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ARTICLES

THE THIRD HOUSE OF CONGRESS VERSUS THE FOURTH BRANCH OF GOVERNMENT: THE IMPACT OF CONGRESSIONAL COMMITTEE STAFF ON AGENCY REGULATORY DECISION- MAKING*

JAMES P. HILL**

This article presents a simple yet unsettling proposition: regulatory decision-making, among the most intrusive and pervasive aspects of federal activity, is largely the product of two politically unaccountable bureaucracies. Unelected congressional committee staffs and unelected regulatory agency officials comprise these two politically unaccountable bureaucracies. Both of these bureaucracies have developed outside the constitutional framework. Modern regulatory decision-making, therefore, is not the result of formal directives or interactions between the regulators and their constitutionally elected masters. Instead, modern regulatory decisions-making is the result of only informal negotiations between the unelected congressional committee staff members and the unelected regulatory agency officials.

By largely ignoring the significant role that congressional committee staff members play in influencing the process and product of regulatory decision-making, reformers proposing formal changes in the rulemaking process risk overlooking the need for simultaneous exploration of informal reforms.¹ This article explores the growth and development of the informal committee staff bureaucracy and

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1. The most common formal proposals advocated in recent years include the legislative veto, increased court review of rulemaking, sunset legislation, a regulatory budget, cost-benefit analysis requirements, regulatory negotiation commissions, and increased Presidential control over rulemaking.

its impact on regulatory decision-making in the 1970's.

INTRODUCTION

Federal administrative agencies are sometimes referred to as the fourth branch of government. In the 1970's this country saw a dramatic expansion of this so-called fourth branch of government with a concomitant rise in federal regulatory activity.² As a result, legal scholars and political scientists alike were confronted by the troubling question: "*Quis custodiet ipsos custodes?*" (Who will regulate the regulators?) The common initial approach in responding to this question is to address it only in formal constitutional terms. Recently the United States Supreme Court in *Immigration and Naturalization Service v. Chadha*,³ invoked formal constitutional requirements in answering such a question. In *Chadha*, the Court invoked the constitutional requirements of the bicameral clause⁴ and the presentment clause⁵ to delineate the relationship between Congress and its administrative agencies.

Reliance on a formalistic constitutional approach in order to unravel the issue of regulatory control, however, ignores the reality of our modern regulatory system. It ignores the informal delegation of oversight authority granted by Congress to a bureaucratic subsystem that developed outside the constitutional framework. Specifically, it ignores the informal delegation of authority to the congressional committee staff.

This article focuses on the critical, but overlooked, informal oversight role Congress delegates to its committee staff. The dramatic growth in regulatory activity⁶ and in the size of the adminis-

2. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting). "They [administrative bodies] have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking." *Id.*

3. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

4. U.S. CONST. art. I, § 7, cl. 2.

5. U.S. CONST. art. I, § 7, cl. 2, 3.

6. One indicator of increased regulatory activity was the growth in the number of pages in the *Federal Register*:

1973	—	35,586
1974	—	45,422
1975	—	60,221
1976	—	57,072
1977	—	63,629
1978	—	61,261
1979	—	77,497
1980	—	87,012
1981	—	63,554 (Reagan Presidency)

N. ORNSTEIN, T. MANN, M. MALBIN, *VITAL STATISTICS ON CONGRESS*, 1982, 139 (1982) [hereinafter cited as *VITAL STATISTICS*].

trative branch⁷ during the mid-1970's compelled Congress to delegate this oversight role. Congressional approval of an enlarged committee staff bureaucracy was a key factor in enabling members to perform this oversight role. In fact, committee staff sizes increased by 56 percent in the mid-70's. A noticeable decline in this enlarged staff membership did not occur until 1981.⁸

United States Senator Daniel Patrick Moynihan argued that the congressional response of increasing staff levels was predictable. The purpose was to meet the challenge of a growing executive bureaucracy under what he termed was the "Iron Law of Emulation."⁹ As Moynihan theorized:

If a large (and unsupported) forecast may be permitted, it is that the long-run effect of competitive emulation will be to create government by submerged, horizontal bureaucracies that link the three branches of government. They will speak their own language and stay in place while their constitutional masters come and go.¹⁰

With regard to the importance of one of these submerged bureaucracies,¹¹ namely the congressional committee staffs, Moynihan observed:

They [the regulations] are probably comprehensible to the committee staff of the Congress, who draft the legislation which the regulations typically carry out. But I know it to be true—in my case, and I cannot suppose I am alone—that most legislative language is incomprehensible to me. I depend utterly on translations.¹²

7. Created during this period were the Environmental Protection Agency (1970), the Occupational Safety and Health Administration (1970), and the Consumer Product Safety Commission (1973).

8. Staff size of House and Senate Standing Committees:

Year	House	Senate
1973	878	873
1974	1,107	948
1975	1,433	1,277
1976	1,680	1,201
1977	1,776	1,028*
1978	1,844	1,151
1979	1,909	1,269
1980	1,917	1,191
1981 (Reagan Presidency)	1,843	1,022

* Decline caused by committee reorganization that went into effect in 1977 which shifted S. Res. 60 Senate staff committee to personal staff payrolls. VITAL STATISTICS, *supra* note 6, at 113.

9. D.P. MOYNIHAN, *IMPERIAL GOVERNMENT* 65 (1978). The Iron Law of Emulation provides that whenever any branch of the government acquires a new technique which enhances its power in relation to the other branches, that technique will soon be adopted by those other branches as well. *Id.*

10. *Id.* at 31.

11. Other submerged staff bureaucracies include congressional personal staffs, support agency staffs such as the General Accounting Office and the congressional Research Service, and formal and informal caucus and coalition staffs.

12. D.P. MOYNIHAN, *supra* note 9, at 31.

Have congressional committee staff members, Senator Moynihan's translators, significantly influenced regulatory decision-making? Did this influence occur during the regulatory explosion of the 1970's? Samuel Patterson delineated the importance of congressional committee staffs in executive-legislative branch relations:

In a sense, the committee staff is at the center of a policy subsystem, linking House and Senate committees with the executive departments concerned with the substantive policy area of the committee. Accordingly, committee staffs have a substantive innovative capability, and potentially a very wide influence over public policy originating in committees and subcommittees.¹³

Curiously, however, the few studies which address the phenomenal growth of the congressional staff in the mid-1970's do not explore the informal power that committee staff members exercise in the regulatory arena. Instead, they focus on the legislative, rather than the regulatory consequences, of staff growth.¹⁴ At best, congressional staff studies have made only passing reference to the impact of staff on regulatory activity.¹⁵ Yet a review of legal literature, political science literature, court decisions, congressional legislation, committee reports, committee surveys, newspaper accounts, and a recent university survey¹⁶ indicate that during the mid-1970's congressional committee staff may have played a more significant role in the development and implementation of the regulatory schemes than generally realized.

To assess the regulatory significance of heightened committee staff involvement requires examination of the legal and political consequences of delegating to congressional committee staffs the task of overseeing the so-called fourth branch of government. The period chosen for exploring staff significance is the regulatory boom era of the 1970's. This period is significant because it set the stage for emergence of a large and powerful committee staff bureaucracy. An examination of the formal and informal powers available to the staff to affect regulatory decision-making during this period will be assessed. Finally, the impact of this committee staff bureaucracy on the formal congressional oversight process and on the development and implementation of regulatory schemes devised by agency bureaucracies will be explored. Through this process, the significance

13. Patterson, *The Professional Staffs of Congressional Committees*, 15 AD. SCI. Q. 22, 35 (1970).

14. See M. MALBIN, *UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT: THE INVISIBLE FORCE IN AMERICAN LAWMAKING* (1980); H.W. FOX AND S.W. HAMMOND, *CONGRESSIONAL STAFFS* (1977).

