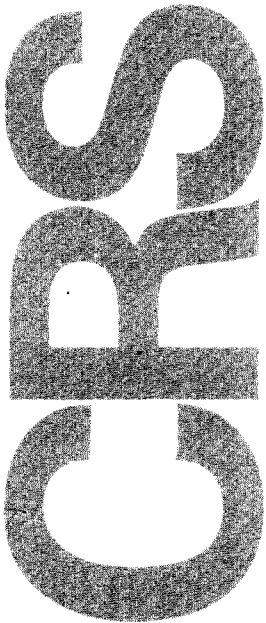


U.S. DEPOSITORY MATERIAL  
GOVERNMENT DOCUMENTS COLLECTION  
NORTHERN KENTUCKY UNIVERSITY  
LIBRARY

CONGRESSIONAL ACTION TO OVERTURN AGENCY RULES:  
ALTERNATIVES TO THE "LEGISLATIVE VETO"

by  
Frederick M. Kaiser  
Analyst in American National Government  
Government Division



September 24, 1979

CONGRESSIONAL  
RESEARCH  
SERVICE  
THE LIBRARY  
OF CONGRESS

JK 1015 C

The Congressional Research Service works exclusively for the Congress, conducting research, analyzing legislation, and providing information at the request of committees, Members, and their staffs.

The Service makes such research available, without partisan bias, in many forms including studies, reports, compilations, digests, and background briefings. Upon request, CRS assists committees in analyzing legislative proposals and issues, and in assessing the possible effects of these proposals and their alternatives. The Service's senior specialists and subject analysts are also available for personal consultations in their respective fields of expertise.

### ABSTRACT

Congress has available a variety of statutory and nonstatutory techniques, other than the "legislative veto," that have been used to overturn Federal agency rules, prevent their enforcement, limit their impact, or hinder their promulgation. This survey of the different statutory instruments of congressional control--direct overturn of rules, modification of agency jurisdiction, limitations in authorizing and appropriating statutes, requiring inter-agency consultation, and advance notification to the Congress--discusses a variety of mechanisms that vary in their use and their specificity, range of impact, and length of effect.

CONTENTS

ABSTRACT.....	iii
I. INTRODUCTION.....	1
II. STATUTORY TECHNIQUES.....	5
A. DIRECT OVERTURN OR PREEMPTION OF RULES.....	5
1. Discussion.....	5
2. Examples.....	6
B. STATUTORY MODIFICATION OF AGENCY JURISDICTION.....	12
1. Discussion.....	12
2. Examples.....	13
C. LIMITATIONS IN AUTHORIZING AND APPROPRIATING STATUTES.....	35
1. Discussion.....	35
2. Examples.....	38
D. REQUIRING FEDERAL AGENCY PRIOR CONSULTATION AND REVIEW.....	49
1. Discussion.....	49
2. Examples.....	50
E. ADVANCE OR PRIOR NOTICE PROVISIONS.....	58
1. Discussion.....	58
2. Examples.....	60
III. NONSTATUTORY TECHNIQUES: COMMITTEE REPORTS.....	65
IV. CONCLUSION.....	75

The author wishes to credit Robert Amorosi  
for the secretarial production of this report.



THE LIBRARY OF CONGRESS  
*Congressional Research Service*

WASHINGTON, D.C. 20540

CONGRESSIONAL ACTION TO OVERTURN AGENCY RULES:  
ALTERNATIVES TO THE "LEGISLATIVE VETO"

I. INTRODUCTION

Mounting interest in the "legislative veto" as a device for congressional disapproval of Federal agency rules 1/ also has prompted a related inquiry: What other mechanisms are available to accomplish the same purpose? The most direct, of course, is a statutory rejection of the offending rule; but other approaches, which vary in scope, directness, and explicitness, exist. This report, surveying recent congressional action, identifies different legislative instruments, with an emphasis on statutory techniques, and provides examples illustrating their use.

Harold Bruff and Ernest Gellhorn, in a report prepared for the Administrative Conference of the United States, highlight the principal alternatives to the legislative veto from the vantage point of a congressional committee:

-----

1/ "Rule" is defined in 5 U.S.C. 551(4) and includes different types of agency statements of general or particular applicability-- establishment of standards and guidelines, rates, and regulations-- designed to implement, interpret, or prescribe law or policy.

The focus of this study is on regulations, although other types of related rules, e.g., standards, are considered also. Moreover, the legislative techniques to override or disapprove such rules have been applied to other types of executive and administrative action, not just rule-making.

Without the veto, a committee displeased with an agency rule has two major options. It may stage an embarrassing oversight hearing, or it may propose legislation to rectify the problem it perceives. But any legislation it proposes must obtain passage in both houses of Congress and approval by the President or a veto override. Until the proposed legislation is adopted, a controversial agency rule, if issued, remains in effect. If the committee chooses to hold a hearing, the agency may resist, testing the committee's power to obtain legislation. 1/

Yet there are other types of statutory and nonstatutory techniques that have the effect of overturning rules, that prevent their enforcement, or that seriously impede or even preempt the promulgation of projected rules. For instance, a statute may alter the jurisdiction of a regulatory agency or extend the exemptions to its authority, thereby affecting existing or anticipated rules. Legislation that affects an agency's funding may be employed to prevent enforcement of particular rules or to revoke funding discretion for rulemaking activity or both. Still other statutory actions, less direct but potentially significant, are mandating agency consultation with other Federal or State authorities and requiring prior congressional review of proposed rules (separate from the legislative veto sanctions). Such provisions may change or

-----

1/ Bruff, Harold H., and Ernest Gellhorn. Congressional Control of Administrative Regulations: A Study of Legislative Vetoes. Harvard Law Review, v. 90, May 1977: 1423.

An overview of some of the prominent statutory and nonstatutory techniques is included in U.S. Congress. Senate. Committee on Government Operations. Study on Federal Regulation. Volume II: Congressional Oversight of Regulatory Agencies. (Committee print) Washington, U.S. Govt. Print. Off., 1977. Chapter 6. Legislative Committee Oversight: Techniques and Processes. (Hereinafter referred to as Senate Study on Federal Regulation.)

even halt proposed rules by interjecting novel procedural ingredients along with different perspectives and influences into the process.

It is also useful to examine nonstatutory controls available to the Congress. These techniques include legislative, oversight, investigative, and confirmation hearings; specialized committee staff and General Accounting Office examinations; establishment of select committees and specialized subcommittees to oversee agency rulemaking and enforcement; provisions in committee reports, especially accompanying authorizations and appropriations, advocating agency reconsideration of particular rules and their implementation; floor statements critical of specific rules or agency enforcement procedures; and direct contact between a regulatory agency and a congressional office that opposes existing regulations or questions projected rules. Such mechanisms are all indirect influences; unlike statutory provisions, they are neither self-effecting nor legally enforceable. Nonetheless, nonstatutory devices are more readily available and more easily effectuated than controls imposed by statute. Although an explicit cause-effect relationship between such devices and the overturn or modification of a particular rule is impossible to determine, observers have attributed substantial influence to nonstatutory controls in regulatory as well as other matters. 1/

-----

1/ Inter alia, see: Harris, Joseph P. Congressional Control of Administration. Washington, Brookings, 1964; Ogul, Morris. Congress  
(1/ Continued )

It is impossible, in a limited time, to provide a comprehensive and exhaustive listing of congressional actions that override or have the effect of overturning actual and proposed rules or that prevent the promulgation of projected rules. Consequently, this report concentrates upon the more direct statutory devices, although it also discusses committee reports accompanying bills, the nonstatutory technique that is frequently most authoritatively connected with the final legislative product. The statutory mechanisms surveyed in this report cross a wide spectrum of possible congressional action:

- single-purpose provisions to overturn or preempt a specific rule;
- alterations in program authority that remove jurisdiction from an agency;
- agency authorization and appropriation limitations;
- agency prior consultation requirements; and
- congressional prior notification provisions.

-----

(1/ Continued) Oversees the Bureaucracy: Studies in Legislative Supervision. Pittsburgh, University of Pittsburgh Press, 1976; Fenno, Richard. The Power of the Purse: Appropriations Politics in Congress. Boston, Little, Brown, 1966; Freeman, J. Leiper. The Political Process: Executive Bureau-Legislative Committee Relations. New York, Random House, 1965; Kirst, Michael. Government Without Passing Laws: Congress' Nonstatutory Techniques for Appropriations Control. Chapel Hill, University of North Carolina Press, 1969; Melville, Charles. Legislative Control Over Administration Rule Making. University of Cincinnati Law Review, v. 32, Winter, 1963: 33-54; Scher, Seymour. Congressional Committee Members as Independent Agency Overseers: A Case Study. American Political Science Review, v. 54, December, 1960: 911-920; Marx, Fritz Morstein. Congressional Investigations: Significance for the Administrative Process. University of Chicago Law Review, v. 18, Spring, 1951: 503-520; Vinyard, Dale. Legislative Committee-Executive Agency Relations. Western Political Quarterly, v. 21, September, 1968: 391-399; and Senate Study on Federal Regulation.



## II. STATUTORY TECHNIQUES

### A. DIRECT OVERTURNING OR PREEMPTION OF RULES BY STATUTE

The most fundamental and direct mechanism for Congress to overturn a rule is by enactment of a statute which explicitly revokes the offending rule or preempts the area covered by the rule. Although several recent examples can be cited, the relative paucity of such statutes may imply that this technique presents difficulties for Congress. It makes heavy demands on congressional resources, requires review and approval by the entire Congress, and must be signed by the President (or his veto overridden). Also, Members may have to clarify "vague statutes" in areas where there may be a "lack of statutory direction," where Congressmen "are faced with the clash of powerful industry forces," 1/ and where less arduous approaches may be available to accomplish the same end.

It should be emphasized that statutory overrides of Federal agency rules are more powerful congressional instruments of control than legislative vetoes of the same:

--statutory overrides may occur even though a specific rule has been "approved" by a failure legislatively to veto it earlier;

--statutory overrides terminate agency rules immediately and preclude similar future endeavors, whereas legislative vetoes, which disapprove or fail to approve rules in the present, do not necessarily prevent later promulgation of the same type of rule;

-----

1/ Senate Study on Federal Regulation, p. 50.

--statutory overrides may nullify both proposed and final rules, including those already administered, while legislative vetoes apply only to proposed rules, although such vetoes may require reconsideration of existing rules; and

--statutory overrides impose a directive of the entire Congress, unlike the legislative veto which may reflect the viewpoint of only a single committee or one Chamber and which may simply be a failure to approve an agency rule within a narrowly-bounded time frame.

The potency of statutes is such that even the threat of enactment may be sufficient to modify administrative rules and their enforcement.

In this case, the Senate Study on Federal Regulation determined that:

It is a rare and short-tenured administrator who will defy a clear congressional directive contained in a public law. Recognizing this, committees sometimes go through the motions of marking up a bill before an agency will respond to congressional prodding.

In a dispute over agency policy one committee recently held hearings and a mark-up on a proposed amendment to the agency's enabling act. The committee then reported the bill to the floor of its House. At that point, the agency dropped its opposition to the committee's position for fear of an embarrassing defeat. 1/

During the 1973-1978 period, Congress used statutes to overturn or preempt Federal agency rules on relatively few occasions. Six examples are:

- (1) Little Cigar Act of 1973 (P.L. 93-209; 87 Stat. 352).

Congress prohibited cigarette advertising on television with passage of the Public Health Cigarette Smoking Act of 1969, which amended the Federal Cigarette Labeling and Advertising Act of 1965 (15 U.S.C.

-----

1/ Ibid., p. 51.

1331-1340). These actions preempted the field from regulatory agency jurisdiction.

Subsequently, the Internal Revenue Service (IRS) determined that "little cigars" could not be classified as cigarettes; therefore, it was not illegal to advertise them on television, a technique several tobacco companies adopted in 1973. <sup>1/</sup> However, "the overriding public interest and the immediacy of the problem" <sup>2/</sup> generated by such advertising, according to the report of Senate Commerce Committee, engendered new legislation, P.L. 93-209, which made it "unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." (Emphasis added.) By this statute, Congress extended its preemption to another commodity that would otherwise have been subject to FCC jurisdiction and neutralized the IRS determination, as it applied to "little cigar" advertising on television and radio.

(2) Lead Based Paint Poisoning Prevention Act Amendments of 1973 (P.L. 93-151; 87 Stat. 565, 567). P.L. 93-151 amended the statutory definition of the term "lead based paint" and in so doing imposed new statutory regulations regarding the content of lead in interior

-----  
<sup>1/</sup> U.S. Congress. Senate. Committee on Commerce. Little Cigar Act of 1973; Report to Accompany S. 1165. Washington, U.S. Govt. Print. Off., 1973. (93d Congress, 1st session. Senate. Report no. 93-103). p. 3-4.

<sup>2/</sup> Ibid., p. 5.

residential paints. The pre-existing regulations, promulgated by the Food and Drug Administration (FDA), were, in effect, overridden by the Act. FDA had considered lowering the required level but cited the need for further study before issuing a rule that would establish a more restrictive level. 1/ P.L. 93-151, however, mandated a lower maximum lead content level, effective by the end of calendar year 1974, unless the Chairman of the Consumer Product Safety Commission (CPSC), not FDA, determined a higher level was safe. 2/ That determination, however, would have to be based on statutorily-mandated studies.

Although the 1973 amendments permitted some administrative discretion over future determinations and allowed the FDA-designated level to remain in the interim, the statutory language superseded FDA authority and imposed new administrative requirements regarding any deviation from the forthcoming legislatively-established lead content levels.

(3) Motor Vehicle and Schoolbus Safety Amendments of 1974 (P.L. 93-492; 88 Stat. 1470, 1481-1483). These amendments included a provision that, in effect, overturned the regulation governing

-----

1/ U.S. Congress. Senate. Committee on Labor and Public Welfare. Lead Based Paint Poisoning Prevention Amendments; Report to Accompany S. 607. Washington, U.S. Govt. Print. Off., 1973. (93d Congress, 1st session. Senate. Report no. 93-130). p. 4-5.

