CONGRESSIONAL INTERVENTION IN THE ADMINISTRATIVE STATE: AN INQUIRY INTO THE KEATING FIVE HEARINGS

by

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(ABSTRACT)

The relationship between members of Congress and administrators has always been problematic. Interaction between the two takes place in oversight, casework and constituency service. Since the relationship is between two branches of government, separation of powers is a problem and a delicate balance must be maintained when the two branches interact. Interaction is a current concern because the amount taking place is increasing.

There are only a few guidelines that govern the interaction between members of Congress and administrators: court opinions, rules and expectations of both the House and Senate and the code of ethics for public servants. Since the guidelines are sketchy, most operate according to their own ideas of what is and what is not appropriate interaction.

The Keating Five Hearings provide a well-documented interaction between members of Congress and administrators highlighting the relevant law and the normative and ethical issues that guide this interaction.

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Chapter 1: The Issues Surrounding Intervention

Introduction

During the two-month period from November 15, 1990 through January 16, 1991 the Keating Five hearings were broadcast in their entirety by C-SPAN, the cable public affairs network. Held by the Senate Ethics Committee in response to a complaint filed by the citizens lobby Common Cause, the Committee attempted to examine the interaction that had occurred between five senators, known as the Keating Five, and regulators of the Federal Home Loan Bank Board (FHLBB) regarding Lincoln Savings & Loan. Lincoln was a small thrift located in Irvine, California and controlled by Charles H. Keating.

The savings and loan situation had been unraveling for some time and the country was scandalized at the activities that were being revealed. Thrift failures had become rampant. Although the reasons for these failures varied, greed, fraud and corruption were prominent. One of the worst thrift failures was Lincoln Savings & Loan.

When it was revealed that five United States senators had come to the defense of Lincoln, and apparently stymied regulators in their efforts to close down the thrift, the public was outraged. It seemed a flagrant attempt to help a

campaign contributor violate the law. Keating had contributed a substantial amount to all five senators.

The senators explained that they had simply provided constituent service and their activities were appropriate given the nature of casework. They viewed their behavior as a necessary effort in behalf of a constituent by the lawfully elected representatives.[1] It was their duty to intervene when a constituent may have been unfairly treated by government regulators and where the administrative state[2] seemed to be overstepping its bounds.

The regulators felt somewhat differently. They protested that the senators had prevented them from protecting the taxpayer and administering the laws in a fair and timely manner. They felt that the pressure exerted on them by the senators was excessive, and bordered on interference.

The Senate Ethics Committee convened hearings to explore the nature of the interaction and the appropriateness of what took place. Unfortunately, its focus was limited. The

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[1]Keating had real estate, employees and other interests in the four states the senators represented.

2Although this term can mean different things to different people, I rely on the explanation and examination provided by John A. Rohr in his influential book To Run A Constitution: The Legitimacy of the Administrative State (Lincoln, KS: University Press of Kansas, 1986. See especially pages xi and note 11 on page 217 for a general understanding of this concept and how it is used in this study.

Committee decided only whether the five senators' action, in assisting a constituent and campaign contributor, followed too closely on the heels of campaign contributions.

The hearings left unresolved the complex relationship that should, or should not, exist between regulators and elected officials as well as a host of other questions that surround this relationship.

The Problem, Rationale and Significance

This interaction between administrators and members of Congress is a major concern in our system of government because of the separation of powers doctrine and the delicate balance of powers that must be maintained. Unanswered concerns surrounding how one branch of government should deal with another can threaten that balance.

The increasing interaction between members of Congress and administrators serves only to complicate the problem and to underscore its urgency. There are two reasons for this. First, congressional oversight of the administrative state is increasing. And second, casework and constituency service is increasing as well.[3] Unless examined and clarified soon, more problems concerning interaction will undoubtedly arise increasing the present confusion.

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[3]The reasons for this increase will be explored in the literature review section on page seven.

Members of Congress and administrators view this interaction differently. Not surprisingly, their viewpoints seem to be colored by their own perspectives. This is evident from the Keating Five hearings. The senators viewed their behavior as appropriate and even expected, whereas the administrators were deeply concerned over what they considered inappropriate interference. Appropriate ethical behavior is rarely clear-cut and this fact is evident in the Keating Five hearings.

Interaction between regulators and members of Congress and administrators occurs largely without guidelines. What guidelines do exist are sketchy and the various participants disagree on their rank and importance. The Keating Five hearings ended with the particular matter of the five senators settled but many of the larger issues relating to the interaction between members of Congress and administrators unresolved. The issues need to be studied.

Research surrounding the interaction between members of Congress and administrators has been narrowly focused. The studies that exist have left many important questions unexamined as will be shown later in the literature review.

In addition, concerns about ethical issues in government are increasing. This is a concern all over society and in all aspects of government. The American public is demanding high ethical standards. Ethical behavior is couched in value

structures deeply embedded in individuals and in institutions. These value structures guide behavior and can be considered a normative base. The normative base which underlies this interaction between members of Congress and administrators needs to be examined.

Of interest in the Keating Five hearings were some of the attitudes and ideas expressed by the participants. Many of the prevailing ideas call into question the legitimacy of the administrative state, its processes and networks. Administrative agencies have evolved. Systematic study of them has been sketchy at best. Attitudes regarding the administrative state could shed light on the normative base referred to above. We need to examine how the agencies are viewed. The Keating Five Hearings offer a window on these attitudes.

As a result of the Keating Five hearings, and the issues raised, members of Congress set up a task force to propose guidelines on the interaction between them and administrators. Their efforts did not take into consideration the administrators' viewpoints and dilemmas. This administrative perspective should not be ignored. It also deserves study.

Clearer guidelines may help resolve the interaction dilemmas. But even so, an examination of these issues will shed light on how the various roles are interpreted and may

illuminate, for future study, the normative attitudes and values that have not been previously identified.

The purpose of this study is to use the Keating Five investigation to examine the interaction that occurred between administrators and members of Congress and to clarify the normative standards and ethical assumptions that underlie it. This study will seek to examine the questions that arise from this interaction by approaching it from an administrative perspective.

This is an eclectic study. Several schools of thought are useful in examining interaction between members of Congress and administrators. The balance of power principle highlights the purpose each branch was meant to serve. This is essential in understanding the interaction because the branches have evolved over time and the interaction must adapt to these changed conditions without violating the balance of powers. Issues that have constitutional implications should not be left to languish.

Representation is also an issue because the members of Congress are the officially elected representatives of the people and many of the difficult issues regarding interaction can be tied to representation, especially that of constituency service. In fact, representation issues go to the heart of the Keating Five controversy. The senators felt they were simply performing their expected representative function,

whereas the administrators viewed it as an effort to secure favored treatment.

The politics/administration dichotomy concept is important for this study. What legal guidelines exist, governing the interaction, draw on this concept. In addition, the assumptions behind the dichotomy clearly shaped the behavior of many of those involved in the Keating Five controversy.

Different elements of the problem are evident. The various actors in the interaction need to be studied to determine their understanding of the purpose, role and function of an agency, and how this viewpoint may complement or clash with other assumptions and perspectives.

The legal and ethical framework fashioned by the courts that shape and guide interaction between members of Congress and administrators will be made explicit. This framework provides clues as to the assumptions that already exist and indicate areas that need to be clarified. Future changes in the nature of interaction must be consistent with this framework.

Review of the Literature

I have been referring to the interaction between members of Congress and administrators. The interaction in question is not between the Presidency and the Congress. The

Presidency needs to be distinguished into two different entities.

> . . . [T]he "executive" is much more than the presidency; the executive is essentially two related but often conflicting institutions: the presidency and the bureaucracy. The increased power of the executive, in short, results from not only the emergence of an imperial presidency but also the emergence of the modern administrative state.[4]

This distinction is quite recent. This modern "administrative state" is the subject of my study. The classic structure in American government of an executive, legislative and judicial branch was fundamentally changed at the end of the nineteenth century when our modern administrative agencies were born. The agencies have blended the afore-mentioned powers and they are lodged within one agency. In addition, our modern administrative state is also empowered by statute to act in formulating and implementing policy. In the past, policy had to be incorporated into statute. It is these differences that characterize our modern administrative state. The bureaucracy or "administrative state" is an entity in its own right and deserves study now that it has come of age.

> The administrative state is however, in many respects a prodigal child. Although born of congressional intent it has taken on a life of its

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[4]Lawrence C. Dodd and Richard L. Schott, Congress and the Administrative State (New York: John Wiley and Sons, 1979), 7.

> own and has matured to a point where its muscle and brawn can be turned against its creator.[5]

Being an addition to the constitutional framework of executive/judicial/legislative entities has created some problems. The administrative state still struggles with questions of legitimacy. Although no universal definition of legitimacy exists, the concept has always been hotly debated.[6] For my purposes I will rely on the following definition:

> Legitimacy is the foundation of such governmental power as is exercised both with a consciousness on the government's part that it has a right to govern and with some recognition by the governed of that right.[7]

It is the "recognition" part of this definition that is so troubling in the Keating Five controversy. Also, I am concerned with this concept because "institutional legitimacy is an indispensable condition for institutional effectiveness."[8]

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[5]Ibid., 2.

[6]For a recent examination of legitimacy issues see the May/June 1993 issue of Public Administration Review. There are seven articles that address this under the title: "Public Administration and the Constitution". For the classic argument against legitimacy of the administrative state, see Theodore J. Lowi, The End of Liberalism, 2d ed., (New York: W. W. Norton & Company, 1979).

[7]The quote is from an article by Dolf Sternberger in The International Encyclopedia of the Social Sciences, ed. David L. Sills, vol. 9, (New York: The Macmillan Company & The Free Press, 1968), 244.

