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# CONGRESSIONAL LIAISON

## An Inquiry Into Its Meaning For Congress

Edward de Grazia

### Introduction

**A** FUNDAMENTAL inhibition is preventing congressmen today from approaching the question of their liaison with the executive branch of government in such a way as to maximize their influence over the administration of the programs which they enact into law. This inhibition seems to stem largely from the mistaken belief that the constitutional doctrine of the separation of powers precludes their participation in, as opposed to review of, the executive branch's administration of the laws.

The system of the separation of powers in government seems to have been instituted by the Founding Fathers so that the legislative and executive arms would constantly check and balance each other. Underlying its institution was the classic fear that without a check-and-balance mechanism one arm would naturally come to dominate the other and the people would be exposed to the excesses either of unrestrained legislative rule or of unrestrained executive rule. It is no doubt chiefly because "separation" seems so far to have successfully warded off these twin evils that the doctrine today is regarded with a respect amounting to awe.

Awe of constitutional doctrine has perhaps led contemporary congressmen to overlook the fact that the Constitution itself contains no

provision that actually precludes Congress from participating in the administration of the laws. At the time of the Convention, the concept of administration as we know it, did not exist. The President was assigned "the executive power" and instructed to "take Care that the Laws be faithfully executed." The Congress was given "all legislative powers" and the power "to make all laws . . . for carrying into execution" its powers as well as the powers of "the Government of the United States," and of "any Department or Officer thereof." The (substantive) executive power vested in the President was a whittled-down version of the King's power, as described by Blackstone, while his mandate that the laws be faithfully executed was designed to insure that he *enforced* the laws, and did not dispense with any, as had been the custom of certain of the English Kings. The terms "administration" and "execution" are not synonymous, although historical changes and loose constitutional interpretations have tended to blur the distinctions. The original meaning of the term "execute" is also suggested in the provision empowering the Congress to call "forth the Militia to execute the Laws of the Union." If administration is conceived to include rule-making, regulation, and enforcement functions, the Constitution seems to have intended to assign the first and second of these to Congress and the third to the President. Madison and Hamilton, in *The Federalist Papers*, were under no illusion concerning the honest import of the "separation of powers" doctrine, which they traced to Montesquieu: "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates, or, if the power of judging be not separated from the legislative and executive powers." But this "did not mean that these departments ought to have no *partial agency* in, or no *control over*, the acts of each other." It was only "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, [that] the fundamental principles of a free constitution are subverted."

To make explicit a basic premise of this paper, Congress has as much right to participate in the administration of the laws as it has in their formulation. Indeed, it has the right to participate in each stage of the life of a law or program—before, during, and after its enactment. Under the terms of the Constitution, it takes the Congress and the President together to enact a law that launches a program of administration; but either, to the exclusion of the other as well as together, can formulate the law which determines the pro-

gram, administer the law, review the law's wisdom or effectiveness, compose the law's reform or amendment, or let it wither away.

Thus the congressional role with respect to the business of administration is in no way legally confined, as is often supposed, to the work of reviewing *post facto* the activities of the executive departments. Such *post facto* review is what is generally meant by "oversight," the term presently favored by political scientists and congressmen alike, to describe the congressional task in administration. But as Cornelius Cotter points out in his comprehensive study of the subject,<sup>1</sup> historically "oversight" has always meant more than mere review.

A second premise should now also be made clear: Respect for the constitutional doctrine of the separation of powers does not entail Congress placing undue self-restraint upon the exercise of traditional and legitimate prerogatives concerning the administration of the laws it has helped to pass, and the oversight of the agencies it has helped to create. Excessive self-restraint of this kind might work towards upsetting the balance of powers and tip the scales irretrievably in favor of the executive arms. This is a possibility which is particularly to be guarded against today. For if Congress has been inhibited by regard for constitutional doctrine from participating in the business of administration, the executive branch for its part has shown little sign of being deterred by a similar regard from participating in the process of legislation. On the contrary, observers are agreed that a growing proportion of programs now being enacted into law has its origin not in Congress but in the executive, and that this trend is likely to become more pronounced in the future.<sup>2</sup>

In such circumstances, it seems all the more essential for it to be widely appreciated that Congress has a legitimate, even an indispensable, function to perform in the administration of the nation's laws and programs. Oversight of the executive is not only the right of Congress, it is also a duty enjoined upon it by the nature of the administrative process itself. Administration is neither a simple nor

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<sup>1</sup> Cornelius P. Cotter's contribution to this symposium, "Legislative Oversight," shows that with respect to administration the congressional role can range from "direct legislative conduct of the business of government" to *post facto* legislative review of the conduct of administrative agencies.

<sup>2</sup> For an elaboration of this point see the contributions to this symposium by Cornelius P. Cotter, James A. Robinson, Lewis Anthony Dexter, and Alfred de Grazia. Elsewhere consult: Daniel Berman, *In Congress Assembled* (New York: Macmillan, 1964); Donald C. Blaisdell, *American Democracy Under Pressure* (New York: Ronald Press, 1957); Bertram M. Gross, *The Legislative Struggle* (New York: McGraw-Hill, 1953).

an automatic business. It is packed with opportunities and demands for exercises of discretion, on the part of the agency and administrative personnel involved, which should be made politically accountable as far as possible.<sup>3</sup> And the greater the degree of authority given to the agency under the terms of the law enacting a particular program, the greater is the duty of Congress to participate in and supervise the agency's decisions.

It is in the context of this understanding of the role of Congress in relation to the work of the executive branch that the matter of congressional liaison with the executive branch should be viewed. If their potentialities are properly appreciated, channels of liaison between Congress and the White House, the departments, the bureaus, offices, agencies, and even the independent regulatory commissions, could be used as an instrument for recovering congressional ascendancy over legislation and for extending congressional influence in administration. This, however, would require a basic revision of the prevailing somewhat negative attitude of Congress towards the idea of liaison in general, and in particular towards the idea of direct inter-branch "lobbying."

In keeping with, and arising out of, their concern not to bridge the constitutional separation of the government branches, congressmen tend to regard inter-branch lobbying activity with suspicion. Not surprisingly, perhaps, most of their concern to date has been with the amount of open executive branch lobbying of Congress. The agency anti-lobbying law,<sup>4</sup> which was enacted in 1919, for instance, seems to have been chiefly directed at prohibiting executive personnel from trying to influence congressmen by direct communication. A few examples of the type of action "caught" by congressmen, if not by the statute will illustrate the nature of congressional preoccupations in this regard.

When Health, Education, and Welfare Secretary Anthony Celebrezze wired all congressmen to support an administration bill on aid for institutions of higher education, he was roundly denounced from the Hill.<sup>5</sup> While Nathan Strauss was Administrator of the U. S. Housing Authority, he and members of his staff were sharply criticized for "gumshoeing about the Capitol and offices of Congressmen,"

<sup>3</sup> See Blaisdell, *op cit.*, 25 1ff.

<sup>4</sup> *Lobbying with Appropriated Moneys* (18 U.S. Code, Section 1913). One reason why prosecutions of executive personnel are so rare doubtless involves the fact that a department of the executive branch, the Justice Department, has charge of the initiation of prosecutions! The text of the law is set out *infra*, n. 61.

<sup>5</sup> See Berman, *op. cit.*, p. 88.

seeking support for passage of the housing bill.<sup>6</sup> When, in 1963, the secretaries of Defense and State sent co-signed letters to House members urging adoption of the foreign aid bill, Representative Gross of Iowa urged that they be prosecuted under the law.<sup>7</sup> Congressman Smith of Ohio, in 1940, charged that every bureaucrat should be put in jail for lobbying to put his schemes through Congress.<sup>8</sup> In fact, the agency anti-lobbying law, if rigorously enforced, could do just that.

No law exists of course to restrain congressmen from communicating with or "lobbying" the executive branch. Nevertheless, the idea of systematic reverse lobbying seems to be regarded with some disapproval. Robert Ramspeck, representative from Georgia, once called for a constitutional amendment which would "entirely prohibit a member of Congress or a senator from contacting the executive branch of government except in regard to legislation."<sup>9</sup> And in 1945, The Committee on Congress of the American Political Science Association proposed that Congress should abolish its "errand-boy" functions,<sup>10</sup> that is, the present practice whereby members contact the executive on behalf of constituents and others concerning appointments to government posts and cases before government agencies.

