

**INCENTIVES AND OPPORTUNITIES FOR OVERSIGHT:
COMPARATIVE IMPLICATIONS OF THE AMERICAN CONGRESSIONAL EXPERIENCE**

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Observers of the United States Congress, including many of its Members, have long noted with amusement or frustration that the term “oversight” is a *double entendre* in American political discourse. Ironically, “oversight” carries two entirely different and contradictory meanings: to *oversee*, in the sense of observing, monitoring, and even supervising something that is taking place; and to *overlook*, in the sense of failing to notice something that should be apparent. This juxtaposition neatly encapsulates the efforts of the modern Congress to encourage and conduct effective oversight of the departments and agencies of the American federal government.¹

This paper has several purposes: first, to explain why it is often held that Congress has been less successful in conducting oversight than in fulfilling most of its other responsibilities; second, to argue that this perception rests in part on an unduly restrictive conception of what constitutes oversight; third, to identify the two general approaches that the modern Congress has taken in its efforts to promote more and better oversight; fourth, to discuss some of the innovative oversight mechanisms that Congress recently has devised; and fifth, to examine the implications of the American congressional experience for efforts by other national assemblies to improve their own oversight capabilities and performance.

As students of comparative legislatures and parliaments are quick to point out, the United States Congress is different. In what it does and in what part it plays in the larger political system, Congress is so different from most other democratic national assemblies that there is no one label, legislature or parliament, that applies equally well to all of them. Even compared with national assemblies in other presidential systems, the American Congress tends to be unusual in its assertiveness and in the powers it has to assert. Inevitably, therefore, there are some respects in which the American experience concerning oversight may not be directly relevant to assemblies that operate within fundamentally different, albeit democratic, constitutional systems. On the other hand, as I shall argue, the American experience does highlight certain variables and commonalities--in the interests of assembly members, the incentives of political parties, and the effects of structural arrangements--that can promote or retard the practice of oversight in any democratic regime.

¹This paper is not endorsed by the Congressional Research Service or the Library of Congress. I thank my colleagues Fred Kaiser and Walter Oleszek for their very helpful comments.

Oversight as a Responsibility and a Problem

I take "oversight" to refer to activities undertaken by (or on behalf of) members of an assembly that have the effect (even if not always the intent) of monitoring and evaluating the administration of government and the government's implementation of national policies. Such oversight serves at least two purposes. First, it enables the citizenry, acting through its elected representatives, to hold the government accountable for its actions and inactions, for its successes and failures. And second, it assists those representatives in determining how well current laws are working, which is a necessary prerequisite for determining whether new laws are needed.²

In the United States Congress, oversight is very much a committee-centered activity. The Constitution and the rules (standing orders) of both houses of Congress combine to effectively preclude oversight activities during plenary sessions. Members of the House of Representatives and the Senate are constitutionally prohibited from serving as department secretaries (ministers) or from holding any other position in the national or any sub-national government. The standing orders of both houses allow cabinet secretaries to be present "on the floor" during plenary sessions, but this is not a consequential right. The same courtesy is extended by the House of Representatives to "foreign ministers" and by the Senate to members of other national parliaments and the European Parliament.

In practice, cabinet secretaries very rarely take advantage of this right, because the right to be present does not carry with it the right to participate in congressional proceedings in any way. Only the Members themselves can participate in legislative debates. Furthermore, neither house provides in its standing orders for oral or written questions or for any other proceeding in plenary session by which Members can confront senior government officials and compel them to explain their policies or defend their actions. Oversight activities necessarily involve exchanges between Members and non-Members--either government officials or private citizens affected by government actions--and no such exchanges are possible during plenary sessions of Congress.

There would be no constitutional bar against instituting some form of question period in one or both houses of Congress, but the idea never has been seriously considered and there is no reason to expect that it will be.³ Representatives and Senators regularly write to executive branch officials, either on behalf of their constituents or in search of information or explanations for government decisions, and every government department and agency gives high priority to responding to congressional inquiries. However, these written exchanges, and the telephone conversations and meetings that often accompany or substitute for them, take place outside the purview of Congress' formal proceedings.

²The best contemporary study of congressional oversight, and one to which this paper is indebted, is Joel D. Aberbach, *Keeping A Watchful Eye*. (Washington: The Brookings Institution, 1990).

³When questioned about such a proposal in a 1963-1964 survey, 70 percent of the Members surveyed were opposed to instituting a question period, and only 4 percent thought there was a better than even chance that such an innovation would occur. Roger H. Davidson, David M. Kovenock, and Michael K. O'Leary, *Congress in Crisis: Politics and Congressional Reform* (Belmont, CA: Wadsworth Publishing Co., 1966), p. 195. There is little reason to think that such a survey conducted today would produce appreciably different results.

As a practical matter, therefore, officially sanctioned congressional oversight takes place only within the standing (permanent) committees of the House and Senate or within special (temporary) committees created for that purpose.

For more than 50 years, the rules of the House have, in one way or another, recognized the importance of oversight and the responsibility of committees for conducting it. Today, clause 2 of House Rule X states in part that:⁴

(a) The various standing committees shall have general oversight responsibilities as provided in paragraph (b) in order to assist the House in --

(1) its analysis, appraisal, and evaluation of--(A) the application, administration, execution, and effectiveness of Federal laws; and (B) conditions and circumstances that may indicate the necessity or desirability of enacting new or additional legislation, and

(2) its formulation, consideration, and enactment of changes in Federal laws, and of such additional legislation, as may be necessary or appropriate.

(b)(1) In order to determine whether laws and programs addressing subjects within the jurisdiction of a committee are being implemented and carried out in accordance with the intent of Congress and whether they should be continued, curtailed, or eliminated, each standing committee (other than the Committee on Appropriations) shall review and study, on a continuing basis--

(A) the application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction;

(B) the organization and operation of Federal agencies and entities having responsibilities for the administration and execution of laws and programs addressing subjects within its jurisdiction;

(C) any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction (whether or not a bill or resolution has been introduced with respect thereto); and

(D) further research and forecasting on subjects within its jurisdiction.

The Senate's rules contain more terse provisions to the same effect.

Thus, Congress clearly recognizes oversight to be among its responsibilities, and it equally clearly assigns this responsibility to its committees. Yet a recurring theme in evaluations of congressional performance is that Congress and its committees do not meet their oversight responsibility as well as they should. This has been a common assessment of political scientists. In 1968, for example, John Bibby chose "Congress' Neglected Function" as the title for his essay on the status of congressional oversight.⁵

⁴Most Senate committees and certain House committees also are assigned additional oversight functions that allow and direct them to conduct oversight on selected matters that are not within their respective legislative jurisdictions (Senate Rule XXV and House Rule X, clause 3(a)).

⁵John F. Bibby, "Congress' Neglected Function," in Melvin R. Laird (ed.), *Republican Papers*, (Garden City, NY: Doubleday and Company, Inc., 1968), pp. 477-488.

In 1976, Morris Ogul began his study of oversight by observing that “[t]here seems to be consensus in the Congress on the principle that extensive and systematic oversight *ought* to be conducted,” but “[t]hat expectation is simply not met.”⁶ At about the same time, Lawrence Dodd and Richard Schott concluded that, “[f]or decades, members of Congress and political scientists alike have lamented the inadequacy of congressional oversight of the bureaucracy.”⁷

As this last statement indicates, Members themselves have been less than enthusiastic about how well their own institution has satisfied its oversight responsibilities. On three occasions since World War II, Congress has created joint House-Senate committees to conduct comprehensive studies of its organization and procedure. And on each occasion, a theme of the committee’s final report was the need for better oversight. The first committee reported in 1946 that:⁸

Congress needs to improve its lines of communication, its relationships, its understanding of the departments. At present there is no regular machinery of cooperation between them, aside from inadequate informal conversations or correspondence or a full-dress investigation, by which the common problems of governmental policy can be addressed.

In response, Congress provided in Section 136 of the Legislative Reorganization Act of 1946 that “each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee.....” However, when the second joint committee filed its report in 1966, it lamented that “[t]his provision has failed to achieve the desired result. It is a statutory admonition without means of implementation. Although some standing committees have carried on extensive ‘oversight’ activities, most are preoccupied with new legislative programs.”⁹ As we shall see, Congress reacted to this criticism by enacting a new set of “reforms” to improve oversight, and there is some evidence that the amount of oversight activity, to the extent it can be quantified and measured, increased significantly between the 1960s and the 1980s.

Nonetheless, a special committee that the House set up to review its committee system reported in 1973 that the witnesses testifying before it “were virtually unanimous in acknowledging the inadequate oversight being done by congressional committees.”¹⁰ And in a 1988 survey of Members of both houses, barely one-third of the respondents asserted that the committees on which they served “were doing

⁶Morris S. Ogul, *Congress Oversees the Bureaucracy*. (Pittsburgh: University of Pittsburgh Press, 1976), p. 5. (Emphasis in the original.)

⁷Lawrence C. Dodd and Richard L. Schott, *Congress and the Administrative State* (New York: John Wiley and Sons, 1979), p. 184.

⁸Joint Committee on the Organization of Congress, *Report--Organization of the Congress*. Senate Report No. 1011; 79th Congress, 2nd Session; March 4, 1946; p. 6.

⁹Joint Committee on the Organization of the Congress, *Final Report--Organization of Congress*. Senate Report No. 1414; 89th Congress, 2nd Session; July 28, 1966; p. 23.

¹⁰Select Committee on Committees, House of Representatives. *Committee Reform Amendments of 1974*. House Report 93-916, Part II; 93rd Congress, 2nd Session; March 21, 1974, p. 63.

enough oversight.”¹¹ It should not have been surprising, then, that when the third joint committee completed its work in 1993, it reported that “[w]hile committee oversight was not addressed by an overwhelming number of witnesses, those who did testified that, notwithstanding rules which encourage each committee to engage in oversight, the oversight function is more often than not disregarded and needs to be strengthened.”¹²

In part, such critiques of congressional performance may reflect unrealistic expectations. Ogul undoubtedly was right in arguing that no organizational or procedural reforms “will enable the Congress to carry out its oversight obligations in a comprehensive and systematic manner. The job is too large for any combination of Members and staff to master completely,” and any Members who judge their performance and that of Congress as an institution against such a standard “are doomed to feelings of inadequacy and frustration.”¹³ Furthermore, it is most unlikely that any survey of recent cabinet secretaries would reveal a widespread sentiment that Congress was not looking over their shoulders often enough. Indeed, cabinet secretaries have complained (though rarely on the record until after they leave office) about the amount of time they have to devote to preparing for and engaging in both formal and informal meetings “on the Hill.” In assessing the qualifications of potential cabinet appointees, their ability to represent their departments effectively before Congress has become at least as important as their managerial capabilities.

Almost certainly, Congress has been more actively engaged in oversight than in times past. Even so, however, there probably is no more widely held opinion, shared by Members and observers alike, about the state of the modern Congress than the belief that Congress still needs to do more and better oversight. That the same statement could just as well have been made half a century ago speaks to the intractability of oversight as a problem for Congress, as well as to its importance as a responsibility of Congress.

Incentives and Resources for Oversight

If any national assembly should want to conduct oversight, it is the American Congress--or so it would seem at first blush. There are both constitutional and political incentives for congressional oversight, incentives that do not exist at all, or only in attenuated form, in many other democratic regimes.¹⁴

It is well known that the U.S. Constitution creates a competition for power within the federal government by establishing legislative and executive branches that are electorally independent of each other but that share essential powers of government. One of the persistent themes of American political history is the shifting balance of

¹¹Center for Responsive Politics, *Congress Speaks--A Survey of the 100th Congress*. Washington, DC, 1988, especially p. 167.

¹²Joint Committee on the Organization of Congress, *Final Report--Organization of the Congress*. Senate Report 103-215, Vol. 2, and House Report 103-413, Vol. 2; 103rd Congress, 1st Session; December 1993; p. 27.

¹³Ogul, *op. cit.*, p. 5.

¹⁴See Frederick M. Kaiser, “Congressional Oversight of the Presidency,” in *The Annals of the American Academy of Political and Social Science*, v. 499, September 1988, pp. 75-89, and the other studies that Kaiser cites.

power between President and Congress. The role of the President in the exercise of legislative power, which is centered in Congress, is clear and constitutionally based. The veto power is unambiguous, inescapable, and potent. On the other hand, the ability of Congress to make its influence felt in the administration of laws, which is essentially the President's domain, is not as easily traceable to a single constitutional grant of authority. The "power of the purse," on which I shall touch in the next section, gives Congress annual opportunities to adjust funding levels as expressions of its pleasure or displeasure with administrative decisions. However, it would be surprising indeed if all the committees of Congress did not also want to inquire into the administration of laws within their respective jurisdictions--in other words, conduct oversight--as a way not only to monitor, but to attempt to influence the decisions of the President's appointees.

The condition of "divided government", in which the President's party is the minority (opposition) party in one or both houses of Congress, adds a layer of political incentives for oversight to this underlying constitutional incentive. Since World War II, divided government has been more the rule than the exception. In periods of unified government, the majority party in Congress may be tempted to tread gently in its oversight activities for fear of exposing problems and deficiencies that would be embarrassing to its own President and, therefore, potentially damaging to the party's long-term electoral interests. Congressional committees may be especially reluctant to look intensively and critically at the effectiveness of programs that those same committees had been instrumental in creating. In times of divided government, by contrast, congressional oversight offers a ready-made opportunity for the party controlling Congress to criticize and undermine public support for the President and his party, all in the name of satisfying one of Congress' constitutional responsibilities.

Furthermore, congressional committees are organized in a manner that should facilitate oversight. On balance, the many "reforms" that have taken place in Congress during the past several decades should have increased the capacity of, and incentives for, committees to engage in oversight activities.

