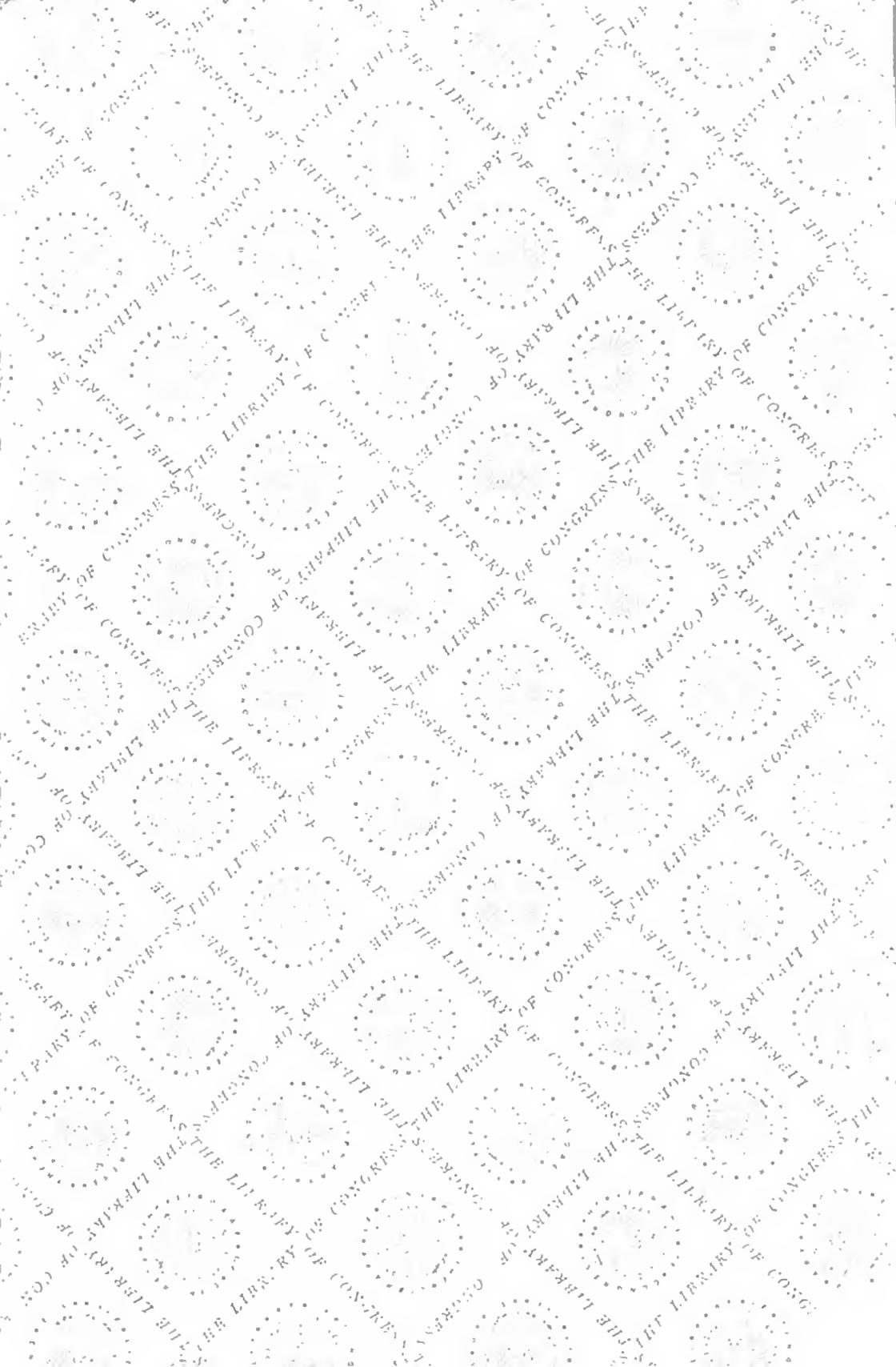


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United States. Congress House. Committee on the  
"Judiciary. Subcommittee on Crime.

# BUREAUCRATIC ACCOUNTABILITY ACT OF 1974

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON CRIME  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
NINETY-THIRD CONGRESS

SECOND SESSION

ON

**H.R. 6667**

BUREAUCRATIC ACCOUNTABILITY ACT OF 1974

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MARCH 27, 1974

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Serial No. 93-51



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## CONTENTS

	Page
Text of H.R. 6667.....	2
Testimony of—	
Dellums, Hon. Ronald V., a Representative in Congress from the State of California.....	12
Prepared statement.....	41
Goldbloom, Irwin, Acting Deputy Assistant Attorney General, Civil Division, Department of Justice.....	68
Prepared statement.....	72
Scalia, Antonin, Chairman, Administrative Conference of the United States, accompanied by Richard Berg, executive secretary.....	42
Prepared statement.....	55
Additional material—	
American Hospital Association, prepared statement.....	77
Bromberg, Michael D., director, Federation of American Hospitals, letter dated April 16, 1974, to Hon. John Conyers, Jr.....	77
“Congressional Oversight and Bureaucratic Accountability,” Congressional Record, March 21, 1974.....	15
H.R. 15072.....	16
H.R. 13799.....	20
H.R. 13798.....	27
Cooper, Dr. John A. D., Association of American Medical Colleges, letter dated April 18, 1974, to Hon. John Conyers, Jr.....	83
Kennedy, Hon. Edward, U.S. Senator from the State of Massachusetts, letter dated March 27, 1974, to Hon. John Conyers, Jr.....	82
McWhorter, John A., chairman, American Bar Association, letter dated April 10, 1973, to Hon. Peter W. Rodino, Jr.....	79



# BUREAUCRATIC ACCOUNTABILITY ACT OF 1974

WEDNESDAY, MARCH 27, 1974

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CRIME,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. [chairman of the subcommittee], presiding.

Present: Representatives Conyers, Rangel, and Cohen.

Also present: Maurice A. Barboza, counsel; Constantine J. Gekas, associate counsel; and Dorothy C. Wadley, assistant to counsel.

Mr. CONYERS. The subcommittee will come to order.

Today we are going to begin the first hearing on the Bureaucratic Accountability Act of 1973. Three similar bills are under consideration. This legislation was originally and introduced by the distinguished gentleman from California, Ronald Dellums, and sponsored by the chairman of the Judiciary Committee, Representative Rodino, and others.

Essentially, the Bureaucratic Accountability Act of 1973 would amend title V of the United States Code in a number of ways. Title I of the bill provides an avenue for interested citizens to participate in the process by which Federal agency policy is formulated and, to quote Senator Kennedy—who was scheduled to be a witness here this morning—"The opportunity accorded persons affected by agency rules to present their views enhances the quality of decisionmaking by Government officials and represents an element of our system of participatory democracy."

Title II deals with the question of the payment of expenses and attorney fees for the representations of persons who are unable to pay the cost of agency proceedings. Title III would eliminate the defense of sovereign immunity in some kinds of suits, and title IV would provide for the enforcement of standards in Federal grant-in-aid programs.

As one who joined Congressman Dellums, who under the aegis of the Congressional Black Caucus held a series of hearings on the subject of "Governmental Lawlessness," I am very pleased that developments since those hearings have revealed not only the nature and the extent of governmental lawlessness, but what might be done in an attempt to turn that situation around. I think this legislation quite appropriately represents a step in that direction.

[H.R. 6667 follows:]

98<sup>D</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 6667

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 5, 1973

Mr. RODINO introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To amend the administrative procedure provisions of title 5 of the United States Code to make the rulemaking provisions applicable to matters relating to public property, loans, grants, benefits, and contracts; to provide for payment of expenses incurred in connection with proceedings before agencies; to provide for waiver of sovereign immunity; to provide for the enforcement of standards in grant programs; and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "Bureaucratic Account-
- 4 ability Act of 1973".

1 TITLE I—RULEMAKING INVOLVING PUBLIC  
2 PROPERTY, LOANS, GRANTS, BENEFITS, OR  
3 CONTRACTS

4 SEC. 101. Section 551 of title 5 of the United States Code  
5 is amended by inserting after “agency and includes” in para-  
6 graph (4) the following: “matters relating to public prop-  
7 erty, loans, grants, benefits, or contracts, and”.

8 SEC. 102. Section 553 of such title 5 is amended—

9 (1) by striking out “or to public property, loans,  
10 grants, benefits, or contracts” in subsection (a) (2),

11 (2) by striking out everything in subsection (b)  
12 after “does not apply—” and inserting in lieu thereof  
13 the following: “does not apply (except in the case of  
14 rulemaking undertaken in connection with grants-in-aid)  
15 when the agency for good cause finds (and incorporates  
16 the finding and a brief statement of reasons therefor in  
17 the rules issued) that notice and public procedure thereon  
18 are impracticable, unnecessary, or contrary to the public  
19 interest”, and

20 (3) by adding after and below paragraph (3) of  
21 subsection (d) the following:

22 “The exception authorized by the preceding sentence to  
23 the period for making publication or service shall not apply  
24 in the case of publication or service of rules made in connec-  
25 tion with grants-in-aid.”

1 TITLE II—PAYMENT OF EXPENSES INCURRED  
2 BEFORE AGENCIES

3 SEC. 201. Chapter 5 of title 5 of the United States Code  
4 is amended—

5 (1) by inserting after section 559 the following  
6 new section:

7 “§ 560. Payment of expenses and participation in forma  
8 pauperis

9 “(a) Each agency shall pay to any interested person  
10 who participates in a proceeding before the agency, gov-  
11 erned by section 553, 554, 556, or 557 of this title, and who  
12 is determined by objective standards to be unable to pay (1)  
13 reasonable attorney fees for representation of such person in  
14 the proceeding, and (2) other reasonable costs, including fees  
15 for witnesses, if such person made a discernible contribution  
16 to promoting agency implementation of a purpose of the Act  
17 of Congress pursuant to which such proceeding is conducted.

18 “(b) Each agency shall adopt rules that enable inter-  
19 ested persons to participate in proceedings governed by sec-  
20 tion 553, 554, 556, or 557 of this title when such persons  
21 are unable to pay the costs of such participation, including  
22 the cost of filing and reproducing materials.”

23 (2) by inserting after the item relating to section  
24 559 in the analysis of chapter 5 of title 5 of the United  
25 States Code the following:

“560. Payment of expenses.”

1           **TITLE III—SOVEREIGN IMMUNITY**

2           **SEC. 301.** Chapter 7 of title 5 of the United States Code  
3 is amended—

4           (1) by inserting after section 706 the following new  
5 section:

6           **“§ 707. Actions against any officer or employee of the**  
7           **United States**

8           “An action in a court of the United States seeking relief  
9 other than money damages and stating a claim that an agency  
10 or an officer or employee thereof acted or failed to act in  
11 an official capacity or under color of legal authority shall  
12 not be dismissed nor relief therein be denied on the ground  
13 that it is against the United States or that the United States  
14 is an indispensable party. The United States may be named  
15 as a defendant in any such action, and a judgment or decree  
16 may be entered against the United States. Nothing herein  
17 (1) affects other limitations on judicial review or the power  
18 or duty of the court to dismiss any action or deny relief on  
19 any other appropriate legal or equitable ground; or (2)  
20 confers authority to grant relief if any other statute granting  
21 consent to suit for money damages forbids the relief which  
22 is sought.”, and

23           (2) by inserting after the item relating to section  
24 706 in the analysis of chapter 7 of title 5 of the United  
25 States Code the following:

**“707. Actions against any officer or employee of the United States.”.**



1       “(2) Each agency which is authorized to make and  
2 administer grants-in-aid shall also require each grantee as a  
3 condition for the receipt or renewal of a grant-in-aid after  
4 the date of enactment of this Act, to maintain a complaint  
5 procedure in accordance with subsection (d) for the receipt,  
6 consideration, and disposition of complaints of the type set  
7 forth in subsection (a) (1).

8       “(b) Each agency shall receive, consider, and dispose  
9 of any complaint submitted to it (in accordance with pro-  
10 cedures adopted by each agency) if the agency determines  
11 that if such failure to comply were true it (A) would have  
12 adversely affected or have a probable imminent adverse  
13 effect upon a substantial number of persons on behalf of  
14 whom the complaint was submitted, or (B) would have  
15 substantially impaired a purpose of the Act of Congress pur-  
16 suant to which the grant-in-aid is administered. Each agency  
17 shall by regulation establish what constitutes a ‘substantial  
18 number of persons’ for any grant, which number shall not  
19 be so high so as to discourage complaints under this sub-  
20 section. If the agency considers that the issues raised by the  
21 complaint are of particular significance in the administra-  
22 tion of a grant-in-aid, it may receive and dispose of the com-  
23 plaint in accordance with section 556 of this title, in lieu  
24 of the procedure under subsection (d).

1       “(c) (1) If the agency, after receiving and disposing of  
2 any complaint under subsection (b), decides that the grantee  
3 failed to comply with the standard with respect to which the  
4 complaint was submitted, it shall, in addition to any other  
5 sanction authorized by law, request the Attorney General  
6 to petition any district court of the United States having juris-  
7 diction of the geographic area in which the grantee is located  
8 to enjoin the grantee from violating such standard. If the At-  
9 torney General does not petition for such injunction within  
10 sixty days of such request, the agency shall order the grantee  
11 to administer the program in compliance with such stand-  
12 ard. If, in the opinion of the agency, the grantee fails to  
13 comply with such order within sixty days after having re-  
14 ceived such order, the agency shall determine another person  
15 who qualifies as a grantee and it shall transfer the grant to  
16 such new grantee; but any such transfer shall not cause a ter-  
17 mination in the grant’s administration. The agency may also  
18 require reimbursement from a grantee for grant funds ex-  
19 pended by the grantee in violation of such standard.

20       “(2) If the agency decides not to receive and dispose of  
21 a complaint under subsection (b), it shall submit the com-  
22 plaint to the grantee for consideration and disposition under  
23 the grantee’s complaint procedure established pursuant to  
24 subsection (a) (2). Any complaint so submitted to the

1 grantee shall not include any agency decision or recommen-  
2 dation on the merits of such complaint.

3 “(3) If the agency either decides not to receive, con-  
4 sider, and dispose of a complaint or disposes of a complaint  
5 by deciding that the grantee complied with the standard  
6 with respect to which the complaint was submitted, it shall  
7 within sixty days from its receipt of the complaint, notify  
8 the person who submitted the complaint, giving its reasons  
9 for not accepting the complaint or for deciding that the  
10 grantee complied with the standard.

11 “(4) If a grantee disposes of a complaint by deciding  
12 that it complied with the standard with respect to which  
13 the complaint was submitted, it shall within sixty days from  
14 its receipt of the complaint, notify the person who submitted  
15 the complaint, giving its reasons for deciding it complied  
16 with the standard.

17 “(5) If the grantee, after receiving, considering, and  
18 disposing of any complaint, decides that it failed to comply  
19 with the standard with respect to which the complaint was  
20 brought, it shall conform to such standard and shall provide  
21 retroactive benefits or services (or their cash equivalent)  
22 from the date the grantee received the complaint until the  
23 date of the grantee’s decision, as compensation to the com-  
24 plainant for harm caused by the grantee’s violation of such  
25 standard.

1       “(6) A person shall not submit a complaint to a grantee  
2 if the agency has decided to receive and dispose of the same  
3 complaint or if the agency has decided that the grantee failed  
4 to comply with the standard with respect to which such  
5 complaint was submitted to the agency.

6       “(d) The complaint procedure to be followed by agen-  
7 cies and grantees shall provide at least the following: (1)  
8 The complaining person may present written material in  
9 support of his complaint, (2) the complaining person may  
10 make an oral presentation in support of his complaint (if  
11 not represented by counsel) at a time and place convenient  
12 both to the grantee and the complaining person, (3) the  
13 complaining person may examine relevant grantee materials  
14 concerning his complaint prior to the complaining person’s  
15 presentations under clauses (1) and (2) of this subsection,  
16 (4) the complaining person may present witnesses and  
17 cross-examine any hostile witness presented by the agency  
18 or grantee, and (5) the grantee may submit written material  
19 in response to material presented by a complaining person  
20 and may make an oral presentation if the complaining person  
21 has made one.”, and

22       “(e) Each grantee shall make available to persons  
23 who are or may be affected by the operation of a grant-in-  
24 aid (1) all materials governing program policy and set-  
25 ting program standards (including regulations, instructions,

1 handbooks, circulars, and manuals), and (2) all materials  
2 relating to the application for such grant-in-aid (including  
3 plans, applications, accompanying reports, other data, and  
4 amendments thereto). Such materials shall be made avail-  
5 able upon request to such persons with minimum reproduc-  
6 tion charges and shall be made available without charge for  
7 access by the public at all agency offices and public or  
8 university libraries. The materials in subsection (2) shall  
9 be made available at the time each grantee makes applica-  
10 tion for a grant-in-aid.”

11 (2) by adding after section 551(13) the following  
12 new definitions:

13 “(14) ‘grants-in-aid’ means programs pursuant to  
14 which the Federal Government transfers funds to State  
15 and local governments and public and private nonprofit  
16 organizations to provide general public services or  
17 finance programs for special groups;

18 “(15) ‘grantee’ means a State or local government  
19 or public or private nonprofit organization that has ap-  
20 plied for or received a grant-in-aid”; and

21 (3) by inserting after the item relating to section 560  
22 in the analysis of chapter 7 of title 5 of the United States  
23 Code the following:

“561. Enforcement of standards for grants.”

Mr. CONYERS. I am very pleased to welcome the author of the bill, the chairman of the hearings held by the Congressional Black Caucus that led to this legislation, a distinguished Member of this Congress and a very personal friend of mine, Congressman Dellums of California.

We are going to receive your prepared statement and ask you to begin in your own way to relate to us the background, the development, and the legislative implications of this bill.

**TESTIMONY OF HON. RONALD V. DELLUMS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, ACCOMPANIED BY ROBERT B. BRAUER, ADMINISTRATOR, AND LARS LIH, LEGISLATIVE AIDE**

Mr. DELLUMS. Thank you.

Mr. Chairman, members of the subcommittee, I am grateful for the opportunity to appear before you as you begin hearings on the Bureaucratic Accountability Act.

We meet today in an atmosphere of crisis, because the challenge of governmental lawlessness has reached the very highest levels. Yet this is a greater problem than just one individual or group of individuals. The Federal Government has grown outside the reach of law—outside the reach of general regulation, passed by the representatives of the people, upon which the people may rely.

Mr. Chairman, I strongly believe that it is no exaggeration to say that governmental lawlessness is rapidly becoming the system of government in the United States. We in Congress have no greater task than to reverse this trend.

In the summer of 1972, when Watergate was a cloud no bigger than a man's fist, the Congressional Black Caucus held a series of hearings on the general topic of governmental lawlessness, the widespread bureaucratic practice of distorting, ignoring, and subverting the congressional mandates contained in legislation. These hearings uncovered a pattern of abuse so extensive as to constitute the gravest threat to meaningful self-government.

At this time, Mr. Chairman, with your permission and the permission of the members of the subcommittee, I would like for the record to give you the testimony of the governmental lawlessness hearings.

Mr. CONYERS. Certainly.

[The document referred to has been retained in committee files.]

Mr. DELLUMS. Thank you.

Governmental lawlessness takes many forms:

Regulations are not issued for enacted programs;

Regulations issued distort and pervert the intent of Congress;

Administration of programs ignores both the intention of the legislation and the rules and regulations which have been issued;

Even after Congress carries out its oversight function and an agency is told to change a program or to enforce it, the agency does not comply—and Congress continues to fund the program as if nothing was wrong; and, finally,

Congress initiates investigation into a problem area, documents the issues, but then does not convert the issues into action.

To show how governmental lawlessness affects the so-called average person the following profile was created as a result of our hearings. It

is drawn around a 28-year-old black, blue collar worker who lives in one of our major cities. He is married, with two children, and works as a GS-5 postal clerk. Here is how governmental lawlessness affects his life:

He is being evicted from his home—for which he was not able to get an FHA mortgage when he bought it because the neighborhood was redlined—by “Project Rehab” which was set up to build houses in the inner city.

His neighborhood is being split by a new freeway which is displacing 10,000 families, and because of which there is no available housing for him to move into after he has been forced out of his home. He found out he could not get relocation assistance, either.

His kids go to a school which was resegregated by a Justice Department ruling. There is an average of 35 children per classroom, but the principal's office has just been redecorated and there are security guards in the hallways, both paid for with title I ESEA funds.

One of his children has been suffering from general weakness, and there is suspicion of lead paint poisoning, but the kids have not had a full medical checkup of that nature.

His mother died within the last year after she came down ill, but she could not get into the charity hospital and the new federally funded hospital never had room.

He, himself, was educated at a black land grant college which was extremely overcrowded and where the facilities were antiquated.

His 20-year-old brother has been in three different manpower training courses and still does not have a job.

His cousin who lost his job some months ago has been forced to take a janitorial job paying under the minimum wage and in doing so lost his welfare benefits.

While his cousin was on welfare, he helped feed his family with food stamps but recently the price for the stamps went up, so that the family is having a hard time getting any sort of adequate nutrition.

He, himself, has been a Government clerk for 6 years, and has had but one major promotion. He has had a complaint about his supervisor filed for 7 months without any action at all being taken either by his agency or by the Civil Service Commission.

He and his wife both are registered to vote and if one looks at the voter registration statistics of his city, it is obvious that blacks constitute a majority, but because of gerrymandering, all major officeholders are white, suburban, and upper middle class.

Despite all this, he is still not what might be termed a militant revolutionary. However, he is against the war and wrote a letter to the local paper saying so. Now his name is on an FBI master list of black troublemakers.

And, while his car has been vandalized twice because there is no adequate street lighting on his block, at night he can look up and see the patrolling police helicopters with super TV cameras purchased with LEAA funds.

I realize that this is a dramatic example but given the nature of the hearings, we came up with what we thought would be an average set of problems for a person confronting Federal bureaucracy.

In response to what we learned during those hearings and other congressional investigations of governmental lawlessness, Senator Kennedy and I, along with 26 of my colleagues in the House, intro-

duced the Bureaucratic Accountability Act of 1973. This legislation proposes concrete steps toward strengthening responsible and reliable government through amendments of the Administrative Procedures Act.

I strongly feel that among the basic causes of "governmental anarchy" is a lack of mechanisms which would allow citizens some means of protection against officials in their concrete, day-to-day contact with them. These mechanisms cannot guarantee that Congress will pass wise and democratic substantive legislation, but they allow us to hope when such legislation is indeed passed, citizens may rely on seeing it actually carried out. And this hope is the basis of active democratic reform and confidence in the capabilities of government.

The aim of the Bureaucratic Accountability Act is to confine the bureaucracy to its legal purposes. We intend to do this by the democratic method of increasing its responsibility, its answerability, both to citizens and to the intent of Congress. Specifically, the bill strengthens the ability of citizens to enforce their rights as established by Congress—against either action or inaction by the bureaucracy. Notice-and-comment rulemaking requirements are extended, costs of participation are reduced, bars to judicial review are removed, and procedures set up to enforce State and local compliance to Federal standards in administering grant-in-aid programs.

All of these reforms are based on long-felt needs and careful suggestions from the many groups involved in working in administrative law. I think the overall result will be more effective government, greater cooperation between citizens and officials, and greater congressional effectiveness.

I would like to emphasize this last point. These administrative reforms are a natural extension of recent proposals in Congress to reform our internal procedures. In both these ways, we would strengthen the status of objective legislation, arrived at by democratic means, as against the subjective political and bureaucratic desires of an uncontrolled administration.