In opposition to such views, this paper recommends that direct inter-branch liaison activities, including those which amount to lobbying, should not be abolished but augmented; and, further, that Congress itself should participate much more energetically in these activities than heretofore.<sup>11</sup>

Inter-branch liaison channels are generally regarded, by legislators and administrators alike, as being primarily a means for the executive lobbying of Congress. But from the point of view of Congress, certainly liaison could be much more validly conceived as a network of two-way avenues through which the two branches of government can communicate with each other, for the purpose of exerting a reciprocal influence upon their respective decision-making processes.

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<sup>6</sup> See V. O. Key, Jr., *Politics, Parties, and Pressure Groups* (New York: Crowell, 1964), pp. 192ff.

<sup>7</sup> This incident is reported in Abraham Holtzmann's forthcoming work on congressional liaison, to be published by Rand McNally.

<sup>8</sup> Key, *op. cit.*

<sup>9</sup> See Gross, *op. cit.*, pp. 135-41.

<sup>10</sup> *Ibid.*

<sup>11</sup> Kenneth G. Olson's contribution herein on "The Service Function of the U.S. Congress," also urges the importance to sound government today of more efficient congressional service and case work. And see Paul H. Douglas, *Ethics In Government* (Cambridge: Harvard University Press, 1952).

Liaison should above all be regarded as a condition of *mutual* access, with the objective of enhancing the legitimate functions of both branches.

Thus conceived and pursued, it is unlikely that liaison would work to undermine the independence or the power of either branch. On the contrary, it might tend to redress the balance which today is inclining in favor of the executive. If individual congressmen, committee members and leaders, together with their staffs, would increase their direct contacts, their liaison with officials of the various executive offices and departments, the role of Congress in planning, formulating, overseeing, and revising legislation would be systematically enhanced. Liaison would become a principal means, rivaling committee inquiry, whereby Congress could gather information about and exert influence upon the executive's administration of the laws.

In developing its channels of liaison with the bureaucracy, Congress should especially concentrate on applying its new information and increased influence in the executive to servicing the needs of its constituents. A major reason why the executive has been able in recent years to gather power at the expense of Congress is the superior ability of its agencies to develop effective liaison with and "service" the greater public, in particular the various private interest groups who form the agencies' respective "clienteles." Largely as a result of this increased bureaucratic-public contact, the impression has been steadily gaining ground that congressmen can no longer satisfactorily represent the people's interests. To regain full status and function as the representative of the people's interests, therefore, the congressman will have to offer more efficient services to his constituents than he is able to do now. Since his inability to provide effective constituent services stems from his present inadequate knowledge of, and means of influence over, the administrative processes of the various executive agencies, the need for greater access to the proceedings and personnel of the executive branch seems clear. And just as the development of liaison channels with the executive would enable congressmen to offer improved service to their constituents, so the undertaking of more constituent casework would enlarge their role in representative government.

The overall proposal contained in this paper, then, is that congressmen should adopt a more positive attitude toward the idea of liaison and develop more effective techniques of liaison both with the executive branch and with the public. In so doing they will simultaneously increase their capacity to oversee the administration

and to represent their constituents, thus forging an instrument for achieving strengthened legislative government.

In what follows, it is proposed first to examine the nature of the congressional liaison system established by the executive, and then to survey in greater detail the use which Congress is currently making of the channels composing the system. The remaining sections contain a discussion of three areas in which Congress could with advantage develop liaison activity. The first section examines the potential of liaison as a principal means of enhancing oversight of the executive. Treated as a separate subject is the development of liaison so as to gain a measure of control over the regulatory commissions, the quasi-judicial segments of the bureaucracy that are outside the executive branch apparatus and have tended to acquire autonomous or non-politically accountable power, partly due to their special status, and a consequential development of "exclusive" liaison with their clientele. The significance of liaison in the area of constituent services and the desirability of using it to strengthen the representational capacities of congressmen, is explored in the final section. Recommendations as to practical ways in which Congress might advantageously develop liaison in each area are presented in the pertinent section.

## Liaison Viewed From the White House

**W**HEN examined from an executive force perspective, channels of liaison with Congress are, first and foremost, a good means of influencing or lobbying Congress, to secure passage of bills in the form wanted by the executive. Secondly, they are means for obtaining the benefit of congressional views, "know-how," and political intelligence in the fashioning or amending of the laws.

However, in these respects the aims of the President must be distinguished from those of the numerous departments, bureaus, and agencies within the executive branch. To some extent, the conduct of liaison with Congress when directed from the White House necessarily involves a tightening of presidential control throughout the executive branch. As Donald Blaisdell points out:

The federal bureaucracy is not subservient to the President, it is neither homogeneous in composition nor unified in purpose . . . it is not insulated from external forces but is tied in criss-cross relations to private individuals and groups and to Congress.<sup>12</sup>

Hence the President will have neither perfect knowledge of nor control over the operations of the branch of government which he heads. But since the time of Eisenhower, at least, the presidency has increasingly sought to organize congressional liaison so as to achieve the twin objectives of enhancing control over the bureaucracy at the same time as it extends its influence over Congress.

Much of the new force that is now discernible within the presi-

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<sup>12</sup> *Op. cit.*, p. 183.

dency (and executive branch as a whole) seems to have been gathered by a successful harnessing of the liaison activities of the mammoth federal bureaucracy with Congress to the White House staff Office for Congressional Affairs and the Bureau of the Budget (whose director is the only presidential appointee not subject to congressional approval). The origins of the Office for Congressional Affairs go back to the Eisenhower Administration. Its chief function today is systematically to clear and coordinate certain executive branch relations with Congress—especially (as will be explored in some detail hereafter) legislative priorities and assistance to congressmen.

The main liaison functions of the Bureau of the Budget are the preparing and proposing to Congress of a single budget to finance all executive branch and regulatory commission operations, and the coordinating and clearing of all departmental, bureau, agency, and even regulatory commission presentations (except those of the oldest, the Interstate Commerce Commission) to the Congress concerning proposed new legislation, changes in existing legislation, and views on existing and proposed legislation. It would seem useful to say a word about the origins of these functions.

Prior to 1921, when the Bureau of the Budget was created in the Treasury Department, the various agencies and departments of the executive branch each went to the Congress with their own budget proposals, not knowing or caring about the budgets being asked by others. Prior to 1939 when the Bureau was transferred to the new "Executive Office of the President," they were, moreover, relatively free to communicate directly to Congress their own views on the desirability of proposed changes in the laws under which they functioned and with which they were most concerned. Today, however, the Bureau maintains surveillance over the legislative proposals and comments of every department and agency, as well as over their actual programs and their individual budgets. As one Bureau director expressed the relationship between budgetary and program supervision: ". . . the major determinant in any budget is whether a given activity should be conducted at all . . ." <sup>13</sup>

Until about ten years ago, most executive branch liaison with Congress was carried on at sub-departmental levels, that is, at the level of the bureau head rather than of the secretary department head. This fact was brought to official notice in 1949 when the Hoover

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<sup>13</sup> Frederick J. Lawton, as quoted in Blaisdell, *op. cit.*, p. 176. For the history of BOB, see *U.S. Government Manual* (1964-65), pp. 55-57. Berman, *op. cit.*, pp. 76ff; Holtzmann, *op. cit.*

Commission Task Force on Departmental Management pointed out that bureau chiefs had built closer connections with the congressional committees than had the secretaries and suggested that the latter's authorities were impaired as a result. By 1955 the Post Office Department and the Departments of State, Commerce, Defense, and Health, Education, and Welfare each had special departmental-level congressional liaison staff; by 1963, all departments had special departmental-level liaison staff.<sup>14</sup>

Today no cabinet officer dares to ignore the job of congressional relations, and most departments expend sizable sums to equip themselves with effective congressional liaison offices. The Department of the Army, for instance, has a liaison staff of 90 devoting (in fiscal year 1963) an estimated total of 81,280 man-hours to liaison, at a combined salary cost of \$380,000. The Department of State has a liaison staff of 30 whose combined salary costs \$350,000 and who devote 141,800 man-hours to liaison work (in fiscal year 1963). Less important agencies will have comparatively modest staffs, but no agency or bureau is without its congressional liaison personnel.

The congressional liaison officers in the various executive agencies and departments, besides reporting to their own directors, also report directly to the White House via the President's Special Assistant for Congressional Affairs. Under the present practice, every Monday noon, each department and agency provides him with a written report of the department's dealings with Congress during the preceding week, and the projection for the current week. These reports are immediately reviewed and an analysis is given to the President for his Monday night reading, along with a suggested agenda for use in his Tuesday morning meetings with congressional leaders. In addition, the heads of the congressional liaison offices in the departments and agencies are called to periodic meetings at the White House to discuss "mutual legislative problems," with emphasis constantly on the President's program.

