1972

Reflections on the Tax Legislative Process: Prelude to Reform

Michael J. Graetz
Columbia Law School, mgraet@law.columbia.edu

VIRGINIA LAW REVIEW

VOLUME 58 | NOVEMBER 1972 | NUMBER 8

REFLECTIONS ON THE TAX LEGISLATIVE PROCESS: PRELUDE TO REFORM

*Michael J. Graetz**

> *[T]o tax and to please, no more than to love and be wise, is not given to men.*
>
> Edmund Burke in a speech on American Taxation, 1774**

TAX reform is one of those motherhood issues—everybody's for it. Election year 1972 generated many far-reaching tax reform proposals which, if enacted, would have a profound impact on virtually every segment of American society. Senator McGovern recommended taxing capital gains at the same rates as ordinary income,[1] eliminating almost $7 billion granted to businesses by reducing the investment tax credit and depreciation allowances,[2] and offering state and local govern-

* Assistant Professor of Law, University of Virginia. B.B.A., 1966, Emory University; L.L.B., 1969, University of Virginia; Staff of the Assistant Secretary for Tax Policy, Department of the Treasury, 1969-1972.

The author would like to express his appreciation to Arthur G. Potts, student at the University of Virginia Law School, for his invaluable assistance in the preparation of this Article. The author would also like to thank F. David Lake of Wilmer, Cutler & Pickering, Washington, D.C., and Theodore A. Kurz of Debevoise, Plimpton, Lyons & Gates, New York City, former colleagues in the Treasury Department for their thoughts and comments during the formulation of this Article.

** SELECTED WRITINGS OF EDMUND BURKE 96 (W. J. Bates ed., 1960).

1 Address by Senator George McGovern before the New York Society of Security Analysts, Aug. 29, 1972, reported in Washington Post, Aug. 30, 1972, at 12, col. 3.

In general, under present law, capital gains income of individuals is taxed at one-half the rates applicable to ordinary income with a maximum 25 percent rate applicable to the first $50,000 of capital gains. Corporations' capital gains are taxed at a maximum 30 percent rate while ordinary income is generally taxed at a rate of 48 percent. Senator McGovern's proposal to tax capital gains at the same rates as ordinary income would have been phased in over a two or three year period. In connection with the increase in capital gains tax, he proposed a reduction in the maximum individual income tax rate from 70 percent to 48 percent.

2 *Id.* at col. 4. Senator McGovern estimated that $4.2 billion would be produced through reductions in depreciation allowances and $2.5 billion by changing the investment credit provisions.

ments a 50 percent interest subsidy to encourage them to issue taxable, rather than tax-exempt, bonds.[3] In addition, he proposed eliminating the percentage depletion allowance and the deduction for intangible drilling expenses—two provisions which currently diminish the taxes on income from the production of oil, gas, and other natural resources.[4] And, even though President Nixon did not detail any tax reform proposals during the campaign, he did pledge to attempt to reduce state and local property taxes.[5] Thus, tax reform, a much discussed topic in the past months, seems certain to become a subject of concern for the 1973 Congress.

In spite of the myriad nature of the proposals, a consensus on goals of tax reform is fairly easily obtained. President Nixon, Senator McGovern, and Congressman Wilbur Mills all agree that reform should simplify the tax laws, produce greater equity in taxation, and promote economic growth.[6] Concurrence on means, however, is a different matter; those

---

[3] *Id.* Under the McGovern proposal, local governments could, at their option, issue taxable bonds and receive a federal subsidy of 50 percent of the interest cost.

[4] *Id.* at 3. McGovern proposed that the present system of percentage depletion which allows deductions in excess of actual costs incurred should be abolished. In addition, he proposed that intangible drilling development and exploration costs should be required to be capitalized where producing properties result from the outlays. Summary of Senator McGovern's Proposals for Federal Tax Reform, on file at the *Virginia Law Review* [hereinafter cited as Summary of Senator McGovern's Proposals].

[5] In his Acceptance Speech at the Republican National Convention, Aug. 23, 1972, President Nixon stated that the goal of his Administration would be to reduce the property tax which he called "an unfair and heavy burden on the poor, the elderly, the wage earner, the farmer and those on fixed incomes." The President's Remarks Accepting the Nomination, August 23, 1972, in 8 Weekly Compilation of Presidential Documents 1265 (Aug. 28, 1972). In his State of the Union Address on Jan. 24, 1972, President Nixon spoke of property taxes in a similar fashion, describing them as the "most oppressive and discriminatory of all taxes." The State of the Union Address, January 20, 1972, in 8 Weekly Compilation of Presidential Documents 71 (Jan. 24, 1972). *See also* Fowlkes, *Administration Leans to Value—Added Tax to Help Solve National Fiscal Crisis,* 4 Nat'l J. 210 (Feb. 5, 1972). Many other tax reform ideas are circulating in Congress and elsewhere. *See, e.g.,* S. 3378, 92d Cong., 2d Sess. (1972); H.R. 11862, 92d Cong., 2d Sess. (1971). For a full discussion of H.R. 11863, see 117 Cong. Rec. H. 12,865 (daily ed. Nov. 19, 1971). More recent indications suggest that the President and Congressman Mills may no longer wish to press for tax reform in the next Session. *See* N.Y. Times, Nov. 30, 1972, at 1, col. 1.

[6] Congressman Wilbur Mills stated in an interview:

> [T]ax reform means more to me than establishment of equity, as important as that is. Simplicity is a great goal of reform.

U.S. News & World Report, May 26, 1969, at 43.

In the summary of his tax reform proposals, Senator McGovern stated that a "fair, efficient and evenhanded tax system is a basic demand and urgent need of every American" and criticized the "inequities" and "mass of complexities" that "riddle" our present tax system. Summary of Senator McGovern's Proposals, *supra* note 4.

In his 1969 tax reform message, President Nixon stated, "We must reform our tax three are far less likely to agree on specific tax reform measures. Political and philosophical biases only partly explain disagreements over the merits of particular proposals. Perhaps more important is the complexity of the task. Economic debate of alternative tax measures inevitably brings to mind Paul Douglas' remark that one could lay all the economists end to end around the world and they would never reach a conclusion.[7] Moreover, attempts to improve the equity of the federal tax system often directly collide with efforts to simplify it.[8] Within Congress, decision-makers tire of responses of "on the one hand . . . but on the other hand" and search constantly for a one-handed lawyer.

The Congressman's dilemma is well illustrated by Under Secretary of the Treasury Edwin S. Cohen's recent testimony on the proper tax treatment of married couples and single persons. Congress had been deluged from both sides—mail from angry unmarried taxpayers protesting that their tax rates were too high relative to married couples with the same amount of income[9] accompanied by complaints of married couples that the tax system penalized marriage if both spouses had income and

---

structure to make it more eqnitable and efficient; we must redirect our tax policy to make it more conducive to stable economic growth and responsive to urgent social needs." HOUSE COMM. ON WAYS AND MEANS, 91ST CONG., 2d SESS., TAX REFORM PROPOSALS 4 (Comm. Print 1969).

[7] For example, economists disagree vehemently on the impetus to economic growth provided by tax incentives such as additional depreciation allowances and the investment tax credit designed to encourage business purchases. The estimates varied on the feedback effect of the Asset Depreciation Range (ADR) system, adopted in 1971. Some experts feel that there will be no revenue feedback. *See, e.g.*, U.S. DEPT. OF THE TREASURY, ASSET DEPRECIATION RANGE (ADR) SYSTEM 40, n.85 (July, 1971). [hereinafter cited as ADR PAMPHLET]. But one economist has calculated that the revenue feedback will be sufficient to ensure that the ultimate effect of the ADR system will be a net revenue gain by 1973, which will grow to about $2 billion in 1974. *Id.* at 40, n.86.

[8] *See, e.g.*, Cohen, *A New Decade for Taxes and the Search for Simplification*, 4 IND. LEGAL FORUM 19 (1970); Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 LAW & CONTEMP. PROB. 673 (1969); Surrey & Brannon, *Simplification and Equity as Goals of Tax Policy*, 9 WM. & MARY L. REV. 915 (1968).

It has been suggested, however, that the added complexity created by attempts to produce greater equity may yield costs for the many which are greater than the cost of inequity for a few. The question to be raised is, "[W]hether, in trading further complexity for equity, we lose not only simplicity bnt also equity." New York Commission on Tax Policy, *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 325, 334 (1972).

[9] *See generally Hearings on Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working, Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. 73-74 (1972) (testimony of Edwin S. Cohen) [hereinafter cited as *Married Single Hearings*].

thereby created an incentive to "live together in sin."[10] Confronted with the unhappiness of both single and married constituents and uncertain of the proper resolution of the fundamental issue of taxation of different types of family units, the House Ways and Means Committee called public hearings in May, 1972. Imagine the committee members' discomfort when the Treasury testified as follows:

> Tax laws cannot be written which will apply to a nation of 200 million persons and provide precise equity in all cases. [W]e cannot devise rules which demand varying tax burdens depending upon the type of household in which a single person lives. Unfortunately we cannot devise rules which will equitably apply the competing principles underlying our tax system to every conceivable set of circumstances.
>
> Mr. Chairman, if you will forgive me for indulging briefly in a mathematical analysis, I think this problem may be well illustrated if you consider four cases that illustrate the nature of the problem and show the impossibility of a solution for all of them.
>
> Case 1 is a single person who earns $20,000.
>
> Case 2, two single persons each earn $10,000.
>
> Case 3, a husband earns $20,000 and a wife earns zero.
>
> Case 4, a husband and wife each earn $10,000.
>
> If we want no penalty on remaining single—and a large group insists upon this—Case 1 must pay the same tax as Case 3. A single person earning $20,000 pays the same as a married couple earning $20,000.
>
> If we want no penalty on marrying, Case 2 must pay the same tax as Case 4. Two single persons earning $10,000 each pay the same tax as a married couple each earning $10,000.
>
> If we want husband and wife to pay the same tax however they contribute to the family earnings, Case 3 pays the same tax as Case 4.
>
> To summarize the tax results:
>
> Case 1 equals Case 3.
> Case 2 equals Case 4.
> Case 3 equals Case 4.
>
> Based on the fundamental mathematical principle that things equal to the same thing must be equal to each other, the result should then be that Case 1 equals Case 2, or, in other words, that the tax on a single person earning $20,000 equals the tax on two single persons each earning $10,000.
>
> But that cannot be so if we are going to have a progressive income tax structure, and progressive taxation is a basic tenet of our income

---

[10] *Id.* at 74.

> tax system. The tax on a single person earning $20,000—Case 1—must be greater than the total tax on two single persons each earning $10,000 if we are to have a progressive rate structure.
>
> I hope you will forgive me for this mathematical presentation, but it becomes apparent from this analysis that you cannot have each of these principles operating simultaneously, and that there is no one principle of equity that covers all of these cases. No algebraic equation, no matter how sophisticated, can solve this dilemma. Both ends of a seesaw cannot be up at the same time. Any rule that is selected will, in some cases, appear to penalize married couples and, in other cases seem to penalize single persons. All that we can hope for is a reasonable compromise.[11]

To no one's surprise, the committee postponed consideration of this issue until 1973. But this lapse of time will render the "right" answer no less elusive.

The difficulty of Congress' task in undertaking major reform efforts in 1973 will be compounded by the pressing governmental need for revenues. Although President Nixon has repeatedly emphasized that he will attempt to keep expenditures under control and thereby escape the need to increase taxes, many feel that this effort is doomed to failure. It is difficult to predict the ultimate resolution of this battle between less spending and more taxes. Only one substantial tax increase has been enacted in peacetime in the past thirty-five years.[12] But the federal deficit has been large in recent years. Despite an upswing in the economy which has produced an increase in tax revenues, the deficit for this fiscal year is expected to total $25 billion.[13] Many economists have asserted that even if no new spending programs are enacted, a tax increase will be necessary.[14] Both Chairman Wilbur Mills[15] and Congressman Byrnes,[16] the ranking Republican on the Ways and Means Committee,

---

[11] *Id.* at 78-79.

[12] *See* R. BLOUGH, THE FEDERAL TAXING PROCESS 238-65 (1952) [hereinafter cited as R. BLOUGH]; J. PECHMAN, FEDERAL TAX POLICY 257 (rev. ed. 1971) [hereinafter cited as J. PECHMAN].

[13] *See* H.R. REP. No. 92-1456, 92d Cong., 2d Sess. 7 (1972). The deficit totals $32 billion if estimated on a Federal funds basis. *Id.* Deficits of this magnitude cause serious inflationary pressures. As the House Report observed, "If the Federal government is not able to reduce its stimulus to the economy during a period of economic improvement it is likely that inflationary pressures will be renewed." *Id.*

[14] *See, e.g.*, G. SCHULTZE, E. FRIED, A. RIVLIN, N. TEETERS, SETTING NATIONAL PRIORITIES, THE 1973 BUDGET 411-20 (1972).

[15] *See* Wash. Post, Sept. 15, 1972, at 1, col. 1.

[16] *See* Wash. Post, Sept. 20, 1972, at 1, col. 1.

agree that a tax increase seems inevitable. Some, including Senator McGovern, have suggested that needed revenues can be obtained through tax reform[17] while others, among them Chairman Mills, doubt that tax reform will produce any net increase in the federal revenues.[18] Certainly the history of tax reform legislation supports the latter view.[19] In any case, the need for additional revenues will undoubtedly affect tax reform decisions. Reforms that exact a substantial revenue cost for improving the equity of the tax system will be less likely to be adopted, and revenue raising reforms may be phased in more rapidly than in the past.

The task of tax reform, an extremely difficult undertaking at any time, may be made immensely more difficult both in economic and political terms when the government has a pressing need for additional revenues. It is precisely because the job will be so difficult that the process for producing new legislation must be as finely-tuned as possible.

Although the spotlight has been intensively focused on the substantive issues of tax reform, the mechanics and procedural aspects have been little illuminated. And, at the very time that the substance of our law appears about to undergo a searching reexamination, fundamental questions have been raised about the functioning of the process for enacting tax legislation. A *New York Times* editorial described the last major tax legislation, the Revenue Act of 1971, in the following terms:

> By any reasonable standard of responsible legislating, Congress has put on a classic demonstration of how not to write a major bill. Decisions have been secret, arbitrary, unexplained. A few men have wielded enormous power and have been accountable to no one [and] the Congressional leadership was always prepared to abdicate its constitutional responsibilities in writing tax legislation rather than risk a showdown with the President.[20]

---

[17] *See* Address by Senator McGovern, *supra* note 1. McGovern estimated that his tax reform proposals would raise $22 billion [by 1975]. He stated:

> Together, the tax justice and military cutbacks I have proposed would approximate $54 billion. The total cost of additions to the national budget by a Democratic Administration would be less than that.

Id. at 4.

[18] Wash. Post, Sept. 15, 1972, at 22, col. 5.

[19] The tax reform and relief provisions of the Tax Reform Act of 1969 were estimated to produce an annual long-run revenue loss of more than $2.5 billion. Staff of Joint Comm. on Internal Revenue Taxation, 91st Cong., 2d Sess. General Explanation of the Tax Reform Act of 1969. 13 (Comm. Print 1970) [hereinafter cited as General Explanation of the Tax Reform Act].

[20] N.Y. Times, Dec. 7, 1971, at 46, col. 1.

Equally vociferous criticism has emanated from other sources. Conservative syndicated columnist David Lawrence considered the Tax Reform Act of 1969 to be "a significant example of how the Congress of the United States struggles with a most complicated piece of legislation—tax reform—and fails to operate efficiently in its lawmaking function."[21] The liberal press agreed; Joseph Kraft made the following comment during the debate over the 1969 Tax Reform Act:

> It is now clear that taxes are too complicated and sensitive a matter to be decided in detail by the Congress. . . . The Congress, in fiscal matters, is a dinosaur—huge body and tiny brain.[22]

These are serious indictments of the process for enacting tax legislation, challenges demanding a reappraisal of tax reform procedures. This Article is intended to help fuel the careful study of the mechanics of tax legislation that is an essential prelude to any major tax reform effort in the months ahead.

The Process for Enacting Tax Legislation

The Constitution grants Congress the power "To lay and collect Taxes, Duties, Imposts and Excises"[23] and further provides, "All Bills for raising Revenue shall originate in the House of Representatives."[24] Congressional power over tax legislation is constitutionally limited only by the President's power to veto legislation which can, of course, be over-ridden by a two-thirds vote of each house. Yet, despite the emphasis in the constitutional framework on legislative responsibility, most tax legislation is enacted as a response to recommendations of the President.[25]

---

21 Lawrence, *Politics Dominate Tax Reform Scene,* The Evening Star (Washington, D.C.), Dec. 11, 1969.

22 Kraft, *Power to Destroy,* Wash. Post, Dec. 7, 1969, at C7, col. 1.

23 U.S. Const. art. I, § 8.

24 U.S. Const. art. I, § 7. The House of Representatives, through its traditionally guarded prerogative to initiate all revenue legislation, will be first to consider, and thus first to shape, any major tax bill. The Senate, however, will exercise its power to amend to add new provisions to the tax bill passed by the House.