The basic aim of the bill is to insure that a citizen may receive an accurate idea of his rights and of the procedures of the bureaucracy by reading the statute books and published material of the bureaucracy. I think this will mean an important extension of responsible participation in the work of self-government.

The basic logic of the bill can be better brought out when it is understood that it is only one-half of a two-part approach. Since the goal is to increase the probability that congressional intent will actually be carried out, it is just as necessary to strengthen congressional oversight abilities as to increase the ability of the citizen to deal with the bureaucracy from his end. I have therefore prepared new additional legislation to deal with this side of the problem.

These bills include, first, the Continuing Congressional Oversight Act. This provides for regular evaluation of agencies by GAO, with a view not only to efficiency but conformity to congressional intent. I will also introduce the Congressional Access to Information Act, which deals with the problem of executive privilege. And finally, more specifically, the Central Intelligence Agency Disclosure Act which takes up the specific problem of CIA secrecy. I would like to submit a description of these bills for the record.

Mr. CONYERS. By all means. We will receive them into the record.  
 Mr. DELLUMS. Thank you.  
 [The description and bills referred to follow:]

[From the Congressional Record, Mar. 21, 1974]

#### CONGRESSIONAL OVERSIGHT AND BUREAUCRATIC ACCOUNTABILITY

Mr. DELLUMS. Mr. Speaker, last spring I introduced the Bureaucratic Accountability Act. The aim of this bill was to give the citizen the necessary tools to see that the bureaucracy followed the law and the congressional intent was followed.

Congress itself has an interest in making sure that the legislation it passes actually has an effect on what the bureaucracy does. This is the indispensable first step in reestablishing the constitutional role of Congress. Not only the citizen but also Congress needs new tools in relation to the Federal bureaucracy. For this reason, I am introducing a set of three bills designed to extend the powers of congressional oversight: this objective is to be pursued by strengthening the investigatory powers of the GAO, by defining the situations in which the President may properly withhold information from the Congress, and by circumscribing the capability of the CIA to escape congressional scrutiny.

The first bill is the Continuing Congressional Oversight Act. As the name suggests, its purpose is to regularize congressional investigation of Government agencies by providing for continuing evaluation of agencies by the GAO. The act provides that the GAO will make evaluations on the basis of the usual criteria used in the past and of one added consideration: whether the expenditure of Government funds conforms to congressional intent. In order to regularize GAO evaluations, which are now carried out only at congressional request, the act directs the Comptroller General to report periodically on each department and establishment of the Government, with an eye to both efficiency and conformity to congressional intent. Because of the magnitude of such a task, the bill directs that such evaluations be made once every 4 years for each department or establishment. The findings are to be made public.

In cases where the head of the department or establishment considers that investigation by the GAO will jeopardize the national interest, he or she may, according to the provisions of the act, so notify the Comptroller General and the appropriate congressional committees, and investigation may then be carried out by those committees. The bill thus arrives at a balance between the interests of congressional oversight and those of national security.

The second bill is the Congressional Access to Information Act. The act requires any head of a department or establishment to "appear and give complete testimony, or to provide complete information pertinent to matters of legislative concern \* \* \*" within 30 days of a subpoena or request for such information by any House or committee of Congress, and to certify the completeness of such testimony and information. A failure, substantive or procedural, to comply with these requirements, would cause the Comptroller General to take all measures necessary to cut off operational funds for the department or establishment in question. Under the act, the President, and only the President may direct a refusal of the information requested when such information concerns advice or policy recommendations to the President from members of the White House staff. Such a refusal, according to the provisions of the act, is to be made by the President in a signed written deposition specifying the areas concerning which information is to be denied. The act further assigns to any House or committee of Congress, as appropriate, standing to bring suit in the district court of the District of Columbia for the purpose of compelling disclosure of the contested information when the House or committee involved feels that it cannot accept the refusal of the information in question. The act thus defines the situations in which the President may refuse to provide requested information to Congress, and sets up a procedure by which contested claims can be judicially resolved.

The third bill is the Central Intelligence Agency Disclosure Act. In amending different sections of the United States Code which relate to the disclosure of information by the CIA, the act calls for the provision to the appropriate congressional committees of kinds of information which may not be denied to the Congress on the ground of national security. The intent of the act is to prevent the public disclosure of sensitive information while assuring its accessibility to the appropriate congressional committees.

93<sup>D</sup> CONGRESS  
2<sup>D</sup> SESSION

# H. R. 15072

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## IN THE HOUSE OF REPRESENTATIVES

MAY 29, 1974

Mr. DELLUMS (for himself, Ms. ABZUO, Mr. BADILLO, Mr. BROWN of California, Mrs. BURKE of California, Mrs. COLLINS of Illinois, Mr. CONTE, Mr. CONYERS, Mr. DERWINSKI, Mr. DIGGS, Ms. HOLTZMAN, Mr. LONG of Maryland, Mr. MANN, Mr. MURTHA, Mr. PATTEN, Mr. PODELL, Mr. RIEGLE, Mr. STARK, Mr. STOKES, Mr. TIERNAN, and Mr. EDWARDS of California) introduced the following bill; which was referred to the Committee on Government Operations

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## A BILL

To amend the Budget and Accounting Act of 1921 to provide for investigations and expenditure analyses of the use of public funds.

1        *Be it enacted by the Senate and House of Representa-*  
2        *tives of the United States of America in Congress assembled,*  
3        That this Act may be cited as the "Continuing Congres-  
4        sional Oversight Act".

5        SEC. 2. Section 312 (a) of the Budget and Accounting  
6        Act, 1921 (31 U.S.C. 53), is amended to read as follows:

7        "(a) The Comptroller General shall conduct a continu-  
8        ing investigation, at the seat of government or elsewhere,  
9        of all matters relating to the receipt, disbursement, and appli-  
10       cation of public funds, and shall make to the President when

1 requested by him or her and to Congress at the beginning of  
2 each regular session, a report in writing of the work of the  
3 General Accounting Office containing findings and recommen-  
4 dations concerning the legislation deemed necessary to facili-  
5 tate the prompt and accurate rendition and settlement of  
6 accounts and to assure that the expenditure of funds by de-  
7 partments or establishments for any program or activity  
8 conforms to the congressional intent in authorizing such  
9 program or activity and concerning such other matters relat-  
10 ing to the receipt, disbursement, and application of public  
11 funds as the Comptroller General may think advisable. In  
12 such regular report, or in special reports at any time when  
13 Congress is in session, the Comptroller General shall make  
14 recommendations looking to greater economy or efficiency in  
15 public expenditures. Any report made under this section  
16 shall be published in the Federal Register within thirty days  
17 of its submission to Congress or the President."

18 **SEC. 3.** Section 206 of the Legislative Reorganization  
19 Act of 1946 (31 U.S.C. 60) is amended to read as follows:

20 **"EXPENDITURE ANALYSIS BY COMPTROLLER GENERAL**

21 **"SEC. 206. (a)** The Comptroller General is authorized  
22 and directed to make a continuing expenditure analysis of  
23 each department or establishment in the executive branch of  
24 the Government (including any Government corporation)  
25 which will enable Congress to determine whether—

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1       “(1) public funds have been economically and  
2       efficiently administered and expended;

3       “(2) programs or activities in operation or being  
4       organized in the departments or establishments conform  
5       to the congressional intent in authorizing such programs  
6       or activities;

7       “(3) the policies and approaches in administering  
8       such programs or activities have been brought or are  
9       being brought into conformity with the congressional  
10      intent in authorizing such programs or activities pursu-  
11      ant to prior recommendations and reports made by the  
12      Comptroller General; and

13      “(4) additional legislation is necessary to insure  
14      that public funds are efficiently and economically ad-  
15      ministered and expended, and public funds are used with  
16      respect to programs or activities in accordance with  
17      congressional authorization.

18      “(b) Reports on such analyses of each department or  
19      establishment including any recommendations for legisla-  
20      tion the Comptroller General may deem necessary relating  
21      to efficient and responsible use of public funds shall be sub-  
22      mitted to the Congress in such a manner that a report on  
23      every department and establishment is submitted to the  
24      Congress every four years and, in addition, interim reports  
25      shall be made on any regular basis and in such manner as

1 the Comptroller General may determine to be proper. Such  
2 reports shall be published in the Federal Register within  
3 thirty days of their submission to Congress.

4 “(c) (1) Any head of a department or establishment  
5 which is subject to an expenditure analysis authorized by  
6 this section may give written notification to the Comptroller  
7 General and to the chairpersons of the congressional commit-  
8 tees having jurisdiction over the affairs of that part of the  
9 department or establishment which is subject to the expend-  
10 iture analysis advising them that in the opinion of the  
11 head of the department or establishment such analysis or as-  
12 pects of such analysis would jeopardize the national security.  
13 Upon such notification, if any such committee determines  
14 that the expenditure analysis should be carried out by a  
15 congressional committee instead of the Comptroller General,  
16 such committee shall proceed to conduct such analysis or as-  
17 pects of such analysis.

18 “(2) Any such analysis carried out by a committee shall  
19 be a complete expenditure analysis as described in subsec-  
20 tion (a). Upon completing such analysis the committee shall  
21 make an unclassified report to the Congress including any  
22 recommendations for legislation the committee deems necess-  
23 sary relating to efficient and responsible use of public funds  
24 by the department or establishment subject to the expendi-  
25 ture analysis.”

93<sup>d</sup> CONGRESS  
2<sup>d</sup> SESSION

# H. R. 13799

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## IN THE HOUSE OF REPRESENTATIVES

MARCH 27, 1974

Mr. DELLUMS introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To provide for the receipt of testimony and information from executive agencies and bodies.

1        *Be it enacted by the Senate and House of Representa-*  
2        *tives of the United States of America in Congress assembled,*  
3        That this Act may be cited as the "Congressional Access to  
4        Information Act".

5        SEC. 2. For purposes of this Act—

6                (1) the term "department and establishment"  
7        means any executive department, independent commis-  
8        sion, board, bureau, office, agency, or other establishment  
9        of the Government, including any independent regulatory  
10       commission or board and the municipal government of

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1 the District of Columbia, but does not include the legis-  
2 lative or judicial branches of the Government;

3 (2) the term "information" includes any knowl-  
4 edge or data reasonably available (to the party receiv-  
5 ing the request for information) and includes documents,  
6 papers, films, tapes, and transcripts; and

7 (3) the term "policy" means—

8 (A) the exchange of views and discussion dur-  
9 ing the development of goals and the determina-  
10 tion of possible courses of action;

11 (B) the development of plans and approaches  
12 to present and future decisions; and

13 (C) the offering or receipt of recommenda-  
14 tions concerning clauses (A) and (B);

15 but does not include the implementation of already  
16 developed goals, courses of action, or decisions.

17 SEC. 3. (a) Either House of Congress, any joint com-  
18 mittee of Congress, any committee of either House, or any  
19 subcommittee thereof, or the Comptroller General at the  
20 request thereof, may subpoena or request any head of a  
21 department or establishment of the United States or any  
22 officer or employee of the United States to appear and give  
23 complete testimony, or to provide complete information  
24 pertinent to matters of legislative concern, or to pending  
25 legislation, or with respect to any congressionally authorized  
26 programs.

1       (b) A subpoena issued by the Comptroller General to  
2 any department or establishment head or officer or employee  
3 at the request of either House of Congress, any joint com-  
4 mittee of Congress, any committee of either House, or any  
5 subcommittee thereof shall be considered to have been issued  
6 by such House, committee, or subcommittee, and a refusal or  
7 failure to provide information or testimony requested pursu-  
8 ant to section 3 of this Act shall be considered a refusal or  
9 failure to provide information or testimony to that House,  
10 committee, or subcommittee. However, this subsection shall  
11 not be construed as authorizing the Comptroller General to  
12 bring a civil action as authorized in section 5 of this Act.

13       (c) (1) Such department or establishment head or  
14 officer or employee shall provide the requested testimony  
15 or information within thirty days of the receipt of the  
16 request, unless otherwise specified by the party making the  
17 request.

18       (2) Such department or establishment head or officer  
19 or employer shall affirm in writing that the testimony or  
20 information provided in response to the request is complete  
21 to the best of his or her knowledge.

22       (d) (1) If the department or establishment head or offi-  
23 cer or employee refuses to testify or provide information, fails  
24 to provide complete testimony or information within the spec-  
25 ified time period, or fails to certify as to its completeness,

1 the Comptroller General shall be notified by the congressional  
2 body or entity which made the request.

3 (2) Upon such notification, unless the information or  
4 testimony is refused in compliance with section 4 (a) of this  
5 Act, the Comptroller General shall take all necessary  
6 measures to withhold all Federal funds for the operation of  
7 the department or establishment or officer or employee in-  
8 volved from the date specified under subsection (c) (1)  
9 until such time as the department or establishment head or  
10 officer or employee complies with the provisions of this  
11 section.

12 SEC. 4. (a) (1) The President may refuse to allow any  
13 information or testimony requested under section 3 to be  
14 provided by the department or establishment head or officer  
15 or employee if such information or testimony relates to—

16 (A) advice made to the President by an individual  
17 who is not an employee of a department or establish-  
18 ment, or an individual who is not subject to confirma-  
19 tion by either House or both Houses of Congress; or

20 (B) information, recommendations, and discussions  
21 relating to the formulation of policy between the Presi-  
22 dent and any individual who is not an employee of a  
23 department or establishment, or an individual who is not  
24 subject to confirmation by either House or both Houses  
25 of Congress.

1           (2) Any such refusal shall be made in writing, signed by  
2 the President, and directed to the Comptroller General, the  
3 official of Congress who made the request, or the chairperson  
4 of the joint committee, committee, or subcommittee thereof  
5 who made the request.

6           (3) Any such refusal shall state the specific topics of  
7 testimony or specific items of information which are refused  
8 and shall set forth the basis for the refusal.

9           (b) If the refusal is not accepted by the requesting  
10 House, committee, or subcommittee as complying with sub-  
11 section (a), it shall proceed under section 5 of this Act.

12         SEC. 5. (a) Either House of Congress, any joint com-  
13 mittee of Congress, any committee of either House, or any  
14 subcommittee thereof may bring a civil action in its own  
15 name pursuant to section 1364 of title 28, United States  
16 Code, in the District Court for the District of Columbia to  
17 compel the President of the United States to provide com-  
18 plete testimony or information pursuant to section 3 of this  
19 Act, if the President's refusal to provide complete testimony  
20 or information does not comply with section 4 (a) of this Act.

21           (b) If the district court finds that such refusal does  
22 not comply with section 4 (a) of this Act, it shall order  
23 the President to comply with the request made pursuant to  
24 section 3 of this Act. If the President does not comply with

1 the court's order, the court may hold the President in con-  
2 tempt, and order appropriate penalties.

3       **SEC. 6. (a)** Chapter 85 of title 28, United States Code,  
4 is amended by adding at the end thereof the following new  
5 section:

6       **"§ 1364. Action to compel disclosure by the President**

7       “(a) The District Court for the District of Columbia  
8 shall have original and exclusive jurisdiction, notwithstanding  
9 the amount in controversy, of any civil action brought by  
10 either House of Congress, a joint committee of Congress, a  
11 committee of either House, or any subcommittee thereof  
12 pursuant to section 5 of the Congressional Access to Infor-  
13 mation Act against the President to determine whether a  
14 refusal of the President to provide information or testimony  
15 comes within the provisions of section 4 (a) of such Act.

16       “(b) Any such action shall be heard and determined  
17 by a district court of three judges under section 2284 of  
18 this title.

19       “(c) Any civil action brought under this section shall,  
20 except as to proceedings the district court considers of  
21 greater importancce, take precedence on the docket over all  
22 other proceedings, and be assigned for hearing and trial at  
23 the earliest practicable date and be expedited in every way.”.

1           (b) The table of sections of chapter 85 of title 28,  
2 United States Code, is amended by inserting immediately  
3 after the item relating to section 1363 the following:

“1364. Action to compel disclosure by the President.”.

93<sup>d</sup> CONGRESS  
2<sup>d</sup> SESSION

# H. R. 13798

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## IN THE HOUSE OF REPRESENTATIVES

MARCH 27, 1974

Mr. DELLUMS introduced the following bill; which was referred to the Committee on Armed Services

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## A BILL

To provide for disclosure of information by executive departments to committees of Congress.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That this Act may be cited as the "Central Intelligence  
4       Agency Disclosure Act".

5       SEC. 2. Section 2953 of title 5, United States Code, is  
6       amended by inserting the following new subsection:

7       “(c) Notwithstanding subsection (b) or any other pro-  
8       vision of law, the Central Intelligence Agency or a Govern-  
9       ment controlled corporation shall provide a report as described  
10      in subsection (a) upon the request of the chairperson of a  
11      congressional committee or subcommittee having jurisdic-

1 tion over matters relating to such Agency or corporation.”.

2       SEC. 3. Section 4 (a) of the Act of August 28, 1958,  
3 entitled “An Act to authorize the making, amendment, and  
4 modification of contracts to facilitate the national defense”  
5 (50 U.S.C. 1434), is amended by inserting at the end  
6 thereof the following: “Notwithstanding any other law, any  
7 such information omitted from a report shall be provided upon  
8 request to the chairperson of a congressional committee or  
9 subcommittee when such information relates to any matter  
10 within the jurisdiction of such committee or subcommittee.  
11 Such information shall not be published pursuant to subsec-  
12 tion (b).”.

13       SEC. 4. Section 7 of the Central Intelligence Agency  
14 Act of 1949 is amended by inserting at the end thereof the  
15 following: “Notwithstanding any other law, the Director  
16 shall provide any information upon request to the chairper-  
17 son of any congressional committee or subcommittee relating  
18 to any matter within the jurisdiction of such committee or  
19 subcommittee.”.

20       SEC. 5. Section 10 (b) of the Central Intelligence  
21 Agency Act of 1949 is amended by adding at the end thereof  
22 the following: “Notwithstanding the preceding sentence,  
23 when requested by the chairperson of a congressional com-  
24 mittee or subcommittee the Director shall provide informa-  
25 tion within the jurisdiction of such committee or subcommit-

## 3

1 tee which will enable it to determine whether the expenditure  
2 of funds by the Agency conforms to the authorized functions  
3 of the Agency and the congressional intent in establishing  
4 the Agency.”.

Mr. DELLUMS. Mr. Chairman, students in schools all over the United States are learning how their Government operates: the Congress passes the laws of the land, and the executive carries them out.

I hate to disillusion these hundreds of thousands of young people, but that is not how it works. What we say or do in Congress often has very little to do with the actions of the executive. But I fervently hope that what we do today will reverse the process that now makes premature cynics out of our young people and despairing pessimists out of our citizens.

I would like for a moment now to turn to a brief summary, Mr. Chairman, an analysis, of the Bureaucratic Accountability Act:

In sections 101 and 102(a), extension of rulemaking requirements, the Administrative Procedures Act sets forth some minimal due process requirements to be followed whenever the bureaucracy issues "rules" that affect the citizenry. These include adequate prior public notice of the intended rule, opportunity for written comments by interested persons, and opportunity to petition for changes or exceptions. Opportunity for oral argument is discretionary, and final administrative decisions are not confined to any record established by these proceedings.

Although these requirements are minimal, there exists very large exceptions. In fact, at present the requirements apply mainly to the regulatory agencies. The time has come to extend these APA procedures to social programs and other aspects of "positive government." Allowing the citizen to present his case, and requiring the bureaucracy to hear all relevant views, are increasingly indispensable tools of effective government.

Therefore, this bill eliminates the existing exemptions of "matters relating to public property, contracts, loans, grants, benefits" from the rulemaking requirements of notice and comment.

In section 102(b).—New criteria for rulemaking requirement exemptions: This section regulates those cases in which there is a legitimate public interest served by exemptions from the public notice and opportunity to comment requirements. First, the present exemption of interpretive rules and general statements of policy is eliminated. These agency decisions are often just as important as rules proper. The division between rules and interpretive statements is inefficient for deciding what should or should not be exempted.

The bill substitutes a more function classification, based on language already in the APA: "impracticable, unnecessary, or contrary to the public interest." Grant-in-aid decisions cannot be exempted, in accordance with the procedures set up in section 401.

In section 201.—Payment of expenses incurred before agencies: Our system of government relies on the spontaneous cooperation of the citizenry. This includes active participation in the administrative process, either by defending rights that Congress has sought to protect—the "private attorney general" concept already recognized by the courts—or by providing information and perspectives that the bureaucracy would not have the resources to discover. When this private participation aids in vindicating public policy, the citizen should not be penalized by excessive financial burdens. Costs of participation should be kept at a minimum, and the agency should

have the option of subsidizing these who otherwise would not be able to make a contribution. The Comptroller General has already expressed his opinion that agencies may spend appropriated funds in this way: this section of the bill makes it incontrovertible.

Section 301.—Sovereign immunity: Sovereign immunity is a common law doctrine that prohibits suits against the sovereign without his consent. It is used by the Government arbitrarily and unpredictably, and frustrates the orderly legal planning of the citizen. The removal of this doctrine in the days of active positive Government is a long overdue reform endorsed by most of those concerned with administrative law.

Section 401.—Enforcement of standards for grants: The aim of this section is to insure the maintenance of Federal standards of performance and policy aims in those State and local programs that depend on Federal funds.

The bill defines grant-in-aid programs as “programs pursuant to which the Federal Government transfers funds to State and local governments and public and private nonprofit organizations to provide general public services or finance programs for special groups.”

Second, all grant decisions are made subject to the public notice-and-comment procedures of rulemaking. This was done in section 102 above. This will allow objections to be heard before a State or local program is approved and funded. Relevant materials are required to be made available to interested persons.

Third, procedures for hearing complaints concerning grant plan applications and the administration of existing grant programs are set up, both on the level of the Federal administering agency and the State or local grantee.

The agency will hear complaints when they are made in the name of a substantial number of those persons affected by a grant-in-aid program, or when the agency decides an important policy question is involved. The agency is also given less disruptive ways of enforcing Federal standards than the complete termination of the program.

As we recall, Mr. Chairman, in the hearings on governmental lawlessness, when an issue was raised with respect to a State or local program and residents felt that the law was not being adhered to, the only redress that a community had was to ask for the funds to be stopped. If the funds were to be stopped in order to threaten an agency to correct a particular problem or to live within the law, hundreds or even thousands of persons would have been handicapped by stopping all of the funds.

So you could have, for example, a program funded by the poverty program. A local group of people found that the program was being administered outside appropriate law. These people then challenged the agency and the only recourse the Federal Government had was to cut off the money if compliance was not met. Then the community residents found if they pushed the issue all of the way to that conclusion, many people would have lost their jobs or many persons would have lost the service. So the local community found itself powerless because on the one hand they want the Government to live up to the law and on the other hand they cannot afford to have all of the funds cut off.

What we try to do in this section is open up other possibilities. We realize this ventures into new areas and we have no particular pride of authorship in this area and we are certainly open to recommendation, but the major reason we put in this section was to open up discussion and point up the fact that there is an obvious need for new approaches in this area.

Mr. CONYERS. Which title is that?

Mr. DELLUMS. This is title IV.

Finally, grantees are required to hear complaints from any person adversely affected by their administration of the program. Minimum standards for grantee complaint procedures are set up in this section 401.

Mr. Chairman, that concludes our formal statement. We appreciate the opportunity of coming before you this morning and we more than appreciate the fact that you are holding hearings on what we consider one piece of legislation that goes to some very important matters that confront this country at this moment in history.

Mr. CONYERS. Thank you for opening the discussion around your bill, Ron.