The efforts of the White House to increase control of bureaucratic liaison with Congress are understandable when we remember that to the extent that the bureaucracy relates to Congress (or private interest groups) with respect to its budgetary and legislative requests, free of presidential supervision or control, to that extent are the

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<sup>14</sup> The developments are traced by Holtzmann, *op. cit.* Raw data on size and expenditures of departmental staffs are found in the files of the chairman, Subcommittee on Foreign Operations and Government Information, House Committee on Government Operations.

possibilities weakened of the President fully implementing his own program. The situation has been commented upon by a number of observers:

Many a bureaucrat maintains his position because of the support of one or more members of Congress who occupy influential positions. Sometimes this support is based upon the backing of private organizations to whom the executive official in question has demonstrated a friendly and cooperative attitude.<sup>15</sup>

Not always do all units within a department maintain an undivided loyalty to the cabinet member at the head and to his superior, the Chief Executive.<sup>16</sup>

The average unit of the bureaucracy is far more deeply committed to its own particular program than to the program of the Administration as a whole. Accordingly, an agency whose pet project has been turned down by the Budget Bureau and the White House is seldom inclined to accept this verdict as final. If it has influential friends in Congress, it may be in an excellent position to challenge the President's decision.<sup>17</sup>

If Congress also disagrees, "the agency may still be able to achieve its ends by collaborating directly with its clientele interest groups."

Agency clientele will be mobilized to apply pressure in the proper places. The Department of Commerce will find it easy to obtain the cooperation of business organizations; the Department of Labor will enlist the unions; and the Department of Agriculture will be assisted by the farmers' organizations.<sup>18</sup>

The clientele, of course, can try to change the President's plans, by working upon Congress.

Every executive agency lobbies for expanded functions and increased funds. When the departmental estimates are assembled by the Budget Bureau and are presented to the President for his review and decision the influence of the citizen groups may again be actively exerted. After the estimates are submitted to Congress, the groups continue to exert influence actively, openly and covertly.<sup>19</sup>

The attempt to frustrate autonomous bureaucratic liaison with

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<sup>15</sup> Gross, *op. cit.*, p. 135.

<sup>16</sup> Blaisdell, *op. cit.*, p. 38.

<sup>17</sup> Berman, *op. cit.*, p. 80.

<sup>18</sup> *Ibid.*

<sup>19</sup> Blaisdell, *op. cit.*, p. 177.

Congress and to replace it with an effective system of liaison responsive to the President is reflected in these words of Lawrence O'Brien, while he was serving as President Johnson's Special Assistant for Congressional Affairs:

So by establishing this team and working very, very closely with these people in the departments and agencies, it gave us additional manpower, and it insured that our activities would be properly channeled for maximum results, and we would not have cross-wires and individuals going off in separate directions and working with the congress.<sup>20</sup>

And, just as the liaison of the bureaucratic agencies with Congress when uncontrolled by the President could frustrate his policies, so may liaison when controlled by him be used to promote his program. Again, Lawrence O'Brien:

For example, we would anticipate that the Secretary of Agriculture would have a great interest in our education program, although it does not come under his activities in his department. Nevertheless, he has friends and associates on the Hill, and he would be an advocate of our educational legislation whenever an opportunity presented itself.<sup>21</sup>

Of course, the Secretary of Agriculture's "friends and associates on the Hill" may be likely to lend more weight to the Secretary's views on education if he has already lent some weight, or evidenced a willingness in the future to lend some weight, to the views of those Hill friends and associates on agricultural matters—such as the hiring, promotion, and firing of personnel within the department, and the opening of departmental doors to inquiries concerning the problems and desires of important constituents.

Recognition of the importance to the presidency of congressional liaison has reached the stage where President Johnson has repeatedly told his Cabinet that "next to the Cabinet officer himself" the congressional liaison man is "the most important position in the Department."<sup>22</sup>

Presidential control of the channels of congressional liaison is by no means absolute. Even today many departments preserve, in the office of legislative "presentation" and perhaps more notably in the offices of their general counsels, important separate functional liaison chan-

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<sup>20</sup> Transcript of interview prepared for National Education Television Network, July 7 and 14, 1965.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*; see also *White House Press Release*, November 19, 1964.

nels with the Congress concerning legislation. And it is not yet clear whether the less formal links from the executive branch to Congress, established when the bureaucracies dealt with Congress at the bureau rather than departmental level, have been entirely disbanded with the move to control liaison at the departmental level and coordinate the overall liaison effort in the White House. From the standpoint of Congress, of course, it is desirable that access be maintained into as many different levels of the bureaucracy as possible.

## Liaison Viewed From Capitol Hill

**A**LTHOUGH, as Abraham Holtzmann's forthcoming comprehensive work on congressional liaison will document, Congress has not in general resisted the President's attempts to establish a centralized system of congressional liaison, it has on two notable occasions refused cooperation. The House Appropriations Committee declined to accept the new "official" channels in lieu of their traditional liaison channels with departmental budget officers. Express requests from Secretary of Defense McNamara and Secretary of Labor Goldberg that departmental liaison staff be used by the committees were rejected. The reason given by a House committee member was the desire "to protect the working divisions when this point of view is different from the Secretary's."<sup>23</sup> Another executive defeat was received in 1962 when the Department of State's Congressional Relations Office initiated a policy to "coordinate" all relations between officials of State and Capitol Hill. Although framed as though its main motive were to provide better service to Congress, it was construed by congressmen as a general effort on the part of the executive to monitor all channels of inter-branch communication and close off their unofficial sources of information within the bureaucracy. Objections from the Hill were sufficiently strong to persuade the department to discontinue the attempt almost as soon as it was begun.

Lawrence O'Brien's theory on the reasons for the otherwise generally positive responsiveness of Congress to the new system of liaison deserves note:

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<sup>23</sup> Holtzmann, *op. cit.*

Now they talk about arm twisting and all that sort of thing . . . the fact of the matter is that what we have by way of strength, if we do have anything, in promoting the program, is the attitude of the average member of Congress toward President Johnson, that there is a good feeling on the Hill, if you will, toward the President. There is a realization of his massive problems, there is an attitude of general acceptance of his basic proposals in the legislative area, and therefore we find the doors are open to us. The members are interested in hearing our views, we are equally interested in having their views, and their views are extremely important.<sup>24</sup>

In fact, the executive attitude towards liaison gets mirrored in the Congress. Members see, in the White House Office for Congressional Affairs, ways of satisfying legitimate executive branch needs: the President's need "to promote his program," the need of department heads to account "politically" for their programs, the need of the executive branch "to lobby Congress" because of the latter's "complex and difficult nature." As one congressman put it to Abraham Holtzmann:

We expect and welcome White House legislative liaison men O'Brien and Manatos to tell us what they feel is important in the legislative field. They know the priorities; we can't read through all (the executive) messages and know what the priorities are.<sup>25</sup>

Dissent can arise whenever the White House liaison activities become too "obvious" or "crude" and whenever threats, rather than favors and services, are tendered. It also arises, as shall subsequently be explored, when executive officials go "over the heads" of Congress directly to the public.

Once when asked about the nature of the "hundreds of calls" that must come to him from members of Congress, the President's Special Assistant on Congressional Affairs referred to the special White House tours and other prestige-lending favors, and to services that could be performed for the important constituents of friendly congressmen. He concluded his reply with the following remarks:

This is a rather massive government, many departments and agencies and sub-divisions, and we find at times *we can encourage quicker action, and earlier decision, or perhaps we can express the Presidential view directly to his constituents.* It would

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<sup>24</sup> *Op. cit.*

<sup>25</sup> Holtzmann, *op. cit.*

indicate what *his close relationship is to the White House*. . . . (We) are constantly aware of the need and the right of the Congressman *to receive reasonable service* from the Executive Branch. After all, most of those fellows give us great service, because they support the program, and again—always recognizing they're elected to office (emphasis supplied).<sup>26</sup>

The "hundreds" of calls which the White House Office for Congressional Affairs receives from members must be viewed in the context of: the 47,000 inquiries from individual congressmen received in one recent year at the Department of State, plus 1,200 inquiries from congressional committees on pending legislation; the 204,600 queries by individual congressmen, received at the Department of the Air Force, plus 22,700 requests by congressional committees concerning pending legislation; and the hundreds of thousands of other calls received annually by other departments and bureaucratic agencies. The "independent" regulatory agencies, for instance, received over 2,000 inquiries each during the year in question from individual congressmen, plus from 50 to 1,500 requests concerning pending legislation from congressional committees.<sup>27</sup>

James Robinson's study<sup>28</sup> of the State Department's congressional liaison operations disclosed two classes of information being sought in this area by congressmen—information relating to constituents' requests and information relating to executive foreign policy. Seventy-five percent of the Congress communicated, either directly or indirectly through their staffs, at least weekly with the department. Most of the communications concerned problems of their constituents. But, however trivial or unrelated to policy many of these problems may have seemed, Robinson found that it was often by these means that the interest of individual congressmen in foreign policy developed. For in some cases, what begins as a small inquiry of limited scope develops into a major policy question. As a result, the State Department operates on assumptions similar to those of the White House Office for Congressional Affairs, as described by Mr. O'Brien in the words just quoted. Robinson puts the point as follows:

The more satisfactorily it handles constituent-initiated requests, the more likely it is to obtain the support of members on

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<sup>26</sup> *Op. cit.*

<sup>27</sup> Data in the files of the chairman, Subcommittee on Foreign Operations and Government Information, House Committee on Government Operations.