25 The Revenue Acts of 1964 and 1971 are good examples. Suggestions for new tax provisions emanate from every department of the Executive Branch: the Department of Housing and Urban Development suggests new tax incentives for investments in low and moderate income housing; the Department of Health, Education and Welfare wants tax credits for the cost of tuition at private schools; the Council of Environmental Quality wants to provide tax benefits for the preservation of historic buildings, or tax

Congressional consideration of a major or controversial tax proposal typically begins with a public hearing held by the House Committee on Ways and Means.[26] If the Administration initiates the measure, the Secretary of the Treasury is generally the first witness to appear, followed by other Administration spokesmen and then by witnesses from the general public. At the conclusion of these public hearings the Ways and Means Committee generally holds executive sessions on the proposals. The public is excluded from these deliberations, but Treasury representatives, the committee's staff, and the Staff of the Joint Committee on Internal Revenue Taxation[27] are normally present to state their views, respond to questions and supply data and analyses. The House Legislative Counsel, assisted by the staffs of the Treasury and the Joint Committee on Internal Revenue Taxation, translate the committee decisions

penalties for using lead in gasoline; the Labor Department is interested in the tax treatment of pensions and other employee benefits. Tax proposals involving fiscal policy often originate with the President himself or with his advisors in the Office of Management and Budget, in the Domestic Council, the Treasury, or in the Council of Economic Advisors. Under the guidance of the President, responsibility for tax policy and tax administration is vested in the Department of the Treasury. Although administration of the tax laws is generally delegated by the Secretary of the Treasury to the Commissioner of Internal Revenue, responsibility for the formulation of tax policy is retained in the Office of the Secretary and assigned to the Assistant Secretary for Tax Policy, or to the Under Secretary. The Assistant Secretary for Tax Policy oversees a staff of twenty lawyers and thirty-five economists, statisticians and econometricians which is actively engaged in the development of tax policy and legislation for the Administration. In this process of development, the staff consults with and relies on many other persons in the Treasury Department and elsewhere in the Administration. The staff frequently gathers information from the Internal Revenue Service, the Council of Economic Advisers, the Office of Management and Budget, the Domestic Council, the International Council and the Federal Reserve Board. The President, of course, retains final authority over fiscal policy within the Administration and generally sends messages to Congress on any Administration proposals for major changes in the tax law.

[26] Established in 1789, the Ways and Means Committee is one of the oldest and most eminent of the House Committees. It exercises jurisdiction over legislation concerning taxes, tariffs, revenue sharing, foreign trade policy, welfare and health insurance, the level of the public debt, and the social security system. In the last Congress more than 2000 bills introduced were referred to the Ways and Means Committee. The committee is composed of twenty-five members, fifteen of whom are chosen from the party having a majority of the membership in the House and ten of whom are from the party in the minority. Because of the extensive commitments of the Ways and Means Committee, its members generally do not serve on other House committees.

[27] The Joint Committee on Internal Revenue Taxation was established in 1926 primarily to make a technical tax staff available to both the House Ways and Means Committee and the Senate Finance Committee. Meeting only three times a year on the average, the committee has certain specific functions relating to overseeing the administration of the tax laws. Its primary importance is to provide status for its professional staff, composed of lawyers, economists, accountants and statistical analysts.

into statutory language and the Joint Committee staff then prepares a report describing the bill and outlining reasons for the Ways and Means Committee's action. The bill and committee report next go to the House for limited debate. Tax bills are generally sent to the House floor under a "closed" rule under which no amendments other than those offered by the committee are generally permitted.[28] After House approval the process is repeated in the Senate.

The hearings of the Senate Finance Committee may produce even more witnesses and protests than the previous House hearings. House passage of the bill generally heightens public awareness of the issues, and the Senate hearings represent the last opportunity for public presentation of views. Unlike the House procedure, the Senate rules provide for unlimited debate when a tax bill is considered on the floor, and generally permit any Senator to move to delete or modify any part of the bill or to add new provisions.

When the bill passed by the Senate differs from the House version, the revised bill is returned for House consideration. Though the House may accept the changes made by the Senate, it ordinarily will ask for a conference to reconcile the differences. The conferees meet in private, generally with the assistance of Treasury and the congressional staff. The House members and Senate members each vote on the issues as a unit, the vote of each block being controlled by a majority vote of that side.

Once agreement has been reached, a conference report is issued containing the statutory changes and briefly explaining the conference result. The report is presented separately to the Senate and House of Representatives. Each must either accept or reject the conference version; no amendments are allowed. If approved by both bodies, the bill is sent to the President for his signature or veto.[29]

---

28 The usual procedure for consideration of tax bills is for the House Rules Committee, at the request of the Ways and Means Committee, to recommend the closed rule to the entire House with a provision for a specified period of debate on the floor. The time allotted is divided evenly between the parties. Each side has a manager, usually the chairman of the Ways and Means Committee and the ranking member of the minority respectively, who controls the time allotments for persons desiring to speak on the matter. After the alloted time for debate of the measure has expired, opponents can move to recommit the bill to the Ways and Means Committee with instructions to report it back to the House with specified amendments. This motion permits opponents of the measure to record their position and get a test vote on the entire bill. If the opponents prevail on the motion to recommit, the effect is to amend the bill in accordance with the provisions of the motion. If it fails, the Ways and Means bill remains unchanged. *See generally* R. BLOUGH, *supra* note 12, at 76-78.

29 Minor tax bills often follow the same procedure. In some cases, however, no public

Relationship Between the Congress and the President

The President's power of persuasion has been a far more effective influence on tax legislation than his veto power; since 1948 the President has signed every major tax bill passed by Congress.[30] President Nixon threatened to veto the Tax Reform Act of 1969 after it was passed by the Senate because he considered the revenue loss from the bill excessive and inflationary.[31] Although this threat did have some impact in shaping the compromises reached by the conference committee, the President ultimately signed a bill containing overall tax reductions that he did not particularly like.[32]

The President's power to propose legislation and persuade the Congress to adopt it has had more effect. The public now expects the President to provide leadership on all issues of national policy, particularly on fiscal matters. The President announces his planning and recommendations for fiscal policy in his annual budget messages and economic reports. If the economy is sluggish, the deficit too great, or if the cost of living rises steeply, the President receives the blame. If his proposals do not pass Congress, we feel that the test of leadership has not been met.

At the same time, the public has become increasingly critical of congressional delay or inaction on presidential initiatives for short-term fiscal

---

hearings are conducted and a conference is unnecessary since the Senate will accept the House bill or the House will accept the Senate amendments. The procedures for enacting relatively minor bills have been criticized recently by certain members of the House of Representatives. *See* Woodworth, *The Federal Tax Legislative Process* 25 NAT'L TAX J. 405, 409 (1972) [hereinafter cited as Woodworth]. For a more detailed description of the tax legislative process, see J. PECHMAN, *supra* note 12, at 32. *See also* Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted,* 70 HARV. L. REV. 1145 (1957); Address by Edwin S. Cohen before the Tax Section of the American Bar Association, London, England, July 15, 1971, on file at the *Virginia Law Review.*

30 President Roosevelt vetoed the Revenue Act of 1943, and President Truman vetoed the Revenue Act of 1948. Both bills were subsequently passed by Congress over the presidential veto.

31 *See, e.g.,* N.Y. Times, Dec. 10, 1969, at 54, col. 1; Wall Street Journal, Dec. 10, 1969, at 22, col. 1.

32 Statement by the President Upon Signing the Tax Reform Act of 1969 into Law, December 30, 1969, in 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 7 (Jan. 5, 1970). The President stated:

> Eight months ago, I submitted a sweeping set of proposals to Congress for the first major tax reform in 15 years, one which would make our tax system more fair.
> My proposals were carefully balanced to avoid increasing the pressure on prices that were already rising too fast.
> Congress has passed an unbalanced bill that is both good and bad. The tax reforms, on the whole, are good; the effect on the budget and on the cost of living is bad.

policy.[33] The need for prompt action, coupled with the prevailing view of presidential responsibility, has produced numerous recommendations that Congress delegate the President limited authority to raise or lower taxes within a certain range.[34] Critics of the process, such as McGeorge Bundy, typically turn to such proposals:

> Flexible tax rates are now quite simply indispensable to the effective management of economic policy. . . . The Congress is too big and slow and varied to exercise this power on its own. . . . In tax policy the Executive branch is not much too strong, as the disbelievers in modern government tell us, but much too weak.[35]

---

[33] The parliamentary system of government in Canada is structured so as to guarantee that the government's tax proposals are enacted without significant modification. The efficiency of this system, which keeps a tax measure secret until it is announced in the Budget, has greatly impressed American economists. In Walter Heller's words, "[T]he flexibility, speed and selectivity of the Canadian action in 1966 made the U.S. political economist's mouth water." W. HELLER, NEW DIMENSIONS OF POLITICAL ECONOMY 104 (1967), *quoted in* Note, *Tax Adjustments for Economic Stability and Growth: Proposals for Reform of the Legislative Process*, 5 HARV. J. LEGIS. 267 (1968).

Consider the following remarks of Patrick Jenkin, Financial Secretary to the Treasury of the United Kingdom:

> Whereas the separation of powers is still a reality in the United States, the British Constitution has changed out of all recognition. Today, the separation between Executive and Legislature is now hard to discern. The Executive, in the persons of the Prime Minister and his Government, so far from being excluded from the Legislature, are Members of Parliament and indeed lead and direct its business. In turn, they depend for their continuance in office upon their being able to command a majority in the House of Commons. If they fail to command a majority, then the Government must resign, and a General Election may ensue.
>
> [This general constitutional position] applies, of course, in all fields of policy, but it is of particular significance in the field of fiscal policy. This is so for the very good reason that the right to raise revenue lies at the heart of Government; financial legislation is almost by definition a matter of confidence, i.e., a matter on which the continuance of the Government in office depends. The Government, if it is to remain in office, must be sure of its ability to carry its main fiscal proposals into legislation: it must be able to *rely* on its majority in the House of Commons to secure this.

Address by Patrick Jenkin before the Tax Section of the American Bar Association, London, England, July 15, 1971, on file at *Virginia Law Review*.

Thus, there are three major features of a parliamentary system which differ from the American system. Ministers sit in the legislature, and because they represent the majority party, their proposals are usually certain to become law. Second, Parliament's role as an initiator of policy is strictly limited. And third, the defeat of a major proposal put forward by the Government could precipitate the Government's resignation and perhaps an immediate general election.

[34] For a more complete discussion of these proposals, see Note, *Tax Adjustments for Economic Stabilization and Growth: Proposals for Reform of the Legislative Process*, 5 HARV. J. LEGIS. 267, 271-289 (1968).

[35] McGeorge Bundy in the Godkin Lectures of 1968, *quoted in* Kraft, *Power to*

But the Congress has steadfastly refused to give serious consideration to such a measure, and even the proposals for delegation of some congressional taxing authority to the President have been limited to measures designed to facilitate short term fiscal policy.[36] No one has advocated delegation of authority to determine basic tax reform issues. To suggest that the Congress grant the President its power over basic tax reform issues would be to suggest that our democratic system be replaced by a parliamentary or more authoritarian form of government.[37]

Rather than delegating power to the President in tax matters, Congress has been attempting to increase its own power by demanding presidential proposals for tax reform. The Revenue and Expenditure Control Act of 1968 contained a provision requiring the President to present his recommendations for tax reform to the Congress by December 31, 1968.[38] And, during the recent Senate debate over revenue sharing, Senator Kennedy proposed a similar amendment to require the President to submit tax reform proposals in 1972.[39] Perhaps these amendments reflect congressional expressions that presidential cooperation is essential to major tax reform. They are certainly not serious attempts to delegate congressional responsibility to the Executive, for once the President's proposals are forwarded the Congress will carefully guard its prerogatives to reject or modify his suggestions. For the foreseeable future, therefore, the Congress will continue to make basic decisions of tax policy; it will exercise full control over the tax legislative process until a bill is passed by both houses and sent to the President for his signature or veto.[40] Rather than attempting to exercise power which

Destroy, Washington Post, Dec. 7, 1969, at C7, col. 3. *See also* Wall Street Journal, Dec. 10, 1969, at 22, col. 1; N.Y. Times, Dec. 7, 1971, at 46, col. 1.

36 Congress has delegated power to the President to vary rates of the Interest Equalization Tax. *See* INT. REV. CODE OF 1954 § 4911(b)(2). But this is a minor deviation from congressional control over tax rates.

37 See note 186 *infra* and accompanying text.

38 Revenue and Expenditure Control Act of 1968, § 110, Pub. L. No. 90-364, 82 Stat. 251 (1968).

39 Amendment No. 1479 to H.R. 14370, 92d Cong., 2d Sess., debated at 118 CONG. REC. S. 14,394-401 (daily ed. Sept. 8, 1972).

40 The President, however, does derive power to act through the rulemaking authority which Congress has delegated to the Treasury. Although this delegation of authority is ordinarily limited to relatively technical matters in areas requiring special administrative expertise or posing potential administrative problems, the delegation may be quite broad. The granting of authority to prescribe the rules governing depreciation allowances is an example of a broad delegation. Acting through the authority of the Treasury, the President in 1971 was able to effectuate changes in depreciation policy involving an annual revenue loss of close to $4 billion. Congress subsequently modified the President's depreciation changes in the Revenue Act of 1971.

it may not even have—the power to compel presidential recommendations—the Congress should concentrate its efforts to insure that its own processes for enacting tax legislation are designed to obtain as much information as possible and to use this information effectively in reaching difficult decisions.

The Information-Gathering Process

Developing and maintaining an appropriate tax structure for a nation as economically complex and dynamic as the United States is a mammoth task. Often the resolution of arcane and technical issues of tax policy may have a profound impact on the domestic economy which is elusive or immeasurable. Given the immensity of the task, the basic work has been performed extraordinarily well; the American tax system compares favorably with any in the world. This is a tribute both to the legislators and to those who assist them in considering and enacting the tax laws.

The tax structure is far from perfect, however, and tax reform is inevitable in the coming years. If this reform effort is to be successful, the legislators and the public must be as well informed as possible. And, while the present legislative process has operated well in the past, the system by which Congress receives and evaluates the facts that underlie its substantive choices is deficient in a number of respects. These deficiencies are in some cases paralleled by Congress' failure adequately to inform the public of the rationale for the actions it is taking. In either case the tax reform effort suffers—those enacting the law are not provided optimal information; those seeking to understand the law and comply with it are sometimes deprived of useful knowledge concerning the legislators' intentions. These are areas ripe for revision.

Revision of the Public Hearing Forum

Congressman Wilbur Mills has announced that the Ways and Means Committee will undertake a "thoroughgoing and extensive review of the entire federal system" early in 1973 with a view toward producing a major tax reform bill.[41] In addition to disagreeing with some of the present substantive tax policies, Congressman Mills is apparently dissatisfied with the present process for considering tax reform legislation. In May, 1972 he introduced the "Tax Policy Review Act of 1972"[42] which

[41] BNA Daily Report for Executives, Sept. 8, 1972, DER No. 176, at 1. *See also* Washington Post, Sept. 15, 1972, at 22, col. 2.
[42] H.R. 15230, 92d Cong., 2d Sess. (1972).

would have eliminated fifty-four "tax preference" provisions over a three year period, stating that by repealing those benefits his bill was designed to guarantee that "tax reform will be considered in the period ahead in a manner which will give assurance of . . . an orderly and systematic review of virtually all provisions of the Internal Revenue Code giving any special exclusion or deduction or special tax rate to any particular type of group or category of income."[43]

Beneficiaries of tax preference provisions have come to regard them as a matter of right. Typical of this attitude is the statement of a Standard Oil executive to the Senate Finance Committee that a half a century of faith in stable tax treatment of the industry would have been breached if the depletion allowance were reduced.[44] Congressman Mill's bill would have reversed this relationship and shifted the burden to the proponents of specified tax preference provisions, requiring them to demonstrate that congressional reinstatement of the tax preference would serve the national interest. Thus, many supporters of tax reform applauded Congressman Mill's proposal as a novel approach to the elimination of special tax provisions.[45] But the procedure proposed in this bill carries substantial risks. By setting termination dates for tax provisions that significantly affect investment decisions, enactment of the bill would cause immediate economic uncertainties and disruptions. For example, enacting a termination date for the deduction for state taxes and eliminating the exemption for interest on state and local bonds could cause serious difficulties for those responsible for planning the financing of state and local governments. Moreover, an immediate impact could occur in the market for state and local bonds.[46] Acknowledging the possible "uncertainties and undesirable economic effects" that might be created by the auto-

---

[43] Statement of Congressman Wilbur Mills, May 31, 1972 (Press release introducing H.R. 15230, the "Tax Policy Review Act of 1972," CCH 1972 STAND. FED. TAX REP. vol. 59, p.II, no. 31 v-vi (June 7, 1972)..

[44] *Hearings on the Tax Reform Act of 1969 Before the Senate Comm. on Finance*, 91st Cong., 1st Sess., p. 5, at 4410-14 (1969) (Testimony of George V. Myers, Director and Executive Vice President of Standard Oil Co. of Indiana).

[45] Common Cause described it as "an essential first step in opening the door leading to tax justice." *Hearings on Administration Request for Increase in Public Debt Ceiling Before the House Committee on Ways and Means*, 92d Cong., 2d Sess., at 312 (Statement of Mitchell Rogovin, General Counsel, Common Cause).