With respect to oversight, a national assembly always is at a competitive disadvantage vis-a-vis the "permanent government" because of the latter's advantages of size and expertise. Notwithstanding the proposals to impose limits on the number of terms that Representatives and Senators may serve, the turnover in congressional membership remains higher than some might think. As of this year, 43 percent of the Senators now serving, and exactly the same percentage of Representatives, have held their offices for six years or less. In view of the increasing reach and complexity of government activities, six years is not so very long for Members to develop the mastery of policy and government that is necessary to know what questions to ask during oversight hearings and to know how to probe behind answers that often are defensive, obscure, or self-congratulatory. Furthermore, the job description of Representatives and Senators requires them to be generalists, whereas the job descriptions of civil servants and even their more transient political masters require them to be specialists. From these perspectives, the oversight contest between branches would appear to be a mismatch.

For Congress, of course, the saving grace is its committee system, the continuity of which permits a degree of stability and specialization that goes a long way toward leveling the oversight playing field. Since World War II, changes in the structure of the House and Senate committee systems have taken place at the margins. As new issues have emerged and others have faded in importance, each house has created several new committees and has abolished or recombined others. But the basic responsibilities of most committees have persisted, as have the conventions that Members tend to remain on the same committees from Congress to Congress (unless

they have opportunities to move to one of the few most powerful or prestigious ones), and that committee leadership positions go to each committee's long-serving members. Whatever the other advantages and disadvantages of the seniority system, it has promoted continuity of service on committees and ensured that at least some of each committee's members will have developed considerable expertise concerning the programs and government departments within their jurisdiction. The implications for Congress' oversight capacity are illustrated by the answer reportedly given by Representative Carl Vinson, the long-serving chairman of the House Armed Services Committee, when asked after the 1960 presidential election if he might resign his House seat to become Secretary of Defense in the new Kennedy administration. Vinson is reputed to have replied, "I would rather run the Pentagon from here."¹⁵

Vinson's experience and knowledge made this a credible claim. However, and notwithstanding the continued importance of committee seniority for selecting chairmen and ranking minority members, he was the exception then, just as he would be today. During the intervening years, at least three directions of change within the House and Senate committee systems have, on balance, encouraged and facilitated oversight, even in the absence of such experienced committee leaders.

First and perhaps most important has been the growth of committee staffs. Oversight is, almost inescapably, a staff-intensive enterprise. It is staff who do the research, conduct the preliminary inquiries, and make all the other preparations for oversight hearings, and then prepare written reports of committee findings. The formal committee hearings are only the tip of the proverbial iceberg, and it is the committee staff who labor beneath it, so to speak. With this in mind, observe that, in 1960, the House and Senate standing committees employed a total of 910 staff members; 30 years later, this number had more than tripled to 3,083.¹⁶ How much staff is enough is a question without an answer. Most Representatives and Senators are likely to believe that committees are over-staffed, except, of course, for the committees on which they happen to serve. The essential point is that congressional committees have sufficient staff to engage in constructive oversight activity if this is what committee leaders assign them to do.

A second trend was the increased importance of subcommittees, especially in the House. In the 1970s, the number of subcommittees grew significantly, as did their importance for legislation and oversight. During the current decade, their number in the House has shrunk back to levels last seen in the 1950s, but there has not been a comparable diminution in the role they play in committee deliberations. During the 1970s, House subcommittees became more autonomous, with full committee chairmen exercising much less control over subcommittee memberships, budgets, staff, and agendas. Subcommittees, therefore, provided centers of influence for the large numbers of Members who held leadership positions on them and who saw their subcommittee service as a prime way for them to make their mark in Congress.

¹⁵Francis O. Wilcox, *Congress, the Executive, and Foreign Policy*. (New York: Harper & Row, 1971), p. 90. In 1995, the new House Republican majority imposed a six year limit on service as chairman of the same committee or subcommittee. The first occasion to enforce this limit will arise in 2001, following the congressional elections of November 2000. One effect of the term limits already has been to encourage several current chairmen to retire rather than remain in the House in a lesser capacity.

¹⁶When the Republican party gained majority control in both houses following the 1994 election, it reduced committee staff in both houses, but especially in the House of Representatives.

On the one hand, the growth of what sometimes was called “subcommittee government” was criticized as fragmenting Congress and complicating the legislative process. On the other hand, the same development created many more forums of activity, each with a more narrow, specialized focus than the standing committees and, in principle at least, each able to look more intensively at a smaller slice of governmental activity. Beginning in 1995, the new Republican majority in the House sought to once again strengthen committees and their chairmen at the expense of their subcommittees. However, it is always more difficult to recentralize power once it has been dispersed than to decentralize it in the first place.

The third trend culminated more than 20 years ago, when both houses of Congress completed the process of making their formal proceedings almost completely “transparent” to public observation and media scrutiny. Called “sunshine” reforms at the time, changes in House and Senate rules opened all committee hearings to the public and the media, except in unusual circumstances involving, for example, national security, propriety commercial secrets, and internal committee personnel matters. As I shall discuss momentarily, one disadvantage of oversight activity, from the perspective of the individual Representative or Senator, is its dubious electoral/political value. At least with oversight hearings open to view, Members could envision the possibility of reaping some favorable publicity as recompense for their efforts.

In addition to these three trends, the quality and quantity of congressional oversight also has benefitted from the expanded mandate of the General Accounting Office (GAO). Originally created in 1921 as the government’s audit agency and always considered to be an agent of Congress, GAO and its mission were expanded by Section 204(a) of the Legislative Reorganization Act of 1970 to include program evaluation studies. The agency through its head, the Comptroller General, was directed to:

review and analyze the results of Government programs and activities carried on under existing law, including the making of cost benefit studies, when ordered by either House of Congress, or upon his own initiative, or when requested by any committee of the House of Representatives or the Senate, or any joint committee of the two Houses, having jurisdiction over such programs and activities.

Ever since, GAO has been available to undertake large-scale and long-term studies that would be far beyond the staff resources of the congressional committees requesting them, and to make recommendations for improving the agencies and programs under review. Although sometimes a slow and cumbersome weapon, the GAO study is a powerful force for intensive program review that committees can deploy within the limits of the agency’s resources.

There is one additional political incentive for oversight that deserves attention. The nature of the American law-making process makes it quite likely that important laws will be ambiguous in important respects. There is no such thing in the United States as a national party platform or manifesto on which all of the party’s congressional candidates are expected to run. Furthermore, party unity in congressional voting is something that never can be assumed. Instead of party discipline, there is voluntary party cohesion. The result is that the legislative process in Congress is a process of coalition-building. This requires that successful legislative proposals be written in ways that will attract majority coalitions in both houses. Almost invariably, therefore, they involve compromises designed to bring together Members of each house whose interests and preferences differ to greater or lesser degrees, and

then to find some middle ground between the differing positions of the House and Senate. As a result, new laws often contain deliberate, constructive ambiguities--terms and phrases that are chosen precisely because they are subject to multiple interpretations--so that both or all parties to the negotiations can claim that their needs have been met, that their interests have been satisfied, and that their views have prevailed.

Even when the intent of Congress is clear, the political distance separating the legislative and executive branches--a distance that increases dramatically during periods of divided party control--can create doubts among Members that the department charged with implementing a new law will interpret it as Congress hopes and expects. A major law that emerges from the legislative process almost always differs in important respects from whatever initial proposal the President or his cabinet secretaries may have made to Congress. There is a natural concern, therefore, that these same officials will interpret Congress' final product in ways that bring it as close as possible to what they originally sought, even if that interpretation differs from what the bill's primary congressional authors intended. But when a new law contains important ambiguities, it is even more certain that the legislative process will extend in an important sense beyond the moment at which the law is enacted. Then begins the contest over how it is implemented, as Members with differing interpretations of the same new statutory language try to convince executive branch officials to accept their understanding of "congressional intent." In this sense, what are called oversight hearings often can be thought of as a different kind of legislative hearing, as committee members spar with each other and with executive branch officials over what the language of the law means. Congress, after all, cannot evaluate how well that law is achieving its intended purpose unless there is some widely shared understanding about what that purpose is.

Police officers trying to solve a crime ask who had the means, the motive, and the opportunity to commit it. In the same way, the considerations I have just discussed should support the conclusion that Congress has the means, the motive, and the opportunity to engage in effective oversight activity. However, the picture I have drawn in this section is incomplete without adding several factors that act as disincentives to conduct oversight.

First and foremost is the question of how oversight work serves the interests of those who conduct it. It is no accident that Congress calls itself a legislature; its Members think of themselves primarily as legislators, as law-makers. Whether they are liberal or conservative, whether they support an expansive or a limited role for government in national life, it is probably fair to say that most Representatives and Senators seek election and re-election in order to change national policy or to protect it against change. It is probably also fair to say that they think of themselves as representatives, usually of their districts or states but sometimes of some broader national constituency--farmers, "taxpayers," or Americans of Hispanic ancestry, for example. They are much less likely to think of themselves as overseers of government. "If I had wanted to spend my time supervising a bureaucracy, I would have become a bureaucrat." I suspect this is a sentiment that is widely shared among Members of Congress. Effective oversight often is tedious, detailed, and time-consuming work for which many Members have difficulty generating enthusiasm, and for the most natural human motive: they find it boring.

Even so, Representatives and Senators would steel themselves to boredom if they were convinced that it was worth their while. Yet if we accept the assumption that re-election is among their most important goals, if not their overriding goal, we must recognize, as most of them do, the importance of the fact that oversight activity is not

very likely to generate the kind of favorable publicity and constituent appreciation that they seek. At this point, I need to introduce a distinction between oversight and investigations. The line between the two may be fuzzy. But for our purposes, let us distinguish between them by defining congressional investigations as committee inquiries into allegations of wrong-doing, whether it takes the form of criminal conduct or simply gross negligence or incompetence. Investigative hearings can attract media coverage and public attention, and produce positive publicity for committee members who succeed in portraying themselves as determined truth-seekers, struggling to prevent executive branch officials from concealing damaging or embarrassing secrets that the American people have a right to know. Almost by definition, however, oversight hearings--which may focus, for example, on whether too large a share of the funds for an agricultural support program are being devoted to staff salaries and consultants' fees--lack this kind of dramatic appeal. If oversight hearings often are boring to the Members who should be attending them, they are probably even more boring to reporters, and they surely would be more boring still to the Members' constituents if they ever knew about them, which they almost certainly will not because the media are unlikely to report on them.

Oversight should flourish during periods of divided government because the majority party in Congress has a political interest in revealing deficiencies in the President's administration. There is a danger, however, that the political appeal of investigating allegations of malfeasance or criminality can tempt committees away from less dramatic oversight inquiries into program implementation and effectiveness. I do not mean to denigrate congressional investigations nor deny that they can inspire remedial legislation. By their nature, however, investigations are very time- and staff-intensive, and they easily can consume large chunks of committee and subcommittee agendas. Even though Congress is in session most of the year, there are real constraints on how often committees and subcommittees can meet and how many projects they can undertake. Most of Congress' most serious business is crammed into the middle of each working week because so many Members are en route to or from their constituencies on Mondays and Fridays. In part for this reason, and because most Members serve on more than one committee and its subcommittees, they often find that they are expected to be in more than one place at the same time. So they must be selective in deciding how they will allocate their time and efforts.¹⁷

Committee and subcommittee chairmen are, in a sense, competing for the time and attention of their own members, persuading them that they should choose to attend a meeting of one committee on which they serve instead of another, or instead of using that time in one of many other ways. With this in mind, chairmen naturally are tempted to give priority to activities that are most likely to appeal to their colleagues' policy and political interests. And in the priority ranking of most Representatives and Senators, oversight hearings fall considerably below legislative hearings and markups and below well-publicized investigations. Perhaps the saving grace for oversight is that congressional committee rules usually permit only a few members, and often only one, to conduct a hearing; a majority of the committee or subcommittee need not be present. Furthermore, as I shall argue in the next section, much of the most useful congressional oversight is not labeled as such.

The Inseparability of Legislative and Oversight Activity

¹⁷For a recent and innovative study of this issue in the context of committees' legislative activity, see Richard L. Hall, *Participation in Congress* (New Haven, CN: Yale University Press, 1996).

Reliable data on committee oversight activity are notoriously difficult to compile. The best available are those that Aberbach reported in his 1990 study. These data, covering 11 years between 1961 and 1983, show a consistent increase in committee oversight hearings and meetings, both in absolute terms and as percentages of all committee hearings and meetings.¹⁸ During this period, there was a fourfold increase in the number of days per year on which a House or Senate committee held a meeting or hearing the primary purpose of which evidently was to conduct oversight. In relative terms, the number of such “oversight days” as a percentage of all the days on which House or Senate committees met rose fairly steadily from 8.2 percent to 25.2 percent during the same 22-year period. Unless these trends have reversed for some reason during the years since then, which is unlikely in light of some of the factors discussed above, we can conclude with some confidence that the amount of congressional oversight activity has increased, although these data by themselves do not reveal either the quality or even the actual quantity of oversight that took place.

As Aberbach is quick to point out, his data must be treated gingerly, and he is probably right in arguing that the data are more likely to under-estimate than to over-estimate the number of committee sessions devoted to oversight activity. In fact, the nature of his data require him to draw a brighter line between committee legislative and oversight activity than he would like and than congressional practice warrants. In fact, any analysis of congressional oversight must recognize that, in practice, legislative and oversight activity are inseparable and that the best oversight often takes place during committees’ legislative hearings.

The House rule, quoted above, that directs its committees to conduct oversight makes clear that one of the two purposes of oversight is to enable the committees and, through them, the House to assess the “conditions and circumstances which may indicate the necessity or desirability of enacting new or additional legislation....” In other words, oversight is a necessary precursor of legislative work. It was for much the same reason that the Supreme Court, in its seminal 1927 decision in the case of *McGrain v. Daugherty*, decided unanimously that:¹⁹

[T]he power of inquiry--with process to enforce it--is an essential and appropriate auxiliary to the legislative function....A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information--which not infrequently is true--recourse must be had to others who possess it.

