industries will be prosecuted. Selective enforcement is too common.

8. As mentioned above, there is a high priority need to restructure the internal process in the EPA for the promulgation of substantive rule changes. Although this need is indirectly related to enforcement, it is a significant consideration for the enforcement program area. Developing substantial improvements in the enforcement area will depend to a significant degree on the ability to issue some new substantive regulations to clarify and simplify regulations which presently create major enforcement problems. As long as the agency continues to take several years to make substantive changes in regulations, a number of more significant problems in the enforcement area will continue to be insoluble. (It should be noted that under the Administrative Procedure Act, 5 U.S.C. Section 533, regulations may be quickly developed and placed in effect after only 30 days for public notice and comment.)

9. Delegations of enforcement authority should be revised to clarify and place responsibilty for enforcement actions. Blanket delegations such as those presently in existence should be withdrawn and replaced by specific delegations giving lower level officials greater authority on minor actions and restricting more closely authority to impose major sanctions or take actions of significant impact and public concern.

10. Enforcement pressures have been used to get cities and industries to agree to do acts for which there are not legal requirements in return for "forgiving" other actions required by law or regulation. These agreements are then used as precedent to force others to comply.

11. The EPA should make greater effort to develop cooperation and coordination with states in sharing enforcement activity. The existing policy of federal review of state enforcement activity should be curtailed so as to foster trust with the states.

12. Existing EPA penalty policies need immediate reevaluation and revision to assure adequate flexibility which would aid

rather than impede settlement of pending litigation. Moreover, it should be accepted as a guideline for states, not a mandatory requirement which would trigger federal enforcement if the state elects not to use it.

13. The existing memorandum of understanding between EPA and the Department of Justice should be reopened to reflect the above policy concerns as well as cover all enforcement referral actions.

14. The consolidated permitting regulations should be reviewed and revised to remedy procedural aspects which do not fully recognize the rights of the permitee.

15. A substantive revision which could apply to several EPA programs and have a significant impact on the enforcement program would be to adopt regulations which would change the context of the EPA's regulatory efforts from focus on technology to focus on end results. It makes a significant difference in the size, content, and scope of EPA's regulatory program if it is addressed to the end result, for example, to the emissions leaving a plant, rather than having to address "upstream" problems such as which element of the plant is most responsible for the creation of certain emissions. Requiring enforcement staff to be technical experts on various processes and industrial activities places a substantial burden on the staff and reduces its overall effectiveness. Moreover, attempts to carry out enforcement programs "upstream" substantially increase the cost of and intrusiveness of the enforcement activities without commensurate environmental improvements.

16. Another substantive change which would have a substantial effect on the enforcement program would be modifications to allow flexibility and innovation in control strategies to allow effective trade-offs and enhance the opportunity to achieve the best overall results. The "bubble concept" is an example. If fully implemented, the concept would allow an entire plant to be considered a single source of emission, so that the industry could concentrate its resources on reducing the worst sources of emission rather than having to reduce all sources of emissions. The present EPA interpretation of the "bubble concept" so confuses and limits the use as to destroy the potential for progress.

17. A special effort should be initiated to test and expand concepts of self-regulation and consensus rulemaking. There would appear to be substantial opportunities for increasing effectiveness and reducing costs of the regulatory effort if these techniques could be used to free EPA staff to develop

expertise at auditing and testing compliance programs run by others.

18. A medium- to long-term effort which could have a substantial impact on the enforcement program would be to review the national standards regulations and other criteria established by the agency against the concept of "enforceability." Because the EPA has been willing to adopt "technology forcing" requirements at the front end of the process, it has shifted substantial burdens to the enforcement end of the process to ensure that the technology advancements intended have in fact occurred and are implemented. Since not all technology breakthroughs occur on the schedule desired by the bureaucrats designing the regulations, an inherent enforceability problem is created. Resolution of major issues relating to the ability of industries to achieve certain standards should be resolved through the rulemaking process and not dumped upon the enforcement program and the adjudications which it employs. This process of shifting the burden is particularly unfair to the dischargers since there is little flexibility to adapt to realities within the enforcement program. Many of the statutes were clearly designed to resolve such issues prior to enforcement. Under several of the EPA's laws, the validity of the regulations and their "technological forcing" standards cannot even be raised in a judicial enforcement proceeding. The only issues to be resolved are whether or not the industry has in fact complied with the standards and, if not, when compliance will begin and of the amount of penalties to be imposed. If the standards have proven to be unrealistic, both the discharger and the enforcement staff are faced with an impossible situation which may then result in an administrative variance or other unsatisfactory informal resolution.

Legislative Options

1. Many of the environmental regulatory laws were written with the broadest definitions of national policy and widest scope of authority for the agency. There is a significant need for Congress to make the principal legislative decisions between broadly stated policy, such as clean up the nation's waters and the direct enforcement against individual dischargers. Each of the major environmental laws should be defined in greater detail as to what is expected from each of these laws to help guide not only the adoption of substantive policies by the EPA but also its enforcement activities.

2. The environmental laws should be amended to insert both

economic feasibility and cost/benefit analysis as an implementing program to be developed by EPA in setting standards and in resolving enforcement actions. As improvements have been made over the years in such areas as air pollution and water pollution, each increment of further improvement tends to cost more in proportion to the benefits achieved. The scope of the pollution problem which the country faces and the cost of achieving improvement have both modified significantly since the major environmental laws were originally adopted.

3. The need to impose national standards and to get moving immediately with major nationwide pollution control programs which fueled the original environmental laws has to a substantial degree passed in many areas. Now the realities of enforcing these laws on a case-by-case basis are rising to greater significance. Effective enforcement requires the ability to modify demands to meet unique factual situations which continually arise under all of the environmental programs. Therefore, the environmental laws should clearly authorize the adoption of variance programs by the EPA when no immediate threat to the public health and safety would require full implementation of the restrictions established by the laws and regulations.

4. Because of the misuse of funds authorized to be distributed under various environmental programs, further detailing within the statute is necessary to clarify the exact use and limitations on use intended by Congress. Such clear standards would inhibit the use by EPA of the funding programs as indirect enforcement mechanisms. A serious effort should be made to require cost-effectiveness and cost-benefit considerations in all grant programs.

5. In the area of enforcement against publicly-owned dischargers, consideration should be given to tying compliance with federal standards to the availability of federal funds to offset the cost of achieving such standards. Exceptions could be made for discharges which present clear threats to the public health and safety. However, most federal standards go far beyond threats to public health and safety and require vast expenditures of funds to achieve a greater degree of purity or clarity in air and water than we accept in our everyday living. Such results may be desirable for a national goal, but they clearly are not necessary expenditures within the severely constrained limits of many local budgets already unable to support public services of greater need, such as adequate levels of public education and police and fire protection.

6. An effort should be made to restore in the environmental

laws the concept of federalism which was given a great deal of attention when the laws were passed, but has turned into no more than lip service as the laws have been implemented by EPA. If a state agrees to assume the responsibility for the environmental regulatory program, the federal involvement should be drastically cut back and concentrate only on end results to allow the states to manage their internal affairs in the way they deem best. In particular, various political considerations built into the laws should be eliminated, such as the special restrictions on clean areas imposed to stop the relocation of industry and, therefore, to protect the Northeast. *See, e.g.*, Clean Air Act Sections 160-169. There are similar concerns with the requirement that user fees be imposed whether or not a local agency is willing to pay the full cost and requirements. An example is pretreatment regulation, which mandates limitation on individual industry discharges even if the treatment works into which they discharge are able to achieve EPA standards without the control desired by the federal bureaucracy. Another example is the need to prohibit the "piercing" of the public bodies which have accepted responsibility for achieving the end results required by the act. This action allows federal bureaucrats to impose direct regulation on industry. On the other hand, when states refuse to assume the burdens established under the federal regulatory program, the full burden of the program should be placed on the federal bureaucracy. The realization by both Congress and the federal bureaucracy of the costs, adverse publicity, and headaches associated with the enforcement of many of the environmental programs would undoubtedly result in more realistic approaches and more reasonable requirements than when the federal regulators are able to sit back and merely demand that state and local officials perform the distasteful and, in some cases, unreasonable actions mandated by federal requirements.

Planning and Management

Principal Deficiencies of Existing Policies

1. The Agency has failed to effectively implement Executive Order 12044 or its own implementing program which requires determination of economic impact of regulations.
    - E.O. 12044 and the EPA program are fatally defective and must be revised in order to eliminate the numerous exceptions and other excuses for non-adherence.

- The hypothesis that EPA can be expected to determine objectively the economic impact of its regulations is untenable; the EPA has regularly stated there is no economic impact or has provided less than adequate economic analyses to buttress its regulatory action;
- Closely related to the point above, the EPA has deliberately exempted itself from two important "check and balance" reviews: the old interagency "quality of life" review and the requirement to prepare Environmental Impact Statements for major federal actions which might have significant impacts on the quality of the human environment (ref: Sec. 102(2)(c) of PL 91-190, NEPA).

2. The Agency must review its decision to split regulations into subsets to avoid the Executive Order. The EPA should evaluate the cumulative impact of all regulations on any source category.

3. There is failure to take into account economic impact of sister agencies' (e.g., OSHA, DOE, FDA) regulations on similar topics.

- The failure to take into account economic impact of sister agencies' regulations is not necessarily a primary failure of the EPA—it results from a lack of direction from Congress and the Executive; there is no law requiring EPA to take into account—not merely "consider"—the regulation of sister agencies. Even the OMB, the U.S. Regulatory Council and the IRLE are "paper tigers" in that regard.
- It is axiomatic: In the absence of a specific legislative requirement and an independent "watchdog" organization to make sure that the requirement is being met, federal agencies cannot be expected to coordinate and synchronize their programs with those of their sister agencies. To expect a single federal agency, of its own volition, to ascertain the cumulative and synergistic impacts on society resulting from the regulations that it and its sister agencies promulgate is asking too much.

4. There is failure to use various data bases within the agency and in other agencies to develop regulations (e.g., use of contractors to gather data already available from other sources).

- More serious than the failure to use existent data bases to develop regulations, is the congenital incapability of determining the accuracy and reliability of the data used in the development of the regulations. Even when the

EPA is appraised of the errors in such data, it fails to incorporate corrections in later promulgations.

- Closely related and just as serious is the lack of any institutional means (i.e., peer review) for critically evaluating the accuracy and reliability of the data produced by the EPA's contractors. It should be emphasized that the EPA, unlike every other federal agency engaged in R&D support, does not have a written policy that would encourage and prod its contractors to publish their research in appropriate scientific or professional journals where results could receive essential critical peer review. This policy failure is directly responsible for the promulgation of many defective EPA regulations. Also, the EPA, to forestall making information available via the Freedom of Information Act, has required the contractor to hold the design on the study as well as the data and, after review and acceptance by the EPA, the contractor then submits only the conclusions to the EPA. Under FOIA, EPA must release only the "information available" and this prevents individuals from obtaining the data and verifying conclusions.

5. Regulatory reform has been used as a public relations tool, not to accomplish true reform.

- At the same time, one should understand that *really* significant regulatory reform can only be accomplished through the legislative route. Congress *must* be prodded by the Executive to amend existing environmental laws in ways that would lead to greater flexibility both in the development of regulations and in the "fine tuning" and improvement of regulations already on the books.
- Closely related, regulations will not receive very much in the way of substantive "reform" or improvements in the absence of an independent "third party" or overview organization charged with the responsibility of reviewing regulations on a regular basis to determine whether they are achieving their stated objectives in the most cost-efficient manner. An overview organization, possibly GAO, Office of Science and Technology or OMB, rather than a new agency, could provide independent, objective and *credible* assessments of regulations for the Executive and the Congress, thereby providing one politically viable basis for changes in environmental protection laws and regulations. Actually, this is a congressional oversight function.

6. Early input by the regulated community on economic impact of regulations (e.g., regulations at the work group level should be open for input) would be beneficial.

- The problem has not been the lack of economic input from the regulated community; the real problem has been EPA's arrogant disregard of those inputs, as well as its frequent attempts to impugn the credibility of inputs from the business community.

7. The economic consequences of regulations are downplayed and considered as industry costs, not as the true cost to society. It must be noted that the true costs include inflated cost to consumer and the impact of lost jobs and taxes to communities.

8. Planning and management (P&M) should be not only an advocate of accurate and reliable risk/benefit/cost considerations, but also it should be responsible for establishing the EPA methodolgy and assuming its implementation. P&M should insist on independent assessments by EPA's intramural cost/benefit findings.

9. There should be better coordination of regulations involving various segments of EPA, i.e., air, water, solid waste. Regulations for each source category should be summed to determine total economic and physical impact.

However the failure to take into account (in contradistinction to "coordination") and harmonize regulations dealing with air, water, solid waste, etc., will not be accomplished until it is recognized that the major laws that mandate the regulations are written in such a manner as to impede and indeed, prevent real coordination and accountability. The combination of design specs as opposed to performance specs and unrealistic schedules for attainment work against careful assessments of total costs and benefits of aggregated regulation covering air, water, solid waste, toxic substances, etc.

10. There should be an overview and audit impact of all regulations after they are in force for several years and remedies recommended for inequities. Audits must be required by law and must be carried out by independent organizations, not by the same agency which promulgated them.

11. There has been inadequate assessment of the effect of U.S. regulations on international competition and balance of payments.

- The "helter-skelter" approach to developing regulations and the absence of a requirement that EPA prepare comprehensive Environmental Impact Assessments be-

fore it can promulgate regulations have led to adverse impacts on international competition and balance of payments.

- The recent Executive Order requiring "International Environmental Assessments" of proposed U.S. exports is ill-conceived. If left standing it will greatly increase U.S. liabilities for its action without concomitant benefits for the U.S. in international trade.

International Activities

Background

There are some fundamental differences between the policies of the United States and those of Japan and the European nations in environmental control. These impact directly on this nation's position in world trade.

For example, in most European countries, air and water quality standards are considered as guidelines and are not strictly adhered to in absolute terms as in the United States. These countries do not establish source by source air emission limitations with diffusion models as is the common practice in the United States. Normally, Europeans use their quality standards (if they have adopted such standards) as objectives to be pursued by installing the latest technology on new sources and requiring retrofit controls on existing sources where a serious problem exists.

Generally, the Japanese rigidly follow their national ambient air standards and local prefectures often adopt more stringent standards.

A second policy difference lies in the manner of attainment of air quality guidelines in both Japan and Europe. Use of tall stacks and intermittent control measures are acceptable. Tall stacks reduce need for more stringent controls to meet ambient quality objectives. Intermittent controls such as reduced operations and/or changes in fuel mix during stagnant weather conditions reduce cost of construction and operation of controls. The United States' practice is to assume a combination of "worst case" scenarios to develop emission limitations. The computer diffusion models employed by the U.S. EPA assume several simultaneous "worst case" conditions:

- Meteorological conditions are in an inversion state.
- All permitted sources are operating at maximum capacity.
- All operating sources are operating with their "worst case" fuel mix.