[46] Other market disruptions would likely follow passage of a bill such as Mills' Tax Policy Review Act of 1972. For example, the bill would have substantially modified the tax treatment of capital assets by cutting back on depreciation allowances in two stages and repealing the investment credit. An increase in investment could have been expected prior to each of the three repeal dates as taxpayers attempted to take advantage of the more liberal tax benefits.

matic termination provisions, Mills abandoned his bill[47] in favor of a measure introduced by Congressman Ullman which merely calls for a comprehensive review of the tax structure during 1973 and 1974.[48]

Although the drawbacks of the Mills bill clearly seem to outweigh its advantages, the measure did dramatize the need to improve the process for congressional consideration of major tax reform. In 1969 the Ways and Means Committee began its consideration of tax reform with a press release announcing that public hearings would be held on seventeen specified tax reform subjects.[49] The press release reflected many of the same issues discussed in a four volume document containing the comprehensive recommendations of the Johnson Administration's Treasury staff. This document, published by the Ways and Means and Finance Committees prior to the 1969 House public hearings, set forth the Treasury staff's tax reform recommendations and its supporting rationale and served to direct the attention of the witnesses testifying at the public hearings to those issues. The need for an initial focus of the public debate was particularly great in 1969. As the Nixon Administration had just taken office, it was unable to issue its own recommendations until the close of the public hearings.[50] Thus, without the focus supplied by the

---

47 BNA Daily Report for Executives, *supra* note 41, at 1.

48 H.R. 15360, 92d Cong., 2d Sess. (1972).

49 Press Release of Chairman Wilbur Mills, Committee on Ways and Means, January 29, 1969, *Hearings on Tax Reform, 1969, Before the House Committee on Ways and Means*, 91st Cong., 1st Sess., pt. 1, at 5-12 (1969). The seventeen topics were:

1. Tax Exempt Foundations
2. Tax Treatment of Charitable Coutributions
3. Other deductions
4. Standard Deduction
5. Minimum aud Maximum Income Tax on Individuals
6. Tax Treatment of the Elderly
7. Deferred Executive Compensation
8. Income Averaging
9. Taxation of Single Persons
10. Capital Gains
11. Foreign Tax Credit
12. Multiple Trusts
13. Tax Treatment of Busiuess Income
14. Tax Treatment of State Municipal Bonds (sic)
15. Possible Revisions of Tax Provisions Relating to Corporate Mergers
16. Estate and Gift Taxes
17. Treatment of Tax Depreciation by Regulatory Agencies

50 Although the hearings had begun on February 17, 1969, the President's recommendations were not presented until April 22. *Tax Reform Proposals Contained in the Message from the President of April 21, 1969, Before the House Committee on Ways and Means*, 91st Cong., 1st Sess., at 1 (1969). This delay was occasioned by the pressures of time, the President having taken office less than one month before the start of the hearings.

press release and reference to the previous Administration's proposals, the Ways and Means' public hearings might have languished without direction for a considerable period of time.

As in the past, the public hearings in 1969 proved to be an inefficient means of contributing to the members' understanding of the issues or to their proper resolution. The public hearings before the Ways and Means Committee on the Tax Reform Act of 1969 lasted more than two months. During that time more than 600 witnesses appeared, producing over fourteen pounds of testimony. Most of the testimony was in support of the pecuniary interests of the particular witness or of the industry he represented.[51] Much was repetitious and had little impact on committee decisions. Additionally, the committee members' attendance at the hearings varied greatly; on many occasions only two or three Congressmen were present. It is hardly surprising, therefore, that Laurence Woodworth, the Chief of Staff of the Joint Committee on Internal Revenue Taxation, expressed his dissatisfaction with the public hearing process and questioned whether the present procedure "always represents the best use of the Committee member's time."[52]

The public hearing process would be vastly improved if, as Dr. Woodworth has suggested,[53] the committees required that persons wishing to testify submit a written statement in advance of the hearings. This would enable the committee staffs or the Joint Committee staff to summarize the positions taken by each person. The committee could then review these summaries and invite a number of witnesses to submit oral testimony in a manner that would elicit a cross section of opinion without attracting repetitious and irrelevant statements. Additionally, the availability of a complete statement of those witnesses who are selected to appear before the committees would enable Congressmen to prepare questions on the issues raised by their testimony.

The public hearing procedure would also be substantially improved if, prior to the hearings, the members of the committes educated themselves in depth on the issues to be considered. This could be achieved by holding informal meetings among committee members and panels of experts selected from members of the tax bar, academic tax lawyers, public finance economists, and public interest groups. Similar discussions should be held with the Treasury and Staff of the Joint Committee on Internal Revenue Taxation. These preliminary consultations would place Con-

---

51 See text accompanying note 111, *infra*.

52 Woodworth, *supra* note 29, at 408.

53 *Id.*

gressmen in a far better position to question incisively witnesses who appear at the public hearings.[54]

The tax writing committees could improve their ability to deal with more specialized areas of the law by forming subcommittees to develop expertise and make recommendations on particular issues of tax legislation. Thoughtful recommendations made in 1959 on the taxation of partnerships and corporations have languished without committee attention during the past thirteen years.[55] While much of this inattention can be explained by the committee's heavy workload,[56] the formation of subcommittees to consider these matters could have led to some action on several of these recommendations. Estate and gift taxation, a subject which seems certain to be considered in the next tax reform effort, is an ideal example of an issue that would benefit from a subcommittee's attention.[57]

If a subcommittee system is to produce significant benefits, substantial power must be delegated to these bodies. Full review of the subcommittee's efforts by the full committee would result in a duplication of the initial labors and substantially greater inefficiencies. Significant delegation of authority is most important in the case of subcommittees formed by the House Ways and Means Committee. Since the Ways and Means Committee plays a more pivotal role in the initial formulation of tax

---

[54] The Ways and Meaus Committee has used such a procedure in the past. For example, in 1954 the Ways and Means Special Subcommittee on the Taxation of Life Insurance Companies held a few days of informal sessions with representatives from the Treasury, the Joint Committee staff, state insurance commissioners and the life insurance industry. The group then issued a position paper which served to focus debate at the public hearings. *See generally* Curtis, *The House Committee on Ways and Means: Congress Seen Through a Key Committee*, 1966 WISC. L. REV. 121, 126 28 (1966).

[55] For a discussion of the tax treatment of partners, see HOUSE COMM. ON WAYS AND MEANS, 86TH CONG., 1ST SESS., TAX REVISION COMPENDIUM, pt. 3, at 1707 (Comm. Print 1959). For a discussion of tax treatment of corporations, see *id.* at 1767.

[56] In addition to tax matters the Committee has jurisdiction over social security, welfare, health insurance, revenue sharing, trade and tariffs, and the level of the public debt.

[57] The issues of estate and gift tax reform are extremely complex. *See, e.g.*, HOUSE COMM. ON WAYS AND MEANS AND SENATE COMM. ON FINANCE, 91ST CONG., 1ST SESS., U. S. TREASURY DEPARTMENT TAX REFORM STUDIES AND PROPOSALS, pt. 3, at 384-401 (Comm. Print 1969) (discussion concerning revision of the tax treatment of generation-skipping transfers). Moreover, relatively little revenue is involved. The estate and gift taxes produce about $4 billion annually, less than two percent of federal revenues. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT & BUDGET, THE BUDGET OF THE U. S. GOV'T, FISCAL YEAR 1971 (1972) (adjusted figure). If desired, the full committee could provide general goals for the subcommittee. There are numerous other areas of the tax laws that could benefit from subcommittee attention. The tax treatment of small business (Subchapter S) corporations and cooperatives are additional examples.

legislation, its subcommittees will initially bear more significant responsibilities than will the Senate subcommittees.

Finally, Congress would be well-advised to utilize the expertise that it accumulates from consideration of earlier tax reform proposals.[58] The 1973 Congress could benefit from the expertise that remains from the 1969 tax reform effort. That effort attuned most of the committee members to the issues of tax reform, and many have already formed tentative judgments on some questions. Under these circumstances, the ordinary process might be reversed. In 1973, consideration of tax reform could begin with the Joint Committee on Internal Revenue Taxation, composed of the five senior members of both the House Ways and Means and Senate Finance Committees, meeting in executive sessions with Treasury and the Joint Committee staff to draft a committee report containing its recommendations for tax reform.[59] Since the members of the Joint Committee will probably serve on a conference committee when the House and Senate pass tax reform bills, their views concerning appropriate tax reform measures will carry great weight.

The process would be similar in effect to a procedure used in the parliamentary systems of government in Great Britain and Canada. The Government, which in a parliamentary system generally has sufficient control over the legislature to assure enactment of its proposals, will often issue a Green Paper setting forth a tentative description of action it proposes to take. The paper will elicit comment which the Government considers in finalizing its position. A Joint Committee report could serve much the same purpose as the Green Paper, providing a statement of key congressional members' best collective judgment on tax reform issues. In addition, it would offer a useful supplement to the Administration position. Examination of the two documents would provide a relatively reliable indication of the areas in which Congress and the Administration will agree. Persons wishing to testify before the Ways and Means Committee could structure their statements accordingly, concentrating on areas in which they felt they could or should exercise the most significant impact. Thus, the committee could begin its public hearings with testimony more clearly directed to the important

---

[58] Obviously, the bite of electoral politics and the retirement of committee members will cause some attrition of the knowledgeable Congressmen. Nonetheless, many committee members have participated in the consideration and passage of numerous tax bills. Two thirds of the present membership of the House Ways and Means Committee participated in the consideration of the Tax Reform Act of 1969.

[59] The Joint Committee issued preliminary proposals in 1945 which led to the Tax Adjustment Act of 1946.

issues. In most cases the Administration would begin the public hearings with a statement of its position. Subsequent testimony would then probably tend to concentrate on the differences between the Administration position and the Joint Committee recommendations.

Some could object to the practice of opening the public hearings with a statement of position of the Joint Committee since it would tend to weaken the voice of some of the junior members of the tax writing committees who are not on the Joint Committee. This criticism does not seem dispositive. If the subcommittee practice were adopted in conjunction with the Joint Committee's issuance of its position paper, the junior committee members who served on those bodies would gain the opportunity to play an often decisive role in shaping the policy on specific issues. An alternative to the Joint Committee's issuance of of its position paper would be for the House Ways and Means Committee, after meeting in executive session with Treasury and the Joint Committee staff, to issue a statement of position prior to opening the public hearings. By meeting to develop the position paper, the committee members would become well versed in the issues of tax reform at an early stage of the process. Compromises necessary to produce the position paper would illuminate the opposing considerations relative to particular issues. Publication of the position paper would in turn focus the public comment to areas of particular concern to the committee.

Adoption of these proposals would produce a much more orderly and efficient process. The tax reform effort would begin with the Administration's announcement of its position on the major questions, followed by meetings of the Joint Committee or the Ways and Means Committee to develop a position paper. While the formulation of that position paper was going on, other members of the tax writing committees could begin meeting in subcommittee to initiate work on specific issues in discrete areas of the law. Issuance of the position paper would be followed by written comments from the public which would be summarized for the Ways and Means Committee by the Joint Committee staff. The committee could then meet to discuss informally the issues raised by the written comments and to select witnesses for testimony at the public hearings. Since under this procedure the members of the committees would be far more knowledgeable on the issues to be considered in the public hearings, their questioning of the witness would be much more incisive than it is under present practices. Moreover, the actual public hearing process would be considerably more streamlined both in terms of the number of witnesses and the focus of their testimony. The cumulative effect of these alterations in the information-gathering system would be a better informed Congress concentrating on the specific issues that it must resolve in the tax reform effort.

Main Sources of Information:
The Treasury and the Joint Committee Staffs

Regardless of the mechanics of the process for enacting tax legislation, Congress will rely heavily in making its decisions on the information received from two critical sources—the Treasury Department and the Staff of the Joint Committee on Internal Revenue Taxation. It is therefore important that Congress develop means to maximize these bodies' utility as suppliers of data and information.

The Treasury Department often plays a dual role in presenting proposals to the Congress. Its recognized expertise often prompts the tax writing committees to look to Treasury for an objective evaluation of a proposal's impact on the elusive goals of tax equity and simplicity, economic vitality, and administrative feasibility.[60] On the other hand, as the principal representative of the President on tax matters, Treasury is expected to function as a powerful and effective advocate of his proposals.[61] The severity of this conflict of roles generally depends upon the political significance of the issue at hand. For example, Treasury's position on the oil depletion allowance was not controlled by tax equity considerations. By contrast, its testimony before the Ways and Means Committee in May of 1972 concerning the appropriate tax treatment of single and married persons exemplifies thoughtful and objective analysis.[62]

Treasury's need to wear two hats may limit its performance of both roles. It is hard to be sure when a lobbyist is being objective or when an analyst is lobbying; Treasury's dual responsibility thus complicates the congressional decision-making task. But it is not practical to expect Treasury to discard either role. Congress must therefore exercise care in evaluating its testimony.

Congressional staffing in the tax area is atypical. Both the Ways and Means Committee and the Finance Committee have small but very able

---

[60] For a discussion of Treasury's role in the formation of tax proposals, see note 25, *supra*.

[61] Such conflicting duties exist in other executive departments, as the controversies between Congress and the Defense Department illustrate.

[62] *Married Single Hearings, supra* note 9.

staffs which generally concentrate on nontax matters.[63] The primary congressional staff work in tax legislation is performed by the Staff of the Joint Committee on Internal Revenue Taxation. The Joint Committee, established in 1926, now serves primarily to provide a technical tax staff to both the House Ways and Means Committee and the Senate Finance Committee. This expert tax staff, composed of lawyers, economists, accountants, and statistical analysts, is continuously at the disposal of all members of the Ways and Means and Finance Committees.[64]

The Joint Committee staff and the Treasury follow a tax proposal from its genesis to final enactment. Both are present at the public hearings, where the Secretary of the Treasury is usually the key witness. Both are usually invited to attend the executive sessions of the Ways and Means, Finance, and Conference Committees—the Treasury to state the Administration position and answer questions; the Joint Committee staff to provide information, analysis, and recommendations. Both are involved in drafting statutory language and committee reports.[65] At every stage of the legislative process, the Congress relies heavily on information and analyses supplied by both. A tax reform effort therefore demands that Congress obtain the best possible information from these two sources. New kinds of information must be developed, and the presentation of information should be refined.

Coordination of Tax Proposals with Direct Governmental Actions

Tax proposals are sometimes advanced to further governmental objectives other than revenue-raising or control of fiscal policy. The proposal to allow a tax credit for tuition paid to private schools provides

---

[63] However, the Chief Counsel of each of these staffs is an experienced tax authority. Each staff also has two attorneys who devote their time exclusively to tax matters.

[64] In addition to the Chief of Staff, there are twenty-two professional persons on the staff: thirteen tax lawyers, four economists, four revenue estimators and one accountant. Woodworth, *supra* note 29, at 406.

[65] The House and Senate Legislative Counsels are responsible for drafting the statutory language with the assistance of the committee staffs, the Joint Committee staff, the Treasury and the Internal Revenue Service. The Joint Committee staff is responsible for the committee reports, which it prepares after consultation with the other staffs. There have been suggestions that individual committee member's staffs should be present in executive sessions to advise them. *See, e.g., Married Single Hearings, supra* note 9, at 65 (Testimony of Albert H. Turkus). One objection to the procedure is that it might encourage some members to be absent, leaving much of the discussion to be carried on by a group of aides. *Woodworth, supra* note 29, at 409.

The invitation to attend the executive session is not automatically extended. In 1972 the Treasury Department was not invited to appear before the Senate Finance Committee.

one recent example.[66] Many proposals of this type have become law; the system is replete with provisions for special tax treatment to encourage particular activities or investments. Important examples of tax legislation of this kind are the deduction for percentage depletions[67] and the exemption for interest from state and local bonds.[68] Other provisions, such as the marijuana tax,[69] have been specifically designed to discourage certain activities. Recently, proposals have been made to tax the lead content of gasoline and emissions of sulphur into the atmosphere.

The decision to use the tax system for such purposes may carry substantial risks.[70] The tax proposal may be a less efficient means of fulfilling the social objectives than resort to direct regulation or a subsidy program. In some cases, the tax program may duplicate or contradict other direct subsidies or regulations; and it quite often will introduce new inequities and complexities into the tax law. The 1969 tax reform effort focused on many of these provisions and this will undoubtedly reoccur when the Congress next considers tax reform. Still, only a bare start toward identifying and evaluating these problems has been made.

In recent years the Treasury has published a "tax expenditure budget" containing estimates of the revenue foregone because of certain tax provisions.[71] The conference report on the Revenue Act of 1971 directed the Treasury and the Joint Committee staff to prepare a more detailed report on these provisions which should be available when

---

66 *See Hearings on Tax Credits for Nonpublic Education*, 92nd Cong., 2d Sess. (1972).

67 INT. REV. CODE OF 1954, § 613.

68 *Id.* § 103.

69 *Id.* §§ 4741, 4751, *repealed in* Comprehensive Drug Abuse Prevention Control Act of 1970, Pub. L. 91-513, 84 Stat. 1292 (Oct. 23, 1970).

70 *See*, Surrey, *Tax Incentives at a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970); Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1970).

71 *See, e.g.*, U.S. DEPARTMENT OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF FINANCES 339 (1968). *See generally, Statement of Edwin S. Cohen Before the Joint Economic Comm. Congress of the United States*, Dept. of the Treasury News, July 21, 1972 [hereinafter cited as *Cohen J. E. C. Statement*]. The Revenue Act of 1971 as passed by the Senate would have amended the Budget and Accounting Act to require the budget submitted by the President to contain estimates of revenue losses from tax provisions and estimates of indirect expenditures through the operation of the tax system. In conference a decision was made requiring the Treasury to submit such estimates to the House Ways and Means Committee, the Senate Finance Committee and the Joint Committee on Internal Revenue Taxation and to publish such information in the Annual Report of the Secretary of the Treasury. *See* H.R. REP. 92-708, 92d Cong., 1st Sess. (1971).