Chief among the “conditions which the legislation is intended to affect or change” are the effects that current laws have had or are having on the problems that new legislation would be enacted to address. A committee’s legislative recommendations must be based on oversight conclusions of some kind unless the committee is prepared to act in ignorance. Much of the time that committees spend in what are advertised as legislative hearings is, in fact, devoted to investigating the strengths and weaknesses of current law, and its record of successes and failures in achieving the effects that Congress intended for it to have. If new legislation is needed, it is because the existing law was ill-conceived or because it was not implemented effectively or because the conditions it was designed to address have changed. Enabling Congress

¹⁸Aberbach, *op. cit.*, pp. 34-37 and Appendices A and B.

¹⁹*McGrain v. Daugherty*, 273 U.S. 135, pp. 174-175.

to choose among these alternatives, to define the problem (if any) for which new legislation would be the solution, is a core purpose of effective oversight. From this perspective, all policy-related committee hearings contribute to fulfilling Congress' oversight task. What differentiates some hearings from others is whether the oversight occurs in the process of evaluating new legislative proposals.²⁰ As we shall see, one of the ways in which Congress recently has attempted to improve its oversight performance is by creating recurring requirements for committees to act on new legislation, with the expectation that the need for committees to make responsible and informed legislative recommendations would inspire them first to undertake more regular and sustained oversight.

The number of oversight hearings, therefore, measures only a fraction of the oversight activity in which congressional committees actually engage. In fact, probably the most intensive and regular oversight takes place during the course of the hearings on the President's annual budget proposals that the House and Senate Appropriations Committees and their subcommittees conduct each year. The purpose of these hearings is to inquire whether the President's budget requests for specific departments, agencies, programs, and activities are justified, or whether Congress should provide larger or smaller sums instead. The hearings can involve line-by-line scrutiny of a department's proposed budget, with the cabinet secretary and his or her subordinates being expected to justify each request in which subcommittee members take an interest. And as an appropriations subcommittee inquires how much money the department needs for next year to continue implementing a certain program or law, it is only natural for the subcommittee's members first to ask how the department spent the money that Congress provided during the past year for the same purpose.

During 1993 and 1994, the hearings of all the House and Senate appropriations subcommittees were published in a total of 133 volumes that occupy almost exactly 30 feet (roughly 9.2 meters) of library shelves. Furthermore, these hearings represent only the formal and public dimension of congressional committee review of the annual budget. Both before and after the hearings, even more detailed inquiries are conducted, in writing or by telephone, by the committee staff.

The importance of the appropriations process for congressional oversight deserves even more emphasis, especially when Congress is compared with national assemblies in parliamentary regimes. Under parliamentary government, the prime minister and cabinet submit an annual budget that the parliament usually debates but typically approves without substantial change. For the parliament to disapprove the budget would almost certainly be judged tantamount to a vote of no confidence that requires the government to resign. In Congress, by contrast, the President's budget submission early each year only begins a protracted process of detailed review, amendment, argument, and negotiation that usually continues until October 1 (when the new fiscal year begins) and often beyond. During this process, every figure in the budget is subject to challenge and change, either at the recommendation of one of the appropriations committees or by an amendment that an individual Member offers during a plenary debate.

The implications of this process are profound, not only for budget control but also for the general character of the relations between Congress and the executive branch

²⁰A committee may hold a legislative hearing as a way to convince an executive branch official to change the way in which he or she is interpreting or administering an existing law. If that official fails to make the desired change, the committee may propose enactment of a new law to impose changes that the official may find even less palatable.

of the federal government. Each cabinet secretary knows that his or her budget request first must be approved by (actually, negotiated with) the President and his budget advisors. But the secretary also knows that it is ultimately Congress, more often than not accepting the recommendations of its appropriations committees, that decides how much money he or she actually will receive to continue the activities of the department. Herein lies the answer to a question sometimes asked by MPs from democratizing regimes who are visiting Washington for the first time: “When Congress asks government officials for information, why should they provide it?” The reason, of course, is that a recalcitrant cabinet secretary risks paying a price in the form of punitive budget cuts. Or to put it more generously, it is very much in the interest of all cabinet secretaries to win the support and confidence of the appropriations subcommittees that largely control the annual budgets for their departments.²¹

In part because of the appropriations process, congressional oversight activity, or activity with oversight implications, is far greater than we find if we focus only on committee hearings called exclusively for oversight purposes. Yet oversight through budget scrutiny also has serious limitations. The appropriations committees and subcommittees operate under time pressures, and each subcommittee is responsible for reviewing complex budgets of large organizations (departments and agencies)--often, several large organizations. There simply is not enough time and manpower for an appropriations subcommittee to look carefully at more than a fraction of the specific budget requests on which it must act, and certainly no time and manpower to undertake the time-consuming inquiries that detailed program review and evaluation can require. To exaggerate, from the government’s perspective, the congressional appropriations process often appears to constitute micromanagement—unjustified and inappropriate congressional intrusion into the details of program administration that should rightly be left to administrators. From the congressional perspective, on the other hand, each appropriations subcommittee can look carefully only at a sampling of the spending programs within its jurisdiction, and it must select a far smaller number of programs for detailed scrutiny, usually undertaken when charges of serious program deficiencies come to the subcommittee’s attention.

Organizing Congress to Conduct Oversight

Throughout most of its history, Congress’ preferred approach to promoting more and better oversight has been to make organizational changes in its committee system. A brief summary of the key developments in this recurring series of institutional “reforms” within the House of Representatives will give a sense of what Congress evidently hoped it could accomplish.

The first committee in the House of Representatives that was assigned oversight-related functions was the Committee on Public Expenditures, created in 1814 and re-created every two years thereafter until 1880. The committee enjoyed a government-wide mandate “to examine into the state of the several public departments, and particularly into the laws making appropriations of moneys, and to report whether the

²¹Of course, this is by no means the only reason why executive branch officials often provide Congress with information they might prefer not to share. Congressional committees and subcommittees have the authority to issue subpoenas requiring those officials to appear at committee hearings and to bring with them documents the committee wishes to examine. In the most extreme cases, officials can be charged with contempt of Congress if they fail to comply with congressional subpoenas. Inter-branch disputes of this kind usually are resolved by negotiations before it becomes necessary to resort to such an extreme measure.

moneys had been disbursed conformably with such laws,” and also to recommend measures that would enhance government economy and accountability. Only two years later, however, the House also created a group of five other committees, each to examine the expenditures by one of the five cabinet departments. Four additional committees were created during the next 90 years to accompany the establishment of four new departments.²² Each of these committees was to complement the work of the other committees that had legislative jurisdiction over the programs each department administered. Although the “expenditure” committees did have some legislative powers, essentially the House created a separate set of committees primarily for the purpose of overseeing the departments by examining how they spent the money that Congress appropriated for their use.

In 1927, the House of Representatives re consolidated these committees into a single Committee on Expenditures in the Executive Departments, later renamed the Committee on Government Operations and known today as the Committee on Government Reform.²³ Like the various separate committees it replaced, this House committee continues to have legislative responsibility for certain government-wide matters such as the reorganization of the government, the federal civil service, and public access to government information. In addition, though, this committee has special oversight responsibilities that complement the oversight duties, quoted earlier, of all the House’s other legislative committees. The Government Reform Committee is directed to “review and study on a continuing basis the operation of Government activities at all levels with a view to determining their economy and efficiency.”²⁴ This open-ended mandate authorizes the committee to roam at will through all the fields of government activity, as can its counterpart, the Senate Committee on Governmental Affairs. Thus, the House (and Senate) adopted a two-pronged organizational approach to oversight: first, give each committee the responsibility to conduct oversight within its limited jurisdiction; and second, give another committee government-wide oversight jurisdiction, even at the risk of duplication and inter-committee competition.

The presumed virtues of the government-wide oversight committee have been (1) its mandate to examine government activities from a broader perspective and without regard to jurisdictional boundaries among departments or congressional committees; and (2) its duty to concentrate solely on oversight, without being distracted or preoccupied by major legislative responsibilities. However, the capacity of the Government Reform Committee and its predecessors to fully compensate for the presumed failure of the House’s other committees to devote sufficient time and attention to oversight has been limited by two problems. First, the committee never has succeeded in developing the influence within the House and the prestige outside it that would make Members anxious to serve and remain on it. Representatives who

²²Asher C. Hinds, *Hinds’ Precedents of the House of Representatives*. (Washington: US Government Printing Office, 1907), v. 4, pp. 830-831.

²³It is interesting, though perhaps nothing more, that when the Republicans took control of the House in 1995, the Committee on Government Operations was renamed the Committee on Government Reform and Oversight. This change presumably identified more clearly the committee’s two primary responsibilities. Two years later, the same majority party decided that the committee would be known simply as the Committee on Government Reform. This change may have been intended to emphasize the committee’s legislative role. Alternatively, the committee’s new name may have been chosen in the expectation that it would make the committee more appealing to Members and the public alike.

²⁴Clause 3(e) of House Rule X.

serve on the committee generally hold one or more other committee assignments that often become their primary focus of attention. Second, giving one committee the assignment to study the economy and efficiency of all government programs fails to capitalize on the policy specialization and expertise that has been one of the primary claims to fame of congressional committees. In light of its extraordinarily broad mandate, the Committee on Government Reform essentially must choose between being very selective or very superficial. Not surprisingly, the committee usually has chosen the first course, and has been able to conduct in-depth studies of only a relatively small number of issues during each two-year Congress.

Perhaps with such concerns in mind, the House adopted a different organizational approach in 1974. Without abandoning its Government Operations Committee (as it then was known), the House directed each of its legislative committees with more than 15 (later amended to 20) members to create a special oversight subcommittee, or to assign each of its subcommittees the responsibility for oversight of the programs within its jurisdiction. The reform committee in which this proposal originated explained that these special oversight subcommittees “would help direct and focus a committee’s attention on the need to conduct systematic review of programs and agencies under their jurisdiction. No longer will committees be able to plead lack of time or incentive for oversight, since a specific entity would have that function as its first and only priority.”²⁵ But by the time the House adopted the reform plan, it had been amended in a way that effectively made, and continues to make, the creation of a special oversight subcommittee an option that each committee can adopt or not as it sees fit. In 1998, only five of the 13 committees to which the 1974 rule applied had separately designated oversight subcommittees.

In short, the House of Representatives (and, to a somewhat lesser degree, the Senate) has tried various organizational solutions to the problem of encouraging effective oversight. First, it created separate oversight committees for each executive department. Second, it established a single oversight committee with government-wide reach and responsibility, while also directing each legislative committee to conduct oversight of programs and agencies within its jurisdiction. Third, it encouraged, but did not require, each legislative committee to establish a separate oversight subcommittee.

In addition, the House also has recognized the need to coordinate whatever oversight activities its committees and subcommittees do undertake. For this purpose, it has asked each legislative committee to formulate and publish a biennial plan for its oversight activities. It has directed its government-wide oversight committee to compile and attempt to coordinate these plans. And it has directed this same committee to share its oversight findings with the appropriate legislative committees and for each legislative committee to include these oversight findings in its written report on any related legislation it approves. I think it fair to say that none of these coordinating devices has made much difference, however reasonable and well-intended they may have been.

By such means, Congress has attempted to reform its organization in order to expand the opportunities for oversight. By creating committees and subcommittees exclusively for oversight purposes, the House has protected them against the distractions and temptations of legislative business. These oversight panels also have been available as vehicles to carry energetic and ambitious chairmen and members

²⁵U.S. House of Representatives, Select Committee on Committees. *Committee Reform Amendments of 1974*. House Report 93-916, Part II. 93rd Congress, 2nd Session, 1974; p. 64.

into the public spotlight. But recall the conclusion of the 1993 joint committee on congressional organization: that notwithstanding these reforms, "the oversight function is more often than not disregarded and needs to be strengthened."²⁶ The organizational approach to encouraging and improving oversight may have been necessary, but it has not been sufficient.

New Approaches to Oversight

The essential weakness of the organizational approach is that it cannot adequately address the problem of incentives. It is true that oversight committees and subcommittees are forums that their members, and especially their chairmen, can use to publicize issues that concern them, attempt to influence government policies and practices, and, not incidentally, enhance their reputations in the House as well as their public stature and visibility. Nonetheless, these are incentives for relatively few Members, many of whom prefer to take advantage instead of other opportunities that Congress offers to promote their personal goals and their policy agendas. Furthermore, creating incentives for some individuals to engage in oversight activities is not the same as creating incentives for the House as an institution to focus more of its collective time and effort on oversight. Especially since the 1960s, therefore, Congress has turned its attention to devising ways in which it could more or less force itself to pay more attention as an institution to its oversight responsibilities.

One common device, for example, has been for Congress to enact laws that include requirements that government officials submit written reports to the House and Senate on some matter of special interest to the two houses (or at least to a few of their members). One study reports that the number of such required reports that Congress is to receive once, annually, periodically, or at some other interval more than tripled from roughly 1,000 in 1973 to 3,627 in 1992. According to a press report, that number had increased to roughly 5,300 by early 1996. In that year, the House published a book of more than 200 pages that did nothing more than list all of these requirements.²⁷ The Department of State, for example, was required by law to submit to Congress each year reports on such matters as Americans incarcerated abroad, human rights in countries receiving development assistance, voting practices in the United Nations, the employment of Americans by international organizations, and gifts given by the U.S. government to foreign individuals.

In some instances, the purpose of such reporting requirements is to allow Congress to avoid or defer making a definitive policy decision. In others, the purpose is to encourage the agency or department concerned to pay attention to some issue or to implement some policy that Congress favors. The report requires the executive official to account for his or her actions (or inactions). In still other cases, however, the intention behind the reporting requirement is to remind Congress annually, or however often Congress thinks necessary, of some issue to which it needs to continue paying attention, or to remind one or both houses of the need to review the implementation of some law or policy. The receipt of the report is supposed to be a reminder to

²⁶See n. 12.

²⁷U.S. Senate. Joint Committee on the Organization of Congress. *Congressional Reorganization: Options for Change*. Senate Report 103-19; 103rd Congress, 1st Session 1993; p. 117. *Congressional Monitor*, March 25, 1996, p. 7. U.S. House of Representatives. *Reports to Be Made to Congress*. House Document No. 104-199; 104th Congress, 2nd Session; 1996.