This "worst case" combination is translated into more stringent emission limitation which must be met every hour of the day.

The difference between the United States and its competitor countries in air pollution control is further increased by a difference in measurement of air quality. Methodology for particulate measurement in the United States is a high volume sampler which collects particles larger than the respirable or inhalable size. Other countries use a reflectance or a transmittance test which measures inhalable size or visibility and, in the range found in American cities can be one-half to one-sixth the reported result using the American method. Comparison of adopted ambient standards is thus difficult unless the methodology is the same.

The United States has annual average standards for air and national uniform standards for water. European nations do not agree with such an approach and allow variations depending on local physical and economic considerations. Also, the scientists, and in particular, the British government, see no reason for an annual average. It is considered nonsensical.

Principal Deficiencies of Existing Policies

1. Carrying U.S. health, safety, and environmental concerns through regulation of exports, without any concurrent commitment by foreign producers of similar products.
2. U.S. balance of payments and market share impacted negatively through unilateral control.
3. Needless U.S. regulations directed toward world scale problems when other countries fail to adopt comparable regulations.
4. Lack of acceptance of scientific opinion which differs from U.S. community.
5. Active proselytizing abroad by EPA, thus earning considerable animosity among foreign regulatory authorities. EPA should restrict its activity to information exchange.
6. No protection of data costs. Proprietary information is made public by EPA to foreign countries and thus to competitors.
7. Documents and study results are provided by EPA at no cost to the receiving country.
8. No clear executive branch policies regarding domestic involvement in international activities. An executive branch policy statement could be extremely beneficial in 1) clarifying

an overall U.S. intention; 2) more clearly delineating the agency's role and responsibilities.

9. Agency activities in programs that, in effect, result in industrial costs that are the equivalent of off-budget funding. This is an extremely sensitive matter and an executive branch policy statement regarding this practice could be important.

Administrative Options

1. Cancel present "White House" policy development and/or implementation on export of hazardous materials.

2. Limit EPA concern for exports to legislative intent under FIFRA and TOSCA as information only.

3. The evaluation of domestic policy and position is often predicated on less than full assessment. The agency's position and its recommendations could benefit from executive branch insistence upon multi-national studies.

4. Participation of the U.S. government through EPA in multi-national areas results in binding agreements between these governments, which in turn, directly affect the implementation of domestic laws. However, these arrangments are arrived at without the applicable due process normal to domestic legislation and regulatory development. The usual persuasion is EPA funding of foreign national programs with funds not subject to OMB review. New legislation or policy statements providing these due process requirements are necessary.

5. The responsibilities of the Department of State in overall diplomacy and international relations are well established. The relationships between EPA and Department of State, however, are not so clearly defined. There is strong EPA influence on State Department proposals abroad (e.g., OECD, individual nations). This would also benefit from executive branch review and policy statement.

6. The activities of EPA in the international arena are only one component of a much broader spectrum. A policy statement recognizing this and providing for clarification and the establishment of cohesive integrated policies and approaches would be beneficial.

7. The present agency approach towards development of international positions suffers from a lack of full public and industrial participation. The process is separate from the requirements of the Administrative Procedures Act. Either through Executive Order or introduction of legislation, this deficiency should be remedied.

8. Bilateral, trilateral and multi-lateral agreements exist. It would appear that these are often the result of individual negotiation and outside the direct review of the executive branch and the Congress. Clarification of the agency's authority, public participation, executive and congressional oversight should be considered. For example, EPA and State Department use funds on foreign deposit that are outside OMB review.

9. Growing international concern with suspect toxic substances results in varying priorities being established. This results in confusion domestically because of different priorities among different agencies. A clear mandate leading to the creation of an international consensus on a priority-setting system should be developed.

10. There is a need for the establishment of clear goals and objectives and a program should be initiated to identify critical policy areas by industrial sector and by issue. The resultant matrix would provide clear policy guidelines, and aid in the establishment of priorities and facilitate assessment of international and agency objectives.

11. Coalitions of critical material-producing nations have already developed in the formulation of economic and political power blocks similar to OPEC. Thought needs to be given towards development of equivalent (if possible) units, such as might be accomplished through a North American Economic Community. While not strictly an EPA issue, EPA could play a central role in such development since many of the issues involve safety, health or related matters.

BUDGET

Introduction

For FY 81, the President requested $5.34 billion to run the Environmental Protection Agency, in the following major categories:

- $1.391 billion for regulatory activities or "operations;*
- $3.7 billion for construction grants for publicly-owned sewage treatment works; and
- $250 million for a proposed oil and hazardous substance liability fund (a.k.a. "Superfund").

*The operating budget includes $3.3 million to run the U.S. Regulatory Council, chaired by EPA Administrator Douglas Costle.

The Appropriations Committees in the Congress made a number of changes that affected the President's original request. The Administration itself proposed an increase for hazardous waste and related problems three days before the Senate took up EPA's appropriation. This addition was accepted on the floor. A conference committee did not complete its action before the 1980 election recess. Congress did not pass the proposed Superfund bill for which funds had been included before the session ended *sine die.* A compromise was accepted during the lame duck session.

Both House and Senate have appropriated identical sums for construction grants: $3.4 billion. This amount is unchanged from FY 80 and is $300 million below the President's request.

The following analysis of the EPA budget discusses each of the three major categories. Although the construction grants program has the largest federal budgetary impact, the regulatory program imposes costs on private activities of vastly greater magnitudes due to increased costs to consumers.

The Superfund account provides funds only for the first year's operation. The Administration's proposed legislation authorized the fund to raise $1.625 billion from appropriations and fees over 4 years. Congress did consider a much larger program. The Senate committee-reported bill authorized a 6-year fund at a total of $4.085 billion. The finally adopted bill authorized $1.6 billion over 5 years, with 7/8 to be funded by industry, the rest by the federal government. This is a major new program, which includes purposes other than the institution of a liability fund. It reflected a problem that overwhelmed the attention of the agency and the environmental committees in Congress: the release of hazardous substances into the environment and hazardous waste disposal sites. This problem will shape the agency's activities over the next 4-8 years.

Integration of the superfund program into the EPA programs for protection of water, air and land is critically important. Eliminating an existing dump site can easily adversely affect water, air or another land site. If the presently proposed approach is adopted—a separate entity within EPA (in excess of 1,500 employees and even so far as locating them in separate buildings from the regional headquarters)—the decisions could be counterproductive to land, air and water control programs. The alternative is to include the site reclamation or containment in air-water-land control strategies. The difference in approach will mean large differences in costs and manpower as well as impact.

Municipal Construction Grants Progams

By far, the largest account in EPA's budget is the wastewater treatment construction grants program. Construction grants accounted for $3.7 billion, or 70 percent of the $5.34 billion requested by the Carter Administration for EPA in FY 1981.

It provides 75 percent in federal cost-sharing for planning, design, and construction of grant-eligible components of publicly-owned treatment works.

Annual appropriations are alloted to states by statutory formula. States establish priority lists against which EPA obligates funds to municipal projects. States have 24 months from the beginning of the fiscal year to obligate that year's allotment.

Construction grants have been a part of the Federal Water Pollution Control Act since 1956. Table I illustrates the funding history of the program. Between 1956 and 1972, EPA grant awards totalled $5.2 billion, providing a variable 30-55 percent federal match. Since the 1972 amendments, Congress has appropriated $31.6 billion for new projects plus $2.4 billion for reimbursement to old law projects. (Reimbursements are retroactive payments to bring the federal share of old law projects to 50 percent.) In FY 1981, an additional $3.4 billion will become available.

Of the $31.6 billion appropriated between FY 1973-1980, $26.0 billion has been obligated to new projects. The unobligated balance, as of August 30, 1980, is $4.5 billion. Projects worth $5.2 billion have been completed. Thus, 83 percent of funds appropriated to date are for projects still "in the works."

The bulk of grant funds goes for actual capital construction. However, $2.0 billion of the $26 billion in total obligations since 1972 have been used for facilities planning (step I) or detailed design drawings (step II). The development of facilities plans propels the program. EPA recently estimated that the construction costs of projects now in the planning or design phase are $21 billion more than appropriations to date. Awards for new facilities plans are made regularly.

Since the Clean Water Act of 1977, up to 2 percent of each state's annual allotment for this program is available for administration. This is in addition to Section 106 basic grants for state water agencies to assist in carrying out all parts of the Act. The funds reserved for state administration of delegated functions reduces the appropriations devoted to actual con-

struction. At the current appropriation rate of $3.4 billion, this reserve approximates $70 million annually.

The industrial cost recovery requirement in the 1972 amendments have been repealed. This in effect eliminated the proposal that industry repay the capital costs associated with treating its wastewater in municipally-owned facilities. EPA estimates average industrial capacity at 16.4 percent of a treatment plant.

A precedent-setting amendment now permits New York State to use its construction grant allotment to dredge PCBs from the bottom the the Hudson River.

The EPA systematically updates its estimates of needs for the construction grants program. The latest biennial Needs Survey provides data as of 1978. "Total Needs" for five major construction categories, to serve a year 2000 population, are estimated at $106 billion, not counting control of urban storm water. The federal share is approximately $80 billion.

TABLE 1
ENVIRONMENTAL PROTECTION AGENCY
CLEAN WATER ACT CONSTRUCTION GRANTS
FY 1973—FY 1982
(billions of dollars)

Fiscal Year	Authorization	Appropriation	Unobligated Balance (as of 8/31/80)
1973	$5.0	$ 2.0	—
1974	6.0	3.0	—
1975	7.0	4.0	—
1976	0	9.0[1]	—
T-N[2]	0.7	.480	.280
1977	—	1.0[3]	—
1978	4.5	4.5	
1979	5.0	4.2	1.309
1980	5.0	3.4	2.958
1981	5.0	3.4	N/A
1982	5.0	*	*
		$35.0	$4.547[5]

1. "Impounded" funds released under court order.
2. Talmadge-Nunn amendment. Authorized in P.L.94-369 July 22, 1976), Title III.
3. Authorized in Appropriation Act.
4. Appropriation passed both House and Senate. Conference pending as of October 1, 1980.
5. EPA estimates it obligated $2.51 billion during the month of September 1980, before the end of the fiscal year. This would reduce the unobligated balance to $2.0 billion. However, when the FY 81 appropriation bill is passed, the unobligated balance will increase by $3.4 billion, to $5.4 billion, net obligations.

NOTE: In addition, between FY 56-72, there were grants of $5.2 billion under the "old law." Also, $2.4 billion was appropriated between FY 73-76 for reimbursement to such "old law" projects.

The EPA has reduced what it considers the federal share should be to $53.4 billion. Assuming annual appropriations at $4.5 billion and a 7 percent annual inflation rate, EPA has estimate it will take 26 yars to complete the program. Actually, if inflation remains at 8.5 percent, the program will never end.

In recent years, inflation in this sector has ranged from 13 percent to 18 percent annually. Appropriations have decreased annually since the 1977 Clean Water Act extended the program from FY 78 to FY 82. Although the Administration requested $3.8 billion for FY 80 and $3.7 billion for FY 81, Congress appropriated $3.4 billion for each year.

EPA is evaluating the entire construction grants program in a process called the "1990 Strategy." It will be presented to Congress next year. However, most of what is in the "1990 Strategy" is massaging present procedures. No fundamental changes in scope are suggested. In 1977, the Administration announced its commitment to a program goal of $45 billion in federal grants over 10 years. Neither requests or actual appropriations have matched the $4.5 billion needed annually to meet this goal.

EPA and the states have had difficulty enough administering what appropriations were made. Obligations of funds slowed down considerably during FY 78 while EPA wrote the regulations to implement changes Congress made in the 1977 Clean Water Act. To reduce outlays and shrink the deficit during FY 81, the Administration itself brought the program to a halt in several states last March by freezing their FY 80 allotments.

Client groups are supplementing EPA's 1990 Strategy by looking at construction grants over the long term. ASIWPCA, an association of state water program administrators, is developing position papers on funding and management issues. The Association of Metropolitan Sewerage Agencies, composed of the largest cities and sewage treatment authorities, also has a keen interest in the program's future.

The Administration should carry through with the evaluation work now underway at EPA. To avoid its becoming an adventure in paper shuffling, unswerving attention to the objectives of reducing the federal financial commitment and simplification of the program must be maintained.

A reasonable budget request for FY 82 would be $3.4 billion.

unchanged from the two previous years' appropriations, and a level Congress is likely to approve. This compares with an authorization of $5 billion. Current authorizations expire at the end of FY 82.

A commitment to FY 83 and subsequent appropriations at a level of $3.5 billion annually should be made strictly contingent on Congress enacting a comprehensive program of reforms prior to the end of FY 82. These should include not financing step I and step II planning (make this local and state decision responsibility), reducing the federal matching share to 50 percent for secondary treatment plants, and not financing advanced waste treatment.

The program should continue to favor the development of truly innovative and alternative wastewater treatment technologies that reduce operating costs or energy use, or generate revenues through recylcing of nutrients, water or energy. To date, EPA has not encouraged innovative technology. What Congress and EPA has classified as innovative (land treatment) is not; it dates to antiquity.

In the long-term, EPA should assist and encourage technology advances in municipal wastewater pollution control through research, evaluation, and demonstrations, but should not provide grant assistance for construction itself.

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THE NATIONAL ENDOWMENTS FOR THE HUMANITIES AND THE ARTS

Michael S. Joyce*

INTRODUCTION

The mission of the National Endowment for the Humanities and the National Endowment for the Arts as stated in Section 951, Title 20, of the United State Code cannot easily be improved on. Properly, the legislation proclaims that (1) "the encouragement and support of national progress . . . in the humanities and the arts . . . is an appropriate matter of concern to the federal government"; (2) "a high civilization must not limit its efforts to science and technology alone but must give full value and support to the other great branches of man's scholarly and cultural activity"; (3) "democracy demands wisdom and vision in its citizens and must therefore foster a form of education designed to make men masters of their technology"; (4) "the practice of art and the study of the humanities requires constant dedication and devotion and that, while no government can call a great artist or scholar into existence, it is necessary and appropriate for the federal government to help create and sustain not only a climate encouraging freedom of thought, imagination and inquiry but also the material conditions facilitating the release of this creative talent"; (5) "world leadership . . . rests in part on respect and admiration for the nation's high qualities as a leader in the realm of ideas and of the spirit."

**Author's Note:* The preparation of this report was a collective enterprise involving many individuals. William J. Bennett, Janice G. Bergmann, Samuel Lipman, Philip N. Marcus, Stephen Miller, William E. Russell, Saul Schechtman and Hugo Weisgall deserve special mention. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

These individual elements are worth citing as a reminder of the high and sound purposes for which the Endowments were created. Any future administration, whether it be Democratic, Republican or independent, ought to have no difficulty in accepting these provisions. The legislated mandate for the National Endowment for the Humanities and the National Endowment for the Arts rests on noble ideals which both Endowments, at their best, should uphold. Activities of the Endowments in recent years, however, reveal a tendency to emphasize politically inspired social policies at the expense of the independence of the arts and the humanities. This report discusses these tendencies and offers some positive suggestions for re-directing the Endowments toward the highest purposes for which they were created.