15. For an excellent survey of the roles legislative staffs play in the legislative process, see Hammond, *Legislative Staffs*, 9 LEGIS. STUD. Q. 271 (1984).

16. Unpublished Central Michigan University 1984 Survey conducted through grants from the Dirksen Congressional Foundation and the Central Michigan University Research Professor Program.

of a largely unexplored staff subsystem process which developed outside the constitutional framework will be demonstrated. Specific emphasis will be placed on the impact of congressional committee staffs on the agency regulatory decision-making process of the 1970's.

THE REGULATORY EXPLOSION AND INSTITUTIONAL CHANGE IN THE 1970's

While committee staffs have historically played some role in regulatory oversight, the dramatic growth in regulatory activity, along with major institutional changes in the executive and legislative branches during the 1970's, created a unique opportunity for more extensive staff involvement in the oversight of regulatory agencies. The Council of Economic Advisers remarked that in the 1970's the growth in the number and size of regulatory agencies was greater than that which took place during the New Deal period.¹⁷ At the same time that regulatory activity began to increase,¹⁸ executive control over these agencies steadily declined. By 1974 President Nixon had resigned. President Nixon's resignation, and the Watergate scandal that precipitated it, both contributed to a decline in the steady progression of executive reports calling for measures to strengthen management control over federal agencies.¹⁹ Indeed, Watergate created a vacuum in executive branch control over federal agency activity.²⁰ Donald Santarelli, then director of the Law Enforcement Assistance Administration, boldly conjectured that there was in fact a total absence of White House control in 1974.²¹

The year 1974 was also a pivotal year for Congress. In 1974 Congress underwent a dramatic change in both composition and power brokerage. The 1974 election brought to Congress the largest class of new Democrats (75) since 1948.²² This surge of new Democrats changed both the factional composition and issue orientation of the House of Representatives.²³ This dramatic change in House composition provided enough votes for the House to implement reforms which led to both the ousting of three committee chairmen and the dispersal of the centralized power of committee chairmen to

17. ECONOMIC REPORT OF THE PRESIDENT 134 (1982).

18. See STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, 95TH CONG., 21ST SESS., STUDY ON FEDERAL REGULATION 116 (Comm. Print 1977). (In 1974, 67 federal agencies adopted 7,596 new or amended regulations).

19. R. NATHAN, THE ADMINISTRATIVE PRESIDENCY 5 (1983).

20. *Id.* at 55. "White House control over the domestic agencies in the final days of the Nixon presidency was all but nonexistent." *Id.*

21. *Id.* at 56.

22. *Whatever Happened to the Watergate Babies*, 42 CONG. Q. 498 (1984).

23. K. KOFMEHL, PROFESSIONAL STAFFS OF CONGRESS xvi (1977).

the subcommittee level.²⁴ As a result, wrote a former congressional aide, "many subcommittees gained increased importance and subcommittee chairmanships were parcelled out among junior members."²⁵ This dispersal of committee power also resulted in increasing the influence of many subcommittee staff members who previously were relegated to positions of secondary importance vis-a-vis a full committee staff.

Watergate and the decline of executive authority over a largely autonomous regulatory structure provided the impetus for Congress to increase its oversight and involvement in federal agency activity.²⁶ congressional concern was especially focused on new health and safety regulations which were then being promulgated by the Environment Protection Agency (EPA), Occupation Safety and Health Administration (OSHA), Federal Trade Commission (FTC), and the Consumer Product Safety Commission (CPSC).²⁷ These new health and safety regulations were described by former EPA Administrator Douglas Costle as, "[t]he new forms of regulation that rapidly developed in the 1970's. . . that we have only begun to learn how to measure."²⁸

One indication of the increase in congressional oversight and involvement in federal agency activity was the dramatic jump in the number of House committee and subcommittee meetings held immediately after the Watergate scandal.²⁹ A second indication was the fact that more than half of all the important legislative vetoes occurring between 1970 and 1975 were passed in only one year, namely 1975.³⁰ With regard to legislative vetoes, Robert Dixon wrote: "This development represents a significant attempt by Congress to move from vigorous oversight of the executive, through hearings, reports, and revision of statutes, to shared administration under existing statutory delegations."³¹ Still another indication was the explosive growth of congressional ad hoc groups formed to lobby for administrative favors during this period.³²

24. Hopkins, *The Ninety-Fourth: A Congress in Transition*, 62 AM. B. J. 65, 66 (1976).

25. *Id.* at 66.

26. J. ABERBACH, *THE DEVELOPMENT OF OVERSIGHT IN THE UNITED STATES CONGRESS: CONCEPTS AND ANALYSIS* (Sept. 1977). (The University of Michigan Institute of Public Policies Discussion Paper No. 100).

27. Costle, *Environmental Regulation and Regulatory Reform*, 57 WASH. L. REV. 409, 413 (1982).

28. *Id.*

29. VITAL STATISTICS, *supra* note 6, at 131. House committee and subcommittee meetings increased from 5,888 in 1973-74 to 6,975 in 1975-76. *Id.*

30. Comment, *Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto*, 26 AM. U.L. REV. 1018, 1023 (1977).

31. Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423, 427-28 (1978).

32. Library of Congress Congressional Research Service, *The Informal Caucus*

Whatever the reason for the earlier broad delegations of legislative authority granted to regulatory agencies, after 1974 Congress became more involved in the details of agency regulatory activities through a revitalization of subcommittee oversight activity. This more active congressional involvement did not, however, occur as a personal undertaking by members of Congress. Rather it was undertaken by a growing number of unelected committee staff. The committee staff's emergence as overseer of the regulatory establishment is the avenue that this paper will next explore.

THE EMERGENCE OF A STAFF BUREAUCRACY

The institutional ferment of the 1970's, together with a significantly enlarged committee staff, created a favorable environment for the emergence of a potent committee staff bureaucracy to oversee the regulatory arena.³³ As committee staff members increased, so too did the opportunities to expand their involvement in regulatory oversight. Thus, Eric Redman's observations about the importance of staff in the legislative process are equally applicable to their significant role in helping Congress vie with the President for control of the regulatory process. Mr. Redman stated:

[A]nyone who knew the Senate would know that to ignore the role of staff is to ignore not only Senate reality but the key reason why the Senate is still capable of vying with the President for legislative leadership (The same could be said, of course, for the House of Representatives).³⁴

Recent literature, however, has focused only upon the enlarged congressional staff's impact on the complexity of recent congressional legislative activity.³⁵ Accordingly, whatever the rationale given for the rapid expansion of congressional staff,³⁶ it has been the

(July 14, 1982) (audio brief). Forty of the 70 modern informal congressional caucuses were formed between 1974-1980.

33. R. FENNO, *CONGRESSMEN IN COMMITTEES* 82 (1973) Fenno distinguished committee staffs from personal staff, characterizing the latter as larger and exhibiting more of the characteristics associated with complex, specialized bureaucracies.

34. E. REDMAN, *THE DANCE OF LEGISLATION* 17 (1973).

35. H.W. FOX AND S.W. HAMMOND, *CONGRESSIONAL STAFFS* (1977).

36. See J. WEATHERFORD, *TRIBES ON THE HILLS* 217 (1981).

Staff growth in the 1970's received an extra push from the rather unlikely source of President Richard Nixon. The Democratic Congress initially increased staff as a way to fight the Republican White House more effectively, but a significant boost to congressional staff came from the Watergate tapes. A conversation between John Dean and President Nixon on February 23, 1973, particularly piqued congressional self-importance:

D: I spent some years on the Hill myself and one of the things I always noticed was the inability of the Congress to deal effectively with the Executive Branch because they never provide themselves with adequate staffs, had adequate information available—

P: Well, they have huge staffs compared to what we had.

legislative rather than the regulatory impact that has received scholarly attention.³⁷ The Supreme Court's acceptance of congressional staff members as the "alter ego" of the Congressmen in the legislative process³⁸ only reinforced the notion that their primary significance was legislative in nature.