Congress considers tax reform in 1973.[72] Hopefully, this report will coordinate information and analyses of tax subsidies with information describing direct government programs in related fields. It is important, for example, that both the tax and appropriations committees know that the estimated revenue loss in 1971 from special provisions in the natural resource area was 60% of the direct expenditures; that the loss in commerce and transportation was 80%; and that the tax loss in community development and housing amounted to 140% of the direct expenditures.[73]

Congress should not be satisfied to receive this data only with respect to existing tax provisions. The information should be updated annually and each new proposal should be subjected to this scrutiny. For example, in 1969, when Congress enacted special tax incentives to encourage purchases of railroad rolling stock[74] and coal mine safety equipment,[75] it gave little attention to these problems. The rapid write-off afforded railroad rolling stock was a substitute for the investment credit repealed by the 1969 Act.[76] In its testimony before the Senate Finance Committee, Treasury opposed the railroad rolling stock proposals but did not present any details about direct subsidies or regulations bearing on transportation priorities.

Since 1969, some tax proposals have been subjected to greater scrutiny. The Ways and Means Committee rejected the President's proposal to tax the lead content in gasoline in part because of exposure of conflicts between the tax proposal and pollution regulations during the public hearings[77] and the executive sessions. But the Ways and Means Commit-

---

[72] *Cohen J. E. C. Statement, supra* note 71, at 9-10.

[73] The percentage computations represent the ratio of tax expenditures over direct expenditures. Direct expenditures, classified according to the functional categories of government expenditure used in the budget, were derived from the 1971 estimates as they appear in the 1972 budget. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT & BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, Fiscal Year 1972, at 138 (Education & Manpower), 120 (Commerce & Transportation), 129 (Housing & Community Development). Tax expenditures for calendar year 1971 were classified in similar fashion. *Cohen J.E.C. Statement, supra* note 71, Appendix D, at 1-2. For similar comparisons for 1968, see Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures,* 83 HARV. L. REV. 705, 709-10 (1970). Caution must be exercised in making such comparisons because of revenue estimating difficulties. See notes 85-103 *infra* and accompanying text.

[74] INT. REV. CODE of 1954, § 184.

[75] *Id.* at § 187.

[76] *See* S. REP. No. 91-552, 91st Cong., 1st Sess. 252 (1969).

[77] *See Hearings on Tax Recommendations of the President Before the House Ways and Means Comm.,* 91st Cong., 2d Sess. (1970).

tee failed to command consideration of this issue when it examined the President's proposal for a tax credit for tuition payments to private schools. Even though Secretary Richardson of the Department of Health, Education and Welfare testified with the Secretary of the Treasury, the committee did not require these witnesses to evaluate the tax proposal in conjunction with direct expenditure programs and justify the value of the program in the context of HEW's overall education program.[78]

The practice of enacting new tax incentives with little regard for the extent and nature of direct government programs should cease. Congress should require the Treasury and the Joint Committee staff to provide it sufficient information to make informed judgments on the relationship between tax provisions and other government programs and should weigh this consideration in determining whether existing tax provisions should be retained and new tax proposals enacted. Tax proposals to further nonrevenue raising objectives simply cannot be properly evaluated without this kind of analysis.

Ongoing Statistical and Economic Analyses

In addition to meeting the need to coordinate direct expenditures and tax expenditures, Congress should continually study and evaluate the tax system to assess its fairness and determine its efficiency in performing its economic functions. Congress and the staffs now fail to give adequate consideration to the achievements or failures of the programs they have enacted. And, by not looking back to assess adequately the programs they have enacted, Congress loses a valuable opportunity to measure the possibility of success of proposals under consideration.

Review of the recent history of tax increases and decreases to further short-term fiscal policies reveals the importance of this continual evaluation. In 1971 President Nixon proposed four major tax measures to stimulate economic growth and recovery: elimination of the automobile excise tax, tax reductions for individuals, restoration of the investment credit,

---

[78] *See generally, Hearings on Tax Credits for Nonpublic Education Before the House Ways and Means Committee*, 92nd Cong., 2d Sess., pt. 1, at 1-60 (1972). A subject of particular concern on this measure is the constitutionality of this method of encouraging private education. In Essex v. Wolman, 41 U.S.L.W. 3167 (Oct. 10, 1972), the United States Supreme Court upheld a lower court decision invalidating an Ohio statute that permitted partial reimbursement of tuition to parents with children in private schools. The lower court had determined that the primary recipients of the provision were religious institutions and that the act violated the First Amendment proscription. Some have suggested that granting a tax credit would not violate the constitutional prohibition.

and liberalization of depreciation allowances. Tax reductions for individuals, the investment credit, and liberalized depreciation allowances were proposed by President Kennedy in the early 1960's when he was faced with similar economic problems. The investment credit was removed in 1966, reinstated in 1967, and repealed in 1969. Individual income taxes were increased in 1968 and reduced in 1970. The automobile excise tax was reduced in 1965 but the reductions postponed in 1969 and 1970. No one can be sure of the precise effect of any one of these changes, much less of them all. While general trends resulting from these changes have been noted, much additional information and analysis is needed if the Government plans to continue, roughly on a biannual basis, to use the tax system to effectuate fiscal policies.

The 1971 depreciation revision provides a useful illustration of the problem. Institution of the new ADR system of depreciation which provided greater depreciation allowances for business assets was hotly contested. Opponents alleged that it would be a relatively inefficient implement of fiscal policy. Treasury contended otherwise, citing for support the general success of President Kennedy's program. The amount of revenue involved was substantial—an average of almost $4 billion was estimated to be lost annually by the new system. Unfortunately, the decision on this issue had to be made without adequate data reflecting the effect of the similar liberalization of depreciation allowances made nine years earlier. Information on the depreciation lives of business assets was simply not available. And, while the new depreciation system specifically remedied the problem of gathering information on depreciation lives,[79] the general problem remains.

[79] A comprehensive system of depreciation accounting is prescribed by the ADR System, requiring in particular the use of closed-end vintage accounts under which assets are accounted for by year of acquisition. Taxpayers are required to file annual schedules with their tax returns providing information on asset acquisitions and asset retirements by vintage accounts, showing the amount, type, and age of assets retired. The required information also includes experience with respect to the repair, maintenance, rehabilitation, or improvement of assets in each guideline class.

This system of depreciation accounting and information reporting will enable the Treasury Department for the first time to compile annual data on a systematic basis as to the periods of actual use of property which is subject to depreciation. Further, the system will provide data on repair and maintenance expenditures that will permit the refinement of rules for expensing or capitalizing such expenditures. In connection with the ADR system, the Office of Industrial Economics was established in the Internal Revenue Service to collect and review these data and other materials. This will provide a basis in the future for establishing or changing guideline classes, guideline lives, the ranges provided for various guidelines classes, the repair allowances for various guideline classes, and other elements of the ADR system. ADR PAMPHLET, *supra* note 7, at 8-9.

Congress presently receives too little analysis of information concerning the effects of past changes. Once a provision has been enacted, it is often forgotten. It becomes imbedded in tax law, removable only after presentation of overwhelming evidence of its inefficiency. Congress has recently shown an increasing awareness of this problem and has begun to take steps to force periodic reconsideration of tax measures. The 1969 Act provides that certain measures expire five years after passage.[80] Congressman Mills' 1972 Tax Policy Review Act proposal also reflects concern for this problem.[81] But the shortage of analysis remains and the tax reform effort suffers without it.

The need for consideration of the effects of the actual operation of existing provisions will be particularly acute in 1973 due to the magnitude of the revisions enacted in the 1969 tax reform effort. The 1969 Act revamped the tax treatment of charitable contributions, private foundations, income from capital gains and earnings, real estate depreciation, and percentage depletion, among others. Every available research tool must be utilized to evaluate the 1969 changes and to use this information in projecting the potential effects of future changes.[82] Congress must receive this kind of evaluation before it can intelligently consider further alterations of the tax structure.

In one major respect, the substantive tax law inhibits evaluation of the fairness of the tax system. In determining effective rates of tax or comparing tax rates of individuals, analysts typically begin with statistics of income based on "adjusted gross income" classes.[83] Adjusted gross income, as defined in the Internal Revenue Code, comes closer to a net income concept than any other item on tax returns. But, inconsistencies in the Code definition of adjusted gross income distort analysis. Many items of income are not encompassed within the Code definition. For example,

---

[80] *See, e.g.,* INT. REV. CODE OF 1969, § 167(k) (relating to rehabilitation of low-income housing). This provision was retained for certain new incentives enacted in 1971. *See, e.g.,* INT. REV. CODE OF 1971, § 188 (relating to the amortization of certain expenses for on-the-job training and child care facilities). The Treasury should be required to submit to Congress periodic reports on the efficacy of tax provisions and to make these publicly available.

[81] See text accompanying notes 42-48, *supra.*

[82] The need for ongoing analysis also exists with respect to proposals which are not enacted in a particular year but which may be reproposed in subsequent years. Examples of such proposals are the taxation of capital gains at death, tax credit for political contributions, and interest subsidies for taxable state and local bonds.

[83] *See, e.g., Hearings on the Economics of Federal Subsidy Programs Before the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee,* 92d Cong., 1st Sess., at 59-73 (testimony of Joseph A. Pechman and Benjamin A. Okner).

only one-half of capital gains income is generally considered within the adjusted gross income concept and no income from tax exempt interest is included in the Code definition. Moreover, while expenses incurred in producing business income are deducted in computing adjusted gross income, expenses incurred to produce investment income are not. These investment expenses are treated in the same way as personal deductions such as charitable contributions and state sales taxes. Thus, a person who incurs $200,000 of business expenses to produce $200,000 of income will have adjusted gross income of zero, while one who incurs $200,000 of investment expenses to produce $200,000 of income will have $200,000 of adjusted gross income even though his net income was zero. This latter individual will be described as having $200,000 of adjusted gross income and paying no tax, and his inclusion in the $200,000 adjusted gross income class will lower the effective tax rates for that class. The business taxpayer, whose net income is the same, will be included in the class of taxpayers with zero adjusted gross income. These inconsistencies make meaningful analysis even more difficult. Thus, Congress should alter the statutory definition of adjusted gross income to produce a more consistent and more accurate approximation of a net income concept and thereby facilitate needed study of the tax system.[84]

Revenue Estimates

One question invariably must be answered before a decision to support a change in the tax laws is made: "What is the revenue effect"? If the proposal is one to implement fiscal policy, revenue considerations will dictate the scope of the recommended changes. If the revenue loss from the change appears too great, the measure will often be rejected or, at a minimum, substantially modified to decrease the loss. When the issue is tax reform, Congressmen will often wish to produce a "balanced" package, offsetting the revenue gained from revenue-generating tax reforms with tax relief provisions usually designed to lessen the burden of low and moderate income taxpayers. On many occasions during congressional consideration of the 1969 Act, members of the Ways and Means and the Senate Finance Committees would take out their pencils and

[84] Speech of Edwin S. Cohen before the Federal Tax Institute of New England, Boston, Mass., April 29, 1972, at 12. There are difficulties in attempting to construct a perfect definition of adjusted income. For example, tracing interest expenses to income presents particularly difficult problems. In addition, other inconsistencies afflict the present definition of adjusted gross income. Moving expenses, for instance, are deducted before arriving at adjusted gross income, but union dues and child care expenses are not.

begin adding the revenue losses and gains from the bill's various provisions. The total estimated gains from the tax reform provisions of the 1969 Act had a limiting effect on the size and scope of the tax relief measures. For example, revenue cost is an important reason why the standard deduction today is limited to $2,000.[85] Moreover, the 1969 tax relief provisions were phased in over a number of years because of revenue considerations.[86] Since the revenue projections may dominate tax policy decisions, the accuracy of the estimates is a subject of critical importance.[87]

If, as many expect, the next round of tax reform is debated at a time when a tax increase is considered necessary, revenue considerations may again dominate the decision-making process. Examination of suggested modifications of the present treatment of property at death affords an example of the impact of revenue considerations. Under present law if a taxpayer owns property at death, no income tax is collected on the increase in value of the property that occurred during the period of his ownership. Senator McGovern proposed to tax the appreciation in value of such assets, and his proposal was estimated to produce $4 billion in revenue by 1975.[88] In 1968, the Treasury staff advanced a similar proposal, but limited the tax to gains that accrued after enactment of the new provision and coupled the new provision with an equivalent reduction in estate taxes.[89] Thus, the 1968 Treasury staff proposal would not have produced an amount of annual revenue corresponding to that of Senator McGovern's proposal until at least ten years after enactment, and the increase in revenues would have been offset by the estate tax reduction.[90] The exemption of pre-enactment gains was apparently included in the 1968 Treasury proposal because it was considered inequitable to tax gains which had accrued prior to enactment. The estate tax reduction was designed to maintain the existing level of deathtime taxes. But the need for revenue outweighed these considerations when Senator McGovern advanced his proposals; both exemptions were abandoned.[91]

Notwithstanding the critical significance of revenue estimates in the

---

85 *See* MARRIED SINGLE HEARINGS, *supra* note 9, at 78.

86 *See* GENERAL EXPLANATION OF THE TAX REFORM ACT, *supra* note 19, at 13-16.

87 For a more detailed discussion of the subject, see R. BLOUGH, *supra* note 12, at 287, 299-303.

88 Summary of McGovern's Proposals for Federal Tax Reform, *supra* note 4.

89 *See generally* TAX STUDIES AND PROPOSALS OF THE UNITED STATES TREASURY DEPARTMENT 91ST CONG., 1ST SESS., pt. 3, at 331-40, 355-57 (Comm. Print 1969).

90 *Id.*

91 Summary of McGovern's Proposals for Federal Tax Reform, *supra* note 4.

enactment of tax proposals,[92] few people outside of a small group of economists know very much about the process of revenue estimating. Many tax lawyers are unaware of the importance of the estimates, and the press rarely questions their accuracy. More importantly, decision-makers in the Executive branch and the Congress tend to accept estimates without attempting to make a qualitative distinction as to their comparative reliability. If Congress is to maximize its reform effort it must find better ways to evaluate the projections on which it relies.

On the spending side of the budget, allocations to various programs can be made with a somewhat greater degree of certainty. Although certain spending items are "uncontrollable," the cost of a particular program will generally not exceed the amount appropriated. Thus, there typically comes a point when the government must stop writing checks. Not so on the revenue side. Revenues foregone through a particular tax provision can be virtually boundless, limited only by the ability and willingness of persons to engage in the activity that enjoys tax-favored status.

Because revenue estimates are projections of future events, they are necessarily uncertain. Although the Treasury Department and the Joint Committee staff do an admirable job of predicting the impact of proposed tax measures, the difficulty of the task renders uniformly accurate projection impossible. For example, in 1969 the new minimum tax on individuals was estimated to produce close to $300 million in revenue in 1970;[93] less than $117 million was actually realized.[94] The primary reason for the disappointing revenue production was an unexpected turn of events: 1970, a year of recession, produced far less capital gains income than was anticipated in 1969, the year in which the estimate was made.

While uncertainties are always present to some extent, revenue estimates range from very reliable projections to educated guesses. Several factors affect the reliability of an estimate. Most important is the quality of underlying data from which the estimate is derived. The best data is found in the Treasury tax models derived from the *Statistics of Income* which is based on information taken from tax returns. Data derived from

---

92 Congress now requires that the committees provide a revenue estimate with any reveuue measure, projecting its anticipated revenue gains or losses for the following year. 2 U.S.C. § 190(j) (Supp. 1972).

93 GENERAL EXPLANATION OF THE TAX REFORM ACT, *supra* note 19, at 20.

94 INTERNAL REVENUE SERVICE, PRELIMINARY REPORT, STATISTICS OF INCOME—1970 INDIVIDUAL INCOME TAX RETURNS 24 (1972).

sources other than tax returns, such as from the Census Bureau or the Bureau of Labor Statistics or National Income Statistics, ordinarily produce less reliable revenue estimates. Income as defined by the Census Bureau includes transfer payments, such as social security payments, which are excluded from income under the Internal Revenue Code. Similarly, census information is taken from "households" which may include one tax return or several. Accounting for income tax purposes may differ from that used for other purposes. The data from sources other than tax returns must be adjusted to take these differences into consideration. The accuracy of the data therefore depends heavily on the validity of the adjustments. By contrast, when tax return data is used no such adjustments are necessary. Thus, an estimate of the revenue loss associated with a specified increase in the standard deduction would be quite reliable since the Treasury tax model contains tax return data concerning the itemized deductions presently claimed in excess of the standard deduction. However, the revenue effect of a proposal to reduce the standard deduction would be far more difficult to estimate since no tax return information currently exists that would permit quantification of the itemized deductions of individuals who lowered their taxes by taking the standard deduction.