PART ONE: REPORT ON THE NATIONAL ENDOWMENT FOR THE HUMANITIES

PRESENT POLICIES

Basic Policy Assumptions

Beyond the mission of the NEH as adequately stated in its enabling legislation, the significance of NEH goes to the heart of American society. American society strives both for liberty and equality. Freedom and justice for all is our credo. But these goals are not always in harmony. Can a modern society achieve their full implementation when they are judged to be in tension? This great question of modern life animates the recent public debate about elitism and populism in the agency's actions. At its best, the NEH stands for excellence, the highest fruit of the pursuit of liberty.

As a true friend of democracy, the NEH can teach the nation the limits of equalitarian impulse. Its responsibility to this larger end is stated as a matter of law. Its inescapable involvement with democratic politics means the exercise of continuous political skills to avoid entanglement in its powerful leveling forces.

NEH will remain an object of some controversy. The chairman of the agency must be familiar with the causes of the controversy, and be able to make his way through the dilemmas of our politics. Any attempt to change the legislation would be impractical. Any effort to avoid the problems inherent in the legislation would be foolish. The place to begin

is to reduce the ambitions and expectations that have been placed upon NEH.

The chairman of each Endowment has primary responsibility for preserving the agency's apoliticial purpose. Here we would propose a distinction. The chairman must promote and defend the "apolitical" nature of the agency's operations. But he must also be "political" in terms of dealing with Congress. The present chairman seems hardly to acknowledge the former but is considered by many to do the latter very well. A chairman who can and will do both well is necessary.

What follows in our analysis rests upon the following general proposition. By doing less, NEH can do greater good. By doing scholarship, NEH can support an important cultural goal, and begin to extricate itself and the humanities from the buffeting of popular forces.

Summary of Principle Deficiencies of Existing Policies

Though NEH engages in many worthwhile tasks, its performance could be improved in several areas. To begin, three general principles may be advanced as a guide for NEH activity: (1) the Endowment should restrict itself in funding the humanities to projects and programs which truly are in the realm of humanities. Simply put, this means that the NEH should support the humanities, rather than sociological crusades, political action, or political education as demanded by narrowly partisan interests. (2) The National Endowment for the Humanities should have an interest in funding programs which are intelligently conceived and valuable in their own terms. (3) The National Endowment for the Humanities should fund worthy individuals, groups and institutions in need of support which cannot be obtained elsewhere.

These propositions, though seeming self-evident, need comment, because they are not always observed. Granting that the National Endowment for the Humanities is subject to political pressure and strives to be independent in judging and assessing individual projects, realistically speaking, it is feasible to think that the Endowment could be more selective in its judgments than it is at present. Again, this is not just a reflection on the general performance of the Endowment, but rather, an encouragement to excellence. Given existing political and cultural conditions, this excellence is achievable.

A terrible disservice has been done to the humanities by the expectation, and sometimes the insistence and demand, that

they be integrated into public policy. While the humanities are an extraordinary resource for the enlightenment of citizens on public issues, humanists are not uniquely qualified—in fact, they are often unqualified—to speak of the facts and details of specific cases and problems that citizens may confront, such as: the expenditure and distribution of taxes, the wisdom of land development schemes, or the uses of retirement. It is possible that an occasional scholar in the humanities may be able to illuminate issues, but the unfortunate employment of humanists in settings where they are asked to speak of things about which they know nothing, and to give advice on living, has done the humanities a disservice. Such situations have occurred with regrettable frequency in the state-based programs.

Strong leadership can make itself felt in the National Endowment for the Humanities as it can in other agencies of government. It is possible that there has been over-sensitivity to the various and different wishes of members of the National Council; in law the National Council is advisory to the Chairman, and it is the Chairman who makes the decision on funding. To defy the Council at every turn would be a critical mistake; however, the Chairman should give the Council a sense of the proper direction of the Endowment. The Chairman should chair and lead, as well as react.

The notion that federal monies must be carved up and distributed to groups on the basis of a model of statistical representation (so much for "elite scholars," so much for members of under-represented groups, so much for teenagers, so much for those over 70, and the like), clearly needs to be overcome. The Endowment, of course, must be responsive. It ought to respond to any sound proposal from any group or individual, and it should make efforts to seek out proposals and programs from those whose activity or program may be sound, but who may feel discouraged to apply because they are not members of the "educational establishment." This is a very different proposition from statistical equality—the working assumption that there is an automatic and proper percentage for each constituency of American society which policies and funding must reflect.

Consistent with the provisions of federal legislation, the work of the Endowment could become more significant than it is at present, given better leadership and more coherent policies. For example, the fascination with public media and public programs, which has often led to the spending of large

sums on projects of limited intellectual contribution to the education of citizens, must be reversed. Similarly, schemes to improve the teaching of the humanities at the elementary and secondary levels which have been funded out of a slavish devotion to "innovation" must be resisted. Above all, programs must be scrutinized to ensure that they possess a demonstrable chance of success.

SHORT-TERM PROBLEMS AND OPTIONS

There is no administrative or legislative crisis or other issue concerning the NEH presently requiring emergency action either by the White House or the agency. Furthermore, the NEH is a small, simple agency lacking the legislative and administrative baggage carried by most federal offices.

Naturally, the senior staff positions may need to be filled, which in a new administration would mean consideration of replacements in about 12 senior staff positions. Once this has been done, the first problem will be to establish the basic principles guiding the NEH's programs and processes. Here, basic policies can and must be given adminstrative substance, and the program staff will be eager to know what a new administration means to do about program budgets and staffing. A prepared policy, with some indication of its practical consequences, will gain the loyal support of the staff and raise staff morale, without which medium-term problems are certain to arise. The problem can be aggravated by delay. The present chairman made the mistake in assuming the disloyalty of the NEH staff when he took office; he thus succeeded in alienating and insulting many people. In fact, with few exceptions, all the people on the staff were loyal to the agency and its mission, not to a particular chairman. A new chairman should recognize the fact that, despite a great changeover in personnel in the last three to four years, the NEH is still not a typical government agency.

An immediate administrative act, consistent with the policy directions set for NEH, should be to rescind guidelines for racial or ethnic quotas applied to the grant review and evaluation processes. The present, just-promulgated guidelines require the selection of expert reviewers and consultants to be modified by regard for such quotas.

The criterion of excellence should be applied to selection of application reviewers as well as to the applications themselves. If a particular application requires, for example, a reviewer

with knowledge about subcultural dialects, such knowledge is necessary, but not sufficient. Predictable criticism that insistence on excellence means discrimination against members of minority groups should be clearly and confidently confronted. It must be explained that the discovery of excellence in minority groups, and its reward, is discouraged, not encouraged, by such quotas.

A major issue in redirecting and reorganizing the agency will be to establish the principle of scholarly excellence as the criterion for budgeting and program definition. If excellence is the measure, then competition before academic peers must be the gauge. Proceeding from this principle, two points must be made. First, some present programs, and even entire divisions exist for specious reasons, to justify requests for ever-increased agency budgets, and to serve political, or politicized, ends. A good means for identifying either situation is the level of competitiveness in the awards process. Second, some programs are, in truth, entitlement programs where application is tantamount to award. As a practical guideline, the ratio between awards and serious, competent applications might be as low as one out of four or five. Whatever the ratio, commitment to the principle of excellence will, in practice, likely result in the rejection of more applications than are funded.

Another related issue is the question of continuing support for long-term projects, which effectively "obligates" certain program funds. There are in academe NEH-supported "factories" or NEH-initiated projects that are thereby effectively exempted from competition. There is much to be said for setting firm guidelines for projects (most often in scholarly research) where applicants know beforehand the limits, in either dollars or time, of support. The reason for such a policy of restriction is not the democratic desire that every scholar have his turn, but rather scholarly: long-term projects bestow an unalterable status on their participants that not only discriminates against new projects but also dramatically distorts scholarly standards. In scholarship, the assurance of money works an insidious effect on the pace and simplicity of the work itself.

MEDIUM-TERM PROBLEMS AND OPTIONS

For the most part, the first year (1981) would have to be spent getting the Endowment's intellectual house in order. Reaffirmation of a more specific definition of the humanities

should be accomplished and necessary changes in programs and procedures made so that submission of the FY 83 budget in the early fall of 1981 fully reflects the goals of the NEH leadership. What follows is a review the Endowment's major program divisions.

The Division of Research Programs

In 1977, the academic community became fearful that the new NEH administration would neglect research and scholarship in favor of "popular" activities. While this change has indeed occurred, the effects on NEH programs and funding for traditional and basic areas are still not fully apparent.

The Research Division has special and general problems that need attention. In general, the Division has been cut back to its FY 76 funding level, and part of that reduced funding used to support new, secondary programs. To obtain funds for increased research support, small programs—conferences and publications— could be combined. Two larger programs could be folded into other budget line items: the state and local history program, which has been turned into a program of "outreach" for often unqualified recipients, and the translations program, which is an idea in search of a definition as well as scholars. Abolishing these two artificially constructed program categories would not in the slightest affect the availability of support for research, but would save money going to contrived or third-rate projects.

There are two special programs in the research division which have caused problems. The first problem concerns the Endowment's special efforts in the conservation and preservation of research resources (cited as one area of increased emphasis for the NEH in FY 1981). Because this effort is primarily concerned with the preservation of manuscripts, books and documents, it requires scientific and technical skills which the NEH does not have. Efforts in this area should be undertaken by another federal agency.

The second special problem is the intercultural research program, where $3.6 million has been newly allocated. The first aspect of the problem is that the NEH is doing work on an emergency, ad hoc basis that may in the long-run involve federal cultural policy in national security planning. The value of the program as an object of support is not an issue. What is at issue is the source of federal support. There are two other federal agencies which could assume this responsibility—State

or ICA. The second aspect of this problem is twofold: not only would NEH involvement tend to compromise its other work, but it would effectively remove an activity that is important for political reasons from proper consideration and would complicate coordination of national security policy.

The medium-term problem is for the NEH to arrange for transfer of this program elsewhere. This would require intervention by the White House.

The Fellowship Division

Fellowships have suffered much in spirit and prestige in the present administration. The program could usefully receive more funding and other support, as well as some reorganization. A recent praiseworthy development in this Division is the refinement of support into the so-called categories B and C fellowships (for younger scholars and college teachers). Additional funds could be found by abolishing the small program for centers of advanced study ($300,000), which overlaps with research programs, and by reducing the professions program ($1.7 million).

Because the growth of the seminar program may have exceeded the natural supply of senior scholars who can most usefully offer tutorials for their junior colleagues, the program should be reduced in size. This can be done by shifting some of its money into the summer stipends program. Furthermore, in addition to its uneven quality, the program has in the past had a faintly patronizing air that can be removed by increasing the funds directly available to junior scholars to do their own work.

In general, the Fellowship Division is solid because of its concern for scholarship. The newer programs may have grown too much, owing to the desire to make this Division seem to be other than it is, but reorganization and internal budget adjustments will correct the problems.

Division of Special Programs

It is likely that all the programs in this Division, upon scrutiny and evaluation, will prove to be unjustified.

Youth Programs.

Youth Programs promote the study of the humanities by young people aged 16 to 25. As such, the programs have symbolic importance, and political "sex appeal." But Youth

Programs has grown too large, and the rationale for such funding is too loose. (Some council members called them "kiddy corps" grants.) This program should be reassessed in comparative context with the Education Division's Elementary and Secondary Education Program.

Science, Technology and Human Values Program.

This program is superfluous in view of recent arrangements to do joint funding with other agencies, for example, the Department of Energy. While the general area is important, and while the NEH has earned distinction for its role in promoting the inclusion of the humanities (philosophy-ethics), most of the Endowment's impact has derived from grants made by its established programs. Consideration should be given to eliminating this as a separate program.

Program Development/Special Projects

The strictest examination of the Program Development/ Special Projects category should be instituted. This program should be eliminated, and its $6.9 million budget (for FY 1981) used for scholarship and education programs in the other program divisions. It is in this area that most of the politically motivated funding originates. Indeed, the very existence of a program category using the word "special" in its title may well imply a deficiency in the agency's organizational structure. There is no reason why the NEH cannot take the initiative to do "special" things within the context of regular programs, and by using regular review standards.

Division of Education Programs

Careful attention should be given to the interrelationship of Consultant Grants, Pilot Grants, and Development Grants. Because serious study of the humanities disciplines at all levels of schooling is crucial to the health of the humanities, the role of the Elementary and Secondary Education Program should receive serious examination. As in the past, it is likely that the most effective grants tend to be large and committed to rigorous training for in-service teachers.

While a strong case can and should be made for increasing the budget of the Elementary and Secondary Education Program, new ways should be explored to promote the importance of humanities in the schools. One suggestion is to design a way to expand the work done by the National Humanities Faculty.

It might also prove profitable to think in terms of a cooperative arrangement with foundations and corporations to engage in joint funding of projects initiated by local school districts.

Division of State Programs

The committees (which receive 20 percent of the NEH budget) should complement, but not duplicate, NEH programs. These committees ought to exercise reasonable flexibility and imagination; at the same time they should maintain a commitment to quality and merit, supported by procedures that are competitive, not political.

Division of Public Programs

Media Program

Reevaluation of the kinds of projects supported is necessary. Some further attempt to assess the cost effectiveness and educative value of media programs should be made. Also, attention should be paid to the kind and degree of requirements over applicants and grantees exerted by NEH. (There has been much controversy over this question for years.)

Museums and Historical Organizations Humanities Programs

The whole question of NEH support of cultural organizations needs to be raised and explored. Though the NEH seems to have spent much time doing this recently, nothing specific seems to have been decided beyond agreements between the Arts Endowment, the new Department of Education, and the Institute for Museum Services. (A Commissioner's task force worked on this in 1978-79.)

Libraries Humanities Project

This program is the latest example of empire building at NEH, as well as an illustration of the over-expansion resulting from confusion about the agency's purpose. Despite the inflated rhetoric used to justify its existence, the "humanities projects" are either "outreach" efforts to expand the agency's reach beyond the academic world or are superfluous additions to federal programs for libraries administered by the Department of Health and Human Services. While there may be exceptional library programs which might appropriately receive NEH support, Libraries Humanities Projects as presently conceived is not likely to assist such projects. This program, in its current form, should be abolished.

Chairman's Grants

The chairman's discretionary grants should be reserved chiefly for projects which require emergency funding; discretionary authority ought to be exercised only in cases where there are sound reasons for exemption from regular review. Accordingly, the appropriation of the chairman's discretionary fund should be increased only if it can be justified.

BUDGET

The NEH budget should stay at its FY 81 level of funding. There is no reason for increasing its request level (or attaining its authorization level) once the agency concentrates more consistently on excellence in scholarship and education.

The FY 1981 budget could, by reprogramming of funds and restructuring of programs, yield something approaching an additional $28 million for scholarship. (The range is from $16 to $28 depending upon the the strictness of the standards which define excellence and the level of competition.) To hold the budget at this level might entail some problems with a few congressmen who would like for reason of personal prestige to see more growth.