2/ The original bill, S. 607, in the 93d Congress had allowed that authority to remain with FDA in the Department of Health, Education and Welfare. Ibid.

safety belt interlock systems. The Department of Transportation (DoT) had issued a regulation requiring that all 1974 model year cars have systems that prevented the automobile's engine from being started unless the safety belt was secured. Section 109 of P.L. 93-492 required that the Secretary of DoT amend the motor vehicle safety standard (49 CFR 571.208) according to new requirements enumerated in the remainder of the section. The section precluded any future regulatory requirement for a safety belt interlock system or for a continuous buzzer system and added a legislative veto provision over any further occupant restraint system standards promulgated by the Secretary.

(4) Highway Safety Act of 1976 (P.L. 94-280; 90 Stat. 425, 454). Title II of P.L. 94-280 authorized funds for certain programs administered by the National Highway Traffic Safety Administration (NHTSA). Congress, responding to a volume of complaints from States, modified existing safety standards imposed on the States and overturned a specific standard stipulating that States require motorcyclists to wear safety helmets. <sup>1/</sup> Section 208 of P.L. 94-280 prohibited the Secretary of Transportation from requiring that a State adopt or

-----

<sup>1/</sup> U.S. Congress. House. Committee on Public Works and Transportation. Federal-Aid Highway Act of 1975; Report to Accompany H.R. 8235. Washington, U.S. Govt. Print. Off., 1975. (94th Congress, 1st session. House. Report no. 94-716). The Senate bill, S. 2711, as reported by the Senate Public Works Committee, did not contain such a provision, which was added by amendment on the floor of the Chamber following extensive debate. Congressional Record (daily ed.), v. 121, Dec. 12, 1975: S21935-S21941.

enforce a law, rule, or regulation requiring motorcycle operators or passengers 18 years of age or older to wear a safety helmet when operating or riding on a motorcycle.

(5) Health Research and Health Services Amendments of 1976 (P.L. 94-278; 90 Stat. 401, 411). The Food and Drug Administration (FDA) of the Department of Health, Education and Welfare (HEW) had issued regulations designed to protect consumers against vitamin and mineral products FDA determined to be either useless or harmful if ingested in large doses or over an extended period of time. A final FDA regulation, published on Aug. 2, 1973, to become effective on Jan. 1, 1975, but stayed by the Administration, proposed that most vitamins and minerals with a potency of 150% or more of their recommended daily allowance (RDA) be classified as drugs. Vitamins A and D were to be classified as drugs at 100% of their RDA.

This controversial rule, which had antecedents dating to the mid-1960s, was considered an infringement on the consumers' "freedom of choice," according to congressional opponents. <sup>1/</sup> As a result, section 501(b) of P.L. 94-278 countered the regulations by directing the Secretary of HEW to "amend any regulation promulgated under the Federal Food, Drug, and Cosmetic Act which is inconsistent with" new restrictions on his authority. Those restrictions barred

-----  
<sup>1/</sup> Rogers, Paul C. Conference Report on H.R. 7988, Health Research and Health Services Amendments of 1976. Remarks in House. Congressional Record (daily ed.), v. 122, April 12, 1976: H3244-H3245.

regulation of the composition or maximum potency of vitamins, minerals, or combinations thereof, unless they were of a specified type (e.g., toxic, habit-forming, administered by a doctor) or unless they were intended for use by a specified clientele (e.g., by individuals in the treatment of specific diseases or disorders, by children, by pregnant women).

(6) Saccharin Study and Labeling Act (P.L. 95-203; 91 Stat. 1452-1453). This Act included several provisions affecting proposed Food and Drug Administration (FDA)/Health, Education and Welfare (HEW) regulations regarding the distribution of saccharin or any product containing it. One provision, discussed in the next section of this report, affected the authority of the Secretary of HEW to issue regulations in the area.

A second provision, contained in section 4(a)(1), stipulated express language to be used on labels of saccharin products, thereby preempting a possible FDA/HEW rule that might have required more cautionary language. In addition, Section 4 precluded any such label from being construed as restricting or prohibiting the sale or distribution of saccharin products. The secretary of HEW was granted authority to review and revise or remove this label requirement only on the basis of new information, that is, "if the Secretary determines such action is necessary to reflect the current state of knowledge concerning saccharin." That restriction on the Secretary's discretion prevented sole reliance on then-existing data, which had encouraged the proposed saccharin regulations initially.

B. STATUTORY MODIFICATION OF AGENCY JURISDICTION

A second major statutory technique for Congress to limit the impact or effect the overturn of existing or proposed rules is to alter the jurisdiction of the issuing Federal agency:

- by granting exemptions to the rulemaking authority of the agency head;
- by removing express areas from the regulatory authority of the agency head;
- by establishing moratoriums on certain rulemaking;
- by transferring jurisdiction from one agency to another or from the Federal agency to State authorities;
- by providing for waivers for regulated categories; and
- by deregulating an area.

Such statutory instruments, occasionally used in tandem with direct overrides or congressional preemption of specific rules, usually have a broader impact than the more focused revocation or preemption. It is evident from floor debates and committee reports accompanying statutory changes of jurisdiction that, at least in notable instances, the incentive for modifying agency jurisdiction was to repeal or mitigate the impact of a series of interrelated rules or a specific regulation. By removing jurisdiction from an agency, such a statute has the effect of annulling rules and regulations applicable to that area.

A well-known illustration of jurisdictional modification occurred with the 1959 amendment of Section 315(a) of the Communications Act--the requirement that broadcasters provide equal broadcasting opportunities to candidates for public office--administered by the Federal Communications



Commission (FCC). Because of FCC's literal interpretation of Sec. 315(a), Congress explicitly exempted four kinds of news programs that are under the control of the broadcaster (rather than the candidate) and, thus, precluded FCC "equal time" regulation in those areas. 1/

Recent examples include the following statutory provisions:

(1) Lead Based Paint Poisoning Prevention Act Amendments of 1973 (P.L. 93-151; 87 Stat. 565, 567). As described in the previous section, P.L. 93-151 included a provision establishing new standards regarding the acceptable level of lead in interior residential paint. In addition, section 6 of the 1973 Amendments realigned jurisdiction for promulgating future regulations over lead levels between a congressionally mandated minimum and maximum. The authority was transferred from the Food and Drug Administration/HEW, which had considered but delayed issuing new regulations, to the Consumer Product Safety Commission (CPSC). Along with the transfer of authority, Congress established guidelines, in section 5, for studies to be conducted prior to CPSC issuance of regulations promulgating any new levels that exceeded the lower level.

(2) Interstate Commerce Act--Exemption (P.L. 93-201; 87 Stat. 838). This act of Dec. 27, 1973, amended the Interstate Commerce Act (49 U.S.C. 903(b)), exempting "the transportation by a water carrier

-----  
1/ P.L. 86-274; 73 Stat. 557. For a brief review of the FCC interpretation of Section 315(a) and the subsequent congressional action, see: Schmidt, Benno C., Jr. *Freedom of the Press vs. Public Access*. New York, Praeger, 1976, p. 143-145.

of commodities in bulk . . . which are loaded and carried without wrappers or containers and received and delivered by carrier without transportation mark or count." The effect of such an amendment was "to remove outmoded restrictions upon the application and scope of the qualified exemption from regulation contained in section 303(b) of the Interstate Commerce Act." 1/ The Senate Commerce Committee report on the proposed legislation noted that statutory action was required to overturn "an interpretation by the Interstate Commerce Commission of the obsolete and restrictive wording," 2/ an interpretation, incidentally, that had not been implemented, awaiting "completion of congressional consideration of the problem." 3/ P.L. 93-201, thus, terminated possible implementation of this pending rule and also made permanent certain improvements in the language of the exemption from ICC economic regulation contained in P.L. 91-590, a statute which was scheduled to expire on December 28, 1973.

(3) To Authorize and Request the President to Call a White House Conference on Library and Information Services Not Later Than 1978, and for Other Purposes (P.L. 93-568; 88 Stat. 1855, 1862). This statute contained an amendment that exempted particular organizations--

-----

1/ U.S. Congress. Senate. Committee on Commerce. Water Carrier Barge Mixing Rule Legislation of 1973; Report to Accompany S. 2267. Washington, U.S. Govt. Print. Off., 1973. (93d Congress, 1st session. Senate. Report no. 93-513). p. 1.

2/ Ibid.

3/ Ibid., p. 3.

social fraternities and sororities at universities and Girl Scouts and Boy Scouts, among others--from regulations promulgated by the Secretary of Health, Education and Welfare under title IX of the Education Amendments of 1972.

That title prohibited discrimination on the basis of sex in any educational program or activity receiving Federal funds. The P.L. 93-568 exemptions were prompted by title IX regulations that would otherwise have been applicable to "a number of organizations which have no legitimate bearing on the original intent of title IX," according to Senator Bayn, the amendment's sponsor and principal author of title IX. 1/

(4) Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-210; 90 Stat. 31, 34-35, 42, 124). This statute included several provisions altering Federal rulemaking jurisdiction and represented one of the broadest efforts in deregulation, a primary purpose of which was "to provide for an extensive overhaul of railroad rate regulation by the Interstate Commerce Commission"

-----

1/ Bayn, Birch. White House Conference on Library and Information Services in 1978. Remarks in Senate. Congressional Record, v. 120, Dec. 16, 1974: 39992. Added as a nongermane amendment to S.J. Res. 40, the exemption provision was described by Senator Bayn as "a rather complicated unanimous-consent agreement," since the Chamber had already considered and approved S.J. Res. 40 three days before. Ibid., p. 39991.

2/ U.S. Congress. Committee of Conference. Railroad Revitalization and Regulatory Reform Act; Report to Accompany S. 2718. Washington, U.S. Govt. Print. Off., 1976. (94th Congress, 2d session. Senate. Report no. 94-595). p. 134.

(ICC). 2/ Those deregulation provisions, incorporated in title II of P.L. 94-210, were intended to "eliminate needless and harmful regulatory constraints on railroads, and . . . prescribe ratemaking practices which will encourage effective competition and protect consumers." 1/

Section 202 established new standards for determining the justness and reasonableness of rates charged by common carriers by railroad, thereby affecting existing determinations based on formulas established by the ICC. The section also adopted language clarifying the meaning of the term "variable cost" and its determination. In addition, this section stipulated that the ICC could not find a rate unlawful on the ground that it exceeded a just and reasonable maximum unless it found that the carrier had "market dominance" over the service rendered under such a rate. This provision statutorily modified existing standards and rules under which a rate would have been found unlawful. Finally, under section 202, the Commission would inaugurate procedures for the establishment of railroad rates based on seasonal, regional, or peak period demand for rail services and for separate rates for district rail services, again altering existing rules which did not include such considerations.

Section 207 amended section 12 of the Interstate Commerce Act (49 U.S.C. 12(1)) by adding certain possible exemptions. The ICC derived authority to grant exemptions to common carriers by

-----

1/ Ibid.

railroad subject to Part I of the Interstate Commerce Act, where regulation was not necessary to effectuate the national transportation policy in that Act, and where the Commission found that regulation would serve little or no public purpose. Any such exemption could be evoked only after notice and opportunity for a hearing. Although the language is not mandatory, permitting ICC discretion in granting exemptions in this regard, section 207 asserted a congressional interest in extending exemptions from ICC authority to certain carriers, 1/ thereby reducing the effective impact of regulatory rules under the national transportation policy provision. The Senate Commerce Committee report on the original bill, S. 2718, noted the rationale and intent in conferring this exemption authority:

The Committee believes that an exemption power in the Commission is very desirable, and the Commission itself has recommended for several years that it be given such power. The requirement of full proceedings before exemption can be granted and before reimposition of regulation, as well as the findings which must be made, assure that the Commission will not act in such a manner as to contravene its Congressional mandate to regulate interstate commerce. At the same time, the power to exempt from regulation in whole or in part will enable the Commission to commit its limited resources in areas where they are most needed, by enabling it to deregulate those areas which have no significant bearing on the overall regulatory scheme. 2/

-----

1/ The exemption provision was limited to common carriers by railroad, vis-a-vis other parties, subject to Part I of the Interstate Commerce Act, "because of the jurisdictional objections of the Committee on Public Works and Transportation of the House of Representatives." Ibid., p. 153.

2/ U.S. Congress. Senate. Committee on Commerce. Rail Services Act of 1975; Report to Accompany S. 2718. Washington, U.S. Govt. Print. Off., 1975. (94th Congress, 1st session. Senate. Report no. 94-499). p. 53.

Section 705(e) of P.L. 94-210 eliminated Food and Drug Administration (FDA) jurisdiction over intercity passenger trains regarding regulation of dining car service and waste disposal from railroad conveyances operated in rail passenger service. The section, amending section 306 of the Rail Passenger Service Act (45 U.S.C. 546), was intended to curtail operating expenses and additional financial costs that might accrue to the railroad industry in meeting FDA regulations promulgated under the Public Health Service Act (42 U.S.C. 264). <sup>1/</sup>

(5) Health Research and Health Services Amendments of 1976 (P.L. 94-278; 90 Stat. 401, 410-413). As noted in the previous section, Title V of these 1976 Amendments to the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 349) required the Secretary of Health, Education and Welfare (HEW) to amend any existing vitamin potency regulation promulgated under that Act which was inconsistent with new statutory restrictions on his authority.