The large congressional committee staff bureaucracy that developed in the mid-1970's not only increased congressional legislative activity but also increased the indirect ability of Congress to oversee the activities of federal agencies. In the wake of adverse public reaction to the explosion of regulatory activity in the 1970's, political necessity caused an increasingly overextended Congress to increase its reliance on committee staffs to control the regulators.³⁹ It was no coincidence that four of the five major legislative measures involving the hiring of an increased number of committee staff members were passed in the midst of the 1970's regulatory boom.⁴⁰ Nor should it come as any surprise that committee staff increases since 1970 were particularly significant in committees who had oversight responsibilities over controversial new or emerging social regulatory agencies such as the EPA, the OSHA, the CPSC, and the FTC.⁴¹ Finally, it is

D: Well, they have huge staffs, true, as compared to what they had years ago. But they are still inadequate to deal effectively—

P: . . . Don't try to help them out.

(Congress of course, assumed the Nixon White House knew something about organization, which they didn't, and interpreting Dean's comment about "adequate staff" to mean more staff, immediately increased the payroll.)

37. For an interesting perspective of congressional staffers in the 1950-60 era see CLAPP, *THE CONGRESSMAN* (1963).

38. *Gravel v. United States*, 408 U.S. 606 (1972).

39. VITAL STATISTICS, *supra* note 6, at 97. The average Senator in 1975-76 had 17.6 committee and subcommittee assignments. In 1980-81, the average Senator had dropped to 10.7 assignments. United States Senator James Pearson complained: "The larger the staff you accumulate, the wider the range of work there is, and the subject gets away from you." U.S. News & World Rep., May 15, 1978, at 22.

40. The Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (a permanent complement of Committee staff—4 professional and 6 clerical); The Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (increase to six professional aides and minority hiring); The House Reform Amendments of 1974 (H. Res. 988) tripled the staffs of most standing committees; S. Res. 60 provided three associate committee assistants for each Senator; and the Senate Committee System Reorganization Amendments of 1977 dealt with proportionate staffs and minority staff funding.

41. VITAL STATISTICS, *supra* note 6.

Committee:	'70	'75	'79	'81*
(H) Energy & Interstate Commerce	42	112	150	151
(H) Appropriations	71	98	129	127
(H) Education & Labor	77	114	121	121
(H) Government Operations	60	68	85	84
(S) Government Affairs	55	144	179	153**
(S) Labor & Human Resources	69	150	155	119**
(S) Appropriations	42	72	80	79**
(S) Commerce	53	111	96	78**
(S) Environment & Public Works	34	70	74	56**

* Reagan Presidency

** Republican control of the Senate

significant that most of the committee staff increases, at least in the House, occurred at the subcommittee level, the source of most congressional oversight activity.⁴²

Even though the number of committee staffers dramatically increased after 1973, a 1977 congressional study of federal regulation noted that most oversight remained ad hoc in nature and was stimulated more by news articles, by complaints from constituents, by special interest groups, or by information from disgruntled agency employees, rather than by a coordinated staff oversight process.⁴³ Aberbach's 1977 study of the quality of oversight indicates, in fact, that increased numbers of committee staff only confused an already uncoordinated oversight process:

However, when authority over staff is dispersed, increases in the number of staff people are more likely to lead to increases in the level of oversight activity than to increases in systematic oversight. The problems of lack of coordination and lack of an orderly, methodical approach to oversight are, in fact, probably exacerbated by mere increases in the number of staff aids.⁴⁴

Even if increased numbers of congressional committee staff have not improved regulatory oversight quality or coordination, they have significantly transformed the committee staff subsystem.

Several of the more important changes in the enlarged committee staff should be noted. For example, by 1975 the so-called temporary investigative committee staff personnel had become well-entrenched members of the statutory committee staff bureaucracy.⁴⁵ Many of these new committee staff members could be classified as social activists⁴⁶ in contrast to the conservative staff members described by Clapp in the early 1960's.⁴⁷ This reflected the changing philosophical composition of the permanent committee staff bureaucracy.

Studies indicating a high turnover of staff during the 1970's⁴⁸

42. See M. MALBIN, *supra* note 14, at 17; see also KOFMEHL, *supra* note 23, at xxvi-xxvii. The author points out that as a result of the House Committee Reform Amendments of 1974, House committees hired an additional 218 regular staff members in 1975 and 191 more specially authorized personnel than in 1974. Also, only nine months after passage of Senate Resolution 60, the Senate hired 291 additional staff, and during the rest of 1975 Senate committees hired 411 more employees.

43. STUDY ON FEDERAL REGULATION, *supra* note 18, at 121.

44. ABERBACH, *supra* note 26, at 7. See also CMU Survey, *supra* note 16. In the CMU Survey one regulator noted: "Increased staff impedes rather than facilitates the process—too many cooks—the more people the agencies have pulling on them, the freer they are to do what they please." *Id.*

45. H. MANSFIELD, CONGRESS AGAINST THE PRESIDENCY 114 (1975).

46. *Why Congress Delegated Power*, Wall St. J., July 8, 1983, at 12, col. 1.

47. See C. CLAPP, *supra* note 36.

48. Salisbury & Shepsle, *Congressional Staff Turnover and the Ties That Bind*, 75 AM. POL. SCI. REV. 381, 386 (1981).

also meant many committee staff members now lacked the institutional memory characteristic of the professional committee staff experts.⁴⁹ This data further highlighted the growing divergence in goals between the traditional professional committee staffer and the emerging policy entrepreneur.⁵⁰ Even the political environment in which the committee staffs toiled changed during the mid-1970's. As Michael Pertschuk, a former key committee staff member and regulator noted, President Carter's appointment of social activists to federal regulatory agencies limited new legislative opportunities for committee staff members.⁵¹ Instead, the staff was forced to focus upon negative oversight of the new regulators' initiatives as a substitute for legislative activity in order to justify their presence.

The simultaneous formal institutional changes in the congressional committee system previously mentioned, coupled with the significant transformation of the committee staff subsystem did, however, provide a unique opportunity for an enlarged committee staff to exercise the latent yet considerable powers delegated to it by Congress in the regulatory arena. It is to an examination of the staff regulatory oversight power that this article now turns. This line of inquiry is pursued in order to explore the nature and extent of informal committee staff influence over regulatory development. The amount of informal committee staff influence over regulatory development is important because the degree to which this *de facto* authority to oversee and influence regulatory development resides, and is exercised at the staff level, presents a new twist to the issue of formal congressional control over federal regulators. The issue next confronted is specifically: what are the legal implications, the political implications, and the regulatory consequences of Congress informally delegating its authority to oversee an unelected regulatory bureaucracy to an unelected committee staff bureaucracy?

THE INFORMAL POWERS OF COMMITTEE STAFF

The informal oversight power delegated to the committee staffs is considerable. This delegation is particularly significant in the regulatory arena because Congress almost totally depends on its committee staff to perform regulatory oversight. This means that much of the committee staff interaction with regulatory agencies is not subject to congressional supervision.⁵²

The corresponding growth of committee staff and proliferation

49. R. JONES & D.P. WOLL, *THE PRIVATE WORLD OF CONGRESS* 161 (1979).

50. Price, *Professional and Entrepreneurs: Staff Orientations and Policy Making on Three Senate Committees*, 33 J. OF POL. 316, 335 (1971).

51. M. PERTSCHUK, *REVOLT AGAINST REGULATION* 67 (1982).

52. B. CRAIG, *THE LEGISLATIVE VETO* 126-27 (1983).

of subcommittees only served to enhance the opportunity for staffers to expand their influence.⁵³ With the increase in congressional committee responsibilities and the corresponding decrease in staff supervision, committee staff members were better able to pursue their own initiatives, particularly in the regulatory arena.⁵⁴ Furthermore, although staff members often publicly disclaimed their own importance,⁵⁵ the availability of these powers to a growing, unelected staff bureaucracy raised a number of important questions related both to the issue of delegation of legislative authority and to the issue of political accountability.