A second major factor contributing to the difficulty of achieving uniform reliability of projections is the inability to determine accurately how the change will be received by taxpayers. Thus, revenue estimates of the effect of proposals which are likely to induce changes in patterns of behavior are typically less trustworthy than estimates of proposed changes which function independently of persons' reactions. Projections of the revenue effect of changes in the amount of the personal exemption are extremely sound. Data concerning the present revenue loss from personal exemptions is readily obtainable from the Treasury tax model and people are not likely to have additional children, go blind, or reach age 65 faster because the personal exemption is increased from $750 to $800. In contrast, the estimated revenue effects from the changes in withholding under the Revenue Act of 1971 proved to be in error by $4-5 billion for calendar year 1972[95]—an error of over 500 percent. In making the projection, estimators had assumed that people would change their withholding forms to minimize the

[95] *Compare* S. Rep. No. 92-437, 92d Cong., 1st Sess., 17 (1971), *with Hearings Before the House Committee on Ways and Means on the Subject of Administration Request for Increase in Public Debt Ceiling*, 92d Cong., 2d Sess., 32 (June, 1972) (Testimony of George P. Schultz).

amount withheld by claiming all available withholding allowances. In effect, those who failed to do so were making an interest-free loan to the government which is, of course, economically unwise. Nonetheless, a significant number of people preferred to allow the Government to overwithhold and refund tax when they filed their return rather than confront the situation which had existed the previous year when many persons were underwithheld and were forced to make large tax payments when they filed their returns. Revenue estimators cannot attempt to predict such economically irrational behavior.[96]

Often these distorting factors operate simultaneously, making accurate projection even more difficult. For example, the concurrence of reliance on second-best data sources and the difficulty of predicting taxpayer response to change makes the estimates of revenue which would be obtained from taxing currently tax-exempt interest on state and local bonds fairly uncertain. Tax exempt interest is not required to be reported on individual tax returns and information about individual holdings of tax-exempt bonds is sketchy.[97] Furthermore, in order to make meaningful projections, interest rates must be estimated and correlated with individual holdings.[98] Finally, predicting personal and market reactions to changes in the taxability of state and local obligations is quite difficult. Nevertheless, it is fairly well accepted dogma that taxing state and local bond interest without simultaneously providing a direct interest subsidy would produce approximately $2.2 billion in federal revenue.[99] No allowance is made for the highly conjectural nature of that figure; no attempt is made to give that estimate less credence than other more trustworthy projections.

The most difficult revenue estimates are those of proposals to reduce tax benefits that are available through complex legal arrangements in specialized areas. For example, it was virtually impossible to estimate accurately the revenue to be gained by the provision in the 1969 Act

---

[96] Some portion of the overwithholding was due to the manner in which the withholding changes were implemented. Many employees were not made aware of the new rules and thus had inadvertant overwithholding. The Internal Revenue Service did not require employees to file new withholding forms.

[97] This is why the Senate Finance Committee in 1969 would have required taxpayers to disclose their tax-exempt interest on their tax returns. SENATE COMM. ON FINANCE, REPORT TO ACCOMPANY H.R. 13270 S. REP. No. 91-552, 91st Cong., 1st Sess., 218-19 (1969). This provision was not adopted.

[98] One additional problem is the age of the basic data. The basic data source is the Federal Reserve survey taken in 1962. Although this is constantly updated, the basic source is now rather old.

[99] *Cohen J.E.C. Statement, supra* note 71, Appendix D, at 2.

which limits the deductibility of interest incurred in certain investment activities.[100] Much of the interest to be affected by the new provisions was reflected in tax returns of partnerships and thus was not readily available from tax return data for individuals. Furthermore, the provision is extremely technical and complex, applying in different ways under varying circumstances. While much interest on indebtedness incurred prior to the effective date of the new provision was exempted from its impact, the exemption often depended on the particular circumstances in which the indebtedness was incurred. Notwithstanding these difficulties, the interest provision was estimated to produce $20 million in revenue and this estimate was in no way distinguished from perfectly reliable projections such as the revenue loss from the increase in the personal exemption. Similar examples abound. The revenue loss from new tax incentives for particular investments such as in pollution control or job training and child care facilities are extremely difficult to project. Likewise, estimates of revenue to be gained through increasing the estate tax on generation-skipping trusts are little more than sophisticated guesses.

Additional factors affect the reliability of revenue estimates. Typically, estimates are made with the assumption that no other changes in the law are made at the same time. Thus, if two or more provisions are changed the impact may be synergistic or may produce less revenue effect than would the sum when calculated independently.[101]

---

[100] INT. REV. CODE OF 1954, § 163 (d) [originally enacted as Tax Reform Act of 1969, § 221, Pub. L. No. 91-172, 83 Stat. 487 (1969)]. *See* GENERAL EXPLANATION OF THE TAX REFORM ACT, *supra* note 19, at 20.

[101] Two elements of the Asset Depreciation Range (ADR) system, as originally proposed, illustrate this point. The new first-year convention was expected to lose $1.8 billion in revenue in 1971 and the ability to use depreciation lives up to 20 percent shorter than the guideline lives was estimated to cost $700 million of revenue for 1971. Together, they were estimated to cost $2.8 billion in 1971. By 1978, the process was expected to reverse. The first-year convention was estimated to cost $800 million and the 20 percent shortening of lives, $3.9 billion, but the total loss estimated for 1978 was only $3.9 billion.

In cases such as these, other technical difficulties may have a profound influence on the reliability of revenue estimates. For example, the order in which two or more proposals are considered often has a dramatic impact on the predicted revenue effect. Consider a proposal to increase the maximum standard deduction, which under present law is 15 percent of adjusted gross income with a $2,000 ceiling, to 20 percent with a $5,000 ceiling. Calculating the rate and ceiling changes independently will produce the following estimates: raising the ceiling to $5,000 without increasing the 15 percent rate would cost $1.3 billion; raising the rate to 20 percent without increasing the ceiling would cost $1.0 billion. Raising the rate to 20 percent *and* the ceiling to $5,000 would be estimated to cost $4.7 billion. If you treat the change in rate as coming first, it would

Estimates are ordinarily "first-level"; no projection is made of secondary or "feedback" effects of the change in economic activity which may result from the tax change. Estimates of these effects often vary greatly among economists. When Treasury proposed the new ADR system of depreciation, one economist testified that no revenue feedback would occur; another testified that the revenue feedback would be so great as to translate an annual "first-level" revenue loss of almost $4 billion into an annual $2 billion revenue gain.[102]

Finally, the length of time available to make the estimate may affect its reliability. Congress often calls for instantaneous predictions of the effects of complex changes. Certainly many of these estimates could be improved if more time were available.[103]

---

be estimated to cost $1.0 billion with $3.7 billion attributed to raising the ceiling. By treating the increase in the ceiling as coming first, one would estimate a $1.3 billion loss from that change with the rate change estimated to lose $3.4 billion. By changing the order in which estimates are made, policy makers can dramatically affect the revenue estimates attributed to particular changes in the law. Many estimates are interdependent. For example, revenue estimates from changes in particular itemized deductions, such as eliminating the deduction for home mortgage interest, depend upon changes in other itemized deductions and in the standard deduction. And the revenue effect of changes in percentage depletion are dependent on what change, if any, is made in the treatment of intangible drilling expenses.

[102] See note 7, *supra*.

[103] For at least the past 20 years, estimators have been subject to tremendous pressure from legislators who demand that estimates be produced quickly. For a discussion of this problem, see R. Blough, *supra* note 12, at 298-99.

The uncertainties of hastily derived revenue estimates is well illustrated by the deliberations on Senator Miller's amendment to the minimum tax provision in the Tax Reform Act of 1969. Senator Miller's amendment substantially altered the Senate Finance Committee bill, increasing the minimum tax rate from five to ten percent and allowing taxes paid under the regular income tax to be deducted from the total preferences in determining the preferences to which the ten percent rate would be applied. The Senator defended these amendments, in part, on the grounds that they would produce $40,000,000 more in revenues than the Senate Finance Committee bill. The amendment easily carried the Senate. 115 Cong. Rec. S. 16371-74, S. 16387-90 (daily ed. Dec. 10, 1969). The Miller amendments remained substantially intact in the conference committee report and were enacted into law. Later, when the Reform Act was sent to the President, the Joint Committee staff published final revenue estimates which predicted that the Miller-amended minimum tax provision would produce $20,000,000 less than the Senate Finance Committee version. Staff of the Joint Committee on Internal Revenue Taxation, 91st Cong., 1st Sess., Revenue Estimates Relating to the House, Senate and Conference Versions of H.R. 13270—Tax Reform Act of 1969, at 9 (Comm. Print 1969).

The history of sections 452 and 462, which were originally enacted as part of the 1954 Code but repealed retroactively in 1955, illustrates how disasterous uncritical reliance on estimates can be. In the case of those sections, it became clear only after enactment that the estimate was extremely conservative and that immense revenue losses were

The myriad of factors and assumptions that can affect reliability mandates a qualitative distinction of revenue estimates. But Treasury and the congressional committees typically do not attempt to classify estimates by reliability. Reliable and unreliable estimates are added together, and substantive tax decisions are routinely based on the totals. Since revenue estimates are frequently dispositive of issues, they should be used more carefully. Congressmen should inquire into the methodology of estimates, not to master the techniques of revenue estimating but to evaluate the reliability of the estimates that are important to their decisions. Treasury and committee staffs should supply a range of revenue estimates. For example, it is better to know that a given proposal is estimated to produce $200-500 million of revenue than to be given a single $350 million estimate. Not only would such a figure be more accurate, the breadth of the range may provide insight into the reliability of the estimate. Finally, Congress should consider establishing categories for revenue estimates depending on their potential accuracy, and should require the Treasury and the Joint Committee staff to identify which category estimate it is supplying.[104] The Treasury and the congressional committees should spare no effort to make their use of revenue estimates more intelligent, more thoughtful, and more rational. Their impact at every stage of the process is far too crucial for the present practice to continue.

Who Speaks for the Public Interest?

Improving the information presented to Congress by Treasury and the Joint Committee staff will not ensure that the committees receive the most complete information possible. These bodies are not omniscient on tax questions. Moreover, although the Treasury Department and the Joint Committee staff traditionally have represented the public interest, political factors limit their options before Congress and sometimes render unfettered objective presentation impossible.[105] Perhaps the best that can

---

almost certain to result. For a full discussion of these sections, see New York Commission on Tax Policy, *supra* note 8, at 342-43.

[104] It should be noted that because of the collaboration, in arriving at an estimate, between revenue estimators on the Treasury staff and estimators on the Joint Committee staff, the check of each staff on the work of the other is vitiated. In effect, ouly one estimate is produced. This is necessitated in part because of Congress' lack of access to a computer. This absence of computer facilities hampers Congress' ability to deal independently with many issues of tax policy and budget-making.

[105] See text accompanying notes 60-62, *supra*.

be hoped is that the political influences do not affect the two on the same issues.

The Treasury Department recently testified about the federal tax structure before the Joint Economic Committee, presenting information concerning the distribution of benefits from "tax preferences" among different income classes.[106] The Tax Reform Research Group, an organization created in 1970 by Ralph Nader, suggested that the data would be more indicative of the distribution of tax preferences if it included information about the number of taxpayers in each income class.[107] For example, Treasury had indicated that the $10,000-$15,000 class received $719 million in deductions for interest paid on mortgages on owner-occupied homes, while the wealthiest group, those with incomes over $100,000, received $32 million. The Nader group supplemented this information by showing that the average benefits from the provision were $50.97 to a taxpayer in the middle-income group and $410.78 to a taxpayer for the highest income class.[108] Such additional perspectives, the inevitable result of increased public participation in the information-gathering process, would offer the legislators substantial assistance in understanding the complex questions they must resolve.

If congressional decision-making is to be both intelligent and sensitive to the needs of the various sectors of the American populace, added inputs from the public interest sector are imperative. Wilbur Mills has voiced this sentiment:

> The government comes at us from one side with its bills, the high income brackets come at us from the other side with their lawyers and consultants. What the average taxpayers need is a lobby of their own.[109]

---

[106] *Cohen J.E.C. Statement, supra* note 71, at Appendix E.

[107] N.Y. Times, Aug. 29, 1972, at 20, col. 1. Washington Post, Aug. 29, 1972, at 2, col. 6.

[108] Other data might be relevant here. Decision-makers might be interested in statistics showing the monetary benefits as a percentage of the total tax obligation of the respective tax groupings. Similarly, a study might be made illustrating the aggregate income exclusions and deductions rather than just the tax loss. The essential point is not to downgrade the usefulness of the figures presented but rather to demonstrate that new perspectives flowing from increased public presentation in the information-gathering process will almost certainly contribute to improved understanding by the committee members. However, by making unsupported charges that the Treasury data was "deliberately misleading," the Nader Group called into question its own objective status and thus diminished its effectiveness as a spokesman for the public interest. For a statement of the charges made by the Nader group, see Washington Post, Aug. 29, 1972, at 2, col. 5. Similar charges have been made by this group in the past.

[109] Wilbur Mills, *quoted in* Boston Globe, Feb. 11, 1969.

Typically, Treasury's public testimony is followed by a parade of witnesses representing particular financial interests. In the 1969 public hearings on tax reform, the tax-writing committees heard witnesses supporting the favored tax treatment of farms, investments in real estate, and natural resources; persons from churches and universities concerned with possible reductions in tax-deductible charitable contributions; and representatives of state and local governments threatened by possible loss of tax-exemptions for interest on state and local bonds.[110] Of the 267 witnesses who testified during the three weeks of Senate hearings on the Tax Reform Act of 1969, over 225 or 84 percent represented particular industries or groups with a financial stake in the committee's decisions.[111] The few public spirited witnesses who had no pecuniary interest at stake fell into four general categories: members of Congress, academicians, representatives of bar and accountants' associations, and representatives of "public interest" organizations.[112] A measure described in the report of the Ways and Means Committee as a tax reform bill unsurpassed in substantive scope[113] inspired testimony before the Senate Finance Committee of only eighteen members of Congress; seven academicians; representatives from one bar association; representatives from one association of accountants; and twelve "public interest" organizations.[114]

A more detailed examination of testimony before the Senate Finance Committee hearings on the Tax Reform Act of 1969 on behalf of the public interest is revealing. Of the eighteen members of Congress who testified before the committee, seven spoke primarily about the impact

110 *See Hearings on H.R. 13270 Before Sen. Finance Comm.*, 91st Cong., 1st Sess. (1969) [hereinafter cited as *1969 Sen. Finance Comm. Hearings*]; *Hearings on H.R. 13270 Before House Ways and Means Comm.*, 91st Cong., 1st Sess. (1969) [hereinafter cited as *1969 House Ways and Means Comm. Hearings*].

111 *1969 Sen. Finance Comm. Hearings, supra*, note 110.

112 There is no simple way to categorize testimony as representing public or private interests. For the purposes of this Article, private interest testimony is defined as testimony given by a witness who has a direct personal financial interest, or who represents an organization which has a direct financial interest in the legislation. There are obvious problems with such a definition, because every citizen has some immediate interest in tax legislation.

113 House Comm. on Ways and Means, Report to Accompany H.R. 13270, H.R. No. 91-413, pt. 1, 91st Cong., 1st Sess. 1 (1969). The opening paragraph reads as follows:

> The Tax Reform Act of 1969 (H.R. 13270) represents a substantive and comprehensive reform of the income tax laws. Your committee is not aware of any prior tax reform bill of equal substantive scope.

114 *1969 Sen. Finance Comm. Hearings, supra* note 110. Twenty-three Congressmen testified but five merely introduced other witnesses and gave no personal testimony. *Id.*

of proposals on industries that were essential to the economy of their states.[115] Although in some instances this testimony added little new information to the arguments proposed by industry lobbyists, it did lend support to the industry statements. Thus, while limited in scope, the testimony of these seven Congressmen, was valuable to the committee. The remaining eleven Congressmen dealt with some of the broader issues of the 1969 Act—the need for tax reform, for simplicity in the tax laws, and for tax relief. Several of the congressional witnesses entered into the record prepared statements which examined particular problems with varying degrees of sophistication. Other more general testimony, while perhaps not helping the committees cut through the legal and economic complexities of the legislation, provided an effective and occasionally eloquent articulation of popular views on taxation.

A number of elected state officials testified. In most cases, their testimony was solely to oppose any alteration in the tax exempt status of municipal bonds. Nine mayors and seven governors presented arguments to the committee on the bond issue; none dealt with any other questions of public policy crucial to the Tax Reform Act of 1969. An unusual opportunity for gathering testimony on the public interest was thus lost. These public officials, coming from as far as California and Hawaii, had invested a considerable amount of time, energy, and public funds to travel to Washington. Yet, as lobbyists, they only addressed the tax-exempt bond issue.

The academicians' input into the tax legislative process is of crucial importance. Admittedly, academic experts have their political leanings and even an occasional axe to grind. Nevertheless, academics provide an important source of objective, informed opinion on taxation problems. In the Senate Finance Committee hearings on the 1969 Tax Reform Act, four economics professors testified. Four law professors spoke, a disappointing if not astounding turnout. The Directory of the Association of American Law Schools lists over 500 teachers who specialize in federal income taxation; thus, less than one percent of those academics possessing legal expertise in the field testified. Of the several law schools in the immediate District of Columbia area only the University of Maryland was represented.

This sparse representation from the teaching end of the legal profession might be offset somewhat by more active participation of the prac-

[115] *See, e.g.*, testimony of Colorado Senator Gordon Allot, *1969 Sen. Finance Comm. Hearings*, *supra* note 110, at 4356-74 (oil shale depletion allowance and molybdenum depletion allowance).

ticing bar. The American Bar Association's Section on Taxation, however, limits its testimony to three aspects of tax legislation: problems of statutory draftsmanship, unnecessary complexity, and alternative means of accomplishing general objectives.[116] While these are extremely important points, more complete testimony is sorely needed. Ways must be developed to fill the present gap in knowledgeable testimony of tax practicioners on the substantive issues. The practicing bar must fill the void that the ABA has left. The effect of the lack of testimony of unaffiliated tax practicioners, coupled with the lack of participation of tax experts from the law schools, makes it difficult for the committees to obtain objective legal opinion from the public. Under the present procedures, the committees are all too often exposed to effective argumentation from only one perspective.