Section 501(a) listed those restrictions: the Secretary may not establish maximum limits on the potency of any synthetic or natural vitamin or mineral within a food to which this section applies; may not classify any natural or synthetic vitamin or mineral (or combination thereof) as a drug solely because it exceeds the level of potency

-----

<sup>1/</sup> This provision was shortly thereafter amended by sec. 105 of P.L. 94-555 (90 Stat. 2615), in effect restoring FDA authority to regulate dining car service but expressly prohibiting similar authority with regard to waste disposal. This statute is discussed below.

which he determines nutritionally rational or useful; and may not limit the combination or number of any synthetic or natural vitamin, mineral or other ingredient of food within a food to which this section applies. Section 501(a) provided exceptions to the restrictions on the Secretary's authority for classes of users (e.g., children, pregnant or lactating women) and for certain types of vitamin and mineral substances (e.g., toxic, habit-forming, carcinogenic).

This amendment curtailing the regulatory jurisdiction of FDA had a lengthy heritage of congressional concern about FDA regulation of dietary supplement labeling and the content of special dietary food products. 1/ The resulting restrictions were perceived by one Member of Congress as follows:

For 20 long years the FDA has been overzealously trying to protect Americans from a threat that really does not exist...attempting to treat all vitamins and minerals, when they are of a potency or a combination they do not like, as drugs...What the Congress has done is tell the FDA that they were throwing too wide a net. They were going too far in trying to protect citizens from themselves. They were interfering with legitimate freedom of choice. 2/

(6) Consumer Product Safety Commission Improvements Act of 1976

(P.L. 94-284; 90 Stat. 503, 504). Section 3 of this Act placed limitations on the jurisdiction of the Consumer Product Safety

-----  
1/ Rogers, Paul C. Conference Report on H.R. 7988. Remarks in House. Congressional Record (daily ed.), v. 122, April 12, 1976: H3245.

2/ Goldwater, Barry M. Jr. Ibid., p. H3246.

Commission (CPSC), specifically prescribing CPSC regulatory jurisdiction of pesticide safety labeling; tobacco and tobacco products; and sale and manufacture of firearms and ammunition or its components, such as gun powder, under certain acts. The section prohibited CPSC regulation of tobacco products or ammunition as a "hazardous substance" under the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.), and regulation of pesticides under the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471), i.e., pesticide-regulated packaging standards for child protection.

The genesis of the restrictions on CPSC regulatory jurisdiction came indirectly from the Commission itself, which had denied petitions from private groups that it had authority to regulate handgun ammunition or tobacco products as hazardous substances. 1/ The Commissions' denials were appealed in Federal court, which subsequently concurred with the petitioners--that CPSC did in fact have jurisdiction--and ordered the Commission to consider the petitions on their merits. 2/ Section 3 of P.L. 94-284 was necessary to preclude potential CPSC regulations that might have

-----

1/ U.S. Congress. Senate. Committee on Commerce. Consumer Product Safety Commission Improvements Act of 1975; Report to Accompany S. 644. Washington, U.S. Govt. Print. Off., 1975 (94th Congress, 1st session. Senate. Report no. 94-251). p. 5-6.

2/ Ibid.



conflicted with the intent of Congress in the Federal Hazardous Substances Act, as the petitioners wanted stronger Federal control of such products than existed. 1/

(7) Coastal Zone Management Act Amendments of 1976 (P.L. 94-370; 90 Stat. 1013, 1032). These amendments included a provision prohibiting certain regulations by the Secretary of Health, Education and Welfare (HEW) for a specified time period. Section 16(b) ordered that the Secretary "shall not promulgate final regulations concerning the national shellfish safety program before June 30, 1977" and shall consult with the Secretary of Commerce prior to issuance of any such future regulations.

The mandated delay in promulgating such final regulations was designed to ensure adequate time for the Commerce Department to complete a special study of shellfish and a comprehensive review of all aspects of the molluscan shellfish industry, expected to be completed by April 30, 1977. 2/ The moratorium held in abeyance HEW regulations, developed by its Food and Drug Administration, that were perceived as injurious to the shellfish industry:

-----

1/ Ibid.

2/ U.S. Congress. Committee on Conference. Coastal Zone Management Act Amendments of 1976; Report to Accompany S. 586. Washington, U.S. Govt. Print. Off., 1976. (94th Congress, 2d session. House. Report no. 94-1298). p. 39.

Proposed Federal regulations which were to be promulgated by the FDA would have driven the many shellfish processors and watermen into bankruptcy. It has been estimated by the President's Council on Wage and Price Stability that had these FDA regulations gone into effect, they would have cost the shellfish industry almost one fourth of their annual product value. This not only portended increased prices for consumers of oysters and clams, but it would have meant that the many families dependent on the shellfish industry as a way of life and a means of support would henceforth be included in our national unemployment figures. 1/

(8) Energy Conservation and Production Act (P.L. 94-385; 90 Stat. 1125, 1129). The Energy Conservation and Production Act included a provision that, in effect, curtailed the regulatory jurisdiction of the Federal Energy Administration (FEA) by limiting the enforcement authority of the Administrator/FEA over certain rules. Sec. 106 of the act amended sec. 7 of the Federal Energy Administration Act of 1974 by adding that:

The Administrator or his delegate may not exercise discretion to maintain a civil action...or issue a remedial order against any person whose sole petroleum industry operation relates to the marketing of petroleum products, for any violation of any rule or regulation, if (1) such civil action or order is based upon a retroactive application or interpretation of such rule or regulation, and (2) such person relied in good faith upon rules, regulations, or rules interpreting such rules and regulations, in effect on the date of the violation.

-----  
1/ Bauman, Robert E. Statement on Conference Report on S. 586. Remarks in House. Congressional Record (daily ed.), v. 122, June 30, 1976: H7077.

In other words, Sec. 106 prevented retroactive enforcement of rules and regulations against the small independent operators in the petroleum industry, with the "intent . . . to provide relief to businesses which have been subjected to seemingly endless changes in rules and regulations by FEA and to penalties arising from those changes made after the original effective date of such rules and regulations." 1/ Many small firms, the conference committee determined, had been "confronted by subsequent amendments to those [existing] rules applied retroactively . . . [causing] an unnecessary burden and unjust penalties . . ." 2/ Similar prohibitions were not applied to "marketers with the means to challenge all enforcement actions based upon arguably ambiguous rules, regulations or rulings or upon clarifying amendments thereto." 3/ Nor did this provision prohibit FEA from "perfecting its rules and regulations" in the future; it only removed enforcement authority over certain amended rules applied retroactively to a particular type of petroleum marketer.

(9) Education Amendments of 1976 (P.L. 94-482; 90 Stat. 2081, 2234). The Education Amendments of 1976 incorporated a provision that exempted specified programs and activities from regulations

-----

1/ U.S. Congress. Committee of Conference. Energy Conservation and Production Act; Conference Report to Accompany H.R. 12169. Washington, U.S. Govt. Print. Off., 1976. (94th Congress, 2d session. House. Report no. 94-1392). p. 62.

2/ Ibid.

3/ Ibid.

promulgated under title IX of the Education Amendments of 1971. Section 412 of P.L. 94-482 provided the following exemptions to Health, Education and Welfare rules and regulations regarding sex discrimination in educational programs or activities receiving Federal funds:

--Boys State and Nation and Girls State and Nation conference activities;

--father-son or mother-daughter activities, with the provision that if such activities are provided for students of one sex, opportunities for reasonably comparable activities are to be provided for the other; and

--beauty-talent contestant scholarships.

The exemptions were added to the basic bill, H.R. 12851 in the 94th Congress, by floor amendments: that affecting talent-beauty contestant scholarships by the House and those affecting American Legion Boys and Girls State and father-son or mother-daughter events by the Senate. The House amendment, agreed to by voice vote, 1/ was designed to restore scholarships terminated by HEW regulations developed under title IX, what the amendment's sponsor regarded as an "unintended result . . . [and] most unfortunate that title IX has resulted in a termination of these educational programs." 2/

The Senate provisions regarding American Legion Boys/Girls State programs and mother-daughter or father-son events followed

-----

1/ Congressional Record (daily ed.), v. 122, May 12, 1976: H4320.

2/ Edwards, Jack. Statement. Ibid., p. H4329.

HEW rulings, based on title IX regulations, that banned such activities. Although the rulings were subsequently suspended, the decision to do so was "administrative and could change again. In fact, HEW officials, in a meeting with the American Legion, stated that legislation would be the only permanent solution to the problem," according to the amendments' sponsor, Senator Fannin. <sup>1/</sup> The amendments to title IX did so, by removing such areas from HEW jurisdiction.

(10) Rail Transportation Improvement Act (P.L. 94-555; 90 Stat. 2613, 2616, 2621, 2628). The Rail Transportation Improvement Act included three sections that restricted Interstate Commerce Commission (ICC) jurisdiction:

(1) section 108 prohibited the ICC from issuing regulations requiring Amtrak "or any railroad providing intercity rail passenger service to provide food service other than during customary dining hours";

(2) section 206 exempted local commuter service provided by rail but not by bus, if its fares are "subject to approval or disapproval by a Governor of any State in which it provides services"; and

(3) section 218 explicitly precluded ICC authority over "(a) abandonment or discontinuance with respect to spur, industrial team, switching, or side tracks if such are located entirely within one State, or (b) any street, suburban, or interurban electric railway which is not operated as part of a general system of rail transportation."

-----  
<sup>1/</sup> Fannin, Paul J. An Amendment Relating to Sex Discrimination. Remarks in Senate. Congressional Record (daily ed.), v. 122, Aug. 26, 1976: S14643.

Section 108, as part of Title I, was designed "to reduce the cost of providing rail passenger service." 1/ The ICC-related provisions in Title II, which affected ConRail, were designed to limit unintended ICC regulatory authority and encourage expanded State authority. In the latter case, Section 206 granted an exemption to local bodies providing mass transportation services by rail if their fares were subject to approval by a State governor. This provision, in effect, transferred certain ICC jurisdiction to States which had such gubernatorial authority.

Section 218 amended section 1a(1) of the Interstate Commerce Act (49 U.S.C. 1a(1)), a section which had been only recently added by the Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-210). That "new section, however, inadvertently [did] not expressly exempt 'spur lines' from its provisions." 2/ The House Interstate and Foreign Commerce Committee report on the Rail Transportation Improvement Act offered an explanation why ICC rulemaking authority should be excluded in this regard:

-----  
1/ U.S. Congress. Senate. Committee on Commerce. Rail Amendments of 1976; Report to Accompany S. 3131. Washington, U.S. Govt. Print. Off., 1976. (94th Congress, 2d session. Senate. Report no. 94-851). p. 1.

2/ U.S. Congress. House. Committee on Interstate and Foreign Commerce. Rail Amendments of 1976; Report to Accompany H.R. 14932. Washington, U.S. Govt. Print. Off., 1976. (94th Congress, 2d session. House. Report no. 94-1479). p. 22.

The Commission's abandonment procedures have never applied to such track and it is not Congress' intent (nor does the Commission desire) that such track should be subject to its abandonment procedures. These tracks are not operated as a part of a general system of rail transportation and thus are purely local and should be subject to local jurisdiction as has been the case historically. 1/

(11) Clean Air Act Amendments of 1977 (P.L. 95-95; 91 Stat. 685, 695-697). Section 108 of the Amendments to the Clean Air Act restricted the authority of the Administrator of the Environmental Protection Agency (EPA) to require indirect source review programs as part of State implementation plans, which otherwise must be approved by the Administrator. In defending this provision before the House, one of the conferees on the bill, Rep. Broyhill, alluded to EPA's previous experience:

One of the more troublesome activities in which EPA had been involved was the attempted regulation of indirect sources--such as shopping centers--which attract mobile sources of pollution. I am pleased to report that the conference report, following the general intention of the House bill, prohibited the Administrator of EPA from requiring indirect source review programs. States are given authority to adopt, suspend, or revoke such programs. 2/

-----  
1/ Ibid.

2/ Broyhill, James T. Conference Report on H.R. 6161, Clean Air Act Amendments of 1977. Remarks in House. Congressional Record (daily ed.), v. 123, Aug. 4, 1977: H8668. The exceptions to such prohibition, which are eligible for EPA regulation, are major federally funded public works projects, such as highways and airports, and federally owned and operated indirect sources. Two years earlier, Congress had adopted appropriations limitations preventing EPA from administering or promulgating any program to regulate parking in the FY 1976 appropriations, P.L. 94-116 (discussed below).

(12) Saccharin Study and Labeling Act (P.L. 95-204; 91 Stat. 1451, 1452). This Act statutorily preempted saccharin-product labeling, as noted in the previous section dealing with statutory overrides of (prospective) rules.

The Act, through section 3, also provided for an 18-month moratorium on the banning of saccharin or saccharin products by requiring that the Secretary of Health, Education and Welfare (HEW) not take action "to prohibit or restrict the sale or distribution of saccharin, any food permitted by . . . [an FDA] interim food additive regulation to contain saccharin, or any drug or cosmetic containing saccharin." The exception to this restriction was that the Secretary may ban such products within the period only on the basis of new information made available before the end of the period; that determination could not be made solely on the basis of information made available before enactment. <sup>1/</sup> This qualification on the Secretary's discretion to ban saccharin products during the 18-month moratorium prevented exclusive reliance on the original studies that had determined carcinogenic effects of saccharin.

-----  
<sup>1/</sup> U.S. Congress. Committee of Conference. Saccharin Study and Labeling Act; Conference Report to Accompany S. 1750. Washington, U.S. Govt. Print. Off., 1977. (95th Congress, 1st session. House. Report no. 95-810). p. 9.



Prompting the statutory moratorium was a proposed FDA rule, announced April 14, 1977, banning saccharin in diet soft drinks and foods as well as in cosmetics, such as lipstick, toothpaste, and mouthwash, thereby terminating an estimated 90% of the saccharin market. FDA had reviewed saccharin tests by the Canadian government which had discovered an increased incidence of bladder cancer in laboratory test animals. Regarding new testing required by P.L. 95-204, during the moratorium, HEW was first to request that the National Academy of Sciences conduct the necessary studies, the components of which were detailed in section 2. After specified intervals of time, the Secretary was required to report the findings and any recommendations to the appropriate congressional committees. 1/

(13) Clean Water Act of 1977 (P.L. 95-217; 91 Stat. 1566, 1583, 1599-1606). This statute amended the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) and included a number of different types of alterations of rule-making jurisdiction. These included granting waivers for regulated items, transferring authority from Federal to State jurisdiction, and providing exemptions for certain activities.