Congress. The problem, not surprisingly, is that the sheer number of these reports makes it all too likely that any one of them will get lost in the avalanche of paper. Although congressional committees employ several thousand people, there still is not enough time and manpower to study all the reports with care. The very popularity of these reporting requirements makes it almost inevitable that even the reports that were intended for oversight purposes too often will be overlooked.

Many of the so-called "reforms" that one or both houses of Congress has instituted during the past 30 years have had some implications--whether direct or indirect, intentional or inadvertent--for congressional oversight. Several approaches have been particularly noteworthy, however, in that they either have attempted to require Congress to engage in periodic oversight inquiries, or they have given Congress new tools to review and countermand executive decisions. Another approach now being tested is intended to facilitate oversight by giving Congress benchmarks to use in its oversight of individual departments, agencies, and programs. Each of these approaches is discussed below.

Recurring Reauthorizations and Sunset Laws

Perhaps recognizing that an organizational approach to oversight had proven insufficient--that creating opportunities for oversight would not achieve the purpose unless accompanied by more powerful individual and collective incentives to seize those opportunities--Congress has attempted to devise action-forcing approaches to oversight that are more compelling than the receipt of a report. Two of these approaches have entailed attempts to create arrangements designed to convince Congress that it will face certain and unacceptable consequences if it fails to engage in oversight. Oversight then becomes more a matter of necessity than choice. House and Senate committees are given what are supposed to be powerful incentives to pay more time and attention to oversight than they otherwise might choose to give it.

One of these techniques is to terminate funding for government programs unless Congress acts affirmatively and regularly to approve continued funding, presumably only after satisfying itself about the operation of those programs to date. The other approach is even more draconian: to terminate the underlying legal authority for the programs themselves unless Congress votes, again affirmatively and regularly, to renew that authority--and again, on the basis of an oversight review of the programs in question. The difference between these approaches, and the basis for them, is tied to some of the complexities of the national budget process in the United States.

As discussed above, the United States, unlike most other democracies, does not enact a single budget law each year to fund the activities of the central government. Instead, the annual budget for the American national government is supposed to be enacted into law through thirteen or more funding, or appropriations, bills (and separate tax bills). For example, one of these bills appropriates funds for most activities of the Department of Defense; another funds the Departments of State and Commerce, the federal courts, and various other agencies. The development of these bills is the responsibility of the House and Senate Appropriations Committees, which, naturally enough, are among the most powerful committees in Congress.

However, there is a potentially important limit on the discretion of the Appropriations Committees. Under the rules of the House (and, to a lesser extent, those of the Senate), Congress is not to appropriate funds to be spent for any purpose, program, or activity for which there is no statutory authority. In other words, the House's rules require Congress to enact a law establishing a new program before

appropriating money to fund it. This statutory authorization is not to be included in the appropriations bill itself, nor is the bill authorizing a program to include appropriations to fund it. The program authorization is to be enacted before the House even considers the appropriations bill that contains funding for the program. And such an authorization bill is not within the ambit of the Appropriations Committees; instead, that bill is reported by whichever one of the House's other committees has jurisdiction over the purpose and subject of the proposed new program. In this way, according to the theory implicit in congressional rules, Congress first enacts a law that reflects a decision that the national government should undertake a new program. Then, and only then, does Congress make a subsequent and independent decision about how much money to provide during the next fiscal year for implementing the program.

Until relatively recently, Congress' conventional practice was simply to enact a law creating the program without any reference to the appropriation of funds to implement it, or sometimes with a provision authorizing the appropriation of "such sums as may be necessary to carry out the purposes" of the law. This constituted a permanent authorization that satisfied the requirements of the House's rules. In each year thereafter, Congress could appropriate however much or however little it chose for that program. However, critics of this practice contended that it led to a significant imbalance of power in favor of the Appropriations Committees, both within Congress and in the relations between Congress and the executive branch. The House and Senate committees that recommended enactment of the program (known in congressional parlance as the "authorizing" committees) only had to act once. Once they proposed a bill to create the program and Congress enacted that bill into law, the law and the program would continue in existence indefinitely without further action by those committees. Of course, the authorizing committees could decide at any time to review the law and propose to either amend or repeal it, but the committees were under no obligation to do so. On the other hand, the House and Senate Appropriations Committees were required to consider the merits and operation of the program each year as that pair of committees decided how much money to make available for it.

The result, so it was argued, was to concentrate power unduly in the hands of the Appropriations Committees at the expense of Congress' other committees. The Appropriations Committees were at the center of the legislative "action" each year, with other committees fearing that they were becoming peripheral players. By the same token, executive branch officials knew that they would be accountable each year to the appropriations subcommittees that funded their programs, so these officials were very responsive to the interests and preferences of Appropriations Committee members. There was considerably less incentive, however, for them to pay as much attention to their authorizing committees and their members. The authorizing committees might or might not engage in oversight; they might or might not consider legislation affecting the programs for which they were responsible. In other words, the potential danger posed by the authorizing committees was unpredictable and sporadic; the danger posed by the Appropriations Committees was certain and almost constant.

Looking at these same arguments from an oversight perspective, the development of the thirteen annual appropriations bills creates what I already have argued are probably the best and most effective opportunities each year for congressional oversight of the executive branch. Each program is subject, at least potentially, to review as the appropriators propose its funding level for the coming fiscal year. On the other hand, the existence of permanent program authorization laws did not create equivalent opportunities or incentives for authorizing committees to engage in the same kind of regular oversight.

For these reasons, among others, Congress has moved during the past several decades from reliance on permanent program authorizations to a much greater use of annual or periodic reauthorization requirements.²⁸ Now when Congress passes a bill that creates a new program or entity, the bill frequently contains a provision such as: "There are hereby authorized to be appropriated \$1,000,000 for fiscal year 2001 to carry out the purposes of this act." Such a provision has a dual effect on the subsequent enactment of appropriations. First, the amount authorized by the provision (\$1,000,000 in this illustration) becomes a ceiling on how much Congress can appropriate without violating the rules of the House of Representatives. Second and more important for our purposes, Congress can only appropriate funds to implement the law for the one fiscal year (in this case, Fiscal Year 2001) for which those funds have been authorized by law. When it comes time for Congress to appropriate funds for the next fiscal year, it would violate the House's rules for Congress to appropriate any funds to implement the law during that fiscal year unless Congress first has passed a new law extending the authorization of appropriations through the next fiscal year.

In other words, when the House and Senate agree to make funding for a government program subject to an annual authorization requirement, Congress is supposed to pass two bills each year to continue that program in operation: first, a law to reauthorize the enactment of appropriations for the program; and second, the appropriation law itself. If Congress fails to pass the necessary reauthorization bill, the law establishing the program remains in force, but Congress cannot breathe life into it by appropriating funds for its implementation without violating its own procedural rules. Alternatively, Congress may place a new program on a periodic reauthorization cycle by authorizing appropriations for the program for two, three, or perhaps five fiscal years at a time. It is much more the rule than the exception today for new government programs to be subject to some such recurring reauthorization requirement. Congress has even gone back and placed long-standing programs and entities, such as the Departments of State and Justice, on reauthorization cycles.

From an oversight perspective, recurring reauthorization requirements are an action-forcing device. A program is brought to a standstill unless Congress appropriates funds to continue it, Congress cannot appropriate those funds unless Congress first authorizes them, and Congress certainly would not authorize the new appropriation without first determining that the program deserves to continue without significant change. Therefore, the House and Senate committees responsible for originally authorizing the program can be expected to review its operations, every year or every several years, as part of their reauthorization responsibilities. Oversight becomes an almost inevitable byproduct of the congressional funding process.

In practice, however, there are several related impediments to the reauthorization process as a form of obligatory oversight activity. Most important, the authorization stage of the authorization-appropriation sequence is not mandated by the U.S. Constitution, nor is it required by law. It is imposed by the rules that each house of Congress adopts under its constitutional authority to regulate its own legislative procedures. And just as each house may adopt almost any rules it chooses, the House or Senate is equally empowered to ignore, waive, suspend, amend, or repeal almost any of its rules. Consequently, Congress cannot be compelled to comply with the reauthorization requirements it has imposed on itself. Furthermore, because the reauthorization of appropriations for a program is not required by law, the executive branch can continue to implement the program so long as Congress appropriates

²⁸Louis Fisher, "Annual Authorizations: Durable Roadblocks to Biennial Budgeting," *Public Budgeting & Finance*, v. 3, n. 1, Spring 1983, pp. 23-40.

funds for it, even if Congress enacts the appropriation in violation of its own rules because the appropriation is not authorized by law.

The recurring need to reauthorize appropriations for government programs creates an opportunity for the authorizing committees to engage in oversight on an annual or periodic basis, but it has not always proven to be effective in requiring the committees to act. By the same token, the House and Senate have not always acted on reauthorizing legislation that its committees have proposed. If the two houses are prepared to ignore or waive their rules, they can enact an appropriation that has not yet been authorized, and the agency or department concerned can proceed to spend whatever funds Congress appropriates.

There are several reasons why the House and Senate often have been unable to enact the laws needed to renew expiring authorizations. First, the need to enact authorizations each year before the House and Senate can begin to consider their appropriations bills in plenary session places time pressures on the authorizing committees that often are impractical for them to meet, especially during odd-numbered years when the House and Senate have to take time to reorganize themselves after congressional elections. Second, some reauthorization bills prove difficult or impossible to enact because their provisions are so controversial. And third, the House and Senate do not feel compelled to resolve these controversies surrounding a program or agency when they know that Congress probably will have to address the same controversies when it considers the bill appropriating funds for the program or agency. The authorization-appropriation process creates two opportunities for each house to confront contentious policy choices. If Representatives and Senators would prefer not to vote on those choices any more often than necessary, they have a natural incentive to avoid the authorization stage and proceed directly to confront those choices in the context of making unavoidable appropriations decisions.

Perhaps the best example is the law that Congress is expected to enact each year to authorize appropriations for the foreign assistance programs of the United States. This bill presents Representatives and Senators with their best opportunity to address many aspects of American foreign policy. The bill is a magnet for proposals and amendments on such questions as how much the U.S. should spend on these programs, how the funds should be allocated among various nations and regions, whether the U.S. should provide assistance through bilateral or multilateral mechanisms, what conditions should be attached to U.S. assistance, and so on. It should come as no surprise, therefore, that congressional leaders may decide to forego the difficult process of enacting this bill and proceed instead to consider the foreign assistance appropriations bill, which also provides a battleground for precisely the same issues. Why fight the same battles twice, when the Constitution requires only that Congress pass the appropriations bill, not the reauthorization bill that is required only by House and Senate rules?

According to the Congressional Budget Office, which annually tracks such spending, appropriations this year [1999] for programs and activities with expired authorizations will exceed \$102 billion. CBO analyst Ellen Hays, in an interview, noted that defense and intelligence are the only two program areas that Congress subjects to reauthorization scrutiny on a regular basis.

Some major activities have gone without a full-scale review for a decade or more. The Justice Department's authorization, for example, was last rewritten in 1980 and the Foreign Assistance Act in 1985. The law governing

the space program, which this year will spend \$13.7 billion, hasn't been reviewed since 1993.²⁹

In each of the years since, the authorization bills have died at some stage of the legislative process and Congress has proceeded to enact appropriations, even though in violation of its own rules.³⁰

At best, therefore, recurring reauthorization requirements are a flawed way by which to require congressional committees to conduct annual or regular reviews of program effectiveness and efficiency. There is no real penalty that Congress must pay if it fails to meet the requirements it sets for itself, so long as the House and Senate are willing to appropriate funds in the absence of the required reauthorizations. Perhaps as a consequence, some members have advocated an alternative approach, in the form of "sunset" laws, that are more difficult to circumvent or ignore. Proposals for sunset laws received regular attention during the late 1970s and early 1980s, and have continued to surface from time to time since then.

Most laws that Congress enacts are permanent in that they remain in force unless and until Congress enacts new laws to repeal them.³¹ As I have attempted to explain, it may not be possible to implement some laws if Congress fails to enact appropriations for that purpose. However, even those laws remain on the statute books in a dormant condition until Congress does provide the funds needed to bring them to life. Sunset provisions change this situation by including within a law a provision that the law is to expire at a certain date or in a fixed number of years following its enactment. A law containing this kind of provision has a natural life cycle that ends at a time that is well known in advance.

A primary rationale for including a sunset provision in a law is to guard against the tendency for government organizations and programs, at least in the United States, to continue in place, even after the justification for establishing them may have dissipated or disappeared altogether.³² If a law is subject to a sunset provision, Congress must act affirmatively to re-enact it if it is to remain in force. Under these circumstances, the failure of Congress to act has real consequences because what is at issue is a provision of law, not a mere House or Senate rule that can be set aside at will. So the congressional committees with jurisdiction over the law have a real incentive to renew it. And the committees' members understand that they may have trouble making a compelling case to the larger House or Senate to support the law's re-enactment unless they can demonstrate that they have studied its implementation and recommended any needed changes to it--in other words, that they have conducted effective oversight.

²⁹Dick Kirschten, "Overlooking Management, *Government Executive*, June 1999, p. 16.

³⁰Of course, the failure of Congress to enact an authorization bill does not mean that no meaningful program review took place if the House and Senate committees of jurisdiction developed bills that died at a later stage of the legislative process.

³¹A partial exception are the annual appropriation bills that usually make funds available only until the end of the next fiscal year.

³²See Herbert Kaufman, *Are Government Organizations Immortal?* (Washington: The Brookings Institution, 1976).

Accepting this logic, some Representatives and Senators have advocated enacting laws that subject a wide array of programs and entities to sunset requirements. Some of these bills have proposed staggered schedules by which some of the laws within the jurisdiction of each congressional committee would expire in different years so that the committee would not be overwhelmed by the workload involved in re-enacting them. It also has been suggested that the expiration schedules be arranged so that government activities that address the same general issue--such as health, transportation, education, and so on--would be subject to review and re-enactment at the same time. This would make it possible for Congress to evaluate all those activities in a comprehensive and coordinated way.