<sup>28</sup> James Robinson, *Congress and Foreign Policy Making* (Homewood, Ill.: Dorsey Press, 1962).

policy matters . . . non-policy good will is transferred to and reinforces policy relations, and regardless of the content of a Member's request, the Department is anxious to oblige.<sup>29</sup>

Throughout the executive branch congressmen seek and are provided with policy information specifically requested by individual constituents or for use in general explanations of government programs to constituents. Some offices of congressional liaison are assiduous in furnishing congressmen with documentation explaining their programs, tailored to the congressman's institutional needs. In a related connection congressmen can obtain executive agency help for speech making. Publicity in local newspapers concerning helpful congressmen may also be arranged by some departments. A valued service performed by most, if not all, departments and agencies is to advise the interested congressman of an awaited decision or action as soon as it occurs, and before the information reaches the constituent through other channels. A closer look at the activities of the congressional liaison office belonging to an important agency which was once well-known for the hostility shown it by congressmen provides an insight into the developing pattern.<sup>30</sup>

The Agency for International Development's Congressional Liaison Office was given the responsibility to provide assistance to members of Congress and their staffs on matters pertaining to foreign aid, "so that one call could be made to AID on any aspect of the Agency's operations and a quick and responsive reply would be received, along with whatever assistance might be required." Its staff presently numbers 11, and is headed by a senior grade officer who is a political scientist with a broad Capitol Hill background.

The staff acknowledges all congressional mail and follows up on each inquiry "to make sure that the Member gets the information he needs as promptly as possible." With the exception of a limited amount of correspondence signed by the Administrator or Deputy Administrator of AID, all AID correspondence with Congress is signed by the Director of Congressional Liaison Office. The staff also furnishes information or services requested by members of Congress by telephone. These requests relate to all areas of the world where AID has programs and all aspects of those programs. The staff arranges interviews and conferences requested by members of Congress and committee staff members with AID officials and with

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<sup>29</sup> *Ibid.*

<sup>30</sup> The information on AID was provided by William Gibbons, Director, Congressional Relations, Agency for International Development.

foreign representatives or technicians engaged in AID-sponsored programs. They themselves receive members of Congress, or their constituents, in order to explain AID's programs, objectives, and accomplishments, to arrange job interviews, or to help constituents who are interested in doing business with AID or investing abroad. When requested, the staff assists members of Congress and staffs with arrangements for congressional study missions abroad.

In addition the congressional liaison staff is responsible both for the distribution of all congressional bills, reports, and hearings relevant to the AID executive staff in Washington and the missions abroad, and for the coordination of agency comments in response to such reports, surveys, and investigations. Finally, in order to keep the agency personnel in Washington and overseas "fully informed about all statements of Congressional opinion on foreign aid, as well as action on AID legislation," the congressional liaison staff prepares a daily summary of pertinent items in the *Congressional Record*.

A sampling which represented probably 75 percent of the total, was made of matters handled in the AID Congressional Liaison Office during a single week. The sampling revealed 168 telephone calls from members of Congress and their staffs on such matters as: a company in Wisconsin wanting to bid on planes; a constituent wanting an appointment on a project in Guatemala; a company in North Dakota wanting a contract; a firm protesting an AID contract award to an Oregon firm; another inquiry on behalf of the Oregon firm; the faculty at Roberts College in Turkey complaining about AID clearance requirements; the population problem; Vietnam; housing guaranties; an OAS conference; aid to Yugoslavia; AID-financed procurements in the United States; balance of payments and gold flow; Cooley loans; and employment interest of constituents. During that week there were also 84 requests from members of Congress for information; the appropriate materials were assembled and sent out by the Congressional Liaison staff. Calls or visits were made by the staff to 71 senators and congressmen for the purpose of assisting them, at their request, with various AID questions and problems. Approximately 75 letters were sent during that week to members of Congress in response to mail or telephone requests.

The major subjects of congressional inquiry and liaison with AID are personnel, constituency business, and program or policy problems. On policy, the Congressional Liaison Office seeks to interpret and fill the need of congressmen to explain the AID programs to their constituents, through speeches and public statements. The office also

tries to arouse the interest of congressmen in the importance of foreign aid. Those congressmen who "believe" in foreign aid are given assistance in building support for the AID programs among their constituents. The office seeks to furnish these services on an individual basis, where possible, and on as broad a base as possible; it functions upon the belief that if more congressmen took the initiative in applying for the assistance available to them and to their constituents, the success of the AID programs would undoubtedly be enhanced. In addition to the normal types of contact, the Congressional Liaison Office prepares programs for coffee discussions which take place almost every week with six members of the House Foreign Affairs Committee (three Republicans and three Democrats); lunches are also arranged on occasion with the "foreign affairs committee" of The Democratic Study Group.

Abraham Holtzmann's forthcoming book<sup>31</sup> indicates that in general members of Congress value their relations with the liaison officers within the executive branch, and view their functions as legitimate. There were even a few complaints among the congressmen Holtzmann interviewed of being "insufficiently lobbied." In sum, liaison with key members of the executive branch appears to give the congressman (1) direct access to those who make executive policy—high-ranking officials in the secretaries' offices; (2) a "point of view" concerning departmental administration; (3) information about policy questions, to fill what sometimes seems "a vacuum"; and (4) perhaps most importantly, assistance in the meeting of constituent needs.

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<sup>31</sup> *Op. cit.*

## Liaison as a Means for Heightening Congressional Oversight of the Bureaucracy

**A** LINK between the achievement of satisfactory White House-Congress relations and the placement of executive branch personnel was acknowledged in the original title of Mr. O'Brien's office under President Kennedy: "Special Assistant to the President for Congressional Relations and Personnel."<sup>32</sup> News analyst Edward P. Morgan reported in March of 1962 that O'Brien had "trained Cabinet and agency liaison officers to alert him on their prospects, problems—and potential vacancies." O'Brien's office was also understood to have set up an exhaustive card index of up-to-date information about each congressman's whims, needs, and interests—and his voting record. This intelligence, of course, was and is put to use in the President's attempts to win the congressional support necessary to implement his legislative program. It ought not to be surprising if Mr. O'Brien's operations have, on occasion, to be painted by observers in Machiavellian tones:

Only when sweet reasonableness produced no results did (O'Brien's) men resort to threats and strong-arm methods. The most extreme sanction they could impose was to eliminate a Congressman from consideration when patronage jobs were available and when favors were requested at the White House. A blacklisted member would be "dead" as far as the White House was concerned. He would find every office in the Executive

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<sup>32</sup> The personnel function, it may be noted, has now been transferred to a different White House office.

Branch ignoring his requests for services whether substantial or petty.<sup>33</sup>

Actually, the "punishment" which the President, through his White House Office for Congressional Affairs, may be able to administer to an uncooperative congressman, if properly regarded, carries clues for strengthening congressional oversight of administration. The task now is for congressmen to resist whatever domination may be implied by the system of coordinated liaison established under presidential control, and seek instead to shape the system to their own vital purposes.