One of the changes involved amendments to section 404 of the Federal Water Pollution Control Act, the section which granted Federal regulatory jurisdiction over water pollution from point sources through the issuance of permits by the Army Corps of Engineers.

-----  
1/ Ibid., p. 8-9.

Sec. 67 of P.L. 95-217, affecting permits for dredged or fill material, reduced such Federal jurisdiction by exempting the "discharge of dredged or fill material . . . from normal farming, silviculture, and ranching activities" from the requirement of specific permits. Furthermore, certain "gray areas" were removed from Federal jurisdiction if a State had an approved program (i.e., under section 208 of the Federal Water Pollution Control Act):

Similarly, no permits are required for other such "gray area" practices involving those agriculture, mining and construction activities listed in section 208(b)(2) (F) through (I) that are more properly controlled by State and local agencies under section 208(b)(4) and for which there are approved best management practice programs. For example, section 208(b)(4) regulatory programs are responsible for controlling pollution that may result from sheet flow across a site prepared for construction or from the placement of pilings in water to support structures such as highways, railroad tracks, and docking facilities. Under the committee amendment, no permits are required for such activities when regulated under section 208. 1/

Section 67 also established "a process to allow the Governor of any State to administer an individual and general permit program for the discharge of dredged or fill material into phase 2 or 3 waters after the approval of a program by the Administrator" 2/

-----

1/ U.S. Congress. Senate. Committee on Environment and Public Works. Clean Water Act of 1977; Report to Accompany S. 1953. Washington, U.S. Govt. Print. Off., 1977. (95th Congress, 1st session. Senate. Report no. 95-370) p. 76.

2/ U.S. Congress. Committee of Conference. Conference Report to Accompany H.R. 3199. Washington, U.S. Govt. Print. Off., 1977. (95th Congress, 1st session. House. Report no. 95-830). p. 101.

of the Environmental Protection Agency (EPA). EPA retained oversight of and could reject State programs; but the amendment allowed "States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the corps program in the so-called phase 1 waters." 1/

Section 67 of P.L. 95-217 added still another exemption to the regulatory jurisdiction regarding permits for dredged or fill material, resulting from Federal construction projects. A new section exempted Federal activities that discharge dredged or fill material from the permit process when the Federal construction project has been specifically authorized by Congress, if information on the effects of such discharge is included in an environmental impact statement and submitted to the Congress before the actual discharge and prior to either the authorization or the appropriation of funds for such construction. This exemption for certain Federal construction projects from the 404-permit requirement was "in recognition of the Constitutional principal of separation of powers. Where a project has been specifically authorized by the Congress that authorization should not thereafter be subject to nullification by an executive agency." 2/

-----  
1/ U.S. Congress. Senate. Committee on Environment and Public Works. Clean Water Act of 1977, p. 75.

2/ U.S. Congress. Committee of Conference. Conference Report to Accompany H.R. 3199, p. 104.

In addition, P.L. 95-217 amended certain EPA regulatory activity through the issuance of permits, i.e., under authority of section 402 of the Federal Water Control Act Amendments of 1972. Section 33 of P.L. 95-217 prevented the Administrator/EPA from requiring a permit under his authority in section 402 "for discharges composed entirely of return flows from irrigated agriculture." Thereafter, such sources of pollution would be included in areawide waste treatment management under the responsibility of the States. According to the Conference Committee report on the Clean Water Act of 1977, "the purpose of this [new] section is to assure that no permit can be required by EPA for regulation of irrigation return flows." 1/

P.L. 95-217, through section 43, provided yet another transformation of Federal regulatory jurisdiction by establishing procedures for the Administrator/EPA to grant a waiver for nonconventional pollutants, a new category vis-a-vis conventional and toxic pollutants, and a "gray area . . . about which there is the most to learn." 2/ Described as a "safety valve" by the proposed legislation's Senate floor manager, Senator Muskie, the provision permitted that in the case of such non-conventional pollutants, an industry "has a chance under these amendments to prove no adverse environmental effects relating to a particular

-----  
1/ Ibid., p. 69.

2/ Muskie, Edmund. Clean Water Act Amendments of 1977--Conference Report. Remarks in Senate. Congressional Record (daily ed.), v. 123, Dec. 15, 1977: S19638.

pollutant, and after making a showing, escape regulation." 1/ House conferee Rep. Ray Roberts offered the following explanation for including the provision:

Another major problem area was the law's [Federal Water Pollution Control Act] strict requirement for industry that would cost millions of dollars and result only in a little more clean-up of our waters. The conferees wrestled with this problem and developed a fair and workable compromise. Strict requirements are still in effect for damaging pollutants, such as toxics. However, for certain other [nonconventional] pollutants, industry may get a waiver. 2/

By way of summary, P.L. 95-217 provided three distinct mechanisms--transferring authority from Federal to State authorities, providing exemptions, and granting waivers--for modifying rulemaking authority, changing specific rules and their implementation, and mitigating the effect of others.

(14) Airline Deregulation Act of 1978 (P.L. 95-504; 92 Stat. 1705-1747). Approved on the final day of the 95th Congress, the Airline Deregulation Act of 1978 contained a number of mechanisms which would, in effect, overturn existing rules and regulations, lessen their impact, prevent the promulgation of more rigid rules, and remove rule-making authority. The complex legislation, developed over a four-year period, included five distinct techniques that

-----  
1/ Ibid., p. S19637.

2/ Roberts, Ray. Report on the Resolution Providing for Consideration of Conference Report on H.R. 3199, Clean Water Act of 1977. Remarks in House. Congressional Record (daily ed.), v. 123, Dec. 15, 1977: H12919.

affected the jurisdiction of the Civil Aeronautics Board (CAB):

- graduated or phased termination of CAB authority over domestic air routes (Dec. 31, 1981) and over domestic air fares, rates, mergers, and acquisitions (Jan. 1, 1983), along with abolition of the Board itself on Jan. 1, 1985, unless Congress overrides these "sunset" provisions;
- eventual transfer of CAB authority to other Federal agencies, including the determination of small carriage rates to the U.S. Postal Service; the jurisdiction for mergers, interlocking directorates, and antitrust actions relating to interstate and foreign air transportation to the Justice Department; the compensation for air transportation to small communities to the Transportation Department; and authority for foreign air transportation to Transportation in consultation with the State Department;
- exemptions from CAB authority, including regulation of much commuter aircraft, airline company acquisition by non-airline companies, certain classes of services (as CAB determines), and certain air carrier transportation involving the State of Alaska;
- restrictions on CAB rulemaking with respect to charter airlines, requiring the Board to impose rules on such airlines that were no more rigid than those imposed on other classes and precluding the Board from making charter rules and regulations any more restrictive than on October 1, 1978, thus, in effect, "approving all actions the Board has taken with respect to the liberalization of charters . . . " 1/; and
- waiving CAB approval authority for an additional route for each airline during 1979-1981.

(15) Endangered Species Act Amendments of 1978 (P.L. 95-632; 92 Stat. 3751, 3752-3758). Following a Supreme Court decision preventing Tennessee Valley Authority operation of the Tellico Dam because of endangerment to the snail darter fish, listed as an

-----  
1/ Cannon, Howard. Airline Deregulation Act of 1978--Conference Report. Remarks in Senate. Congressional Record (daily ed.), v. 124. Oct. 14, 1978: S18799. See also Edward Kennedy, *ibid.*, p. S18798, on other CAB reform efforts prior to enactment of the deregulation bill.

endangered species, Congress approved amendments in 1978, establishing new mechanisms for determining exemptions to the 1973 Endangered Species Act. The Amendments created a seven-member interagency Endangered Species Committee, composed of the heads of: the Council of Economic Advisors, Environmental Protection Agency, National Oceanic and Atmospheric Administration, and the Departments of Agriculture, the Army, and the Interior who chairs the new Committee. The seventh member would be a Presidential appointee representing the Governor of the affected State. The Committee makes final determinations based upon recommendations from a three-member review panel which reports on exemption applications that may be submitted by the affected Federal agency, by the Governor of the State in which an agency action will occur, or by a permit or licensee applicant.

#### C. LIMITATIONS IN AUTHORIZING AND APPROPRIATING STATUTES

Statutory limitations and directives affecting specific Federal rules and regulations exist in both appropriating and authorizing legislation, although the former are the more common vehicles for such funding restraints. In most instances, they prohibit expenditures for specified regulatory activity or for enforcement of a particular rule. In that fashion, these limitations prevent an agency from promulgating or implementing a rule and, thus, nullify the rule for the duration of the authorization or appropriation period.

The last phrase, however, suggests the major qualification on such statutory techniques. Their impact is restricted to a specified time period; and unless reenacted in subsequent authorization or appropriation statutes, their effect terminates. As a corollary, these restraints applied to funding amounts lack permanency, with the consequence that the offending rule would be enforced in the future without continued congressional approval of the statutory language. Moreover, appropriation bills, as distinct from authorizations in this case, cannot propose new or general legislation or amendments to existing legislation, for the most part. <sup>1/</sup> Therefore, provisions in appropriation statutes can neither permanently override the statutory authority on which a particular rule is based nor overturn a specific rule in an absolute sense.

-----

<sup>1/</sup> Senate Rule XVI reads in part: "The Committee on Appropriations shall not report an appropriation bill containing amendments proposing new or general legislation...No amendment which proposes general legislation shall be received to any general appropriation bill..."

House Rule XXI reads similarly: "Nor shall any provision in any such [appropriation] bill or amendment thereto changing existing law be in order, except such as being germane to the subject matter of the bill shall retrench expenditures...by reduction of the amounts of money covered by the bill..." House Rule XXI is elaborated upon in section 483 of the Rules of the House of Representatives: "Although the rule forbids on any general appropriation bill a provision 'changing existing law,' which is construed to mean legislation generally, the House's practice has established the principle that certain 'limitations' may be admitted. It being established that the House under its rules may decline to appropriate for a purpose authorized by law, so it may by limitation prohibit the use of money for part of the purpose while appropriating for the remainder..."

However, Louis Fisher has provided an overview of the intricacies and nuances of appropriations bills that "dilute the force of this rule" of Congress. U.S. Library of Congress. Congressional Research Service. The Authorization-Appropriations Process: Formal Rules and Informal Practices (by) Louis Fisher. (Washington) Aug. 1, 1979, p. 31 and 29-39.



Finally, the potential effectiveness of authorization and appropriation restraints is limited because some kinds of budget expenditures are largely immune from either express appropriation or authorization: borrowing and contract authority or "backdoor spending"; permanent authorizations or appropriations; existence of off-budget agencies; trusts and special funds; certain uncontrollable expenditures, such as those mandated by statutory formulae; and carry-overs of unexpended funds. 1/ Also, reprogramming of funds 2/ permits certain administrative spending discretion once programs are in effect.

In the case of major regulatory agencies, however, most budget accounts are at least periodically appropriated. The Senate Study on Federal Regulation found that the fourteen major regulatory agencies "are funded through 43 separate budget accounts, only four of which are not subject to appropriations review." 3/ Consequently, the

-----

1/ A comprehensive review of these techniques has been prepared by Allen Schick. See: U.S. Congress. House Committee on the Budget. Congressional Control of Expenditures. (Committee print) Washington, U.S. Govt. Print. Off., 1977.

2/ See: Fisher, Louis. Presidential Spending Power. Princeton, N.J., Princeton University Press, 1975.

3/ Senate Study on Federal Regulation, p. 21.

potential for appropriations limitations is greater in the regulatory field than in most other areas. Yet, since nearly all Federal agencies, not just major regulators, have authority to promulgate rules, and because of the difficulties and limitations associated with statutory authorization or appropriation spending controls, that potential may remain unevenly and infrequently utilized. Nonetheless, the Senate Study on Federal Regulation argued the significance of this statutory technique in controlling Federal regulations:

Once enacted, these statutory controls are completely straightforward. In fact, it could be argued that appropriations oversight is effective precisely because the statutory controls are so direct, unambiguous, and virtually self-enforcing. While agencies are able to bend the more ambiguous language of authorizing legislation to their own purposes, the dollar figures in appropriations bills represent commands which cannot be bent or ignored except at extreme peril to agency officials. 1/

Some recent examples of appropriations or authorizations limitations applied to specific rules include:

(1) Appropriations for the Departments of Labor, and Health, Education and Welfare and Related Agencies for FY 1974 (P.L. 93-194; 87 Stat. 746, 763). This Act continued to apply the following limitation to National Labor Relations Board (NLRB) appropriations: No part of the appropriation could be used in connection with NLRB activities concerning bargaining units composed of agricultural laborers or to organize or assist in organizing agricultural laborers.

-----  
1/ Ibid., p. 31.

The provision also included in the definition of agricultural laborers, employees engaged in the maintenance and operation of certain waterways and reservoirs, operated on a mutual, non-profit basis, in which at least 95% of the water stored or supplied is used for farming purposes.

This limitation reaffirmed the exclusion of agricultural laborers from the Labor Management Relations Act of 1947 (29 U.S.C. 152) and the Fair Labor Standards Act of 1938 (29 U.S.C. 203). <sup>1/</sup> In so doing, the FY 1974 Act used language that was initially attached to NLRB appropriations for FY 1947 (P.L. 79-549; 60 Stat. 698). By maintaining the extended definition of agricultural laborers, P.L. 93-194 incorporated language first applied in the FY 1954 appropriations act (P.L. 83-170; 67 Stat. 257-258), and, thereby, retained the express exemption of this grouping from possible NLRB rulemaking jurisdiction.