I have been trying to thumb through the copies of the testimony taken on June 26, 27, 28, and 29, 1972, of the Congressional Black Caucus hearings on Governmental Lawlessness, which were held in the Rayburn Building, room 2175. Some of us here were present; certainly Congressman Rangel, a member of this committee, and now the chairman of the Congressional Black Caucus, was there. I was trying to recapture the flavor of those hearings.

It seems to me that they were among the most stimulating that we have ever participated in on an ad hoc basis or otherwise. Could you begin, Ron, by talking a bit of how they came about and what we did? I recall that there were a great number of Members of Congress not in the caucus who participated in these hearings, and rather important people concerned with this question in political, governmental and media activities were also active. That set, I think, the tone that brought this matter to the attention of a great many citizens across the country in a very forceful way.

Mr. DELLUMS. Thank you, Mr. Chairman.

As you recall, many, many months before Watergate, the Congressional Black Caucus held a series of meetings and at one particular meeting where we were submitting proposals about what we could do during the 92d Congress, I mentioned to my colleagues that I thought Washington, D.C. was the crime capital of America and that I was not talking about crime in the streets but in fact crime in the suites. I was talking about crimes carried out in Washington, D.C. under the guise of Executive privilege, administrative action and bureaucratic fiat. Little did we know that the issue we were raising went far beyond even our wildest imagination.

The caucus made the decision—perhaps naively—that we would hold these hearings just prior to the Democratic and Republican conventions and the presidential elections, in the hope that we would create discussion in the country about the whole question of governmental lawlessness and administrative law.

Well, Watergate at that point was reduced to a "slight incident," most of the press was preoccupied with the personalities in the election,

and I would imagine in looking back in retrospect at that past election, very few, if any, issues were really intelligently discussed or debated.

I doubt if the American people can even name one issue talked about in that election.

But we raised this issue because we felt that Washington, D.C. is a place where extraordinary lawlessness takes place. Let me give you some examples of what I mean.

Housing legislation passed by Congress includes no limit where such Federal housing should be located; however, over the past few years, HUD has issued site selection criteria which so limit the areas in which housing can be built as to virtually exclude central cities.

The 1970 Uniform Relocation Act provides for reasonable payments and protection for families and businesses displaced by federally aided projects. The Department of Transportation has prepared adequate regulations to administer the act but does not enforce them. As a result, thousands of families are still being displaced—mainly by urban freeways—without being covered by the act. An example is the Brookland area here in Washington, D.C., a functioning middle-income area which would be destroyed by a new freeway going up to the Maryland suburbs.

Project REHAB of HUD gives cities allocations to rehabilitate housing for moderate income families. However, HUD has excluded thousands of displaced families from relocation benefits.

The Federal agencies which determine guidelines for home financing have issued guidelines and regulations which discriminate against racial minorities, women, and central city home buyers.

Law Enforcement Assistance Administration—prior to its last enactment—under which the Justice Department provides financial and technical assistance to States and local governments for ostensible improvement of criminal and judicial systems, was initially conceived by the President's Crime Commission and the Congress to provide Federal money to States and localities for innovations, experimentation, and reform. Instead, testimony indicated that LEAA funds had been used throughout the country by police to purchase weapons systems. Enforcement of the LEAA equal employment opportunity regulations are not effective. There is no requirement for preaward compliance review. As an example, more than \$2 million was given to Mississippi during 1970 at the same time as suits were pending contesting the ratio compliance of the Mississippi Commission of Law Enforcement and charging the Mississippi Highway Patrol with systematic exclusion of blacks. Complaints were not processed.

The Civil Rights Commission still awaits LEAA reply to its August 1971 communication requesting that LEAA conduct a compliance review of one State with a 45-percent black working age population and a State highway patrol of less than 1-percent black.

On the FBI and Secret Service, testimony indicated that the FBI is greatly—and now we find in recent memoranda that we even have more documentation of these facts—the testimony indicated that the FBI is greatly exceeding congressional mandate by illegal surveillance of black leaders in the fields of sports, entertainment, religion and politics.

The Secret Service, utilizing the FBI files, has put names of all surveillance subjects in a computer bank. Included in the 180,000 names, including aliases, in this data bank are such notables as Tony Randall, Groucho Marx, and Marlon Brando. The Secret Service keeps most of its black suspects in a secret, separate category called the "Black Nationalists." There are some 5,500 names, including aliases, in this computerized file.

Mr. CONYERS. As I recall, did not Jack Anderson produce the computer printouts of the blacks named? They appeared to include nearly any black who had ever achieved any public notoriety, whether in athletics, business, community affairs, music, entertainment, or anything?

Mr. DELLUMS. Yes, sir. You are absolutely correct, Mr. Chairman. As you recall, in a very dramatic moment in the hearings, Mr. Anderson got up and unfolded an IBM printout, walked way out of the room unfolding it and still had not unfolded all of the names of persons under some kind of regular surveillance by the FBI, including such notables as Ralph Abernathy, Jackie Robinson, and Coretta King.

On voting rights: Under section 5 of the Voting Rights Act of 1965, every jurisdiction covered must get advance Federal approval before changing any voting law procedure. However, many southern States and local governments will not obey this. Yet the Justice Department refuses to take any action to force submission, even when it knows that a voting change has been made and will be enforced in an election.

We can go on to school desegregation, civil rights enforcement, Employment Service Agency, a look at the work incentive program. The WIN program was created to assist AFDC recipients in gaining employment skills with the goal of removing them from welfare rolls. In 1971, Congress made WIN—if you recall, I think Congress at one time wanted to call it WHIP—the work incentive program—which probably would have been much more apt than WIN, but I imagine they did not want to telegraph it—in 1971, Congress made WIN mandatory for all AFDC recipients. WIN program priorities provide first for enrollment of AFDC fathers and then for volunteer mothers. Discrimination is made on the basis of sex.

According to witnesses, the WIN program repeatedly gives assistance first to those individuals who already have job skills. In all States, 40 percent of WIN enrollees, work incentive program enrollees, are in "holding" positions; that is, they are enrolled in the program but are receiving no services.

The WIN program has been a failure and costs have been exorbitant; yet by deliberately incomplete reports the Department of Labor and Employment Service agencies have suggested that the program is greatly reducing welfare costs and getting jobs for poor people and should be expanded.

In Colorado the Employment Service told the legislature that the program had saved \$3.7 million in welfare payments. It omitted the fact that actual program cost to achieve this reduction was \$9.3 million.

Mr. CONYERS. What I wanted to do, Ron, was try to recapture some of the flavor of those hearings 2 years ago. They were pre-Watergate, they were important, they did portend things that were

to come. I think that the transcripts of those hearings—we have four volumes here and there are apparently more—are germane to the subcommittee's deliberation. I would like to ask if there is any way that, through any of the able men on your staff—and I note for the record you are accompanied by Bob Brauer, Lars Lih, and Luis Rumbaut, who helped put those hearings together. Some of the portions of the Congressional Black Caucus hearings could be condensed so that we might consider including them in the hearings of this subcommittee. I think it would be very important and beneficial to those who were not present or participating in them.

Mr. DELLUMS. We would be very privileged, Mr. Chairman, to work on that and produce something for you for the record.

Mr. CONYERS. Now, what you have drawn is a picture of lawlessness, of an inability in our agencies and departments to provide, in and of themselves, a meaningful accounting to the American people of programs that are supposed to be operative and beneficial. I am particularly intrigued by title IV of this bill—I am proud, incidentally, to be a cosponsor—where we speak to the point of allowing the citizens to know what the regulations are. And I would like, if you would, for you to spend just a little time on title IV.

It is fair to point out that we have with us representatives from the Justice Department and from the Administrative Conference of the United States. I am hoping that you and your assistants are going to be able to sit with us during the course of their presentations and discussions as well, because this may be the most direct examination we will have had of these kinds of things in quite a while here in the House of Representatives.

So, if you would, could you elaborate on the implications of title IV, which I see as being of prime importance in remedying the kind of problems that you have outlined and have indicated to be so numerous?

Mr. DELLUMS. Thank you, Mr. Chairman.

First, I would say that our effort here is one to try to extend objectives of the Freedom of Information Act to all citizens, set up a procedure whereby people can be involved in the process of making inputs at the time programs are being administratively established; and, second, to involve people in the process after the program is set up, when they have legitimate complaints.

As I said in my opening statement, when it comes to the complaint period, that is when programs have been set up and people do in fact have complaints about how programs are being administered, virtually the only remedy now is to challenge the program all the way, to the extent of proposing to cut off funds. This often flies in the face of their best interest because they do not want to cut off all of the programs; they just want to make sure they are operating within the framework of the law.

Mr. CONYERS. If I may interrupt at that point, because you touched on a nerve; I recall a situation in Detroit regarding a revelation of the scandals in housing administered by the Department of HUD in terms of providing low-cost housing to citizens who have not the economic means to make a downpayment. After the instances of corruption and bribery were revealed, the answer that came from Washington to deal with the problem was to cut out the program.

Mr. DELLUMS. Right.

Mr. CONYERS. Thereby further punishing the intended beneficiaries for the inefficiency and corruption that existed within the program itself.

That happens countless times where our remedy becomes worse than the problem itself.

Mr. DELLUMS. Precisely. What we are saying here is that when people have complaints, the grantee has to hear those complaints so that the people are involved in the process. We open it up so that cutting off funds is not the only option left. What we often do in correcting many of these categorical programs to the "most depressed in our society"—often defined as the "most powerless persons," as in their effort in Detroit to try to make a program relevant and legal and noncorruptive—is to snatch it all away from them to give only that option. And when people are faced with that particular threat of cutting all funds, they often fall back and the program continues to go on in its unfettered fashion.

What we have suggested is there has to be a place where the problem can be dealt with and something done to correct those abuses and problems. In section 401 we attempt to do that during the complaint phase. Most importantly, we try to provide the opportunity under the Freedom of Information Act for people to have access to information, for people to know what the standards are, what the rules and regulations and guidelines are in the setting up of those programs, and if there is any anticipated problem at that point, they are able to make an input to try to correct potential abuses before they begin.

I think this is extraordinarily important. As you know, if we on the legislative side of Government were more appropriately involved in conducting our constitutional responsibilities of oversight—which I think that we throw out the window at least 95 percent of our responsibility in this area when I look at many of the committees which should but do not seriously engage in the function of oversight—maybe we could assist the people.

That is one of the key issues these bills go to.

But I think as a general rule, within the framework of a democratic society, the only hope that people have is for decisions to be made in the open. No decisions should be made in the dark and I think we have to open up our governmental processes. If we in fact believe that democracy is in fact an extraordinarily vital way to govern, then we have got to believe in the competence and capability of people. But what we often do is to say we live within a framework of a democratic society and then deny millions and millions of people the opportunity to be significantly involved in the process.

I realize that many of our decisions even here on the Hill are made in the dark of executive session or in closed rooms, but at least many of those practices are being challenged by the chairman and many members of this committee and many others of my colleagues, and I feel that we are going to eventually win that fight and make this body totally democratic.

At the same time, we also lock out many many people from that process and I believe that that flies in the face of what democracy is all about. What this bill tries to do is simply say that if we are going to live in a democratic society, then let us believe in the right of people to

participate in their government. And I find it extraordinary that many people seem to believe that when young college students with long hair and sandals raise the issue of participatory democracy, this is some kind of radical extremist statement. Yet, I think that statement is consistent with what democracy is all about. This bill attempts to open up this process and expand participation to the people.

Mr. CONYERS. We are in a sense tied to the oversight consideration, because 2 years ago I had no way of knowing that I would end up a subcommittee chairman in fact hearing this bill, and that this subcommittee would have oversight over LEAA, one of the programs that we very clearly singled out for examination in the caucus hearing.

Because of the time limitations that we are under before the House goes in session, I am not going to ask any other questions. I know you will be available throughout these hearings. There will be as many as will be necessary. But I would like to call now on Congressman Charles Rangel of New York, who was also a participant at those hearings, for any questions that he would like to have of you and then, of course, we will hear from Mr. Cohen of Maine, and then we want to hear from our other two distinguished witnesses from the Administrative Conference Commission and from the Justice Department, if we can get them all in this morning.

I yield now to Congressman Rangel of New York.

Mr. RANGEL. Thank you, Mr. Chairman.

I think you ought to be congratulated as well as Congressman Dellums, not only for the hearings and the drafting of this legislation, but certainly for consistently following through with it and having these hearings.

The concept of sovereign immunity, of course, is derivative of the protection of the monarch from the peasants. And, of course, the ruling class and the kings always did have a threat from the people. I think this legislation really at the time that it was brought up was a forewarning that the violations of people's dignity as well as immorality of some of the administrative decisions certainly affected a broad class of Americans that expanded beyond that of blacks and other minorities.

Of course, a challenge to this concept indicates that your bill will increase the caseloads of the Federal court system, and in addition to this, the provision of providing funds for those who cannot afford to bring their case to court.

I wonder, Congressman Dellums, whether you or your staff have researched the cost to the American Government of the Senate Watergate hearings, impeachment proceedings, of criminal court cases involving members of the executive branch of Government, in order to determine what cost that has been to the American people—without dealing with the morality of the question—as opposed to what the cost would have been if the people had an opportunity to make inquiries of their Government.

Mr. DELLUMS. I would simply say to my distinguished colleague from New York that we do not have the specific figures, but I can try to speculate. I am sure that the cost to the American people as a result of the revelations of Watergate probably far exceeds the cost to the Government of providing funds to those persons economically incapable of obtaining representation before the bureaucracy in rulemaking proceedings.

Certainly, whenever people file law suits against the Government in the event that the sovereign immunity section is left in the bill—which I do not think is radical at all, because for the most part the government does take the cases—all we do is simply make it very clean and very clear.

I think the increase in the number of cases would be minimal. There would not be any extraordinary change. It is almost a moot point because, as I said, in most cases when people want to sue, the Government does take the cases.

I think the total effect of our legislation would be to open up the process, and that this opening-up will eliminate those abuses that created Watergate in the first place. We are really talking about an insignificant amount of money, and certainly if we compare it to the millions and millions of dollars that history will record we spent as a result of Watergate, if we compare the two, I think the amount of money caused by a more open process would be minuscule. I do not think it would pose any significant financial burden on our already substantial budget.

Mr. RANGEL. Is it true that as a practical matter, every aggrieved party will not be petitioning an agency or court; what you are doing or what your legislation intends to do is to open up the doors so that the general public can determine what their rights are as they relate to government, so that once a standard which included people is accepted, this would preclude others from bringing what is referred to in the law as nuisance suits?

Mr. DELLUMS. Precisely, Mr. Rangel.

Just a couple of quick points. We are simply saying that people are often stultified by the bureaucracy. Many decisions are made by nameless, faceless persons in the bureaucracy and people have no access to them—no way to really cope. This bill gives people means by which to deal—hopefully, effectively—with the bureaucracy, and I think the result would be to minimize the cost and militate against all of these hearings and trials and tribunals that we are presently undergoing with respect to Watergate, simply because we hadn't opened up the process.

I think the reason we have a Watergate is that the process has been closed on the administrative side of Government. We are trying to change the law so that we increase the American people's involvement in the administrative process. I think that that is critical and important and I think that the country financially will be a lot better off than if this legislation is not passed. I think that instead of ending up in Watergates over the years, this bill provides a mechanism where we can stop this and provide the opportunity for people to be involved.

Mr. RANGEL. Yes. It is clear to me and I am certain you share my point that the real issue here is the increased judicial workload, increase in courts, balanced with justice and fair play and I think it should be an easy decision to make.

Thank you so much for your eloquent testimony explaining the legislation.

Mr. DELLUMS. Thank you.

Mr. CONYERS. I recognize the gentleman from Maine, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chairman, and Congressman Dellums.

I think it perhaps appropriate that you are here today. I notice in

the Washington Post a column by David Broder, whereby he stated, "Integrity and accountability are the key ideas on which freedom and justice depend."

I think that is a pretty eloquent statement in itself.

Second, I perhaps should explain, if anyone noticed I was smiling at the court reporter, that it was not flirtatiousness in any degree. This court reporter has difficulty keeping up with my questions and answers. I noticed that she had a great deal of difficulty keeping up with you, and I dare say, half of your testimony has been lost, as most of mine usually is.

Another point, you indicated that you hoped in the near future that the Congress should become completely democratic. I hope you meant that with a small "d." I am sure you did.

Mr. DELLUMS. I meant that with a small "d." I think that is much more important in the long run.

Mr. COHEN. I have a number of questions that I would like to ask you, but I also would like to hear the remaining witnesses, so I will just ask a couple of brief ones.

Under title II we deal with the question of the interested person who lacks the ability to pay the legal costs and witnesses and so forth. The question I would like to ask you, what standards would you suggest as far as the ability to pay? Because I understand, for example, a Nader student research group was instrumental in an FTC case on misleading ads, as I recall, Campbell Soup, and I would like to ask, would a nonprofit group be considered; one, unable to pay, and would you impose the standards of indigency on individuals or groups. Give us some guidance on that.

Mr. DELLUMS. Mr. Cohen, I am going to let my staff aide, Mr. Brauer, answer that question.

Mr. BRAUER. Congressman, the purpose of this is to encourage community groups and public interest law firms to participate in the administrative process. We would, I think, hopefully find both the impoverished citizen, the unorganized community group, and the nonprofit organization hopefully participating.

The thrust of this, as with the other parts of that section, was to get the widest participation, to get the best decisions regarding the administrative process.

Mr. COHEN. Who would determine the standards for the ability to pay, would it be the agency or would it be an appeal allowed from the determination like this outside of the agency of administrative process?

Mr. BRAUER. We have a Comptroller General's decision in this area which provides for establishment of standards. I think we would be certainly willing to listen also to individual agency suggestions and talk about the adoption of objective standards by agencies.

Mr. COHEN. Just one other point. I would like to pick up on the issue mentioned by Congressman Rangel about the doctrine of sovereign immunity. I think certainly the statement about this being an old and outmoded rule handed down through the dead hand of history is quite accurate; that is, it stems from the concept that the king can do no wrong. And in the field of tort law, it is fair to say, I think, many of the States through judicial decision have been overturning the doctrine of sovereign immunity and at the Federal level

we have been doing it by piecemeal legislation, such as I recall Senator Percy submitted a bill in the Senate, also voted on in the House recently, in response to the Collinsville incident with the drug raid and the abuse of the civil rights of individuals. There is another example of the sovereign immunity doctrine being eroded, as it should.

The only other point I would like to make though, in your opinion, would it apply to instances involving individuals? Now, Congressman Rangel asked the question, but would it involve an individual suing, bringing suit or seeking specific relief against the Government? How would you distinguish? When does a public group act as opposed to the individual and how do you avoid the situation of a nuisance suit or tying up governmental operations through multiplicity of lawsuits?

Mr. DELLUMS. First of all, I am not an attorney, but I am sure you are aware that a judge can dismiss any case if he did not think it had standing.

What we would like to do is remove that whole provision. Within the framework of democracy in America, the people are sovereign, and in a situation where it is either individuals or groups, the judge certainly has discretion as to whether to hear or not hear a particular case. We do not make any distinction. We say individuals as well as groups ought to have the opportunity and let the discretionary responsibilities rest where they ought to, and that is with the judge.

Mr. BRAUER. We think the scope of the sovereign immunity section is diminished, since section 4 provides for handling complaints in administrative hearings and by administrative procedure. I think if that works effectively and it is mandated by the agency to the grantee, by the grantee to the local grantee, then you have in effect good complaint procedures, and your administrative procedures would lessen the requirement for judicial relief.

Mr. COHEN. But on the question of standing it seems to me if you eliminate any restrictions whatsoever, the judge would be required to rule each and every individual has a standing according to that technical phrase.

Mr. BRAUER. If the case is presented, that is correct.

Mr. COHEN. And it would not be the question whether his interest was de minimis or not, but he would in fact have standing so it could not be dismissed out of hand through lack of standing, through removing qualifications.

Mr. BRAUER. You have legal questions of standing. The question is whether you have a legitimate complaint.

Mr. DELLUMS. That is right. That is the point I want to make. Maybe you can advise us what the legal term is.

Mr. COHEN. On standing?

Mr. DELLUMS. Whether the case is an adequate case or not.

Mr. BRAUER. The cost and the difficulty have to be weighed against that fact. You have a wider opportunity to seek redress.

We must weigh that against the inability of the citizen to get redress from the Government if the Government chooses not to give it. I think the fact of the matter is, outside of land claims, that there probably will be not much utilization.

Mr. CONYERS. We have more questions, because this is only the initial examination of a rather technical piece of legislation. Because we have the chairman of the Administrative Conference here and an Acting Deputy Assistant Attorney General from Justice, we want to

thank you at this point, Congressman Dellums and Mr. Brauer, for starting off what I think is one of the most interesting and important pieces of legislation that has come before this subcommittee.

Mr. DELLUMS. Mr. Chairman, I deeply appreciate those remarks and I thank you and the members of the committee for an opportunity to testify before it.

Mr. CONYERS. I hope you will be able to stay with us and hear some of the other witnesses.

[The prepared statement of Hon. Ronald V. Dellums follows:]

STATEMENT BY HON. RONALD V. DELLUMS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, Members of the Subcommittee, I am grateful for the opportunity to appear before you today as you begin hearings on the Bureaucratic Accountability Act. We meet today in an atmosphere of crisis, because the challenge of governmental lawlessness has reached the very highest levels. Yet this is a greater problem than just one individual or group of individuals. The federal government has grown outside the reach of law—outside the reach of general regulation, passed by the representatives of the people, upon which the people may rely. Mr. Chairman, I strongly believe that it is no exaggeration to say that governmental lawlessness is rapidly becoming *the* system of government in the United States. We in Congress have no greater task than to reverse this trend.

In the summer of 1972, when Watergate was a cloud no bigger than a man's fist, the Congressional Black Caucus held a series of hearings on the general topic of governmental lawlessness, the widespread bureaucratic practice of distorting, ignoring and subverting the congressional mandates contained in legislation. These hearings uncovered a pattern of abuse so extensive as to constitute the gravest threat to meaningful self-government.

In response to what we learned during those hearings and other congressional investigations of governmental lawlessness, Senator Kennedy and I, along with 26 of my colleagues in the House, introduced the Bureaucratic Accountability Act of 1973. This legislation proposes concrete steps toward strengthening responsible and reliable government through amendments of the Administrative Procedures Act.

I strongly feel that among the basic causes of "governmental anarchy" is a lack of mechanisms which would allow citizens some means of protection against officials in their concrete, day-to-day contact with them. These mechanisms cannot guarantee that Congress will pass wise and democratic substantive legislation, but they allow us to hope when such legislation is indeed passed, citizens may rely on seeing it actually carried out. And this hope is the basis of active democratic reform and confidence in the capabilities of government.

The aim of the Bureaucratic Accountability Act is to confine the bureaucracy to its legal purposes. We intend to do this by the democratic method of increasing its responsibility, its answerability, both to citizens and to the intent of Congress. Specifically, the bill strengthens the ability of citizens to enforce their rights as established by Congress—against either action or inaction by the bureaucracy. Notice-and-comment rulemaking requirements are extended, costs of participation are reduced, bars to judicial review are removed, and procedures set up to enforce State and local compliance to Federal standards in administering grant-in-aid programs.

All of these reforms are based on long-felt needs and careful suggestions from the many groups involved in working in administrative law. I think the over-all result will be more effective government, greater cooperation between citizens and officials, and greater congressional effectiveness.