Staff powers in the modern regulatory oversight arena have been enhanced because they have been exercised in conjunction with formal congressional oversight techniques; thus, legitimizing committee staff members informal interaction and negotiation with the regulators. Formal congressional oversight techniques such as oversight hearings, congressional investigations, statutorily-mandated agency reporting requirements, statutory amendments to agency enabling acts, legislative veto provisions, congressional casework inquiries, and agency confirmation hearings have also provided committee staff members with numerous opportunities to influence regulatory decision-making. To appreciate the ability and extent to which staff members can influence regulatory behavior without seeking congressional approval, an elaboration of the significance of the committee staff's informal oversight power is provided.

A. Oversight hearings

In many respects oversight hearings, held to review agency activities, are initiated, structured, and directed by the committee staff rather than by the committee members. Subcommittee staff, according to one survey, were the most frequent initiators of subcommittee hearings.⁵⁶ This gives the staff the power to threaten that a hearing will be held where an agency is unresponsive to staff probes. The threat of a hearing carries a heavy price tag in terms of research and preparation time. This causes a reduction in agency resources for some projects as well as a redirection of agency attention.⁵⁷ As United States Representative Fernand J. St. Germain

53. G. FORD, *A TIME TO HEAL* 26 (1979).

54. See *With Shorter Stays For Legislators, Bigger Staffs, Who'll Run Congress*, 203 *SCI.* 245, 247 (1979).

55. Jones & Woll, *The Tail and The Dog: How the Staff Wags Congress*, 11 *WASH. MONTHLY* 30, 37 (1979).

56. Stenger, *Congressional Committee Staff Members: Advocates or Process Administrators?* (April 1978) (unpublished thesis in Southern Ill. Univ. Library).

57. See, 1976 *Bicentennial Institute*, 28 *AD. L. REV.* 569, 734 (1976) [hereinafter cited as *Bicentennial Institute*]; see also *STUDY ON FEDERAL REGULATION*, *supra* note 18, at 80 (involving the increase in oversight hearings for regulatory agencies).

complained:

You have situations where the staff sets in motion the machinery for reports, inquiries, research, and, lo and behold, you've got a hearing underway. This is costly in money and manpower, not just for Congress but for business and other private groups that spend enormous sums getting ready for the hearings.⁵⁸

Once the hearing is approved by the committee the staff is responsible for organizing it, selecting witnesses, and briefing committee members. This is all in addition to drafting questions for the staff to pose to the witnesses.⁵⁹ One survey indicates that it is common for staff, not only to interact with prospective witnesses prior the hearings,⁶⁰ but also to structure the appearance and topical coverage of the witnesses.⁶¹ In effect committee staff set the agenda for the hearing process;⁶² they control the flow and presentation of information. Moreover, by increasing the number of hearings, committee staff can provide themselves with more autonomy to oversee an agency's activity because Congressmen are often unable or unwilling to focus upon the more mundane regulatory hearings.

B. Authorization and appropriation hearings

These hearings are the financial lifeblood of an agency, and the agency's financial operation is dependent upon favorable committee action. While the importance of formal authorization and appropriation hearings cannot be ignored, what is more significant is that much of the negotiation over the content of the all-important final conference committee bill is handled informally at the committee staff level.⁶³ Indeed, because of committee staff access to the committee and subcommittee chairmen and because of increasing committee dependence on staff, what Patterson wrote in 1970 is even more appropriate today: "The success of the agency in congressional hearings depends upon effective anticipation of the interests and concerns of the committee staff, since these interests tend to be, or

Oversight hearings for Regulatory Agencies

Congress	House	Senate
91st	4	3
92nd	4	1
93rd	7	5
94th	14	11

58. *Congress Frets About Its Own Bureaucracy*, NEWSWEEK, May 15, 1978, at 22.

59. Scully, *Reflections of a Senate Aide*, 47 PUB. INT. 41, 46 (1977).

60. Stenger, *supra* note 55, at 166.

61. *Id.* at 97.

62. *Id.* at 89.

63. M. MALBIN, *supra* note 14, at 46.

to become, the concerns of committee members."⁶⁴

Because committee staff members control both the way that information is gathered and the way that recommendations to the committee are made,⁶⁵ earning the displeasure of the authorization and appropriation committee staff could certainly have an adverse affect on an agency's yearly budget. Further, committee staff members have on occasion been known to take formal actions, although contrary at times to the committee's wishes, when it suited them. Clearly committee staff members do sometimes overstep their limited formal role in the oversight process.⁶⁶

C. Committee investigations

Committee staff members possess the authority to probe agency activities with or without formal committee approval. Staff powers exercised without formal approval include: staff-initiated investigations the results of which are reported to a member to stimulate a formal committee probe;⁶⁷ release of a staff report to Congress to highlight an agency activity (an action which does not require a full committee vote)⁶⁸ in order to stimulate a demand from Congress for a committee probe; or leaking the results of formal or informal committee investigations to the media to stimulate public demand for committee action.⁶⁹ Thus, the power of committee staff members to informally stimulate resource-draining agency investigations and to cause staff familiarity with agency operations make them a significant force which agencies must heed. The committee staff's views, therefore, have an important impact on agency activities and decisions.

D. Committee reports

Committee reports are used as one of the major sources of determining legislative intent by the courts. Committee reports have, therefore, become an indispensable interpretive document especially

64. Patterson, *supra* note 13, at 25.

65. D. PRICE, *THE COMMERCE COMMITTEES* 329 (1975).

66. See, Wash. Post, July 17, 1983, § A, at 7, col. 1; see also JONES & WOLL, *supra* note 49, at 161 (committee staff director issued a phantom 56 billion dollar appropriation hearing report).

67. FENNO, *supra* note 33, at 148.

68. See M. MALBIN, *supra* note 14, at 29.

69. E.g., *Travel Abuse Laid to Federal Agency: Staff Report Accuses EPA Aides of Unreported Vacations on Trips Paid by Taxpayers*, N.Y. Times, March 22, 1979, § A., at 20, col. 3; *Safety Agency Accused of Laxity in Guardian Role*, Wash. Post, May 17, 1977, § A., at 2, col. 1 (evidence from staff investigation); *Labor Department Is 'Inept' on Safety Enforcement, Hill Unit Charges*, Wash. Post, Sept. 13, 1974, § A., at 2, col. 5 (charges grew from investigation by Senate Labor Subcommittee Staff investigation). See also M. MALBIN, *supra* note 14, at 5.

in light of the broad delegation of legislative authority granted to regulatory agencies.⁷⁰ As one writer succinctly stated, ". . .both the creators and managers of statutory programs are influenced strongly by committee reports because the reports are considered to be official expressions of congressional intent, second only to the laws themselves."⁷¹ By drafting these reports with little if any committee review,⁷² committee staff members possess a significant ability to mold the interpretation of broad statutory mandates. Even the conference committee reports, the most important report documents in the legislative process, are drafted by staff largely without committee review.⁷³ One commentator termed this lack of committee supervision over the drafting of committee reports as the "Achilles heel" of the legislative process.⁷⁴

By delegating report writing duties to their respective staffs, congressional committees have greatly enhanced their staff's informal negotiating power over the agencies that the respective committees oversee. That is to say that as questions of legislative intent concerning statutory provisions or agency reporting requirements arise, committee staff members, who are the drafters of the bills and reports, become a natural source of congressional intent upon which agency officials can rely. This agency reliance on the interpretative value of committee reports has shifted much of the settlement of regulatory policy-making to behind the scenes negotiation between the committees' staffs and the agencies themselves.⁷⁵ Court cases granting committee staff members immunity in their committee report writing activities only serve to legitimize this alter ego role⁷⁶ without addressing the legislative significance of this delegation of authority.