(2) Appropriations for the Department of Housing and Urban Development and Sundry Independent Agencies for FY 1976 (P.L. 94-116, 89 Stat. 581, 600). Two provisions were attached to the appropriations act that limited the rulemaking authority of two agencies, the Environmental Protection Agency (EPA) and the Department of Housing and Urban Development (HUD).

-----

<sup>1/</sup> In the 92d and 93d Congresses, there was consideration of statutorily applying these two acts to agricultural workers, possibly under the jurisdiction of NLRB or under a proposed Agricultural Labor Board with similar powers. See: U.S. Congress. House. Committee on Education and Labor. Subcommittee on Agricultural Labor Management Relations. Hearings, 93d Congress, 1st session, May 21, 1973. Washington, U.S. Govt. Print. Off., 1974.

Section 407 provided that no such funds could be used by EPA to "administer or promulgate, directly or indirectly, any program to tax, limit or otherwise regulate parking that is not specifically required pursuant to subsequent legislation." The prohibition on EPA was based on the expectation that EPA might develop regulations or require cities to impose tax surcharges designed to reduce air pollution generated where large numbers of automobiles are gathered, as at shopping centers or stadiums. Precisely what action EPA might have taken was uncertain, according to floor statements on behalf of the provision, since no specific rules had been proposed; and "the Senate dropped this provision with the understanding that the Environmental Protection Agency did not intend to implement the parking proposal without further approval and clarification from the legislative committees . . ." <sup>1/</sup> Nonetheless, at the insistence of the House conferees, the appropriations statute limitation was enacted, as an amended version of the original House provision. <sup>2/</sup> It precluded any EPA rulemaking with respect to parking, barring subsequent legislation that might permit such authority.

-----

<sup>1/</sup> Boland, Edward P. Conference Report on H.R. 8070. Remarks in House. Congressional Record (daily ed.), v. 121, Oct. 3, 1975: H9567.

<sup>2/</sup> U.S. Congress. Committee of Conference. Conference Report to Accompany H.R. 8070. Washington, U.S. Govt. Print. Off., 1975. (94th Congress, 1st session. House. Report no. 94-502). p. 14.

A provision in section 408, also retained as a modification of the House version, limited HUD's authority to establish noise control standards for federally insured or federally assisted housing. However, the effective scope of the limitation was severely constrained through the Senate modification, which made the restraint applicable only "in connection with construction in an area zoned for residential use in Merced County, California." 1/ The final version, incorporated as section 408, read:

Sec. 408. None of the funds provided by this Act shall be used to deny or fail to act upon, on the basis of noise contours set forth in an Air Installation Compatible Use Zone Map, an otherwise acceptable application for Federal Housing Administration mortgage insurance in connection with construction in an area zoned for residential use in Merced County, California.

(3) Highway Safety Act of 1976 (P.L. 94-280; 90 Stat. 425, 454-455). As noted above, sec. 20 of the Highway Safety Act overturned a specific standard requiring motorcyclists to wear safety helmets, promulgated by the National Highway Traffic Safety Administration/ Department of Transportation. That section, in this authorization act, also imposed funding restraints on the Secretary of Transportation's discretion to ensure the adequacy and appropriateness of certain safety standards. Sec. 208(b) required the Secretary, in cooperation with the States, to conduct an evaluation of the adequacy and

-----  
1/ Merced County, California is in the congressional district of Rep. B. F. Sisk, who had proposed broader limitations on the House floor.

appropriateness of all uniform safety standards devised under this program, and to report his findings and recommendations, including revision or consolidation of existing standards, to Congress on or before July 1, 1977.

The authorization limitation then followed: "Until such report is submitted, the Secretary shall not . . . withhold any apportionment or any funds apportioned to any State because such State is failing to implement a highway safety program approved by the Secretary . . . ." The funding restriction in sec. 208(b) prohibited the withholding of funds for approximately one year, from May 5, 1976, when the law was enacted, until July 1, 1977, the final date of submission of the Secretary's required report.

Based on complaints from States, 1/ sec. 208(b), in effect, relaxed enforcement of the safety standards, complementing an earlier provision in sec. 208(a) that eased compliance with the uniform safety standards.

(4) Appropriations for the Departments of Labor, and Health, Education and Welfare, and Related Agencies for FY 1977 (P.L. 94-439; 90 Stat. 1418, 1421). Within this Act, the appropriations for the Occupational Safety and Health Administration (OSHA) in the Labor Department included two limitations on expenditures on behalf of

-----

1/ U.S. Congress. House. Committee on Public Works and Transportation. Federal-Aid Highway Act of 1975: Report to Accompany H.R. 8235. Washington, U.S. Govt. Print. Off., 1975. (94th Congress, 1st session. House. Report no. 94-716.)

OSHA rules and regulations. The first prohibited OSHA from expending or obligating any such funds for the assessment of civil penalties issued for first instance violations of any standard, rule or regulation promulgated under the Occupational Safety and Health Act of 1970 (other than certain serious or repeated violations), unless the workplace was cited for more than 10 violations in the first inspection.

The second limitation precluded obligating or expending such appropriated funds to prescribe, issue, administer, or enforce any standard, rule, regulation, or order under the Occupational Safety and Health Act of 1970 which is applicable to any person who is engaged in a farming operation and employs 10 or fewer employees. This provision adopted House language in limiting OSHA enforcement of its regulations 1/ and along with the former limitations on OSHA enforcement, was extended to the FY 1978 appropriations through a provision in the subsequent resolution (P.L. 95-205), which stated:

-----

1/ U.S. Congress. Committee of Conference. Conference Report to Accompany H.R. 14232. Washington, U.S. Govt. Print. Off., 1976. (94th Congress, 2d session. House. Report no. 94-1384).

No appropriation or fund made available or authority granted pursuant to this joint resolution shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during the fiscal year 1977. 1/

(5) Appropriations for the Department of Housing and Urban Development for FY 1978 (P.L. 95-119; 91 Stat. 1073, 1089). Sec. 408 of these appropriations included a funding limitation, providing that no such funds "shall be subject to the Federal regulation defining the conditions under which two or more persons shall be eligible for admission to public housing as a family . . ." In essence, this restriction nullified a Housing and Urban Development (HUD) regulation that unintentionally permitted homosexual couples to be eligible for public housing.

-----

1/ P.L. 95-205; 91 Stat. 1460, 1461. The continuing resolution for FY 1978 appropriations was necessitated by the failure of the House and Senate to resolve differences over HEW appropriation restrictions.

A modified version of the second limitation on OSHA had also been approved by the Senate in the 95th Congress. H.R. 11445, the Small Business Administration Authorization Act, had been amended to provide that small businesses which employ 10 or fewer employees shall be exempt from coverage under the Occupational Safety and Health Act, unless a firm's injury/illness rate is certified at a specified level to be too high. This would, therefore, exempt all certified small businesses, not just farms, as the appropriations act limitation provides. House and Senate conferees agreed to a substitute version of the small business exemption to OSHA health and safety regulations, retaining the civil penalty and reporting provisions. U.S. Congress. House. Committee of Conference. Amending the Small Business Act and the Small Business Investment Act of 1958; Conference Report to Accompany H.R. 11445. Washington, U.S. Govt. Print. Off., 1978. (95th Congress, 2d session. House. Report no. 95-1671). p. 46. However, the bill, H.R. 11445, was pocket vetoed by President Carter.



In final regulations published on May 9, 1977, HUD introduced the criteria of a "stable family relationship" to determine eligibility, a concept which gave rise to unexpected interpretations. According to the House sponsor of the amendment to HUD appropriations:

This development was not contemplated by the Department and poses an issue which it is unprepared to deal with at this time. It is my understanding that the Department would like to reconsider these regulations for that reason...The Department ought to have an opportunity to reconsider those regulations... 1/

(6) Appropriations for the Department of Transportation and Related Agencies for FY 1979 (P.L. 95-335; 92 Stat. 435, 450).

This appropriation act included a provision in sec. 317 that precluded the use of such funds "to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system)." This limitation was added as an amendment on the House floor, by a vote of 237-143 on June 12, 1978, 2/ and later restored by the conferees, when the Senate had failed to approve it. 3/

-----  
1/ Boland, Edward P. HUD Appropriations for FY 1978. Remarks in the House. Congressional Record (daily ed.), v. 123, June 15, 1977: H5931.

2/ Congressional Record (daily ed.), v. 124, June 12, 1978: H5321.

3/ U.S. Congress. Committee of Conference. Conference Report to Accompany H.R. 12933. Washington, U.S. Govt. Print. Off., 1978. (95th Congress, 2d session. House. Report no. 95-1329). p. 14.

The main focus of the provision was a National Highway Traffic Safety Administration (NHTSA)/Department of Transportation regulation mandating that all new automobiles be equipped with air bags or other passive restraints by the 1984 model year. The regulation was promulgated in June, 1977, calling for a phased introduction of passive restraints, either automatic belt systems or airbags, beginning with the 1982 model year and extending to all automobiles produced in the 1984 model year. Consequently, the limitation included in the 1979 appropriations statute would not directly affect the standard whose effective implementation dates were two and four years beyond the end of the appropriations period. Nonetheless, according to the amendment's sponsor, Rep. Shuster, "this appropriations bill, while not the best vehicle, is the only vehicle left for Members to express themselves on an issue affecting the lives and pocketbooks of millions of Americans." 1/ Previously, 160 House Members cosponsored a resolution of disapproval of the NHTSA rule; but the House did not vote on it, since the Interstate and Foreign Commerce Committee had voted against reporting out the disapproval resolution. 2/

-----

1/ Bud Shuster. Remarks on an Amendment to the Transportation Appropriation, Fiscal Year 1979. Remarks in House. Congressional Record (daily ed.), v. 124, June 12, 1978: H5308.

2/ Ibid. Interestingly, the Shuster amendment had been subject to a parliamentary inquiry and point of order. Rep. Eckhardt stated that "since this amendment in no way changes that [NHTSA] requirement with respect to seat belts, passive seat belts, therefore this is not in fact a retrenchment [of appropriated funds]...this is legislation within an appropriations bill calling for specific

(2/ continued)

(7) Appropriations for the Treasury Department...for FY 1979

(P.L. 95-429; 92 Stat. 1001, 1002). The fiscal year 1979 appropriations for the Bureau of Alcohol, Tobacco, and Firearms (BATF) in the Treasury Department contained a prohibition on using such funds for proposed gun control regulations. No funds were to be available for administrative expenses in connection with proposed BATF rules of March 21, 1978, that would have consolidated or centralized the records of receipt and disposition of firearms, maintained by the Treasury Department. Moreover, both Chambers agreed to delete \$4.2 million from the BATF appropriations request, the amount estimated for implementing the proposed regulations. The restrictive language of the final bill, which would also prevent reprogramming to implement the proposed regulations, was defended by the Senate Appropriations Committee: ". . . the proposed regulations go beyond the intent of Congress . . . It would appear that BATF and the Department of Treasury

-----

(2/ continued) additional duties on the part of the Secretary of Transportation; that is, it directs the Secretary of Transportation to revise his present modes of putting into effect the restraints..." Rep. Shuster rebutted, insisting that the amendment "is simply a proper limitation on the use of funds. No additional duties are imposed upon the executive." The Chair concurred with Rep. Shuster and overruled the point of order, arguing that "it is well settled that a limitation may negatively restrict funding in an appropriation act for part of a discretionary activity authorized by law if no new affirmative duties or determinations are thereby required." Ibid. June 9, 1978: H5280-H5281.

are attempting to exceed their statutory authority and accomplish by regulation that which Congress has declined to legislate." <sup>1/</sup>

(8) Appropriations for the Departments of Labor, and Health, Education and Welfare, and Related Agencies for FY 1979 (P.L. 95-480; 92 Stat. 1567, 1569-1570). Approved on the final day of the 95th Congress, the FY 1979 appropriations for the Department of Labor contained limitations on the Occupational Safety and Health Administration (OSHA) that extended beyond the previous restrictions in fiscal years 1977 and 1978, through P.L. 94-439 and P.L. 95-205, respectively (described above). Those limitations on OSHA authority to prescribe, issue, administer, or enforce certain rules included:

- prohibiting OSHA from imposing civil fines for first-instance health or safety violations of a non-serious nature, unless the offending establishment had been cited for 10 or more violations on such inspection;
- prohibiting OSHA from issuing civil penalties for non-serious violations by an employer of 10 or fewer employees if the employer, prior to the inspection, had: (1) voluntarily requested consultation under a specific assistance program, (2) had the consultant examine the condition cited, and (3) made or is making a "reasonable good faith effort to eliminate the hazard created by the condition cited";
- exempting from OSHA jurisdiction, "any work activity by reason of recreation hunting, shooting, or fishing"; and

-----

<sup>1/</sup> U.S. Congress. Senate. Committee on Appropriations. Treasury, Postal Service, and General Government Appropriations Bill, 1978; Report to Accompany H.R. 12930. Washington, U.S. Govt. Print. Off., 1978. (95th Congress, 2d session. Senate. Report no. 95-939). p. 12.

--exempting from OSHA jurisdiction, "any person who is engaged in a farming operation which does not maintain a temporary labor camp and employs 10 or fewer employees." This final restriction restored language from the House version that had been deleted by the Senate to permit OSHA "to inspect any farm, regardless of size, that maintains a temporary labor camp" 1/ (i.e., migrant worker camp).