[8]James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government (Cambridge:

The administrative state is now huge and its activity exceeds that of Congress. The Code of Federal Regulations exceeds the size of the U.S. Code indicating that administrative discretion has drastically increased.

> The continued delegation of policy-making authority to the bureaucracy has made the administrative process a primary arena for competition between the American president and Congress.[9]

This has produced a perpetual tug-of-war between the Congress and the Presidency, somewhat refereed by the judicial branch, to control the administrative state. This conflict has prompted studies and concern that our system of government is facing a potent crisis.[10] In addition, previous assumptions are no longer accurate. For example, the notion that Congress enacts laws and the President's subordinates administer them no longer holds up. The arena for policy making and administration is muddled and blended, complicating the

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Cambridge University Press, 1978), 10.

[9]William F. West and Joseph Cooper, "Legislative Influence v. Presidential Dominance: Competing Models of Bureaucratic Control," Political Science Quarterly 104 (Winter 1989/90): 581.

[10]Charles M. Hardin, "A Challenge to Political Science," PS 22 (September 1989): 595-600; Mark P. Petracca, "Divided Government and the Risks of Constitutional Reform," PS 24 (December 1991): 634-7; and Francis E. Rourke, "The 1993 John Gaus Lecture: Whose Bureaucracy Is This Anyway? Congress, the President and Public Administration," PS 26 (December 1993): 387-92.

efforts of every branch to fulfill its constitutional duties, and increasing conflict.

Dodd and Schott blame the Congress for this conflict and:

> . . . the Constitution itself, which was written under assumptions about the nature of the legislative branch that are no longer valid.[11]

Despite this conflict among the branches, Congress still has a great deal to say about how the administrative state is run. It has the authority to create and abolish agencies as well as determine staffing, duties etc.

Approximately twenty years ago Congress was being criticized for not overseeing the administrative state enough. The criticism has changed. Congress is now being castigated for overseeing too much and "micromanaging."[12]

> Micromanagement is a relatively new word to express a very old complaint: intervention by Congress in administrative details.[13]

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[11]Dodd and Schott, ix.

[12]Kenneth W. Thompson, ed., Governance II: The Presidency, The Congress, and the Constitution: Deadlock or Balance of Powers? (Lanham, MD: University Press of America, 1991), 87.

[13]Louis Fisher, "Micromanagement by Congress: Reality and Mythology," in The Fettered Presidency: Legal Constraints on the Executive Branch, ed. L. Gordon Crovitz and Jeremy A. Rabkin (Washington D.C.: American Enterprise Institute, 1989), 139.

Micromanagement by Congress is seen as "subversive" to administration and the criticism is becoming more common.[14] The dividing line between oversight and micromanagement is undoubtedly thin. The perception that the administrative state is out of control, and needs to be reined in by Congress, is often the justification for congressional micromanagement.

One scholar argues that Congress has an interest in keeping the administrative state "permeable."[15] Congress wants certain imperfections so that when problems arise, members can fix them. If it were not permeable, Congress would not have to intervene on the part of constituents. This intervention allows members to appear busy and responsive to the public.[16]

Regardless of one's perspective, Congress must have a say in administration if it is to perform its legislative function.

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[14]James L. Sundquist, "Congress as Public Administrator," in A Centennial History of the American Administrative State ed. Ralph Clark Chandler (New York: The Free Press, 1987), 285.

[15]Morris P. Fiorina, "Congressional Control of the Bureaucracy: A Mismatch of Incentives and Capabilities," in Congress Reconsidered, ed. Lawrence Dodd and Bruce Oppenheimer, (Washington D.C.: Congressional Quarterly Press, 1989), 332-48.

[16]A notion that has been empirically verified, see David Moon, George Serra and Jonathan P. West, "Citizens' Contacts With Bureaucratic and Legislative Officials," Political Research Quarterly 46 (December 1993): 931-41.

> The power to legislate is largely meaningless if the legislature lacks the ability to ensure proper administration of public policy.[17]

Other scholars suggest that legislative attention to administration is a "precondition" for discretion to be bestowed.[18]

Oversight

Research regarding oversight is shaped by how oversight is defined. There are many definitions for oversight and there does not seem to be one that is agreed on. However, some definitions are more common than others. For my purposes, all are sufficient because every standard definition includes the actions that took place between the Keating Five and the administrators. One of the most common, and the most broad is Ogul's:

> Legislative oversight is behavior by legislators and their staffs, individually or collectively, which results in an impact, intended or not, on bureaucratic behavior.[19]

This is admittedly a broad definition, but it is widely used. Other standard definitions of oversight usually refine or

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[17]Dodd and Schott, 155.

[18]David Epstein and Sharyn O'Halloran, "Administrative Procedures, Information, and Agency Discretion," American Journal of Political Science 38 (August 1994): 716.

[19]Morris S. Ogul, Congress Oversees the Bureaucracy: Studies in Legislative Supervision (Pittsburgh: University of Pittsburgh, 1976), 11.

narrow Ogul's.[20] Without question, "[h]ow oversight is defined affects what oversight one finds."[21]

This standard definition of oversight can include a great many activities by Congress, its members and staff. In addition, oversight cannot be labeled easily or confined to a particular part of Congress' policy proceedings. Oversight is found in all parts of the proceedings.[22]

Research on oversight can get quite complicated even with a very narrow definition of oversight, because it can be both a dependent and independent variable. Oversight both causes, and is caused by, a variety of factors which is making the research varied and diverse.[23]

Legal justifications for Congress performing oversight can be found in the Constitution, statute and the Supreme Court. The "necessary and proper" clause as well as the "commerce" clause are considered the constitutional

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[20]See Seymour Scher, "Conditions for Legislative Control," Journal of Politics 25 (August 1963): 526-51; and Joseph P. Harris, Congressional Control of Administration (Washington, D.C.: Brookings Institution, 1964).

[21]Ogul, Congress Oversees the Bureaucracy, 7.

[22]Donald F. Kettl, "Micromanagement: Congressional Control and Bureaucratic Risk," Agenda for Excellence: Public Service in America, ed. Patricia W. Ingraham and Donald F. Kettl (Chatham, N.J.: Chatham House Publishers, 1992), 96.

[23]Bert Rockman, "Legislative-Executive Relations and Legislative Oversight," in Handbook of Legislative Research ed. Gerhard Lowenberg, Samuel C. Patterson and Malcolm E. Jewell, (Cambridge, MA: Harvard University Press, 1985), 551.

references. By engaging in oversight, Congress makes sure that its laws are being executed correctly. Oversight is considered "necessary and proper for carrying into execution" the powers given to it in the Constitution. Oversight reviews this "execution." Congress is authorized to regulate commerce. In order to assure that commerce is being conducted according to law, Congress oversees the administrative state in administering this function. In addition, the Supreme Court has determined that Congress' oversight powers are extremely broad.[24]

Congress first defined oversight responsibilities in sections 136a and b of the Legislative Reorganization Act of 1946. Further clarifications were added in subsequent legislation. This act charges the standing committees with continuing responsibility to review administration and application of laws.

In addition to the legal justifications for oversight, there are historical expectations and norms. John Stuart Mill was probably the first scholar to address the need for legislative bodies to oversee the administrative state.

Intervening in the administrative state is a well-established expectation of members of Congress. It is seen as one of their official responsibilities. The problem comes in

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[24]Watkins v. United States, 354 U. S. 178 (1957).

how far members should go in their oversight activity. But, the representative function is expected.

Congress is elected by the people and administrators are not.[25] Congress holds the administrators accountable to the people. This is the classic justification for congressional intervention in the administrative state. This is essential because ". . . unaccountable power flies in the face of the central norms" of democracy.[26] This representative function "is the essential quality that distinguishes democracy from autocratic rule."[27]

With the emergence of the administrative state, legislative activity has shifted away from Congress. This means important policy is largely determined away from the branch that is considered truly representative. However, representativeness seems to be both the weakness and the strength of Congress when it intervenes in the administrative state.

> . . . the complaint against the Congress is that in its responsiveness to constituency interests it too

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[25]Efforts have been made to establish the "representativeness" of administrators, see especially John A. Rohr, To Run A Constitution cited on page 2.

[26]Judith Emily Gruber, Controlling Bureaucracies: Dilemmas in Democratic Governance (Berkeley: University of California Press, 1987), 5.

[27]Sundquist, 287.

> often sacrifices the broad public interest to the narrow, and the general to the parochial.[28]

Unfortunately, if the Member goes too far, the representativeness aspect gives way to special treatment for individuals.

Historical events have largely determined the performance and study of oversight. In the early days of United States history, Congress played a much larger role in administering the government. It was not until the twentieth century that much of administration was delegated to the presidency.

The politics/administration dichotomy dominated the thinking between the late 1800s and 1930s. It was the traditional paradigm that governed interactions.[29] Elected officials determined policy and administrators applied it. The one realm did not interfere with the other.[30] In addition, oversight of administration usually consisted of detailed restrictions enacted into law.[31] An example of this would be the legislative veto provisions included in statute.

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[28]Sundquist, 286.

[29]West and Cooper, 582.

[30]This notion of neutral competence still generates some scholarly attention, see Francis Rourke, "Responsiveness and Neutral Competence in American Bureaucracy," Public Administration Review 52 (November/December 1992): 539-46.

[31]Leonard D. White, "Congressional Control of the Public Service," American Political Science Review 39 (February 1945): 3.

Public administration as a discipline rose during this time period. Its early history was characterized by efforts to make it more independent of political controls and to centralize administration under a hierarchy headed by the President. Beginning in the 1960s efforts were being exerted to reverse this trend with the idea that administrators had become too independent.[32] In addition, the scope and complexity of government had significantly increased. This brought on increased calls for more comprehensive and systematic congressional oversight.