Although there is an obvious similarity between sunset provisions and reauthorization requirements, there also is a critically important difference that deserves to be emphasized. Congress always has the option, to which it frequently has resorted, to waive a reauthorization requirement and to continue appropriating funds to implement a program even though the appropriation of those funds has yet to be authorized by law. As a matter of law, all that matters to officials of the executive branch is that Congress has enacted the program's appropriation. Whether or not Congress violated its own rules in the process is irrelevant. If the funds have been appropriated, the department or agency concerned may use them to implement the program. By contrast, Congress cannot nullify a sunset provision as easily; only by enacting a new law can Congress prevent the legal authority for the program from terminating as scheduled.

Clearly, sunset provisions are a much more powerful action-forcing device than reauthorization requirements. There are real and serious consequences that follow if congressional committees fail to conduct the oversight and then take the required legislative action that sunset proposals envision. Furthermore, these are consequences that the committees concerned almost certainly would be unwilling to accept because very probably they were the same committees that had been instrumental in developing the programs in the first place. Yet it is precisely this strength of the sunset approach that also is its greatest potential weakness. Critics of sunset proposals argue essentially that this approach expects and demands too much of Congress, and is too likely to lead to programs being extended perfunctorily or abolished unintentionally.

One concern is whether the committees of the House and Senate, even with all their subcommittees and staffs, could effectively cope with the additional workload that generally applicable sunset provisions would impose. Committees would have to conduct sunset reviews in addition to all the legislative and other responsibilities they already have. Ironically, this potential workload problem would be exacerbated if a government-wide sunset "system" were arranged so that all related programs would have to be reviewed at the same time because they would expire at the same time. Most or all of these programs would fall within the jurisdictions of the same congressional committees, so that a committee could find itself having to review the performance of, and re-enact the statutory authority for, many programs during the same year, rather than being able to spread out the burden over a number of years.

Nonetheless, sunset laws really demand that committees conduct the kind of careful and periodic oversight that Congress already has recognized as its responsibility and that it has sought to encourage by other means. The potential workload problems could be controlled by requiring programs to be re-enacted no more often than every five to ten years, and by allowing each committee to propose a schedule of sunset termination dates for the programs within its jurisdiction. Alternately, some sunset proposals would create new, special committees solely to

conduct the periodic program reviews and propose legislation to revise and renew program authority. This last approach addresses the concern that it is not realistic to expect critical program evaluations from standing committees that were instrumental in creating the programs and, therefore, have a vested interest in preserving them. On the other hand, this approach also would deprive Congress of the specialized expertise of its standing committees, and it would place the responsibility for all sunset reviews in the hands of one committee that could not possibly develop detailed knowledge of all the programs requiring renewal.

A potentially more worrisome problem is that sunset proposals require more than a committee review if a government agency or program is to remain in operation, with or without any changes in its purposes or methods. Any government activity that is made subject to a sunset termination date is doomed unless it is kept alive by affirmative legislative action. This poses a problem because the bias in the U.S. legislative process is toward inaction. The conventional stages of this process require a proposed new law to be considered and approved in one or more subcommittees and then one or more committees of each house, then for it to be debated, amended, and passed during House and Senate plenary sessions, and finally for it to emerge from a process of bicameral compromise---and all this within a two-year period and before the bill even if submitted to the President for his approval or veto. The practical consequence of this "obstacle course," as it has been described, is that most bills fail to survive the process, and not always because majorities in one or both houses oppose them, but sometimes simply because Congress is unable to complete work on them in time. Even relatively simple and non-contentious bills can fall victim to much more controversial proposals that are added as amendments.

At issue is inertia, in two respects. Underlying the notion of sunset provisions is the belief that the natural tendency of government is to remain in motion--to continue doing whatever it already is doing, though perhaps doing more of it and at greater cost. Sunset provisions block that tendency, but at the risk of making the future of government programs subject to the equally natural tendency of Congress to remain at rest. To put it more fairly, sunset laws put programs at risk because of the characteristics of Congress that make action more difficult than inaction, without regard to the merits of the specific programs. One danger, therefore, of imposing sunset requirements on many or most government activities is that some of those activities would be brought to an end primarily because Congress failed to renew them in time. The opposite danger is that, to avoid this possibility, Congress could resort to perfunctory committee reviews and routinized statutory extensions, without engaging in the kind of scrutiny that sunset proposals are intended to provoke.

Biennial Budgeting and Its Implications for Oversight

Congress now is considering, as it has before but has not yet implemented another "reform" proposal that could have important implications for oversight and, in fact, is intended in large part to encourage more oversight activity. This proposal would move the central government, partially or completely, to a biennial budgeting system. Although there are differences in details, most biennial budgeting plans share several common elements and expectations. First, Congress would retreat from annual reauthorization requirements in favor of laws that reauthorize appropriations for agencies and programs for at least two years at a time. Second, the President would propose a budget every other year, and Congress would respond by appropriating funds for two-year periods. The most common proposal for linking these two elements is for Congress to enact authorizations in one year and then for it to enact all appropriations in the following year. In this way, Congress would alternate from year to

year between a focus on authorizations and substantive program changes and a concentration on appropriations decisions.

What would the authorization and appropriation committees do during every other year when their legislation was not scheduled for action and enactment? Presumably they would devote their time and efforts to oversight. A fundamental if often unstated premise underlying biennial budgeting proposals is that House and Senate committees would do more and better oversight if only they had the time to do it--if only they were not so preoccupied with the need to develop annual reauthorization bills. The committees now lack the time they should have for oversight activities and if they had more free time, they would invest much or all of it in oversight.

For reasons already discussed, there are grounds for skepticism that a lack of time is the primary reason why House and Senate authorizing committees do not engage in as much oversight activity as their critics would like. To put it more generously, reducing the committees' legislative burden may be a necessary condition for improving oversight, but it may very well not be a sufficient one. Improving oversight markedly requires addressing both opportunities and incentives. Biennial budgeting proposals address the former and apparently assume that the latter will take care of themselves.

As we have seen, Congress has been content to put some programs and agencies on a multi-year reauthorization schedule while insisting on annual reauthorization requirements for other programs and agencies (even if Congress does not always, or even often, satisfy those requirements). When a government activity is largely predictable and non-controversial, there may be no need to review it, in the process of authorizing new appropriations for it, more often than every several years. Some government activities, such as U.S. foreign assistance programs, however, are contentious and subject to rapidly and unexpectedly changing circumstances. Not surprisingly, therefore, Congress has been unwilling to relinquish its opportunity to review and revise them each year during the process of considering an annual reauthorization bill. A biennial budgeting system that eliminated all annual authorization requirements would, in this respect, treat all programs and agencies in the same way, rather than setting reauthorization timetables that reflect the differences among them.

Proponents of biennial budgeting probably would respond that there is little purpose served in maintaining annual reauthorization requirements that are regularly and almost routinely ignored. Would it not be better to have a biennial authorization process that actually works rather than an annual process that does not? But what if changing circumstances convince Congress of the need to enact new legislation before the time envisioned by the biennial reauthorization timetable? Congress and its authorizing committees could act on such legislation during the year that is supposed to be dedicated primarily to appropriations decisions. But for controversial programs, is this not likely to happen all the time? Are we not likely to have a biennial authorization bill enacted in one year, followed in the second year by an emergency bill to amend the terms and conditions of the authorization, followed in the third year by the next biennial authorization bill, and so on? Even if that were to happen, though, would it not be better for Congress to act annually on basic program authorities (and ceilings for appropriations levels) only when necessary, rather than expecting Congress to take such action every year when its failure may indicate that it really is not necessary? And so the argument goes.

With regard to the authorization process, therefore, biennial budgeting proposals are built on several assumptions: that the authorizing committees should devote more

time and effort to oversight than they now have available; that if the legislative burden on these committees is reduced, they will respond by devoting their additional "free time" to oversight; and that eliminating annual reauthorization requirements actually will make available significantly more "free time" for these committees. Although it always is dangerous to predict the effects of proposed congressional reforms, it does seem likely that relying on multi-year authorizations would produce some increase in oversight activity, though perhaps not as much as advocates of biennial budgeting either hope or expect.

I have argued that Congress engages in much of its most effective oversight activity during the course of the annual appropriations process. What might be the effect of biennial budgeting on oversight from this perspective? If the House and Senate appropriations subcommittees have time each year to study closely only a small fraction of the programs within their respective jurisdictions, surely they--and congressional oversight--would benefit greatly if they were required to develop their spending bills only every second year. During the other, non-appropriations, years, these subcommittees certainly would devote themselves to oversight because, having very few other legislative responsibilities, they would not have much else to do.

The force of this argument depends on whether a system of biennial appropriations would, in fact, avoid the need for appropriations legislation during what is supposed to be the non-legislative year. And on this score, there again is some reason for skepticism. Even today, when Congress enacts appropriations annually, it typically begins each year by enacting one or more "supplemental" appropriations bills to add or reallocate spending for the current fiscal year before it begins passing the appropriations bills for the next fiscal year. Spending projections are notoriously imprecise, especially when program costs are affected by changes in domestic and international economic conditions (inflation, interest rates, unemployment, etc.) that are not within direct congressional control. In addition, unanticipated developments, ranging from natural disasters at home to military or humanitarian crises abroad, that occur during a fiscal year can convince Congress of the need for new spending that was not anticipated and included in the appropriations bills enacted before the fiscal year began. In recent years, therefore, the annual appropriations process, often has involved enactment of supplemental appropriations for the current fiscal year as well as all the appropriations for the coming fiscal year.

Is it not likely that, in practice, a biennial budgeting system might become a system in which Congress enacts biennial appropriations every second year but devotes a considerable amount of time during each intervening year to enacting supplemental appropriations for the fiscal biennium in progress? With a biennial appropriations timetable, there are sure to be at least as many, and almost certainly more, demands for supplemental appropriations to respond to even more changing circumstances and new developments.

Furthermore, the difficulties of budget planning also make it likely that Congress will have to act every other year on major supplemental appropriations bills. As this is being written in the first half of 2000, Congress is deeply immersed in making appropriations and other budgetary decisions for the period ending in September 2001. Meanwhile, executive branch officials already are engaged in budget planning for the fiscal year ending in September 2003, more than three years into the future. Because of the time required to develop the President's annual budget, even before Congress begins its laborious deliberations, executive branch planners now have to make budgetary assumptions and predictions that often are educated guesses or projections of recent spending patterns into the future. Biennial budgeting will require these same officials to look even further ahead and develop budget proposals that, for that reason

alone, are even more likely to require revision when the time comes to actually implement them.

One alternative would be for the executive and legislative branches to make more generous appropriations decisions than they do now so that administrators have a sort of contingency fund on which to draw in order to fund unanticipated or under-estimated expenses. However, the more politically plausible alternative would be for budget decisions to be made on the basis of the best possible projections, however uncertain they may be, and then for those decisions to be revised through supplemental appropriations legislation as the need arises. If so, Congress is likely to invest even more time than it does now in developing, debating, and enacting what could become a major omnibus supplemental appropriations bill during the years that House and Senate appropriations subcommittees otherwise might devote to oversight work.

These arguments do not justify a conclusion that implementing a biennial budgeting scheme would not create more opportunities for oversight. However, they do suggest that the incremental increase (and, presumably, improvement) in congressional oversight may not be nearly as significant as the proponents of reform suppose.³³

Legislative Veto and Congressional Review of Regulations

At the same time that Congress was developing interest in terminating government activities or changing the process for funding them as ways to provoke more and better oversight, the House and Senate also were looking for more effective ways to ensure that executive branch officials would interpret and implement laws in the manner Congress intended. The mechanism that Congress developed, with the sometimes reluctant acquiescence of successive presidents, became known as the "legislative veto" because it provided for something akin to the legislative process in reverse. Just as the Constitution gives the President the power to veto new laws that Congress passes, the legislative veto was designed to give Congress the statutory authority to veto decisions that executive departments and agencies were about to promulgate and that would have the force and effect of new laws.

Congress either cannot or will not--and often should not--write new laws that are specific and complete enough to resolve every issue and cover every contingency that may arise as those laws are implemented and enforced. Virtually every major law that Congress has enacted in recent decades has required the department or agency concerned to issue implementing regulations.³⁴ These regulations may be needed, for example, to define terms that the law leaves undefined, to set standards for which the law provides only vague criteria, or to establish the organization and procedures that

³³On this subject, see the testimony of Louis Fisher before the House Committee on Rules, March 10, 2000, available at http://www.house.gov/rules/rules_fish09b.htm.

³⁴The prevalence and consequences of delegated legislative authority are by no means limited to the United States. In Israel, for example, "[t]he ministries that deal with economic matters are aided by the Knesset's penchant for delegating to the appropriate minister many of the details of legislation. This transfer of legislative activity to the executive branch allows the Knesset to deal in principle while the ministries deal with details, but in reality it means that enormous economic and political power is concentrated in the economic ministries." Asher Arian, *The Second Republic: Politics in Israel*. (Chatham, NJ: Chatham House Publishers, Inc., 1998), p. 57.

are necessary to accomplish the law's objectives. For example, a law to control water pollution might create a new office within the Environmental Protection Agency to administer a program that charges polluters fees for discharging certain pollutants into vulnerable rivers and streams. The law may leave it to the agency administrator to fix the organization, procedures, and staff of the office, to decide on the appropriate fee schedule, to identify the pollutants that the program is to cover, to define a process for determining the vulnerability of individual rivers and streams, and only then to establish the procedures for actually enforcing the law.

Obviously, the way in which these decisions are made will have a profound effect on how the law is implemented and what consequences it has for water quality and public health, as well as for the profitability of polluting industries, the prices they charge, and the people they employ. The implementing regulations are more than just bureaucratic detail. They go to the heart of the law's success in meeting its objectives, as Congress has defined them. Furthermore, these regulations have the same force and effect as does the law itself--the regulations constitute delegated or subsidiary legislation--even though they were not written and approved through the normal legislative process. How then to ensure that the regulations are not arbitrary, unfair, or inconsistent with Congress' legislative purposes? Conventional oversight hearings by congressional committees may reveal problems with these regulations, but only after the fact--only after the regulations have been issued and enforced, and only after at least some damage already has been done. How can Congress assure itself that the regulations are fair and suitable *before* they take effect?