In 1961, there were an estimated 36,000 jobs bearing annual combined salaries totaling \$50 million, classed as dispensable by patronage. Judgeships, U.S. Marshal posts, postmasters and customs collectors, the legislative branch posts of the Public Printer in the Government Printing Office and the Librarian of Congress, and seats on the regulatory commissions are included.<sup>34</sup> Not classed as patronage jobs, but of comparable significance to the presidency are the many posts throughout the higher levels of the bureaucracy which get filled, vacated, and refilled on the basis of recommendations coming from the Hill via the White House. As Robinson observed, patronage can be dispensed by the President, to establish credit with an individual legislator either for some unspecified future purpose, or to secure some particular present legislative objective.<sup>35</sup>

It is, of course, mistaken to view the practice of appointing to executive posts officials recommended by congressmen as a necessary evil. At best, the practice can and does infuse into the executive branch gifted and experienced personnel, many with invaluable Hill experience whose credentials may be otherwise undiscoverable to the administration. Moreover, from the point of view of Congress, they constitute a corps of individuals whose ties to the Congress can be used to assist congressional participation in administration and to counterbalance those elements contributing to the build-up of autonomy within the bureaucracy. Among the reasons why the Presi-

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<sup>33</sup> Berman, *op. cit.*, p. 84. See also William Chapman's article "LBJ's Way: Tears, Not Arm-Twists" in *The Washington Post*, October 17, 1965, p. E-1, for these words from a freshman congressman whose vote was wanted on a House Rules Committee discharge petition: "The White House liaison people came and talked to me. Then some contributors to my campaign back home called me up. Then my party chairman back home called to remind me that Home Rule for Washington was part of our Democratic platform. . . . It wasn't any accident. They've got a file on me over there a mile long."

<sup>34</sup> See Berman, *op. cit.*, p. 88.

<sup>35</sup> *Op. cit.*, pp. 123-24.

dent will want to have some, possibly all, of his agencies and departments sprinkled, if not larded, with congressional favorites, is his need for congressional assistance in controlling problematical segments of the bureaucracy. In the case of the Department of Defense, for example, some commentators have expressed a fear of the existence of a military autocracy which promotes its vested interests in many ways. Its members "intervene in the formation of policy, press both the Bureau of the Budget and the President for funds necessary to carry out and support the programs they help to make, and direct this pressure to Congress."<sup>36</sup>

The appointment to key positions within "problem" departments or bureaus of persons loyal to members of Congress as well as persons dedicated to the President helps counteract such autonomous powers. Reliable congressional liaison with the White House is a prerequisite to the finding and filling of such critical staff positions within the bureaucracy. It is important, in this connection, however, to determine to what extent the congressional and White House senior grade appointees get "sinecured" by the bureaucracy or are able to fulfill their key assignments.

Cooperation with the President in the area of personnel appointments is one way to enhance congressional participation in administration, but other forms of contact with the agencies are needed if Congress' proper role in the governmental process is to be regained. For example, increased direct liaison between Congress and the bureaucracy might help repair the deficiency in political accountability frequently said to exist in departments like those of the Army, Navy, and Air Force. But this would not be enough. Here, the main need for Congress would seem to be to counteract the inordinate degree of direct "liaison" which has steadily grown up between the departments and their clientele and interest groups. Overly long tolerated executive-defined and enforced security and secrecy regulations have further weakened congressional oversight of and control over the nation's military and defense programs. To counteract this subservience, and having in view that each of the three Pentagon military Departments already maintain offices of "congressional liaison" on Capitol Hill, consideration ought to be given to establishing *within the Pentagon* congressional offices of "executive liaison," whose personnel have

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<sup>36</sup> See Blaisdell, *op. cit.*, pp. 183ff; B. M. Sapin and R. C. Snyder, *The Role of the Military in American Foreign Policy* (New York: Free Press of Glencoe, 1954); Edward L. Katzenbach, Jr., "How Congress Strains at Gnats, Then Swallows Military Budgets," *The Reporter*, July 20, 1954, p. 2

been cleared by Congress for access to classified data of the most sensitive categories. They might perhaps be part of or attached to the staff of the armed services committees or the military subcommittees of the government operations committees. Alternatively they might perhaps be attached to a new joint committee of Congress charged with matters affecting congressional relations with the other branches of government. Reference points for such administrative innovations might be Alfred de Grazia's proposal for establishing "Congressional Tribunes" within departments and agencies,<sup>37</sup> and George Galloway's recommendation of the appointment within the agencies of congressional "boards of visitors" with full access to the agencies' personnel and activities. Under the latter's proposal, the congressional "visitor" would:

. . . become especially informed by observation and experience concerning (the agency's) programs and problems. He would become a special champion of the public interest in relation to the work of that agency. . . . Among his colleagues in Congress he would become a recognized and trusted authority concerning conditions in the agency, mediating between them, adjusting disputes, clarifying issues, and developing cooperative attitudes and arrangements.<sup>38</sup>

Or, as shortly will be discussed, introduction of an American-style Ombudsman system may be in order.

Having clearance for access to classified data and armed with some investigative rights, possibly linked in some way to the departments' own offices of congressional liaison, or replacing them,<sup>39</sup> such "executive liaison" staff or congressional Ombudsmen could convey

<sup>37</sup> Alfred de Grazia, *Republic in Crisis* (New York: Federal Legal Publications, 1965), pp. 238ff.

<sup>38</sup> *Legislative Process in Congress* (New York: Crowell, 1953), p. 458.

<sup>39</sup> In this connection, Congress might itself wish to examine, within the context of the desirable organization of the executive branch, the position of the congressional relations officers within their departments and bureaus, to determine: (a) the extent to which the congressional liaison officers should participate in the deliberations and decisions of highest policy importance to their departments and agencies; and (b) the degree to which some of the legislative liaison functions, still largely performed within departmental and agency offices of the general counsels, might be brought within the operational scope of the new liaison offices. There is a sense in which good congressional liaison officers, within the executive branch, sometimes find themselves "in the middle," as the two branches compete and cooperate with each other in endeavoring to accomplish the sound administration of law and program. Without bidding such officers any disloyalty, members of Congress should feel free to tax them to the utmost to defend or amend their agency's policy actions.

informed opinions to Congress as to viable areas for changes in the military departments' critical operations.

Measures of this kind applied selectively to or throughout the executive branch for the purpose of making Congress more effective in the administration of the laws seem more promising than certain other types of proposals involving greater inter-branch liaison and communication. One such type of proposal, for instance, would invite executive participation in the floor debates of Congress. Non-voting seats on the floor of the House would be available to the heads of executive departments to "provide members of congress with a first-hand opportunity to learn about executive operations" and "prevent department heads from neglecting congressional opinion and require them always to be prepared to defend their operations before Congress."<sup>40</sup> Despite the formal attractiveness of the idea, and its relevance to a parliamentary system of government, any move in this direction would seem unlikely to provide Congress with significantly greater insight into, oversight of, or participation in, the administration of laws and policies by the executive branch.

A proposal made by Kefauver and Levin in 1947 would provide quarters on Capitol Hill "for liaison staff for each Federal department and major agency."<sup>41</sup> This comes closer to present political and administrative realities; in effect, it would expand across the executive board the existing practice of the Departments of the Army, Navy, and Air Force in maintaining congressional liaison staff offices on Capitol Hill.

But, from the standpoint of Congress it is the reverse of this process—the placing of congressional "Tribunes," "Advisers," "Ombudsmen," or "Boards of Visitors" physically within critical administrative departments and agencies—which would seem most conducive to enhancing congressional oversight; and it would be particularly valuable, if, as Galloway proposed, they "would have full access to (the agency's) personnel and activities and would become especially informed by observation and experience concerning its programs and problems."<sup>42</sup>

Other proposals for strengthening congressional oversight would require administrators to give Congress more complete and regular

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<sup>40</sup> Robert Heller, *Strengthening The Congress* (Washington, D. C.: National Planning Association, 1945), p. 27.

<sup>41</sup> Estes Kefauver and Jack Levin, *A Twentieth Century Congress* (New York: Duell, Sloan & Pearce, 1947), p. 149.

<sup>42</sup> *Op. cit.*

reports on their activities.<sup>43</sup> From the standpoint of improving oversight, there is little doubt that the regularization and deepening of agency reporting would theoretically aid the Congress; but as has been often remarked, the standing committees are already too heavily burdened with their legislative duties, and too restricted by their limited staff, to keep a close, continuous watch upon even those parts of the executive branch whose activities are within their jurisdiction.<sup>44</sup> Unless the government operations committees or other organs of the Congress could find new systematic means to digest additional information concerning executive branch administration, the implementation of such proposals will not strengthen but further burden congressional oversight of administration.<sup>45</sup>

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<sup>43</sup> Roland Young, *This Is Congress* (New York: Knopf, 1943), p. 255.