I would like to emphasize this last point. These administrative reforms are a natural extension of recent proposals in Congress to reform our internal procedures. In both these ways, we would strengthen the status of objective legislation, arrived at by democratic means, as against the subjective political and bureaucratic desires of an uncontrolled administration.

The basic aim of the bill is to insure that a citizen may receive an accurate idea of his rights and of the procedures of the bureaucracy by reading the statute books and published material of the bureaucracy. I think this will mean an important extension of responsible participation in the work of self-government.

The Chair welcomes the chairman of the Administrative Conference to the witness table.

I note that we have a number of visitors here, some of whom I do not know about. We have students from McKinley High School and their teachers, Miss Marilyn Bordeen and Mr. Thomas Brown. We welcome you and hope this is an important experience that will generate some activity for you.

Mr. Scalia has been chairman of the Administrative Conference since September 1972. He is a distinguished lawyer who is on leave from the University of Virginia Law School. He has had a great amount of Government experience, including that as former General Counsel in the Office of Telecommunications Policy.

We are very pleased to have you before us as the second witness on the hearings connected with the Bureaucratic Accountability Act. We have your statement. We will receive it in the record and allow you to proceed in your own manner. [See p. 55]

**TESTIMONY OF ANTONIN SCALIA, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY RICHARD BERG, EXECUTIVE SECRETARY**

Mr. SCALIA. Thank you, Mr. Chairman.

In listening to Congressman Dellums, I was relieved because he speaks as fast as I do. I suspect the stenographer will not be relieved. I am sorry.

As you know, the Administrative Conference is a permanent agency established by the Congress to make a continuing study of the administrative procedures of all Federal agencies and to provide recommendations and advice concerning those procedures to the agencies, the President, and the Congress itself. It is composed of policy level officials from most of the major Federal agencies and of lawyers from the private sector with special knowledge and experience in the field of administrative law. About 60 percent of our membership is from Government—most general counsels of agencies—and the remaining 40 percent consists of private and public interest lawyers and law professors.

I describe the makeup because I think it is important in your evaluation of the Conference recommendations which support this legislation. That makeup might lead one to have a plausible suspicion that the Conference might on occasion not act as radically as one would like. I do not think that suspicion would be justified, but it would be plausible. I do not think suspicion that the Conference would recommend anything that will bring down the fabric of the Government or cause chaos in the administrative process is even plausible.

The proposed Bureaucratic Accountability Act bears directly upon matters of administrative fairness and efficiency that are the Conference's main concern. Many of the features of the legislation implement proposals which the Conference has adopted; my purpose in appearing here today is principally to address those features. I do not intend to discuss them in great detail, since I understand that with respect to each your witness list includes the consultant to the Conference whose report formed the basis of our recommendation. I hope, however, to

describe all these Conference proposals in broad outline and to reaffirm our strong support for their adoption.

I will discuss the recommendations of the conference as they relate to the Bureaucratic Accountability Act under each of the four titles of H. R. 6224.

**Title I—Rulemaking Involving Public Property, Loans, Grants, Benefits or Contracts.** As you know, section 553 of the Administrative Procedure Act establishes a mechanism for public participation in the formulation of substantive rules by Federal agencies. An agency is required to publish its proposed rule in advance, and to receive and consider written comments by interested persons before promulgating the rule in final form. This simple device has been called one of the greatest inventions of modern government. It is probably the principal means of direct citizen involvement in Federal lawmaking.

Mr. CONYERS. How new is it?

Mr. SCALIA. Well, it was required as of the adoption of the Administrative Procedure Act in 1946—28 years old. It was used before that by some agencies but on a voluntary basis. Nonetheless, 28 years is old enough.

Section 553 exempts—and has exempted since the time of the APA—rulemaking which relates to public property, loans, grants, benefits or contracts. As to this, there is no guarantee of citizen participation by reason of the exemption contained in section 553(a)(2) of the APA. Conference Recommendation 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, a copy of which I have attached to my printed testimony, urges this exemption be eliminated.

Those doubts very surely should have disappeared by now. Experience has shown that so-called notice-and-comment rulemaking is not a cumbersome or impractical process—and that it improves not only the fairness but also the efficiency of administrative action. Yet the curious exemption not only remains in the law, but over the years has actually increased in its practical scope. The percentage of Federal activity that related to public property, loans, grants, benefits or contracts in 1946 was substantially less than the percentage now covered. Grant and benefit programs account for a large share of new legislation, and have done so consistently in recent years. Though the section 553(a)(2) exception cannot be said to have swallowed the rule, it certainly restricts it to a much narrower category of cases than either reason or experience would advise.

Why, for example, should notice-and-comment procedures not be required for the adoption of rules establishing criteria and qualifications for the sale and leasing of public lands, or the granting of mineral rights and grazing permits? Why should they not extend to the rules adopted for various Government loan programs, such as those administered by the Federal Housing Administration, the Veterans' Administration and the Small Business Administration? Why should they not apply to the criteria and qualifications established for National Science Foundation research grants, Department of Transportation highway construction grants, and HEW grants to aid in the construction and equipment of elementary and secondary schools? Why should they not apply to the rules governing eligibility for cash benefits from the Social Security Administration or the Railroad

Retirement Board? Why, finally, should they not extend to the rules imposed upon actual and potential Federal contractors by almost all Federal agencies?

These are all areas of importance to all citizens. And they are areas in which the Federal agencies need the views and opinions of the public no less than in the more traditional fields of agency activity. I do not mean to paint the situation as being worse than it is. In point of fact—and this is perhaps the ultimate demonstration of the soundness of the proposal that is now before you—most Federal agencies have in fact been using notice-and-comment procedures with respect to public property, loans, grants, and benefits even though they are not required to do so. So in these areas, the amendment merely adopts as law what the agencies have already acknowledged as desirable. In the contract field, however, it will effect substantial changes; and those changes are desirable.

Mr. COHEN. As I understand it, HEW and HUD have done this voluntarily. I think the Department of Defense and GSA do not. Is that correct?

Mr. SCALIA. Yes; and I think most agencies do not with respect to contracting. But this will come up later in my testimony. The Department of Defense, of course, can rely not only upon the exception for public property, loans, grants, benefits, or contracts but also upon the military or foreign affairs functions exception, which is another item I think your legislation would well address.

There will of course be those who are fearful of extending the compulsory provisions of section 553 into these new areas—just as I suppose there were those who were fearful of extending them in 1946 to the more numerous areas of Federal activity now covered. It seems to me that the ultimate answer to those fears, in addition to the successful experience with section 553 rulemaking over the past 28 years, is the simple fact that agencies can in any event dispense with the most restrictive requirements of section 553—the notice-and-comment procedures—if and when they find that they are impracticable, unnecessary, or contrary to the public interest. With this broad exemptive provision, that will continue to be contained within section 553(b), it seems to me there are no grounds for panic that the orderly governmental process will be disrupted.

I would like to suggest two respects in which title I of this legislation might be improved—one by addition and one by deletion. In addition to the public property, loans, grants, benefits or contracts exemption from section 553 rulemaking, there is a second principal exemption of immense scope that could profitably be restricted. This is the military or foreign affairs functions exemption, which is the subject of recommendation 73-5 adopted by the Administrative Conference last December, a copy of which is attached to my printed statement. Briefly stated, this recommendation would eliminate the categorical exemption for military or foreign affairs functions and insert in its place (1) a total exemption for rulemaking involving matters specifically required by executive order to be kept secret in the interest of national defense or foreign policy and (2) provisions which will make it clear that specific classes of military or foreign affairs rulemaking can be exempted on a categorical basis when the agency finds that rulemaking would be impracticable, unnecessary or contrary to the public interest. I will not belabor the details of

these proposals; they are described with precision in the attached recommendation, and suggested statutory language is contained in an appendix to the recommendation. I earnestly urge that you consider including such provisions in this legislation. I believe they provide all the protection to the vital interests of national defense and foreign affairs that is required, without unnecessarily restricting the openness and accessibility of Government.

The one action taken by title I which I suggest you reconsider is the deletion of subpart A of section 553(b), which exempts from notice-and-comment rulemaking "interpretative rules, general statements of policy [and] rules of agency organization, procedure, or practice." This deletion was made by section 102 of the bill. The basis for exemption of interpretative rules which is contained in the present act is that these rules do not impose any new command or requirement on a private citizen, or deprive him of any governmental benefit. Rather, such rules merely set forth the agency's interpretation of what the law already does—which interpretation—unlike a substantive rule—can be overturned by a court with relative ease.

When the Congress tells an agency it shall set forth certain rules pertaining to a particular economic activity, to regulate that activity, in doing so the agency is in a sense making law. By an interpretative rule, on the other hand, the agency is merely giving its judgment as to what the existing law, the detailed law passed by the Congress means—an interpretation of the tax code provisions or something of that sort.

The problem with including such rulemaking within section 553, as this bill would do, is that the important practice of agency advice-giving would be seriously discouraged. When we use the word "rules" we generally think of detailed written requirements—and most substantive rules of general applicability indeed take this form. Under the APA, however, the word "rule" technically means "the whole or a part of [any] agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency"—5 U.S.C. 551(4). Thus, for example, oral advice provided to a social security applicant as to whether he qualified for benefits and what he must do to obtain them is technically a rule—though an interpretative rule, which under the present statute does not require notice and comment. If the law is changed as this bill proposes, so that notice-and-comment procedures are required, advice of that sort, I think, would simply not be given. Even explanatory material which an agency issues for the purpose of informing the general public regarding the terms of a new statute or regulation would fall within the revised notice-and-comment requirements—so that an agency could not explain a new rule to the public without having a rulemaking on the explanation. In short, reason requires that there be an exemption for "interpretative" rules; its elimination would in my view be a net loss rather than a net gain for the cause of public information.

I might add that the bill before you makes no change in section 552 of the Administrative Procedure Act and my comments rather assume that it means to. The requirement that rules be published is not contained in section 553, but in section 552. So if it is your intent not only to apply the notice-and-comment procedures to interpretative

rules but also to have them published, a change would have to be made in section 552 as well. I might also add that section 552, I think, tries to draw a sensible line. It now requires publication of substantive rules and statements of general policy or interpretations of general applicability formulated and adopted by the agency. So it is only the more formal interpretative rules that need be published, that is, those adopted by the governing body—the commission or, if it is a one-man body, the agency head.

As to the exemption for “general statements of policy”: I frankly do not know how an agency head would be able to give a speech without putting it out for comment in advance if this exemption were eliminated—and if he did that I presume no one would come hear the speech. There must be some exception for generalized descriptions of the direction in which an agency is heading, which are not operative in and of themselves. I believe that is what the language of the present exemption is intended—and has been interpreted—to reach. I am unaware that it has posed any real problem.

Finally, as to the exemption for “rules of agency organization, procedure, or practice”: I would see no problem in applying notice-and-comment procedures to the more formal and more significant of these, those already required to be published under section 552; but the difficulty is that any “statement” of future effect pertaining to these matters is technically a rule—so that innumerable minor adjustments of agency staffing, procedure, or practice would require notice-and-comment procedures. On balance the game does not seem to be worth the candle, since this is once again an area in which I have not heard any significant complaint.

Of course the response could be made, and Congressman Dellums suggests this, that none of the differences I have raised poses any difficulty because section 553(b)(A) in any event excuses the rule-making procedures when there is a finding that they were “impracticable, unnecessary, or contrary to the public interest.” I am not averse to using that exemption. I refer to it myself in my prepared testimony. But if one creates a scheme in which that exemption is used more often than not, the entire currency becomes debased; and that exemption would, in my view, apply to most of the new rulemaking that would be drawn in by elimination of section 553(b)(A). To preserve the integrity of the remainder of section 553, and in the absence of any real need in these areas I have discussed, I think it preferable to continue with the present law, which in this respect has worked well.

I might add one other point—that even the exemption of 553(b)(A), which Congressman Dellums referred to, does not apply under the language of this bill to any rule adopted in connection with grants-in-aid. I frankly do not understand why even that exception would not be allowed in grant-in-aid programs.

Title II pertains to payment of expenses incurred before agencies. From the first year of its existence the Administrative Conference has recognized the need for Federal agencies to make special efforts at obtaining the views of the poor with respect to rulemaking which may substantially affect them. Conference recommendation 68-5 is addressed entirely to this subject. The Conference has not, however, taken any position with respect to the direct payment of counsel fees and participation in forma pauperis—though it did debate the subject at one of its sessions in 1971. The few comments I have about this title of the bill are therefore my own and not those of the entire agency.

Let me speak first to what I consider the most significant feature of title II—the provision for public payment of attorneys' fees. It is obviously appealing to conclude that if public provision of counsel is appropriate before the courts it should be appropriate before the agencies as well. Some distinctions, however, must be drawn. In the courts, counsel is automatically provided at public expense only with respect to criminal proceedings. Even when substantial sums of money are sought by or from a poor person in a civil proceeding, the State and the Federal Government commonly provide no legal assistance, except to the extent that they operate or subsidize legal aid programs or provide legal advice through the staff of small claims courts. There is assuredly no absolute entitlement to legal representation in civil cases. It seems to me strange to require an attorney at public expense for a general rulemaking proceeding when none is provided in a civil action which much more substantially affects the person involved.

Mr. COHEN. What about the area of social security? Isn't it the law, the claimant who is turned down by the Social Security Administration and files a complaint and is reversed, that person is entitled to have attorney fees reimbursed to a reasonable degree?

Mr. SCALIA. That, I do not know, Congressman.

Mr. COHEN. I think this is the law.

Mr. SCALIA. It may well be. He is obviously entitled to a fair hearing on the point—

Mr. COHEN. He is entitled to have reasonable attorney fees assessed by the court.

Mr. SCALIA. I will check the point and I assume you are correct on it.

Aside from the disparity with judicial practice, which is what I was talking about, I find the sweep of the provision excessively broad. It does not seem to me that a poor person necessarily requires an attorney with respect to section 553 (informal rulemaking) proceedings. These are not legalistic proceedings—and many persons who can afford representation by counsel appear on their own behalf. Even with respect to adjudicative-type proceedings under the APA (sections 556 and 557), it is by no means clear that representation by counsel is always important. In Social Security hearings, for example, which account for more formal adjudications by far than any other single program in the Government—and perhaps more than all the others combined—the claimant is now rarely represented by counsel, and the Government itself almost never. The administrative conference is conducting a major study of disability claims under various statutes administered by the Department of Labor, the Social Security Administration, the Veterans' Administration and the Civil Service Commission, with the object of determining whether there is any discernible difference in outcome when the claimant is represented by counsel. It is by no means clear that there is. Much more study is needed before a conclusion of even the universal utility, much less the universal indispensability, of legal representation is justified.

It would be different if we were talking only about the provision of counsel in formal (secs. 556 and 557) adversary cases in which the agency is seeking to impose a criminal or even a civil sanction upon an impecunious defendant. Here the analogy to provision of counsel in the courts is much closer, and it is likely that the need for counsel is more general. I expect, however, that the utility of an attorneys' fees provision limited in this fashion would be extremely

small. Most of the civil and criminal sanctions which Federal agencies apply pertain to violation of economic or commercial regulations, and almost invariably involve malefactors of some, if not great, wealth. And in the only sanction case I am aware of in which an impecunious defendant sought public provision of counsel, the agency found that it had authority to provide it under current law. See *American Chinchilla Corp.*, 1970 Trade Register Report, paragraph 19059 (FTC 1969).

The present bills seek to limit the scope of the attorneys' fees provision not by restricting the categories of proceedings to which it applies but by requiring as a condition of compensation that the poor person has "made a discernible contribution to promoting agency implementation of a purpose of the act of Congress pursuant to which [the] proceeding is conducted." (I presume, by the way, that this test is intended to apply to compensation under both clauses (1) and (2) of sec. 560(a), but it might be interpreted to apply only to the latter; this ambiguity should be eliminated.) That standard does not seem to me workable. Every position, even when it loses, makes a discernible contribution to the administrative process if it causes the agency to focus upon an idea that should be considered. Is the Government, under this provision, to determine which ideas are or are not worthy of consideration and thus of subsidy? It seems to me that the proposed standard will either invite recurrent appeals to the courts from denials of compensation (and who will pay for those appeals?) or, perhaps more likely, will be taken to mean that compensation is almost always awarded.

I am sure you have no illusions about the economic cost of this provision, which will be substantial. I am more concerned about the potential social and administrative costs. If representation of the poor is to be provided at public expense, it seems to me more rational to achieve this goal through grants to private organizations established for that purpose. In this way, the merit of the proposed participation or intervention—the likelihood, if you will, that it will make a "discernible contribution"—will be evaluated by some knowledgeable person before, rather than after, the intervention occurs. I frankly suspect that under the provision as written there will be more lawyers with a cause looking for poor clients than poor clients with a problem looking for lawyers. Perhaps this in fact is the genuine intention of the proposal—simply to subsidize "public interest" representation, which may be a good idea. But if that is the case, then I do not see why the subsidy should be conditioned upon poverty. There are many worthy "public interest" causes identified not specifically with the poor but with the entire society, no single member of which has a sufficient pecuniary interest to make the hiring of a lawyer economically feasible. Environmental protection is an example.

As to the administrative costs: This is what weighs most heavily. I greatly fear the tendency of this proposal to formalize and lawyerize proceedings that are now generally conducted in a nonadversary fashion. When claimants in social security cases, for example, are regularly represented by lawyers, it is likely that the Government will feel constrained to follow suit—so that proceedings which now typically involve only a claimant presenting his case to an impartial administrative law judge will be converted into a full-blown trial.

In short, my personal reaction is that this provision is overbroad and, until we know more about the actual utility of representation, possibly premature. I would hope that in the enormous majority of agency proceedings—both formal and informal—the citizen, even the poorly educated citizen, can obtain a fair and careful hearing without speaking through the mouth of a lawyer. If that is not the case, I think we should be talking not about providing lawyers for all our citizens but about revising all our procedures.

With respect to the other principal portion of title II, which would permit the payment of “other reasonable costs, including fees for witnesses”: I do not have the same substantial misgivings about this, because I do not feel it has the same potential for formalizing the entire administrative process. Fees for travel and expert witnesses, however, could involve substantial expense, and I would hesitate to have the public assume them without some evaluation of utility more realistic than that contained in the present bills.

Mr. COHEN. When you talk about your objection to the lawyerizing of essentially administrative procedures, what about the Workmen's Compensation Act which is essentially administrative procedure? It seems to me that lawyers are now an inherent part of that process and it has not been to the detriment of the claimants.

Mr. SCALIA. There are proceedings where lawyers are needed. There are also proceedings where they are counter-productive. For example, in small claims court cases, it is thought, by many at least, to be desirable positively to exclude lawyers.

Mr. COHEN. But you are talking about something under a hundred dollars—small claims.

Mr. SCALIA. No. No. Most authorities would recommend that the jurisdictional limit be much higher than that.

You raise a point which is now a question of some controversy, and that is whether in general grant and benefit proceedings, disability proceedings, welfare proceedings, there should be a formalized structured proceeding. As you may know, the British system is quite the opposite of ours. It is not formalized and there is not representation by counsel.

Mr. COHEN. You are not suggesting we follow the British system?

Mr. SCALIA. I only raise it to demonstrate the fact that it is not necessarily the case that to have an efficient and fair system we must have representation by counsel in all cases.

Mr. COHEN. That is all.

Mr. SCALIA. I might note that the statutory provisions governing in forma pauperis proceedings in the Federal courts do not provide for such expenses, but merely for the waiver of fees and costs and Government payment of transcript and printing expenses. 28 U.S.C. section 1915 (1970). It is my view that if any expenses beyond these are to be borne by the public in proceedings that do not involve criminal or civil sanctions, those expenses—whether for attorneys, expert witnesses, travel or subsistence—should be authorized in advance at the discretion of agency. I might note that agency authorization of such expenses may already be permitted with respect to proceedings under at least some current laws. As Congressman Dellums pointed out, the Comptroller General has recently sustained the legality of the FTC's payment of transcript costs, attendance fees, mileage and

subsistence expenses—for not only an indigent respondent, but even an indigent intervenor. See Opinion No. B139703, July 24, 1972. Under those circumstances, when the agency is making evaluation of the need and the utility in advance, there is no problem.

Title III—Sovereign Immunity, is perhaps the most difficult of these titles to get a handle on. It would adopt almost verbatim Conference Recommendation 69-1, Statutory Reform of the Sovereign Immunity Doctrine, a copy of which is attached to my printed testimony. The purpose of these provisions is to eliminate some vestiges of the ancient doctrine of sovereign immunity insofar as that doctrine prevents a citizen from challenging the legality of action by Federal officials.

Most statutes enacted in recent years contain a specific judicial review provision. Many of the older functions performed by the executive departments, however, and (generally by oversight) a few new statutory functions, are not subject to these provisions. In such instances, judicial review is available through so-called nonstatutory review—actions in the U.S. district court cast in the form of standard civil suits, such as actions against the Federal official for declaratory judgment, injunction or mandamus. These “nonstatutory” actions are sometimes frustrated, however, by the doctrine of sovereign immunity, which has gradually been disappearing from our jurisprudence but subsists in a greatly reduced and highly unpredictable form.

I will not trouble you with a lengthy description of the various ways in which the doctrine may be employed to prevent judicial review of administrative action. It has been invoked in cases of various types, including challenges to agricultural regulations, Government employment practices, tax investigations, postal rate matters, administration of labor legislation, food and drug regulation, control of subversive activities, and administration of grant-in-aid programs. There is little pattern to the results in these cases, and for nearly every example of a case in which the defense prevailed, there is a closely analogous case in which it was rejected. That is the main problem we have now. The law of sovereign immunity makes no sense.

I would like to describe one case which to my mind demonstrates most forcefully the injustice of the doctrine. In 1962, in *Malone v. Bowdoin*, 369 U.S. 643, the Supreme Court held that a citizen could not invoke the assistance of the courts to prevent what he said (and the Court assumed) was an unlawful seizure of his land by the Forest Service. The Forest Service officer moved in and said “This is Federal land,” the citizen said “No, it isn’t, it is mine,” and the Court said “It may well be yours but we can’t look into that.” The citizen’s only remedy was to give up the land and sue for its value in the U.S. Court of Claims. With the result, I suppose, that each Forest Service officer has the power of condemnation. That shows you the injustice of it.

To show you the irrationality of it, you might compare that case with *Udall v. Talman*, in which the Supreme Court did not apply the doctrine of sovereign immunity and allowed suit to compel the Secretary of the Interior, the Government, to issue an oil and gas lease on Federal land. There the Court found sovereign immunity did not prevent the suit. I submit there is really no intellectually satisfying way of reconciling those two cases, and that is the problem with the doctrine nowadays.

The purpose of the conference recommendation, and I presume of title III of the present bill, is to provide for judicial review of improper agency action in those isolated situations in which the doctrine of sovereign immunity now stands in the way. Its only intent is to permit challenge of agency action, not to provide monetary relief where that is not now accorded by law. Hence its limitation to those suits seeking relief other than money damages. Those tort and contract claims which the Congress has chosen not to permit under such legislation as the Federal Tort Claims Act (62 Stat. 933), the Court of Claims Act (62 Stat. 1940,) and the Tucker Act (24 Stat. 505) would be still subject to a defense of sovereign immunity.