Since 1969 a few new public spirited groups concerned with tax policy have been formed.[117] These groups have attempted to redress the balance so heavily weighted in favor of private pecuniary interests. While they have had a substantial impact,[118] one need only point to the sparcity of public interest testimony before the Senate Finance Committee on the Revenue Act of 1971, a bill designed to implement the President's new fiscal policy by granting about $18 billion in tax relief, to see that the balance has not shifted.[119] This showing is somewhat surprising, especially since the nature of the tax relief contained in the President's 1971 recommendations was highly controversial. The central issue, the division of the tax relief between business and individual taxpayers,

---

116 Testimony of Scott F. Crampton, Chairman, American Bar Association Section on Taxation, *1969 Sen. Finance Comm. Hearings*, *supra* note 110, at 5146.

117 Taxation with Representation and Ralph Nader's Tax Reform Research Group are examples.

118 The following observation appeared in The Kiplinger Tax Letter, April 21, 1972:

> Public interest groups also have been a surprise. It used to be that lobbyists represented special interests, Treasury represented public. Now citizen lobbies are stepping in, supported by small individual gifts. They claim that they speak for the average person [and] the general welfare. It's easy to dismiss them, to scoff. But remember Ralph Nader's rise, and his current influence. And remember that one of the lobbies is his.

Id. at 1.

119 Only eleven members of Congress testified—about half the number in 1969. There were nine academicians, an increase of one over 1969. The bar association and certified public accountants failed to testify. Sixteen individuals representing public interest organizations appeared, four of which are included among the academicians testifying. Of these sixteen public interest witnesses, the testimony of five was sponsored by Taxation with Representation, a new public interest organization. The special interests were again well represented with over thirty-eight witnesses. *Hearings on 1971 Revenue Act Before Senate Finance Comm.*, 92nd Cong., 1st Sess. (1971).

generated considerable debate. One element of the House bill, the new Asset Depreciation Range system, was hotly contested since its inception in January, 1971.[120] This review indicates that even at the public hearing stage those representing private interests vastly outnumber those attempting to represent the public interest. And this is the last time that most persons representing the public interest will be heard while the lobbyists for the private interests will continue to urge Congressmen to adopt their position until the bill's passage. After the public hearing stage, the public must totally rely on the members of Congress, the Treasury, and the congressional staffs to present its case.

The public must be made better aware of the major economic and social issues that are constantly being resolved through the tax system. The public hearings should be modified to provide a forum for more meaningful discussion of the issues, and other sources of public interest testimony must be found. For example, present law prohibits charitable organizations from testifying before congressional committees. The Ways and Means Committee recently held hearings on a bill to permit such testimony.[121] Passage of legislation of this type would provide the Congress a valuable new source of information. Additionally, Congress must find some method to reduce academic ennui. The Joint Economic Committee has achieved greater participation of academicians by inviting selected witnesses to testify in public hearings.[122] If invitations to public hearings will produce testimony from academicians when announcements of public hearings will not, the tax writing committees should certainly extend such invitations.

THE DECISION-MAKING PROCESS

Increased public participation in the tax legislative process coupled with revision of the public hearing forums and the suggested improvements in the information supplied by the Treasury and the Joint Committee staff will go far toward improving the information-gathering process. But this is only half of the battle. We must also ensure that the

120 The proposed ADR regulations provoked written comments to the Treasury from more than 150 individuals, corporations, and associations, and 50 witnesses testified at Treasury's public hearing. ADR PAMPHLET, *supra* note 7, at 6, n.2.

121 *Hearings on Legislative Activity by Certain Types of Exempt Organizations Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. (1972). In its testimony, the Treasury Department supported the idea of allowing charitable organizations to testify.

122 *See, e.g., Hearings on the Value-Added Tax Before the Joint Economic Comm.*, 92d Cong., 2d Sess. (1972).

process for translating information and judgments into law functions as efficiently as possible.

Executive Sessions

The Ways and Means and Senate Finance Committees' informal deliberations in executive session comprise the heart of their consideration of tax bills.[123] The public is excluded from these sessions. Present are the Treasury to state the Administration position and answer questions, and the staff of the Joint Committee on Internal Revenue Taxation to provide information and analysis. Ordinarily, each member of the committee is free to question the Treasury and the Joint Committee staff at length on any relevant matter, and the Congressmen generally take advantage of this opportunity.[124]

The informal nature of executive sessions renders precise description impossible; a given session will be a mixture of debate, negotiation, and compromise. However, the committee chairman has the power to set the tone for the executive sessions by virtue of his procedural control. The House Ways and Means Committee, chaired by Wilbur Mills, rarely takes a vote in executive session until an issue has been fully explored. Often during the deliberations, the Treasury and the Joint Committee staff are asked to investigate several approaches to a problem and suggest new alternatives. Typically, from this deliberative process a consensus will emerge and the committee will often be virtually unanimous in supporting the ultimate solution which has resulted from negotiation and compromise. The members' votes on specific issues are rarely needed and rarely taken.

The Senate Finance Committee, under the leadership of Russell Long, makes decisions quite differently. The Finance Committee has the benefit of starting with a copy of the House bill which it reviews section by section. Consequently, in its executive sessions the Finance Committee can deal with specifics at an earlier stage than the Ways and Means Committee. In most cases it considers an issue at length and votes at the end of its deliberation. In some cases, however, votes begin with the first

123 Woodworth, *supra* note 29, at 407.

124 Time for debating tax bills, however, is limited. In 1969, the House Ways and Means Committee met in executive sessions, usually held both morning and afternoon, for over three months to consider the Tax Reform Act. But time pressures allowed the Senate Finance Committee only three weeks to deliberate this massive bill in executive session. Committee members recently have urged that their personal staffs be admitted to the executive sessions. This would certainly enable the Senators and Representatives to deal more effectively with the issues. *But see* Woodworth, *supra* note 29, at 408-09.

discussion of the issue and the chairman considers all votes tentative until the final vote to report the bill is taken. Thus, the same issue is sometimes voted on many times during the consideration of a bill. During its three weeks of executive session on the Tax Reform Act of 1969 the Finance Committee took over three hundred votes. Former Assistant Secretary of the Treasury, Stanley Surrey distinguished the decision-making processes of the Ways and Means and Finance Committees in the following terms: "What emerges from Ways and Means is a committee result; what emerges from Finance is a composite of personal results."[125]

Decisions in both committees are often the results of compromises in which the committee chairman and the ranking minority member play important roles. The Treasury, as the President's chief spokesman, can be highly effective in presenting the Administration's position. On issues of great importance to the Administration, the Secretary of the Treasury will often be present in the executive sessions; other times Treasury is represented by the Deputy Secretary, the Under Secretary, or the Assistant Secretary for Tax Policy. In addition, the committees rely heavily on the analysis and advice of the staff of the Joint Committee on Internal Revenue Taxation.

Seldom do the votes in either committee follow party lines; the members generally have more personalized opinions on the issues. On occasion, however, a fairly clear party split is discernible. For example, in 1969 the question whether tax relief should be accomplished by increasing the personal exemption resulted in a party division, largely because the issue became a political vehicle in a Democratic Senator's reelection campaign.[126] In 1971, Republicans and Democrats divided over the distribution of tax relief between individuals and business taxpayers, but the votes on this issue in the committees and on the floors of Congress represented philosophical as well as party differences.

Publicizing the Joint Committee Pamphlets

The committees' consideration of the issues in the executive sessions are to a large extent directed by the pamphlets prepared by the Joint Committee staff. Typically, the pamphlets organize the consideration of the subject, describe the position taken by the Treasury

---

[125] Stanley S. Surrey, *quoted in* Rosen, *Will These Men Raise Taxes?*, DUN'S, September 1972, at 48.

[126] Senator Albert Gore of Tennessee led the battle to raise the personal exemption. He was defeated by William Brock in the 1970 elections.

and other important witnesses during the public hearings, and offer the Joint Committee staff's analysis of various measures under consideration.[127] The pamphlets sometimes contain the recommendations of the Joint Committee staff. One hundred and twelve pamphlets were prepared and used by the committees during the consideration of the 1969 Tax Reform Act.[128] Executive sessions often begin with the chairman asking the Chief of Staff of the Joint Committee to review the pamphlet with the committee. The documents are considered "confidential committee prints" and are not made available to the public.

The Joint Committee staff pamphlets provide an extremely important source of information and analysis for the committees. Through them, the Chief of Staff of the Joint Committee directs, insofar as is possible, the committees' consideration of issues. Often the alternatives and options set forth in the pamphlet provide a complete listing of the alternatives considered in the executive sessions. As any lawyer recognizes, the ability to state the issues and present alternatives frequently provides the opportunity to guide the ultimate resolution of issues. The committees give great weight to recommendations of the Joint Committee staff.

It is surprising that a document so central to legislative resolution of the issues is never made public. Through its testimony at the public hearings, the Treasury's position becomes known. But the position of the staff of the Joint Committee, which may be accorded greater weight by the congressional committees, is forever free from public scrutiny and evaluation. Indeed, even many Congressmen may be unaware of the revelations contained in the pamphlets. Admittedly, secrecy plays an important role in some of the deliberative processes of Congress. Although the executive sessions now leave a large gap in the legislative history of a tax provision, the reason for excluding the public from the meetings seems sound. Candid discussion of the issues would undoubtedly be tempered by public attendance. The same rationale is not as persuasive, however, when applied to the Joint Committee staff pamphlets. No committee deliberations would be disclosed by their publication, and a number of positive benefits might flow from opening the documents to public scrutiny.

If the committees should determine that it is practical to publish the pamphlets sufficiently in advance of the executive sessions, they could thereby create an additional input into the establishment of the parame-

---

127 Woodworth, *supra* note 29, at 407.

128 *Id.*

ters of their considerations. Furthermore, even if pre-executive session dissemination of the pamphlets and consideration of suggested alternatives is not considered feasible, their subsequent release would supplement the legislative history of the proposals and thereby increase public awareness of the issues. The pamphlets often form the basis of the committee reports which have become an increasingly important source of legislative history. Moreover, the pamphlets provide additional information about the alternatives considered and rejected by the congressional committees. Thus, they could provide valuable insights into the committees' intentions in adopting measures[129] and thereby help tax practitioners and the courts apply the law properly.[130]

Promoting Simplification of the Tax Laws

Generally the members of the committees concern themselves only with the broad parameters of the policy decisions, leaving many questions unanswered until resolved by the staffs during the drafting of the statute.[131] Actual drafting of the statutory language is done by the staff of the House or Senate Legislative Counsel in consultation with the committee staffs and the staffs of the Treasury and the Joint Committee on Internal Revenue Taxation. The Chief of Staff of the Joint Committee is usually the final arbiter of the policy decisions that go into drafting the statute, but Treasury's views are given considerable weight, particularly

---

129 For cases illustrating the use of legislative history in the interpretation of tax laws, see United States v. Davis, 397 U.S. 301 (1970); Fribourgh Navigation Co. v. Commissioner, 383 U.S. 272 (1966); Commissioner v. Tellier, 383 U.S. 687 (1966).

Occasionally the press comments directly on the nature of these pamphlets. For example, in 1969 the Wall Street Journal reported a proposal for the taxation of mutual savings banks, and stated in part:

> Committee sources said the proposal on mutual savings banks, which was made to Congress by the Treasury Department under President Johnson and was subsequently endorsed in a *confidential report* to the Ways and Means panel from an *influential* Congressional staff group, is still open to discussion, with an uncertain outcome.

Wall Street Journal, July 11, 1969, at 3, col. 1 (emphasis added).

130 Although publication of the Joint Committee staff's pamphlets might not disclose the actual deliberations of the congressional committees, release of the information might not be entirely free of cost. Public disclosure of the pamphlets might jeopardize the Joint Committee staff's relationship with the congressional committees. The possibility of damaging this relationship seems particularly acute in the case of publication of the staff's recommendations; release of the analysis and the alternatives considered by the committees would appear to present less of a threat. In light of this possibility, the Joint Committee staff might release only the analysis and the alternatives it suggested for committee consideration.

131 *See* Woodworth *supra* note 29, at 407.

when Administration proposals have been accepted by the congressional committee. Only in extremely rare cases is the statutory language reviewed by the members of the committees. As a general rule, major policy decisions which are made by the staff during the bill's drafting are reported to the committee in general terms. When very complicated or technical matters are involved, the committees may never be made aware of the staff decisions.[132]

The intricate nature of tax legislation seems to necessitate the delegation of immense authority to the staffs. The congressional tax staffs are extraordinarily able and the committees have great confidence in their abilities. Little would be gained if committee members devoted their time to the task of reviewing complicated statutory drafts. Nonetheless, the present system has produced tax laws that are unbelievably complex. More than twenty years ago, Judge Learned Hand expressed his frustration with the complexity of our tax laws:

> In my own case the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time. I know that these monsters are the result of fabulous industry and ingenuity, plugging up this hole and casting out that net, against all possible evasion; yet at times I cannot help recalling a saying of William James about certain passages of Hegel: that they were no doubt written with a passion of rationality; but that one cannot help wondering whether to the reader they have any significance save that the words are strung together with syntactical correctness.[133]

This pattern has continued to the present. A favorite of tax practitioners is the following paragraph added to the Internal Revenue Code in 1969:

> For purposes of paragraph (3), an organization described in paragraph (2) shall be deemed to include an organization described in

[132] The committee report sets forth pertinent economic and statistical data, summarizes the nature and background of the problems and the reasons for the committee's decision, and often contains a technical analysis of the various provisions of the bill. It is generally drafted by the staff of the Joint Committee in consultation with the Treasury staff.

[133] L. Hand, The Spirit of Liberty 213 (Dilliard ed. 1952). This sentiment was also voiced by Albert Einstein who stated that the federal income tax is the hardest thing in the world to understand. Completing his own return, Einstein reputedly remarked, "This is too difficult for a mathematician, it takes a philosopher."

section 501(c)(4), (5), or (6) which would be described in paragraph (2) if it were an organization described in section 501(c) (3).[134]

Often, tax provisions applicable to large numbers of low and middle income taxpayers become so overwhelmingly complex that they are impotent in accomplishing their intended purpose.[135] Thus, every call for tax reform has stressed the need for simplification of the tax laws.[136]

---

[134] INT. REV. CODE of 1954, § 509(a). The following observations was quoted in BUSINESS WEEK, Nov. 28, 1970, at 51:

> Says C. Lowell Harriss, a Columbia University economist: 'An impression of stupefying complexity will strike anyone picking up the law; the impression will remain after hours or days of study.' Some sections of the Internal Revenue Code have been described as 'boldly meaningless,' by tax expert Allen D. Choka, in an article titled *The Sheer Hell of the Internal Revenue Code* in *The American Bar Assn. Journal*.

[135] For example, in 1971, Congress liberalized the deductions allowable for expenses for child care or domestice services which are incurred to enable a taxpayer to be gainfully employed. Revenue Act of 1971, § 210 (a), Pub. L. No. 92-178, 85 Stat. 497 (1971). The provision was intended to aid working mothers who argued that the expenses of hiring a babysitter should be just as deductible as John Paul Getty's expenses of hiring a secretary.

This seems to be a simple and worthwhile objective, until one examines the details. First, to obtain any deduction, the taxpayer must qualify as a head of a household which includes a child under age fifteen, or a disabled spouse, or any dependent who is incapable of caring for himself. No deduction is allowed for a married taxpayer unless he files a joint return *and* his spouse is physically or mentally incapable of caring for herself *or* is gainfully employed on a substantially full time basis (at least 30 hours per week for a substantial part of the month in question). There are rules defining who is married and who is single, which determine marital status on a monthly, rather than a yearly basis. The deduction cannot exceed $4,800 per year—or more accurately, the deduction for "employment-related" expenses is allowed ouly to the extent such expeuses *incurred*—not *paid*—do not exceed $400 per month. Thus, the Code provides for an accrual accounting concept available on a monthly basis to cash basis taxpayers.

In general, an employment related expense must be incurred for services in the taxpayer's household, except that in the case of a child under fifteen, $200 of the $400 per month may be incurred for care outside the home, $300 in the case of two children and $400 in the case of three or more children. Next the deduction is phased-out at the rate of 50 cents every $1.00 by which the taxpayer's (and his spouse's) adjusted gross income exceeds $18,000 (for the year in which the expense is incurred—not the year in which the expense is paid). Thus, to know on April 15, 1974, if $75 paid to a babysitter on January 1, 1973, for services rendered during the last week of December 1972 are deductible, a taxpayer must know his adjusted gross income for 1972; he must then divide that amount by 12 to determine the part of adjusted gross income applicable to December 1972. The taxpayer will also have to know his marital status in December of 1972, whether the wife was disabled or working full time, and whether a qualifying individual was a part of his household. Finally, the deduction is only available to taxpayers who itemize their deductions. Imagine a person wading through all these rules and computatious only to conclude that he would save more tax by taking the standard deduction. Provisions such as these have sent many taxpayers to H&R Block and other tax return services.