Matching grants should be made available solely as a response to private initiative and solely by private organizations to prevent federal decisions from allocating private sector money. A decent regard for the instincts and capacities of private organizations would limit the "federalization" of our nation's culture, and would at the same time allow for the recognition of their predominant role in our culture.

Finally, the budget size of NEH is a policy question. By remaining at its present size, the NEH would proclaim a halt to the creeping nationalization of culture, and would also announce the need for increased private support. The NEH must not become the fat boy in the canoe, likely by its bulk to upset the delicate balance between public and private support.

Much of our report relates to recommended changes in the budget for FY 82. The goal should be to be influential and effective, *not* to do *"more."*

STAFFING

The staff of NEH poses special problems, due to the uniqueness of the work and the special qualifications involved. The NEH should remain exempt from the usual government

personnel regulations; all senior program officers, are, of necessity, special appointments.

The program directors' jobs (GS12 and above) should be evaluated. Because at present there is no "career pattern" for such jobs there are problems either of rapid turnover or stale bureaucrats. Several solutions are possible. One step is to permit rotation among program directors, so that staff could move among the divisions or even take leaves of absence to work in academic jobs. Another step would be to adopt the procedures at the National Science Foundation where program directors are hired from academic posts for a limited (2 year) stay. Whatever the device, the senior program staff should not remain in one job for more than, say, five years.

The middle-level professional staff (GS 7-11) also needs to be looked at, due to the frustration and turnover that results from limited advancement. Most of the work of the agency is done by people at this level, yet they are barred from promotion to program managers, and they are in specialized jobs where there is little opportunity to transfer to other agencies.

The present chairman greatly expanded his office. He did this by creating new positions and by hiring "consultants" and part-time permanent staff. While the use of consultants for selected projects is appropriate within the context of personnel ceilings established for the agency by Congress, this kind of arrangement should be used judiciously. In recent years, the NEH administration has apparently used "consultants" to do ongoing staff work. The expertise of the NEH staff should be considered first for special tasks.

LONG-TERM PROBLEMS AND OPPORTUNITIES

Resolution of the problems described in this report should improve the work of the National Endowment for the Humanities. But it will take time to reverse such undesirable current trends as declaring all NEH meetings public, and releasing panelists' names before review sessions. The recently released Report of the Rockefeller Commission on the Humanities may well deserve serious consideration in so far as it points the way to problems and potential solutions which the Endowment will want to consider.

Perhaps the knottiest long-term issue facing the humanities is the decline of private support, especially from organized philanthropy. One cause of the decline is the Tax Reform Act of 1969 (revised in 1974), which results from popular suspicions

of private wealth. The tax laws should be recast to encourage private giving, and hence to lessen the political pressures and temptations placed on NEH.

A key challenge to NEH leadership in the coming years will be to make the best possible case for policies of merit, excellence, and achievement, and at the same time cultivate the most cordial relations with the Congress. Fortunately, those in Congress responsible for the continuation of NEH funding are generally sympathetic to the overall goals of the Endowment's enabling legislation. And, with appropriate leadership, including skillful representation of the Endowment's goals and policies on Capitol Hill, the agency can make strides forward to true excellence.

PART TWO: REPORT ON THE NATIONAL ENDOWMENT OF THE ARTS

PRESENT POLICIES

Despite protestations to the contrary, under its current leadership, the NEA is more concerned with politically calculated goals of social policy than with the arts it was created to support. To accomplish goals of social intervention and change, the decisions of the Endowment, enforced by the granting of funds and the threat of their cutoff, require that artists and institutions serve audiences rather than art, vocal constituencies rather than individually motivated artistic impulses. The arts are asked to be everything for everybody, at one and the same time to remedy the perceived ills of society, employ all who want to be artists, and fill up the leisure hours of an entire population.

At the heart of this instrumental treatment of art and artists lies a flawed conception of art. Because the current direction of the NEA is in the hands of those with few aesthetic commitments and less discernment, art is increasingly seen as mere entertainment, a diversion whose importance—and the amount of money it receives—is measured by the number of people who can be found to make up its audience.

Because numbers is the major criterion for funding, a lion's share of NEA funds goes to great exhibiting and performing institutions and their smaller counterparts. To maintain their share of public subsidies, these organizations must, as part of a general process of often unwise expansion, arrange their

offerings so as to bring in an ever larger audience; to accomplish this task inevitably requires the ever greater employment of advertising and marketing techniques which cheapen when they do not actually compromise artistic content. That content itself, moreover, including the choice of repertory in music and exhibition subjects in art, must be chosen to be of maximum attractiveness and comprehensibility to an unsophisticated mass public.

In the case of individual creative artists, because there is little likelihood of their finding a large audience, the amount of federal funds expended decreases sharply. Hundreds of composers, writers, and visual artists receive trifling sums; these grants are scattered broadside to the serious and the trivial alike, apparently on the principle that a penny bet on every number will somehow in the end produce sizeable winnings.

Vastly larger funds are allocated to satisfy yet another demand, that of politically powerful groups who expect to receive public funds in an amount commensurate with their strategic electoral strength and with how loudly their self-appointed spokesmen can complain. The NEA spends millions of dollars yearly to fund programs and policies which are unconcerned in any way with enduring artistic accomplishments; the best of these projects do no more than fossilize the popular culture of the past, and the worst are little more than high-flown welfare and employment schemes.

As with any government undertaking, the effect of large amounts of spending is the creation of new classes of recipients. In the case of the NEA, some of these recipients are professionals, trained in all too many cases for jobs and roles which cannot exist without the establishment of new programs funded by still larger subsidies. Not surprisingly, a large and self-regarding bureaucracy has been created at the NEA in Washington, to apportion money and oversee its use. This bureaucracy, now firmly established, has encouraged and supported the creation of parallel bureaucracies on the regional, state, and local levels; in order to deal with this powerful administrative structure, a similar group of office-holders, cloned in the image of their governmental models, has arisen in all American arts institutions large and small.

Human nature being what it is, credit for these dubious victories has been taken by politicians in power, anxious as always to reap public honor for the spending of public monies. In the area of the arts, elected officials have been dismayingly eager to display their countenances and air their artistic

pretentions on widely publicized ceremonial occasions; the mood presently engendered by the NEA has only stimulated institutions and many artists themselves to cooperate in the paying of undisguised public tributes to those who are neither artists nor even patrons, but rather representatives of the people.

THE BUDGET

The NEA budget for the upcoming fiscal years (1981, 1982), should be examined with a view toward rendering it effective in carrying out the recommended goals and policies of the task force. If indeed the next administration's position with regard to NEA shall be characterized by a) a first priority commitment to the support of serious culture, b) promotion of the long-term fiscal health of arts institutions, and c) cultivation of audiences with a true desire for high-quality artistic experience, then certain budgetary reforms may be appropriate.

The NEA has, since its inception, labored under dual goals of cultivating the best in art and supporting art for the sake of its social benefits to the general population as well as to special constituencies within the general population. Of course, in an ideal world, not only will art of the highest quality proliferate, but audiences demanding such art will multiply in abundance. The real world, however, is beset with limitations— of art of high caliber, resources to cultivate such art, and audiences who appreciate and demand such art. There is a trade-off between the goals which NEA has pursued: some of "the best" in art must be sacrificed if art as social service is the primary goal; conversely, art as social service may be required to suffer for the sake of cultivating limited art of the highest quality. It is necessary, therefore, to make distinctions and to set priorities; the current programs of the NEA reflect a reluctance to do so.

It is recommended that in the next administration, distinctions be made between serious art for art's sake and art for the sake of social service; and that NEA set priority on—indeed, exist for—the cultivation of serious culture. It is certainly valid that the arts be a part of social service programs—be they in disadvantaged communities, prisons and hospitals, for the aged, the infirm, or the handicapped. Decisions on their use, however, are properly a function of social service agencies; in all likelihood, on a level as close in governmental structure to the recipients as possible. Accordingly, programs at NEA which are concerned primarily with the social benefits of art

should be re-structured to emphasize their strictly artistic components and arrange the transfer of their other functions to the appropriate governmental agencies.

STAFFING

Practice and Philosophy

In certain respects, NEA staffing philosophy is characteristic of federal agencies; for example, for positions below the GS-12 to GS-13 level, the general philosophy is that all "outsiders" (non-civil service employees) start in entry-level positions (GS 4 or 5 level). As GS-13 and above positions comprise approximately 25 percent of full-time staff (and approximately 15 percent of total full and part-time staff), this means that approximately 75-85 percent of total NEA staff either are or were clerical/support staff. This practice of automatic promotions does not, of course, allow for consideration of excellence and experience as the prime criteria for selecting staff. The degree to which this practice results from civil service legal requirements, or simply from philosophical attitudes inherent in a federal bureaucracy, should be investigated. It is recommended that the new administration establish criteria of excellence, accomplishment, and appropriateness of experience as the prime criteria in the selection of personnel; certainly the higher level positions should be filled by the best individuals who can possibly be found, whether inside or outside the civil service system. As a natural outcome of the policy of excellence as a staffing criterion, every effort should be made to provide talented individuals who entered the NEA through typical civil service procedures with opportunities to use and develop their talents and skills.

Levels

It is recommended that an examination of the composition of NEA staff be undertaken to determine to what extent staffing requirements are being adequately and appropriately met. At present, NEA staff is comprised of approximately 240 full-time staff (working 40 hours per week) and approximately 100 part-time staff (working 32-39 hours per week). The ratio of part to full-time staff suggests that an attempt is being made to evade staffing limits. This less than straightforward practice seems inadvisable; it is recommended that part-time designation be reserved for special circumstances rather than day-to-day activities.

LONG-TERM PROBLEMS AND OPPORTUNITIES

The activities of the NEA must be based in the future on a decision to turn away from the goal of public success and approval toward the support of artistic creation. The arts that NEA funds must support belong primarily to the area of high culture; such culture is more than mere entertainment and is concerned with permanent values beyond current tastes and wide appeal. Any attempt, therefore, by the practitioners and supporters of high art to exploit the possibilities inherent in mass culture for general approval and economic reward must be resisted, for to blur the distinction between the serious and the popular is to destroy both the integrity of great art and compromise the authenticity of popular culture itself.

A rigorous attempt must be made to allow art, whatever its sources of funding, to exist in a free market place of aesthetic ideas. Because art does not move in obedience to social dictates, because it cannot be planned in advance, and because it grows according to its own (mostly unarticulated) rules, it must be granted an existence independent from the proclaimed social goals of the state; accordingly, it must be funded for its own sake, rather than for any presumed economic or propaganda benefits.

In general conformity with the widely felt desire to lessen the predominant role of government in our lives, the NEA must accept the proposition that official support can have only limited goals. It can ease to some extent the birth pangs of new art. It cannot determine the exact part of the past which is to preserved, nor can it dictate the manner of its presentation to a contemporary public; these are artistic questions which must be decided anew by each successive generation of artists. The NEA cannot decide, either directly or indirectly, the course of new art or devise a schedule for its progress; at most, it can modestly support the individual efforts of artists who are serious, highly competent, and large of vision.

If the goals of official cultural policy must be limited in scope, the style of their implementation must be that of the low profile, of a modest acknowledgement that great art is always superior to the source of its support. Political figures must realize, as must the leaders of the NEA, that though the arts are worthy of homage, men are not; neither elected nor appointed officials must be allowed to use association with the arts as a means of political advancement.

Contrary to present practices, the private sector, both in industry and education, must be encouraged to find its own way in support of the arts; the present exploitation of the device of matching grants as a means of directing private funds to the accomplishment of government goals must be ended. And the commercial media—most importantly in the area both of pay and broadcast television—must be urged to present art under commercial sponsorship rather than be allowed, as they have been in the past, to abdicate their cultural responsiblities to the public communications empire.

As far as the responsibility of the NEA to the audience for art is concerned, it must act on the principle that its duty is to make available otherwise unavailable art to those who ardently desire it. The NEA must resist the self-aggrandizing temptation to market art, to package it, and to exaggerate either its benefits or necessity. It must cease requiring institutions, as a condition of funding, to expand beyond their optimum size. The NEA must accept the sad fact that simply creating art for audiences does not always result in creating an audience for art. It must finally acknowledge that the enduring audience for art is largely self-selecting, a relatively small public marked by the willingness to make sacrifices of other pleasures for the sake of artistic experience.

Much can be done in the realm of education to ensure that an audience for art, knowledgeable and appreciative, continues to exist. Efforts must be made to redress the present imbalance between the training of professionals and the training of a sophisticated public. The first step in finding a proper balance between practitioners and audience must be a realization, supported by the allocation of funds, that the teaching of laymen to know and love works of art is not a less honorable and rewarding task than the more glamorous creation and performance of masterpieces.

The redirection of public funds is never an easy task; responsibilities once assumed by government, and promises once made, cannot be lightly abandoned. The transition from the present policies of the NEA to the new policies outlined here can and must be undertaken in an orderly fashion, with every possible opportunity afforded to grants recipients and staff to accommodate to new programs and criteria. Above all, the major problem which the NEA will face is not financial but rather philosophical; it is recognition of the need to redefine its missions as support of art and artists, nothing less, and nothing else.

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ACTION, LEGAL SERVICES CORPORATION AND COMMUNITY SERVICES ADMINISTRATION

Alfred S. Regnery*

INTRODUCTION

It is not unlikely that an incoming conservative Administration will turn its attention, in domestic policy matters, to the massive income transfer, social welfare and subsidy programs operated by such Cabinet agencies as the Department of Health and Human Services, the Department of Education, the Department of Labor and the Department of Housing and Urban Development. Such an approach is understandable in light of the enormous sums of money dispensed by those agencies and the negative impact so many of their programs have on inflation, American values and the American economy. Yet, necessary as such an effort may be, any approach which focuses exclusively on direct grant programs and on efforts to make them more affordable and efficient may well prove an exercise in futility.

This is so because such preoccupation will fail to confront the power of the ideas, ideologies and ideologues which are the true wellsprings from which some of the most objectionable aspects of domestic spending programs flow. To attempt to reform domestic spending programs without attacking the respectability of the still-prevailing premise that political solutions "of the left" are solutions "for the poor" will only subject

**Author's Note:* The preparation of this report was a collective effort involving many individuals. Joseph Blatchford, Jeff Burnam, Michael Horowitz, Phil Lyons and John Meyer deserve particular mention. The author alone assumes responsibility for this report. No views expressed herein should be attributed to any other individual.

the public to continued delusion by the never ceasing efforts of the opponents of reform to caricature conservative alternatives as "racist," "uncaring" and devoid of compassion. The American people *are* a compassionate people, and at whatever cost to their own perceived interests they are likely to favor programs and policies perceived to be moral and caring in character. Thus, unless conservative ideas can break the moral monopoly still enjoyed by persons indifferent to the well-being of the American private sector and by proponents of expanded government power, any effort to reform federal domestic policies is likely to be reduced to the level of tinkering.