I would like to suggest, however, several changes in the provisions of title III. The last clause of part 1 of the conference recommendation which is attached to my printed testimony was intended to assure that the new waiver of sovereign immunity would also not undo any carefully drawn restrictions placed upon earlier waivers of sovereign immunity in other specific statutes besides the Tort Claims Act, the Tucker Act, and so forth, monetary relief statutes. That clause in the conference recommendation provides that "nothing herein \* \* \* (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The bill departs from this language by eliminating the phrase "expressly or impliedly" and changing the phrase "that grants consent to suit" to "granting consent to suit for money damages." It is not apparent why only the prior congressional intention in money damage statutes is to be honored. There are other statutes which permit suit for one type of nonmonetary relief, such as declaratory judgment, without thereby intending to permit other remedies that would be much more disruptive of Federal processes, such as injunction. I therefore think this limitation undesirable—as I do the exclusion of the specification that an implied limitation in an earlier statute will continue to be honored.

The elimination of so venerable an antiquity as the doctrine of sovereign immunity may seem at first blush a rash and radical step; it invites woeful predictions of administrative chaos and confusion. The administrative conference, which is composed of experts in this field, most of whom are from the Government itself, has studied the issue with great care, and is on record to the effect that such predictions are groundless. The doctrine of sovereign immunity—insofar as it applies to judicial review of agency action—has been moribund for many years, and the present proposal would merely sweep away the few confused and unpredictable remnants left by the courts. With the important modifications I have just discussed, the provisions of title III of the present bill are both administratively sound and highly desirable.

I might note that even when the doctrine of sovereign immunity goes, other protections which achieve whatever good purposes the doctrine of sovereign immunity now achieves will remain. For example, the language of 5 U.S.C. section 701, the judicial review portion of the Administrative Procedure Act, which provides that this chapter applies—judicial review applies—"except to the extent statutes preclude judicial review or agency action is committed to agency discretion by law.

Many of the sovereign immunity cases are right—in fact, most of them are probably right. But instead of looking to the real question, that is, under the statute in issue was this action meant to be committed to agency discretion, was that the congressional intent; instead of looking at that, the courts play with the medieval concept of sovereign immunity, asking is this action by the Government or are you trying to force the Government to do something. That is not really where the inquiry should be directed. By sweeping that away, I really think not too many decisions will be altered; but they will be considered on the basis of the proper grounds.

Of course, another protection that will continue to exist despite abolition of sovereign immunity is the courts' power to deny particular equitable relief where that would not be desirable. As any lawyer knows, a court can deny any injunction in its sound discretion; and the Supreme Court has done so. In one of its cases it said the Court in its discretion may refuse to give a remedy which would work public injury or embarrassment just as in sound discretion the court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.

These doctrines as well as the doctrines of standing, ripeness, and others, are adequate to protect whatever real interests the Government has. The doctrine of sovereign immunity simply confuses the issue.

There are several additions to title III which I would like to suggest in order to accomplish fully its purpose of assuring citizen redress against unlawful official action. I will not go into these; they are printed in my testimony. Briefly, they are an elimination of the monetary requirement in the general Federal question provision of the judicial code, which sometimes prevents judicial review of agency action. How do you establish that your right to remain free from military service is worth more than \$10,000? Sometimes there is no worth established but it must be established to bring suit. Other desirable additions to the bill would be changes relating to proper parties defendant and to the venue statute. I simply refer you to my printed testimony for those points.

Finally, let me address myself to Title IV—Enforcement of Standards for Grants.

Recommendation 71-9 of the Administrative Conference, which I have attached to the printed text of my testimony, is addressed to the enforcement of standards in Federal grant-in-aid programs. By grant-in-aid programs, I mean those Federal grants that are channeled through public and private grantees to enable them to provide services to the public. Whether these grants are made under so-called categorical grant programs or under statutes providing for more broadly targeted block grants, there are invariably Federal requirements which must be met as a condition for initial approval, and in the subsequent operation of the program by the grantee. The procedures for enforcing these requirements tend to vary with each Federal program, although Congress and the agencies have, on occasion, attempted to formulate a general approach to certain common problems—as, for example, in title IV of the Civil Rights Act of 1964, 42 United States Code section 20000(d), which deals with enforcement of the prohibition of racial discrimination in federally assisted programs.

Conference recommendation 71-9 sets out in general terms those procedures which ought to be built into the administration of every Federal grant-in-aid program to insure that grants are made, and assisted programs are conducted, in accordance with the standards and conditions imposed by Congress and the administering agency. Briefly, the recommendation calls for establishment of complaint procedures at both the agency and the grantee level so that those who are the intended beneficiaries or are otherwise affected by the assisted program may complain of the proposed grant or of the subsequent operation of the program. It also calls for an adequate information system to assure that persons affected may take advantage of these complaint procedures. Finally, it recommends that agencies have at their disposal a range of sanctions to apply in cases of violation, so that they are not faced with the dilemma of having to overlook the grantee's derelictions or terminating assistance entirely and thus "throwing out the baby with the bath water."

The basic principles of recommendation 71-9 are embodied in title IV of the Bureaucratic Accountability Act. I understand that Prof. Jerry Mashaw of the University of Virginia Law School, who was one of the two consultants responsible for the development of our recommendation, will appear before the subcommittee at a later date to discuss in detail both the recommendation and its proposed statutory implementation. The latter is a provision of such complexity that I cannot begin to do it justice in what remains of my already extended remarks.

I would like, however, to make a few brief observations: The conference recommendation, you will note, is addressed to the agencies, and does not explicitly call for legislation except where the agency finds that necessary to provide an appropriate range of sanctions. I would welcome legislative implementation of the recommendation, provided that can be achieved without depriving the agencies of the flexibility which they need and which the recommendation assured. I suspect that proviso cannot be met if the legislation seeks to apply very detailed provisions to the enormous diversity of grant-in-aid programs administered by many different agencies. I believe the present proposals suffer somewhat from this defect.

Section 561(c)(1), for example, would require a reference to the Attorney General for injunctive relief in any case in which the agency decides that the grantee has been guilty of the violation complained of. Such a reference would be appropriate often, perhaps usually, but certainly not always. Administrative sanctions might be preferable in some cases; in others adequate assurance of future compliance might be obtained; in still others the assisted program might be completed or so near completion that obtaining injunctive relief would not be worth the effort.

Another instance of the same lack of flexibility appears in connection with the evaluation of complaints. Whereas the conference recommendation looks to the agency to make an informed qualitative judgment regarding the substantiality and plausibility of each complaint, section 561(b) seems to require the agency, in deciding how the complaint should be processed, to assume the truth of all allegations and to apply a mechanical test for determining whether a substantial number of persons would be affected on the basis of that assumption.

Surely the agency must have sufficient control over its enforcement priorities to be able to dispose summarily of a complaint which "states a cause of action" in a formal sense but is unfounded or trivial on the basis of information available to the agency. In such a case I would require simply that the agency supply the complainant a statement of reasons for its action in dismissing.

In addition, I see a number of technical problems in title IV, particularly uncertainty as to what procedures the granting agency must employ before imposing sanctions. I would be pleased to have my office assist the subcommittee staff in ironing out these minor difficulties and perhaps in discussing the manner in which needed flexibility can be built into the statutory requirements. If this can be achieved, I would support the enactment of title IV.

I appreciate your attention to a statement which grew well beyond its originally intended length. I attribute that failing quite simply to the tremendous importance and scope of the legislative provisions before you. I congratulate the subcommittee for its initiative in confronting the problems of governmental accountability to its citizens. I assure you of the continued support of the Administrative Conference in that endeavor.

I will try to answer any questions you may have.

Mr. CONYERS. We are going to have to defer questions, but I think I can safely say that your very persuasive and analytical presentation here will immeasurably help the supporters and initiator of this legislation.

I particularly welcome your offer to work with the subcommittee staff, and perhaps Congressman Dellums' staff, who I happen to personally know have labored for many many months in putting this original bill together and are probably grateful, too, for the fine detail with which you and your assistants have revealed a very convincing and I think constructive evaluation of the legislation before us.

I would like to acknowledge the fact that your executive secretary is here, Mr. Richard Berg. We welcome him here as well.

I yield now to the gentleman from Maine for any observation that he might make.

Mr. COHEN. Thank you, Mr. Chairman,

I want to join in the chairman's comments about your presentation. It certainly was thorough, thoughtful, and very helpful.

Just one point I would like to make. On page 15, where you suggest, about the middle of the page, "a significant number of situations remain, however, in which a plaintiff must ground his action on the 'general Federal question' provision of section 1331, and hence must establish a value of \$10,000 at issue," I think you are misreading title 28. You have as a basis for jurisdiction in the Federal courts either one, a general Federal question or if it does not amount to a general Federal question, such as a tort suit between two individuals from different States, then you have to establish the \$10,000 amount. But if you have a general Federal question, there is no dollar limit on that, as I can remember the law.

Mr. SCALIA. I demur.

Mr. CONYERS. Again, thank you very much. We are looking forward to your continued cooperation with the subcommittee.

[The prepared statement of Mr. Scalia follows:]

STATEMENT BY ANTONIN SCALIA, CHAIRMAN, ADMINISTRATIVE CONFERENCE  
OF THE UNITED STATES

On H.R. 6224, a bill to amend the administrative procedure provisions of title 5 of the United States Code to make the rulemaking provisions applicable to matters relating to public property, loans, grants, benefits, and contracts; to provide for waiver of sovereign immunity; to provide for the enforcement of standards in grant programs; and for other purposes.

Mr. Chairman and members of the subcommittee: As you know, the Administrative Conference is a permanent agency established by the Congress to make a continuing study of the administrative procedures of all Federal agencies and to provide recommendations and advice concerning those procedures to the agencies, the President, and the Congress itself. It is composed of policy-level officials from most of the major Federal agencies and of lawyers from the private sector with special knowledge and experience in the field of administrative law.

The proposed Bureaucratic Accountability Act bears directly upon matters of administrative fairness and efficiency that are the Conference's main concern. Many of the features of the legislation implement proposals which the Conference has adopted; my purpose in appearing here today is principally to address those features. I do not intend to discuss them in great detail, since I understand that with respect to each your witness list includes the consultant to the Conference whose report formed the basis of our recommendation. I hope, however, to describe all these Conference proposals in broad outline and to reaffirm our strong support for their adoption.

I will discuss the recommendations of the Conference as they relate to the Bureaucratic Accountability Act under each of the four titles of H.R. 6224:

TITLE I—RULEMAKING INVOLVING PUBLIC PROPERTY, LOANS, GRANTS, BENEFITS OF  
CONTRACTS

As you know, section 553 of the Administrative Procedure Act establishes a mechanism for public participation in the formulation of substantive rules by Federal agencies. An agency is required to publish its proposed rule in advance, and to receive and consider written comments by interested persons before promulgating the rule in final form. This simple device has been called one of the greatest inventions of modern government. It is probably the principal means of direct citizen involvement in Federal law-making.

The APA exempts from these requirements, however, rulemaking which relates to "public property, loans, grants, benefits or contracts." As to this, there is no guarantee of citizen participation by reason of the exemption contained in section 553(a)(2) of the APA. Conference Recommendation 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, a copy of which I have attached to my printed testimony, urges that this exemption be eliminated.

Whatever doubts or uncertainties may have justified the 553(a)(2) exemption in 1946 when the new rulemaking requirements were first adopted, there is nothing to justify its continuation. Experience has shown that so-called "notice-and-comment" rulemaking is not a cumbersome or impractical process—and that it improves not only the fairness but also the efficiency of administrative action. Yet the curious exemption not only remains in the law, but over the years has actually increased in its practical scope. The percentage of Federal activity that related to "public property, loans, grants, benefits or contracts" in 1946 was substantially less than the percentage now covered. Grant and benefit programs account for a large share of new legislation, and have done so consistently in recent years. Though the section 553(a)(2) exception cannot be said to have swallowed the rule, it certainly restricts it to a much narrower category of cases than either reason or experience would advise.

One suspects that the original basis for this particular exemption was the principle that governmental withholding of a "benefit" is juridically different from governmental impairment of a "right"—that a citizen has no right to complain about, or to participate in, a decision concerning something to which he is not "entitled." This philosophy—the so-called "right-privilege" distinction—used to hold sway in judicial as well as legislative chambers, so that it was once generally held that prospective grantees of public benefits had no standing to sue. But that attitude of mind has disappeared from the courts, and it is time that it disappear from the executive branch as well. The use of public property, the conferring of public loans, grants and benefits are in modern society of enormous

importance to the individual citizen; there is no reason why he should have less participation in bureaucratic disposition of these matters than of others.

Why, for example, should notice-and-comment procedures not be required for the adoption of rules establishing criteria and qualifications for the sale and leasing of public lands, or the granting of mineral rights and grazing permits? Why should they not extend to the rules adopted for various government loan programs, such as those administered by the Federal Housing Administration, the Veterans Administration and the Small Business Administration? Why should they not apply to the criteria and qualifications established for National Science Foundation research grants, Department of Transportation highway construction grants and HEW grants to aid in the construction and equipment of elementary and secondary schools? Why should they not apply to the rules governing eligibility for cash benefits from the Social Security Administration or the Railroad Retirement Board? Why, finally, should they not extend to the rules imposed upon actual and potential Federal contractors by almost all Federal agencies?

These are all areas of importance to all citizens. And they are areas in which the Federal agencies need the views and opinions of the public no less than in the more traditional fields of agency activity. I do not mean to paint the situation as being worse than it is. In point of fact—and this is perhaps the ultimate demonstration of the soundness of the proposal that is now before you—most Federal agencies have in fact been using notice-and-comment procedures with respect to public property, loans, grants and benefits even though they are not required to do so. So in these areas, the amendment merely adopts as law what the agencies have already acknowledged as desirable. In the contract field, however, it will effect substantial changes; and those changes are desirable.

There will of course be those who are fearful of extending the compulsory provisions of section 553 into these new areas—just as I suppose there were those who were fearful of extending them in 1946 to the more numerous areas of Federal activity now covered. It seems to me that the ultimate answer to those fears, in addition to the successful experience with section 553 rulemaking over the past 28 years, is the simple fact that agencies can in any event dispense with the most restrictive requirements of section 553 (the notice-and-comment procedures) if and when they find that they are “impracticable, unnecessary, or contrary to the public interest.” With this broad exemptive provision, that will continue to be contained within section 553(b), it seems to me there are no grounds for fear that the orderly governmental process will be disrupted.

I would like to suggest two respects in which Title I of this legislation might be improved—one by addition and one by deletion. In addition to the “public property, loans, grants, benefits, or contracts” exemption from section 553 rulemaking, there is a second principal exemption of immense scope that could profitably be restricted. This is the “military or foreign affairs functions” exemption which is the subject of Recommendation 73-5 adopted by the Administrative Conference last December, a copy of which is attached to my printed statement. Briefly stated, this recommendation would eliminate the categorical exemption for “military or foreign affairs functions” and insert in its place (1) a total exemption for rulemaking involving matters specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy and (2) provisions which will make it clear that specific classes of military or foreign affairs rulemaking can be exempted on a categorical basis when the agency finds that rulemaking would be “impracticable, unnecessary or contrary to the public interest.” I will not belabor the details of these proposals; they are described with precision in the attached recommendation, and suggested statutory language is contained in an appendix to the recommendation. I earnestly urge that you consider including such provisions in this legislation. I believe they provide all the protection to the vital interests of national defense and foreign affairs that is required, without unnecessary restricting the openness and accessibility of Government.

The one action taken by Title I which I suggest you reconsider is the deletion of subpart A of section 553(b), which exempts from notice-and-comment rulemaking “interpretative rules, general statements of policy [and] rules of agency organization, procedure, or practice.” The basis for exempting interpretative rules is that these do not impose any new command or requirement on a private citizen, or deprive him of any governmental benefit. Rather, such rules merely set forth the agency’s interpretation of what the law already does—which interpretation (unlike a substantive rule) can be overturned by a court with relative ease. The problem with including such rulemaking within section 553 is that the important practice of agency advice-giving would be seriously discouraged. When we use the word “rules” we generally think of detailed written requirements—and

most substantive rules of general applicability indeed take this form. Under the APA, however, the word "rule" technically means "the whole or a part of [any] agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). Thus, for example, oral advice provided to a Social Security applicant as to whether he qualifies for benefits and what he must do to obtain them is technically a rule—though an interpretative rule, which under the present statute does not require notice and comment. If the law is changed as this bill proposes, so that notice-and-comment procedures are required, advice of that sort I think would simply not be given. Even explanatory material which an agency issues for the purpose of informing the general public regarding the terms of a new statute or regulation would fall within the revised notice-and-comment requirements—so that an agency could not explain a new rule to the public without having a rulemaking on the explanation. In short, reason requires that there be an exemption for "interpretative" rules; its elimination would in my view be a net loss rather than a net gain for the cause of public information.

As to the exemption for "general statements of policy": I frankly do not know how an agency head would be able to give a speech without putting it out for comment in advance if this exemption were eliminated—and if he did that I presume no one would come hear the speech. There must be some exception for generalized descriptions of the direction in which an agency is heading, which are not operative in and of themselves. I believe that is what the language of the present exemption is intended—and has been interpreted—to reach. I am unaware that it has posed any real problem.

Finally, as to the exemption for "rules of agency organization, procedure, or practice": I would see no problem in applying notice-and-comment procedures to the more formal and more significant of these; but the difficulty is that any "statement" of future effect pertaining to these matters is technically a rule—so that innumerable minor adjustments of agency staffing, procedure or practice would require notice-and-comment procedures. On balance the game does not seem to be worth the candle, since this is once again an area in which I have not heard any significant complaint.

Of course the response could be made that none of the differences I have raised poses any difficulty because section 553(b) in any event excuses the rulemaking procedures when there is a finding that they were "impracticable, unnecessary, or contrary to the public interest." But if one creates a scheme in which that exemption is used more often than not, the entire currency becomes debased; and that exemption would in my view apply to most of the new rulemaking that would be drawn in by elimination of section 553(b)(A). To preserve the integrity of the remainder of section 553, and in the absence of any real need in these areas I have discussed, I think it preferable to continue with the present law, which in this respect has worked well.

#### TITLE II—PAYMENT OF EXPENSES INCURRED BEFORE AGENCIES

From the first year of its existence the Administrative Conference has recognized the need for Federal agencies to make special efforts at obtaining the views of the poor with respect to rulemaking which may substantially affect them. Conference Recommendation 68-5 is addressed entirely to this subject. The Conference has not, however, taken any position with respect to the direct payment of counsel fees and participation *in forma pauperis*—though it did debate the subject at one of its sessions in 1971. The few comments I have about this Title of the bill are therefore my own and not those of the entire agency.

Let me speak first to what I consider the most significant feature of Title II—the provision for public payment of attorneys' fees. It is obviously appealing to conclude that if public provision of counsel is appropriate before the courts it should be appropriate before the agencies as well. Some distinctions, however, must be drawn. In the courts, counsel is automatically provided at public expense only with respect to criminal proceedings. Even when substantial sums of money are sought by or from a poor person in a civil proceeding, the State and the Federal government commonly provide no legal assistance, except to the extent that they operate or subsidize legal aid programs or provide legal advice through the staff of small claims courts. There is assuredly no absolute entitlement to legal representation. It seems to me strange to require an attorney at public expense for a general rulemaking proceeding when none is provided in a civil action which much more substantially affects the person involved.

Aside from the disparity with judicial practice, I find the sweep of the provision excessively broad. It does not seem to me that a poor person necessarily requires an attorney with respect to section 553 (informal rulemaking) proceedings. These are not legalistic proceedings—and many persons who can afford representation by counsel appear on their own behalf. Even with respect to adjudicative-type proceedings under the APA (sections 556 and 557), it is by no means clear that representation by counsel is *always* important. In Social Security hearings, for example, which account for more adjudications by far than any other single program in the government—and perhaps more than all the others combined—the claimant is now rarely represented by counsel, and the Government itself almost never. The Administrative Conference is conducting a major study of disability claims under various statutes administered by the Department of Labor, the Social Security Administration, the Veterans Administration and the Civil Service Commission, with the object of determining whether there is any discernible difference in outcome when the claimant is represented by counsel. It is by no means clear that there is. Much more study is needed before a conclusion of even the universal utility, much less the universal indispensability, of legal representation is justified.

It would be different if we were talking only about the provision of counsel in formal (sections 556 and 557) adversary cases in which the agency is seeking to impose a criminal or even a civil sanction upon an impecunious defendant. Here the analogy to provision of counsel in the courts is much closer, and it is unlikely that the need for counsel is more general. I expect, however, that the utility of an attorneys' fees provision limited in this fashion would be extremely small. Most of the civil and criminal sanctions which Federal agencies apply pertain to violation of economic or commercial regulations, and almost invariably involve malefactors of some, if not great, wealth. And in the only sanction case I am aware of in which an impecunious defendant sought public provision of counsel, the agency found that it had authority to provide it under current law. See *American Chinchilla Corp.*, 1970 Trade Reg. Rep. par. 19059 (FTC 1969).

The present bills seek to limit the scope of the attorneys' fees provision not by restricting the categories of proceedings to which it applies but by requiring as a condition of compensation that the poor person has "made a discernible contribution to promoting agency implementation of a purpose of the Act of Congress pursuant to which [the] proceeding is conducted." (I presume, by the way, that this test is intended to apply to compensation under both clauses (1) and (2) of section 560(a), but it might be interpreted to apply only to the latter; this ambiguity should be eliminated.) That standard does not seem to me workable. Every position, even when it loses, makes a discernible contribution to the administrative process if it causes the agency to focus upon an idea that should be considered. Is the Government, under this provision, to determine which ideas are or are not worthy of consideration and thus of subsidy? It seems to me that the proposed standard will either invite recurrent appeals to the courts from denials of compensation (and who will pay for those appeals?) or, perhaps more likely, will be taken to mean that compensation is almost always awarded.

I am sure you have no illusions about the economic cost of this provision, which will be substantial. I am more concerned about the potential social and administrative costs. If representation of the poor is to be provided at public expense, it seems to me more rational to achieve this goal through grants to private organizations established for that purpose. In this way, the merit of the proposed participation or intervention—the likelihood, if you will, that it will make a "discernible contribution"—will be evaluated by some knowledgeable person before, rather than after the intervention occurs. I frankly suspect that under the provision as written there will be more lawyers with a cause looking for poor clients than poor clients with a problem looking for lawyers. If this in fact is the genuine intention of the proposal—simply to subsidize "public interest" representation—then I do not see why the subsidy should be conditioned upon poverty. There are many worthy "public interest" causes identified not specifically with the poor but with the entire society, no single member of which has a sufficient pecuniary interest to make the hiring of a lawyer economically feasible. Environmental protection is an example.

As to the administrative costs: I greatly fear the tendency of this proposal to formalize and lawyerize proceedings that are now generally conducted in a non-adversary fashion. When claimants in Social Security cases, for example, are regularly represented by lawyers, it is likely that the Government will feel constrained to follow suit—so that proceedings which now typically involve only

a claimant presenting his case to an impartial administrative law judge will be converted into a full-blown court trial.

In short, my personal reaction is that this provision is overbroad and, until we know more about the actual utility of representation, possibly premature. I would hope that in the enormous majority of agency proceedings—both formal and informal—the citizen, even the poorly educated citizen, can obtain a fair and careful hearing without speaking through the mouth of a lawyer. If that is not the case, I think we should be talking not about providing lawyers for all our citizens but about revising all our procedures.