There had been an attempt on the floor of the House to prevent OSHA inspections of any workplace employing fewer than 100 persons without a search warrant, in the wake of a Supreme Court decision permitting an employer to require a search warrant before inspection. A point of order, however, was sustained against this amendment, on the grounds that it would have required "affirmative action by an executive," which cannot accompany appropriations limitations. 2/

#### D. REQUIRING FEDERAL AGENCY PRIOR CONSULTATION AND REVIEW

The statutory techniques discussed above directly override, prevent the promulgation of, or effect the overturn of specific rules and regulations, by revoking an express rule, altering the issuing agency's jurisdiction, or denying funds for enforcement or implementation. In addition to these manifest control mechanisms, two other statutory techniques--agency prior consultation and review requirements and advance notice (to Congress) provisions--deserve mention. Although

-----

1/ U.S. Congress. Committee of Conference. Making Appropriations for the Departments of Labor, and Health, Education, and Welfare, and Related Agencies; Report to Accompany H.R. 12929. Washington, U.S. Govt. Print. Off., 1978. (95th Congress, 2d session. House. Report no. 95-1746). p. 10.

2/ For debate and decision by the chair, see Congressional Record (daily ed.), v. 124, June 7, 1978: H5117.

their influence is indirect and applicable to a category of rules, rather than expressly tied to a single rule, consultation and review requirements interject new and possibly different perspectives and recommendations in the decision-making process by requiring review or consultation with units (i.e., other Federal agencies or congressional committees) outside the rule-issuing agency. The purpose or effect of such statutory requirements, in certain instances, is to retard the development or change the orientation of prospective rules emanating from a particular agency.

The next section focuses on advance notification to the Congress, whereas this section concentrates on statutory consultation requirements among Federal agencies and between the Federal agency and State authorities. There appears to be a substantial and increasing number of both types of prior notification, consultation, and review provisions. Several illustrations of non-congressional review or consultation requirements follow.

(1) Insecticide, Fungicide, and Rodenticide Act (P.L. 94-140; 89 Stat. 751, 752). Sec. 2 of P.L. 94-140 amended the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, by providing procedural changes for both proposed and final rules promulgated by the Administrator of the Environmental Protection Agency (EPA). Sixty days prior to signing proposed regulations and 30 days prior to signing final regulations under that authority, the Administrator/EPA must provide copies to the Secretary of Agriculture. The

Secretary may comment in writing within a specified time period and those comments, along with the response of the Administrator/EPA, are to be published in the Federal Register.

Supporting this consultation provision, the Senate Committee on Agriculture and Forestry noted the complexity surrounding regulations in the field of pesticide control and EPA's "unenviable position of choosing a course that must have trade-offs between the conflicting objectives of environmental protection, and the economic advantages that pesticide uses afford." <sup>1/</sup> It was determined that "EPA has not always given adequate consideration to agriculture in its decisions. . . . There is clearly a need to consider the impact of EPA's decisions on agriculture if balance is to be achieved." <sup>2/</sup>

(2) Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-210; 90 Stat. 31, 35). Among other things, this statute required Interstate Commerce Commission (ICC) consultation with the Federal Trade Commission (FTC) and the Attorney General in establishing rules to determine "market dominance" over a service rendered at a particular rate or rates. The conference report on the bill emphasized that the new rules were "intended to inaugurate

-----

<sup>1/</sup> U.S. Congress. Senate. Committee on Agriculture and Forestry. Insecticide, Fungicide, and Rodenticide Act; Report to Accompany H.R. 8841. Washington, U.S. Govt. Print. Off., 1975. (94th Congress, 1st session. Senate. Report no. 94-452). p. 5.

<sup>2/</sup> Ibid., p. 9.

a new era of competitive pricing," 1/ and adopted the concept of "market dominance" as a factor in determining whether a rate is lawful. Rather than allowing the ICC to establish appropriate standards and procedures exclusively, sec. 202 required that: "The Commission shall solicit and consider the recommendations of the Attorney General and of the Federal Trade Commission in the course of establishing such rules." In so doing, the provision incorporated Federal agencies already intimately involved in the issue of effective competition.

(3) Highway Safety Act of 1976 (P.L. 94-280; 90 Stat. 425, 454-455). This legislation incorporated several techniques of statutory controls over Federal rules, including overriding of a rule and funding restraints. In addition, sec. 208(b) of P.L. 94-280 provided for Federal-State cooperation in evaluating and recommending changes in existing uniform safety standards: "The Secretary of Transportation shall, in cooperation with the States, conduct an evaluation of the adequacy and appropriateness of all uniform safety standards established under section 402 of title 23 of the United States Code which are in effect on the date of enactment . . . [and] shall report his findings, together with his recommendations,

-----

1/ U.S. Congress. Committee of Conference. Railroad Revitalization and Regulatory Reform Act; Report to Accompany S. 2718. Washington, U.S. Govt. Print. Off., 1976. (94th Congress, 2d session. Senate. Report no. 94-595). p. 148.



including but not limited to, the need for revision or consolidation of existing standards and the establishment of new standards, to Congress . . ."

As with the other provisions limiting the Department of Transportation in the Act, sec. 208(b) was added in response to complaints from States of overly rigid administration and inflexibility regarding the safety standards promulgated by the National Highway Traffic Safety Administration. <sup>1/</sup> This section sought to provide direct State participation in the ensuing evaluation. It did so, incidentally, at the same time the Secretary was prohibited from withholding funds apportioned to any State for failing to implement a highway safety program approved by the Secretary.

(4) Coastal Zone Management Act Amendments of 1976 (P.L. 94-370; 90 Stat. 1013, 1033). This Act prevented the Secretary of Health, Education and Welfare (HEW) from promulgating final shellfish safety regulations until June 30, 1977, nearly a year hence. Accompanying that moratorium was a consultation requirement: At least sixty days prior to the promulgation of any such regulations, the Secretary/HEW, in consultation with the Secretary of Commerce, shall publish an analysis of (1) the economic impact of such regulations on the domestic shellfish industry, and (2) the cost of such national shellfish safety program relative to the benefits that it is expected to achieve.

-----

<sup>1/</sup> U.S. Congress. House. Committee on Public Works and Transportation. Federal-Aid Highway Act of 1975; Report to Accompany H.R. 8235. Washington, U.S. Govt. Print. Off., 1975. (94th Congress, 1st session. House. Report no. 94-716).

This moratorium on HEW rulemaking and the attendant consultation requirement were designed to allow adequate time for the completion of a comprehensive review of all aspects of the molluscan shellfish industry and evaluation of the impact of Federal law concerning water quality on that industry, to be conducted by the Commerce Department. In consequence, projected Food and Drug Administration/HEW regulations, anticipated to affect adversely shellfish processors and watermen, would thereafter necessarily consider new data regarding their potential impact. 1/

(5) Energy Conservation and Production Act (P.L. 94-385; 90 Stat. 1125, 1128-1129). This Act limited the enforcement authority of the Administrator of the Federal Energy Administration (FEA), as noted above. It also provided a requirement for hearings to be held in geographical areas affected by FEA rules and regulations. Where hearings were to be held and the effects of proposed rulemaking were "localized," 2/ that is, confined to a single state or political subdivision thereof, "the conference intended to assure that the Federal Energy Administration will take into consideration the particularized concerns and needs of the areas, governmental units or residents most substantially affected." 3/

-----

1/ For discussion of the moratorium and consultation provisions, see Congressional Record (daily ed.), v. 122, June 30, 1976: H7077-H7078.

2/ U.S. Congress. Committee of Conference. Energy Conservation and Production Act; Report to Accompany H.R. 12169. Washington, U.S. Govt. Print. Off., 1976. (94th Congress, 2d session. House. Report no. 94-1392). p. 61.

3/ Ibid.

(6) Rail Transportation Improvement Act (P.L. 94-555; 90 Stat. 2613, 2630-2631). As identified in a previous section, this act of Oct. 19, 1976, contained a number of provisions affecting the jurisdiction of the Interstate Commerce Commission (ICC). It also included in sec. 301 a required report incorporating prospective regulations and utilizing inter-agency consultation, regarding "the risk of outbreaks of disease or illnesses and any other adverse environmental effects resulting from the discharge of waste from railroad conveyances . . . and the financial and operating hardships on railroads or public authorities which would result from a prohibition of waste disposal." The report, submitted to Congress by the Secretary of Health, Education and Welfare (HEW) in consultation with the Interstate Commerce Commission and the Secretary of Transportation, was to contain recommendations that any of the authorities consider "appropriate to balance possible dangers of disease or illness and environmental considerations with operating or financial considerations . . ."

The required report was in recognition of concerns about unregulated waste disposal, then only recently exempted from Food and Drug Administration (FDA)/HEW regulatory authority. 1/ Nonetheless, the consultation provision, attendant to that report and recommendation, assured that they would not be HEW products exclusively and that

-----

1/ Sec. 705(e) of P.L. 94-210; 90 Stat. 124.

considerations other than the "risk of outbreaks of disease or illnesses" would be incorporated--i.e., financial and operating hardships, the principal reasons for exempting waste disposal from FDA/HEW jurisdiction in the earlier Railroad Revitalization and Reform Act (P.L. 94-210; 90 Stat. 124).

(7) Clean Air Act Amendments of 1977 (P.L. 95-95; 91 Stat. 685, 720-721). Section 120 of these amendments to the Clean Air Act required the Environmental Protection Agency (EPA) to consult with the Nuclear Regulatory Commission (NRC) regarding radioactive pollutants that were placed under the Act and EPA jurisdiction. That requirement was two-fold: (1) an EPA obligation to consult with NRC prior to "listing any source material, special nuclear, or byproduct material . . ." as an air pollutant; and (2) establishment of "an interagency agreement with respect to those sources or facilities which are under the jurisdiction of the Commission" regarding development, implementation, and enforcement of emission limitations, standards, and other requirements.

Section 120 also extended beyond formal consultation by permitting NRC to override or "disapprove any EPA, State or local standard [or emission limitation] promulgated under the Clear Air Act if the Commission finds . . . that the application of such standard would

endanger public health and safety." 1/ The President, however, may overturn the NRC disapproval within 90 days.

(8) Emergency Interim Consumer Product Safety Standards Act of 1978 (P.L. 95-319; 92 Stat. 386, 389). This Act, establishing a statutory interim safety standard for the manufacture of cellulose insulation, preempted Consumer Product Safety Commission (CPSC) authority in this regard. CPSC, which had failed "to exercise its authority in a timely manner," 2/ however, was empowered to amend the interim standard. The Commission, which was to rely upon already existing relevant standards developed by the General Services Administration for the amendment, would not be required to promulgate it if, after consultation with the Secretary of Energy, CPSC determined that the amendment was unnecessary or its implementation would create an undue burden upon the industry. The reporting House Committee on Interstate and Foreign Commerce required such consultation, agreed to by the conference, "because the Secretary may have useful information relating to the need for the amendment and the amendment's impact on the industry." 3/

-----  
1/ U.S. Congress. Committee of Conference. Clean Air Act Amendments of 1977; Report to Accompany H.R. 6161. (95th Congress, 1st session. House. Report no. 95-564). In Congressional Record (daily ed.), v. 123, Aug. 3, 1977: H8547.

2/ U.S. Congress. House. Committee on Interstate and Foreign Commerce. Emergency Interim Consumer Product Safety Rule Act of 1978; Report to Accompany H.R. 11998. Washington, U.S. Govt. Print. Off., 1978. (95th Congress, 2d session. House. Report no. 95-1116). p. 3.

3/ Ibid., p. 8.

E. ADVANCE OR PRIOR NOTICE PROVISIONS

A second indirect statutory mechanism that might be used to constrain the promulgation of Federal agency rules is the advance or prior notice provision; i.e., a statutory requirement that an agency directly notify Congress or appropriate committees regarding proposed or final rules, usually within a specified time (e.g., 30 or 60 days) before the rules become effective. Many prior notification requirements are associated with subsequent legislative veto mechanisms, whereby a committee, a single Chamber, or Congress can disapprove the proposed rule. This section, however, considers only exclusive prior notice provisions in an attempt to delineate alternatives to legislative vetoes.

Such a requirement, of course, does not permit direct rejection of a rule; but it does enable appropriate committees to be more readily aware of forthcoming regulations than would otherwise be the case. <sup>1/</sup> In addition, since prior notification includes a lead-time, usually of thirty or sixty days commensurate with the public notice and comment provisions for the agency rules, the congressional committee has opportunity to scrutinize the proposal before its effective date, conduct hearings or authorize staff studies, and

-----  
<sup>1/</sup> The Senate Study on Federal Regulation, p. 66, found that under the present circumstances, "Very few committees or committee staff members systematically review the regulations issued by agencies under their jurisdiction. Issues of the Federal Register containing proposed agency rules are not regularly scrutinized."

comment on the proposed rule. Moreover, such review authority, even though lacking the sanction of a legislative veto, may provide the necessary incentive for the informal negotiations between the regulatory agency and congressional committee that Harold Bruff and Ernest Gellhorn have described as "a highly efficient review technique:"

The congressional procedures required to bring a legislative veto resolution to the floor of either house are cumbersome and time-consuming. It is therefore in the interest of both the agency and its congressional oversight committees to avoid resorting to these procedures by resolving policy issues informally. As the case studies show, informal negotiations with compromise on both sides is characteristic of the review process under a legislative veto provision. These negotiations are a highly efficient review technique in the sense that they resolve policy differences between the agency and the committees relatively quickly, and without destroying the coherence of the resulting rule as an item veto might. Indeed, it is when negotiations fail and the formal machinery is invoked that policy impasse threatens. 1/

Prior notice requirements, exclusive of those associated with legislative veto provisions, have been incorporated in at least fifteen pieces of legislation affecting Federal agency rulemaking from 1973 through 1978. 2/

-----  
1/ Bruff and Gellhorn, Congressional Control of Administrative Regulation, p. 1433.

2/ This listing is extracted from three Congressional Research Service inventories of legislative veto and advance notice provisions included in statutes during the past forty-five years: U.S. Library of Congress. Congressional Research Service.