The above views serve to enhance the significance of the three agencies here under study. One and one third billion dollars may be only a small fraction of the total budget, but it can and has sustained the power and credibility of thousands of full-time, self-styled representatives of poor people, minorities, consumers and other groups of Americans thought to be exploited by the private sector and to require ever-expanding federal protection and support.

BASIC POLICY ASSUMPTIONS

All of the government's poverty programs within CSA, LSC and to a lesser degree, ACTION, fail to rely, to any appreciable degree, on the free enterprise system as a means of ending poverty. Those people who make policy at the poverty agencies feel that the present corporate structure encourages poverty, and that the only methods of fighting poverty are policies of the left, and are the policies which ultimately dictate that much of the money appropriated by Congress for fighting poverty goes to the so-called "poverty barons." A considerable amount of CSA's money, for example, goes to private research firms to do studies to determine how the poor can be helped. As a CSA employee was recently quoted as saying:

> the whole emphasis on helping is no longer there. The poor aren't being helped by giving money to buy study after study that will end on some shelf somewhere. The poor don't need studies. They need jobs. They need income to take care of their families. You don't need a study to understand that.

A distressing amount of federal poverty funds are used for "advocacy," research programs into legal remedies for the poor against the establishment and against the business com-

munity, law suits, and to fund social engineering attempts to tell the poor what they need and don't need. A surprisingly small amount of those poverty funds actually wind up helping "the poor." It is primarily for that reason that the billions of federal dollars which have been spent on poverty programs have not reduced the ranks of the poor, and why the budgets of the poverty agencies are disproportionate to their leftward influence. Lawsuits, lobbying, studies and social engineering do little to reduce poverty; they go a long way, however, in helping to stimulate government control of society and the free enterprise system.

Those who run the Legal Services Corporation believe that the poor cannot live without constant legal assistance, and equate this need for legal services with their need for nutrition, health care, shelter and clothing. Furthermore, the policymakers are not so convinced that the poor can be helped by bringing individual cases to try to solve grievances which might arise with landlords, vendors, and so on, but believe instead that most legal and social problems can be solved by class actions which attempt to remedy some wrong which Congress is unable or unwilling to correct. Congress, in its authorizing legislation, took that view as well, with the result that much of Legal Services' budget is consumed by researching and actually bringing class action lawsuits which its theorists and lawyers believe will help the poor, but which the poor themselves usually know very little about. Again, as in the case of the Community Services Administration, most of the reasoning behind those lawsuits are the theories of the left, and they are lawsuits which, in one way or another, would erode the free enterprise system and establish a more complete welfare state.

Although many of the policy assumptions behind ACTION are innocuous enough, many of ACTION's programs have been used by social engineers to push society further to the left. Thus VISTA, for example, became, at one point, a movement of white middle-class youth attempting to impose their beliefs and standards on poor black communities. Similarly, attempts have been made to turn the Peace Corps into a cadre of elitist white college graduates attempting to help revolutionize poor, Third World countries.

It goes without saying that a certain amount of direct assistance to the poor is necessary, and should continue. However, the social engineering which is practiced by CSA, LSC and ACTION is totally inconsistent with what the goals of a

conservative administration should be; such activity should be curtailed, and the agencies redirected to actually assist the poor.

EXECUTIVE ORDER OPTIONS

Legal Services Corporation

Because it is a quasi-public corporation, Executive Orders or other Presidential initiatives will have no direct effect on the Legal Services Corporation.

Community Services Administration

CSA is an executive branch agency and would be subject to change by Executive Orders and other executive functions consistent with existing law. A new administration should, by Executive Order:

1. Strictly limit grantee lobbying of Congress and state legislators.

2. Strengthen and increase the size of the Inspector General's Office. Insist that inspectors and auditors work together on common problems. Provide for immediate action upon any problems revealed by inspections. Limit the time frame on inspections where possible so that inspections do not drag on and take the place of action.

3. Give the CSA project review board the final authority to kill grants, consistent with applicable law.

There are several other changes which can be brought about by a new staff and new regulations, or which would be accomplished by Executive Order, requiring only direct assistance to the poor, with minimum administrative expense.

Such change in direction will be discussed later in this report.

ACTION

ACTION is an independent agency and thus not subject to Executive Orders. However, its Director is appointed by the President and is thus subject to executive control. The President should direct the new Director to:

1. Review the regulations which must be issued by November 1, 1980 to implement the restrictions placed on political activities by Congress in the 1979 amendments to the Domestic Volunteer Services Act and determine whether revised regula-

tions or changes in the law are necessary to effectively restrict VISTA volunteers from union organizing and from lobbying state and local governments and legislatures.

2. Eliminate the National Grants Program within VISTA or redirect its funding to other grantees. At present, many of the groups funded under the National Grants program are engaged in activities which place them in a confrontational mode with state and local officials and community leaders. ACTION state officials have reservations about this program. Following an executive investigation by the LABOR-HEW Subcommittee of the House Committee on Appropriations, which recommended the abolition of the National Grants Program, the House of Representatives in 1979 defeated an amendment by Representative Mickey Edwards (R-Okla.) to terminate this program. No legislation is needed, however, in order to redirect the funding of National Grants or to eliminate the program altogether, as the funding for this program is at the discretion of the Director.

3. Strengthen and increase the size of the Inspector General's Office. Insist that inspectors and auditors work together on common problems. Provide for immediate action on any problems revealed by inspections and make sure that inspections do not take the place of action.

SHORT-TERM PROBLEMS AND OPTIONS

Legal Services Corporation

Congress should proceed to repeal the Act authorizing LSC forthwith, as the Corporation is so basically flawed that it is beyond reform sufficient to justify its continuation. The structure of the LSC is such as to immunize it from political pressure and Administration meddlng, and it thus presents a difficult problem for reform in the short-term. The only real hold that Congress and an Administration willing to use its constitutional power have over LSC, short of abolition, is its budget and the appointment powers. The next President will be able to name eleven new Board members in his first year, which means that administrative and personnel changes could be made relatively soon.

Most Legal Services funds are expended through grants to several hundred neighborhood or community legal service centers scattered throughout the country; each is an independent, autonomous organization, governed by its own board of directors.

There have been several congressional attempts to reform LSC on a piecemeal basis through the use of restrictive amendments to appropriations bills limiting LSC participation in certain types of cases, such as abortion cases, gay rights cases and lobbying. All have been ineffective and difficult to enforce. Further restrictions of that sort are therefore not recommended.

Certain broad restrictive language could be included in appropriations bills which would reform LSC to a considerable degree. A limitation against class action cases brought against state, local or federal government agencies, for example, would quickly stop attempts to change policy. Restriction against the use of funds for the National Support Projects, the LSC-funded legal think tanks (Center for Law and Education, Center on Social Welfare Policy and Law, Migrant Legal Action Program, National Consumer Law Center, etc.) would drastically reduce LSC's social meddling; both restrictions, together with commensurate cuts in the budget, would limit LSC lawyers to representing individuals in individual lawsuits. It must be remembered, however, that the support centers have been specifically authorized and funded by Congress, and substantial continued support for them still exists.

None of these reforms would really make sufficient changes in LSC, however. The only real option is its demise.

ACTION

VISTA

VISTA under Sam Brown has emphasized organizing low income people instead of providing services which might help individuals escape from the cycle of poverty. VISTA is an established program with much support in Congress and the media. Many VISTA funded activities, such as helping to locate housing for refugees, working with cooperatives to market agricultural products and crafts or conserve energy, or providing paraprofessional services such as community planning aid—are noncontroversial and valuable. An attempt by the Ford Administration to decrease funding for VISTA for fiscal year 1977 by 40 percent was not acceptable to Congress and the Administration would never have persuaded Congress to eliminate VISTA, as it was rumored to want to do. There is nothing in existing statutes which justifies the recent emphasis placed on organizing poor people against local governments and community leaders. It would be far easier to change the

character of VISTA than to eliminate it. This could be accomplished by placing an emphasis on specialized skills in recruiting VISTA volunteers, by prohibiting using VISTA volunteers in administrative or supervisory positions, or by requiring that a VISTA volunteer slot be filled only on the basis of a specific request for a specific talent.

Peace Corps

The present arrangement whereby the Peace Corps is an autonomous and independent organization within ACTION should cease, which could be done by internal administrative action. The Peace Corps would function more efficiently and effectively by sharing recruiting, administration and public affairs with other ACTION programs, all of which are presently separate. Also, the Peace Corps should remain as nonpolitical as possible, and should remain a small, well-trained and well-equipped corps of people with special abilities to offer to developing countries.

Older American Volunteer Programs

On March 7, 1980, the General Accounting Office reported that "Opportunities are available for ACTION to Enhance Older American Voluntarism" (HRD-80-58). GAO found that 1) ACTION was not ensuring that its grantees have developed effective procedures and practices for referring elderly applicants who could not be placed in ACTION programs to other volunteer opportunities in the community; and 2) that ACTION should establish formal procedures to encourage the use of joint sponsorship arrangements—whereby multiple projects are administered by a single sponsor. Of the 862 Older American Volunteer Program's sponsors since 1979, only 66 sponsors operated two or more projects.

Community Services Administration

Because the statute authorizing the Community Services Administration is so broad, the agency's authority can be largely determined by its director and staff. Accordingly, legislative changes are probably unnecessary if the proper staff changes are made. As the triennial reauthorization of CSA programs comes up at the end of FY 1981, it would be wise for a new administration to have made attempts to change the organization from within, and to make substantial reforms before attempting to change the reauthorization statute. If

successful reforms have been made, they will be able to be included in the statutory reauthorizations; on the other hand, that will give the opponents of reform a chance to tie the hands of the new administration. Nevertheless, at the time of reauthorization, a one-year instead of a three-year reauthorization should be obtained, or at least a postponement on the reauthorization until 1982 and the adoption of a continuing resolution in the interim, as a new administration will need 12 to 18 months to gain control of CSA's administrative machinery, use the Office of Inspector General to expose the abuses of the programs that need to be thoroughly reformed or abolished, and weaken the "poverty barons'" taxpayer-funded political machine.

The key short- and medium-term problems are to depoliticize CSA, dissolve the "poverty barons'" machine by requiring that CSA funds be spent for the actual benefit of the disadvantaged, and clean up the many abusive uses of public money (whether allowed by ineffective monitoring of grants or actually permitted by the terms of grants). It will take a year to make a serious impression on these problems, though most of what must be done does not require legislation.

Nor are Executive Orders needed. CSA's Director can change CSA regulations, limited only by the language of the Act. The following areas can be attacked by regulatory and policy changes:

1. Lobbying and Related Activities

Grantee lobbying with program funds (program funds are CSA federal funds plus required nonfederal share; these are the funds whose use CSA has the legal power to regulate) can be forbidden (Congress has already had such a prohibition in CSA's appropriation for three years, but up to a few months ago, no attempt was made to enforce it). Permissible bounds of advocacy can be narrowed by a combination of new regulation and changes in grant-making policy. Waste and abuse of grantee travel and consultant funds can be attacked by severe restrictions on all such expenditures. OMB cooperation will be needed because OMB Circular A-110 mandates uniform rules for all non-governmental grantees in many areas, including this one. Still, exceptions can be granted and CSA's need for tighter control on its grantees is clear.

2. Shift of Grant Funds to Service-Oriented Grantees

A crucial step is to shift grant money away from advocacy-oriented grantees to service-oriented grantees. One obstacle to such a shift is Section 604 of the Act (42 USC 2944), which requires that CSA give a grantee "notice and opportunity to show cause" before CSA can deny refunding to most grantees. The notable exception to this requirement is the Economic Development Program under Title VII of the Act which has no such requirement. CSA regulations define a 20% or greater cut in funding of a program as a denial of refunding; this is probably best left undisturbed to avoid legal challenge. It does allow for an exception from the hearing requirement for a change of CSA policy, though this may be vulnerable to legal challenge. Such a redirection of grant funds will take at least a year to complete, as grantee funding cycles are usually a year long and are spread over the fiscal year.

3. Monitoring and Enforcement

We recommend a substantial shift of personnel and resources to the Office of the Inspector General to beef up CSA's audit and inspection capability. On the basis of consultation with experienced personnel in the area, we would estimate these staffs should be doubled—a transfer of about 50 slots. Also, a third Division of Enforcement should be added to this office and 20 slots should be transferred to it, increasing the total size of the Office of the Inspector General from about 50 to about 120 employees. One of the fundamental problems in CSA (and many other agencies) is that no one in the bureaucracy has as his primary job follow-up on audits, inspection, and other information indicating the need for corrective action. The Division of Enforcement would have as its sole responsibility to get appropriate action in such cases, be it referral to Department of Justice, defunding, or more mild measures.

4. Grant Review

At an earlier stage of the funding cycle, another structural reform can help to kill many bad grants before they are made. CSA has a Project Review Board which reviews all new proposed grants and contracts over $50,000 and makes recommendations on their funding. This Board should be greatly strengthened, and its failure to approve a grant should kill the grant except in the most unusual circumstances. It

should be given whatever other resources it needs to collect and digest information before meeting to review grants and contracts.

5. Board of Directors

A problem which can only be attacked legislatively is the weakness of the CAA Boards of Directors. This weakness is one of the primary reasons for the power of the poverty barons. It is a direct consequence of the complex legislatively mandated structure of these boards (1/3 representatives of the poor, 1/3 representatives of local government and 1/3 representatives of various community groups including business and labor).

We propose that Section 211 of the Act (42 USC 2791) be dramatically simplified and the administrative ability of these boards increased by making them consist of 50% representatives of local government and 50% representatives of business and other community groups selected by local government. Instead of their present 1/3 representation on the board, the poor would democratically select an advisory council which would advise the board on all questions, but have no executive power. However, its formal endorsement of any grant proposal would be legally required before said proposal could be funded. Thus, the representatives of the poor would have an effective voice in what programs are funded, but more competent and experienced people would oversee the programs and the CAA staff, including the Executive Director. Another benefit of this proposal is that it would save several million dollars a year in board training costs. It would be controversial, but it would have a natural base of support in the local governments.

Another useful legislative initiative would be to amend Section 604 of the Act (42 USC 2944) by deleting the part of subsection (2) which mandates a hearing before refunding can be denied. Thus it would be established that continued federal funding is not a vested right as it is, in effect, under the present system. A more moderate remedy would be to retain the requirement for a hearing, but explicitly require the courts to sustain an agency decision not to refund, unless it is found to be "arbitrary and capricious."

LONG-TERM PROBLEMS AND OPPORTUNITIES

General

The future of all three agencies scrutinized in this report can be the subject of intense debate in conservative circles. There has been, and will continue to be, substantial support for abolishing each of the three agencies, turning certain of the programs over to other agencies, and simply forgetting about the other programs. On the other hand, there is a school of thought which believes that agencies such as these three should be used by conservatives to accomplish their own goals: Legal Services, for example, could be restructured and staffed with conservatives, and could proceed to bring class action cases, do research, advocacy and the rest, to accomplish conservative goals.