With respect to the other principal portion of Title II—which would permit the payment of “other reasonable costs, including fees for witnesses”: I do not have the same substantial misgivings about this, because I do not feel it has the same potential for formalizing the entire administrative process. Fees for travel and expert witnesses, however, could involve substantial expense, and I would hesitate to have the public assume them without some evaluation of utility more realistic than that contained in the present bills. I might note that the statutory provision governing *in forma pauperis* proceedings in the Federal courts do not provide for such expenses, but merely for the waiver of fees and costs and Government payment of transcript and printing expenses. 28 U.S.C. § 1915 (1970). It is my view that if any expenses beyond these are to be borne by the public in proceedings that do not involve criminal or civil sanctions, those expenses—whether for attorneys, expert witnesses, travel or subsistence—should be authorized in advance at the discretion of the agency. I might note that agency authorization of such expenses may already be permitted with respect to proceedings under at least some current laws. The Comptroller General has recently sustained the legality of the FTC’s payment of transcript costs, attendance fees, mileage and subsistence expenses—for not only an indigent respondent, but even an indigent intervenor. Sec Opinion No. B139703, July 24, 1972.

#### TITLE III—SOVEREIGN IMMUNITY

Title III of the Bureaucratic Accountability Act would adopt almost verbatim Conference Recommendation 69-1, *Statutory Reform of the Sovereign Immunity Doctrine*, a copy of which is attached to my printed testimony. The purpose of these provisions is to eliminate some vestiges of the ancient doctrine of sovereign immunity insofar as that doctrine prevents a citizen from challenging the legality of action by Federal officials.

Most statutes enacted in recent years contain a specific judicial review provision. Many of the older functions performed by the executive departments, however, and (generally by oversight) a few new statutory functions, are not subject to these provisions. In such instances, judicial review is available through so-called “nonstatutory review”—actions in the United States district courts cast in the form of standard civil suits, such as actions against the Federal official for declaratory judgment, injunction or mandamus. See 5 U.S.C. §§ 792-04. These “non statutory” actions are sometimes frustrated, however, by the doctrine of sovereign immunity, which has gradually been disappearing from our jurisprudence but subsists in a greatly reduced and highly unpredictable form.

I will not trouble you with a lengthy description of the various ways in which the doctrine may be employed to prevent judicial review of administrative action. It has been invoked in cases of various types, including challenges to argicultural regulations, government employment practices, tax investigations, postal-rate matters, administration of labor legislation, food and drug regulation, control of subversive activities, and administration of grant-in-aid programs. There is little pattern to the results in these cases, and for nearly every example of a case in which the defense prevailed, there is a closely analogous case in which it was rejected. I would like to describe one case which to my mind demonstrates most forcefully the injustice of the doctrine. In 1962, in *Malone v. Bowdin*, 369 U.S. 643, the Supreme Court held that a citizen could not invoke the assistance of the courts to prevent what he said (and the Court assumed) was an unlawful seizure of his land by the Forest Service. The citizen’s only remedy was to give up the land and sue for its value in the United States Court of Claims.

The purpose of the Conference recommendation, and I presume of Title III of the present bill, is to provide for judicial review of improper agency action in those isolated situations in which the doctrine of sovereign immunity now stands in the way. Its only intent is to permit challenge of agency action, not to provide monetary relief where that is not now accorded by law. Hence its limitation to those suits “seeking relief other than money damages.” Those tort and contract

claims which the Congress has chosen not to permit under such legislation as the Federal Tort Claims Act (62 Stat. 933), the Court of Claims Act (62 Stat. 1940) and the Tucker Act (24 Stat. 505) would be still subject to a defense of sovereign immunity.

The last clause of part 1 of the Conference recommendation was intended to assure that the new waiver of sovereign immunity would also not undo any carefully drawn restrictions placed upon earlier waivers of sovereign immunity in other specific statutes. It provides that "nothing herein . . . (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The bill departs from this language by eliminating the phrase "expressly or impliedly" and changing the phrase "that grants consent to suit" to "granting consent to suit for money damages". It is not apparent why only the prior Congressional intention in *money damage statutes* is to be honored. There are other statutes which permit suit for one type of nonmonetary relief, such as declaratory judgment, without thereby intending to permit other remedies that would be much more disruptive of Federal processes, such as injunction. I therefore think this limitation undesirable—as I do the exclusion of the specification that an *implied* limitation in an earlier statute will continue to be honored.

The elimination of so venerable an antiquity as the doctrine of sovereign immunity may seem at first blush a rash and radical step; it invites woeful predictions of administrative chaos and confusion. The Administrative Conference, which is composed of experts in this field, most of whom are from the Government itself, has studied the issue with great care, and is on record to the effect that such predictions are groundless. The doctrine of sovereign immunity—insofar as it applies to judicial review of agency action—has been moribund for many years, and the present proposal would merely sweep away the few confused and unpredictable remnants left by the courts. With the important modifications I have just discussed, the provisions of Title III of the present bill are both administratively sound and highly desirable.

There are several additions to Title III which I would like to suggest in order to accomplish fully its purpose of assuring citizen redress against unlawful official action. Even when the danger of unexpected application of sovereign immunity is eliminated, certain suits for the purpose of seeking judicial review of administrative action will not lie in the Federal courts because of the jurisdictional amount requirement of \$10,000 contained in 28 U.S.C. § 1331. In many cases in which judicial review is sought, special statutes grant jurisdiction without regard to the amount in question; a significant number of situations remain, however, in which a plaintiff must ground his action on the "general Federal question" provision of section 1331, and hence must establish a value of \$10,000 at issue. But how is one to place a price upon an individual's claim that he is entitled to remain free from military service, or to travel abroad, or to be free from continuous police surveillance? In short, where the plaintiff's basic purpose is not to seek money from the Federal government but to obtain review of unlawful official action, the monetary limitation of section 1331 should not apply.

Accordingly, in its Recommendation 68-7 adopted in December 1968, the Conference urged the following:

"Title 28 of the United States Code should be amended to eliminate any requirement of a minimum jurisdictional amount before United States district courts may exercise original jurisdiction over any action in which the plaintiff alleges that he has been injured or threatened with injury by an officer or employee of the United States or any agency thereof, acting under color of Federal law. This amendment is not to affect other limitations on the availability or scope of judicial review of Federal administrative action."

I hope the Committee will insert such a provision in Title III of the present bill.

Another technical obstacle that has sometimes frustrated needed judicial review and will continue to do so even when the obstacle of sovereign immunity is eliminated, is the doctrine of proper parties defendant. It must be recalled that for roughly a century courts have been getting around the doctrine of sovereign immunity through the fiction of suits against named officers. These are in every respect suits against the Government and are defended by Department of Justice or agency attorneys. But the fiction that the suit is against the named official may yet produce strange quirks, for example where a plaintiff has named the wrong official or the official is replaced before the suit is terminated. It is true that the Mandamus and Venue Act, 28 U.S.C. § 1391(e), and recent amendments to the Federal Rules of Civil Procedure, Rules 15(c) and 25(d), have eliminated most of the problems in this area, so that today misnaming a defendant

official is seldom fatal. Nevertheless the present rule is complicated and remains a trap for the unwary. Accordingly, in Recommendation 70-1, a copy of which I have attached to my printed testimony, the Conference recommended that section 703 of Title 5, U.S. Code be amended to permit the plaintiff to name as defendant in judicial review proceedings the United States, the agency, the appropriate officer, or any combination thereof.

Recommendation 70-1 also dealt with another problem which we believe should be handled in this bill. The Mandamus and Venue Act, 28 U.S.C. § 1391(e), presently permits extraterritorial service of process in suits against Federal officials acting in their official capacity. The purpose of this legislation, enacted in 1962, was to relieve plaintiffs seeking nonstatutory review of agency action of the necessity of coming to the District of Columbia in order to obtain service of process on the appropriate official. Under section 1391(e) the suit can now be brought in the plaintiff's own district or where the cause of action arises, and although the plaintiff must pursue the fiction of naming the appropriate official, he may serve him anywhere. This is fine so far as it goes. However, section 1391(e) by its terms is applicable only where *each* defendant is an officer or employee of the United States. There are circumstances in which it would be useful and in the interests of justice for the plaintiff to be able to name nonfederal defendants in the same action. An example is the case in which the plaintiff is complaining of an agency action respecting public land which benefits another private party. Clearly, the other private party should be joined as a defendant, but the plaintiff cannot make such joinder without losing the benefits of section 1391(e). I must emphasize that the Conference proposal does not suggest that extraterritorial service of process be available to reach a nonfederal defendant. It proposes merely amending section 1391(e) to permit joinder of nonfederal defendants who may be served in the district.

The Conference is of the view that niceties of pleading and pointless refinements of venue should not impair the citizen's right to obtain substantial redress for unlawful action on the part of his governmental officials. I urge you to adopt the provisions of Recommendation 70-1 in connection with Title III of the present bill.

#### TITLE IV—ENFORCEMENT OF STANDARDS FOR GRANTS

Recommendation 71-9 of the Administrative Conference, which I have attached to the written text of my testimony, is addressed to the enforcement of standards in Federal grant-in-aid programs. By grant-in-aid programs I mean those Federal grants that are channeled through public and private grantees to enable them to provide services to the public. Whether these grants are made under so-called categorical grant programs or under statutes providing for more broadly targeted block grants, there are invariably Federal requirements which must be met as a condition for initial approval, and in the subsequent operation of the program by the grantee. The procedures for enforcing these requirements tend to vary with each Federal program, although Congress and the agencies have, on occasion, attempted to formulate a general approach to certain common problems—as for example, in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000(d), which deals with enforcement of the prohibition of racial discrimination in federally assisted programs.

Conference Recommendation 71-9 sets out in general terms those procedures which ought to be built into the administration of every Federal grant-in-aid program to ensure that grants are made and assisted programs are conducted in accordance with the standards and conditions imposed by Congress and the administering agency. Briefly, the recommendation calls for establishment of complaint procedures at both the agency and the grantee level so that those who are the intended beneficiaries or are otherwise affected by the assisted program may complain of the proposed grant or of the subsequent operation of the program. It also calls for an adequate information system to assure that persons affected may take advantage of these complaint procedures. Finally, it recommends that agencies have at their disposal a range of sanctions to apply in cases of violation, so that they are not faced with the dilemma of having to overlook the grantee's derelictions or terminating assistance entirely and thus "throwing out the baby with the bath water."

The basic principles of Recommendation 71-9 are embodied in Title IV of the Bureaucratic Accountability Act. I understand that Professor Jerry Mashaw of the University of Virginia Law School, who was one of the two consultants responsible for the development of our recommendation, will appear before the Subcommittee at a later date to discuss in detail both the recommendation and its proposed

statutory implementation. The latter is a provision of such complexity that I cannot begin to do it justice in what remains of my already extended remarks.

I would like, however, to make a few brief observations: The Conference recommendation, you will note, is addressed to the agencies, and does not explicitly call for legislation except where the agency finds that necessary to provide an appropriate range of sanctions. I would welcome legislative implementation of the recommendation, provided that can be achieved without depriving the agencies of the flexibility which they need and which the recommendation assured. I suspect that proviso cannot be met if the legislation seeks to apply very detailed provisions to the enormous diversity of grant-in-aid programs administered by many different agencies. I believe the present proposals suffer somewhat from this defect.

Section 561(c)(1), for example, would require a reference to the Attorney General for injunctive relief in any case in which the agency decides that the grantee has been guilty of the violation complained of. Such a reference would be appropriate often, perhaps usually, but certainly not always. Administrative sanctions might be preferable in some cases; in others adequate assurance of future compliance might be obtained; in still others the assisted program might be completed or so near completion that obtaining injunctive relief would not be worth the effort.

Another instance of the same lack of flexibility appears in connection with the evaluation of complaints. Whereas the Conference recommendation looks to the agency to make an informed qualitative judgment regarding the substantiality and plausibility of each complaint, section 561(b) seems to require the agency, in deciding how the complaint should be processed, to assume the truth of all allegations and to apply a mechanical test for determining whether a substantial number of persons would be affected on the basis of that assumption. Surely the agency must have sufficient control over its enforcement priorities to be able to dispose summarily of a complaint which "states a cause of action" in a formal sense but is unfounded or trivial on the basis of information available to the agency. In such a case I would require simply that the agency supply the complainant a statement of reasons for its action in dismissing.

In addition, I see a number of technical problems in Title IV, particularly uncertainty as to what procedures the granting agency must employ before imposing sanctions. I would be pleased to have my office assist the Subcommittee staff in ironing out these minor difficulties and perhaps in discussing the manner in which needed flexibility can be built into the statutory requirements. If this can be achieved, I would support the enactment of Title IV.

I appreciate your attention to a statement which grew well beyond its originally intended length. I attribute that failing quite simply to the tremendous importance and scope of the legislative provisions before you. I congratulate the Subcommittee for its initiative in confronting the problems of governmental accountability to its citizens. I assure you of the continued support of the Administrative Conference in that endeavor.

I will try to answer any questions you may have.

#### RECOMMENDATION No. 69-8—ELIMINATION OF CERTAIN EXEMPTIONS FROM THE APA RULEMAKING REQUIREMENTS

##### RECOMMENDATION

In order to assure that Federal agencies will have the benefit of the information and opinion that can be supplied by persons whom regulations will affect, the Administrative Procedure Act requires that the public must have opportunity to participate in rulemaking proceedings. The procedures to assure this opportunity are not required by law, however, when rules are promulgated in relation to "public property, loans, grants, benefits, or contracts." These types of rules may nevertheless bear heavily upon nongovernmental interests. Exempting them from generally applicable procedural requirements is unwise. The present law should therefore be amended to discontinue the exemptions to strengthen procedures that will make for fair, informed exercise of rulemaking authority in these as in other areas.

Removing these statutory exemptions would not diminish the power of the agencies to omit the prescribed rulemaking procedures whenever their observances were found to be impracticable, unnecessary, or contrary to the public interest. A finding to that effect can be made, and published in the Federal Register, as to an entire subject matter concerning which rules may be promulgated. Each

finding of this type should be no broader than essential and should include a statement of underlying reasons rather than a merely conclusory recital.

Wholly without statutory amendment, agencies already have the authority to utilize the generally applicable procedural methods even when formulating rules of the exempt types now under discussion. They are urged to utilize their existing powers to employ the rulemaking procedures provided by the Administrative Procedure Act, whenever appropriate, without awaiting a legislative command to do so.

(Adopted October 21-22, 1969.)

**RECOMMENDATION 73-5—ELIMINATION OF THE "MILITARY OR FOREIGN AFFAIRS FUNCTION" EXEMPTION FROM APA RULEMAKING REQUIREMENTS (ADOPTED DECEMBER 18, 1973)**

The basic principle of the rulemaking provisions of the Administrative Procedure Act—that an opportunity for public participation fosters the fair and informed exercise of rulemaking authority—is undercut by various categorical exemptions in 5 U.S.C. § 553(a). More than 25 years' experience with rulemaking under the APA has shown some of these broad exemptions to be neither necessary nor desirable. The Administrative Conference has previously recommended elimination of the exemptions for matters "relating to public property, loans, grants, benefits, or contracts" (Recommendation 69-8, October 22, 1969). Since rules on those subjects may bear heavily on nongovernmental interests, the Conference concluded that their categorical exemption from generally applicable procedural requirements was unwise. For similar reasons, the breadth of the present exemption for all rules which involve a "military or foreign affairs function" is unwarranted.

As with the earlier Recommendation, elimination of the categorical exemption for military or foreign affairs functions would not diminish the power of the agencies to omit APA rulemaking procedures when their observance is found to be impracticable, unnecessary, or contrary to the public interest, or when other exemptions contained in Section 553 are applicable, such as those for "general statements of policy" or for rules relating to "agency management or personnel." In addition, the present Recommendation would retain limited exemptive provisions specially directed to the needs of military and foreign affairs rulemaking.

**RECOMMENDATION**

(1) The APA's categorical exemption for "military or foreign affairs function" rulemaking should be eliminated.

(2) Two aspects of special concern in the military and foreign affairs areas should be dealt with by modified exemptive provisions in place of the present categorical one:

(a) Rulemaking in which the usual procedures are inappropriate because of a need for secrecy in the interest of national defense or foreign policy should be exempted on the same basis now applied in the freedom of information provision, 5 U.S.C. § 552(b)(1). That is, Section 553(a) should contain an exemption for rulemaking involving matters specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.

(b) Some of the agencies affected by elimination of the categorical exemption issue numerous rules for which public procedures would be inappropriate or unnecessary. Such agencies would find it burdensome to make case-by-case findings that the usual procedures are "impracticable, unnecessary, or contrary to the public interest" under Section 553(b)(B). Repeal of the categorical exemption for "military or foreign affairs functions" should not be construed to discourage use of the implicit power to apply the Section 553(b)(B) exemption on an advance basis to narrowly drawn classes of military or foreign affairs rulemaking. It is therefore recommended that repeal of the exemption be accompanied by statutory clarification of the agencies' power to prescribe by rule specified categories of rulemakings exempt by reason of Section 553(b)(B), provided that the appropriate finding and a brief statement of reasons are set forth with respect to each category. Though it would not be mandatory, agencies should consider using notice-and-comment procedures for adoption of the exemptive rule itself. Statutory amendment should also amplify the existing Section 553(b)(B) standards for exemption by including specific reference to the national interest in the military-foreign affairs area.<sup>1</sup>

<sup>1</sup> An Appendix to this recommendation sets forth suggested language to effect the changes recommended by paragraph (2).

(3) Wholly without statutory amendment, agencies already have the authority to use the generally applicable APA procedures for rulemaking when formulating rules of the exempt types. They are urged to do so, wherever appropriate, in matters now excluded by the "military or foreign affairs function" exemption.

#### APPENDIX

Section 553(a) and the relevant part of 553(b), amended in accordance with this recommendation, might read as follows:

##### "§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a matter pertaining to a military or foreign affairs function of the United States specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; or

(2) a matter relating to agency management or personnel [or to public property, loans, grants, benefits, or contracts].<sup>2</sup>

(b) \* \* \*  
Except when notice or hearing is required by statute, this subsection does not apply—

\* \* \* \* \*  
(B) when the agency for good cause finds that notice and public procedure thereon would be impracticable, unnecessary, or contrary to the public interest (including national interest factors if a military or foreign affairs function is involved). The agency shall incorporate in each rule issued in reliance upon this provision either (i) the finding and a brief statement of reasons therefor, or (ii) a statement that the rule is within a category of rules established by a specified rule which has been previously published and for which the finding and statement of reasons have been made.

#### RECOMMENDATION No. 69-1—STATUTORY REFORM OF THE SOVEREIGN IMMUNITY DOCTRINE

The technical legal defense of sovereign immunity, which the Government may still use in some instances to block suits against it by its citizens regardless of the merit of their claims, has become in large measure unacceptable. Many years ago the United States by statute accepted legal responsibility for contractual liability and for various types of misconduct by its employees. The "doctrine of sovereign immunity" should be similarly limited where it blocks the right of citizens to challenge in courts the legality of acts of governmental administrators. To this end the Administrative Procedure Act should be amended.

#### RECOMMENDATION

1. Section 702 of title 5, United States Code (formerly section 10(a) of the Administrative Procedure Act), should be amended by adding the following at the end of the section:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. Section 703 of title 5, United States Code (formerly section 10(b) of the Administrative Procedure Act), should be amended by adding the following sentence after the first full sentence:

If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.

(Adopted October 21-22, 1969.)

<sup>2</sup> Recommendation 69-8 proposed the deletion of the bracketed phrase.

## RECOMMENDATIONS ADOPTED JUNE 2-3, 1970

## RECOMMENDATION 70-1 PARTIES DEFENDANT

The size and complexity of the Federal Government, coupled with the intricate and technical law concerning official capacity and parties defendant, have given rise to innumerable cases in which a plaintiff's claim has been dismissed because the United States or one of its agencies or officers lacked capacity to be sued, was improperly identified, or could not be joined as a defendant. The ends of justice are not served when dismissal on these technical grounds prevents a determination on the merits of what may be just claims. Three attempts to cure the deficiencies of the law of parties defendant have achieved only partial success and further changes are required to eliminate remaining technicalities concerning the identification, naming, capacity, and joinder of parties defendant in actions challenging federal administrative action.

## RECOMMENDATION

1. The Federal Rules of Civil Procedure contain liberal provisions for substitution of parties and for amendment of pleadings and correction of defects as to parties defendant. The Department of Justice should instruct its lawyers and United States Attorneys to call the attention of the court to these provisions in cases involving technical defects with respect to the naming of parties defendant in any situation in which the plaintiff's complaint provides fair notice of the nature of the claim and the summons and complaint were properly served on a United States Attorney, the Attorney General, or an officer or agency which would have been a proper party if named. The Department of Justice should be responsible for determining who within our complex federal establishment is responsible for the alleged wrong and should take the initiative in seeking correction of pleadings or adding of proper parties. Since the Department of Justice has acquiesced in the substance of this recommendation, it would also be appropriate for the Department of Justice and the Administrative Conference of the United States to seek an amendment of the Federal Rules of Civil Procedure to provide that the Attorney General shall have the responsibility to correct such deficiencies.

2. Congress should enact legislation:

(a) Amending section 703 of title 5 to allow the plaintiff to name as defendant in judicial review proceedings the United States, the agency by its official title, the appropriate officer, or any combination of them.

(b) Amending section 1391(e) of title 28 to include within its coverage actions challenging federal administrative action in which the United States is named as a party defendant, without affecting special venue provisions which govern other types of actions against the United States.

(c) Amending section 1391(e) of title 28 to allow a plaintiff to utilize that section's broadened venue and extraterritorial service of process in actions in which non-federal defendants who can be served in accordance with the normal rules governing service of process are joined with federal defendants.

## RECOMMENDATION 71-9—ENFORCEMENT OF STANDARDS IN FEDERAL GRANT-IN-AID PROGRAMS

(Adopted Dec. 7, 1971)

Federal agencies annually disburse billions of dollars in grants-in-aid to State and local governments and to private entities to subsidize activities in such areas as welfare, housing, transportation, urban development and renewal, law enforcement, education, pollution control and health. While State and local governments and private organizations are the direct recipients of the grants, the intended ultimate beneficiaries of the grant programs are private persons helped by the expanded level of support or services made possible by Federal funds.

In administering these grants both public and private grantees must observe the Federal grant standards established to assure the accomplishment of Federal purposes. Federal agencies have often encountered difficulty in enforcing compliance by the grantees with the Federal standards. A factor contributing to this difficulty is that many Federal agencies do not have adequate procedures for resolving questions of compliance and for handling complaints by private persons affected by a grant-in-aid program that the program does not comply with Federal standards. A further contributing factor is that the principal sanction presently available to Federal agencies for securing compliance is to cut off the flow of Federal funds. This sanction raises a serious problem because, unless its threatened

imposition prompts compliance, it stops worthwhile programs and adversely affects the interests of the innocent private persons whom the Congress intended to benefit through the program of Federal financial assistance.

To aid in alleviating this situation the following recommendations are proposed with respect to each Federal program in aid of State, local or private activities through which support or services are provided to individual beneficiaries or to the public generally. However, the recommendation does not apply to research, training, or demonstration grants to government units or private organizations or individuals, or to grants such as fellowship grants to individuals that primarily benefit the recipients of the grants.

#### RECOMMENDATION

##### *A. The Federal Administrative Complaint Procedure*

The Federal grantor agency should have an administrative procedure for the receipt and impartial consideration of complaints by persons affected by the grant-in-aid program that a plan, project application or other data submitted by a grant applicant or grantee as a basis for Federal funding does not meet one or more Federal standards. This procedure should afford the complainant an opportunity to submit to the grantor agency for its consideration data and argument in support of the complaint, and should afford the grant applicant or grantee involved a fair opportunity to respond. If the agency determines that the complaint is apparently ill-founded or is insubstantial, it should notify the complainant of its determination and should state in writing the reasons therefor. If the agency determines that the complaint appears to be substantial and supported by the information at hand, it should so notify both the complainant and the grant applicant or grantee of its present determination in this respect and should state in writing the reasons therefor. If the agency exercises discretion not to make a determination on one or more issues raised by a complaint, it should so notify the complainant in writing. The agency should pass upon all complaints within a prescribed period of time.