The legislative veto was a creative answer to this question.³⁵ Essentially, it gave Congress the opportunity to veto certain agency regulations before they took effect. Individual laws that required implementing regulations sometimes provided that the department or agency concerned was to develop these regulations and then submit one or more of them to Congress before beginning to enforce them. After receiving one of these regulations, Congress would have a fixed period of time, perhaps 30 or 60 days, during which it could vote to disapprove, or veto, it, and thereby prevent it from taking effect in the form in which it had been submitted.

There are several reasons why Congress writes laws in ways that require implementing regulations to be issued. Sometimes a question may be so complex and technical that Representatives and Senators do not consider themselves equipped to make an informed decision. Instead, the decision needs to be left to experts. Sometimes, on the other hand, Congress delegates a legislative decision because it has been unwilling to make the decision itself. Regulations then are needed to interpret and elaborate on provisions of law that Congress deliberately left vague and incomplete, perhaps because that ambiguity was necessary in order to assemble the majority required to pass the law. In either case, the legislative veto procedure would assign an executive branch official the responsibility to propose a specific regulation and then submit it to Congress for its approval or disapproval.

³⁵Another approach is embodied in the Administrative Procedures Act of 1946 which requires that executive branch officials follow a process for writing regulations that expose those regulations to public scrutiny while they are still in draft form, and which insists that the issuing officials explain and justify the choices they have made. The choice does not have to be one between legislation, enacted through a deliberative and transparent process, on the one hand, and regulation, developed arbitrarily and secretively, on the other. See Benjamin W. Mintz and Nancy G. Miller, *A Guide to Federal Agency Rulemaking*. 2nd Edition. (Washington: Administrative Conference of the United States, 1991).

The first legislative veto was enacted in 1932, giving the President the authority to develop plans for reorganizing the executive branch, but with each plan subject to a congressional veto. Slowly at first, and then at an accelerating pace, this device became increasingly popular, proliferating, according to one observer, "like water-lilies on a pond (or algae in a swimming pool, depending on one's point of view)."³⁶ Writing in 1983, Fisher and Rosenberg found that, "[s]ince 1932 about 210 laws containing some 320 separate veto provisions have been enacted, most within the last decade."³⁷ Typically, these provisions permitted one or both houses of Congress to veto a regulation simply by adopting a resolution disapproving it. If Congress failed to adopt the resolution of disapproval within the time permitted for it to exercise its veto, the regulation would take effect.³⁸

³⁶Stephen Breyer, "The Legislative Veto After *Chadha*," *The Georgetown Law Journal*, v. 72, 1984, p. 786).

³⁷Louis Fisher and Morton Rosenberg, "Congressional Life After *Chadha*: Searching for an Institutional Response," reprinted in U.S. House of Representatives, Committee on Rules. *Legislative Veto After Chadha*. Hearings. 98th Congress, 2nd Session, 1984, p. 188.

³⁸The statute creating the veto often would include special "fast-track" legislative procedures to increase the likelihood that the House or Senate, or both, would have an opportunity to vote on the resolution of disapproval within the time permitted for Congress to act.

In this way, Congress and the President developed a new way to preserve the delicate balance of powers between them. Congress could delegate legislative power to the President's subordinates with more confidence that it could prevent this power from being exercised in ways inconsistent with its intent and expectations. The executive branch officials, on the other hand, could exercise the powers delegated to them unless Congress acted quickly and affirmatively to disapprove their plans for doing so. The increasing frequency with which Congress included legislative vetoes in its bills, and the President signed those bills into law, is perhaps the best evidence that members of both branches accepted the legislative veto as a convenient and workable solution to an otherwise intractable problem.³⁹

In 1983, however, the Supreme Court held that the legislative veto was not merely extra-constitutional, it was unconstitutional. In the now-famous case of *Immigration and Naturalization Service v. Chadha*, the Court held that the legislative veto violated the procedures set out in the Constitution for making and changing national law. What the Court found constitutionally impermissible was the manner in which Congress exercised the legislative veto. Almost every statute providing for a legislative veto also allowed one or both houses to exercise the veto by adopting a resolution that was not submitted to the President for his signature or for his own veto. The purpose of the legislative veto was to give Congress, acting unilaterally, the ability to disapprove a proposed regulation that presumably was inconsistent with Congress' expectations and purposes--but that, also presumably, did suit the President's policy goals. If Congress were to pass a bill that disapproved a regulation, the President could--and would be expected to--exercise his constitutional power to veto that bill, so that Congress' vote of disapproval would be ineffectual so long as the President and his veto were sustained by even just one-third-plus-one of the members of either the House or the Senate. It was for this reason that Congress designed legislative vetoes so they could be exercised by one or both houses acting without the President.

However, the Supreme Court held that by disapproving a regulation, Congress was taking an action that had the "purpose and effect of altering the legal rights, duties, and relations of persons" outside of Congress, and that the Constitution requires that such an exercise of legislative power must be "exercised in accord with a single, finely wrought and exhaustively considered procedure."⁴⁰ This procedure requires both houses of the Congress to pass the same bill in the same form and for that bill to become law with the President's assent or notwithstanding his veto. By contrast, the legislative veto was to be exercised by one house acting alone, or by both houses acting together but without opportunity for the President to veto that action. The Supreme Court's decision had the effect of rendering unconstitutional all the legislative vetoes that had been enacted during half a century were unconstitutional, so all the legislative-executive accommodations that these vetoes embodied came crumbling to the ground.

One effect of the *Chadha* decision was to drive the legislative veto underground, but not necessarily in the sense of burying it. Through formal requirements or informal understandings, Congress often continued to expect departments and agencies to seek congressional approval before promulgating regulations or taking various other kinds of decisions. More often than not, what has been required is the approval of one or more committees of both houses. When President Bush signed a 1992 bill containing such requirements, he stated that they "constitute legislative vetoes similar to those declared unconstitutional by the Supreme Court in *INS v. Chadha*.

³⁹ Presidents and senior executive branch officials often criticized legislative vetoes and questioned their constitutionality. There is good reason to think, however, that they were more agreeable to the practice as a useful legislative compromise than their public utterances suggested.

⁴⁰ *INS v. Chadha*, 462 U.S. 919 (1983).

Accordingly, I will treat them as having no legal force or effect in this or any other legislation in which they appear.”⁴¹ As Louis Fisher has argued, however:⁴²

Although the President may treat committee vetoes as having no legal force or effect, agencies have a different attitude. They have to live with their review [oversight] committees, year after year, and have a much greater incentive to make accommodations and stick by them. Presidents and their legal advisers can indulge in confrontations with Congress on these issues. Agencies cannot risk these types of collisions with the committees that authorize their programs and provide funds.

The leverage that congressional committees enjoy because of the authorization-appropriation process discussed above has enabled them to continue to express legislative approval or disapproval of executive branch actions that its officials ignore at their political peril. Even so, there remains a real difference between political influence and legal authority. Consequently, Congress has continued to look for new and constitutionally pure ways to review executive branch regulations and invalidate regulations that do not meet congressional approval. Since the *Chadha* decision was rendered in 1983, there have been only four years during which the same party has elected the President and controlled both houses of Congress. It is not surprising, therefore, that Congress has continued to wonder whether the executive branch is going to interpret and apply a new law as a majority in Congress intended. Notwithstanding the *Chadha* decision, many in Congress still wanted some convenient way to stop proposed implementing regulations from taking effect.⁴³

One alternative to the conventional legislative veto, and an alternative that House and Senate adopted selectively in the years following the *Chadha* decision, was to transform the manner in which Congress can express its disapproval.⁴⁴ Instead of empowering one or both houses to act unilaterally, the two houses can pass a bill (or, more commonly, a joint resolution, which is functionally the same) that disapproves a proposed or existing regulation and that is subject to the President’s veto. This approach satisfies the Supreme Court’s constitutional concerns. However, because the President can be expected to veto any bill to disapprove a regulation issued by one of his political subordinates, Congress can enforce its disapproval only if two-thirds of the members of each house are prepared to enact the bill into law by overriding the presidential veto. In short, Congress still can exercise a legislative veto, but only by a two-thirds vote.

⁴¹Quoted in Louis Fisher, “The Legislative Veto: Invalidated, It Survives,” in *Law and Contemporary Problems*, v. 56, n. 4, Autumn 1993, p. 288. Also see Fisher, *The Politics of Shared Power* 4th edition (College Station, TX: Texas A&M University Press, 1998), especially pp. 91-104.

⁴²*Ibid.*

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On current practices, see Alexis Simendinger, “The Paper Wars,” *National Journal*, July 25, 1998, pp. 1732-1739.

⁴⁴On alternatives to the legislative veto, see Frederick M. Kaiser, “Congressional Control of Executive Actions in the Aftermath of the *Chadha* Decision,” *Administrative Law Review*, v. 36, n. 3, Summer, 1984, pp. 239-276.

A second approach has been for Congress to include in more general bills one or more provisions to nullify or cancel the effect of specific regulations. The most convenient and effective “vehicles” to carry these provisions, which often are called “riders,” are the thirteen or more annual appropriations bills. These bills must be enacted each year, and because their primary purpose is to fund government activities, it is reasonably compatible with that purpose to include provisions to the effect that none of the funds appropriated for a department or agency shall be used to carry out a certain regulation or policy. A provision of this kind may not legally cancel a regulation, but it does the next best thing by preventing any money from being spent to implement the regulation. Furthermore, it is more difficult politically for the President to veto any such provision because it is only one small part of a very large and important appropriations bill that is essential to keep the government in operation. The appeal to Congress of attaching this kind of rider to appropriations bills is one of the reasons why, in recent years, Congress has had so much trouble enacting all the needed appropriations by the beginning of each new fiscal year.

Whatever the advantages and disadvantages of the pre-*Chadha* legislative vetoes and these two post-*Chadha* alternatives, all of them were selective in that they applied only to one regulation or to one very limited class of regulations. As such, they have been unsatisfactory or insufficient to Representatives and Senators who believe that there is a systemic problem with government regulations, and that Congress requires a way to review them all, to review them systematically, and to nullify any of them before they take effect. From time to time, therefore, there were bills introduced, both before and after the *Chadha* decision, to make most or all new regulations subject to congressional review and veto. Not until recently, however, was this kind of comprehensive approach enacted into law.

In 1996, with a Democratic President and Republican majorities in the House and Senate, Congress enacted a multi-purpose bill that, among other things, included a mechanism by which Congress now can review and disapprove almost any government regulation.⁴⁵ This law, sometimes called the Congressional Review Act, requires that Congress, and the appropriate committees of each house, receive a copy of each proposed new regulation and a statement describing its purpose and effect. Although the detailed provisions of the law are rather complicated, the law effectively gives Congress at least a 60-day period during which both houses can pass a law disapproving a new regulation. In most cases, a regulation cannot take effect until the 60-day period has ended or at least one house of Congress has voted not to disapprove that regulation.⁴⁶

On paper, the 1996 law appears to give Congress powers and opportunities for oversight that it never had before. In practice, however, there is less here than meets the eye. First, proposed new regulations already are published and available to the members and committees of Congress; the new law only makes access to them somewhat more convenient. Second, even in the absence of this law, Congress always can pass a bill to nullify any regulation, whether or not it already has taken effect. Third, the 1996 law does not require Congress to vote on whether to

⁴⁵The Contract with America Advancement Act, Public Law 104-121, 100 Stat. 868-874, 5 U.S.C. 801-808.

⁴⁶Morton Rosenberg, *Congressional Review of Agency Rulemaking: A Brief Overview and Assessment*. CRS Report for Congress #96-777. Washington: Congressional Research Service, 1996. For a more elaborate discussion of the act, its implementation, and its limitations, see Rosenberg, “What Happened to Congressional Review of Agency Rulemaking,” *Administrative Law Review*, v. 51, n. 4, Fall 1999, pp. 1051-1092.

disapprove any or all regulations; its major effect, the importance of which certainly is not to be minimized, is that it protects a disapproval resolution from being killed in the Senate by a filibuster (which can be ended only by a three-fifths vote). And finally, if and when Congress does pass a disapproval resolution pursuant to this law, that joint resolution remains subject to a presidential veto and, therefore, enactment into law only by two-thirds majorities in both houses

Even under this recent law, a heavy burden continues to rest on those who would disapprove a regulation. They must convince the appropriate committees to support a joint resolution disapproving it, they must convince majorities in each house to consider the resolution in plenary session, they must endure as much as ten hours of plenary debate in the Senate, and, in the likely event of a presidential veto, they must secure two-thirds majorities in both houses to enact the disapproval resolution into law. During the 18 months following enactment of the 1996 act, according to one estimate, "over 5,800 new regulations have been promulgated by the executive branch, including 93 major regulations with an impact of over \$100 million or more in the economy."⁴⁷ Since then, the same trend continued. As of October 1999, the number of regulations promulgated after the Congressional Review Act became law exceeded 15,000, with a total estimated economic impact, according to one source,⁴⁸ of more than \$300 billion. Yet a total of only eight disapproval resolutions have been proposed under the 1996 law, none of which reached a final vote in either house.⁴⁹ Ironically, the sheer number of regulations that are subject to the disapproval procedure may undermine its use; it may be too easy for the most controversial and questionable regulations to become lost among all the others.

Two new and related proposals have been made with such problems in mind. Some members of Congress have proposed creating a Congressional Office of Regulatory Analysis to study and report to Congress on proposed new regulations. One value of this office presumably would be to reduce the analytical and informational burden on congressional committees and their staffs, and make it more practical for Congress to decide which new regulations should be disapproved. A second and potentially more far-reaching proposal would shift the burden to those who support implementation of a new regulation. Under this kind of scheme, no new regulation (or perhaps none that exceeds some threshold of importance) could take effect until Congress enacts into law a resolution that approves it. If Congress failed to act, the regulation could not be implemented.⁵⁰

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Statement of Representative Sue W. Kelly in U.S. House of Representatives, Committee on the Judiciary. *The Role of Congress in Monitoring Administrative Rulemaking*. Hearings. 105th Congress, 1st Session; September 25, 1997, pp. 21-22.