Unlike the Department of the Treasury or the Department of Defense, American society could survive quite well without the assistance of these agencies. It is even questionable whether continued existence of these agencies will do anything to change the plight of the poor in America. Thus a strong argument can be made that the agencies should be abolished and their funds used elsewhere.

But what about the argument that the agencies should be restructured and restaffed with conservatives who would continue to use them for social engineering projects from a conservative angle? In analyzing that argument, several threshold arguments must be considered: a) do agencies fit into the federalist model as envisioned ideally by a conservative administration? b) Do the ethics of social engineering, even when done for conservative ends, conflict with the goals of limited government of a conservative administration? c) Are there sufficient numbers of conservative lawyers, sociologists and other activists to staff such agencies? d) Are there in fact conservative solutions to the problem of poverty which would lend themselves to use by agencies such as these?

The structure and the tradition of CSA and LSC militate against their redirection away from confrontational, leftist policies. The agencies have existed in one form or another for 15 years, and have policies, procedures, regulations, staff and supporters who have been developed over a long period of time, who dictate the direction the agencies take, and who could not be replaced quickly. The staffs of the agencies themselves and of the grantees are well-established groups of people committed to liberal policies and traditions who could

not possibly be replaced by any group of people during a two-or three-year period. In the case of Legal Services, employing or funding 5,500 lawyers, we doubt that there are sufficient conservatives to fill a third of the positions.

Legal Services Corporation

Because the bulk of LSC's work is done by autonomous, independent organizations which set their own policies and hire their own staffs, it would not be possible to attempt to change the direction of LSC through staff: there are simply too many of them.

The poor do have legal problems which need solution, and they need lawyers who either work *pro bono* or who are paid a salary to represent the poor. But a $350 million federal bureaucracy is not needed to provide such services. As the *New Republic* said in its September 24, 1977 issue:

> The legal services program may be the most extreme example of the paternalism of the American welfare state: denying the poor what they explicitly lack—money—in favor of the goods and services the government thinks they should have, in the amount and proportion it deems appropriate. There is much validity in the libertarian argument that this approach denies the poor both the freedom to decide their own needs and the responsibility, essential to individual independence and self-reliance, to accept the consequences of such decisions.

Community Services Administration

Poor administration and the philosophy that the poor should not be held accountable for their mistakes have contributed to the problem of the poverty barons, but we believe the philosophy of the Great Society is the true culprit. CSA's mission should be redefined in three key respects:

1. It should promote cooperation with the more fortunate sectors of society, rather than an adversarial relationship towards them.

2. It should concentrate on helping actual poor people and abandon grandiose, utopian schemes for the conquest of poverty.

3. It should define its role as supportive and transitional rather than central, realizing that the private sector, not government, is best able to lift people out of poverty and, in particular, to create jobs. Support for more emphasis on cooperation with the private sector can be drawn from the preamble to the Economic Opportunity Act which includes the statement, "It is the sense of Congress that it is highly desirable

to employ the resources of the private sector of the economy of the United States in such efforts to further the policy of this Act" (42 USC 2701).

ACTION

ACTION is, in the long term, certainly not neccessary to the continuance of the Republic, but under the right circumstances and with proper reforms could be valuable and useful. Specifically, it should be changed as follows:

1. *Peace Corps:* The Peace Corps should remain under the close scrutiny and control of ACTION management (it is now within ACTION but has a large degree of autonomy), but should be completely non-political. Recruiting, administration and public affairs programs should be handled together with other ACTION projects to reduce overhead and staff, and the Corps itself should return to the direction established in 1969: a small, well trained group of professional and technical people able to assist developing countries with their problems. It should be non-ideological, non-flamboyant, and run by competent and able people.

2. *Older American Programs:* These are programs which could be expanded if budgetary considerations permit, and which could be handled administratively on the state level. The programs cost slightly over $87 million per year, and do provide a certain degree of comfort and aid to the 290,000 people involved in them. If they are retained at all, they should be kept small and nonpolitical. Older American Volunteers serve as foster grandparents or as companions to elderly persons who would not otherwise be able to live independently at home, they help victims of domestic violence, juvenile delinquents and other troubled youth, and give legal, tax, budget, and home security advice. Low income older volunteers are paid a stipend of $2.00 per hour. Other older volunteers receive only transportation expenses, meals, and liability insurance. Some of the services rendered by older volunteers are worth many times the money that the government spends on them.

3. *VISTA* should be restructured so as to become a well-trained and well-equipped corps of skilled workers who provide specialized services to low income groups. Untrained liberal arts students, with no clear motive but "social engineering" should be excluded, and VISTA volunteers should be prohibited from organizing low income people against the establishment and free enterprise system.

BUDGET

Community Services Administration

The bulk of CSA's budget—$394 million out of $538 million—is the Community Action Agencies (CAAs) funded under Section 221 of the Act (42 USC 2808). Most other grant programs, except the $48 million Economic Development program, are administered by the CAAs. The remainder of CSA's budget is $40 million for federal administrative expenses.

Community Action Agencies—Section 221

There is little that can be done immediately to reform the CAAs. By FY 1982, it will be possible to institute a program of incentives and disincentives for CAAs. We propose a double system:

1. CAAs which upon audit, are found to have spent more than a certain percentage of funds in an unauthorized manner should be penalized by cutting 19 percent of their previous year's funding. This reduction in funding is short of the amount that requires a hearing; experience shows that such hearings tie up CSA in an interminable procedural morass, and hence should be avoided.

2. All CAAs meeting these minimal standards would be ranked on the basis of whatever evidence is available and the bottom 20% would be cut an average of 10% and the top 20% would get an increase of an average of 10%. Such an incentive system is the only way to make any changes in the CAA bureaucracy. The money taken from the bottom CAAs will be available to fund the incentives for the top.

Another administrative change we suggest is to make effective State Governors' vetoes of grants established in Section 242 of the Act (42 USC 2834). At present, grants are rarely vetoed and when they are, the Director routinely uses his statutory authority to override the veto. Consistent with the principles of federalism and the reasonable assumption that the states may know something Washington does not, a presumption should be established in favor of such vetoes and they should be overridden only in rare instances.

Community Food and Nutrition

The $26 million Community Food and Nutrition Program is one of the most politicized of CSA's programs, consisting

largely of advocacy and activists' harassment of state and federal agencies. There are two alternatives: first it can be abolished as we already have numerous anti-hunger programs in America. This we would recommend.

However, the symbolism of abolishing it may prove unacceptable. In that case it should be redirected to activities directly and immediately alleviating hunger. All advocacy, coalition-building, etc., would be ended as these grants run out. In FY 1979, exclusive of Indian and Migrant grants and technical assistance, only 10% of the remaining $19 million went into the categories of "Crisis Relief" (direct aid) and Nutrition Education. At a minimum, these percentages should be reversed so 90 percent, rather than 10 percent actually goes to feed people or improve their nutrition. Under the statutory language authorizing this program (42 USC 2809(a)(5)), such a redirection of the program is clearly justified.

Economic Development

The $48 million Economic Development Program is authorized by a separate title of the Act, Title VII (42 USC 298185), and administered by a separate CSA office, the Office of Economic Development. This program grew out of an attempt to establish a partnership between business and the federal government to help the poor. What in fact resulted was a new set of poverty barons, the Executive Directors of forty-odd Community Development Corporations. As with the CAAs, Congress directed that the boards of these organizations be representative of the poor in the areas served; the specific requirement is that the membership of these boards be at least 50% residents of these areas. Unfortunately, as in the case of the CAAs, this provision did not give the poor an effective voice, but rather decreased the likelihood that these boards would have the ability to supervise their Executive Directors effectively.

A second problem with this program is the total lack of federal control over assets purchased with program funds after the termination of the funding relationship. Legislative ambiguity, permissive OMB regulations (OMB Circular A-110), and lack of forceful CSA administration have combined to allow defunded Community Development Corporations to retain valuable assets (buildings, etc.) with little restriction on either their use or their disposition.

The third major problem with CSA's present funding ap-

proach of trying to develop viable businesses in impact areas, is that the businesses have usually failed—in many cases miserably.

We propose to deal with these three problems through a redirection of program emphasis from funding large business ventures to training the actual poor residents of the impact area to become small entrepreneurs, especially in the service area. The Community Development Corporations could be redirected to provide this training in conjunction with local business. They could also be the source of small loans or grants to poor residents of the areas who develop a feasible business proposal and have shown reasonable evidence of the ability to manage such an enterprise. Thus, if a risk is taken with federal funds, it will be on a small scale, individual basis and any proceeds of such an investment will inure to the benefit of individual poor people, rather than becoming assets controlled by a poverty baron.

During the transition, an effort should be made to regain control over the assets already in the hands of these grantees. Little can be done where the funding relationship has already ended, but CSA regulations should be revised to tighten control over the use of the assets of grantees which are denied refunding in the future. Such attempts may be foiled in court, in which event specific legislative changes will be needed.

As funds become available for new initiatives with the phaseout of many of the presently funded projects, one new initiative which should be explored on a demonstration basis is that of using CSA funds to entice certain types of business which will stimulate local economies and provide employment to locate in target areas. Thus CSA or a Community Development Corporation could play the same part a state or local government does in attracting industry. The specific vehicle would be a contract whereby CSA or the Community Development Corporation would pay the corporation to locate in a target area and train a certain number of poor area residents to work in their new facility. The terms should be generous since the idea is that any significant new plant, store or other enterprise will provide jobs and improve the economic base of the community for a long time to come. It would not be expected that the value of the training alone would equal the value of the new funds paid out. There would be no strings attached other than that the number of trainees specified should be trained. Only if this program remains free of bureaucratic restrictions does it have a chance to succeed. As

CSA's resources are limited, the program should be tried with medium-sized businesses to which CSA could offer a significant incentive.

The Economic Development programs at CSA are somewhat larger than appear in the budget, because the Community Action Agencies spend some of their Section 221 funds on economic development activities free of the restrictions of Title VII and with very little CSA monitoring. It is not clear whether such use of Section 221 funds is legal, and it would seem logical that all major economic development activities should be under the same rules and be monitored by CSA's Office of Economic Development which has what expertise CSA can muster in this area. Therefore we recommend that all major economic development activities be identified and transferred to the Office of Economic Development to be dealt with as discussed above. Funds should be explicitly granted for such activities, rather than being invested, unmonitored and often *sub rosa*, by CAAs. Finally, the Director should use his authority (under Section 616 of the Act, the Director may transfer up to 20 percent of any funds appropriated under one section of the Act to any other section or sections of the Act) to transfer all funds used for economic development activities from Title II, Section 221 to Title VII, Section 712 of the Act.

Energy Programs

In FY 1980, the Community Services Administration administered massive energy assistance programs (mainly cash payments to poor people) totalling $1.6 billion. These programs have been transferred to the Department of Health and Human Services, but the House has voted to allocate $20 million to CSA for Indian and Migrant Programs; the Senate may well vote to allocate $100 million to CSA and to retain some of the Weatherization Program in CSA. Assuming that the funds will be appropriated, there is a good argument that CSA could spend up to $100 million effectively, provided that the personnel slots are made available to monitor the program. Aid to the poor for weatherization is one of CSA's more useful and effective programs. But, as with so many other CSA programs, the advocacy-oriented grants should be cut out. (One of the worst examples of bureaucratic subversion of congressional intent to help poor people directly is the reopening of the 1980 Emergency Energy program pursuant to the Simer case. This case was a sweetheart lawsuit where funds not

obligated before the congressional deadline were ordered to be spent and the plaintiffs and CSA agreed to spend them on advocacy-oriented programs contrary to the appropriation language which mandated direct aid to the poor.)

Other Programs

The $10.5 million Senior Opportunities and Services program is relatively non-political and service-oriented. It should be continued at its present level.

The $6 million National Youth Sports Program run by the NCAA was cut from the budget, but restored by the House. This program is completely non-political, is run honestly and, while not essential, is a better use of the taxpayer's money than many of CSA's programs; it should be retained for the present.

The State Economic Opportunity Program should be abolished administratively, if possible, since it is of little value and adds another useless level of bureaucracy. The $7.5 million spent on the program in 1980 was reduced by 50 percent in this year's budget request and the House voted the reduced figure; the cuts should be retained if the program cannot be completely eliminated. If there is a major switch of program funding, monitoring, and/or control to the states, this program might need to be increased, but it would be better to eliminate it and put these functions in the hands of the state welfare departments.

Funding for demonstration programs was $9.6 million in 1980; $6.6 million was requested for 1981 and the House voted only $3.6 million. These funds are largely discretionary, and hence, can easily be redirected to worthwhile purposes, so cuts might better be made elsewhere. Nevertheless, the presently funded demonstration programs do not justify their level of funding; thus the House cuts are justified unless and until new, worthwhile projects have been developed. In the past, most funding for these programs has come from use of the Director's discretion to transfer from other sections of the Act.

One new project in this area which CSA could usefully fund would be a research and demonstration project seeking to find what technological solutions to the various problems of the handicapped may be available. This approach would be both cheaper and better than the present "accessibility" approach which costs tens of billions and turns the rest of society inside out in the vain attempt to deny that handicapped people are

handicapped. With such a project CSA would be playing its statutory role of being a catalyst for new approaches to the problems of poverty.

Finally, training and technical assistance was cut from $7.5 million to $4.5 million. If these programs were effective, such a cut would be a false economy. As their effectiveness is unproven, there is every reason to support this cut.

Budget Cuts and Transfer Authority

CSA funding (not counting energy programs) is down from a 1980 figure of $547 million to a 1981 request of $538 million and a House bill of $537 million. Nevertheless, more cuts can be made. There are two alternative approaches—the across-the-board method and that of selective cuts.

The across-the-board method is particularly attractive because, as noted above, the Director has authority under Section 616 of the Act to transfer up to 20 percent of the appropriation for any section of the Act to any other section of the Act. This flexibility would enable the Director to counteract the bad effects of such a cut by transferring funds to any section where a cut would be inappropriate from sections which can afford the reduction.

The method of selective cuts would allow deep cuts in the worst programs, but is inflexible and vulnerable to political pressures. On balance, the across-the-board cut seems better for CSA, so we would recommend a 2 percent cut in the total 1981 CSA budget, reducing it to $528 million. This is a fairly sharp cut in view of the fact that the fiscal year will be nearly one-third over when a new administration takes office. Many funding commitments will have been made by then, so the cut in available funds will be much greater. For 1982 a 5 percent cut should be attainable.

If the option of selective cuts is taken, the CAA's Section 221 funding should be cut $13 million back to their 1980 total of $381 million, the Community Food and Nutrition Program's $26 million should be cut as much as possible, and the $48 million Economic Development program should be cut back to its 1980 figure of $44 million. Depending on funding commitments already made, some of these cuts could be accomplished by the rescission and deferral method in 1981. How much could be cut would have to be determined in January or February, 1981. In 1982, an additional cut could be made by eliminating the remaining $3.75 million in funding for the State Economic

Opportunity Offices. One or two of these cuts could be combined with an across-the-board cut if it seemed both feasible and desirable to cut out or sharply reduce one or two programs.