E. Amending agency statutes

Books written by past and present members of Congress have drawn attention to the legislative influence of committee staffs. United States Senator William Cohen wrote in his book entitled *Roll Call*:

70. R. JONES & P. WOLL, *supra* note 49, at 159.

71. Shaman, *The Use of Congressional Committee Reports in the Administrative Process*, 6 IND. L. REV. 481, 484 (1973).

72. K. KOFMEHL, *supra* note 23, at 121.

73. *Id.* at 206.

74. *Id.* at 123.

75. Bruff & Gelhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1417 (1977).

76. *Doe v. McMillan*, 412 U.S. 306 (1973). See also *The Speech or Debate Clause Protection of Congressional Aides*, 91 YALE L.J. 961, 968 (1982) ("The standard set forth in *Gravel* permits congressional aides to assert speech or debate protection for facially legislative acts that they undertake of their own accord").

They draft the laws that will change the shape of America to conform to their visions of equity, the environment and the life-styles of the future. Only in the presence of Senators do the committee staffers fall back into the shadows. Their retirement from the center of control is temporary only—the Senators will move quickly on the treadmill toward another engagement. The staff members are quite accustomed to running the committees according to their plans.⁷⁷

However, the influence of a growing committee staff has also had important regulatory implications. For instance, after major legislative differences have been settled, the implementation details are left to the staff. In fact, these “details” are so important that one commentator has stated that they “can frequently mean everything to whole industries or groups of people.”⁷⁸ Michael Pertschuk, from his unique perspective, also emphasized the importance of these “details.” Pertschuk stated that “[t]he craft of effecting regulatory schemes is an arcane art, the difference between effective and token regulation may well turn on the artful shaping of apparently innocuous and routine legislative boiler-plate.”⁷⁹

Thus, increased committee staff input can and does have a significant impact on resulting regulation and its implementation. In the words of John Quarles, former Deputy Administrator of the EPA:

Much of the problem (referring to water pollution law implementation) stems from a well-intentioned but ill-conceived effort on the part of young congressional staff to force the agency to make more rapid progress than is physically or technically possible. The staff members who draft such legislation believe that short deadlines, combined with highly detailed regulatory requirements, are the only way to keep the agency “honest” and keep the pressure on polluters.⁸⁰

The staff impact, argues Quarles, has meant that Congress must now frequently re-examine and change basic pollution control statutes in order to deal with problems that were unanticipated when the legislation was first drafted.⁸¹

F. *The Legislative Veto*

Rather than being the exclusive tool of elected members of Congress to hold the regulators accountable, the legislative veto has, instead, ironically promoted closer ties between two unelected subsys-

77. W. COHEN, ROLL CALL 200 (1981).

78. Malbin, *Congressional Committee Staffs: Who's in Charge Here?*, 47 PUB. INT. 16, 18 (1977); see also R. DAVIDSON & W. OLESZEK, CONGRESS AGAINST ITSELF 259 (1977) (“senatization” dependence on staff is fast engulfing the House) [hereinafter cited as R. DAVIDSON & W. OLESZEK].

79. M. PERTSCHUK, *supra* note 51, at 27.

80. *Bicentennial Institute*, *supra* note 57, at 727.

81. *Id.* at 728.

tems, namely the agency staff and the committee staff. The threat of a formal legislative veto by Congress has resulted in a stronger bargaining power of committee staff. This stronger bargaining power ensures that regulations will be altered, changed, or eliminated in response to pressure from congressional staff upon whose recommendation members of Congress rely.⁸² Studies of regulatory development in the Department of Education⁸³ and General Services Administration⁸⁴ confirm the existence of an enhanced power that the legislative veto confers upon congressional staff in their negotiations with agency regulators. In fact, Bruff and Gelhorn's study of legislative vetoes concluded that informal staff negotiations would be seriously impaired in the absence of a veto provision.⁸⁵ Perhaps that explains why the growth of congressional staff in 1975 coincided with the proliferation of legislative vetoes in that same year.⁸⁶

G. Casework

While staff assistance with constituent-agency disputes is not usually classified as a formal oversight mechanism, at least one writer's research into this aspect of staff activity concludes that casework has significant potential to affect internal agency activity.⁸⁷ Casework, while not a systematic approach to activity, does keep staff in regular contact with agency personnel.⁸⁸ Furthermore, although casework is usually handled by the Congress' personal staffs, committee staff become involved through committee members' referrals when the problem involves an agency over which the commit-

82. B. CRAIG, *supra* note 52, at 126.

83. *Id.* at 91. After congressional vetoes of former education regulations one committee aide commented: "Education is consulting with committee staff over proposed regulations much more closely."

84. Bruff & Gelhorn, *supra* note 75, at 1398-99. Bruff & Gelhorn stated:

While formulating the first set of rules, GSA consulted closely with the staffs of a Senate committee and a House subcommittee. In a series of twelve to fifteen meetings with the Senate staff, GSA presented drafts of the regulations for comment and criticism and then revised the drafts for presentation at the next meeting. Significant changes were also made on the early drafts after long line-by-line sessions with House staff. These negotiations reduced the number of unresolved issues to five or six the time the regulations formally reached Congress. There was no public participation in the rulemaking because the statute did not require it. And GSA would not have entered negotiations with the committees in the absence of a veto provision.

Id.

85. *Id.* at 1420.

86. Dixon, *supra* note 31, at 427. Between 1932-1975, there were 295 congressional review provisions in 196 laws. From 1969-mid 1974, there were 10 such statutes, while in 1975 there were 21 statutes with 58 legislative review provisions.

87. Johannes, *Casework as a Technique of U.S. Congressional Oversight of the Executive*, IV LEGIS. STUD. Q. 325 (1979).

88. *Id.* at 341.

tee has jurisdiction.⁸⁹

Significantly, the process by which congressional casework is handled has changed dramatically since the passage of the Legislative Reorganization Act of 1946. As Fox and Hammond pointed out:

In 1946, Congressmen appeared with constituents before executive branch departments and agencies; they were hesitant to delegate this activity to aides. Today, aides handle most constituency casework and Federal projects work and now Congressmen worry that they spend too much time responding to staff, and not enough listening to each other and exchanging ideas.⁹⁰

Committee staffs have thus been delegated more authority to affect agency activity. Patrick McLain, Counsel for the House Energy and Commerce Subcommittee on Oversight and Investigations, noted that members need not do much more than sign a letter to get action.⁹¹ McClain stated, in fact, that it is "amazing what can be accomplished by a letter or by staff work."⁹² The wide latitude of permissible staff involvement in agency casework also strengthens their position. Former U.S. Attorney General Griffin Bell summarized legitimate staff activity in this area in the following way:

. . . [I]t is not improper for a member of Congress or a congressional aide to attempt to influence a specific administrative decision. . . through the submission of facts or arguments or views that go to the merits of the decision provided the submission is made in a way that is consistent with the agency procedures that govern the decision.⁹³

H. Confirmation Hearings

A 1977 congressional survey of committee staff members who had responsibility for the oversight of regulatory agencies concluded that confirmation hearings of agency appointees were one of the most frequently used techniques of oversight.⁹⁴ This technique is

89. *Id.* at 343.

90. H. FOX AND S. HAMMOND, CONGRESSIONAL STAFF 4 (1977).

91. Library of Congress Congressional Research Service, *Oversight in Action*, (Feb. 1984) (audio brief on congressional oversight).