[136] *See e.g., Hearings Before the Special Senate Comm. on Aging*, S. Rep. No. 91-1464,

If Congress is to attain the elusive goal of simplification of the tax laws in the next round of reform, at a minimum the committee members must be more attentive to the intricacies of their broad policy decisions. Tax provisions reflect a multitude of objectives and accommodations of numerous points of view. Translation of broad and complex decisions of tax policy into specific provisions of the tax law is therefore an exceedingly complex task, one presently made more difficult by the committees' failure to consider whether their desires can be hammered into comprehensible statutory provisions. Thus, if simplification is to be achieved in the 1973 tax reform effort, the committee members must make sure that the compromises that they strike among the conflicting views of the members of Congress, the Administration, and the staffs do not produce results that the statutory drafters cannot shape into intelligible law. They must exercise restraint in hastily adopting provisions before the staff has thoroughly studied the proposal. Finally, the committee must constrain staff exuberancy that is sometimes manifested by a desire to draft a statute covering every possible mutation of a particular transaction.

Perhaps one way in which the committee members could help to assure that their decisions can be translated into intelligible legislation is to require that the staffs produce a sample tax form and instructions implementing their proposals. In this manner, the committee members could review in detail their decisions without expending undue amounts of their time and without having to personally grapple with the intricacies of statutory drafts.[137] All decisions could remain tentative until the committee reviewed the sample form and instructions.[138] Since the tax form is the medium through which most individuals must face the complexities of the law, the standard of review could be a simple one: The committee members should assume that if they cannot comprehend the details of their decisions as reflected in the tax form, neither can the American public. To do less is to abandon all hope for simplifying our nation's tax laws.

91st Cong., 2d Sess. (1970) (containing a discussion of the inability of elderly persons to comprehend and utilize complex tax provisions intended for their benefit).

[137] The Committes could call on tax form specialists from the Internal Revenue Service to assist in the drafting of these forms.

[138] Obviously the demands of time would prevent the committes from demanding a final version of the tax form. At best, it would be an initial draft which would be refined after enactment of the legislation. However, even this "rough draft" of the tax form would provide the legislators a valuable opportunity to get some feeling for the practical difficulty of drafting forms to express intelligibly some of their policy decisions.

Floor Debate in the House and Senate—Open versus Closed Rules

Probably the most controversial stage of the tax legislative process is the procedure under which tax bills are debated on the floor of the House of Representatives. Usually, bills are considered under a "closed rule" which requires the House to accept or reject the entire measure; debate is limited and generally no amendments are permitted.[139] In contrast, the Senate permits unlimited debate and any Senator can amend tax bills. Provisions of the Senate Finance Committee's bills can be deleted or modified and Senators can add new provisions on the floor.

The variance in the House and Senate rules creates a markedly different form of debate of tax bills on the floors of the two houses of Congress. As a result of the closed rule, debate in the House is usually brief. The Revenue Act of 1971 was debated for only one hour and thirty minutes[140] and, in 1969 the 368-page Ways and Means Committee version of the Tax Reform Act was debated for only six hours.[141] In contrast, the Senate debated the Tax Reform Act for thirteen days. Senators proposed 111 amendments, of which 70 were included in the Senate's version of the bill.[142]

Many of those who would reform the tax laws consider the House's closed rule, a subject of condemnation for over twenty years,[143] a great obstacle to reform. The *New York Times* has complained that the closed rule renders impotent the 410 members of the House who are not on the Ways and Means Committee.[144] Echoing this sentiment, Albert Turkus of Nader's Research Group stated, "Under the present procedure less than 12 million of the nation's 200 million citizens have a meaningful voice in the tax laws that are passed."[145] Both the *Times* and Nader's group have praised the Senate for the quality of its floor debate and amendments.[146]

In this author's opinion, total chaos would result if a major tax bill were ever allowed to be considered on the floor of the House under an

---

139 See note 28, *supra*.

140 117 CONG. REC. H 9157 (daily ed. Oct. 6, 1971).

141 115 CONG. REC. 22, 562 (1969).

142 J. PECHMAN, *supra* note 12, at 43.

143 R. BLOUGH, *supra* note 12, at 77.

144 N.Y. Times, Dec. 7, 1971, at 46, col. 1.

145 Married Single Hearings, *supra* note 9 at 65. The actual import of Mr. Turkus' statement is not clear in light of the fact that the number of registered voters more closely approaches 100 million rather than 200 million. *See also* Stanton, *Taxes: Reform or Revolt?*, THE NEW REPUBLIC, April 15, 1972, at 19,20 [hereinafter cited at Stanton].

146 *See* generally notes 144 and 145 *supra*. *See also* J. PECHMAN, *supra* note 12, at 42-43.

open rule permitting unlimited amendments and debate. Representative O'Neill aptly pictured the problems that would result from House adoption of this practice, during the floor debate over the closed rule in 1969:

> [I]f we ever have an open rule on this bill you will be here not only until Christmas but the year after Christmas, and probably beyond. This bill would never be enacted.
>
> Furthermore, we would be deluged with vans bringing in all the lobbyists from all over the United States who were working on this legislation.[147]

To recognize the validity of this position one need only reflect upon the "diligent and deliberate"[148] work which took place on the Senate floor in 1969 and 1971.

In 1971, the President attempted to stimulate a lagging economy by proposing tax reductions estimated to total $18.8 billion in the fiscal years 1972, 1973, and 1974. The House bill and the Senate Finance Committee bill provided tax reductions totalling $17 billion[149] and $17.2 billion[150] respectively for this three year period, and the bill as finally enacted will reduce revenues by $17.4 billion. But the bill as it passed the Senate—burdened with the Senate floor amendments—would have reduced receipts during this same period not by $17 or $18 billion but by $32.6 billion.[151] The most costly amendments were conceived and supported by Senators who have been most vocal in urging massive expenditures to redress pressing social needs. What were some of these amendments adopted by the Senate?

—A floor amendment to increase the personal exemption from $750 to $800 annually. This would have cost the government nearly $2 billion annually,[152] but how can you tell your constituents that you voted against increasing the personal exemption by the paltry sum of $50?

---

147 115 Cong. Rec. 22554 (1969). The closed rule was approved by a 264 to 145 vote. *Id.* at 22561.

148 N.Y. Times, Dec. 7, 1971, at 46, col. 1.

149 Staff of the Joint Comm. on Internal Revenue Taxation, 92nd Cong., 1st Sess., Summary of Senate Amendments to H.R. 10947 The Revenue Act of 1971 27 (Comm. Print 1971 [hereinafter cited as Joint Comm. Summary].

150 Senate Comm. on Finance, Report on the Revenue Act of 1971, S. Rep. No. 92-437, 92nd Cong., 1st Sess. 17 (1971).

151 Joint Comm. Summary, *supra* note 149, at 26.

152 *See id.* at 5.

—A 10 percent credit for investments creating jobs in the country *and* a 10 percent credit for investments creating jobs in the city, costing an additional $750 million[153]—only the suburbs were omitted.

—A credit of up to $325 for the expenses of higher education at an annual revenue cost of $2.2 billion.[154]

—A credit for property taxes of persons 65 or older, costing $225 million annually.[155]

Each of these amendments was rejected by the conference committee and thus did not appear in the final bill.

The Senate also added on the floor an additional personal exemption for the disabled, who have long argued that they are entitled to the same extra personal exemption that the blind and the elderly receive under present law. The Senate had twice added a similar additional personal exemption in recent years, and on both occasions the conference committee rejected the proposal. Surely Senators voting for this amendment in 1971 had little expectation that it would actually become law. Nonetheless, it is far easier for a Senator to tell a disabled constituent that he supported this amendment and the conference subsequently threw it out than to say that the additional exemption for the blind is nonsensical and that there is no point in adding more nonsense to that already enshrined in the tax laws.

The Senate floor action in 1971 was not atypical. In 1969, the House version of the Tax Reform Act would have produced a revenue gain of $2.5 billion during the three-year period 1970 to 1972; the Senate bill would have *lost* $8.2 billion over the same period.[156] In the long run, after all of the provisions would have been phased into complete effectiveness, the Senate bill would have produced a loss exceeding the losses in the House version by over $3 billion annually.[157] These differences are not simply the product, as many might expect, of the Senate's greater generosity in providing tax relief. The Senate was also a far less aggressive tax reformer than the House. During the years 1970, 1971, and 1972, the tax reform provisions of the House bill would

---

153 *Id.* at 4.

154 *Id.* at 9.

155 *Id.* at 9-10.

156 STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, 91ST CONG., 1ST SESS., SUMMARY OF SENATE AMENDMENTS TO H.R. 13270 TAX REFORM ACT OF 1969 pt. 1 at 118 (Preliminary Comm. Print 1969).

157 The House bill was estimated to lose $2.4 billion annually in the long run; the Senate bill, $5.5 billion. *Id.*

have produced four times as much revenue as the tax reform provisions of the Senate bill.[158] This ratio would have continued into the long-term when the House tax reform provisions would have produced an annual gain of $3.6 billion compared to a $900 million annual gain under the tax reform measures contained in the Senate bill.[159] The Senate's action in 1969 prompted the *Washington Post* to comment, "[E]ven the strongest defenders of democracy are left with a hopeless feeling."[160]

The Senate's record on the two most recent major tax bills does little to commend an open rule to the House. Over 2000 tax bills are introduced in each session of Congress. Many would produce dramatic changes in social and economic policy; virtually all are technical and complex. If each of the 435 members of the House could offer just one amendment to major tax legislation, the result could be disastrous. Individual Senators and Congressmen with myriad other responsibilities are simply unable to devote sufficient time and energy to understand the ramifications of the tax proposals considered in great depth by the committees. Nor do they have staff resources comparable to those available to the committees. The personal staffs of Senators and Congressmen are typically not tax experts, nor are 535 Senators and Congressmen able to call on Treasury and the Joint Committee staff for analysis and recommendations to the same extent as the tax writing committees.[161]

But to maintain that an open rule in the House would be ruinous is not to say that the closed rule must be retained in its present form. One alternative would be to adopt a rule that would allow individual Representatives to move on the floor to delete provisions of the Ways and Means Committee bill while continuing to deny them the power to add new material. Thus, while each provision of the House bill would have to be considered and approved in the Ways and Means Committee, provisions which do not enjoy the support of a majority of the entire House would not survive. Under this procedure, the Chairman of the Ways and Means Committee should be allowed to withdraw the bill if, in his opinion, the floor amendments changed its essential character. One need ouly hypothesize House floor action eliminating all of the tax

158 The revenue estimated from the House bill during the three year period was $6.0 billion compared to $1.5 billion from the Senate bill. *Id.* For further comparison, the Senate Finance Committee's version of the 1969 Act contained reforms producing approximately $250 million less than in the House bill. S. Rep. No. 91-552 *supra* note 76, at 16.

159 S. Rep. No. 92-437, *supra* note 150, at 118.

160 Washington Post, Dec. 12, 1969, § A, at 24, col. 1.

161 Woodworth, *supra* note 29, at 408.

reform provisions of the 1969 Act but retaining the tax relief provisions to see the need for such discretion. Such a rule would substantially increase the House members' voice in the formulation of tax legislation without providing the potential for harm of an open rule.

Not only should consideration of the results of the Senate's open rule of debate and amendment prompt a conviction that the practice would be inappropriate for House consideration of tax measures, it should raise serious questions concerning the wisdom of the Senate's adherence to its own practice. Present Senate procedure for considering tax bills sometimes creates what can only be described as legislative anarchy—measures occasionally burst full blown from Senators who have not given any warning to the Finance Committee; proposals are often not related to one another; ideas are sometimes poorly articulated on the floor. Thus, the Senate practice affords little opportunity for careful reflection and consideration of the wisdom or even the mechanics of the proposals—a particularly severe shortcoming in light of the fact that most Senators generally do not call upon advisors who are as knowledgeable in tax matters as the staffs that advise the Finance Committee. The result of this chaos is often that the Senate version goes to a conference committee where most of the ad hoc floor amendments are summarily deleted.

If the entire Senate is to contribute to a tax reform effort in a systematic manner, that body must develop some procedure to assure the orderly consideration of the issues. Perhaps the best method for rationalizing the Senate process would be to require individual Senators to submit to the Finance Committee a draft of their proposals sufficiently in advance of floor consideration of the bill to enable the committee to study each measure and take a position on it.[162] This process would at least provide a method whereby the individual proposals might be subjected to the collective scrutiny of the members of the Finance Committee and the staffs of the Joint Committee and the Treasury Department. This should in turn contribute to a more thoughtful and balanced consideration of the measures on the floor of the Senate. Even though

---

[162] In order to accomodate for measures that are offered in response to or to counterbalance other proposals, the procedure might provide for a bifurcated submission period. After a short span of time following the close of the initial submission period, long enough for Senators to examine the pending floor amendments and determine whether to submit further amendments, the Finance Committee could ask for a second round of proposed amendments. As the purpose of permitting the second round would be to enable Senators to respond to other amendments, the second round proposals could be made contingent on Senate adoption of the corresponding initial proposal.

the limitations of time might prevent as thorough a consideration as the committee proposals receive, this procedure would certainly represent a significant advance over the disorganization of present Senate practices.

The Bill in Conference—Compromise and Conciliation

If the Senate passes the House bill without amendment, no further congressional action is necessary and the bill goes to the President for his signature. While this may occur with a very minor tax bill, such unanimity is rare with more significant legislation. The Senate generally makes numerous amendments to House measures and a conference is necessary to reconcile the differences. The conference is composed of five or seven members from each house who are appointed by the Speaker of the House and the President of the Senate. Typically, the senior majority and minority members of the Ways and Means and Senate Finance Committees are appointed to the conference committee. The Senate and House conferees each vote on the issues as a unit with a majority of each group controlling its vote. In the conference on the 1969 Act the Senate and House versions differed on over 200 important issues. The conferees met in almost continuous session for five days with one session lasting from ten in the morning until almost four o'clock the following morning.

The conferees' discretion is limited to the areas of disagreement between the House and Senate bills. Where the two bills conform, there is no room for modification. Similarly, the House and Senate bills set the parameters within which the conference can reach agreement. While the conference has wide latitude within these parameters, it must appear to compromise near the middle ground between the House and Senate bills. For example, in 1969, the Senate raised the personal exemption from $600 to $800 while the House retained the $600 amount but included a general rate reduction not contained in the Senate bill. The conference finally settled on a personal exemption of $750 and no rate reduction.[163]

The decisions reached in conference are vital since the conference report cannot be amended by either the House or Senate. Each house must either approve or reject the report. Ordinarily the compromise measure is accepted by both houses. However, if the compromise does not sufficiently reflect congressional desires it can and will reject the conference report. The House rejected the conference report on the Revenue Act of 1951 and requested a new committee. The same con-

[163] H.R. REP. No. 91-782, 91st Cong., 1st Sess., at 328, 331 (1969).

ferees were appointed, and they agreed to certain changes in the conference report after which it was adopted by both houses. In the last session of Congress, the Senate rejected the conference compromise of the Public Debt Limitation bill because it had sacrificed too many of the conditions imposed by the Senate on the President's exercise of the power to make spending cuts to keep the budget within $250 billion.[164] Rather than attempt to reach a new agreement and a more palatable version, the committee deleted the entire presidential spending cut provision in the subsequent conference and the remainder of the bill passed easily.

Recently the conference committee has been roundly criticized in some quarters. The *New York Times*, after complimenting the Senate for its deliberations on the 1971 Revenue Act observed that the conference committee, "meeting once again in private . . . chucked out just about everything the Senate had done in committee and on the floor."[165] The director of Ralph Nader's Tax Reform Research Group described the conference on the 1971 Act in the following terms:

> Unfortunately [the Senate] floor debate and vote are not the end of the process. The Senate and House resolve their differences by going into "conference" which is where the axes are further sharpened. . . . These 12 [sic] powerful people are supposed to represent their respective chambers; more often than not many of them represent their personal views.[166]

Both the *Times* and Nader's group quarreled vehemently with the decisions reached by the conferees in the 1971 Act, particularly with the distribution of tax relief between businesses and individuals. Their criticism seems to reflect more of a disagreement with the views of the men who composed the committee than disapproval of the conference process itself. Surely one cannot expect the conferees to adhere rigorously to their chamber's bill. If they did, no compromise would be forged, differences between the House and Senate bill would remain unreconciled, and no legislation would be enacted. More importantly, the Senate and House must not have disagreed too strongly with the action of their conferees. Though either house could have rejected the conference result, the 1971 conference report passed the House by a vote of 320 to 74 and sailed through the Senate by a 71 to 6 margin.[167]

[164] See note 186, *infra*.

[165] N.Y. Times, Dec. 7, 1971, at 46, col. 1.

[166] Stanton, *supra* note 145, at 20.

[167] 117 CONG. REC. H. 12133, S. 21109 (daily ed. Dec. 9, 1971).

In 1971, as it had in 1969, the conference acted precisely as it was designed to act in our system of checks and balances—it worked out the differences between the House and Senate bills. It also performed a function that conferences have served with tax bills throughout the decade—restraining the many Senate amendments which were not well considered. For example, in 1969 the conference restored to the Tax Reform Act over two billion dollars of annual revenue from tax reform measures which had been diluted on the Senate floor.[168]

Increasing the Public Exposure to the Conference Committee

While the conference committees have performed the difficult task of reconciliation and compromise well, certain improvements are warranted. Much of the basic criticism leveled against the conference procedure, while missing the mark in the sense that it fails to consider the realities of the congressional system, points to a need to make the activities of the conference committee better publicized.