(2/ Continued)

(1) Comprehensive Employment and Training Act of 1973 (P.L. 93-203; 87 Stat. 839, 877). Sec. 602(a) of this Act required that rules, regulations, and guidelines proposed by the Secretary of Labor under this statute must be submitted to the appropriate committees of the Congress and also be published in the Federal Register at least thirty days before their effective date.

(2) Air Transportation Security Act of 1974 (P.L. 93-366; 88 Stat. 409, 415). This Act, approved on August 5, 1974, in the aftermath of numerous incidents of air piracy, required that rules, regulations, and amendments thereto prescribed under Title II by the Administrator of the Federal Aviation Administration--for the screening of passengers and property intended to be carried in air transportation--must be submitted to Congress at least thirty days in advance of their effective date, unless the Administrator determines that an emergency exists. If so, such regulations may take effect in less than thirty days and the Administrator must notify Congress of this determination.

(3) Education Amendments of 1974 (P.L. 93-380; 88 Stat. 484, 567-568). This Act incorporated a number of complex legislative veto mechanisms and Sec. 509 included two exclusive prior notification obligations. The first prior notice provision required that whenever a concurrent resolution of disapproval is enacted by the Congress under the provisions of section 509, the agency which issued the disapproved standard, rule, regulation or requirement may thereafter issue a modified standard, rule, regulation, or requirement to govern the same or substantially identical circumstances, but shall, in publishing such modification in the Federal Register, submit it to the Speaker of the House of Representatives and the President of the Senate, indicating how the modification differs from the forerunner earlier disapproved, and how the agency believes the modification disposes of the findings by the Congress in the concurrent resolution of disapproval.

-----

(2/ Continued) Congressional Review, Deferral and Disapproval of Executive Actions: A Summary and an Inventory of Statutory Authority (by) Clark Norton. (Washington) 1976; -----. 1976-1977 Congressional Acts Authorizing Prior Review, Approval or Disapproval of Proposed Executive Action (by) Clark Norton. (Washington) 1978; and -----. 1978 Congressional Acts Authorizing Congressional Approval or Disapproval of Proposed Executive Actions (by) Clark Norton. (Washington) 1979.



A second obligation of section 509 provided that not later than sixty days after the enactment of any part of an Act affecting the administration of any applicable program, the Commissioner of Education shall submit to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare (now the Committee on Human Resources) of the Senate a schedule with which the Commissioner has planned to promulgate rules, regulations, and guidelines implementing such Act or parts thereof. However, if the Commissioner finds that, due to circumstances unforeseen at the time of the submission of such schedule, he cannot comply with it, he shall notify those committees of that finding and submit a new schedule. The initial schedule submitted by the Commissioner would not require committee approval, although the modified new schedule would.

(4) Age Discrimination Act of 1975 (P.L. 94-135; 89 Stat. 713, 728-731). The Age Discrimination Act of 1975, Title III of the Older Americans Act Amendments of 1975, provided a two-tiered approach for congressional review of proposed regulations. Sec. 304 required the Secretary of Health, Education and Welfare to publish proposed general regulations to implement a statutory provision prohibiting the exclusion of persons on the basis of age from participating in programs receiving Federal financial assistance, within one year after receipt of a report on the subject from the Commission on Civil Rights. The Commission report, including suggested general regulations, was to be transmitted to the Congress and to the President and copies provided to the head of each Federal department and agency with respect to which the Commission makes findings or recommendations. Sec. 307(e) provided that each such Federal department or agency, within 45 working days after receiving a copy of the report, submit its comments and recommendations regarding the report to the President and to the Senate Committee on Labor and Public Welfare and the House Committee on Education and Labor. During a subsequent 45-day period, any committee with jurisdiction over this subject matter may conduct hearings with respect to the Commission report and with respect to the department and agency comments and recommendations resulting therefrom. Following the 90-day period, the Secretary of HEW was to publish final general regulations, taking into consideration any comments received with respect to the proposed regulations.

(5) Insecticide, Fungicide, and Rodenticide Act (P.L. 94-140; 89 Stat. 751, 753). Under the general authority of this Act, the Administrator of the Environmental Protection Agency is required to submit copies of proposed regulations at least sixty days prior to signing and copies of final regulations at least thirty days prior to signing to the House Committee on Agriculture and the Senate Committee on Agriculture and Forestry, along with copies of both forms to the Secretary of Agriculture.

(6) Foreign Relations Authorization Act, Fiscal Year 1976 (P.L. 94-141; 89 Stat. 756, 770-771). The Act provided in section 406 that: regulations prescribed by the Secretary of State governing the carrying of firearms by designated security officers for the purpose of specified protective responsibilities, shall be transmitted to the Speaker of the House of Representatives and the Senate Committee on Foreign Relations not more than twenty days before the date on which such regulations take effect.

(7) Education for All Handicapped Children Act of 1975 (P.L. 94-142; 89 Stat. 773, 794). This Act amended the "Education of the Handicapped Act." Section 5(a) provided that the Commissioner of Education prescribe within one year certain regulations affecting matters related to particular learning disabilities and that such proposed regulations be submitted to the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare, "for review and comment by each such committee, at least fifteen days before such regulation is published in the Federal Register."

(8) Energy Policy and Conservation Act (P.L. 94-163; 89 Stat. 871, 894). One exclusive prior notice provision was included in this Act, which incorporated numerous legislative veto requirements. Section 251 required that the President develop rules regarding certain U.S. obligations under the international energy program but that no such rule may take effect unless the President has transmitted such rule to the Congress; has found that putting such rule into effect is required to fulfill U.S. obligations under the international energy program; and has transmitted such finding to the Congress, together with a statement of the effective date and manner for exercise of such rule. Moreover, such a rule transmitted by the President may not be put into effect or remain in effect after the expiration of 12 months after the date such rule was transmitted to the Congress.

(9) Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-210; 90 Stat. 31, 39). Among other techniques for statutory control of agency rules, this Act included a provision for a report to the Congress based on studies required of the Interstate Commerce Commission (ICC) and the Secretary of Transportation. Sec. 202(g) provided for separate studies by both entities regarding the effect of railroad ratemaking amendments on the development of an efficient and financially stable railway system. Such studies would include "proposals for further regulatory and legislative changes, if necessary," thereby ensuring prior notice for prospective or possible regulatory changes under this title.

(10) Consumer Product Safety Commission Improvements Act of 1976 (P.L. 94-284; 90 Stat. 503, 509). Section 14 of the Act required that the Commission transmit to the Senate Committee on Commerce, and to the House Committee on Interstate and Foreign Commerce each proposed consumer product safety rule under the Consumer Product Safety Act, and each proposed regulation under section 2 and 3 of the Federal Hazardous Substances Act, with certain exceptions regarding imminent hazards, under section 3 of the Poison Prevention Packaging Act of 1970, or under section 4 of the Flammable Fabrics Act. Furthermore, no consumer product safety rule and no such regulation may be adopted by the Commission before the thirtieth day after the proposed rule or regulation is transmitted to the respective committees.

(11) Saccharin Study and Labeling Act (P.L. 95-203; 91 Stat. 1451, 1452-1453). This Act provided for statutory prohibitions against the banning of the sale of saccharin products by the Secretary of Health, Education and Welfare (HEW) and for the express language to be used on labels of products which include saccharin. Any exceptions to such statutory language must be based on new information received by the Secretary of HEW. Section 2(c)(1) required the Secretary, based on mandated studies, to report within 12 months to the Senate Committee on Human Resources and the House Committee on Interstate and Foreign Commerce on "any action proposed to be taken on the basis of the results of the study." Presumably, such action might include a proposal to ban such products within the 18-month period based on new information, as permitted under sec. 3. Section 4(a)(1), which specified mandatory label warning language, permitted the Secretary, on the basis of new information, to review, revise, or remove such warning label requirements. Section 4(a)(3), however, required that the Secretary report any such action to the same committees identified above.

(12) Housing and Community Development Amendments of 1978 (P.L. 95-557; 92 Stat. 2080, 2103). Separate from a legislative veto provision, sec. 324 of P.L. 95-557 contains several prior notice provisions. The Secretary of the Department of Housing and Urban Development (HUD) is instructed to transmit an agenda of all rules or regulations which are under development or review by HUD to the Senate Committee on Banking, Housing, and Urban Affairs and to the House Committee on Banking, Finance, and Urban Affairs, within 30 days after this enactment and semiannually thereafter. Any such rule or regulation may not be published for comment prior to or during a period of 15 calendar days of continuous session of Congress, following transmittal. If either committee intends to review a particular rule which appears on the agenda, the Secretary/HUD shall submit to both committees a copy of any such rule or regulation in the proposed form at least 15 calendar days of continuous session prior to its being published Federal Register for comment. Any

rule or regulation which had not been published for comment before the date of enactment of this statute and which is not included on any subsequent agenda shall be submitted to both committees at least 15 calendar days of continuous session of Congress prior to being published for comment.

No rule or regulation may become effective until after the first period of 20 calendar days of continuous session after publication of the rule or regulation as final. If during that 20-day period, either committee has reported out a joint resolution of disapproval or other legislation which is intended to modify or invalidate the rule or regulation, the rule or regulation shall not become effective for a period of 90 calendar days from the date of committee action, unless the House to which such committee has reported has rejected such resolution or legislation. (The effect of such a provision for committee reporting is to defer the effective date of the rule or regulation, not to disapprove it. The latter could be accomplished only by further congressional action--a joint resolution or legislation, both of which require a Presidential signature.)

(13) Nuclear Regulatory Commission Authorization Act for FY 1979 (P.L. 95-601; 92 Stat. 2947, 2948). The Nuclear Regulatory Commission (NRC) is prohibited from spending an amount of \$500,000 or more in excess of the expressly authorized amounts or reducing that amount by more than \$500,000 for certain functions, including regulatory and possible rulemaking activities, unless the NRC gives notice of the proposed action to three congressional committees--the House Committees on Interstate and Foreign Commerce and on Interior and Insular Affairs and the Senate Committee on Environment and Public Works--thirty days in advance or unless the three committees provide written notice that they have no objection during that thirty-day period.

(14) Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978 (P.L. 95-602; 92 Stat. 2955, 2982). Section 119 of this Act provided that the head of any Executive agency or the U.S. Postal Service is to promulgate regulations to carry out the amendments made by the Act to section 504 of the Rehabilitation Act of 1973. Such regulations may not take effect, however, earlier than the 30th day after the date on which they are submitted to the appropriate authorizing committees of the Congress.

(15) Consumer Product Safety Act, Amendment (P.L. 95-631; 92 Stat. 3742, 3749). This amendment contained a reporting obligation for the Consumer Product Safety Commission (CPSC): to study all of its effective rules during an 18-month period, after which the Chairman/CPSC shall report to the Congress recommending any rule deletions or changes. During that 18-month period, the Commission shall notify the House and Senate of any proposals to delete any rule or portion thereof at the time such a proposal is published in the Federal Register.

### III. NONSTATUTORY TECHNIQUES: COMMITTEE REPORTS

As noted in the introduction, nonstatutory techniques of control over agency rules range from committee hearings and investigations to floor statements and direct contact by individual Members. Such devices have generated a substantial volume of directives, recommendations, opinions, and assertions regarding specific agency rules, their application and enforcement. Yet none of them, even authoritative committee reports accompanying legislation, are in themselves legally binding on the rules or on the agencies which promulgate or enforce them. Moreover, as the Senate Study on Federal Regulation discovered, as "hard as it is to precisely measure [nonstatutory] oversight activity, it is even more difficult to gauge the impact of that effort." 1/

Nevertheless, congressional committee reports accompanying proposed legislation are one nonstatutory vehicle that has been cited as an important influence on bureaucratic action:

Reports on proposed legislation submitted by authorizing, appropriating and conference committees frequently contain language setting forth the intent, expectations and even the commands of the Congress with respect to the implementation of laws. These range in degree all the way from simple urgings on

-----

1/ Senate Study on Federal Regulation, p. 82. The report further surmised: "Even when an agency changes a policy subsequent to congressional prodding, that change may not always be directly attributed to congressional action. Agency administrators are often reluctant to view their policy changes as a result of congressional pressure." Ibid. See *ibid.*, pp. 81-92, for an examination of the "impact of oversight by legislative committees" in the regulatory arena.

the one hand to outright mandates on the other and usually include such phrases as "the committee wishes," "the committee intends," "the committee expects," and "the committee believes." While none of these have any legally binding effect unless they are merely repetitive of the law itself, close attention is paid to them by both the executive and judicial branches when questions arise about the exact meaning or application of a particular statute. 1/

That perception is corroborated by Associate Justice Jackson, whose opinion in Schwegmann Brothers v. Calvert Corporation emphasized the significance of committee report language and the underlying rationale of employing such reports, vis-a-vis floor statements:

[The Court's] resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared.... [To] select casual statement from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.... 2/

The Senate Study on Federal Regulation elaborated on the substance of reports, identifying language in recent Senate and House Appropriations Committee reports that directed, urged, or recommended regulatory agency action. 3/ This section provides other illustrations of similar

-----  
1/ U.S. Congress. Senate. Committee on Government Operations. Subcommittee on Oversight Procedures. Congressional Oversight: Methods and Techniques (Prepared by the Congressional Research Service). Washington, U.S. Govt. Print. Off., 1976. p. 62.

2/ 341 U.S. 384, 395-396.

3/ Senate Study on Federal Regulation, p. 38-41.

report language, where particular rules or their enforcement was questioned.

(1) Health, Education and Welfare (HEW) Appropriations, FY 1974.