92. *Id.*

93. G. BELL AND R. OSTROW, TAKING CARE OF THE LAW 91 (1982). *See also* 5 U.S.C. § 554(d) (1982) (providing that employee presiding over reception of evidence shall make the recommended decision); *Peter Kiewit Sons' Co. v. U.S. Army Corp. of Engineers*, 534 F. Supp. 1139 (D.D.C. 1982) (contractor was denied due process of law when it did not receive constitutionally mandated procedural safeguards prior to debarment); and *Pillsbury Co. v. FTC*, 354 F.2d 952 (Cir. 1966) (corporation denied procedural due process where thrust of senators' questions and comments to the commissioners were directed to the correctness of the commission's approach). *But see* Library of Congress Congressional Research Service, *Oversight and Congressional Policymaking* (Feb., 1984) (audio brief) (where Congressman Dingell described the *Pillsbury* doctrine limits on regulators' testifying as "non-existent").

94. STUDY OF FEDERAL REGULATION, *supra* note 18, at 146.

ranked third, however, in terms of effectiveness.⁹⁵ It is ranked after, first, members' personal communications to agencies and, second, authorization and appropriation hearings. Despite certain limitations,⁹⁶ staff continue to use confirmation hearings to influence agency activity. Under Senator Magnuson, the consumer-oriented Senate Commerce Committee staff did most of the work involving the screening of nominees to ensure that these nominees would aggressively execute the agency's responsibilities.⁹⁷

I. Summary

Staff communication with the agency ranked, on average, as the most frequently used and most effective technique of all those previously mentioned.⁹⁸ Furthermore, as a House subcommittee report concluded, no matter what technique is used a professional committee staff is needed to carry it out.⁹⁹ A 1977 U.S. Senate study, in fact, concluded that the ". . .committee staff shoulder much of the oversight task."¹⁰⁰

Consequently, the reality of congressional control over federal regulators lies, not in the existence of formal congressional oversight techniques, but rather in the exercise of informal staff power within the formal oversight process. Davidson summarized the extent of these informal oversight powers as follows:

Many staff aides have latitude to develop, sell, and mobilize support for their ideas. On occasion, such "entrepreneurial" staff may unilaterally leak information, plant stories with the press, issue reports, harass agency officials, or invoke their member's name to do things he or she might be unaware of.¹⁰¹

The exercise of these considerable committee staff powers to influence regulatory behavior, used in conjunction with and in addition to existing formal congressional oversight techniques, has largely been ignored. Yet, can any attempt to increase congressional control over regulatory agencies be effective if the informal committee staff role is not fully considered? Having examined the powers that com-

95. *Id.* at 146-47.

96. See Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1061 (1975). "There is a series of precedents, drawing strength from the Administrative Procedures Act, which prohibit members of Congress from making off-the-record attempts to influence the decision in particular administrative proceedings and from questioning members of an agency in committee hearings as to their intentions in pending cases." *Id.*

97. *FTC Oversight/Antitrust Enforcement*, 17 TULSA L.J. 587, 631 n.219 (1982).

98. STUDY OF FEDERAL REGULATION, *supra* note 18, at 152.

99. *Federal Regulation and Regulatory Reform: Report by the House Subcommittee on Oversight and Investigation*, 94th Cong., 2d Sess. 545 (1974).

100. STUDY OF FEDERAL REGULATION, *supra* note 18, at 17.

101. R. DAVISON & W. OLESZEK, *supra* note 78, at 240.

mittee members may exercise over regulators, the focus of this paper now shifts to an examination of the way that committee staffs have influenced the congressional oversight and regulatory decision-making processes.

CONGRESSIONAL STAFF AND REGULATORY PROCESS

The impact of an enlarged and increasingly influential congressional committee staff bureaucracy on the regulatory process has been felt both in the congressional oversight and in the agency decision-making process. Modern congressional oversight has largely evolved into a series of informal controls exercised by committee staff members. These informal controls exist almost exclusively except where Congress is prodded into action by a regulation that raises a salient political issue.¹⁰² The more complex and obscure the regulatory issue, the greater the committee staff influence will be.¹⁰³ Similarly, regulatory agency decision-making has shifted from formal congressional directives and interaction to informal committee and agency staff negotiation outside the formal regulatory development process. This has resulted in the addition of another unelected layer of government and thus has separated the regulated from the regulators. Consequently, the development of a coherent regulatory policy has been stymied as more and more regulatory policy has been allowed to develop through an informal committee/agency staff negotiation process. In this process regulatory policy formation has eluded formal congressional review.

A. *The Impact of Committee Staff on the Congressional Oversight Process*

Turning first to the committee staff impact on the congressional oversight process, the result of increased congressional dependence upon and delegation of authority to its committee staff for regulatory oversight has meant a diminished formal role for Congress in its attempts to control the regulators. In effect this result, if not intended, was certainly not an unwelcomed consequence for a Congress already mired in a complex legislative arena.

Indeed, at the committee level, at least one powerful committee chairman encouraged a staff leadership role in committee oversight hearings. As Congressman Dingell, chairman of the House Committee on Energy and Commerce stated: "The best run oversight hear-

102. G. GOODWIN, *THE LITTLE LEGISLATURES* 149 (1970). Staff have greater influence on Senate committees, committees that handle routine matters, and on committees with high membership turnover.

103. CMU Survey, *supra* note 16.

ing would be one in which the counsel of the committee would actually conduct the questioning, and then members would be afforded their time."¹⁰⁴ A United States Senate study also recommended that staff members be given more opportunities to ask follow-up questions of witnesses at hearings.¹⁰⁵

Thus, Congress viewed the encouragement of an increased staff role as a positive development in the modern congressional oversight process. Congressman Dingell emphasized the desirability of this new staff role by noting: "We try to improve the ability of the committee and the members to ask the proper questions by careful staff briefings of the members beforehand; and usually on the oversight subcommittee our members will in fact work very closely with the staff to get proper lines of questions laid out."¹⁰⁶ The extent of congressional delegation to its staff was apparent when the Senate Committee on Government Affairs was forced to question its own aides, through sworn testimony, about the manner in which the committee handled the 1977 investigation of Bert Lance's tangled financial dealings.¹⁰⁷ This incident provided an opportunity to briefly pierce the curtain of formalism that cloaks the true informal workings of committee staff members.

In summary, one committee staff director tersely described the new committee oversight process as follows: "The committee makes the decision, but it's left to the staff to put it in shape."¹⁰⁸ United States Senator Sam Nunn warned about danger of this new staff emphasis: "We are in a position of being deferential to staff because they have a lot of power and run the subcommittees. They wield the power but they are not a responsible part of the process."¹⁰⁹ Finally, Jones and Woll summarized the diminished oversight role of the modern congressional committee. According to Jones and Woll the diminished role resulted from increased reliance on its staff. Jones and Woll noted: "Committees, however, are mere symbols of power, not power itself, unless they are accompanied by adequate staff."¹¹⁰

The enlarged committee staff also transformed the process by which Congress, as a whole, deliberated issues of regulatory as well as legislative concern. Michael Malbin, in fact, wrote:

104. Library of Congress Congressional Research Service, *Oversight and Congressional Policymaking* (Feb., 1984) (audio brief).

105. STUDY ON FEDERAL REGULATION, *supra* note 18, at viii.

106. Library of Congress Congressional Research Service, *Oversight in Action*, (Feb., 1984) (audio brief on congressional oversight).

107. R. JONES & P. WOLL, *supra* note 49, at 165.

108. *The Shadow Government Operating on Capital Hill*, U.S. NEWS & WORLD REP., June 27, 1983 at 65.