We do not recommend cuts in program administration; such cuts would be a false economy at present because of the critical need for CSA to gain control over its grantees. All resources saved by administrative economies should go for audit, inspection, monitoring, enforcement, and evaluation. Furthermore, the House has already cut this budget by $1 million from $40.6 to $39.6 million. Indeed, it may be necessary to find a small amount of additional funds for administration, especially if CSA is running any substantial energy program.

Legal Services Corporation

The Legal Services Corporation budget should be eliminated; alternately, it should be systematically reduced to such extent as to allow the corporation to make grants only to Legal Services Offices for the purpose of individual representation of clients, as described more fully in another section of this report. Accordingly, attempts should be made to eliminate appropriations for the backup centers, and to reduce the appropriation by the amount representing the approximate sum spent on class-action representation, with accompanying limitations on the appropriations against expenditures for those purposes. The remainder of the LSC budget should be eliminated in subsequent years, and certain coordination functions now performed by LSC given to another agency such as ACTION.

ACTION

As indicated, VISTA should be altered either legislatively or through ACTION's budget, with a possible reduction in funding. The other volunteer projects administered by ACTION are relative inexpensive and give a relatively significant return for the amount expended.

EPILOGUE

WHAT THE PRESIDENT CAN DO BY EXECUTIVE ORDER

Danny J. Boggs*

INTRODUCTION

One of the major powers which a President can exercise immediately upon assuming office, without the necessity for Congressional action, is the power to issue, amend or revoke Executive Orders and Proclamations. These are generally directives by the President to the Executive Branch as a whole or selected parts of it, laying down rules as to policies to be followed or organizational procedures to be used.

Most Executive Orders involve internal organization, and division of responsibility or delegation of responsibility originally assigned to the President. These are frequently important, but are not crucial to address in the first few days. On the other hand, there are a number of government-wide programs that rest primarily on the authority of Executive Orders, such as much of the "affirmative action" program, wage-price guidelines, international environmental enforcement and paperwork reduction, to name only a few. In addition, in some agencies there are particular Executive Orders that strongly determine policy, and which are ripe for immediate change. Finally, by issuing new executive orders, a new President can establish new structures to serve his purposes, or signal policy areas that will be key concerns of his administration.

This report will only discuss the highest priorities for action by Executive Order. It will summarize and discuss the recommendations made by individual *Mandate for Leadership* project teams, as well as address the repeal or alteration of existing government-wide orders and issuance of new orders to help lay

**Author's note:* The author wishes to thank Alfred S. Regnery, Michael E. Hammond and Michael Bayer for their assistance in preparing this report. The proposals presented here are essentially summaries of ideas found in the preceding chapters.

the foundation for a new conservative administration. For a more exhaustive treatment of Executive Order options within each department or agency, the reader is referred to the chapter dealing with that agency.

A CONSERVATIVE NOTE

The ideas in this report and in the several chapters on the departments of government could be used to prepare Executive Orders to be issued in the first few days of a new administration. However, it is important to stress that any proposed Executive Order must be thoroughly studied by legal counsel expert in the field of administrative law to verify the constitutionality and legality of the action and put the Order into proper legal form.

It must also be stressed that even where a proposed Presidential Executive Order is legally sound, it may not be politically sound, even given desirable policy goals. In some cases it may be better simply to give a broad policy directive to a Cabinet head to get a job done, rather than to issue an Executive Order on the matter.

Thirdly, as explained in more detail below, there are areas of the government that are statutorily beyond the authority of the President to intervene by Executive Order, such as in the administration of the independent agencies and the requirements of the Administrative Procedures Act. In these fields, the President must act primarily through the appointment of persons who share his philosophy and will take some policy direction from him. There is a fertile field for potentially hostile litigation in any case where the President directs a Department to take action that may be argued to require a formal rulemaking under the Administrative Procedures Act, either to implement a new rule, or to amend or abolish an existing one. While there are certainly strong grounds for upholding the President's right of action in many such cases, extreme care should be taken in considering the possible challenges to any such action when preparing actual Orders.

MAJOR GOVERNMENT-WIDE ACTIONS

The most important actions, both actual and symbolic, are probably those that can cut across the entire government. The more rigid these are and appear to be, the more effective they can be. Although there may be some need for a mechanism for

exceptions, such exceptions cannot be allowed to swallow the initial rule. Several areas where dramatic action could be taken include:

1. *PERSONNEL.* President Carter instituted an alleged personnel freeze in early 1980. This action has had little effect as a result of a lack of enforcement and the many exceptions allowed thereto. A new administration could by Executive Order require that no new employee be hired without specific approval from OMB, or that only one employee be hired for every two that actually leave government service (not one for every two vacancies, as there are always a lot of vacancies going unused for just such an emergency.) If an agency could show a need for a greater ratio of hires to departures, it would have to apply to a central clearinghouse for reallocation from some other agencies which could get by with an even lesser ratio of new hires to departures. This latter approach is similar to the current Carter program, which is not being adequately enforced.

The Personnel Management Team recommends that there be a formal and visible freeze (subject to central clearance and approval) on Schedule A attorneys, consultants, PL-313 employees, IPA employees, and career positions GS-13 and above. They recommend that employment practices below that level be handled by Departmental practice, with a goal of 10 percent cutbacks through attrition, but without a formal Executive Order, because of the great variety of circumstances within the bureaucracy.

2. *BUDGET.* As of this date (December 1, 1980) many major appropriation bills and a final budget have not been approved for FY 1981. It may prove to be less necessary for there to be administratively directed cuts. Since much of the government will probably still be operating under a continuing resolution, the preferred route may be for the new Administration simply to submit a new FY 1981 budget upon taking office, and urge its passage by Congress. In the meantime, Cabinet members and agency heads could be continuing to administer their areas in accordance with that suggested budget.

However, an Executive Order could be issued to require that each agency head spend (in actual outlays) only 98 percent of some prior figure, as adjusted, or the continuing resolution figure. Again, there could be some pool of additional spending allowed, upon approval from OMB, and upon a comparable reduction elsewhere. Any such action must be carefully coordinated with the laws governing rescissions and deferrals,

since a refusal to spend appropriated funds could be subject to challenge. Attention should also be given to the amount of *underspending* by agencies for the partial year to date. Because of the general tendency to overspend at the end of a year, simply a continuation of the year-to-date spending pace could bring significant economies in many agencies.

3. *REGULATIONS.* This administration certainly has a strong mandate to reduce and greatly simplify government regulation. In the last analysis, such a policy direction should be enforced by the appointment of top executives who will prevent the issuance of unnecessary or counterproductive regulations. At the same time, some types of procedural strait-jackets can be helpful in reducing the unending tendency to regulate.

The Carter Administration has issued several orders that purport to address this problem, but those orders (E.O. 12044, extended by E.O. 12221) and the review groups that have been set up really have little teeth. There are several concepts that could be adopted to place drastic limits on the issuance of regulations.

a) One immediate possibility would be to issue an Executive Order to all those agencies subject to the President (the truly independent Regulatory Agencies would be exempt) requiring them not to issue any regulations for a specified period, for example, 6 months or a year. This moratorium would certainly be the most drastic and complete solution to bad new regulations, but it would have several drawbacks. For one thing, many initiatives in the direction of less intrusive regulation will require the amending or re-issuing of existing regulation. It would be impossible to distinguish mechanically between an amended regulation that increases regulation and one that decreases it. Thus, such an absolute moratorium might simply perpetuate the current, clearly unsatisfactory situation. In addition, many statutes require that regulations to implement a particular law be issued by a specific date, and such a ban would run afoul of those statutes. It might be that an Order simply declaring a policy that discretionary new regulations should not be issued would be the best, leaving enforcement of it to the devices suggested below, and to the sound judgment of new appointees.

b) One of the rhetorical measures generally used to demonstrate the growth of regulation is the number of pages in the Federal Register. Even though this is not a precise measure, since many pages are filled with simple notices, repetitive

printing of different versions of the same rule, etc., it is still an easily understood notion. It would be most unfortunate if the first year of a new administration showed the same pattern of growth in the Federal Register and Code of Federal Regulations as earlier years. It would be most dramatic if the growth of the Code stopped dead in its tracks. It would be possible to issue an Executive Order that no agency should consume more pages in the Register than it had the previous year, perhaps calibrated on a month by month basis. Any agency that found that it needed more pages than that would have to get approval from a Regulatory Control group, which could itself allow such publication of regulations only upon cutting back some other source.

While undoubtedly subterfuges could be found to diminish the effectiveness of such a limit, it would both focus the minds of lower-level workers on limitation, rather than expansion, of regulations, and it would serve as a useful excuse for decision-makers who thought that new regulations were unnecessary. It should be recognized that it may be that in some cases this would hinder the improvement or lessening of existing regulations, since any such changes would themselves have to be promulgated as regulations under the Administrative Procedures Act.

c) Another sweeping control on regulation would require that all final rules (or perhaps even all notices of proposed rulemaking) would have to be submitted to a Regulatory Review Group prior to actual issuance. This group would have the power to review all regulations for necessity, authority, clarity, consistency, and scientific basis, if appropriate. For this review to be effective, it would have to have real teeth, such that the regulation in question *could not be issued* without the approval of the Review Group. It would be appropriate to state some time limit, such as 15 days or 30 days, within which the group must act or else the regulation would become effective.

It is certainly a possible problem that the Board would become overwhelmed, or become a huge bureaucracy of its own. But if managed so that it used its "gate-keeping" functions to focus on weeding out the extreme or counter-productive, rather then trying to substitute for the judgment of every Department, it could serve a useful function. Just the thought of having to pass a final review by such an outside body not immersed in the internal constituencies of an agency or Department could exercise a significant dampening effect on expansive regulation-writers.

Under recent legislation, the California Office of Administrative Law now exercises similar power over California regulations (Cal. Government Code §11349, et seq.).

This is another area where a tension may exist between the President's powers to embody and direct the actions of the Executive Branch and some interpretations of the requirements of the Administrative Procedures Act. Any attempt to implement this bold approach should be accompanied by a very careful analysis of the means to sustain it against litigative attack that would almost certainly ensue.

d) Although E.O. 12044 requires a "regulatory analysis" for regulations with "major economic consequences for the general economy" or major segments of it, this has not been heavily enforced or proved to be a useful tool. A new Executive Order in this area could require a specific "cost-benefit" analysis for regulations that could have a major impact. Some type of approval of the form and content of such analyses by a central Review Goup could also be required.

e) In many cases, regulations of some sort are required by statute. It could also be a useful exercise to require each agency to submit a calendar of those upcoming regulations that are specifically required by Congressional direction. A Government-wide compilation of such lists could be a tool to induce Congress to modify or eliminate many of such requirements.

4. *EXISTING REGULATIONS.* President Carter issued E.O. 12044, to improve regulation-making, in 1978. It required all kinds of advance notice and analysis, which has on balance been of some use, but as discussed in ¶ 3, above, has really had little teeth. One example of this is the requirement for periodic review of existing regulation. There is no specification of how periodic such review shall be, or any means of enforcing it.

It would be possible to issue an order mandating the review, on a fixed schedule, of all existing regulations, perhaps on a 4-year schedule so as to complete the review by the end of this administration. It could even be possible to direct the Departments to repeal any regulation not reissued by affirmative action before the deadline for completion of its review. This would both be a useful device for forcing them to concentrate on these old regulations, and a means of perhaps keeping them busy enough that less new mischief would be done. Again, attacks could be made under the Administrative Procedures Act, depending on the procedures used within each Department. Legislation would be needed to bring the independent

regulatory agencies under such a plan, and might be a preferable means of proceeding even in the case of the Executive Departments.

Another possible attack on the burden of regulation would be to replace or supplement the existing "consumer" program within each Department with a "Regulatory Ombudsman," whose specific purpose, free of Deparmental control, would be to advocate the reduction of the burden of regulation in every proceeding.

5. *AFFIRMATIVE ACTION.* In many areas, government programs of affirmative action, instituted by Executive Order, have gone far beyond elimination of any actual discrimination into using statistical methods and quotas to regulate every aspect of private and departmental personnel practices. The two major areas are those of Federal Contract Compliance, which governs the practices of suppliers to the Federal Government, and internal federal personnel policy. The authority for both areas of control arises under Executive Order 11246, and later amendments, especially E.O. 11375. The Justice task force discussed the current excesses of affirmative action and indicated a series of actions that could be taken to control them, if a policy decision were made to take the resulting heat.

In that event, they recommended a virtually total abolition of all references to "affirmative action" or statistical reporting in all Executive Orders in these fields, an action that would undoubtedly engender severe controversy. One alternative would be to immediately take a visible and symbolic action while undertaking a rapid and thorough review of the excesses under such programs. One act that would be both symbolic and practical would be for the government to cease the racial classification of its own employees. It is both racist and demeaning for the government to demand that each of its employees be shoved into pigeonholes such as "Hispanic heritage," North and West European not otherwise classified," "Pacific islander not Japanese or Chinese," and so on. This is particularly true when it requires the making of racial distinctions that should have gone out with the Nuremberg laws and the slave codes. Any actual order in this area should be crafted after a careful study of decisional law concerning those actions now considered by the courts to be mandated by the Constitution or by specific statute.

Another approach to the same problem would be to direct the Justice Department not to file any "pattern or practice" cases unless based on proof of intent to discriminate, not

simply on statistical evidence of unequal results or unintentional discriminatory impact. A more detailed review by Justice of its own and EEOC litigation practices would also be useful.

One of the major problems under Federal Contract Compliance has been a continual extension of the concept of "Federal contractor" to such unwilling "contractors" as utilities or sellers through normal retail channels. After study, it might be advisable to refine the scope of activities covered under the Executive Order.

The Senate has recently adopted stringent restrictions on federal government attempts to use Sections 503 and 504 of the Rehabilitation Act to require retrofitting of existing urban transportation systems with enormously expensive devices to improve access by the handicapped. Unfortunately, these provisions, which would have saved some $10 billion in required new construction in elevators, and power lifts for buses, were deleted in conference. A new administration should seriously consider amending Executive Order 11914 in order to place reasonable restrictions on the scope of work required to comply with Sections 503 and 504.

6. *CONTRACTORS.* One of the major sources of leakage in the Federal budget is the rapidly burgeoning use of contractors to do work that either should be done by federal employees or in many cases need not be done at all. (Cf. Mark Russell's definition of the federal government: "More than 2 million dedicated men and women, doing badly that which generally need not be done at all.") It is true that some well-defined services may be better performed by existing private enterprises. OMB Circular A-76 has been useful in expanding the areas available to private enterprise and small business. However, we are here concerned with contracts dealing with policy, studies, or research, or used to evade personnel ceilings or policy restrictions.