Oversight, as we know it now, and systematic study of it, did not occur until the 1960s and especially the 1970s. There were a few scattered studies of oversight in the 1960s. The 1970s marked several changes. In 1974, the House of Representatives required all committees, except Appropriations, to split oversight from its legislative functions and create specific oversight subcommittees or assign specific oversight responsibilities to its existing legislative subcommittees.

In addition, Richard Nixon's power struggle with Congress served to focus both institutional and scholarly interest on the relationship between the legislative and executive

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[32]Francis E. Rourke, "Bureaucratic Autonomy and the Public Interest," American Behavioral Scientist 22 (May/June 1979): 537-8.

branches. This was also spurred by the notion that the executive branch had become too independent.

In addition to oversight, Congress was using a variety of other activities in attempting to keep the administrative state in line. The most common restrictions Congress imposed were limiting appropriations, enacting temporary authorizations and, of course, the legislative veto.[33]

By the middle of the 1970s, Congress was actively engaged in oversight. Reasons for this vary, but most stem from the idea that rewards and money for enacting legislation had been reduced and that Congress had simply shifted its focus to refining existing legislation instead of passing new laws.[34] This pattern continued throughout the 1980s and has persisted in the 1990s.

> By the mid-1970s, Congress had become more cautious about new legislation, and it has since become much more engaged in oversight -- or micromanaging.[35]

Members are shifting away from their traditional legislative roles of formulating national policy and

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[33]Allen Schick, "Politics Through Law: Congressional Limitation on Executive Discretion," in Both Ends of the Avenue, ed. Anthony King, (Washington D.C.: American Enterprise Institute, 1983), 170.

[34]See Joel D. Aberbach, Keeping a Watchful Eye: The Politics of Congressional Oversight (Washington, D.C.: Brookings Institution, 1990), 39; and Jeremy Rabkin, "Micromanaging the Administrative Agencies," The Public Interest 100 (Summer 1990): 119.

[35]Rabkin, 116-30, 119.

instituting new programs. There are not as many rewards, or opportunities, for creating new programs, and the emphasis has shifted to justifying the old. As a result, members are putting more time into the "ombudsman" function which means intervention in the administrative state.[36]

In addition, the use of the legislative veto was struck down.

> Since Congress has lost the use of this formal procedure, it will likely turn to less formal oversight mechanisms, including direct, personal contacts between members of Congress and administrators, in order to maintain control over administrative agencies.[37]

The political climate has changed. The payoffs for engaging in oversight have increased. With increased payoffs, oversight itself has increased. Coupled with the decline in passage of new laws, the incentives for oversight have increased substantially. But, the oversight of today and the oversight of yesteryear is substantially different.

> The first and most important difference between contemporary micro-management and the traditional pattern is that the scale of government today is vastly larger. And perhaps the most important implications of this fact is the most obvious: the costs of misguided interventions can

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[36]Fiorina, "Congressional Control of the Bureaucracy," 339; Also see Aberbach, Keeping a Watchful Eye, 39.

[37]Brett G. Kappel, "Judicial Restrictions on Improper Influence in Administrative Decision-making: A Defense of the Pillsbury Doctrine," Journal of Law and Politics 6 (Fall 1989): 135.

now be staggering. The S&L crisis is the obvious example.[38]

Forms of oversight vary greatly. Hearings are the most common oversight technique.[39] Other techniques include investigations, studies and reports on the administrative state, communication directly with agencies, the legislative veto, and casework. More extensive oversight often occurs during the appropriations process.[40]

Congressional committees and subcommittees engage in oversight. What results is subcommittees and committees, claiming to speak for Congress, intervening in administration. With the increased number of subcommittees and congressional staff since the 1970s, this problem has multiplied.[41]

Research has distinguished between formal and informal oversight, manifest and latent oversight.[42] Oversight

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[38]Rabkin, 119.

[39]Aberbach, Keeping a Watchful Eye, 141.

[40]For an exhaustive analysis of all the ways Congress can control administrators see the classic book, Harris, 1964. For a more recent analysis see R. Douglas Arnold, Congress and the Bureaucracy: A Theory of Influence (New Haven, CT: Yale University Press, 1979), 279-886; and Louis Fisher, The Politics of Shared Power: Congress and the Executive, 2d ed., (Washington D.C.: Congressional Quarterly Press, 1987), 73-113.

[41]Rabkin, 119.

[42]See Ogul, Congress Oversees the Bureaucracy, 1976.; and Ogul, "Congressional Oversight," 1981; as well as Aberbach, Keeping a Watchful Eye, 1990.

investigations would be considered formal oversight and a telephone call to an administrator would be considered informal oversight. Latent oversight is oversight behind the scenes. Manifest oversight is done in the open.

Ogul argues that oversight has been studied primarily as a formal, manifest function. He feels that inclusion of the more latent functions leads to the belief that more oversight is performed, than has been counted in the past, and better understanding of oversight has resulted.[43] Constituency service, such as casework is a latent form of oversight. Research also suggests that formal, manifest oversight is used when informal, latent oversight mechanisms break down.[44]

There is some evidence to suggest that a lack of formal oversight may mean pervasive influence at the latent, informal level.[45] Also, research suggests that the emphasis in the past

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[43]See Ogul, Congress Oversees the Bureaucracy, 10; and Morris S. Ogul, "Congressional Oversight: Structures and Incentives," in Congress Reconsidered, ed. Lawrence Dodd and Bruce Oppenheimer, (Washington D.C.: Congressional Quarterly Press, 1981): 324-5.

[44]Ogul, Congress Oversees the Bureaucracy, and Ogul, "Congressional Oversight," 317-31.

[45]Barry R. Weingast and Mark J. Moran, "Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission," Journal of Political Economy 91 (October 1983): 765-800.

has concentrated too much on "police-patrol" oversight when in reality Congress responds in a "fire-alarm" fashion.[46]

The proliferation of latent, informal oversight functions has at least one scholar concerned.

> The use of informal oversight mechanisms, which frequently occurs out of public view, raises the possibility that improper congressional influence may be brought to bear on administrative decision-makers.[47]

Kappel argues that the techniques also raise constitutional questions. Like the legislative veto, these techniques allow Congress to avoid the bicameralism and presentment requirements. In effect, they circumvent constitutional norms.

Research on oversight is quite broad. Without question, an overwhelming amount of it deals with simply counting things: the number of oversight hearings, the amount of communication between Congress and the administrative state, or the number of audits. Normative questions such as what form oversight should take are rarely addressed.[48] The early writings began to address the normative issues, but later

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[46]Matthew McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," American Journal of Political Science 28 (February 1984): 165-79.

[47]Kappel, 135.

[48]For a welcome exception, see Pendleton Herring, "Executive-Legislative Responsibilities," American Political Science Review 38 (December 1944): 1153-65.

studies focused on the empirical functions.[49] Recent studies develop empirical and statistical models studying and explaining the interaction.[50]

A main focus of oversight research is who conducts it and what form it takes. Usually the focus is on committees or subcommittees because the parent bodies, or individual members, do not conduct oversight.[51] In addition, the opposing party is more apt to initiate oversight as are senior ranking members and the committee or subcommittee chair.[52]

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[49]For a more extensive review of this literature see Michael J. Scicchitano, "Congressional Oversight: The Case of the Clean Air Act," Legislative Studies 11 (August 1986): 393-294.

[50]Janet A Gilboy, "Some Problems of Broad Delegation of Law Making Power: Reflections From an Empirical Study," Policy Studies Journal 18 (Spring 1990): 627-44; M. Stephen Weatherford, "Measuring Political Legitimacy," American Political Science Review 86 (March 1992): 149-66; B. Dan Wood and Richard W. Waterman, "The Dynamics of Poltical-Bureaucratic Adaptation," American Journal of Political Science 37 (May 1993): 497-528; Arthur Lupia and Matthew D. McCubbins, "Designing Bureaucratic Accountability," Law and Contemporary Problems 57 (Spring 1994): 91-126; Epstein and O'Halloran, 697-722; Jeff Gill, "Formal Models of Legislative/Administrative Interaction: A Survey of the Subfield," Public Administration Review 55 (January/February 1995): 99-106; Kathleen Bawn, "Political Control Versus Expertise: Congressional Choices About Administrative Procedures," American Political Science Review 89 (March 1995): 62-73.

[51]Ogul, Congress Oversees the Bureaucracy; Ogul, "Congressional Oversight," 317-31, Weingast and Moran, 765-800.

[52]Dale Vinyard, "The Congressional Committees on Oversight: Patterns of Legislative Committee-Executive Agency Relations," Western Political Quarterly 21 (September 1968):

Budgetary approval and oversight have always been a popular area for research and studies have extended over quite a length of time.[53]

Much research surrounding oversight has centered on the notion of what incentives exist to engage in oversight. For example, what conditions prompt review by committee[54], what part publicity plays, committee seniority, or members attempting to further their careers, have all been studied.[55] Attention has also focused on oversight likelihood when members tend to approve of the agency's general activities or think the agency's activities are important.[56] In addition, other possible incentives have been argued, such as accidents

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391-99; Ogul, Congress Oversees the Bureaucracy; Michael J. Scicchitano, "Congressional Oversight: The Case of the Clean Air Act," Legislative Studies 11 (August 1986): 393-407; Aberbach, Keeping a Watchful Eye.