The complaint procedure administered by the Federal grantor agency should also provide for the receipt and impartial consideration of complaints that a grantee has in its administration of the funded program failed to comply with one or more Federal standards. It is anticipated that many grantor agencies will find it necessary to limit their consideration of such complaints to situations in which the complainant raises issues which affect a substantial number of persons or which are particularly important to the effectuation of Federal policy and will, therefore, dispose of most individual complaints concerning grantee administration by referring the complainant to such complaint procedures as are required to be established by the grantee. The grantor agency should seek by regulation to define the classes of cases that it will consider sufficiently substantial to warrant processing through the Federal complaint procedure and those classes of cases wherein complainants will be required to pursue a remedy through available complaint procedures administered by the grantee.

##### *B. The Grantee's Administrative Complaint Procedures*

The Federal grantor agency should require as a grant condition the establishment by the grantee of procedures to handle complaints concerning the grantee's operation of the federally assisted program. These procedures should afford any person affected by an action of the grantee in the operation of the program a fair opportunity to contest that action. The "fair opportunity" to contest will necessarily vary with the nature of the issues involved and the identity and interests of the complainant. In all cases, however, the complainant should have the right to submit to the grantee for its consideration data and argument in support of the complainant's position.

##### *C. The Information System*

The Federal grantor agency should seek to assure that persons affected by a grant-in-aid program receive adequate information about the program in order that they may take advantage of the Federal and the grantee complaint procedures. The Federal grantor agency should require as a grant condition that all program materials (regulations, handbooks, manuals, etc.) governing the grantee's administration of a program supported in whole or in part by Federal grant-in-aid funds and all plans, applications and other documents required to be submitted to the Federal agency as a condition to the receipt of Federal funds should be readily accessible to persons affected or likely to be affected by the operation of the funded

program. Plans, applications and other documents that provide the basis for Federal funding should be made readily accessible to interested persons no later than the time of their submission to the grantor agency for approval and at an earlier time when required by law.

The Federal grantor agency should seek to assure that the grantee's system for dissemination of program materials and grant submissions takes account of the nature, location and representation of affected persons. For example, as a part of a plan to make such materials readily accessible, program information might be deposited not only in the offices of the grantee but also in public and university libraries and in the offices of affected interest groups and their legal representatives. It might also be necessary to require the provision of descriptive summaries of technical rules or project applications or to require an oral explanation of program features, for example, the complaint procedures, which are critical to the protection of a beneficiary's interests. The Federal agency should make parallel efforts to disseminate materials relating to its administration of the Federal grant program.

#### *A. Range of Sanctions*

The Federal grantor agency should seek to develop an adequate range of sanctions for insuring compliance with Federal standards by grantees that apply for or receive Federal financial assistance. The sanction of the total denial or cut-off of Federal funds should be retained and used where necessary to obtain compliance, but the agency should have available lesser sanctions that do not result in the prevention or discontinuance of beneficial programs and projects. This range of sanctions should include in appropriate cases:

1. The public disclosure by the agency of a grantee's failure to comply with Federal standards and an indication of the steps believed by the agency now to be appropriate.

2. An injunctive action brought by the agency or the Department of Justice in the Federal courts to require the grantee to fulfill any assurances of compliance with Federal standards made by the grantee or to enforce the Federal standards attached to the grant.

3. The disallowance as a program or project cost of an expenditure by the grantee that does not conform with Federal standards, or other partial denial or cutoff of funds that affects only that portion of a program or project that is not in compliance with Federal standards.

4. The imposition on a grantee who has not complied with Federal standards of additional administrative requirements specially designed to assure that the grantee brings its operations into compliance with Federal standards and redresses the effects of past noncompliance.

5. The transfer of a grant, or the awarding of subsequent grants under the same or related grant-in-aid programs, to a different grantee if the original grantee violates Federal standards.

Where an agency lacks statutory authority to invoke one or more of the above sanctions and such authority would provide an appropriate means of insuring compliance with Federal standards in a grant-in-aid program administered by the agency, it should seek the necessary authority from the Congress.

#### *E. Other Performance Incentives*

The agency should also consider the provision of incentives, such as the contribution of an increased matching share or the awarding of additional grant funds, to grantees who fulfill certain Federal goals. Where the agency lacks statutory authority to provide compliance incentives and such authority would provide an appropriate means of ensuring effectuation of Federal objectives in a grant-in-aid program administered by the agency, it should seek the necessary authority from the Congress.

Mr. CONYERS. I would like to call now the Acting Deputy Assistant Attorney General, Mr. Irwin Goldbloom, who has been trying cases as an appellate attorney in the Department of Justice for some 16 years.

We appreciate your patience. We have your statement and it will be printed in the record, and we would invite you to proceed in your own way.

Welcome to the subcommittee's hearings.

**TESTIMONY OF IRWIN GOLDBLOOM, ACTING DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE**

Mr. GOLDBLOOM. Thank you, Mr. Chairman.

Mr. Chairman, members of the subcommittee: I appreciate the opportunity to appear before this subcommittee on behalf of the Department of Justice to testify on H.R. 6667.

The stated purposes of this bill are to expand formal requirements regarding rulemaking as to public property, loans, grants, benefits, and contracts; to permit private attorneys to obtain compensation from the Public Treasury for services provided to their clients before Federal agencies; to waive sovereign immunity; and to specify procedures which must be followed by agencies administering grants and by the grantees.

To assist the subcommittee, I would like to give a brief synopsis of the substantive changes proposed by H.R. 6667.

Sections 101 and 102 of the bill (title I) amend sections 551 and 553 of title V of the United States Code to place rulemaking as to public property, loans, grants, benefits or contracts within the requirements set forth in the Administrative Procedures Act.

Section 201 of the bill (title II) authorizes agencies to pay reasonable attorneys fees and other reasonable costs to "any interested person" who participates in proceedings before the agency and who is unable to pay "if such person made a discernible contribution to promoting agency implementation" of the act involved in the administrative proceeding.

Section 301 of the bill (title III), in substance, eliminates the defense of sovereign immunity as to any action involving the Federal Government, its agencies, officers or employees.

Section 401 of the bill (title IV) provides a procedure for handling complaints from persons who may be adversely affected by a grant-in-aid, either by submission of a plan, application, or a report or by administration or operation of a program under a grant-in-aid. Grantees are also required to establish complaint procedures.

The Civil Division of the Justice Department handles most of the cases in which the issue is a challenge to agency or other official action. We defend thousands of such challenges every year. It is based on this experience that I wish to comment on H.R. 6667.

Generally speaking, the problem of who may sue the Government or its officials and under what conditions, is a complex matter with varying legal results and at all times extremely important considerations. Officials of the Federal Government in the course of their duties make millions of decisions every year. A decision not to prosecute may not leave an aggrieved party, but one canceling a contract or assessing a penalty almost certainly will produce some kind of grievance. The number and variety of such actions creates a most important question before our society as to the limit of judicial review of executive decisions.

To prevent the possibility that every action of a Government official may be challenged, the judiciary has developed a number of phrases or legalisms such as standing to sue, justiciability, political question, and sovereign immunity. These concepts are in a transitional period. In our view, to attempt to review all Government decisions without

regard to their importance or impact would place an impossible burden on the courts to the point of questioning the constitutionality of the proposition.

Nobody really denies that the function of the courts is to define and protect the individual rights of our citizens. But the courts are not the only forums for redress of grievances. It is not imperative that the courts must decide every dispute in our society. Congress must draw the fine line where judicial action on agency decisions are appropriate. It is my conviction that the ultimate well-being of the judiciary of this country and the assurance of justice to its citizens is dependent upon regulating the number of litigated cases and confining the court's jurisdiction to those areas most appropriate for judicial consideration.

To have every decision of the executive department subject to judicial review results in the substitution of judicial discretion for executive discretion. It is to be noted that 28 U.S.C. 1361 now permits actions in the nature of mandamus in the U.S. district courts for compelling performance of nondiscretionary functions for officers or employees of the United States. It should also be noted that Congress has waived sovereign immunity in other areas to afford an opportunity to redress grievances. See, for example, the Tort Claims Act and the Tucker Act which provide a remedy for claims arising under the Constitution, Federal statutes, and regulations. Also, Congress has made many statutory programs specifically subject to judicial review such as the Social Security Act. However, the lawful function assigned to the executive branch by the Constitution that the President take care that the laws are faithfully executed would be impaired if the courts were assigned the task of reviewing each decision of the executive branch.

With the belief that there is a need in our country for careful consideration before the number of cases in the Federal court system is increased and new subjects are brought before the courts, the Department of Justice is opposed to enactment of H.R. 6667, which would greatly increase the caseload in our Federal Court system, could in certain instances bring Federal projects of great public interest to a standstill by the whim of one citizen, and engender confusion as to the substantive rights of individuals in areas now covered by specific legislation. I would like to discuss the titles of H.R. 6667 to illustrate why we oppose the bill.

In regard to title I, we defer to the agencies and departments having direct involvement in awarding of contracts, administration of public property, and the administration of loans, grants, and benefit legislation. However, I do think that this subcommittee should consider whether the additional procedural requirements proposed by the bill would enable agencies and departments to act with the degree of expedition and flexibility Congress desires. In addition, the new area of law encompassed by title I of the bill could result in a substantial addition to the already heavy caseloads in the Federal court system.

The provisions of title II of the bill for payments of attorneys' fees and costs for representation before agency administrative proceedings would no doubt result in a substantial increase in interventions by persons seeking to claim attorneys, fees. Title II would represent an unwarranted expenditure of tax dollars and, also, is easily subject to

abuse by persons seeking fees. Equally as important, payment of private attorneys' fees out of the Public Treasury is generally unwise. In addition, such legislation weighs attorneys' functions, places undue emphasis on litigation activities at the taxpayers' expense, and detracts from attorneys other important functions. Of course, the agencies which would be directly affected by enactment of title II are in a position to discuss it at greater length.

We think that the defense of "sovereign immunity," which title III of the bill proposes to abolish, should be retained to best serve the public interest. The Supreme Court's discussion of sovereign immunity in *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, p. 703-704 (1949), is apposite. There the Supreme Court stated, and I quote:

It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rules that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, "The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief \* \* \*."

Events following Hurricane Camille offer one illustration of the salutary effect of the sovereign immunity doctrine. There, a business negotiated with officials of the Department of Housing and Urban Development, who sought to lease approximately 400 mobile homes for use by homeless residents. When the negotiations occurred, time was of the essence and only verbal contracts were reached at the time. Eventually, a dispute ensued as to the terms of the contracts. Plaintiff filed suit in the U.S. district court, claiming damages in the amount of \$76,002.25. The district court dismissed the action on the ground that "the relief sought envisions the expenditure of public funds and thus requires that action to be considered as an unconsented suit against the United States." (*Akin Mobile Homes, Inc. v. Secretary of Housing and Urban Development and Department of Housing and Urban Development*, 354 F. Supp. 1036, 1038 (S. D. Mississippi, 1972.))

The U.S. Court of Appeals for the Fifth Circuit affirmed, noting that plaintiff had a right to sue the United States in the Court of Claims. (*Akin Mobile Homes, Inc. v. Secretary of Housing and Urban Development and Department of Housing and Urban Development*, 475 F.2d 1261 (5th Circuit, 1973.))

We think that this case illustrates the function of sovereign immunity in distributing judicial resources in accordance with the congressional intent. Elimination of sovereign immunity would lead to confusion since more than one forum might then have concurrent jurisdiction. In the example, for instance, the appropriate forum was the Court of Claims, not the district court. Thus, the care which Congress has taken to provide remedies only in forums it has specified could be thwarted, if the bill is enacted.

The facts set forth in the Akin Mobile Homes, Inc. litigation illustrate another facet of sovereign immunity. Had plaintiff sought equitable relief requiring the Government to refrain from using its trailers until the dispute was resolved, the claim would have been barred by sovereign immunity, in keeping with the principles enunciated in *Larson v. Domestic & Foreign Corp.* It is important that sovereign immunity be maintained to prevent litigious interference with the public administration.

The Supreme Court has, on numerous occasions, and unanimously, applied the doctrine of sovereign immunity in order to insure that courts and litigants pay heed to the congressional intent, rather than permit litigation where Congress has not authorized suit with regard to a particular subject matter. (See, for example, *Richardson v. Morris*, 409 U.S. 464 (1973); *United States v. King*, 395 U.S. 1 (1969); and *Hawaii v. Gordon*, 373 U.S. 57 (1963).)

Indeed, they are all fairly recent cases.

Although Congress has on numerous occasions waived the defense of sovereign immunity with regard to particular subjects, it has carefully tailored the waivers to serve the public purposes Congress considers appropriate. (See, for example, the Tort Claims Act, 28 U.S.C. 2671 et seq.; the Tucker Act, authorizing suits on contractual claims, 28 U.S.C. 1346(a)(2); and the Freedom of Information Act, 5 U.S.C. 552.) We think that title III of the bill would run counter to congressional intent as expressed in the specific, carefully worded legislation, such as these acts waiving sovereign immunity. Further, the carefully worded acts waiving sovereign immunity would no longer be the sole focus of litigation, leading to confusion as to what substantive rights Congress has conferred and to circumvention of limitations which Congress considered to be in the public interest in specific waivers of sovereign immunity.

If I may digress for a moment by amplifying my statement with respect to title IV.

Title IV of the bill, regulating grant-in-aid and providing procedures for the handling of complaints by agencies and by grantees could severely limit the operations of these grant programs. The standards set by Congress in such grant programs are frequently broadly stated. This is to allow flexibility in the administration and disbursement of funding and to permit initiative on the part of participating States and localities. The determination as to whether congressional standards had been complied with and the nature and extent of any harm resulting would be quite difficult in grant programs where a great deal of discretion has been left to the administering agency and individual grantees. The Department believes that title IV would unduly limit this flexibility, to the detriment of the original intent of Congress.

The procedure established by the bill could result in the filing of many more complaints than are currently received, thereby causing insufficient attention to be given to bona fide complaints. Under the terms of the proposed legislation, excessively detailed consideration of practically every complaint submitted to a grantor agency by any individual or organization, whether or not an applicant or grantee, is required. Grantees must establish similar complaint-handling procedures. Hundreds of thousands of grants are made by the Federal Government each year. Subgrants number in the millions. Multiply

the procedure required by the bill by the large number of grantees and subgrantees which may be participating in particular programs, and the potential crippling effects of the bill can be understood.

It is important to note that Congress, when establishing particular grant programs, generally includes a review procedure to assure due process in the awarding of funds. Agencies which administer these programs have additionally adopted administrative review procedures which afford individuals a means for redress of grievances. In instances where it might be asserted that the established review is inadequate, congressional oversight has proven an important and effective means of assuring the adherence of an agency to any standards mandated by the Congress. Courts have required agencies to follow their rules and procedures and provide appropriate due process remedies. The Department questions the beneficial effects of establishing additional means of review which might operate to subvert and contradict the review mechanisms which already exist and which have generally proven effective.

The Department further objects to title IV because of the relief proposed in the case that a grantee is determined not to be in compliance with congressional standards. The grantee must not only conform to the standards, but must provide retroactive benefits or services, or their cash equivalent, to the complainant for harm caused, from the date of receipt of the complaint. The constitutionality of requiring the States to make such retroactive payments has recently been denied by the U.S. Supreme Court. Coupled with the further provisions of title IV regarding the procedures to be followed to adjudicate complaints, it is foreseeable that the grant administration and application process could become bogged down by numerous challenges from organizations or individuals who had been deprived a benefit under a grant program. The actual payment of grant moneys would be delayed until any possible challenge to its propriety had been brought to a conclusion, since a subsequent finding that the action taken was not consistent with standards set by Congress would otherwise require double payments. Thus, the entire grantmaking and fund disbursing process could be considerably disrupted and delayed.

Mr. Chairman, I shall be pleased to answer any questions.

[The prepared statement of Mr. Goldbloom follows:]

STATEMENT OF IRWIN GOLDBLOOM, ACTING DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman: I appreciate the opportunity to appear before this Subcommittee on behalf of the Department of Justice to testify on H.R. 6667.

The stated purposes of this Bill are to expand formal requirements regarding rule making as to public property, loans, grants, benefits, and contracts; to permit private attorneys to obtain compensation from the public treasury for services provided to their clients before Federal agencies; to waive "sovereign immunity;" and to specify procedures which must be followed by agencies administering grants and by the grantees.

To assist the Subcommittee, I would like to give a brief synopsis of the substantive changes proposed by H.R. 6667.

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discernible contribution to promoting agency implementation" of the act involved in the administrative proceeding.

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Generally speaking, the problem of who may sue the Government or its officials and under what conditions, is a complex matter with varying legal results and at all times extremely important considerations. Officials of the Federal Government in the course of their duties make millions of decisions every year. A decision not to prosecute may not leave an aggrieved party, but one cancelling a contract or assessing a penalty almost certainly will produce some kind of grievance. The number and variety of such actions creates a most important question before our society as to the limit of judicial review of Executive decisions.

To prevent the possibility that every action of a Government official may be challenged, the judiciary has developed a number of phrases or legalisms such as standing to sue, justiciability, political question and sovereign immunity. These concepts are in a transitional period. In our view, to attempt to review all Government decisions without regard to their importance or impact would place an impossible burden on the courts to the point of questioning the constitutionality of the proposition.

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The provisions of Title II of the Bill for payment of attorneys fees and costs for representation before agency administrative proceedings would no doubt result in a substantial increase in interventions by persons seeking to claim attorneys fees. Title II would represent an unwarranted expenditure of tax dollars, and, also, is easily subject to abuse by persons seeking fees. Equally as important, payment of private attorneys fees out of the public treasury is generally unwise. In addition, such legislation weighs attorneys functions, places undue emphasis on litigation activities at the taxpayers' expenses, and detracts from attorneys other important functions. Of course, the agencies which would be directly affected by enactment of Title II are in a position to discuss it at greater length.

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It is argued that the principle of sovereign immunity is an archaic hang-over not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, "The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief. . . ."

Events following Hurricane Camille offer one illustration of the salutary effect of the sovereign immunity doctrine. There, a business negotiated with officials of the Department of Housing and Urban Development, who sought to lease approximately 400 mobile homes for use by homeless residents. When the negotiations occurred, time was of the essence and only verbal contracts were reached at the time. Eventually, a dispute ensued as to the terms of the contracts. Plaintiff filed suit in the United States District Court claiming damages in the amount of \$76,002.25. The District Court dismissed the action on the ground that "the relief sought envisions the expenditure of public funds and thus requires this action to be considered as an unconsented suit against the United States." (*Akin Mobile Homes, Inc. v. Secretary of Housing & Urban Development and Department of Housing & Urban Development*, 354 F. Supp. 1036, 1038 (S. D. Mississippi, 1972.))

The United States Court of Appeals for the Fifth Circuit affirmed, noting that plaintiff had a right to sue the United States in the Court of Claims. (*Akin Mobile Homes, Inc. v. Secretary of Housing & Urban Development*, 475 F. 2d 1261 (5th Circuit, 1973.))

We think that this case illustrates the function of sovereign immunity in distributing judicial resources in accordance with the Congressional intent. Elimination of sovereign immunity would lead to confusion since more than one forum might then have concurrent jurisdiction. In the example, for instance, the appropriate forum was the Court of Claims, not the District Court. Thus, the care which Congress has taken to provide remedies only in forums it has specified could be thwarted, if the Bill is enacted.

The facts set forth in the *Akin Mobile Homes, Inc.* litigation illustrate another facet of sovereign immunity. Had plaintiff sought equitable relief requiring the Government to refrain from using its trailers until the dispute was resolved, the claim would have been barred by sovereign immunity, in keeping with the principles enunciated in *Larson v. Domestic & Foreign Corp.* It is important that sovereign immunity be maintained to prevent litigious interference with the public administration.

The Supreme Court has, on numerous occasions, and unanimously, applied the doctrine of sovereign immunity in order to insure that courts and litigants pay heed to the Congressional intent, rather than permit litigation where Congress

has not authorized suit with regard to a particular subject matter. (See, e.g., *Richardson v. Morris*, 409 U.S. 464 (1973); *U.S. v. King*, 395 U.S. 1 (1969); and *Hawaii v. Gordon*, 373 U.S. 57 (1963).)

Although Congress has on numerous occasions waived the defense of sovereign immunity with regard to particular subjects, it has carefully tailored the waivers to serve the public purposes Congress considers appropriate. (See e.g., the Tort Claims Act, 28 U.S.C., 2671 *et seq.*; the Tucker Act, authorizing suits on contractual claims, 28 U.S.C. 1346(a)(2); and the Freedom of Information Act, 5 U.S.C. 552.) We think that Title III of the Bill would run counter to Congressional intent as expressed in the specific, carefully-worded legislation, such as these Acts waiving sovereign immunity. Further, the carefully-worded Acts waiving sovereign immunity would no longer be the sole focus of litigation, leading to confusion as to what substantive rights Congress has conferred and to circumvention of limitations which Congress considered to be in the public interest in specific waivers of sovereign immunity.

Title IV of the Bill, regulating grants-in-aid and providing procedures for handling of complaints by agencies and by grantees would require undue consideration of frivolous complaints and might, thereby, cause insufficient attention to be given to bona fide complaints. In addition, many grants are of such a limited amount that current recipients could ill afford to set up a complaint procedure such as that proposed by the Bill.

I shall be pleased to answer any questions the Subcommittee may have.

Mr. CONYERS: Thank you very much for your testimony. I have no questions at this point. We appreciate your preparation and your appearance before the subcommittee.

This concludes the first day's hearings on the bureaucratic accountability bill. The subcommittee stands adjourned until the call of the Chair.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned, subject to the call of the Chair.]



## ADDITIONAL MATERIAL

FEDERATION OF AMERICAN HOSPITALS,  
Washington, D.C., April 16, 1974.

HON. JOHN CONYERS, Jr.,  
Chairman, Subcommittee on Crime of the House Committee on the Judiciary,  
Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed is a statement by the Federation of American Hospitals relating to H.R. 6223 and H.R. 6667, legislation now under consideration by your Committee. Our statement deals specifically with the thirty-day period presently allotted for public comment concerning proposed regulations published in the *Federal Register*.

We respectfully request that this statement be made a part of the record.

Sincerely,

MICHAEL D. BROMBERG, *Director*.

### STATEMENT OF THE FEDERATION OF AMERICAN HOSPITALS TO THE SUBCOMMITTEE ON CRIME OF THE HOUSE COMMITTEE ON THE JUDICIARY, RELATING TO H.R. 6223 AND H.R. 6667

The Federation of American Hospitals, a national non-profit association representing more than 600 investor-owned hospitals, thanks the committee for opportunity to present its views on a matter relating to the consideration of H.R. 6223 and H.R. 6667.

The issue with which we are concerned is the length of time allotted for public comment on proposed regulations. With few exceptions, a thirty-day comment period is provided to the public following publication in the *Federal Register* of proposed regulations issued by the Department of HEW. This is totally inadequate in terms of allowing interested parties in the health sector to assess the regulations and form a thoughtfully reasoned response to them.