The Senate Appropriations Committee report on HEW appropriations for FY 1974 contained a response to "deeply disturbing reports that Federal family planning funds were allegedly used to arrange for involuntary sterilization." 1/ As a result of such allegations, the Secretary/HEW promulgated new rules, requiring written consent from all candidates for voluntary sterilization, and approval by a local review committee and in court for persons legally incapable of giving consent. The report concluded: "The Committee urges that the new regulations be implemented as expeditiously as possible, and that the Department redouble its efforts to insure enforcement so that incidents of involuntary sterilization will not be repeated." 2/

(2) Occupational Safety and Health Administration (OSHA)

Appropriations, FY 1974. The House Committee on Appropriations report on 1974 OSHA appropriations included two concerns regarding the occupational safety and health programs. The first was an urging that the Department of Labor, OSHA's parent agency, "should make every effort to approve as many State program plans as possible in fiscal

-----

1/ U.S. Congress. Senate. Committee on Appropriations. Departments of Labor, and Health, Education and Welfare, and Related Agencies Appropriation Bill, 1974; Report to Accompany H.R. 8877. Washington, U.S. Govt. Print., 1973. (93d Congress, 1st session. Senate. Report no. 93-414). p. 7.

2/ Ibid.

year 1974. The ultimate objective should be to allow the States to assume as much as possible of "the occupational safety and health responsibilities . . . so that it will not be necessary to build up a huge force of Federal inspectors." 1/

In addition to emphasizing the Committee's priority for State vis-a-vis Federal enforcement where feasible, the report added a criticism of the OSHA regulatory enforcement agents accused of "harrassment . . . [by] operators of small businesses and agricultural enterprises." 2/ Reminding OSHA of attempts to extend exemptions from its regulatory authority and proposed amendments that "would have the effect of weakening the provisions" of the Occupational Safety and Health Act, "[t]he committee urge[d] the Department to make every effort to insure that compliance officers . . . are equipped with a sufficient degree of expertise and competence in the activities of the establishments which they are undertaking to inspect." 3/ Notwithstanding such cautions, OSHA continued to receive similar criticisms; and Congress found it appropriate in 1976 to exempt agricultural operations employing ten or fewer employees from OSHA's jurisdiction and to prohibit its expenditures for the assessment of certain civil penalties. 4/

-----

1/ U.S. Congress. House. Committee on Appropriations. Departments of Labor, and Health, Education and Welfare, and Related Agencies Appropriation Bill, 1974; Report to Accompany H.R. 8877. Washington, U.S. Govt. Print. Off., 1973. (93d Congress, 1st session. House. Report no. 93-305). p. 7.

2/ Ibid.

3/ Ibid.

4/ P.L. 94-439; 90 Stat. 1421.



(3) Health, Education and Welfare (HEW) Appropriations, FY 1975.

The Conference Report on H.R. 15580 in the 93d Congress included directives to the Office of Secretary/HEW regarding interpretations of title XI of the Education Amendments of 1972, prohibiting discrimination on the basis of sex in educational institutions receiving Federal assistance:

The conferees have received reports that the Department of Health, Education and Welfare is interpreting the provisions of Title IX of the Education Amendments of 1972 (P.L. 92-318), which prohibits sex discrimination in education, in such a manner as to apply these provisions to such organizations as Boy Scouts, Girl Scouts, Campfire Girls, Boys Club, Girls Club, YMCA, YWCA, sororities, fraternities and similar organizations.

The conferees are agreed that this is an improper interpretation of the law and direct that none of the funds appropriated in this bill are to be used to enforce the provisions of Title IX with respect to such organizations.

The conferees also are agreed that none of the funds appropriated in this bill are to be used to enforce the integration of physical education classes by sex. 1/

However, HEW applied regulations under title IX to the organizations identified in the committee report, contrary to the conferees' directive and in evident disagreement with the contention that that would constitute "an improper interpretation of the law." 2/

-----  
1/ U.S. Congress. Committee of Conference. Conference Report to Accompany H.R. 15580. Washington, U.S. Govt. Print. Off., 1974. (93d Congress, 2d session. House. Report no. 93-1489). p. 17.

2/ Ibid.

Nonetheless, within six weeks of the Conference report, issued on Nov. 21, 1974, Congress had approved other legislation negating HEW's action by adopting an amendment to the joint resolution authorizing a White House Conference on Library and Information Services, P.L. 93-567, signed into law on Dec. 31, 1974. 1/ Although the HEW appropriations conference report per se did not effect a change in the application of these HEW regulations directly, it was the first documented congressional recognition of the concern and the only committee report on the issue that eventuated in statutory exemptions to HEW regulatory jurisdiction.

The conference report directive against the use of funds to enforce the integration of physical education classes by sex had apparently minimal impact, since the pertinent regulations, proposed June 20, 1974, did not become effective until July 21, 1975, after the end of the fiscal year (i.e., FY 1975) to which the report applied. During calendar year 1975, two different legislative

-----  
1/ Sec. 3 of P.L. 93-567 (88 Stat. 1862) was added as a floor amendment in the Senate on Dec. 16, 1974, to S.J. Res. 40, after the bill had already been previously cleared for conference. In sponsoring the amendment, Senator Bayh noted that Senate Resolution 40 "was the only bill available at this point in the session to which my amendment could be offered." Bayh, Birch. White House Conference on Library and Information Services. Remarks in Senate. Congressional Record, v. 120, Dec. 16, 1974: 39994. The HEW Appropriations bill to which the above conference report applied, H.R. 15580, approved by the Congress Nov. 26, 1974, became public law, P.L. 93-517, on Dec. 7, 1974, and was unavailable for the amendment. In addition, appropriations limits on HEW regulatory activity would not have had the permanent effect that the legislation, P.L. 93-567, had.

actions--the legislative veto 1/ and amendment to the 1976 HEW appropriations 2/--were taken against such regulations but neither succeeded.

(4) Energy Conservation and Production Act of 1976. The House Interstate and Foreign Commerce Committee included in its report on the proposed Energy Conservation Act of 1976 the oversight findings and recommendations culled from a report of its Subcommittee on Oversight and Investigations. 3/ That report listed a number of criticisms of the Federal Energy Office (FEO) and the Commerce Department rulemaking activity, including:

There was a serious lack of coordination between FEO and Commerce as to what policy should be followed and what regulations should be devised to carry out the intent of Congress in enacting the Emergency Petroleum Allocation Act [EPAA].

Commerce did not independently reform its deficient export control regulations but only acted when prodded by FEO, which may have been reacting to industry complaints.

-----

1/ Under authority of P.L. 93-380, concurrent resolutions of disapproval--S.Con. Res. 46, H.Con. Res. 310, and H.Con. Res. 330--were introduced but none were voted upon in the 94th Congress.

2/ An amendment to H.R. 5901 in the 94th Congress was approved by the House, barring such regulations, among others. However, Senate opposition deleted the provisions from the bill as it came from conference and the House, reconsidering earlier action, also voted to delete the amendment. Congressional Record, v. 121, July 17, 1975: 23343; and July 18, 1975: 23510.

3/ U.S. Congress. House. Committee on Interstate and Foreign Commerce. Energy Conservation and Production Act; Report to Accompany H.R. 12169. Washington, U.S. Govt. Print. Off., 1976. (94th Congress, 2d session. House. Report no. 94-1113). p. 17-18.

Regulations reflecting the mandate of EPA were not issued until April 18, 1974, 4 months after the date required by the Act and after 4 export licenses had been granted resulting in a windfall of about \$8 million to the exporter and higher prices to American consumers. 1/

(5) Clean Water Act of 1977. The Senate Environment and Public Works Committee in its report on the then-proposed Clean Water Act of 1977, which became Public Law 95-217, issued a rebuke to the Environmental Protection Agency (EPA) and its regulation of thermal effluents, under the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500). 2/ The Committee found that under EPA's interpretation and regulatory implementation of sec. 316 of P.L. 92-500, "(h)eat has thus become an unregulated pollutant, clearly not the intent of the Congress. The Congress intended that there be a very limited waiver for [certain] major sources of thermal effluents . . . That limited exemption has been turned into a gaping loophole." 3/

EPA's interpretation of the section; the process it established to grant waivers; and its contention that the 1972 Act was preemptive, precluding more stringent State water quality standards, received harsh criticism in the Committee report:

-----

1/ Ibid.

2/ U.S. Congress. Senate. Committee on Environment and Public Works. Clean Water Act of 1977; Report to Accompany S. 1952. Washington, U.S. Govt. Print. Off., 1977. (95th Congress, 1st session. Senate. Report no. 95-370). p. 7-8.

3/ Ibid., p. 8.

The cumbersome process which the Agency initiated resulted in part in a decision to avoid any application of 1977 regulatory requirements for steam electric powerplants. There is no basis for that decision in the law....The Agency also concluded that the 1972 act was preemptive with respect to the application of State water quality standards and effluent limits for heat. This is a determination for which there is no substance in law and which is wholly contrary to the committee's long held view that the States are free to establish any more strict standards or effluent limitations, as specifically set forth in section 510 of the act.

Even without the State water quality standards/effluent limits question the delays in section 316(A) would be unfortunate and indefensible. 1/

As a consequence of this determination, the Committee propounded two expectations regarding future EPA rulemaking and rule implementation activity in this area:

The committee does not expect, however, that the Agency will now impose any additional 1977 requirement other than State water quality standards...The committee expects the Administrator to establish an expeditious process for determining the validity of applications for exceptions, and to proceed swiftly to enforce effluent limitations applicable to pollutants for which there are no water quality standards or which would clearly interfere with attainment and maintenance of that water quality which assures the protection of public water supplies and the protection and propagation of a balanced, indigenous population of fish, shellfish, and wildlife, and allows recreational activities, in and on the water. Only in this way can these waivers be useful, both to the source which needs to know as early as possible what will be required and to the environment which will benefit from reduction of discharges of pollutants. 2/

-----  
1/ Ibid.

2/ Ibid.

(6) Occupational Safety and Health Administration Appropriations for FY 1979. House and Senate conferees, in their report on Occupational Safety and Health Administration (OSHA) appropriations for FY 1979, urged OSHA "to place primary emphasis of enforcement efforts with respect to migrant labor camps on operations with 10 or more employees." 1/ The appropriations act itself, P.L. 95-480, exempted farms with 10 or fewer employees from OSHA jurisdiction unless they maintained a "temporary labor camp," thereby permitting inspection of any farm with a migrant worker camp, regardless of size. Furthermore, the conference report contained the following directive and reporting obligation associated with such inspection:

The Secretary is directed to report to both House and Senate Appropriations Committees on migrant labor camp inspection experience and results, including: number of employees affected by inspections; size categories of establishments inspected; and the actual number, type and severity of violations found in large and small camps. Reports should be submitted with the fiscal year 1980 budget and at the end of fiscal year 1979. 2/

-----  
1/ U.S. Congress. Committee of Conference. Making Appropriations for the Departments of Labor, and Health, Education, and Welfare, and Related Agencies; Report to Accompany H.R. 12929. Washington, U.S. Govt. Print. Off., 1978. (95th Congress, 2d session. House. Report no. 95-1746). p. 10.

2/ Ibid.

IV. CONCLUSION

Congress has available and has adopted at least five distinguishable types of statutory mechanisms, other than the legislative veto, to overturn or preempt Federal agency rules, to limit their impact, or to prevent or hinder their promulgation. These statutory instruments--direct override or preemption of rules, modification of agency jurisdiction, authorization and appropriation limitations, extra-agency prior consultation requirements, and advance notification to the Congress--vary in terms of their use and impact. Provisions that modify agency jurisdiction appear to be the most frequently used device in the recent past, while direct overrides of rules and authorization or appropriation limitations are the least used, according to this preliminary survey. Consultation or prior review requirements affecting rulemaking agencies, especially advance notice to congressional committees, have become relatively prevalent in comparison to other techniques. However, such consultation or review provisions have only indirect influence, whereas the other types of statutory action have a direct effect on rules or their promulgation.

Moreover, the scope, specificity, and permanency of the impact of the different mechanisms also fluctuate. For instance, the technique of altering agency jurisdiction has often been used to affect a series of interrelated rules, whereas funding

limitations have been reserved for narrow, single-purpose restrictions, which, incidentally, are effective for only the term of the authorization or appropriation, usually one fiscal year. Statutory preemption and direct overturn of rules, permanently overriding them, have been applied to specific rules in contrast to prior consultation or review provisions, which are generic: i.e., applicable to all rules promulgated under a statute or program authority.

Although there are multiple and varied nonstatutory mechanisms for congressional influence over rules and rulemaking, this report considered in detail only the one which is usually most important to the final legislative product: i.e., committee reports that accompany legislation. Such report language has only indirect influence in that it can merely urge or recommend Federal agency action or reconsideration; it cannot impose legal requirements on an agency or abrogate particular rules. Nonetheless, those directives, which come from authorizing, appropriating, and conference committees, generally elicited agency compliance, based on this abbreviated examination. Where compliance was not forthcoming, the committee report language served as a harbinger to further congressional action against an offending rule or rules through attempts to approve legislative vetoes, if available; direct statutory overrides; or appropriation limitations.



The purpose of this report has been to survey the statutory instruments, other than the legislative veto, in which Congress is the initiator or the principal vehicle of action that results in the termination or mitigation of an agency rule. There are other statutorily established mechanisms that also affect the promulgation or longevity of rules but where Congress is not a direct participant, after passage of the legislation. Some of these mechanisms include certain changes in the Administrative Procedure Act (APA) (5 U.S.C. 551 et seq.) or additions of specific administrative requirements beyond the APA provisions. Specific recommendations have included: lengthened public notice and comment periods; adoption of "hybrid" rulemaking or formal rulemaking where neither had existed; creation of a regulatory oversight commission to review proposed rules; improved public participation mechanisms, such as public intervenor funding and payment of attorneys' fees; expanded scope of judicial review of the exercise of delegated rulemaking authority; and increased access to Federal courts by empowering public counsels to challenge administrative rules in court and by easing the requirements for standing by permitting any person who will be adversely affected by a rule to petition for judicial review; among others. These statutory techniques would affect agency rules through the initiative of private parties or other Federal units or both, rather than the Congress or its constituent parts.