[53]Arthur MacMahon, "Congressional Oversight of Administration: The Power of the Purse," Political Science Quarterly 58 (September 1943): 380-414; Michael W. Kirst, Government Without Passing Laws (Chapel Hill: University of North Carolina Press, 1969); Arnold, Congress and the Bureaucracy; Jon Bender, Serge Taylor and Roland Van Gaalen, "Bureaucratic Expertise vs. Legislative Authority: A Model of Deception and Monitoring Budgeting," American Political Science Review 79 (December 1985): 796-828.

[54]Scher, 526-51.

[55]Ogul, Congress Oversees the Bureaucracy.; Aberbach, Keeping a Watchful Eye.; Kettl, 94-109.

[56]Ibid.

and scandals, or the reauthorization process.[57] One of the most intriguing is the notion that congressional oversight is prompted by fire-alarms, a reactive notion, rather than police-patrol, an active notion.[58]

Other research focuses on evaluating oversight techniques[59]; how coordinated oversight is[60] and of course case studies of particular oversight efforts.[61]

There are a few studies that address some limited, normative concerns, or in other words, studies that discuss what relationship should exist between the administrative state and Congress. Many of these studies address how

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[57]Kathleen A. Kemp, "Accidents, Scandals, and Political Support for Regulatory Agencies," Journal of Politics 46 (May 1984): 401-27. and Aberbach, Keeping a Watchful Eye.

[58]McCubbins and Schwartz, 165-79.

[59]Ogul, Congress Oversees the Bureaucracy.; Genevieve J. Knezo and Walter J. Oleszak, "Legislative Oversight and Program Evaluation," The Bureaucrat 5 (April 1976): 37-51.; West and Cooper, 581-606.

[60]Aberbach, Keeping a Watchful Eye; and Jeffrey S. Banks and Barry R. Weingast, "The Political Control of Bureaucracies Under Asymmetric Information," American Journal of Political Science 36 (May 1992): 509-24.

[61]Vinyard, 391-99; Thomas P. Jahnige, "The Congressional Committee System and the Oversight Process: Congress and NASA," Western Political Quarterly 21 (June 1968): 227-39; Parnell, 1360-94; Terry M. Moe, "An Assessment of the Positive Theory of "Congressional Dominance," Legislative Studies Quarterly 12 (November 1987), 475-520.

independent the administrative state is, relative to congressional control.[62]

Other studies and writings on this topic express concern over pervasive congressional influence in the administrative state.[63] Unfortunately, these concerns are brief and anecdotal, usually added on as closing thoughts during the conclusions. The idea dominates that Congress should be influential in the administrative state and many ignore the possibility that Congress may get out of control and that there may be a limit to how much control Congress should exercise.[64] This is a somewhat surprising notion, because the Founding Fathers were well aware of legislative abuse and tyranny.

Constituency Service and Casework

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[62]Weingast and Moran, 765-800; Randall L. Calvert, Mark J. Moran, and Barry R. Weingast, "Congressional Influence Over Policy Making: The Case of the FTC," in Congress: Structure and Policy, ed. Matthew D. McCubbins and Terry Sullivan, (Cambridge: Cambridge University Press, 1987); B. Dan Wood and Richard W. Waterman, "The Dynamics of Political Control of the Bureaucracy," American Political Science Review 85 (September 1991): 801-28.

[63]Herring, 1153-65; Harris, 1964; John D. Lees, "Legislatures and Oversight: A Review Article on a Neglected Area of Research," Legislative Studies Quarterly 2 (May 1977): 193-208; Joel D. Aberbach and Bert A. Rockman, "Mandates or Mandarins? Control and Discretion in the Modern Administrative State," Public Administration Review 48 (March/April 1988): 606-12; Rabkin, 116-30.

[64]Judith a Best, "Legislative Tyranny and the Liberation of the Executive: A View From the Founding," Presidential Studies Quarterly 17 (Fall 1987): 697-709.

Constituency service is a catch-all term for any assistance to a Member's constituents. Constituency service is not a synonym for casework. However, casework does make up the bulk of constituency service.[65]

> Casework is intervention for individuals, groups, or organizations (including businesses) that have requests or grievances against, or a need for access to federal (and occasionally state or local) government department or agencies.[66]

Casework makes up only a portion of the total oversight that is conducted. Casework as oversight has received only moderate attention from the academic community. But, there is agreement that casework can serve as oversight when dealing with constituent problems. Casework often highlights problems in the administrative state that need legislative attention.

> . . . casework constitutes a direct, yet informal and relatively "inexpensive" congressional intervention into agency operations, and therefore it is, in and of itself, a kind of oversight.[67]

In effect, casework can serve as Congress' "antennae" for oversight.[68] The effectiveness, however, of Congress' oversight

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[65]Bruce Cain, John Ferejohn, and Morris Fiorina, The Personal Vote: Constituency Service and Electoral Independence (Cambridge: Harvard University Press, 1987).

[66]John R. Johannes, To Serve the People: Congress and Constituency Service (Lincoln: University of Nebraska Press, 1984), 2.

[67]John R. Johannes, "Casework as a Technique of U.S. Congressional Oversight of the Executive," Legislative Studies Quarterly 4 (August 1979): 347.

[68]Johannes, To Serve the People, 163.

function is still somewhat in question.[69] In addition, the impact it has on the administrative state is unclear.

> Despite the burdens and disruptions that casework creates for executive agencies the argument is often made that the ombudsman role inherent in the handling of casework plays an important role in the ability of Congress to monitor bureaucratic behavior and to discover incidents of maladministration that would otherwise go unchecked.[70]

For a variety of reasons, the casework function is becoming more important. Rapid technological change was expected to make casework increase.[71] The increasing size of the administrative state has also made casework more important in addition to members actually soliciting casework.[72]

Casework as oversight is the specific oversight form that figures prominently in the Keating Five hearings, along with general oversight of the administrative state in keeping it accountable. However, casework as oversight does not figure prominently in the oversight research.

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[69]Kenneth Gray, "Congressional Interference in Administration," in Daniel J. Elazar et al., eds. Cooperation and Conflict: Readings in American Federalism (Itsaca, IL: F.E. Peacock, 1969): 521-42; Ogul, Congress Oversees the Bureaucracy; Robert Klonoff, "The Congressman as a Mediator Between Citizens and Government Agencies: Problems and Prospects," Harvard Journal on Legislation 16 (Summer 1979): 701-34.

[70]Dodd and Schott, 269.

[71]John Saloma, Congress and the New Politics (Boston: Little Brown, 1969).

[72]Johannes, To Serve the People, 55.

Casework has been most extensively studied in terms of its election relevance.[73] Other aspects of research into casework have been limited in scope and confined, almost entirely, to one particular scholar.[74]

Like oversight, much of the research on constituency service deals with counting things: the number of constituent

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[73]David R. Mayhew, Congress: The Electoral Connection (New Haven, CT: Yale University Press, 1974); Richard J. Fenno, Jr., Home Style: House Members in Their Districts (Boston: Little, Brown and Company, 1978); Dianna Evans Yiannakis, "The Grateful Electorate: Casework and Congressional Elections," American Journal of Political Science 25 (August 1981): 568-80; John R. Johannes and John C. McAdams, "The Congressional Incumbency Effect: Is It Casework, Policy Compatibility, or Something Else? An Examination of the 1978 Election," American Journal of Political Science 25 (August 1981): 512-42; Cain, Ferejohn and Fiorina, 1987.; Morris P. Fiorina, Congress: Keystone of the Washington Establishment (New Haven, CT: Yale University Press, 1989); Sunil Ahuja, "Electoral Status and Representation in the United States Senate: Does Temporal Proximity to Election Matter?," American Politics Quarterly 22 (January 1994): 104-18; George Serra and David Moon, "Casework, Issue Positions, and Voting in Congressional Elections: A District Analysis," The Journal of Politics 56 (February 1994): 200-13; George Serra, "What's In It For Me? The Impact of Congressional Casework on Incumbent Evaluation," American Politics Quarterly (October 1994): 403-20.

[74]John R. Johannes, "Casework as a Technique of U.S. Congressional Oversight of the Executive," Legislative Studies Quarterly 4 (August 1979): 325-51; _____, "The Distribution of Casework in the U.S. Congress: An Uneven Burden," Legislative Studies Quarterly 5 (November 1980): 517-44; _____, "Explaining Congressional Casework Styles," American Journal of Political Science 27 (August 1983): 530-47; _____, "Congress, the Bureaucracy and Casework," Administration and Society 16 (May 1984): 41-69; _____, To Serve the People; Johannes and McAdams, 512-42.; _____, "Entrepreneur or Agent; Congressmen and their Distribution of Casework, 1977-1978," Western Political Quarterly (September 1987): 535-53.

requests, the number of contacts between an administrator and a staffer and so forth. Research has determined that senators have heavier casework loads than representatives for obvious reasons. Senior members have larger casework loads than junior members even though most casework is a function of chance rather than anything the Member does to stimulate it.[75]

There is some evidence to suggest that casework volume is decreasing which may mean that its usefulness for oversight may be diminishing somewhat.[76] Other evidence disputes this.[77]

Casework is largely a staff responsibility with the Member getting involved only under unusual circumstances. Most members spend only a few hours a week on casework. Senators spend less time than Representatives. Senior members get involved less with casework than do their younger colleagues. Interestingly, senators on the west coast get more involved in casework than their eastern colleagues.[78]

Members are much more likely to be involved in federal projects rather than individual cases, unless the constituent

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[75]Johannes and McAdams, "Entrepreneur or Agent," 535-53.

[76]Ibid.

[77]Larry Liebert, "Hill's Growth Industry: Constituent Service," Congressional Quarterly Weekly Report 52 (25 June 1994): 1758.