<sup>44</sup> See George Galloway, "The Operation of the Legislative Reorganization Act of 1946," *American Political Science Review*, March 1951, pp. 59-60.

<sup>45</sup> Consult Kenneth Janda's "Information Systems For Congress" and Charles R. Dechert's "Availability of Information for Congressional Operations" in this series of papers.

## **Liaison as a Means of Increasing Congressional Control of the Regulatory Commissions**

**A**N area where increased liaison between the Congress and the bureaucracy could have a particularly salutary effect, is with the regulatory commissions.

The new centralized system of congressional liaison has developed almost exclusively within the ambit of the normal executive departments and bureaus of State, Defense, Agriculture, Health, Education, and Welfare, etc. It has not effectively been introduced into so-called quasi-judicial agencies like the Federal Communications Commission, Federal Trade Commission, Civil Aeronautics Board, and Interstate Commerce Commission. Inasmuch as neither the President nor Congress has been able effectively to bring them to political account, there are compelling reasons to consider extending the system to cover these so-called "independent" agencies as well.

Since congressmen are rarely experts in the complex fields with which the regulatory commissions deal, their inability to penetrate the quasi-judicial curtain surrounding their administration might be diagnosed as a traditional case of impotence through lack of information, and no further questions asked. But more questions should be asked when a presidential appointee to the chairmanship, the highest post of such a commission, can lament:

Elected officials and political appointees in high office often find that they are only nominally in charge of a bureaucracy so firmly entrenched that it is all but impossible to do more than slightly deflect the previously prescribed line of march. "The way things always have been done" becomes a substitute for a creative recognition of new problems. "Whatever is, is right," bit by

bit, becomes "an adequate surrogate for social theory." The rule-book of governmental bureaucracy fastens the chilling tentacle of precedent upon the ironclad base of the law. Occasionally, under stress and urgency and lionheartedness, the tentacle may be ripped asunder, in business or education or even in government; but whereas business or education can now proceed without the dead tentacle of the past, government is still held by the ironclad grip of the law which vested interests refuse to disengage.<sup>46</sup>

As Newton N. Minow went on to observe, for all their importance the economic welfare of the country, the regulatory agencies are in fact responsible neither to the executive nor the legislative branch. This independence was intended to be curtailed by the judiciary, through the process of judicial review of administrative adjudicatory and rule-making actions. The supervision of agency action by the judicial branch is now generally recognized as unsubstantial and incomplete. The efficacy of judicial "oversight" of commission action is suggested by a recent remark of Minow's, in 1964: "Once, while testifying in Congress, I was asked about a specific case, and upon checking I discovered that it had begun when I was in the Army in India in World War II. It is still pending."<sup>47</sup>

Congress' own feelings of frustration, with respect to the maintenance of effective oversight of the regulatory commissions are just as strong; they were expressed in this way by one committee member:

Even when we (on the Committee) suspect something's not right (in the agencies) what can we do about it? It would take forever to really get into the thing. First we'd get a long run-around in and out of the Statute. There's always some little provision that nobody knew was there, except the bureaucrat who pulls it out of the hat. . . . Before we finish they have us thinking it's all because of the terrible law we wrote and nothing at all to do with how they treated it.<sup>48</sup>

Another member put this problem more simply:

The (regulatory) agencies' work is pretty technical. Most of us just don't know enough about it to even begin to ask intelligent questions.<sup>49</sup>

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<sup>46</sup> Newton N. Minow, in "The Mazes of Modern Government," *An Occasional Paper on the Role of the Political Process in the Free Society* (Center For The Study of Democratic Institutions, 1964).

<sup>47</sup> *Ibid.*

<sup>48</sup> In Seymour Scher, "Conditions For Legislative Control," *Journal of Politics*, August 1963, pp. 526, 533ff.

<sup>49</sup> *Ibid.*

The sometimes deliberate discouragement of the congressman, of course, not only minimizes his oversight function but precludes his effective participation in the formulation of new policies and laws.

Nor is the formal committee investigating apparatus readily able to break the "independent" bureaucracy's lock on expertise and knowledge. Another member asserts:

Getting involved with those agencies can be a trap. We start out with what is a good case of hanky-panky and by the time we finish clearing away the smokescreen they (the agency) send up, the point's lost. Before one hearing we sent a couple of our staff people over to the agency to go through their files of decisions and intra-agency memoranda. They were snowed under. It would take an army of staff men a year to begin to make sense out of what's going on over there.<sup>50</sup>

When in addition to such handicaps congressmen wishing to intervene in the agencies' administration of a program also have to cope with judicial norms of the type alluded to by Minow, the restraints upon the congressional oversight function become formidable.

The traditional juridical point of view shielding the regulatory commissions' administration from traditional forms of oversight was expressed by the Committee on Administrative Law of the New York City Bar Association, in 1950, in this way:

Legislative committees ought not try to influence the decisions of pending cases, issues before an agency, or the manner in which a particular case is being handled—"a precept not universally respected in practice." Nor should decided cases be criticized with a view to influencing an agency to reverse a previous ruling or to limit a trend in agency decisions, except when a committee is genuinely considering amending a statute.<sup>51</sup>

These few succinct caveats, if slavishly honored or rigorously enforced, could end the possibility of effective congressional oversight of the administration of the regulatory commissions. It is, of course, the exception which leaves Congress the legal and ethical room needed to employ institutional techniques like committee hearings, to discover and seek to repair regulatory agency maladministration. Congressmen will intervene and even block regulatory agency rule-making processes which they consider to be outside the bounds of

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<sup>50</sup> *Ibid.*

<sup>51</sup> In Seymour Scher, "Congressional Committee Members as Independent Agency Overseers: A Case Study," *American Political Science Review*, December 1960, pp. 911, 913.

the authority vested in the agency, by introducing legislation, or holding hearings dealing with the subject matter involved. Although this technique of oversight is not often used to intervene where "cases of adjudication" are in process, there appears to be no legal objection to such use,<sup>52</sup> while the objection of "unfairness" raised by the agencies seems merely to reflect the judicial norm.

In view of the overriding right and power of Congress to legislate, and to investigate in order to legislate, juridical precepts of this kind should not preclude congressional oversight of rule-making proceedings, nor cases of adjudication, at any proper time. The inhibitions seem to involve inappropriate extensions of the ethics of the courtroom into the commissioner's office; and one reason why congressmen intervene less than they might probably has to do with their traditional respect for legal norms and the large number of members who are lawyers. The flesh of lawyers is educated to crawl at the idea of "off the record" and "ex parte" communications with a judge, by a party or anyone else "interested" in a pending case. But the transplanting of the precept of judicial isolation into the soil of regulatory administrative proceedings—where the President, the Congress, and of course the greater public, are usually directly "interested" in, and affected by the outcome—may have done more harm than good.

For example, in rate-making proceedings, where a rate increase will directly affect consumers, perhaps even exclude some from the market, a rule which prohibits them, their President, and their congressmen from communicating with, and having their views taken into account by the commission involved, seems to mock, not satisfy, notions of due process. Such rules serve further to insulate the regulatory commissions' operations, and render them responsible in fact to the utilities, "common carriers," and other industrial conglomerates, which they are supposed to regulate, and virtually unaccountable to the public in whose interest the regulation theoretically takes place. Typically, the commission is legally restrained from considering consumers' views—except via cumbersome and costly methods of formal intervention which, moreover, often fail to admit the relevancy of the consumers' interest.

In addition, many cases of adjudication by commissions are really

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<sup>52</sup> However, the FCC recently adopted rules further to discourage congressional and other "ex parte" influence upon its proceedings. A party to a proceeding who "directly or indirectly" makes or "encourages or solicits others to make" any "unauthorized ex parte communications" "may be disqualified" from the proceeding. *FCC Docket No. 15381*. ("In the matter of Rules governing ex parte communications in hearing proceedings.") *Report and Order*, July 21, 1965.

semi-planned pieces of legislation. To preclude public and congressional intervention in such cases simply results in leaving the formulation and enactment of such "little laws" entirely to the commission and its clientele. This has less to do with due process for litigants than with private lawmaking by industrial conglomerates.

Nowhere else in the broad range of the federal executive has the governmental conduct created misgivings of the kind raised by the operations of these independent, "quasi-judicial" bodies.<sup>53</sup> Their very structure is now called under question. The fault lies in the absence of political accountability and excessive insulation of the decision-making officials within the organizations, from all but their clientele. A way to reform and political responsibility may therefore consist in opening commission doors to the broadly interested public, especially through their representatives in the Congress, as distinct from the commissions' familiar clientele. For the real problem with the "independent" agencies, of course, has been that they are not very independent of their clientele.