109. Casper, *The Committee System of the United States Congress*, 26 AM. J. COMP. L. 359, 375 (1978 Supp.).

110. R. JONES & P. WOLL, *supra* note 49, at 128.

On the one hand dependence on congressional [sic] staff has, as we have seen, increased the relative power of technocratic issue specialists and of groups with no economic or political constituency. This both reflects and reinforces the complexity of government. On the other hand, Congress has reacted to the government complexity it has created by building up its staffs defensively to preserve an important role for itself. But the size of those staffs and the way they are used has reinforced a situation in which the deliberative aspect of representation gets short shrift on all but the broad outlines of a few issues.¹¹¹

A good example of the increased impact on the role of staff in congressional deliberations involved the impasse over the passage of the landmark Budget and Impoundment Control Act of 1974, legislation that would directly affect agency spending capabilities. United States Senator Robert Byrd established a staff working group to hammer out a compromise and, as Davidson pointed out, "after 90 hours in 25 sessions during 16 days, the staff groups' efforts succeeded: the consensus legislative budget bill passed 88-0."¹¹² Thus, congressional deliberations over this important piece of legislation were replaced by informal staff negotiations.

The growth of committee staff influence also created a new tension in Congress. This phenomenon pitted a generalist-oriented, directly participative Congress against a large number of professional experts upon whom Congress had grown dependent.¹¹³ A 1979 survey of over 200 House members indicated, by large margins, that the growth and size of committee staffs caused serious problems. The same survey also revealed that committee, not personal staffs, had contributed to the fragmentation and unmanageability of the House committee system.¹¹⁴ Yet, Congress has not attempted to undo what Kofmehl had warned against: the establishment of a competing staff bureaucracy in subordinate units of Congress.¹¹⁵ Instead, the formal congressional regulatory oversight process has largely shifted to informal committee/agency staff interactions providing greater opportunities for the exercise of informal staff oversight powers.

B. *The Impact of Committee Staff on Agency Regulatory Decision-Making*

As the performance of oversight responsibilities shifted from a formal role performed by Congress to an informal and largely unsupervised committee staff intervention, so too did influence over

111. M. MALBIN, *supra* note 14, at 250.

112. R. DAVIDSON & W. OLESZEK, *supra* note 101, at 253.

113. R. FENNO, *supra* note 33, at 145.

114. HOUSE SELECT COMMITTEE ON COMMITTEES: FINAL REPORT, 96th Cong., 2d Sess. 266 (1980).

115. K. KOFMEHL, *supra* note 23, at 146.

administrative rule-making shift from formal oversight techniques to an informal committee and agency staff negotiation process. Thus, congressional committee staff emerged in the 1970's as a principal regulatory actor in what Arthur S. Miller termed "a nonstatutory web of interactions that made up a substructure of government in spite of the facade of separation of powers. . . ." ¹¹⁶ Staff interaction transformed the modern regulatory process from formal congressional oversight into "a series of bargains between second-echelon administration officials and committee staff."¹¹⁷ And their impact, as Charles Jones elaborated, has been considerable:

Presidential and congressional staff positions are more than jobs. They come to be the connecting tissue among elected public officials, between them and the bureaucracy, and between them and private interests. These staff serve as an institutional memory for the many commitments made in the name of public officials.¹¹⁸

So concerned was Robert Reich about this informal staff negotiation power that he warned: "[T]he public rule-making process may become a sideshow, unrelated to the real powers of negotiation among congressional committee staff, agency staff, White House aides and special interest representatives who will dictate the substance of the rule."¹¹⁹

The frequent enactment of the legislative veto provisions to agency enabling legislation after 1974 only served to strengthen the already considerable negotiation power of committee staff when dealing with agency officials, and this was at the expense of the formal public rule-making process.¹²⁰ As Professor Gelhorn warned Congress during congressional hearings on the administrative rule-making process: the legislative veto "may focus the analysis of administrative regulations away from the administrative area where it must be somewhere in public under section 553 of the APA and in-

116. Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 *IND. L.J.* 367, 374 (1977).

117. J. KINGDOM, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* 44 (1984).

118. C. JONES, *CONGRESS AND THE PRESIDENCY IN THE NEW CONGRESS* 247 (1979).

119. Reich, *Politicizing the Fourth Branch*, 229 *NATION* 212 (1979).

120. A unique twist to the shift to informal staff negotiation in the late 1970's was that, for the first time, the possibility existed for congressional negotiations with controversial agencies such as the FTC and CPSC to be conducted between current and former committee staffers, the latter having been appointed to agency policy-making positions. *Quality of the Regulators: Joint Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce and the Senate Committees on Commerce and Government Operations*, 94th Cong., 1st Sess. 51 (1975). Prior to 1975, no commissioner appointed to the EPA, FTC, CPSC or OSHA had formerly held a congressional staff position. However, after 1975 at least three prominent committee staffers were appointed as commissioners to one or more of these agencies. The three appointees were Michael Pertschuk (FTC, 1977), David Clanton (FTC, 1976), and Stuart Statler (CPSC, 1979).

stead to private sessions before individual Members of Congress or I would suggest more likely before their staff."¹²¹ With the power of committee staff to screen the regulations and negotiate their final form, *largely without congressional supervision*, the logical conclusion is that the committee staff, for better or worse, left their distinct mark on the final regulatory product.¹²²

Two examples confirm this conclusion. First, the Assistant Secretary for Legislation for the Department of Health, Education and Welfare, testified that the Education Department staff "met in an exhaustive series of approximately 20 meetings over the course of a month and a half after the bill (the Education Amendments of 1974) was enacted in order to *take the views of congressional staff members into account* prior to the beginning of the regulations drafting process."¹²³ A second example involved HUD regulations, where Craig described that department's regulatory process as follows: "Most major regulations developed by HUD since adoption of the legislative veto review process in 1978 have been revised as a result of objections raised by individual members of Congress or committee staffs. Most staff comments have been informal, in other words, unrecorded."¹²⁴

Whether committee staff members were acting at the specific behest of an elected committee member or not, their intervention had yet another important impact on the regulatory process. The important impact was that of delay. The increased numbers of committee staffers enabled them to intervene in regulatory activities more often and to thus require agencies to expend more of their limited time and resources in responding to staff inquiries. Delay, according to a Library of Congress survey of lawyers and administrative law scholars, was listed in the mid 1970's as the most important problem facing regulatory commissions.¹²⁵ Furthermore, the impact of informal negotiations only further weakened the principal goal of restoring political accountability to regulatory oversight. Reich concluded that "it is difficult to hold any single official responsible for outcomes that are the product of secret negotiations among congressional, agency, and White House staff and affected industries."¹²⁶

In addition, either to avoid the political consequences of contro-

121. *Congressional Review of Administrative Rulemaking: Hearings Before the Subcommittee on Administrative Law and Government Relations of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 257 (1975).

122. Bruff & Gellhorn, *supra* note 75, at 1417. "Indeed, much settlement of policy occurred in behind the scenes negotiations between the staffs of the committees and the agencies." *Id.*

123. *Id.* at 1415 (emphasis added).

124. B. Craig, *supra* note 52, at 126.

125. Study on Federal Regulation, *supra* note 18, at 270.

126. Reich, *supra* note 119, at 122.

versial programs or to reconcile competing congressional views, Congress directed its committee staff to make broad, and sometimes conflicting, delegations of legislative authority to agencies.¹²⁷ These broad delegations¹²⁸ meant agencies would either need to constantly consult with Congress (or rather the committee staff bill drafters who handle all the non front-page regulatory activity)¹²⁹ or implement a regulatory scheme on the basis of their own views and interpretations. An increased staff presence made the latter option unlikely in all but the most routine regulations.

When regulators turned to committee staff in the mid-1970's they faced interpretations by a staff that Ralph Nader characterized as having "activist, reformist inclinations. . . ."¹³⁰ Their ties with consumer and environmental advocates made the committee output more prolific and "tougher" in terms of regulation than if the committee members were actively in charge. Faced with more statutory responsibilities than they had time to perform effectively,¹³¹ combined with limited resources, agency discretion required continued political guidance. And what better source of guidance than from the committee staff largely responsible for its creation?¹³² If the agencies failed to consult with the staff, a procession of hearings¹³³ or even legislative veto likely awaited. Thus, increased congressional involvement in the implementation of regulatory schemes, chiefly through a growing committee staff, left agencies subject to an uncertain flow of post-enactment congressional directives. The legal and political consequence of this continued input meant a regulation passed by one Congress evolved through subsequent congressional staff pressures into one "reflecting the current political climate rather than the congressional intent at the time of the initial mandate."¹³⁴

127. *Congressional Oversight*, *supra* note 30, at 1057.