[78]Johannes, "Congress, the Bureaucracy, and Casework", 41-69.

is politically important and large numbers of employees of the district or state are involved.[79]

A profile of the typical constituent requesting help has emerged:

> Holding other variables constant, it becomes clear that being older, living in the East and perhaps in the Midwest working for government (at least in 1978), having a senior representative -- especially of one's own party -- and being politically active lead one to request help more than would be expected in the absence of those characteristics.[80]

Generally speaking, the particular constituent requesting help does not normally affect how hard the Member's office works on behalf of the constituent. Most get the same treatment in the casework process, it may just be quicker treatment. However, if a member does get personally involved, the administrative state does seem to handle the situation more carefully.[81]

Legislators can exhibit various behaviors when responding to constituent requests. Some casework elicits a more aggressive response than others. But, it is fair to say the activity lies on a continuum.

> In its less-than-ideal manifestations, however, casework can become either an attempt by a legislator to pressure the bureaucrats into making

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[79]See Ogul, Congress Oversees the Bureaucracy, 22; Johannes, To Serve the People, 153; and Fiorina, Keystone, 91.

[80]Johannes, To Serve the People, 31.

[81]Johannes, To Serve the People.

> an improper decision in favor of his constituent, or a paper shuffle in which the citizen's complaint is simply "bucked" back to the agency topped by a form letter from the congressman.[82]

Handling casework seems to have positive benefits for both members and administrators. Members get a current eye on how laws are actually affecting constituents which allows them to fine-tune legislation. Casework also helps members hold administrators accountable for how laws are implemented. Members can also gain an appreciation for the everyday operations of agencies through pursuing casework. Casework can also help administrators refine their procedures and operations. Occasionally, casework does alert both members and administrators to serious problems in legislation of agency procedures which can prompt increased oversight. However there is a darker side to casework.

> To the extent that factors other than the inherent merit of a citizen's complaint determine the outcome of his case, the growing ombudsman function poses a threat to the integrity of the political process and to citizens' faith in government. Service responsiveness could undermine genuine symbolic responsiveness."[83]

The Scher Study[84]

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[82]Ernest Gellhorn and Ronald M. Levin, Administrative Law and Process, ed., (St. Paul, MN: West Publishing Co., 1990), 47-48.

[83]Johannes, To Serve the People, 119.

[84]Seymour Scher, "Congressional Committee Members as Independent Agency Overseers: A Case Study," American Political Science Review 54 (December 1960): 911-920.

A study done in 1960 by Seymour Scher most closely resembles the situation in the Keating Five controversy. The study dealt with an analysis of committee members' behavior when overseeing independent regulatory commissions, especially when intervening on behalf of a constituent.[85]

What is interesting about the study is that members, when they shared their constituents concerns, did not shrink from pressing their constituents claim forcefully. The members did not view any of their behavior as improper. In fact, they would concede no constraints at all on their behavior.

> For the committee member there was no abstract meaning in the term "proper" when used to describe the relationship between the independent commission and the committee. Anything was proper that served to bring the agency, in its handling of cases in the regional offices or in its own order, into accord with the members' view of how the agency should act.[86]

When the Member's personal opinions clashed with those of the constituent, the Member handled the grievance routinely.

There did not seem to be any difference in the way members approached independent commissions from executive commissions. The members insisted on the independent commissions' need for independence, but declined to apply any restraints on their own behavior. Agency rules were as much

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[85]The only real difference was that the Keating Five were not members of the relevant committee, with the exception of Senator Riegle and Senator Cranston.

[86]Ibid., 919.

fair game as agency orders. There was no distinction in how they handled either constituent case.[87]

The Administrative Focus

Research that addresses administration and its relevance toward oversight, and casework in particular, is narrowly focused.[88] Students of public administration have not engaged in much research related to oversight. The research that has been done has been done by political science scholars, and "scholars are often partisans of the institutions they study."[89] In addition, the distinction between congressional-presidential relations and congressional-administrative relations has only lately been made.[90]

Without question, the literature on oversight and administration that does exist dwells largely on balance of power issues and administrative discretion:

> Much of the literature on oversight -- and indeed on executive - legislative relations generally -- is either straightforwardly or implicitly prescriptive, pervaded by assumptions about

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[87]Johannes notes that current dealings with independent regulatory agencies is somewhat different now. Member's tend to treat cases dealing with these agencies a little more gingerly, see Johannes, To Serve the People, 175.

[88]For some recent work see Sundquist 1987; Aberbach and Rockman 1988; and Kettl 1992.

[89]Rockman, 388.

[90]Dodd and Schott, 1979.

> government and its proper institutional arrangements, activities, and norms.[91]

When oversight and administration are examined, the idea of just how much discretion the administrators should be allowed pervades the analysis. This is very one-sided. Congress can get out of control too.

Giving administrators too much power is seen as violating our constitutional values. Concern centers around an unchecked administrative state. A multitude of writings exist addressing this subject.[92]

The S&L crisis may finally bring attention to the problems of an unchecked Congress.[93] Up until now, these problems of an unchecked Congress have received largely anecdotal concern and not analytic research. But, there is an increasing chorus warning of the dangers of Congress being

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[91]Rockman, 387.

[92]Gruber, 1987; Riley, 1987; Matthew D. McCubbins, Roger G. Noll and Barry R. Weingast, "Administrative Procedures as Instruments of Political Control," 3 Journal of Law, Economics & Organization (Fall 1987): 242-77; Robinson, 483-98.

[93]Rabkin, 117.

out-of-control.[94] Scholars are beginning to call for attention to what has been termed "legislative drift"

> Legislative drift results where the preferences of politicians evolve over time, creating a legislative environment inconsistent with the preferences of the original political coalition.[95]

Legislative drift results from the legislators efforts to control bureaucracies -- bureaucratic drift. Legislative drift can lead to an out-of-control Congress. The legislative veto is a case in point. The legislative veto was a means of controlling bureaucratic drift but evolved into a measure that upset the balance of powers.[96]

Congress, scholars warn, is too parochial and gets involved in administrative details, ignoring the larger national concerns.[97] Congressional oversight, another scholar warns, "is not merely the power to persuade but the power to

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[94]See Rabkin, 117; Kettl, 104; Aberbach, Keeping a Watchful Eye, 12. See also Murray J. Horn and Kenneth A. Shepsle, "Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs," 75 Virginia Law Review (March 1989): 504; and Steven Shimberg, "Checks and Balance: Limitations on the Power of Congressional Oversight," Law & Contemporary Problems 54 (Autumn 1991): 241.

[95]Jonathan R. Macey, "Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies,' Georgetown Law Journal (Fall 1992): 672.

[96]Macey, 671-703.

[97]Fiorina, 1989.

intimidate as well."[98] Some agencies need protection from outside control, those that have a judicial type function or engage primarily in research, especially statistical research.[99] Still another warns that congressional government is committee government -- specialized government that suffers from the same problems bureaucratic government is accused of.[100] Micromanagement, a another scholar warns, can be extremely costly because regulation deals with billions of dollars.[101] Congress' meddling can lead to laws being implemented unevenly on the population, and unfairly.[102] In fact, in the last decade, Congress seems to have freed itself from any restrictions on intervening in the administrative state.[103]

The main excuse Congress uses in intervening in the administrative state is congressional intent. Administrators, Congress argues, are not following Congress' intent. But, congressional intent is not a clear concept.

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[98]Gormley, 1989.

[99]Rourke, 537-46.

[100]West and Cooper, 581-606.

[101]Rabkin, 116-30.

[102]Archie Parnell, "Congressional Interference in Agency Enforcement: The IRS Experience," Yale Law Journal 89 (June 1980): 1360-94.

[103]Rabkin, 116-30.

> What is the intent of Congress -- that which the law states or that which is defined as the mood of its present members, or even just its strategically located members? Philosophical fog is pervasive here.[104]

As other scholars have pointed out, "Congress rarely speaks with one voice."[105] Determining intent is not easy. Intent must often be inferred from many different voices. Moreover, using congressional intent as an excuse for intervention is more a "battle cry" than a rationale.[106]

The administrative state is not seen as an equal partner in the oversight relationship and scholarly attention has thus been devoted to the legislative realm and deemphasized the importance of the administrative issues. This is true even in recent studies that include administrative issues in their study of oversight.[107]

Research into the role of the administrative state and legislative oversight has not progressed to a very advanced level. Essentially, it has documented only the history that has led to the need for the research.[108]

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[104]Rockman, 548.

[105]Arnold, 280.

[106]Rockman, 548.

[107]See West and Cooper, 1989-90.

[108]For narrative account see, Sundquist, 261-90.

For some time, scholars have been demanding that studies of oversight include the effect on administrators, especially when the form of oversight used is casework.[109]

The interaction documented in the Keating Five hearings needs to be studied. Oversight, especially casework as oversight, is a neglected area of research. Simply counting the amount of oversight hearings or casework incidents is no longer adequate. Deeper questions need to be explored. And that exploration must include the administrative point-of-view by analyzing the effect on administration.

The effect of oversight, and especially casework, on administration needs to be studied. Scholars are calling for a fuller understanding of this phenomenon[110] and questions of appropriate oversight cannot be answered without this information.

> When at long last one asks what is the impact of oversight activity, there is remarkably little to say. The reason is astonishingly simple: Little has been written on the subject, and even

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[109]See Ogul, Congress Oversees the Bureaucracy, 171; Johannes, "Casework as a Technique," 347-48; Joel Aberbach, "Changes in Congressional Oversight," American Behavioral Scientist 22 (May/June 1979): 513; Dodd and Schott, v; Rockman, 419; Kettl, 98.