⁴⁸Melanie Scarborough, *Still Waiting for the Acts to Fall: Four Years of Congressional (non) Review*. (Arlington, Virginia: The Alexis de Tocqueville Institution, 2000), available at www.adti.net/html_files/tax/cra.html

⁴⁹Rosenberg, "Whatever Happened to Congressional Review of Agency Rulemaking?", *op cit.*, p. 1058. Even if the House and Senate do not vote on a resolution under this act, demonstrable support for it within Congress can convince the department involved to reconsider the regulation in question. *Ibid.*, pp. 1058-1059; see also, Allen Freedman, "GOP's Secret Weapon Against Regulations: Finesse," *CQ Weekly*, September 5, 1998, pp. 2314-2320.

The potential problem with this approach, should it ever become law, is the workload it would create. Either the law would have to exempt most new regulations from the requirement for affirmative congressional action, or Congress would be confronted with the need to pass literally hundreds or thousands of regulatory approval bills each year. More than 3,200 regulations were proposed during 1996; they reportedly consumed 15,369 pages in the *Federal Register*, the document in which they are published.⁵¹ Roughly 4,000 new regulations appeared during 1997.⁵² If all these regulations required an affirmative congressional vote to take effect, it is easy to anticipate that, in most cases, congressional review and approval would become so perfunctory as to be of little value.⁵³ In fact, it might, in an ironic way, work to the disadvantage of Congress, because its members would be more directly accountable for regulations than they now are, but without having had any meaningful opportunity to evaluate all but the relative handful that would attract serious attention and debate.

Government Performance and Results Act

There is another problem that Congress (or any national assembly) confronts as it attempts to review and evaluate government performance. By what standard is Congress to judge whether a government program is being implemented effectively and efficiently, and whether that program is making reasonable progress toward achieving its goals?

The laws creating government programs often define their objectives in broad and general terms--for example, to promote public health, to improve educational opportunities for the nation's children, or to reduce the levels of air pollution attributable to automobiles. Taking the last of these hypothetical examples, implementing a law for that purpose requires that decisions be made on matters such as acceptable levels for various air pollutants and realistic year-by-year schedules for achieving the needed reductions. Laws also may give government agencies considerable discretion in determining the best ways to achieve the goals for which the laws were enacted. For example, should air pollution be reduced by imposing fines on automobile manufacturers? The law may allow the responsible agency to determine whether, or under what circumstances, this approach is preferable to alternatives such as prohibiting certain products or processes or requiring the use of certain technologies. But even if the law sets fines as the approach to be followed, that law is unlikely to fix a precise schedule of fines or determine the number of inspectors and the methods they are to use in conducting their inspections. And quite often, it would be a mistake for

Representative Kelly expressed the concern "that this law will become a paper tiger that will empower agencies to act even more boldly because Congress has demonstrated a lack of political will to challenge their decisions." U.S. House of Representatives, Committee on the Judiciary. *The Role of Congress in Monitoring Administrative Rulemaking*. *Op. cit.*, p. 22.

⁵¹Statement of Representative J.D. Hayworth in *ibid.*, p. 27.

⁵²U.S. House of Representatives, Committee on Government Reform and Oversight. *Congressional Office of Regulatory Analysis Creation Act*. House Report 105-441, Part 2. 105th Congress, 2nd Session, June 3, 1998; p. 5

⁵³This general approach, as well as one way to address the potential problems raised here, is advocated by Rosenberg, "Whatever Happened to Congressional Review of Agency Rulemaking?", *op. cit.*, pp. 1083-1090.

Congress to decide all matters of this kind in the laws it passes. To do so would take amounts of time and expertise that are in short supply in any national assembly, even one as well staffed as the U.S. Congress. Furthermore, embedding detailed policy decisions in law creates inflexible administrative standards and procedures that can be changed only through the laborious process of enacting another law.

However, Congress finds itself at a disadvantage when the officials responsible for implementing a program appear before their congressional oversight committees (or their appropriations subcommittees) to testify about what they have accomplished. Naturally enough, these officials are likely to define specific program objectives in terms that make their achievements seem impressive. Should implementation of the air pollution law be evaluated by asking how many inspections were conducted, or how many fines were imposed, or how much pollution decreased? The implementing agency has an obvious incentive to choose whichever criteria for program evaluation are most likely to protect the department's officials from congressional criticism, and justify their requests for greater authority and larger budgets for the coming years.

The Government Performance and Results Act (sometimes called the Results Act or GPRA) addresses these problems.⁵⁴ The act became law in 1993 but did not attract much attention until the Republican party assumed control of both houses of Congress in 1995. Many congressional Republicans were concerned about the weight and intrusiveness of government regulations and suspicious about the motives and intentions of some administrative officials, especially during a Democratic presidential administration. These Representatives and Senators saw in the Results Act a way to improve bureaucratic accountability and perhaps substantiate their concerns about government inefficiencies and the perceived ineffectiveness of some government programs.

The Results Act, which remains very much a work in progress, was designed to establish in advance specific program goals, objectives, and standards by which Congress later could evaluate program results. The act requires executive branch agencies to prepare strategic plans for at least six years as well as annual performance plans and annual reports on program performance. Program managers can be held accountable by comparing their annual performance reports with their performance plans, in the context of their longer-term strategic plans.

A central component of an agency's plan is its delineation of annual performance goals. The intent here is to provide a linkage between the longer term strategic plan and the daily operations of the agency. Part of the process entails establishment of performance indicators to be used in evaluating the program activities; generally, the annual performance goals will thus be stated in an "objective, quantifiable, and measurable form"....⁵⁵

Both agency officials and their congressional oversight committees will know in advance the criteria by which program accomplishments are to be evaluated, so that there will be fixed and, to the extent possible, quantifiable, yardsticks for Congress to use in measuring program effectiveness and government efficiency. These plans and reports are eventually to be incorporated into the annual budget and appropriations

⁵⁴This discussion is indebted to the CRS report on *Government Performance and Results Act: Implications for Congressional Oversight*, by Frederick M. Kaiser and Virginia A. McMurtry, May 12, 1997.

⁵⁵Kaiser and McMurtry, *op. cit.*, p. 5.

process as well. If the Results Act is implemented as designed, program managers no longer will be able to use criteria that may be imprecise and conveniently devised after the fact when they appear before Congress to report on their achievements.⁵⁶

At the heart of GPRA is a distinction between *outputs* and *outcomes*. The conventional way to analyze and evaluate a government program has been to look at outputs—to ask how much the program has produced. How many grants have been awarded? How many individuals or communities have received financial benefits? How many roads, buildings, or bridges have been constructed? A focus on outcomes poses a different question: How much difference has the program made? How much have the grants, the financial benefits, or the construction projects contributed to accomplishing the policy goals and purposes for which the program was designed? Although observing and measuring outcomes is more difficult than observing and measuring outputs, it is outcomes that ultimately matter. Even the most efficient government program is a waste of time and money if it was ill-conceived and if it has proven ineffectual in ameliorating the problem that inspired its creation.

The Results Act is to be implemented gradually, over a seven-year period, so it would be premature to characterize it as a success or a failure. The first annual reports on program performance are being submitted in 2000. Already, however, at least two significant issues have emerged.

One is the difficulty that even the best-intentioned program managers can encounter in identifying precise and quantifiable goals to include in their program performance plans. Take the hypothetical example of a government program to fund AIDS research. Such a program might be evaluated traditionally by referring to data on the numbers of grants awarded, experiments conducted, or new drugs and drug combinations tested. However, these are precisely the kinds of performance standards that have dissatisfied members of Congress, because there is no necessary link between any such data, on the one hand, and the prevalence and seriousness of the disease, on the other. An alternative, therefore, might be to include as a goal in a strategic or annual performance plan some percentage reduction in the number of new AIDS cases, the number of AIDS-related deaths, or the percentage of certain susceptible populations that are infected with the AIDS virus. This approach assumes, however, that there is a direct causal relationship between government activity and improvements in public health, as measured in one or more of these ways, when there are so many other factors that may come into play.⁵⁷

The second issue is the appropriate role for Congress in the development of the long-term strategic plans and the annual performance plans. The Results Act requires

⁵⁶The General Accounting Office developed a guide to assist committees in linking performance plans and performance reports. U.S. General Accounting Office, *Agencies' Annual Performance Plans Under the Results Act: An Assessment Guide to Facilitate Congressional Decisionmaking*. Washington, D.C., February 1998.

⁵⁷Or consider the difficulty of measuring the success of the Department of State in achieving its foreign policy goals. Should progress toward peace in the Middle East, for example, be judged by the number of terrorist incidents in Israel or by the amount of land transferred to Palestinian control, matters over which the United States has no control? The Results Act does recognize the possibility of complex causal relationships and allows for the use of non-quantifiable assessments. However, as social scientists recognize, there is a common tendency for caveats and conditions to become lost in drawing conclusions from quantitative analyses.

agencies, especially in developing their strategic plans, to consult with Congress as well as other interested organizations and groups, including state and local governments. But how much consultation, and in what form, is enough to meet the requirements of the act and, more important, the expectations of Congress?

It is one thing for a government agency to develop its own plan and to define the annual program goals by which it thinks its annual performance should be evaluated. The congressional oversight and appropriations committees then can hold the agency accountable for achieving the goals it had set for itself. It is quite another for the congressional committees to become involved in the development of the agencies' plans and to expect those plans to be revised in response to congressional objections. Majority party and committee leaders in Congress have asserted that it is both appropriate and necessary for Congress to participate actively in the process of developing the long-term strategic plans and, to a lesser extent, the annual performance plans. In their view, the act creates the framework for a creative partnership between the legislative and executive branches as they work together to plan how the laws that Congress has enacted should be implemented and evaluated. If Congress is nothing more than a passive recipient of whatever plans the departments and agencies write, the best its committees can do is to evaluate how well the executive branch has achieved its own goals. But what if those goals are not the goals that Congress thinks should be pursued, or the goals that, from Congress' perspective, the law requires the executive branch to achieve? Developing the goals, the plans for achieving them, and the benchmarks for measuring program achievements, are a responsibility that the two branches of government need to share.

Opponents of this view would argue that some in Congress want to use the Results Act as a wedge by which they can intrude themselves into decisions that are properly administrative in nature and, what is more, decisions that Congress, acting implicitly or explicitly, delegated to the executive branch when it passed the law in question. The Results Act provides for consultation with Congress with respect to strategic plans; it does not require Congress or its committees to approve these plans or agencies' annual plans, which the law could have required (as we know from our discussion of the legislative veto). On this question, the dominant view in Congress will prevail to the extent that its committees are prepared to invest the time and effort to make it prevail.

At this early stage in its implementation, the record of the Results Act is mixed.⁵⁸ In late 1997, majority party leaders in Congress issued a report that was critical of many of the *strategic* plans that departments and agencies had submitted. That report "noted several major flaws in the strategic plans; for example, some agencies set goals that stretched their statutory authority. Other general problems included lack of coordination between agencies for shared missions or goals, and inadequacies in indicators for measuring performance."⁵⁹ According to one press report,⁶⁰

⁵⁸For an early analysis of GPRA in the context of related trends and developments, see Beryl A. Radin, "The Government Performance and Results Act (GPRA): Hydra-Headed Monster or Flexible Management Tool?", *Public Administration Review*, v. 58, n. 4, July/August 1998, pp. 307-316.

⁵⁹Frederick M. Kaiser and Virginia A. McMurtry, *Government Performance and Results Act: Proposed Amendments (H.R. 2883)*, CRS Report 98-224 (March 17, 1998), p. 2.

⁶⁰Stephen Barr, "GOP Sees No Results in Results Act," *The Washington Post*, June 9, 1998, p. A4. The General Accounting Office has issued a somewhat more positive assessment, concluding that "agency strategic reports "appear to provide a workable foundation

Too many agencies lack data about their programs, such as payment error rates or timeliness of service, making it difficult to plan reasonable steps to improvement, the Republicans said.

Other agencies listed goals but did not link them to results, the GOP leaders said. For example, they said, Social Security plans to track the number of callers who dial the agency's toll-free number and get through within five minutes and those who get through on their first attempt. "Both of these goals monitor access to the agency only, not whether the agency actually provided the caller with the help needed," they said.

In June 1998, many of the same Republican leaders also reported that agencies' performance plans were "disappointing."⁶¹

agencies did not deal with major management problems, lacked reliable data to verify and validate performance, often did not give results-oriented performance measures, did not link performance measures to day-to-day activities, and did not coordinate across agencies. Effective leadership...requires a "culture change"; congressional oversight and OMB [Office of Management and Budget] leadership were crucial.

These criticisms may reflect recalcitrance on the part of executive branch officials who see little advantage to be gained from investing more effort and resources than necessary in an exercise that is likely to leave them more vulnerable to congressional criticism. To some extent, however, they also may reflect the difficulties, some of which were mentioned above, in implementing requirements that are eminently reasonable in principle but, in some respects, devilishly difficult to implement.

In response to concerns such as those expressed by congressional leaders, the House and Senate have begun considering amendments to the act. Ultimately, however, the success of the Results Act will depend less on how Congress tinkers with its details and more on how much attention the committees of Congress pay to agencies' plans and their implementation,⁶² and to all the paper that the law is going to

for Congress to use in helping to fulfill its appropriations, budget, authorization, and oversight responsibilities and for agencies to use in setting a general direction for their efforts." U.S. General Accounting Office, *Managing for Results: Agencies' Annual Performance Plans Can Help Address Strategic Planning Challenges*. Washington, D.C., January 1998, p. 3. Two other relevant GAO reports, both issued in September 1998, are *Managing for Results: An Agency to Improve the Usefulness of Agencies' Annual Performance Plans* and *The Results Act: Assessment of the Governmentwide Performance Plan for Fiscal Year 1999*.

⁶¹Genevieve J. Knezo, *Government Performance and Results Act: Brief History and Implementation Activities During the First Session of the 106th Congress*, CRS Report RS20257 (July 9, 1999), p. 3.