The health industry is regularly bombarded with proposed regulations and these are often of crucial importance not only to the institutions themselves, but to the millions of individuals for whom health care delivery is provided. A prime example is the issuance of Medicare and Medicaid regulations. Another example would be the regulations governing Professional Standards Review.

In order to assure that proposed regulations affecting health care are representative of sound public policy, it is mandatory that the public and the health sector as a whole be given the time to respond with comments and constructive recommendations. However, as matters now stand, by the time the proposed regulations reach our hospitals, the staff is left with considerably less than thirty days in which to evaluate regulations that are often complex and lengthy. There is often not enough time available to study the regulations, gather information on their possible and probable effect, and then formulate and forward a response to DHEW officials.

In order to make this period of public comment meaningful and productive, the Federation of American Hospitals asks that this Committee recommend to the Department of Health, Education and Welfare that the period for public comment on proposed regulations be extended to at least sixty days.

We thank you, Mr. Chairman, for the opportunity to present this statement.

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### STATEMENT OF THE AMERICAN HOSPITAL ASSOCIATION, TO THE SUBCOMMITTEE ON CRIME OF THE HOUSE COMMITTEE ON THE JUDICIARY, ON H.R. 6223 AND H.R. 6667

The American Hospital Association, which represents some 7000 hospitals and other health care institutions located throughout the country appreciates the opportunity to present this statement on Title I of H.R. 6223 and H.R. 6667, identical bills pending before the subcommittee, and on a related problem not included in your legislation—the inadequate length of time provided for public comment on proposed regulations. Title I of these bills would amend the Administrative Procedures Act so as to mandate the publication of proposed rules

involving areas now specifically exempted, namely, matters related to "public property, loans, grants, benefits or contracts." Most of the regulations affecting hospitals are included in this exemption.

We would like to commend the sponsors of this legislation for their recognition of a serious problem in the important area of government rule-making. The Administrative Conference of the United States also recognized the need to eliminate the exemption of these areas from the rulemaking requirements and their recommendation is quoted below:

"In order to assure that Federal agencies will have the benefit of the information and opinion that can be supplied by persons whom regulations will affect, the Administrative Procedure Act requires that the public must have opportunity to participate in rulemaking proceedings. The procedures to assure this opportunity are not required by law, however, when rules are promulgated in relation to "public property, loans, grants, benefits, or contracts." These types of rules may nevertheless bear heavily upon nongovernmental interests. Exempting them from generally applicable procedural requirements is unwise. The present law should therefore be amended to discontinue the exemptions to strengthen procedures that will make for fair, informed exercise of rulemaking authority in these as in other areas."

"Removing these statutory exemptions would not diminish the power of the agencies to omit the prescribed rulemaking procedures whenever their observances were found to be impracticable, unnecessary, or contrary to the public interest. A finding to that effect can be made, and published in the *Federal Register*, as to an entire subject matter concerning which rules may be no broader than essential and should include a statement of underlying reasons rather than a merely conclusory recital.

"Wholly without statutory amendment, agencies already have the authority to utilize the generally applicable procedural methods even when formulating rules of the exempt types now under discussion. They are urged to utilize their existing powers to employ the rulemaking procedures provided by the Administrative Procedure Act, whenever appropriate, without awaiting a legislative command to do so."<sup>1</sup>

We firmly believe meaningful public participation in the making of federal rules and regulations is essential. Professor Arthur Earl Bonfield, a recognized expert in the field of administrative rulemaking, has stated the reasons succinctly:

"Public participation in rulemaking helps assure wiser policy formulations than would otherwise be the case, and provides means by which private parties can defend their interests against governmental rules they deem undesirable. The most obvious reason why public participation is worthwhile is that it helps to elicit the information, facts, and probabilities which are necessary to fair and intelligent action by those responsible for promulgating administrative rules."<sup>2</sup>

We were pleased when the Secretary of Health, Education, and Welfare, in a memorandum dated October 12, 1970, directed all agencies and offices of that Department which issue rules and regulations related to "public property, loans, grants, benefits, and contracts" to utilize for public participation the procedures of the Administrative Procedure Act, U.S.C. 553. We wholeheartedly approve that action.

Title I of H.R. 6223 and H.R. 6667, if enacted, would in effect require as a matter of law the actions required by the 1970 HEW directive rather than leaving it a requirement which could be altered or withdrawn at any time. Therefore, we fully support Title I of this legislation and urge its prompt enactment.

A related issue, and one of great importance to the health care field is the length of time allowed for public comment on proposed regulations. The rules and regulations promulgated to carry out the Medicare and Medicaid programs and other health programs administered by the Department of HEW have a direct bearing on both public and private interests. They deal with practically every aspect of the operation of health care institutions and they also intimately affect millions of Americans in their daily lives. In most cases when the Department of HEW and its agencies publish proposed regulations in the *Federal Register*, a 30-day period is specified for receiving public comments. This limited comment period is totally inadequate.

The problems hospitals and the health care field have encountered in connection with the inadequate but customary 30-day period for public comment on proposed.

<sup>1</sup> This recommendation of the Administrative Conference of the United States, currently identified as Recommendation 69-8, was adopted by the Conference in October, 1969.

<sup>2</sup> Arthur Earl Bonfield, A consultant's Report to the Committee on Rulemaking of the Administrative Conference of the United States, September, 1969.

regulations are two-fold. First, it takes considerable time for proposed regulations published in the *Federal Register* to reach hospitals and other health care institutions that are located in all parts of the country. Copies of the *Federal Register* may not reach subscribers in many parts of the country for several days or even a week or more after the publication date. Thus, the 30-day period for comment is in fact much less than 30 days for most interested parties.

The second aspect of the problem is that a 30-day period for study and analysis of proposed regulations is wholly inadequate. The number of federal regulations applicable to hospitals has grown enormously since the start of the Medicare and Medicaid programs and the complexity of such regulations has also increased markedly.

Considerable time and effort are often needed to study proposed regulations, to gather information that will enable determinations to be made as to their effect, and to prepare and forward comments to the responsible officials. Only in this way can the health care field contribute to the formulation of final regulations that are both fair and equitable as well as administratively sound and practicable. The too brief comment periods that are being provided essentially deny many interested parties the opportunity for input into this process.

Many examples of inadequate time for comment on proposed regulations come to mind. I will cite two which have occurred in the last month.

1. The proposed regulations to implement Section 223 of Public Law 92-603 which was enacted in October, 1972 were published in the *Federal Register* on March 19, 1974. This deals with extremely complex matters related to reimbursement of providers of health care to Medicare beneficiaries and after waiting some seventeen months to issue the proposed regulation the Department of HEW provided only 30 days as the time for comment on the regulations by the health care field.

2. The proposed regulations to implement the Emergency Medical Services Systems Act of 1973, Public Law 93-154, enacted in November of 1973 were published in the *Federal Register* on March 29, with allowance of only 15 days for comment thereon. In this case, it took the Department of HEW six months to draft the highly technical and complicated regulations to carry out the Emergency Medical Services Systems law, but the health care field is given only 15 days to evaluate and comment on the impact of the regulations.

Mr. Chairman, to make publication of proposed regulations meaningful and to assure opportunity for public comment and suggestions, it is essential that adequate time for such comments be provided. The American Hospital Association and its members request that your Committee strongly recommend to the Department of Health, Education, and Welfare that the length of time provided for comment on proposed regulations be at least sixty days. We recognize that on very rare occasions a shorter period of time for comment may be found to be necessary, but this should be permitted only in the face of compelling circumstances and findings that are recited in the notice of proposed rulemaking.

In summary, the American Hospital Association supports Title I of H.R. 6223 and H.R. 6667 and urges the Committee to act also on the related issue providing at least 60 days as a general practice for public comments on proposed federal regulations.

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AMERICAN BAR ASSOCIATION,  
Chicago, Ill., April 10, 1973.

HON. PETER W. RODINO, JR.,  
Chairman, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. RODINO: On September 6, 1972, Mr. Kenneth J. Burns, Jr., Secretary of the American Bar Association, transmitted to Mr. Celler, for the information of the Committee on the Judiciary, a resolution that had been adopted unanimously at the August 1972 meeting of the ABA's House of Delegates. The resolution signifies the Association's strong support for legislation which is now pending before your Committee that would eliminate from the rulemaking provisions of the Administrative Procedure Act the current exemption for matters relating to "public property, loans, grants, benefits, or contracts." This proposal is part of the legislative package in HR 6223.

As indicated in Mr. Burns' letter, the resolution was adopted upon a report and recommendation initiated by the Section of Public Contract Law, a copy of which I am enclosing for your further information.

I would like to take this opportunity to express the Section of Public Contract Law's continuing interest in securing the enactment of the foregoing legislation in this session of the Congress and to offer the assistance and cooperation of our membership in achieving that objective.

Sincerely yours,

JOHN A. McWHORTER, *Chairman.*

Enclosure.

ABA RESOLUTION SUPPORTS LEGISLATION TO ELIMINATE APA EXEMPTION OF CONTRACTUAL MATTERS FROM APA'S RULEMAKING REQUIREMENTS

SECTION OF PUBLIC CONTRACT LAW

*Recommendation*

That the House of Delegates of the American Bar Association adopt this Section's resolution as follows; be it

*Resolved*, That the American Bar Association support the enactment of the Congress of legislation to eliminate the current exemption from the rulemaking provisions of the Administrative Procedure Act on matters relating to "public property, loans, grants, benefits, or contracts."

*Report*

The accompanying report submitted in support of the above recommendation stated as follows:

Section 4 of the Administrative Procedure Act (5 U.S.C. 553) prescribes procedures for public notice and comment on Federal agency rulemaking pursuant to which interested persons are afforded an opportunity to participate in the process whereby the policies of Federal agencies are formulated. The APA rulemaking procedure, which complements, in the administrative arena, the political process in the legislative domain, has been characterized by Professor Kenneth Culp Davis, as "probably one of the greatest inventions of modern government."

However, specifically exempted from the public notice and comment requirements is all rulemaking related to public property, loans, grants, benefits, or contracts. 5 U.S.C. 553(a)(2). These exemptions appear to have been predicated upon an uncritical distinction between proprietary and nonproprietary functions of Government; a distinction which has been largely discredited both in law and in the public mind. It may be demonstrated readily that rules and regulations pertaining to these functions bear heavily upon nongovernmental interests and have a substantial impact upon the public; therefore, the continued exemption of rulemaking related to these so-called "proprietary" functions from generally applicable procedural requirements is unwise.

In this report, the Section of Public Contract Law focuses on the need to afford the public an opportunity to participate in the formulation of rules related to public contracts.

The most prominent collections of public contract rules are embodied in the Armed Services Procurement Regulations (ASPR) and the Federal Procurement Regulations (FPR). In addition to these regulations, however, each of the military services has promulgated their own separate procedures or directives to implement or supplement the ASPR and there are currently more than a score of separate procurement regulation systems issued by civilian executive departments and agencies. Moreover, the issuance of rules related to Government contracts does not end at the department level. Practically every operating agency and field procuring activity throughout the Government appears to feel obliged to issue individual contract rules bearing such labels as "instructions," "directives," "procedures," "manuals," "guides," *ad infinitum*.

The sheer volume and complexity of procurement rules issued throughout the Government renders the contract regulations system unmanageable and imposes severe burdens and unnecessary expense upon companies seeking to do business with the Government, either directly as contractors or indirectly as subcontractors. The horizontal proliferation of procurement regulations at the departmental level has given rise to various inconsistencies which add further to the burdens encountered by the public in dealing with these rules. The foregoing problems are compounded by the vertical proliferation of contract rules because of the low visibility and inaccessibility of procurement directives issued at various field or operating echelons.

It is well recognized that Government procurement activity generates widespread economic effects. Similarly, the very rules and regulations related to public contracts exert an enormous impact upon substantive private interests. Government procurement regulations have a reach and impact far transcending mere housekeeping instructions to subordinate officials. Certain public contract rules have been designed specifically to protect the rights of laborers and members of minority groups and to affect the interests of small business concerns and whole geographic areas. Moreover, the preponderance of generally applicable regulations—such as those prescribing mandatory contract clauses or establishing rules governing contract cost principles, records retention, contractor responsibility and contractor debarment—have an enormous direct impact on the rights and obligations of the public at large and on the contractor community in particular. A special significance has been given to Government contract rules by judicial decisions construing procurement regulations to have the force and effect of law. The legal effect attributed to procurement regulations offers a singularly compelling reason for assuring public participation in the contract rulemaking process.

The process for developing contract rules by executive agencies, whether civilian or military, falls short of the minimal standards of procedural fairness accorded by APA rulemaking requirements. Present opportunities for public participation or consultation in the formulation of agency procurement regulations are extremely limited. Civilian agencies, including the General Services Administration which is responsible for the FPR system, consult with interested persons in the private sector only sporadically. The framework for developing regulations governing procurement by the military departments is more structured and highly visible than that pertaining to civilian executive agencies; and the ASPR Committee, operating under established rules of procedure, consults more frequently with industry. However, the ASPR Committee maintains complete discretion over those matters on which comments will be solicited from the public and the "public" invited to participate is limited to certain industry associations. Moreover, civilian and military agencies responsible for formulating public contract regulations rarely demonstrate receptiveness to petitions by interested persons "for the issuance, amendment, or repeal of a rule;" a right accorded by APA Section 4 (e).

After objective study of the procurement regulation process, giving due regard to weighing the benefits to be derived from public participation in the formulation of contract rules against the obvious need to conduct government expeditiously, efficiently and inexpensively, the Section of Public Contract Law has determined that the elimination of the "contracts" exemption from APA rulemaking requirements is desirable and long overdue. Although elimination of the exemption will make public participation in contract rulemaking the rule rather than the exception, as is now the case, the APA rulemaking provisions afford adequate safeguards to agencies which permit them to dispense with public notice and comment procedures when these are found to be impracticable, unnecessary, or contrary to the public interest.

Obvious benefits to be derived from elimination of the "contracts" exemption will be: to accord greater visibility to the issuance of procurement rules at all levels of government; to discourage the unnecessary proliferation of procurement rules which have rendered the system voluminous, complex and relatively unmanageable; and to assure consideration by agency rulemakers of the views of interested persons in the private sector concerning rules having a significant impact on substantive private interests. This latter feature is particularly important in view of the insulated environment in which contract rules are currently issued, and the unfortunate tendency of the procurement regulations to shift risks unfairly to the private sector. The applicability of APA rulemaking provisions to the procurement regulation process may also be expected to stimulate further constructive efforts to improve the process. Accordingly, the Section of Public Contract Law has concluded that, rather than impede the rulemaking process, public participation in the development of agency contract rules is likely to make the process itself more effective and responsive.

The above conclusion is buttressed by the recent recommendation of the Administrative Conference of the United States to eliminate the exemptions of matters relating to "public property, loans, grants, benefits, or contracts" from the public notice and comment procedures of the APA, and by the favorable response of the majority of civilian executive departments in complying with that recommendation. The occasion for the recommendation submitted herewith is

extremely propitious because there are currently pending before both houses of the Congress bills to amend the rulemaking provisions of the APA to eliminate the foregoing exemptions. The Section of Public Contract Law, therefore, recommends adoption of the proposed resolution as an important step in improving the process for formulating agency rules relating to so-called "proprietary" matters and for assuring procedural fairness to persons in the private sector interested in and affected by such rules.

After presentation of the recommendation, report and discussion by the Section Council, the resolution was voted upon and approved by the Council at its Spring meeting on May 10, 1972.

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
Washington, D.C., March 27, 1974.

Hon. JOHN CONYERS,  
*Chairman, Subcommittee on Crime,  
House Committee on the Judiciary.*

DEAR MR. CHAIRMAN: I am sorry that I could not be present this morning to testify in favor of H.R. 6667. I commend the Subcommittee for instituting these hearings on this important bill.

Public confidence in government is at a low ebb. Campaign contributors, inside influence, and actions against the public interest have become the hallmarks of the regulatory process over the past five years. But long before watergate we knew that federal agencies were prone to become agents of the regulated and vested interests instead of servants of the people, and Congress always failed to act. Now, the exposés of the past year have laid the groundwork for genuine progress. Today we have a golden opportunity to make a new start toward more effective and more responsive government. If we learn this lesson of Watergate well, then the steps we take can be as significant for the future health of the federal agencies as reforms in campaign financing will be for the future health of America's elections.

Campaign finance reforms, which are today being debated by the Senate, would remove widespread opportunities for destructive external pressure on government decisionmaking. The Bureaucratic Accountability bill would correspondingly open federal agencies to greater public participation, would encourage such participation, and would make them more responsive and responsible to the American people for whose benefit and protection they were established.

Greater public involvement in administrative decisionmaking and elimination of irrational defenses to judicial review will improve the performance of government agencies while increasing public confidence in them. Thus the Bureaucratic Accountability bill will increase government responsiveness to divergent views and interests, especially those that do not have the political clout and financial resources to be heard in any other way. It will emphasize the broader impact of private and government programs on the character of our society, and not solely on their economic consequences. And it will help to establish legal standards of performance for government agencies and private parties, for the benefit of all people and all businesses affected by government regulations.

Government agencies, since before passage of the Administrative Procedure Act in 1946, have always opposed increasing accountability and administrative due process. They unanimously opposed the Freedom of Information Act in the early sixties. And no doubt they will oppose H.R. 6667. But if the integrity of our agencies is to be restored, then we must open their doors to accommodate and respond to the needs of average citizens, the poor, consumers, minority groups, and other unrepresented segments of our society who are presently shut out. That is the underlying purpose of the Bureaucratic Accountability bill.

I join with Congressman Dellums and other cosponsors of H.R. 6667 in supporting enactment of this legislation.

Sincerely,

EDWARD M. KENNEDY.

ASSOCIATION OF AMERICAN MEDICAL COLLEGES,  
 Washington, D.C., April 18, 1974.

HON. JOHN CONYERS, Jr.,  
 U.S. House of Representatives,  
 Rayburn House Office Building,  
 Washington, D.C.

DEAR CONGRESSMAN CONYERS: The Association of American Medical Colleges represents all of the 114 medical schools in operation in the United States, 400 of the nation's major teaching hospitals, and 51 academic societies. Regulations involving matters related to public property, loans, grants, benefits, or contracts, now specifically exempted from the Administrative Procedure Act very often affect the Association's constituents, particularly its teaching hospital members. Accordingly, the Association enthusiastically supports Title I of HR 6223 and HR 6667, identical bills pending before the *Subcommittee on Crime* of the House Committee on the Judiciary which would eliminate the exemption of these areas from the rulemaking requirements of the Administrative Procedure Act.

The Association also endorses the views presented by the American Hospital Association on a related problem not treated in the pending legislation—the inadequate length of time for public comment on proposed regulations. We have found the 30-day period generally specified for comments on regulations proposed by the Department of Health, Education, and Welfare and its agencies totally inadequate for studying the proposed regulations for gathering information from our constituents to assess the regulation's effects and for preparing and forwarding our comments to the appropriate officials.

The 30-day comment period for regulations affecting health care institutions is too brief for two reasons: First, it often takes a week or more for copies of the *Federal Register* to reach institutions located in many parts of the country, making the already short 30-day period for response even shorter for many interested parties. Second, the 30-day period is particularly inadequate for full study and analysis of health-related regulations which have increased exponentially in both volume and complexity since the advent of Medicare, Medicaid, and other health programs administered by the Department of Health, Education, and Welfare.

To assure meaningful public participation in the consideration of proposed regulations, then, the Association supports Title I of HR 6223 and HR 6667, and requests that your Committee strongly recommended to the Department of Health, Education, and Welfare that it provide at least sixty days for public comment on its proposed regulations.

The Association of American Medical Colleges appreciates this opportunity to present its views, and stands ready to provide any further assistance to you in this matter at your request.

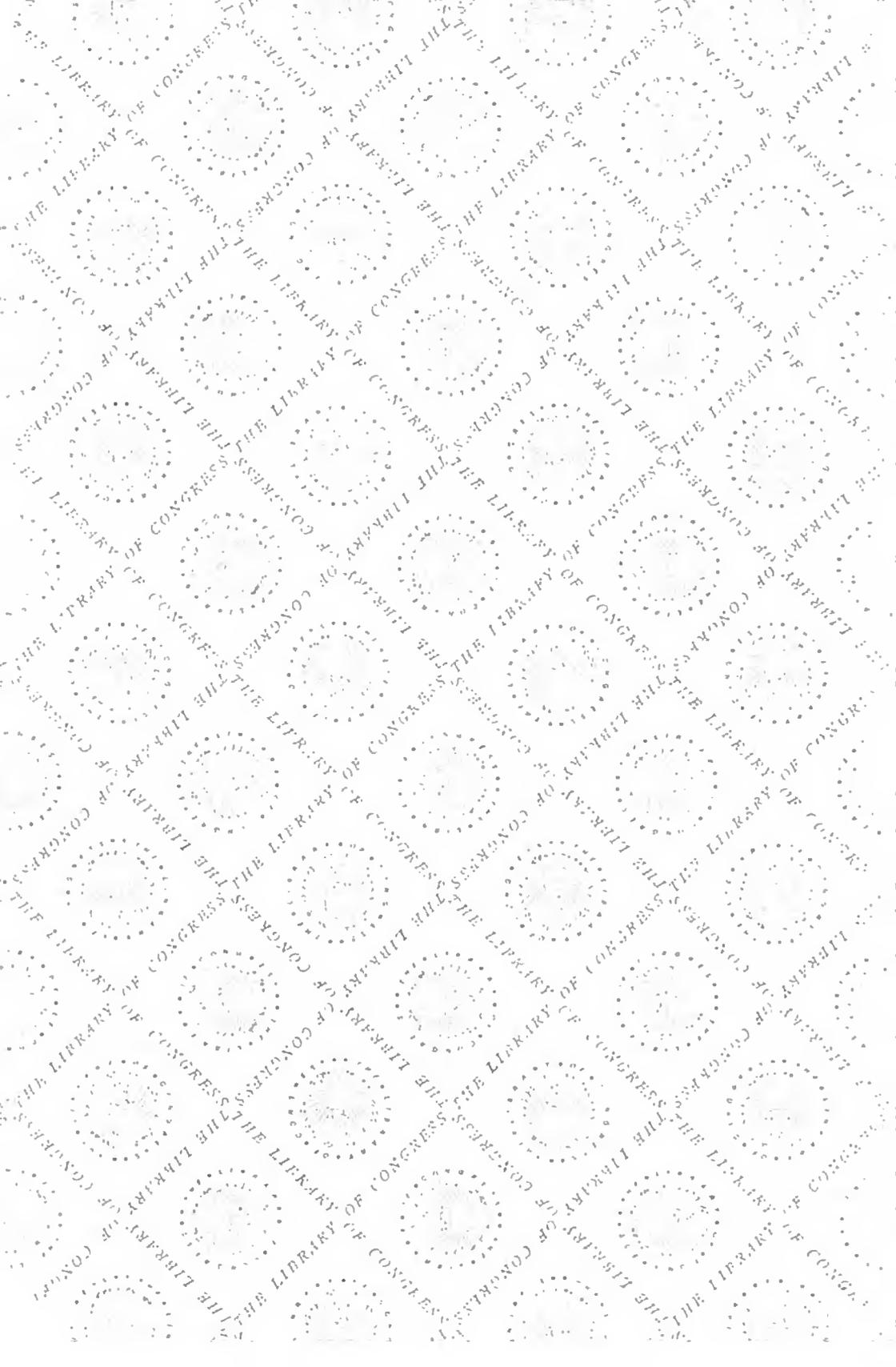
Sincerely,

JOHN A. D. COOPER, M.D.



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