[110]Ogul, Congress Oversees the Bureaucracy, 171; Aberbach, "Changes in Congressional Oversight," 513; Johannes, "Casework as a Technique," 347-48; Johannes, "Congress, the Bureaucracy, and Casework," 66; Rockman 1985, especially 550-51; Kettle, 98.

> less investigated. We have arrived on the dark side of the moon.[111]

The administrative state has matured, and issues that have languished can no longer be ignored. Congress has delegated a great deal of responsibility to the administrative state and the assumptions that shaped notions about interaction in the past may no longer be valid.

> The task is to devise a system of congressional control which will be adequate to democratic purposes without at the same time impairing the capacity of public officials to operate efficiently. This balance cannot be attained by any simple formula.[112]

Research Design

This study is an analytical and theoretical case-study because I focus on one particular interaction with a view toward explaining the phenomenon and attempting to formulate ideas that will shape future action.

The Keating Five investigation offers a view of interaction between members of Congress and administrators that is remarkably well-documented. Approximately eight weeks of hearings were held by the Senate Ethics Committee resulting in several volumes of text.

During the hearings, each senator and witness was represented by counsel. The senators and other witnesses made

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[111]Rockman, 562.

[112]White, 4.

numerous statements, were questioned by their counsel, cross-examined by the special counsel as well as counsel for the other senators. It was a thorough and balanced examination.

In addition, the special counsel appointed by the committee conducted a thorough examination of the events before the hearings were even held. Numerous depositions, exhibits and documentation were collected. These were compiled into several volumes of text and were referred to continuously throughout the hearings.

The tremendous amount of documentation that was collected and compiled helps establish the testimony and presents quite an extensive paper trail. This evidence backs up, refutes and embellishes what is covered in the hearings.

The focus of the hearings may have been limited -- whether campaign contributions followed constituent service too closely -- but special counsel Bennett was allowed to probe and explore any facet of the controversy he thought relevant. What emerged was an extensive analysis of congressional intervention in the administrative state.

I read the documentation and testimony and examined the exhibits. I extracted the normative and ethical statements and inferences in the areas relevant to my research question.

The mechanical aspects of managing the data were handled by using The Ethnograph, a computer software qualitative research tool for social scientists.

By using The Ethnograph, I identified text in the hearings, useful for my research. I then entered the actual text into the computer. These data were later coded according to the following scheme: attitudes about constituency service, attitudes about intervening with regulators, attitudes about the nomination process, attitudes about the administrative state, the status of independent regulatory agencies, the FHLBB and the chief administrator of the FHLBB. The coding scheme included what category the speaker was part of: the Congress, the administrative state, or the public.

The program allowed me to code the data according to who expressed the viewpoint. I was also able to code the data according to what the viewpoint was and what subjects it covered. This later proved valuable using the sorting mechanism and mimics the procedures used with quantitative data.

After the coding was complete, I sorted the data into the respective categories. It was only then that the actual text from the hearings was digested and themes and other implications were identified, and conclusions about attitudes were drawn concerning the intervention. The program allowed me to preserve the actual quotes until the end of my analysis. Hopefully, this helps preserve the integrity of the data.

In addition, the savings and loan disaster was researched. I explored the relevant legislation, rules and

events that shaped it. A thorough understanding of the savings and loan industry is crucial in understanding the intervention of the Keating Five in the administrative state.

I examined the various pieces of legislation that support intervention in the administrative state and made an extensive review of the relevant case law. I supplemented this by reviewing the basic historical and constitutional issues that shape intervention, such as separation of powers and the nondelegation doctrine. In addition, I researched the ethical and normative standards that exist in the Congress and the rules that bind administrators and members of Congress.

Limitations and Delimitations

Any research study suffers from limitations and delimitations and this study is no exception.

There are all sorts of federal administrative agencies. I studied only one organization and it is now defunct. The Federal Home Loan Bank Board (FHLBB) was dissolved in 1989. It was replaced by the Office of Thrift Supervision (OTS). And, the Federal Savings & Loan Insurance Corporation (FSLIC) is also defunct. It is now a component of the Federal Deposit Insurance Corporation (FDIC).

Also, the FHLBB was a regulatory organization. Although classification of government agencies is not an exact science, regulatory organizations are somewhat distinct. Their

structure, organization and activities often differ drastically from those of other agencies.

I have limited the aspects of my study to normative assumptions and other values, and how the various actors understand and view the administrative state. Obviously, there are other issues to be studied, but I confined my study to just those two.

My study deals with only five senators: John McCain of Arizona, Dennis DeConcini also of Arizona, Alan Cranston from California, Donald Riegle from Michigan, and John Glenn from Ohio. Other senators obviously played a part in the Keating issue, such as Jake Garn, but they were not the subject of any hearings so little documentation exists.

Also, my study does not include members of the House of Representatives. Jim Wright played a large part in the savings and loan story, and Lincoln Savings in particular. However, I have chosen not to include him in my analysis because little documentation of his involvement exists. Even though hearings were held by the Committee on Standards of Official Conduct, the focus was limited and the issue it concentrated on had very little to do with the interaction between members of Congress and administrators.

Likewise, the Gonzalez Hearings are not included in my analysis, unless testimony from them was submitted in the Keating Five hearings. Henry Gonzalez, the chairman of a

subcommittee on banking in the House, held hearings on Lincoln Savings & Loan and the part the Keating Five played. However, these hearings were not a balanced analysis. Many felt that Gonzalez was out to prove a point or "get" someone. In addition, he tightly controlled the hearings and many viewpoints were not included or were intentionally ignored. The hearings were not conducted by an impartial body and cross-examination was not permitted. In addition, the five senators concerned, would not all consent to testify in the House hearings. For these reasons, I have chosen to exclude them from my analysis.

C-SPAN, the cable public affairs network, has the entire Keating Five hearings on tape. I tried to secure them to supplement the record with demeanor evidence. But, the cost was prohibitive so this study will not include them. However, they would have provided valuable additional information to analyze.

By using the hearings as my means of probing the attitudes and values of the various actors some limitations are evident. Spontaneous dialogue is undoubtedly better than canned speeches for determining attitudes and values. The hearings can be considered a middle ground between these two extremes. Senators and other witnesses were undoubtedly "prepped" by their counsel for their testimony. Obviously this can impair the integrity of the data. However, witnesses

in hearings are often asked questions they do not expect and must answer quickly with very little thought. Counsel are later able to clarify answers by cross-examination or color a prior answer to reflect a different viewpoint.

A hearings process where cross examination, re-cross examination and rebuttal exist does have the ability to thoroughly examine ideas. The traditional committee process can be somewhat slanted since the process is tightly controlled by the chairman. But the hearings themselves, whatever form they take, do have a spontaneity that more formal statements and procedures lack. This can be valuable for scholars studying political institutions.

Since the Keating Five hearings were ethics hearings a special effort was made to be fair and impartial in dealing with the five senators. All counsel had ample opportunity to explore all relevant themes, introduce whatever evidence they chose and ask whatever questions they thought pertinent.

In addition, the Keating Five hearings text was only one aspect of my study. The volumes included the cold record as well: reports, memoranda, diary references, datebook scribblings, canceled checks, phone records etc. This added a wealth of information to the actual hearings that reflected attitudes and values expressed when the Senators and other figures were not under direct scrutiny by the committee. This serves to strengthen the integrity of the data.

Overview

This chapter has covered a basic introduction of the problem in addition to providing a rationale and statement of the problem. The literature surrounding intervention in the administrative state has been reviewed including issues surrounding oversight and constituency service. The research design of the study has been made explicit, as well as the limitation and delimitations of this study.

Chapter Two is a narrative of the savings and loan disaster. The roots of the S&L industry are explored, along with the legislation that shaped it. Recent developments are given extensive treatment along with the various causes and conditions that shaped the disaster. The chapter ends by highlighting the various players in the Keating Five controversy and explaining their role in the disaster.

Chapter Three documents the historical, constitutional, legal and ethical issues relevant to interaction. Intervention is examined in its historical and constitutional context of separations of power and the non-delegation doctrine. Case law relevant to intervention is explored as well as the ethical issues that were involved. The chapter concludes with implications for administrators.

Chapters Four, Five and Six examine the controversy from various perspectives. Chapter four covers the senators perspective, chapter five covers the administrators

perspective while chapter seven concludes with the public's perspective.

The various chapters come together in Chapter Seven where the summary and conclusions are presented.

Chapter 2: The Savings and Loan Disaster, Charles Keating, and the Keating Five

The savings and loan disaster[1] will cost the United States approximately $150 billion.[2] By any measure it is a costly expenditure and represents the cumulative effect of several different conditions, both in the public sector and in the private. This chapter will present a brief history of the savings and loan disaster as well as a recounting of the part Charles H. Keating played along with the "Keating Five" senators.

The disaster was that many of the S&Ls, or thrifts as they are called, fell into insolvency and had to be "resolved"[3] by the government. Most of the savings and loans resolved were state-chartered institutions primarily in Texas and California. Charles H. Keating owned Lincoln Savings & Loan, a state chartered S&L in California. It was one of the costliest failures in the entire S&L industry. Charles

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[1]The term "bailout", although common, is inappropriate. The government made good on its insurance pledges to investors. This paper will use the term "disaster".

[2]Many estimates exist, but most do not take into consideration the time value of money. This is a present value estimate. See G. Thomas Woodward, Origins and Development of the Savings and Loan Situation, Congressional Research Service, 5 November 1990, 90-522 E, footnote #1.

[3]This term refers to several different activities. For example, the thrift can be seized and liquidated by the government or simply taken over and run by the government. The distinctions will be made explicit later in this chapter.

Keating and Lincoln Savings have become the symbols of the entire disaster.