⁶²In addition, assessments of GPRA probably will continue to reflect divergent expectations for it, as some continue to view it primarily as a means to improve national government performance while others see it as providing leverage for reducing the size and scope of government activity. A useful rule of thumb is that when Congress passes by overwhelming margins a bill that significantly affects the governmental process, there is very likely to be considerable uncertainty or disagreement as to what difference the bill is expected to make. "While the support for the legislation [GPRA] was broad, there was very little real debate over its provisions. GPRA was framed in very general and often abstract terms; neither

generate.⁶³ The Results Act creates yet another opportunity for Congress to engage in well-informed oversight. As always, the question remains whether the members of Congress have sufficient incentives to take advantage of the possibilities this new law can offer.

Implications of the American Experience

It is probably fair to say that the U.S. Congress engages in more oversight activity, in one way or another, than any other national assembly. Yet it is probably equally true that, although both the quantity and the quality of oversight probably have increased during recent decades, Representatives and Senators still tend to believe that the conduct of oversight is more one of Congress' weaknesses than one of its strengths. The various approaches that I have discussed in this paper demonstrate, if nothing else, Congress' recurring interest in finding a solution or a combination of solutions to what it has considered to be a persistent problem.

Probably the most intractable dimension of the oversight problem in Congress is the problem of individual incentives: how to convince individual Representatives and Senators that it is in their own political interests to invest significant amounts of their time, energy, and staff resources in oversight work. On the other hand, there are two powerful institutional incentives that encourage oversight activity: first, the permanent, constitutionally-based competition for power between Congress and the President (and the permanent government he supposedly controls); and second, the complementary partisan competition that characterizes the frequent periods of divided government.

Even if these conditions are not unique to the United States, they certainly are not typical of most other national assemblies. From a comparative perspective, then, of what value is the congressional oversight experience?

One unhappy implication of the American experience is that, to whatever degree oversight is a problem in Washington, it is likely to be a considerably greater problem in other national capitols. The implications of this paper for the prospects of effective oversight in other national assemblies are not particularly encouraging.

In classic parliamentary regimes, of course, the two institutional incentives just mentioned are absent. Almost by definition, the constitutional structure requires that the same party or coalition control both the parliament and the government--or to take account of minority governments, at least that the opposition does not control the parliament. Further, any competition for power between the parliament and the government should be exceptional. In theory, the government is the agent of the parliament; should the government ever lose sight of that fact and attempt to assert powers independent of parliamentary control, the parliament can withdraw its confidence at any time and compel the government to resign. In practice, on the other hand, the parliament sometimes is the agent of the government, when parties and their

authorizing nor appropriations committees focused on the consequences of the process for particular policies or programs. Radin, *op. cit.*, p. 308.

⁶³Ironically perhaps, GPRA was enacted at much the same time that Congress was asking executive branch departments to reduce the amount of paperwork their activities required, including the kind of data-gathering, record-keeping, and reporting by private individuals and organizations that may be necessary if the departments are to conduct the effective performance assessments that GPRA demands.

leaders in government are so strong that the institutional capacity of parliament is stunted and the political futures of MPs depend on the loyal support they give their leaders, especially when in government.

Under these circumstances, parliamentary leaders have far less reason than do congressional leaders to organize the parliament and allocate its resources in ways that promote oversight. As Matti Wiberg argues:⁶⁴

If it is true that both the government and the parliament are controlled by party or parties with a majority in the popular assembly, as is the case by definition with majority governments, then there really is no political space left for parliamentary control as we understand it from a naive reading of the constitution and standing orders. If the government remains, in essence, “a committee of the party or parties with a majority in the parliament,” as Harold Laski put it, then there is no incentive for the majority of the floor to execute hard-nosed control; it is not politically profitable to extend the searchlight upon one’s own closest political allies or literally upon one’s own party.

Occasional protestations to the contrary notwithstanding, government ministers have little reason to welcome effective oversight, and considerable reason not to encourage their party leaders and members in parliament to undertake it. More generally, governments in parliamentary systems usually are less than enthusiastic about improving the parliament’s resources and capacities (and budgets) in ways that could encourage MPs to become more assertive and more able to evaluate and challenge government decisions.

With regard to individual incentives, no system for electing MPs would seem to motivate them to focus on oversight. As I have argued, Representatives and Senators, who are so responsible for their own electoral successes and failures, usually conclude that oversight work--to be distinguished from dramatic and well-publicized investigations--is not likely to add much to their public support in their individual constituencies, even if it does increase the respect they enjoy in Washington. But if a constituency-based electoral system does not encourage oversight, proportional representation should positively discourage it, at least for members of the governing party or parties, who largely control allocation of the assembly’s resources and time. When the parliamentary careers of MPs depend on their placement on their party’s list, the last thing they should want to do is to engage in activity that challenges the policies and actions of their own party’s government.

There are many variants between the U.S. presidential system and a pure parliamentary system--as many new or reforming democracies either are attracted to the French model on its merits, or they hope to combine the advantages of both presidential and parliamentary systems, even at the risk of constitutional incoherence--which is merely one reason that these kinds of generalizations are dangerous to make. Still, it seems reasonable to hypothesize that the more a national variant resembles a parliamentary system--in other words, the more the prime minister and cabinet are exclusively or primarily appointed by and responsible to the parliament, not the president--the less reason the controlling majority in the parliament should have to

⁶⁴Matti Wiberg, “Parliamentary Questioning: Control by Communication?,” in Herbert Doring, *Parliaments and Majority Rule in Western Europe* (New York: St. Martin’s Press, 1995), p. 218, quoting Harold Laski, *Reflections on the Constitution* (Manchester: Manchester University Press, 1952), pp. 104, 108.

attempt to monitor and influence the government through whatever oversight techniques are available.

The need for effective oversight remains, however, no matter how the relations between the national executive and the national assembly are organized, as may perceptions that oversight as currently practiced is inadequate. An essay on the French parliament concludes, in what may be an extreme formulation, that “[t]he procedures for controlling executive power, for scrutinising or debating or questioning executive acts, are completely inadequate. Executive power in France can do more or less as it likes--with only violence in the streets or the fear of losing the next election as a check.”⁶⁵

To encourage oversight, some national assemblies allow a member of the opposition to chair the primary parliamentary oversight committee (an innovation that the American Congress is most unlikely to entertain). For example, the Public Accounts Committee of the British House of Commons, a committee that has been described as “the cornerstone of the Commons’ oversight structure,”⁶⁶ customarily is chaired by a senior opposition member. In Israel, chairmen of the State Audit Committee also have come from the opposition. Such a practice implicitly recognizes that the parliamentary majority has much less reason than the opposition to capitalize on the oversight potential of these committees. However, the chairmanship does not necessarily carry with it the ability to set the committee’s agenda and control its activities.

Parliaments do have one oversight mechanism that the U.S. Congress lacks: the ability of MPs to pose oral or written questions to which ministers are expected to reply. In principle, parliamentary questions can require the government to explain and justify its decisions. A written question may evoke a more detailed and informative reply, but an oral question, posed in open session, can better attract public attention to whatever government policy is challenged or whatever deficiency is asserted in the question. According to Philip Norton, writing about questions in the British House of Commons:⁶⁷

They provoke responses in the form of information, explanation and justification. They absorb the time and intellectual energy of ministers and senior civil servants. They create a critical environment for the discussion of particular programmes and actions. They ensure greater openness on the part of the government. For government, there is no equivalent to the legal right of silence. Use of these parliamentary tools may influence a change of policy or minister or, more frequently, some change in administrative techniques and departmental practices. And their very existence, and the observable impact they sometimes have on policies and careers, have a pervasive deterrent effect throughout the corridors of power.

Accepting Norton’s characterization, there remains reason to doubt that, even in Britain, question periods are being used for oversight purposes as effectively as they

⁶⁵John Frears, “The French Parliament: Loyal Workhorse, Poor Watchdog,” in Philip Norton (ed.), *Parliaments in Western Europe*. (London: Frank Cass & Co. Ltd., 1990), p. 50.

⁶⁶Andrew Adonis, *Parliament Today*. (Manchester: Manchester University Press, 1990), p. 120.

⁶⁷Philip Norton, *Does Parliament Matter?* (New York: Harvester Wheatsheaf, 1993), p. 112.

might. Oral questions, especially to the Prime Minister, frequently are on matters of local interest or for the purpose of scoring political points. In Ireland, too, questions “focus on constituency matters and articulate issues of interest to the local rather than the national community.”⁶⁸ Wiberg summarizes the role of parliamentary questions in the Nordic assemblies in less than enthusiastic terms:⁶⁹

Parliamentary questioning may serve the control function as a by-product. The control function may be fulfilled even when the representatives do not put questions primarily for control purposes....Parliamentary questioning contributes to keeping the government accountable. Questioning provides an arena, not in the focus of political work, but as a safety valve. Questions are not only asked in order to get answers, i.e., information; they are also, and more importantly, asked in order to give information. Questioning serves the signalling function of concerned representatives. Parliamentary questioning functions as an excellent device for tension release.

We need not conclude that parliamentary questions are ineffectual as an oversight device, but they evidently are often posed for other reasons. Interestingly, Wiberg contrasts Scandinavian practice with question time in London, and argues that questioning in the Nordic parliaments is less important and less adversarial *because* of their involvement in legislative activity:⁷⁰

The Nordic parliaments are freer in working out and influencing the laws than the House of Commons and thus are more important in the policy-making process. Moreover, overview or evaluation of the laws and the administration is generally not a top priority among the activities that the MPs can choose from. On the contrary, it seems to be more important to propose and work out new laws than to control the implementation and administration of the old ones.

This assessment is strikingly reminiscent of the assertion I made early in this paper that U.S. Representatives and Senators, working in a very different constitutional environment, think of themselves primarily as legislators, and allocate their time and effort accordingly.

So if this uniquely parliamentary device does not provide an adequate solution to the oversight problem, what does the American experience suggest for how oversight can be promoted, to the extent an assembly and its members wish to engage in it? The preceding analysis suggests at least these implications:

First, oversight can be encouraged by creating committees solely for that purpose, whether the committees have general oversight responsibilities, as in the

⁶⁸Between 1970 and 1981..., the highest number of questions, 10,250, were addressed to the Minister for Local Government/Environment. This average of 932 questions per year consisted mainly of queries about the provision of local services which included roads, traffic lights, housing grants and so on. Audrey M. Arkins, “Legislative and Executive Relations in the Republic of Ireland,” in Norton, *Parliaments in Western Europe*, *op. cit.*, p. 92. See also Frears, *op. cit.*, p. 34.

⁶⁹Matti Wiberg, *Parliamentary Control in the Nordic Countries* (Jyvaskyla, Finland: The Finnish Political Science Association, 1994), p. 363. See also Wiberg in Doring, *op. cit.*, pp. 179-222.

⁷⁰*Ibid.*, pp. 363-364.

U.S. Congress, or more specific mandates, such as committees on public accounts, delegated legislation, statutory instruments, government undertakings, and so on.

Second, oversight can be encouraged by linking government audit activities closely to the assembly, as in the cases of the U.S. Government Accounting Office and the British National Audit Office, so that their findings can provide a convenient stimulus for more programmatic oversight.

Third, oversight can be a time-consuming and laborious process that is aided immeasurably by the presence of a permanent, expert, and sizeable staff.

Fourth, suitable organization and sufficient resources may be necessary for effective oversight, but they are not sufficient. Members must choose to take advantage of these institutional capacities.

Fifth, one way to encourage Members to engage in oversight is by giving them more, or more convenient, access to information about government intentions and actions--through devices such as requiring that reports be submitted or that regulations be transmitted before they take effect.

Sixth, another way to promote oversight is to create convenient opportunities for the results of oversight activity to be reflected in legislation--for example, creating special expedited procedures for the assembly to reject draft regulations that the government has transmitted or to repeal regulations already in effect.

Seventh, still another is to create circumstances (such as the use of expiring authorizations and sunset laws in the United States) that require the assembly to respond with timely legislative action, presumably based on oversight findings.

Eighth, and most important, even if there are one or more special oversight committees, effective and recurring oversight is most likely to be conducted by a series of permanent, well-staffed, and specialized committees.⁷¹ Effective oversight requires time and knowledge. Only a durable system of subject-matter committees can develop the membership continuity and institutional memory that such oversight requires.

Finally, it is unwise to think of oversight as something different from legislation. To conceive of oversight work as something an assembly does in addition to, but separate from, its legislative work is to create a false dichotomy. While an assembly's oversight function and its legislative function may be separable analytically, they are inseparable in practice. It is more useful and accurate to think of oversight and legislative work as one building upon the other. Legislation requires oversight that identifies the need for remedial legislation, which in turn becomes the subject of renewed oversight and then additional legislation, and so on. Legislation-oversight-legislation-oversight-legislation.

One of the characteristics of the legislative process, in the United States at least, is that laws rarely dispose of major policy problems once and for all. A law is enacted that may be partially effective but not entirely so, or the law may have unintended consequences that require new and different legislative responses. As the deficiencies and disadvantages of existing laws are revealed through the oversight process (and in

⁷¹There are arguments both for and against creating a system of committees that coincides with the organization of government ministries. Parallelism in structure can focus the attention of each committee; in the longer term, however, it also can lead to relations developing between committees and ministries that are too familiar and mutually supportive.

other ways), demands build for compensatory legislation. Oversight of the way in which that new legislation is implemented, and the effects it has, may well provoke another round of legislative action. The underlying policy problem is likely to recur, though perhaps in somewhat different form. Effective oversight is not something distinct from the legislative process; they are so complementary as to be inseparable. One inspires, even requires, the other. From this perspective, institutional changes that enhance an assembly's role in making legislative decisions are very likely, sooner or later, to be reflected as well in the assembly's capacity and commitment to conduct oversight.

**INCENTIVES AND OPPORTUNITIES FOR OVERSIGHT:
COMPARATIVE IMPLICATIONS OF THE
AMERICAN CONGRESSIONAL EXPERIENCE**

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