In many cases these contracts are let at a fairly low level in the bureaucracy. One way to get control of the system would be to issue an Executive Order requiring the head of every program office currently having discretionary authority to hire contractors to review each contract either let or contemplated for FY 1981. Each such person would then have to report to the Secretary of that Department the purpose for which the results would be utilized, and the reason that the purpose could not be accomplished by existing personnel. On the other hand, it could be more productive to proceed only in Departments

with a perceived problem in this regard, such as Energy or HHS, and to proceed by internal directive.

A second problem with grants and contracts is the possibility (nay, certainty) of duplication and overlap in the letting of such contracts and grants. Each Department, and subsequently OMB on a cross-Department basis, should be required to establish a grants index to prevent double payment for the same research project, or duplication of grants and research in the same area.

7. *PRESIDENTIAL COUNCILS.* There are a large number of inter-agency councils, co-ordinating committees and groups which do little to justify their existence. Particularly in a new government of closer Cabinet co-ordination and Cabinet management, many such groups are unnecessary. Below are listed a number of groups that could safely be abolished immediately.

Interagency Co-ordinating Council (E.O. 12075) This group rarely meets, and even when it does, serves primarily as a policy making body for the Regional Commissions, themselves a bit of a boondoggle. Very few people know of its existence. It is not a vital force in government and should be abolished.

Energy Co-ordinating Committee (E.O. 12083) Staffing for this group was only recently switched to the White House from the Department of Energy, which was supposed to be the central co-ordinating point for energy in the federal government. It has done virtually nothing for the past year, and appears to perform no useful function.

President's Economic Policy Board. Established to carry out E.O. 11808, which was superseded by E.O. 11975.

Federal Financing Bank Advisory Board (E.O. 11782). A general consensus exists that this Board serves no useful function.

National Productivity Council (E.O. 12089) This group is basically redundant, since its information can be obtained directly from BLS or Commerce.

Commission on National Agenda for the 80's. This group, appointed by Carter, is to make its report by 12/31/80, and is scheduled to terminate by 2/15/81. Even so, it might be worthwhile to kill it on January 21, 1981, as a signal that under this Administration, government will not be setting the agenda for its citizenry. A free people sets the agenda for its government, not vice-versa.

Federal Legal Council (E.O. 12146). Despite some indication that the Attorney General is *primus inter pares* on this body, the Council is basically another example of the shrinking place

of the Justice Department in the conduct of the government litigation. This Council could be abolished, and an Executive Order issued strongly declaring that the Attorney General is to conduct or direct all government litigation and other legal matters, except where such power is given to some other agency by clear and explicit statute. Specifically, the authority of the Attorney General to forbid litigation in violation of Administration policy should be enhanced. Such a step would require careful consideration of the possible need to transfer money and personnel to the Justice Department to carry out any increased workload.

President's Council on Youth Opportunity (E.O. 11330). Because all functions under Executive Order 11330 have been allowed to lapse, the Council should be abolished and the order repealed.

President's Council on Physical Fitness and Sports (E.O. 11562, as amended by E.O. 11945 and 12098). This council has undoubtedly accomplished some good. But it is certainly not the sort of compelling federal interest which should be continued in a year of austerity.

8. *GOVERNMENT REORGANIZATION.* The President can both order a Secretary to adopt certain organizational structures in his or her department, and can also reorganize among departments by the submission to Congress of a reorganization plan, at least until April 1981, when that authority expires under current law. In the Departments of Education and Energy, for example, the stated goals of abolition cannot be accomplished without an Act of Congress. However, it is possible to remove all or most of the personnel and functions from a given organizational unit, thus making it much more amenable to control, dispersal and eventual elimination. As an illustration, the Economic Regulatory Administration could be virtually dismantled by transfering the Fuel Use Act functions to the Assistant Secretary for Fossil Energy, Public Utility functions to the General Counsel, and emergency planning and contingencies to the Assistant Secretary for Policy.

9. *PAPERWORK.* Despite some efforts at controlling aggre gate paperwork through the "paperwork budget" established under E.O. 12174, relatively little has been accomplished to restrain unnecessary information-gathering. This has been especially notable in the Energy area, but is generally true across the entire government. The President could order the Departments to restrict their respective mandatory data collection efforts to the absolute minimum required to carry out

their statutory responsibilities. Each office could be required to report to its respective Secretary:

a. The authority on which each request for information is based;

b. All purposes for which the form is to be used, and how each question relates to that purpose;

c. An explanation of why the information cannot be obtained from other sources;

d. The estimated total cost to the private sector of developing or monitoring the requested data, including the additional cost of maintenance of new records.

The Secretaries would be ordered to take action based on these reports to insure that duplication is eliminated, and that no new information that would increase private sector costs is requested unless a comparable reduction is made elsewhere. In particular, data should be gathered on a sampling basis, unless it can be shown that there is a compelling need for a census-style "complete count" approach.

In addition, neither criminal nor civil penalties should be sought by the Administration for non-compliance with any paperwork requirement which was not properly approved by OMB.

SPECIFIC POLICY ISSUES

10. *PUBLIC LAND POLICY.* One of the greatest failings of the past administration was its virtually total opposition to any sensible use of the vast resources existing on federal lands and under federal control. The general tendency has been to take more and more land out from under private control or out of any category that is available for practical use. An Executive Order could be issued declaring that for every acre "withdrawn" from public use, equivalent acreage must be released elsewhere in the federal land management system. Again, this could be administered initially on an agency-by-agency basis, with the possibility of one agency acquiring some of the unused quota of another agency.

Another suggestion in this area would be to direct the Secretaries of Agriculture and Interior to evaluate present programs for productive use of public lands, particularly energy and non-energy minerals, and renewable resources such as timber and forage. The Order should require that within a reasonable and brief period of time they present proposals for the maximum efficient utilization and protection

of public lands for the benefit of the people of this nation. Such an Order would be a concrete step toward the accomplishment of the campaign pledge that no longer would the federal government be a major hindrance to development of our nation's economic power.

11. *DECONTROL OF ENERGY PRICES.* Under the powers granted by the Emergency Petroleum Allocation Act of 1973, as amended, President Carter has established a schedule leading to the decontrol of crude oil prices by September 1981, when the authority for such control expires. It would be possible to issue an order on taking office that would decontrol crude oil prices immediately.

Gasoline is the only major petroleum product now under control (propane is still controlled). It could be decontrolled by executive action, as well. Unless a new gas crisis, perhaps triggered by the Iraq-Iran war, were to stampede the Congress, reversal by legislation would be most unlikely. Gasoline prices are not being effectively constrained by price controls in any event, as major oil companies now have well over $5 billion in "banked" costs (meaning prices increase they could legitimately impose, even under controls), that they have not been able to recoup. On the other hand, the allocation rules and distortions in marketing caused by present controls are very counterproductive to any effort to use our energy more wisely and efficiently.

These two actions would be important both symbolically and actually in freeing the energy market.

12. *ALASKA LANDS.* If Carter signs the Alaska lands bill passed by Congress, most of the problems caused by the land withdrawals ordered by President Carter will be eased. However, these withdrawals under the Antiquities Act and Wilderness designations should be reviewed to see if the boundaries can be drastically revised to improve availability for exploration.

13. *MANDATORY CONSERVATION ORDERS.* The President has attempted to expand greatly the scope of arbitrary federal power over energy use by an Executive Order (E.O. 12185) making compliance with federal energy conservation mandates a prerequisite for receipt of federal financial assistance, grants and contracts. This could be repealed immediately. This backdoor federal *mandating* of conservation should be stopped and the Executive Order withdrawn.

14. *INTERNATIONAL ENVIRONMENTAL ACTIVITIY.* The Carter Administration has made repeated efforts to im-

pose our own, sometimes extreme, environmental standards on the rest of the world, whether they have the same concerns or not. One major example is the foreign application of the National Environmental Protection Act (NEPA), which attempts to require environmental impact statements for any activities that might affect the environment anywhere in the world (E.O. 12114). This can interfere both with American business and with our foreign relations posture. Some have argued that foreign application is in any event required by the statute, but this does not appear to be the predominant opinion.

15. *EMERGENCY CONSERVATION PLANS.* Public Law 96-102 gave the President very broad and virtually unreviewable authority to impose individual energy conservation plans on states, in instances in which states have not developed satisfactory plans themselves. This would arguably allow the President to institute, through the back door, energy conservation measures which he had no direct authority to impose.

While there is still time, the President should carefully specify, through regulation or Executive Order, reasonable safeguards on his ability to impose restrictions for which he does not currently possess statutory authority.

16. *INTELLIGENCE POLICY.* The Executive Order governing intelligence policy (E.O. 12036) is widely viewed as having been most detrimental to our ability to protect national security against terrorism, subversion, and direct military threats. It affects the National Security Council, the National Foreign Intelligence Board, the Central Intelligence Agency, the Departments of State, Treasury, Defense and Energy, the FBI, and the Drug Enforcement Administration. It places severe restrictions on collection techniques and other intelligence functions, and was considered a victory by the anti-intelligence community. It should either be repealed, and only those portions that specify necessary affirmative authorities reenacted, or it should immediately be reviewed so that it can be reissued in a clarified and improved form.

17. *FREEDOM OF INFORMATION.* One of the problems with the Freedom of Information Act has been that the government, through design or inadvertence, has often needlessly given out information that may be of little consequence to it, but may be highly damaging to a private individual or company. An Executive Order could be issued requiring agencies to exercise discretion to provide notice in appropriate cases to persons who would be affected by such release, allowing them an opportunity to assert any arguments

or defenses available to them. In virtually all instances under the FOIA, the government is not required to withhold information, even if it has the right to do so. Current policy has been to allow discretionary disclosure on a very broad basis. The policy should explicitly be reversed by Executive Order in the fields of intelligence agency and investigative information, and in the area of trade secrets. Here the general rule should be that the Government will exercise its discretion against disclosures, whenever authorized to do so by statute.

18. *EXPORT CONTROL.* At the present time, policy on exports to Communist countries has been to place the heavy burden of proof on those seeking to stop any import. As a result, many American high-technology products have enabled Russia to improve both its military and industrial capabilities. The Project team suggests that concurrent with the lifting of the Grain Embargo there be a temporary embargo of all other products, for at least 90 days. This period of time would allow for the revision and reissuance of export control orders that would significantly limit the types of technology that could go to the Eastern bloc, and would place the burden of persuasion on the exporter.

While not an Executive Order item, it should be noted that it has been recommended that more export control authority be given to the National Security Council or the State Department, which should be better able to assess the foreign policy considerations of the exports than is Commerce.

19. *WAGE-PRICE GUIDELINES.* The President's entire program for attempting to penalize companies that are forced to raise prices rests on Executive Orders (E.O. 12092 and E.O. 12161). This program could be repealed immediately, along with a strong statement that it is the responsibility of the government to fight inflation, while the responsibility of the people and companies is simply to be as productive and efficient as possible, and that they will not be punished for succeeding in that effort.

Similarly, the Council on Wage-Price Stability (COWPS) which has done little good except occasionally to strike out at government-sanctioned monopolies and inefficiencies, could also be abolished by Executive Order. This would cut about 10 million dollars, and several hundred jobs from the payroll of the Executive Office of the President.

20. *CAPITAL FLOW RESTRICTIONS.* Economic progress has always been based on freedom of trade and investment. There are two current Executive Orders that run directly

counter to that truth. E.O. 11387 basically tries to keep Americans from sending money abroad without the government's permission, while E.O. 11858 tries to keep foreigners from investing money over here. Although there are some political fears that each of these panders to, a repeal of both of them together would make a nice package, indicating that we really mean what we say about free enterprise and free individuals.

21. *EXPORT-IMPORT BANK.* E.O. 12166 delegates to the Secretary of State the President's authority to determine whether a denial of credit from the Bank is in the national interest. The current Executive Order includes such grounds for denial as human rights policy, environmental protection, and terrorism. This authority has often been used to retard the economic progress of anti-communist governments, while not being effectively used against countries that train and harbor terrorists. This order could be repealed, and all loans made on a strictly commercial basis, except for a classified list of states that should be denied loans based on National Security Council action. In this way, trade could once again be used to reward friends and punish adversaries, rather than the reverse.

22. *LOBBYING.* In a number of recent cases, Congress has been lobbied by organizations financed with Federal funds, or by government organizations, in violation of good practice, and possibly statutes. Currently most federal lobbying is covered by 18 U.S.C. §1913 and 1007 of the Legal Services Act. These statutes have not been effective because of a series of bureaucratically devised loopholes:

a) The bureaucracy has contended that anti-lobbying restrictions do not cover non-federal funds expended by organizations benefiting from Federal programs. Thus, by "displacement," Federal funds can effectively be used for lobbying. An Executive Order in this area should impose some sort of lobbying and advocacy restriction on any organization receiving Federal funds.

b) Many agencies have argued that the provision of "factual" information to interest groups and their members does not constitute "lobbying" within the definition of 18 U.S.C. §1913. Hence, an organization can use Federal funds to mail 50,000 newsletters announcing potential program cuts to beneficiaries of that program without violating congressional mandates. An Executive Order should specify the type of such "informational" activity that can be done with Federal grants.

c) 18 U.S.C. §1913 allows lobbying by the bureaucracy through "proper official channels." The persons allowed to lobby on behalf of the administration under this clause should be defined with specificity.

23. *SUBSIDIES FOR "PUBLIC INTEREST" ORGANIZATIONS.* A number of agencies have tried to establish programs of "intervenor funding," in which tax dollars are used to pay "consumer groups" or "environmental groups" to testify or lobby for (usually) what the agency wanted to do in the first place. There have been several controversies as to whether these programs were legal without specific congressional authorization. The question seems to be still unsettled. The President could issue an Executive Order specifying that no intervenor funding program could be adopted without specific statutory authority. The Executive Order should contain a list of those few programs deemed to be authorized by statute. In any event, the group funded should be required to show its need and *bona fides* by filing a financial disclosure statement similar to that required of a PAC group, showing receipts, expenditures, and major donors.

Other steps that could be taken to insure that the government does not finance its own aggrandizement would include:

a) amend E.O. 12160 to limit the ability of federal consumer programs to use their authority for activist purposes;

b) amend E.O. 11583 to incorporate Senate-passed prohibitions on intervention by the Office of Consumer Affairs in the proceedings of other agencies;

c) limit the circumstances under which grants and contracts can go to groups organized primarily for lobbying and advocacy;

d) limit the ability of agencies to stipulate to judgments in which funds intended for a specific statutory purpose (such as assistance in paying for home heating oil) are handed over to advocacy groups for largely unrelated purposes. This has been a problem especially where the government has been "represented" by former "public interest" attorneys who may acquiesce in such "sweetheart" deals.

24. *BILINGUAL EDUCATION.* The President could immediately direct the Education Department to reconsider its regulations mandating bilingual education regardless of the policy of local school districts. It should, of course, be made clear that the local districts should be free to use that method if it seemed to them the soundest way to bring about both substantive learning and proficiency in English.

25. *FEDERAL REGULATIONS ON THE BASIS OF STUDENT AID.* The President should consider an Executive Order restricting the ability of the Department of Education to control institutions which are not federally funded, and which are connected with the federal government only insofar as their students receive federal financial assistance in their individual capacities.

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