Presentation of Treasury's Position in Conference—The Treasury Department generally attends the conference to state the Administration's position and to offer technical advice and assistance, and it plays an important role in the formulation of the compromise. Although its testimony in the public hearings before the House and Senate makes the general Treasury position well known, the Department does not, under present procedures, reveal the position that it takes in conference. Treasury should make its position public in a memorandum of position stating its views and the reasons for them.

The legislative history of the minimum tax provisions enacted in 1969[169] illustrates the need for a statement of the Treasury position in the conference. The proposal for a "limit on tax preferences" and allocation of deductions to insure that high-income individuals pay some tax was a showpiece of the President's tax reform recommendations.[170] The

[168] There have been suggestions that this action was expected by the Senators. *See* N.Y. Times, Dec. 7, 1969, § 4, at 1, col. 5:

> Senators who were publicly voting for the Christmas presents were privately agreeing that things had gotten out of hand. But they reassured anyone who raised worried questions about the financial consequences that the joint Senate-House Conference Committee that will write the final version of the tax bill could be trusted to reduce these fiscal gifts to manageable size.

[169] Int. Rev. Code of 1954, §§ 56-58.

[170] *See Hearings on the Tax Reform Act of 1969 Before the House Ways and Means Comm.*, 91st Cong., 1st Sess., pt. 14, at 5048-49, 5482-88 (1969).

House adopted the President's version with only slight modification.[171] Although Treasury voiced its continuing support for the Administration proposal in its testimony before the Senate Finance Committee,[172] that committee considered the House provisions unduly complex and substituted a five percent minimum tax on a specified list of preferences. The Senate Finance Committee also expanded the provision's coverage. The President's recommended version and the House bill only reached individuals; the Senate Finance Committee applied the minimum tax provisions to corporations as well.[173] The Finance Committee version was amended on the floor, principally by increasing the rate to ten percent and allowing the amount of preferences to be reduced by the amount of taxes paid as regular income tax.[174] Senator Miller, sponsor of the floor amendment, announced to the Senate that "the Treasury representatives believe that my amendment is a better approach than the one in the [Senate Finance Committee bill]."[175] The conference committee favored the Senate version over the House measure, and the Senate provision was enacted into law.

Treasury never announced its position on the choice between the House and Senate bills. It did not make public its assessment of the merits of the structure of the Senate version or of the wisdom of extending the coverage of the bill to encompass corporations as well as individuals. While its views on this matter might be inferred from its initial recommendations, the Treasury position in conference should be made public. This might best be done by issuing a memorandum stating its views and the reasons for them. Such a document would perform two important functions. By requiring the Treasury to take and publicly defend a position on each of the Senate amendments, it would encourage more comprehensive analysis of these measures. Release of such a document would also subject the amendments made by the Senate Finance Committee and on the Senate floor to greater public scrutiny.

Development of the Statement of the Managers—The conferees' decisions are transformed into a conference report, as are bills in the executive sessions, by the staffs of the Legislative Counsel, the Joint Committee on Internal Revenue Taxation and the Treasury. Accompanying the

---

171 H.R. 13270, 91st Cong., 1st Sess., §§ 301-302 (1969).

172 *See Hearings on the Tax Reform Act of 1969 Before the Sen. Finance Comm.*, 91st Cong., 1st Sess., pt. 1, at 578-84 (1969).

173 S. Rep. No. 91-552, *supra* note 76, at 113.

174 115 Cong. Rec. 38297-98 (1969) (Remarks of Senator Miller).

175 *Id.* at 38312.

conference report is the "Statement of the Managers on the Part of the Conference Committee." This statement is a rough equivalent to the committee reports of the Ways and Means and Senate Finance Committees but, unlike the committee reports, it does not explain in detail the reasons for the conference committee's action. It merely describes each Senate amendment and the action taken by the conferees.

In many instances the brevity of the Statement of Managers is unfortunate. Often the provision accepted by the conferees did not appear in either the House or Senate bill or resulted from an amendment on the Senate floor which was not explained in the committee reports. For example, in 1969 the House version of the Tax Reform Act contained a provision disallowing any deduction for interest incurred in certain investment activities.[176] The Senate struck this provision from its bill[177] and the conference committee adopted a provision disallowing one-half of the amount that would have been disallowed by the House bill. Examination of the legislative history of this provision—the House bill and the Ways and Means Committee Report, Treasury's testimony on the House bill before the Senate Finance Committee, the Senate Finance bill and report, the Senate bill and the conference report and Statement of the Managers—would convince even a very sophisticated tax lawyer that the conference simply applied the wisdom of Solomon and compromised between the Senate and House versions. The truth is quite different. The conference provision is closely modelled after a measure in the Senate bill which had addressed a similar problem in relation to farm losses.[178] This knowledge, coupled with study of the Senate Finance Committee report on its farm loss provision, greatly enhances one's ability to comprehend the interest provision. Such understanding would be far more easily obtained if a more comprehensive Statement of the Managers were issued that discussed in some detail the provisions which are adopted by the conference which have not been explained by the Ways and Means or Finance Committee reports.[179]

[176] H.R. 13270, 91st Cong., 1st Sess. § 221 (1969).

[177] S. REP. No. 91-552, *supra* note 76, at 305.

[178] *See* Halperin, *Capital Gains and Ordinary Deductions: Negative Income Tax for the Wealthy*, 12 B.C. IND. & COM. L. REV. 387 (1971). *See also* Davenport, *Farm Losses Under the Tax Reform Act of 1969: Keepin' 'Em Happy Down on the Farm*, 12 B.C. IND. & COM. L. REV. 319 (1971).

[179] The Joint Committee staff's action following the 1969 Tax Reform Act reflects its sensitivity to the dearth of legislative history. The staff published a General Explanation of the Tax Reform Act of 1969, note 19, *supra*. The publication was not released, however, until December of 1970. No such publication has yet been released for the 1971 Revenue Act. Even if the staff of the Joint Committee were to institutionalize its prac-

Conclusion

Congress will undoubtedly consider tax reform in 1973. Its resolution of the issues will touch the economic well-being of our nation and may prove vital to the continued success of our voluntary tax system. Reflection on the 1969 tax reform effort makes one suspect that the average American taxpayer is not revolting against inequities in the tax structure; if anything, "he is rebelling against taxes period."[180] While the President's tax reform proposals in 1969 would have increased revenue by $900 million during the five subsequent years, the tax reform and relief provisions finally passed by Congress were estimated to reduce revenues by $20 billion over the same period. This may suggest that the only politically viable road to reform of the present tax structure is through tax reductions for the majority of taxpayers.[181] Nonetheless, tax cuts can hardly be enacted at a time when every level of government—federal, state, and local—claims a desperate need for revenue. Even if expenditures are held at present levels, there will be no slack within which to seek tax reform at the cost of diminishing federal revenue receipts. And, if as many think, the next tax reform effort is considered in the context of a tax increase, the political sensitivity of tax reform issues will be aggravated. In either event, the need to convince the average American to support vigorously a tax reform effort to make our system simpler and more equitable when his own taxes will not thereby be reduced will necessarily complicate the congressional task in the coming months.

The tax reform effort will be further complicated because it will occur at a time when Congress' continued vitality as a modern democratic institution is being questioned. Such fundamental issues as the relationship between Congress and the President and the validity of present methods for funding political campaigns are undergoing intensive scrutiny.[182] But substantive tax changes will not await the resolution of

tice, their publication would be an inadequate substitute for an actual conference committee report. As a staff document, the publication would not be accorded the same weight by the courts as a committee report.

180 *See*, *Income Tax Reform as a Political Issue*, Washington Post, August 29, 1972, § A, at 18, col. 5, quoting Irving Kristol, co-editor of the *Public Interest*.

181 *See e.g.*, N.Y. Times, Nov. 30, 1969, § 4, at 12, col. 2:

> [A]pparently the only way to reform the tax structure of this country is to buy off the resistance of special interests by making large over-all tax cuts. The principle of no tax reform without over-all cuts makes little social or economic sense but it represents political realism.

182 Ralph Nader has issued a massive study of Congress, alleging that "[e]very Congressional session sees a further abdication of their constitutional and de facto respon-

these issues; the next round of tax reform may precede the next round of congressional reform. Thus, those concerned with the tax reform effort must focus on the narrower issues specifically relating to the functioning of the tax legislative process.

Many proposals relating to the tax legislative process have been voiced. For example, Ralph Nader's Tax Reform Research Group has suggested that the Democratic members of the Ways and Means Committee divest themselves of their power to select Democratic members of congressional committees, alleging that this power causes "an undesirable warping of the legislative process."[183] But the appointive system does not unduly "warp" the process of tax legislation. While perhaps a better procedure for selecting committee members could be found—a caucus is one possibility—the present procedure has only a slight effect on the tax legislative process.

The question of the scope of responsibility of the tax writing committees presents a far more vital issue. Surely the cause of tax reform would be advanced if the Finance and the Ways and Means Committees were able to devote more time to tax problems. The committees' need to handle other problems of pressing national concern during the next Congress, such as national health insurance and perhaps international trade, will surely impair their ability to deal with tax reform issues. But it is simply impractical to expect these committees to limit their own jurisdictions to further the cause of tax reform.

Given the limitations of political reality, it may serve little purpose for the coming tax reform effort to advocate reforms which hinge on major redistributions of political power uuless there has been a clear indication that Congress is receptive. Longer-range goals of reform, while important to the continued vitality of the democratic system, are relatively unimportant to the coming tax reform effort. To have an impact on that endeavor, persons must advocate measures that can be made operative in the very near future. To that end, I have detailed a number of suggested adjustments in the present legislative process.

---

sibilities. They're turning the executive branch into a White House Monarchy." Nader Takes on Congress, Washington Post, Oct. 1, 1972 at 1, col. 5. The study includes discussion of such issues as the seniority system and the financing of political campaigns. M. GREEN, J. FALLOWS, D. ZWICK, WHO RUNS CONGRESS? (1972). Some elements of Congress also feel that the institution needs revision. *See* C. Mathias, *The Congress Is Not Doing Its Job,* Wash. Post, Dec. 4, 1972, at A23, col. 3. In January, Senators Mathias and Stevenson initiated hearings to bring attention to these problems. *See* D. Broder, *It Is Now Time For Congress To Reform,* Wash. Post, Dec. 10, 1972, at C6, col. 6.

[183] *Married Single Hearings, supra* note 9, at 65.

More and better information is the first step. The legislative hearings can be improved by instituting prior panel discussions to educate committee members on the substantive issues they must confront. Subcommittees should be delegated power to study and recommend solutions on technical matters of limited scope. Additionally, the Joint Committee on Internal Revenue Taxation or the House Ways and Means Committee should issue a paper prior to the public hearings outlining its tentative position on the major issues to be considered. This should serve both to educate the Congressmen and to provide a focus for the testimony that will follow in the public hearings. In order to maximize the utility of the testimony at the public hearings, the committees should require advance submission of written statements. The statements should be summarized by the Joint Committee staff or the committee staffs and the committees should review the summaries and invite a limited number of witnesses to testify. Finally, the quantity and quality of testimony on behalf of the public interest must be increased by encouraging government officials, academicians, bar and accounting associations, charitable organizations, and other public interest groups to testify.

The Treasury Department and the Joint Committee staff should explore in depth the relationship of tax provisions and related direct expenditures and conduct ongoing studies of the existing tax system. To facilitate studies and comparisons, Congress should redefine "adjusted gross income," a term which presently inhibits proper analysis. Finally, revenue estimates should be classified according to their probable accuracy, and a range of figures should be provided whenever that would serve to illustrate the accuracy and reliability of the projection.

Not only must Congress develop ways to improve the information on which it relies to make its substantive judgments on tax questions, it must disseminate better information to the public. Pamphlets of the Joint Committee staff that the tax writing committees use and rely on in executive sessions should be made public, as should the Treasury position before the conference committee. Similarly, the managers who report the conference committee recommendations should carefully explain the provisions adopted by the conference that differ from the Senate Finance or Ways and Means Committee versions which have been explained in their reports. Some of these proposals require increasing staff manpower which seems needed in any event; others might be modified to accommodate the pressing demands of time. And, if Congress continues to wait until the close of the session to deal with the substantively complex issues of tax reform, implementation of some of these proposals will probably be impossible.

The decision-making process can also be improved. In order to foster simplicity of tax measures, the Congressmen should exercise more care to ensure that their broad decisions can be translated into intelligible law. This would be facilitated if the legislative staffs prepared sample tax forms to give the legislators a feeling of the manner in which their broad policy decisions might be implemented as law. Additionally, the form of debate of tax matters should be altered. The House of Representatives should permit individual Representatives to move deletions on the floor while allowing the Chairman of the Ways and Means Committee to withdraw bills at any time. This would guarantee that no provision would pass the House without the support of a majority of its members voting but would also ensure the Ways and Means Committee enough control over its bill to preserve its essential scope and form. In the other hall of Congress, the Senate should consider means to provide more order to the manner in which it debates tax legislation—requiring advance submission of proposed amendments seems the best possibility.

These proposals are scarcely revolutionary; they would change neither the basic structure of our government nor the present system of congressional powers. Moreover, these recommendations can be implemented before the next tax reform effort begins. The aggregate effect of these proposals should be significant and should contribute to our ability to resolve the increasingly perplexing issues of tax policy. They are a much-needed prelude to reform.

In addition to these suggestions to facilitate the upcoming tax reform effort, there is a need to devise new mechanisms for controlling overall fiscal policy. From its inception in 1789 until the creation of the Appropriations Committee in 1865, the House Ways and Means Committee had jurisdiction over both revenues and expenditures. Formation of the Appropriations Committee sigualed an end to the unified approach over budgetary matters and created a division of authority that has ever since inhibited congressional ability to deal with matters of fiscal policy.[184]

---

[184] Unfortunately, congressional attempts to remedy the problem have generally been half-hearted. In 1946 Congress established the Joint Committee on the Legislative Budget but gave that body no binding authority over legislative appropriations. Little was accomplished, and Congress eliminated this committee. Recently the Joint Economic Committee and the Joint Committee on the Reduction of Federal Expenditures have

Concern for excessive federal spending and rising federal deficits led the last Congress seriously to consider granting the President carte blanche authority to keep federal spending within a $250 billion limit by making selective cuts in spending programs.[185] Although the proposal was ultimately defeated,[186] it served to dramatize Congress' failure to come to grips with this problem. The Public Debt Limitation Act[187] as finally enacted contained a provision establishing a joint committee to study possible methods to enable the Congress to exercise control over budget totals for both outlays and receipts. Clearly no such mechanism presently exists.[188] Spending measures are generally considered in a haphazard and uncoordinated fashion, and no one controls the size of the complete package. Moreover, the spending side of the budget is not correlated with the level of anticipated federal revenues. Past attempts to control overall budgetary policy through powers of persuasion have proven futile; Congress needs more than a fiscal gadfly. In order to effectuate meaningful congressional control over the budgetary process Congress must establish a joint committee with the authority to report a bill establishing total expenditures and revenues for the year. Congress should receive and act on this measure early in the session and thereby set the desired level of the federal deficit or surplus in advance of the final consideration of the taxing and spending programs. Having established the contours of the fiscal package, the legislators must then be willing to set priorities within those boundaries. Only in this manner

sought to curb congressional spending. Lacking the power of legislative committees, the too have been ineffective in shaping fiscal policy. The events of recent months indicate that perhaps Congress is willing to seek a real solution to this problem.

185 H.R. 16810, 92d Cong., 2d Sess. (1972).

186 Supported by Congressman Mills, 118 Cong. Rec. H. 9359 (daily ed. Oct. 17, 1972), the measure passed the House by a margin of 221-163. *Id.*, H. 9402. In the Senate the proposal met more resistance. Many Senators considered the measure to be a total abdication of legislative responsibility and feared for the future of the domestic spending programs that might not enjoy wholehearted Administrative support. Thus, the Senate loaded the House version with amendments to restrict the presidential power to cut expenditures. When the conference committee returned with some of its amendments pared away, the Senate rejected the compromise measure by a vote of 27-39. 118 Cong. Rec. S. 18529 (daily ed. Oct. 17, 1972). Thus, the proposal to give President Nixon the authority to make selective spending cuts died. The President is nonetheless achieving some selective spending cuts by refusing to commit some of the funds appropriated by Congress. *See* Wash. Post, Nov. 29, 1972, at 1, col. 2.

187 Pub. L. No. 92-599 (Oct. 27, 1972).

188 Congressional control over the federal dept is certainly not an effective means for controlling fiscal policy. That power is exercised in response to measures already enacted rather than in an anticipatory manner that wonld shape fiscal policy.

can the Legislative branch reintroduce the element of rationality to its role in directing the nation's fiscal affairs.[189]

[189] Obviously this would require a valliant congressional effort in order to be successful. One basic purpose of the bill would be to force the other congressional committees to shape their priorities in light of the overall budgetary figures agreed upon by Congress. Accordingly, the bill would have to be reported and acted upon fairly early in the session so that subsequent planning of taxation and spending measures could be done rationally, Additionally, Congress might wish to establish some mechanism for periodic reevaluation of spending and taxing measures during the session in order to keep apprised of their progress toward attaining the required balance and to take account of significant new circumstances. Obviously these are complicated issues. These are only some of the questions that the joint committee must grapple with over the coming months.