This chapter will briefly examine (1) the legislation and construction of the S&L industry, (2) the conditions these factors created, and finally, (3) the part Keating and the Keating Five played.

History of the S&L Industry

This country has had a dual banking system for much of its history. Banks and thrifts have coexisted.[4] Although similar in many respects their purposes vary. The purpose of the thrift industry was to promote home ownership. Banks have a variety of other responsibilities. Both industries have always been heavily regulated. Traditionally, thrifts have acquired short-term passbook savings deposits and lent the money by making fixed-interest residential home mortgages. Defaults were rare and the industry was considered stable. This pattern varied little until the 1980s.

Thrifts could be either federally chartered or state chartered. They are largely governed by the entity that chartered them. Federally chartered thrifts were automatically covered by the Federal Savings and Loan

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[4]Another category exists, they are called "savings banks" or "mutual savings banks". Their part in the disaster was small and for our purposes can be safely ignored.

Insurance Corporation (FSLIC).[5] State chartered thrifts could also receive FSLIC protection, but they had to apply for it.[6] This insurance system is considered the "unifying cause" of the S&L disaster.[7]

Originally, thrifts were regulated by the states. The Depression brought the federal government into the arena. President Hoover signed the Federal Home Loan Bank Act on July 22, 1932. This Act created the Federal Home Loan Bank System which consisted of twelve regional banks known as Federal Home Loan Banks and the Federal Home Loan Bank Board (FHLBB) which oversaw the system.

Each regional bank was owned and controlled by the thrifts in the region. CEOs of the local thrifts usually sat on the boards of these regional banks. The regional banks had the authority to make loans to thrifts as needed, much as the Federal Reserve banks do for commercial banks.

The regulatory agencies, the regional offices of the FHLBB were also somewhat independent, although the FHLBB had ultimate authority. Regulatory authority was also shared with

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[5]Pronounced "Fizzlick".

[6]Some state-chartered thrifts were covered by a state insurance organization similar to FSLIC. Many of these had problems during the disaster. The reader may recall the runs on Maryland and Illinois state-chartered thrifts which put the state insurance organizations into difficulty.

[7]James R. Barth, The Great Savings and Loan Debacle (Washington D.C.: The A.E.I. Press, 1991), 101.

some state S&L boards and commissions. This regulatory structure had its roots in a variety of legislation passed in the 1930s.

The 1930s Legislation

The Home Owners' Loan Act of 1933 set up a chartering and regulatory system for federal thrifts to be administered by the Federal Home Loan Bank Board (FHLBB).

President Roosevelt signed the National Housing Act in 1934 which created the Federal Savings & Loan Deposit Insurance Corporation (FSLIC). It insured the deposits at thrifts up to a certain limit.

This organization and regulatory authority was similar to the Federal Reserve System and FDIC protection set up for the commercial banking industry. However, there were some important differences which explain, to a large extent, why thrifts later became insolvent in huge numbers and banks did not. The FHLB system is not as independent as the system set up for banks. Also, the FSLIC was not backed by the full faith and credit of the United States Government like the FDIC.[8] This slight difference resulted in deepening an already desperate situation. Instead of having access to whatever funds it needed to resolve failed thrifts, the FSLIC was

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[8]Paul Zane Pilzer with Robert Deitz, Other People's Money: The Inside Story of the S&L Mess (New York: Simon and Schuster, 1989), 53.

subject to the whim of congressional appropriation. The FSLIC could not shut down many insolvent thrifts because Congress would not appropriate the necessary funds. The damage this difference caused will be evident later.

Growth and Development

Thrifts grew steadily during the period after the Depression and World War II. This time period can be considered the heyday of the thrifts. Doomsday predictions of the inappropriate incentives deposit insurance would unleash did not materialize. There were no massive thrift failures and the insurance system was not abused. More importantly, interest rates remained stable.

This time period was immortalized in the Frank Capra Film It's a Wonderful Life where a small town executive serves a town by operating a small building and loan.[9] These were considered the 3-6-3 days, where executives took in deposits at three percent, loaned it out at six, and were on the golf course by three o' clock.

The 1960s through the 1970s

The situation changed in the 1960s. The difficulties of taking in short-term deposits and lending in long-term mortgages became more apparent with the fluctuation of interest rates. Paying a high interest rate on deposits was

[9]Savings & Loans were originally termed building and loans.

difficult because most mortgages paid a fixed interest rate. If the interest paid out on deposits exceeded that paid into the thrift by the mortgages then all the thrifts would soon become insolvent. The original thrift legislation limited thrifts almost entirely to passbook savings deposits and home mortgages. They had no other options. Congress responded to this dilemma by putting ceilings on the interest rate that both thrifts and banks could pay out on deposits.[10] This temporarily solved the problem.

The dilemma reemerged in the 1970s when interest rates rose significantly and vacillated wildly. Also, consumers were demanding more financial services and they were moving their money out of thrifts to take advantage of new services like money market funds and interest bearing checking accounts. The thrift industry was in a dangerous predicament because their services were limited almost entirely to passbook savings and home mortgages. The interest rate ceiling on passbook savings was making them non-competitive with the higher interest rates consumers could receive elsewhere.

Congress responded by loosening somewhat the activities thrifts could engage in. This was a band-aid solution at best

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[10]Thrifts were allowed a slightly higher interest rate than banks to give them an advantage since they did not offer the variety of services that banks did. This protected the thrifts and promoted home ownership.

and set the stage for the thrift disaster. The thrift problem came to a head when Paul Volcker changed monetary policy in the late 1970s causing interest rates to soar to previously unheard of levels. Unless something changed, all thrifts were headed for insolvency. Pressure was finally sufficient to force Congress to make changes. Changes came in the 1980s.

The 1980s

A deregulation movement gained steam in the late 1970s and Reagan eventually championed it. The changes already mandated for the thrift industry were coupled with the deregulation movement. The result was a series of legislative acts loosening up the restrictions on thrifts. Unfortunately, the economic deregulation was coupled with safety deregulation and the changes in the thrift industry did not coincide with increased supervision and surveillance. Rules were relaxed but there were fewer regulators to administer them.

A Carter initiative, the Depository Institutions Deregulation and Monetary Control Act (DIDMCA), was signed in 1980. The Act eliminated many of the traditional distinctions between thrifts, credit unions and banks. It phased out the interest rate ceilings, enabled thrifts to offer NOW accounts and raised the deposit insurance limit from $40,000 to $100,000. It also expanded slightly the federally chartered thrifts ability to invest in consumer, commercial and other types of loans.

The 1980 Act failed to relax significantly the restrictions on what the thrifts could invest in. As a result, thrifts could offer more services and higher interest rates, but their income was still locked into the low interest fixed-rate home mortgages. By paying out more money than they took in, thrifts were still in trouble. Congress responded to this dilemma with further legislation in 1982.

The Depository Institutions Decontrol Act of 1982, more commonly known as the Garn-St Germain Act, accomplished a variety of things. It no longer limited thrifts exclusively to making residential home loans. They could engage in a variety of real estate and business ventures. It eliminated regulation affecting the appraisal value of the project and the amount a thrift could lend. It instituted Regulatory Accounting Principles (RAP) instead of Generally Accepted Accounting Principles (GAAP).[11] It shifted authority for certain restrictions from Congress to the FHLBB.

Many of the changes were extremely technical and beyond the scope of this chapter. However, the provisions of the Act, "[t]aken together . . . were the financial equivalent of

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[11]GAAP accounting is more stringent than RAP accounting. RAP accounting allowed thrifts to take liberties with the numbers that GAAP would not have allowed. For example, a thrift could appear solvent under RAP when it could not under GAAP.

a nuclear attack on the deposit insurance fund."[12] This will become more evident later when we explore the incentives these changes produced.

States Respond to Garn-St Germain

The response to Garn-St Germain was almost immediate. One of the more unfortunate consequences was state-chartered thrifts began switching to federal charter in order to take advantage of the decreased restrictions. Many states responded by passing the equivalent of Garn-St Germain at the state level in order to attract thrifts back to state charter. Some states loosened restrictions even more than Garn-St Germain. California was one of these.

When Garn-St Germain was enacted, there was a drastic shift from state-charter to federal charter all across California. This resulted in decreased payments to the state regulatory apparatus which resulted in a drop in the number of examiners and the state's ability to regulate the industry. Perhaps more important, it reduced the number of political contributions to state politicians because federally-chartered thrifts cannot make contributions to state political campaigns.

In 1983 California passed the Nolan Act. It was characterized as the "most liberal banking law ever passed

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[12]Martin Mayer, The Greatest-Ever Bank Robbery (New York: Charles Scribner's Sons, 1990), 90.

anywhere."[13] Virtually all restrictions on state-chartered thrifts were lifted. Anyone could own a thrift, the thrift could attract money however it liked, pay whatever interest rate it wanted and invest it however it liked. And, the state-chartered thrifts could operate virtually free of any federal regulation and still have their deposits federally insured by the FSLIC. Similar legislation existed in other states, most notably, Texas.

Dick Pratt and the FHLBB

Besides the legislation changes, rules and regulations were altered in the FHLBB. In 1981 Reagan appointed Richard (Dick) Pratt chairman of the FHLBB. Pratt served until 1983 and presided over most of the developments that helped produce the S&L disaster. He has been characterized as "the angel of death" for the thrift industry.[14]

Pratt instituted a number of things. Garn-St Germain was originally known as the "Pratt" bill. Also, in order to further help thrifts deal with their problems he loosened the restrictions on thrifts acquiring brokered deposits.[15] The

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[13]James R. Adams, The Big Fix: Inside the S&L Scandal (New York: John Wiley & Sons, 1990), 22.