128. For example, OSHA was directed "to assure so far as possible every working man and woman in the nation safe and healthful working conditions. . . ." 29 U.S.C. § 651(b) (1982) and the CPSC to "protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051 (b)(1) (1982).

129. B. Craig, *supra* note 52, at 126-27.

130. D. PRICE, *supra* note 65, at 18.

131. Statement by Russell Train, former EPA Administrator in CONGRESSIONAL QUARTERLY, THE FEDERAL REGULATORY DIRECTORY 113 (1983-84), "Many of EPA's difficulties over the years can be traced to the fact that Congress loaded the agency with more statutory responsibilities within a brief period of time than perhaps any agency could effectively perform."

132. See Schwartz, *The CPSC: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 35 (1982) (discussion of how the Senate Commerce Committee staff manipulated the political environment in order to build public support for legislation creating the CPSC).

133. VITAL STATISTICS, *supra* note 6, at 131. House Committee hearings increased from 5,888 in 1973-74 to 7,022 in 1979-80.

134. *Congressional Oversight*, *supra* note 30, at 1057. See also *Consumer Energy Council of America v. Federal Regulatory Commission*, 673 F.2d 425, 478 (D.C.

There is some evidence that committee staff not only influenced the regulatory development process but also its implementation. One case study, for example, described the role of subcommittee staff as "effective administrative decision-makers in the department's rule-making process—not on equal footing with agency staff but, as a result of the potential for a legislative veto, a powerful and often decisive final arbiter of the substance of agency rules."¹³⁵ It could thus be theorized that two common criticisms of the nature of regulatory activity in the 1970's, the undue delays in implementing policy and the year-to-year uncertainty as to the type of regulatory action to be undertaken, could in part be attributed to the committee staff.

Equally important, by delegating to its staff so much of the "details" of regulatory oversight activity, Congress arguably also forfeited much of its political power to alter the programs already implemented. As Malbin wrote:

Instead of thrashing it all out before the fact, the members too often do not know enough of the details they would need to deliberate until after a program is implemented. By then, the program will have developed a constituency of its own that will resist the changes that could more easily have been demanded in advance.¹³⁶

As for the impact of increased congressional staff intervention on the flexibility of regulation,¹³⁷ Bruff and Gelhorn wrote: "Indeed, the dynamics of the review process may make a negotiated rule substantially harder to change through subsequent public comment. Once time and energy have been spent in negotiations between an agency and Congress, both the agency and the committee may be reluctant to revise the rules that have been thrashed out."¹³⁸

Consequently, control of the process and product of regulatory activity in the 1970's, as well as its subsequent revision, was informally transferred from Congress to its committee staff without a formal delegation of congressional authority. Thus, while Congress preserved the trappings of formal congressional oversight techniques, the reality of control of the modern regulatory process lay, not with Congress proper, but rather with its increasingly influential committee staffs.

Cir. 1982).

135. B. CRAIG, *supra* note 52, at 127.

136. M. MALBIN, *supra* note 14, at 248.

137. See HOUSE COMMITTEE ON ENERGY AND COMMERCE, 98th CONG., 2d SESS., REPORT TO THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS (Comm. Print 1984) (contrast on the views of congressional oversight by former FTC chairman and committee staffer Pertschuk and FTC Chairman James Miller).

138. Bruff & Gelhorn, *supra* note 75, at 1414.

CONCLUSION

In retrospect, the period between the resignation of President Nixon in 1974 and the election of President Reagan in 1980 represented a watershed in federal regulatory development. It was a unique period of institutional change in Congress and in the growth of regulatory activity. It also marked the height of power for one faction of the informal and complex legislative subsystem, the congressional committee staff.

The election of Ronald Reagan and his emphasis on deregulation signaled the beginning of a decline in the congressional committee staff regulatory oversight activity. The 1980 election brought a more conservative Congress, less inclined to delegate more legislative authority for new regulatory schemes. The U.S. Senate switched to Republican control, sending droves of long-time Democratic committee staff members to minority status or to the unemployment line. The House staff bureaucracy was also shaken, with half of its committees electing new chairmen.¹³⁹ Overall, committee staff numbers also declined.¹⁴⁰

Regulatory agencies experienced a decline in activity, with active agencies such as the EPA, FTC, and CPSC facing smaller budgets and fewer staff,¹⁴¹ and new appointees like James Miller (FTC),¹⁴² Thone Auchter (OSHA),¹⁴³ and the ill-fated Anne Burford (EPA), retreating from the regulatory explosion of the 1970's. In 1983 in *Immigration and Naturalization Service v. Chadha*,¹⁴⁴ the legislative veto was held unconstitutional. Thereafter the absence of the legislative veto only added to the already declining level of committee staff negotiation in the regulatory oversight process. Nevertheless, the enhanced role of committee staff in the present-day regulatory framework yet remains as a significant consequence of the regulatory explosion of the 1970's. While Congress claimed that the increase in the committee staff membership occurred as a response to growing agency regulatory authority in the 1970's, the real contribution of the staff was in the way that they permanently trans-

139. *The Hidden Power: Who Really Runs Congress*, U.S. News & World Rep., Mar. 9, 1981, at 47.

140. See VITAL STATISTICS, *supra* note 8.

141. *The Ruleslasher: Federal Deregulation is Running into Backlash, Even From Some Affected Businesses*, Wall St. J., Dec. 14, 1983, at 14, col. 1.

142. THE FEDERAL REGULATORY DIRECTORY, *supra* note 131, at 291. Miller stated: "We have made strong progress in getting away from the notion of national nannyism and Star Trek law enforcement where the bold go where no man has dared to go before." *Id.*

143. *Id.* at 400. On Auchter: "It is increasingly clear that [Auchter's] direction will be significantly different both in style and substance from that of his predecessor."

144. 462 U.S. 919 (1983).

formed the process of controlling the regulators and the regulatory output. In delegating most of its oversight responsibilities to an unelected committee staff, Congress completed the transfer of *de facto* authority for ensuring the accountability of our regulators from the elected legislative arena to the unelected agency/staff negotiation level. This transfer has become the unheralded but, nevertheless, significant reality of modern regulatory decision-making.

The enhanced role of the committee staff also compounded the political accountability problem as Congress became even further removed from the oversight process, resulting in what Michael Pertschuk termed the "revolt against regulation."¹⁴⁵ As Craig wrote:

congressional staff, however, are just as "unelected" and "nameless" as their executive counterparts. In light of recent studies chronicling the rise in power and the loose, sometimes nonexistent, level of management and control exercised over staff by their elected congressional masters, it is reasonable to conclude that they are subject to even less control than are executive bureaucrats whose rulemaking activities are at least constrained by provisions of the Administrative Procedures Act and other regulations for procedural fairness.¹⁴⁶

As legal scholars pay more attention to the informal legislative and regulatory processes, perhaps then we will begin to look beyond formal legal doctrines and processes to properly assess how subsystems such as the committee staff have affected the nature of regulations we have inherited from the 1970's. The first step in such an assessment requires recognition of the critical informal role of committee staff in the modern regulatory process. Perhaps then an inquiry into the accountability issue of who regulates the regulators can be approached more realistically by exploring both formal and informal regulatory reforms. Until then, the impact that committee staff has had on our modern regulatory decision-making process will remain a lasting, albeit unrecognized, legacy.

145. M. PERTSCHUK, *supra* note 51.

146. B. CRAIG, *supra* note 52, at 126-27.