The organized and unorganized interests with privileged access to the Chief Executive and the regular departments are usually fairly apparent; but it is never clear which interests initially will have such access to a new agency that is expected to act with some of the detachment of a court. Experience indicates, however, that the regulated groups will have more cohesion than those demanding regulation, that they can therefore keep close track of the work of the commission, and that consequently little will be done by a commission beyond what is acceptable to the regulated groups. Even when groups have sought regulation, such as the licensing of occupations, the commission has been regarded as the most appropriate form for their purposes because it assures privileged access for the initiating group.<sup>54</sup>

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<sup>53</sup> See, for example: James A. Landis, *Report on the Regulatory Agencies to the President-Elect* (Washington, D. C.: Government Printing Office, 1960); Bernard Schwartz, *The Professor And The Commissions* (New York: Knopf, 1959); Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton, N. J.: Princeton University Press, 1955), pp. 130ff.

<sup>54</sup> Pendleton Herring, *Public Administration and The Public Interest* (New York: McGraw-Hill, 1936), p. 213; see also Harmon Zeigler, *Interest Groups In American Society* (Englewood Cliffs, N. J.: Prentice-Hall, 1964), pp. 280ff; David Truman, *The Governmental Process* (New York: Knopf, 1951), pp. 416ff; Pendleton Herring, *Presidential Leadership* (New York: Farrar and Rinehart, 1940), pp. 115-16 suggests: "The existence of independent commissions, while sometimes inconvenient to presidential power, may yet relieve the chief executive of a greater burden of political power than any one man can carry."

It is thus that agencies like the ICC, FCC, AEC, and CAB have sometimes come to be characterized as "captive" agencies. Precisely because the decision-making officials are overprotected from external, public influence, they are underprotected against the pressures of the industries they are intended to regulate, and tend to succumb to institutional captivity.

A Commission formally independent of the Chief Executive and expected to assume the detachment of a judicial body is more likely to be primarily accessible to organized elements among the regulated than is an agency in the executive branch. It can less easily command the resources of the Presidency for defending its policies; and it is less readily accessible to some of the interests that reach the Chief Executive.<sup>55</sup>

Although congressional committee investigative process can, subject to the limitations arising from lack of expertise, legitimately intervene in the processes of the regulatory agencies, effective oversight or participation by Congress requires more than occasional full-scale investigation. Needed, here perhaps even more than elsewhere, are channels by which congressmen can constantly raise questions and get answers, concerning cases, rules, and policies on all matters attended to by the agency officials. If the answers are not satisfactory to Congress, the law governing the agency can be amended accordingly. But when questions cannot be asked, the ground cannot be laid for improvement of administration through changes in the law. In short, Congress' access into the executive, afforded by informal and formal channels of liaison, should be extended to the independent regulatory commissions.<sup>56</sup>

In view of the special criticism that has gathered round the

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<sup>55</sup> David Truman, *op. cit.*, p. 420; see also Scher, *Journal of Politics, op. cit.*, pp. 526ff.

<sup>56</sup> There is some evidence that some congressmen have not been intimidated by the application of juridical norms to regulatory proceedings. In one of the few important published studies of congressional relations with regulatory agencies, Seymour Scher concluded that:

"For the Committee member there was no abstract meaning in the term 'proper' when used to describe the relationship between the independent commission and the Committee. Anything was proper that served to bring the agency, in its handling of cases in the regional offices or in its own orders, into accord with the members' view of how the agency should act. . . . Formal norms intended to restrict the Congressman in checking the adjudicatory activity of an independent commission are not, in practice, observed by him. The committee member recognizes no limitations on his behavior by virtue of the agency's judicial functions. He may or may not see a distinction between using his committee status as a weapon against an executive bureau

operations of the regulatory commission it would seem indicated for Congress to reexamine the basic question of the "independence" of these commissions, and their relationship to the President and to the legislative branch whose "creature" or "arm" they were originally designed to be. As has been shown, prevailing juridical norms are restraining the exercise even of normal congressional oversight of these agencies.

Apart from budgetary supervision, at present the President's control over the commissions seems mainly to concern his right to name the chairmen and influence the latter's powers over "housekeeping" operations, meetings, and the establishment of agenda. The ICC declines even to permit the Bureau of the Budget to coordinate its legislative proposals and comments.<sup>57</sup> Newton Minow has proposed severing the commissions' judicial functions and placing their administrative functions under presidential control. It may be, on the other hand, that some new institutional form of access by the Congress to the commission's basic processes could be established. In this connection the Congress' experience with existing liaison offices in executive departments (such as the Department of State) which have adjudicatory or "quasi-judicial" functions (such as passport and visa operations), should be studied in greater detail. Sooner or later, some more creditable system must replace the caricature of the judicial process which haunts regulatory commission operation, and for which the Congress is itself partly to blame:

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with largely service functions and against a quasi-judicial regulatory agency. If he recognizes the distinction in words, he acts as though none exists. Agency orders, equally with agency rules, are fair subjects for his attention. Whether the adjudicatory determination by the agency is in process or has been completed makes no noticeable difference to him." (Scher, *American Political Science Review*, *op. cit.*, pp. 911, 919).

Senator Everett Dirksen made a long statement in the wake of congressional disclosures of "off-the-record" contacts between regulatory agency commissioners and their clientele, of which the following is an extract:

"These people get lost down here in this baffling, bewildering labyrinthine Government. Even we Senators get lost in it. I sometimes wonder what the average citizen would do if he didn't have the opportunity to come down here and talk with us and see what his rights are, and where he has to go, and whether we can't do a little something for him. . . . I went beyond the trial examiner; I didn't even bother with him, he is just an intermediary, I went where the decision is to be made. The Commissioners I talked to would have a vote. If it is a five-man commission and I get three votes on that commission for my constituent, everything is hunky-dorey. So I went right to the point where the decision is made." (Quoted in Scher, *Journal of Politics*, *op. cit.*, p. 536.)

<sup>57</sup> Information received from Wilfred Rommel, Director, Office of Legislative Reference, Bureau of the Budget. Also see Herring's provocative remark, *op. cit.*

The job that Congress gave the Commission was somewhat comparable to asking the Board of the Metropolitan Opera Association to decide, after public hearing and with a reasoned opinion, whether the public interest, convenience, or necessity would be better served by having the prima donna role on the opening night sung by Tebaldi or by an up-and-coming American soprano who might prove herself the Tebaldi of tomorrow, or. . . .<sup>58</sup>

David Truman more soberly observed:

The more undefined and unprecise the policy determinations reached by the legislature in passing a statute, the more certainly will the activities of an enforcing Commission have to reflect a *modus operandi* worked out with the regulated groups.<sup>59</sup>

Some legal commentators suggest that maybe the commissions should be obliged to adopt investigative and rule-making proceedings, with maximum public participation, in lieu of adjudicatory proceedings. It is quite possible that all adjudicative operations of these commissions could be made over into rule-making functions and that these could be broadly opened up to oversight by Congress or control by the President, and be made accountable in such form to the public. If Congress were to assume a new responsibility toward the commissions, some type of consumer "Ombudsman" would probably need to be created to provide properly representative institutional channels for public liaison.

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<sup>58</sup> Judge Henry Friendly, as quoted by Newton N. Minow, *op. cit.*

<sup>59</sup> *Op. cit.*, p. 419.

## Liaison as a Means of Improving Representational Capacity of Congress

**A**CCCESS to the bureaucracy is a key to effective oversight. Access for an hour to the correct official within an agency can be more useful to a congressman, and more conducive to participation in administration, than a bale of official files or a week of investigative hearings. Increased means of access not only facilitate oversight, they can also help congressmen broaden and strengthen their services to their constituents, their ultimate source of rightful power.

Roger H. Davidson has pointed out<sup>60</sup> that the strength of the legislature has traditionally rested on its control, if not its outright monopoly, of the vital channels of communication with the constituencies and those interests making demands on the instruments of government. He, and other contributors to this symposium, are calling attention to the way in which, because of the proliferating relations between the executive branch and private interest groups, a species of executive "representation" is threatening to overpower congressional representation of the constituents. Yet, as has been recognized by Abraham Holtzmann and other students of congressional-executive relations, the Congress especially resents, as an intrusion on its prerogatives, bureaucratic appeals to the public "over Congress' head." Inasmuch as the bureaucratic channels of communication, or liaison, with the interest groups are the chief means by which this new mode of executive representation is being pursued, some way should be found for Congress to open up similar liaison

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<sup>60</sup> See his contribution to this series of papers, "Congress and the Executive: The Race For Representation."

channels of its own so as to develop countervailing congressional representation of the various interest groups.

Before considering methods by which this objective might be achieved it is perhaps necessary to point out the shortcomings of a negative proposal that has received some general support: namely that Congress should seek to curtail executive-clientele liaison via the agency anti-lobbying law.

There are certain types of public and private agency-clientele liaison which because they can result in pressures upon Congress might be considered to violate the agency anti-lobbying law, or be otherwise contrary to sound public policy. An example of the former type, hotly criticized in Congress at the time, was Secretary of Agriculture Brannon's visiting St. Paul, Minnesota, and other cities in 1950 and delivering talks on the problems of farmers and the purposes of his "Brannon Plan." An example of the latter type might be the head of a defense contracting company visiting Washington to discuss with the office of the Secretary of Defense a new military requirement of interest to his company, and the defense budget. Both types of contact can strengthen executive representation at the expense of congressional representation. But can either type wisely be curtailed by invoking or expanding the anti-lobbying law?

*Public* addresses, speeches, conferences by heads and other senior officials of executive departments, although paid for out of public funds cannot, it seems to me, wisely be restrained—even when they are designed specifically to promote an executive program and indirectly to influence Congress, and may thereby involve technical violations of the existing anti-agency lobbying law.<sup>61</sup> As a repre-

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<sup>61</sup> The text of the law, *Lobbying with Appropriated Moneys* (18 U.S. Code, Section 1913), follows:

"No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephones, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

"Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than \$500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment. . . ."

sentative of the Bureau of the Budget's Division of Legislative Reference suggested to the House Select Committee on Lobbying Activities:

It has been the practice of Presidents for as far back as I can remember, to make specific assignments of given subjects to members of the Cabinet or to other agency heads, and say, Here is something I advocate. It's up to you, Mr. So-and-So, to marshal all the support you can for this particular measure.<sup>62</sup>

A simple antidote to excessive executive speech-making is increased congressional speech-making. Thoroughly adequate provision could be made at the staff level of Congress, for furnishing members with the means, including expertise, for making counter-administration policy speeches, during debates and in "St. Paul" as well.

*Private* meetings, conferences, and discussions with special interest-group representatives on particular matters pending in the departments and agencies may inadvertently or intentionally result in an indirect lobbying of Congress through the interest groups concerned. However, as it stands now, the agency anti-lobbying law cannot restrain the kind of indirect lobbying that may be involved here; nor would any amendment of the existing law—short of forbidding all communications between agency officials and private interest groups about pending matters that are not made a matter of public record—have the intended effect.

There is a more positive and practicable way in which Congress might seek to counteract such agency-clientele liaison activities: By offering inducements to encourage constituents to refer their problems vis-à-vis the bureaucracy to their elected representatives.

Constituents with bureaucratic problems today can go direct to the agency concerned, or hire a lawyer, or ask their congressman to speak on their behalf. Asking their congressman will avail them only to the extent that he has the means to inquire and intervene on their behalf. These means range from a letter to the agency to repeatedly summoning the agency's head to meetings on the Hill to defend the agency point of view, with threats of burdensome formal committee investigation, or bad reports to appropriations committee colleagues, lurking in the background. If the member has the requisite power,

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<sup>62</sup> U.S., Congress, House, *Hearings Before the House Select Committee of Lobbying Activities Pursuant to H. Res. 298*, 81st Congress, 2d Session, 1950, Part 10, "Legislative Activities of Executive Agencies," p. 15. To some extent the problem can be dealt with in the program and appropriations authorizations given each department and agency.

the agency will be forced to give the problem the consideration it may deserve.

Congressmen should therefore seek to develop methods of systematically increasing their ability to service the needs of their constituents at every level of the bureaucracy. In this respect, they should not hesitate to utilize to the full the contacts and expertise made available to them by the congressional liaison offices of the various departments, agencies, and bureaus.

But of course the simplest way to induce persons to refer their questions and problems with the bureaucracy to their elected representatives, in preference to the agencies themselves or to lawyers, is for Congress to enlarge its members' own individual staffs available for case work, provide members of Congress with special funds for the retention of outside assistance, including legal assistance, and make it plain to constituents that they are in a position to provide them with more (free) services and to present cases effectively to the bureaucracy.<sup>63</sup>

A complementary measure to increase congressional and cut back bureaucratic representation of, and liaison with, constituent interest groups would be to forbid any agency or department from denying any request for a service, benefit, grant, award, contract, loan, etc., without notifying the applicant's congressman in advance. Agency officials would then probably tend to clear intended denials informally with the congressman's office before taking an actual decision, thereby involving congressmen directly in the administrative process.

The necessity for congressmen to inquire and intervene with the executive branch in regard to particular cases and problems of interest to constituents can scarcely be questioned. As has been indicated, if properly developed, case and service work would provide Congress with important means and motives for oversight, and with a mode for participating in administration. At present, however, this activity tends to be informal and is often subject to the criticism that it is too selective and involves too much special pleading. Priority consideration should be given to the possibility of institutionalizing the service function, and elevating it to the level of a formal, comprehensive duty of the congressman.

The results could hardly be other than deeper and broader congressional oversight of agency administration, with a corresponding decrease in bureaucratic force and instances of political unaccount-

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<sup>63</sup> For a detailed account of the staff requirements needed to undertake case work effectively, see Kenneth Olson, *op. cit.*

ability. Essentially, members of Congress and their staffs would be undertaking to represent directly their constituents—including the agencies' existing clientele and interest groups—before the agencies and departments of the executive branch.

Pendleton Herring once predicted that:

The congressman more and more will . . . come to serve as a mediator between his constituency and the operations of government within it. He is in a strategic position to observe how governmental functions actually impinge upon his constituents. He is in a position to advise his constituents how to receive maximum benefits from what the government stands ready to give them and how to make their views felt about desirable fields for governmental action. He is in a position to discover areas where governmental activity should be withdrawn or modified.<sup>64</sup>

A strengthening of the ability of congressmen to service their constituents' needs in relation to the bureaucracy would underwrite the essential "mediating" function of congressmen. This would be accomplished, in effect, by members of Congress increasing direct liaison with the great bureaucracy on the one hand and with their individual constituents on the other.

In the end, the augmentation and strengthening of the mediating functions of congressmen, with the bureaucracies, *on behalf of their own constituents*, should give rise to a congressional corps of persons with loyalties and duties akin to those of the Ombudsmen of Sweden, Denmark, Norway, and New Zealand. As is rather well known, these legislative agents or commissioners investigate citizens' complaints of bureaucratic abuse and although they properly do not have any punitive powers nor the power to amend administrative decisions, they have vital powers to investigate and to form and issue opinions. Recently, proposals for the establishment of comparable offices have been made in England, Canada, Australia, Ireland, and Holland, and also in New York, Illinois, Connecticut, and California. West Germany is reported to have adopted an Ombudsman system for military affairs.<sup>65</sup>

Congressman Henry S. Reuss' proposal for the creation of an Administrative Counsel of the Congress, a concept reported on and supported by Kenneth Olson<sup>66</sup> and others, should be considered in

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<sup>64</sup> *The Politics of Democracy* (New York: Rinehart, 1940), p. 383.

<sup>65</sup> See Donald C. Rowat, *The Ombudsman: Citizens Defender* (Toronto: University of Toronto Press, 1965).

<sup>66</sup> *Op. cit.*

relation to the Ombudsman experience. It seems desirable, however, that the image be recast in the more positive terms of the Ombudsman's function, and away from the rather negative conception of the office as a means of taking "some of the load" of citizens' complaints off congressmen's shoulders, leaving them more time for legislative matters.

When Congress comes to realize that doing constituent case work and solving citizens' complaints are essential aspects of the governmental process and incomparable methods of overseeing administration, which in no way threaten the constitutional checks and balances, Congress will be able to discern and reach for a new, more creative role. To the degree that Congress imaginatively develops plainly needed new institutional means for the public to obtain satisfaction from the vast and remote bureaucracies, and yet retain control over those means, will Congress' role in the classic American experiment in republican government be revitalized and rewarded. Hopefully in the offing is an historic marriage of the sometimes despised but nevertheless essential case-work function of the congressman with the sometimes annoying but generally healing work of the Ombudsman.