[14]Mayer, 23.

[15]Brokered deposits were large deposits supplied to the thrift via brokers. Brokered deposits could come from anywhere in the country. Brokered deposits are contrasted with passbook savings deposits -- the traditional thrift deposit -- small deposits made by local individuals.

significance of this change will be more clear in the next section.

Pratt had a number of thrift insolvencies to deal with, but his hands were essentially tied because the FSLIC did not contain adequate funds to deal with the insolvencies. He creatively got around this problem by instituting things like mergers, although many of the acquirers of these failed thrifts later went under themselves. In addition, Pratt changed the definition of net worth requirements so that fewer thrifts would have to declare insolvencies.

Conditions Resulting From the Changes

The most important result of all the changes was that the system was much more open to abuse and taking risks was actually encouraged. It was easy to open or buy a thrift, and one could operate it however one liked without incurring any penalties, or even losing much money, as will be obvious later. This did not result entirely from legislation, but a coming together of many forces, both in the public and private sectors that produced a situation many unscrupulous people exploited. In effect, the system was wide-open to abuse and to irregularities never before thought possible. This situation was feared when deposit insurance was instituted, but did not actually take place until the 1980s.

The extent of the situation can be illustrated with a few examples. One thrift changed its name to "Crazy Louie's"

because their interest rates were "insane."[16] Another thrift took steps toward establishing a branch office on the moon.[17] Perhaps the best example is that of California.

> By 1984 it was easier to get approval to own a California savings and loan than it was to get a casino license in neighboring Nevada. As a result some people who might not have qualified to run a casino in Nevada got thrifts in California instead and ran them like they <u>were</u> casinos."[18]

At the root of the entire problem was the federal deposit insurance program. Thrifts were required to make payments to the FSLIC and this composed its funds. The funds were used to resolve failed thrifts. In theory, the industry should be self-sustaining. What actually happened was that thrifts stepped up risky activities, because restrictions had been loosened, resulting in more thrift failures. But, there was no additional money for the FSLIC to deal with the failures. Ultimately, the taxpayers had to subsidize the FSLIC in order for it to meet its insurance obligations to depositors.

Rules governing brokered deposits had been loosened. Brokered deposits were large deposits usually in the form of $100,000 CD's that were deposited in a thrift, through

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[16]Mayer, 18.

[17]Pilzer, 81.

[18]Stephen Pizzo, Mary Fricker, and Paul Muolo, <u>Inside Job: The Looting of America's Savings and Loans</u> (New York: McGraw-Hill, 1989), 61.

arrangement by a broker.[19] Previously, brokered deposits could comprise only five percent of a thrift's assets. This restriction was removed allowing thrifts to accept as many brokered deposits as they wanted from depositors anywhere in the country. Brokered deposits were a fast, stable source of money as opposed to passbook savings deposits which tended to be small and haphazard. The catch was the expense.

Brokered deposits were an expensive source of cash. Thrifts had to pay a high interest rate in order to attract them. And, under the lifted restrictions, thrifts could pay the high interest rate depositors were demanding. Brokered deposits were an almost unlimited supply of funds and thrifts could not resist them.

Brokered deposits became all the rage. Traditional passbook savings as the main source of funds decreased in thrifts in the 1980s and brokered funds took their place. Depositors were not concerned because their deposits were insured under the new $100,000 limit. Coupled with the lifted restrictions on what thrifts could invest in, the situation became explosive.

Traditionally, thrifts were legally restricted to offering mainly residential home mortgages. This was their expertise and what their organizations were set up to do. The

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[19]Brokered deposits are also referred to as "hot money".

1980s legislation allowed them to diversify and make a variety of loans. Instead of just funding homes, thrifts could start investing in things like condominium projects, shopping centers and other business construction. This was not inherently bad, but the expertise necessary to make these new types of loans was largely lacking in most thrifts and many thrifts entered this new lending market unprepared. In addition, regulators were unprepared to supervise it for reasons that will be discussed later.

In addition to the multiple types of loans thrifts were then able to make, restrictions had been lifted on "direct investments." Thrifts were not limited to just loaning out money so that others could operate businesses or other entities. Thrifts could directly buy these operations themselves. For example, a thrift could own its own chain of fast-food enterprises.

What evolved was thrifts paying top dollar for brokered deposits and then investing it in projects that were highly questionable and very risky. Many of these projects failed. Condominium units did not sell, shopping centers could not fill up, fast-food enterprises lost money. They defaulted on their loans making thrifts unable to repay on the brokered deposits, resulting in thrift insolvencies and a drain on the FSLIC.

The FHLBB stopped requiring loan-to-value tests in 1983. This allowed thrifts to make loans that were 100 percent of the value of the enterprise, and sometimes more. Previously, thrifts could lend only about 80 percent of what the enterprise was worth. The removal of this regulation led to fraud and paper profits. For example, if a thrift wanted to fund a condominium project, it would loan the amount of the project, plus an origination fee, plus about one years worth of interest. The loan would be recorded as an asset. The origination fee and first year of interest would be considered income. The thrift would record and publicize a profit when in reality there was none. The thrift executives would then pay themselves a handsome bonus for making the thrift grow. The loan would invariably go bad and the condominium project would end up being a loss. But this took time. The thrift could stave off default, and disaster, by renewing the loan, funding another origination fee, paying its executives more bonuses and recording more income on their balance sheet which deluded people into thinking the thrift was growing.

New brokered deposits would be used to pay off old brokered deposits and the bad loans would continue to be refinanced. Since many of the loans were to thrift executives' friends and business partners, the loans were

meant to go bad. It was just a way to fleece the thrift and pad pockets.[20]

> Nevertheless, it was a scam -- a Ponzi scheme that had to collapse because many of the loans had to go bad. When that happened, either the party was over, because the S&L would have to report the losses caused by the bad loans -- which would put a stop to the bonuses and dividends -- or they had to do something to conceal the losses.[21]

The thrift industry's supposed "growth" between 1983 and 1985 was largely just paper profits from brokered deposits and exorbitant loans that eventually went bad. Some thrifts were growing 400 to 500 percent per year, but it was just smoke and mirrors. The disaster occurred during this time period, but it took much later for this fact to be recognized and it was much too late for the FSLIC to cut its losses.

Ponzi schemes were not the only mechanism used to conceal losses. "Loan participations" became another common mechanism. Thrifts were selling each other bad loans. When a loan began to go delinquent the thrift would sell it to a friendly thrift and often buy a bad loan in return. Both thrifts would then have a new asset they would not have to record on accounting mechanisms for another six months.[22] In

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[20]This maneuver was popular. In the phrase that cropped up in the industry, "A rolling loan gathers no loss".

[21]Martin Lowy, Highrollers: Inside the Savings and Loan Debacle (New York: Praeger, 1991), 128.

[22]This maneuver was called, "swapping a dead horse for a dead cow".

addition, the maneuver would fool examiners who would not be able to check the loan's underwriting and documentation because it was located at the other thrift.

Much of the thrifts' maneuvering to create inflated profits and conceal losses depended on fraudulent appraisals. Appraisers could often be "bought" and then paid for their services in inflating the value of property or business enterprise a thrift was interested in. Also, thrifts often shopped around for appraisals they liked. They would get verbal appraisals until they got one they wanted and then put it in writing.

The underwriting and documentation for many of the loans thrifts were making were inadequate. Loans were often made haphazardly to friends and associates of thrift executives. Documentation was often missing or done after-the-fact to conceal fraud or sloppy management.[23] This complicated regulators' ability to identify what was going on and to punish wrong-doing.

Accounting standards deteriorated during the 1980s. The problem resulted largely because government was trying to help the thrifts. Generally Accepted Accounting Principles, or GAAP, were altered to allow the thrifts to get away with certain things. The alterations caused the techniques to be

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[23]A technique called "file stuffing".

known as Regulatory Accounting Principles, or RAP. What RAP did, in essence, was allow assets to be inflated in value and deferred losses from being counted. This led to the mistaken belief that thrifts were doing well financially.

The accounting principles used by thrifts did not reflect the assets and liabilities' market value. The thrifts' accounting was correct, but it did not reflect reality. This prevented thrifts from being closed when they truly were insolvent and delayed their day of reckoning with the regulators.

Another accounting problem was the "capital requirement" or in other words the "net worth" of thrifts. "Capital" refers to the money invested by owners and investors in the thrift when it is established. The capital requirement for thrifts was lowered during the 1980s. This was a problem for two reasons. First, it makes it much easier for anyone to own a thrift. And second, the owners of a thrift have limited liability. It extends only to their initial investment. When the thrift's capital registers zero, the owners can walk away. Owners had very little of their own money at stake. If the thrift failed, the owners lose only their initial investment and the FSLIC picks up the tab. If the thrift prospers, the owners make it big. This system encourages speculation.

All thrifts were required to have audits conducted by an independent accounting firm. Unfortunately, the thrift had to

bear the cost of the audit which meant they often changed accounting firms if they did not like a particular audit. In addition, problems were reported only to thrift management, not to any regulatory entity.

Although all thrifts received these audits during the 1980s, they almost always came out clean. Auditors acquiesced in a variety of accounting irregularities that should not have been tolerated. Virtually every accounting firm in the country has been sued for activities relating to the thrift industry.[24] Vernon, one of the most notorious thrifts in Texas was given a clean bill of health by Arthur Young only five days before it was seized by regulators.[25]

Junk bonds played a small part in the disaster. The term "junk bonds" refers to high-yield securities. High-yield securities are simply investments that bear a higher interest rate than most other investment instruments, largely because they are riskier. They are subordinated debentures, which means that other debt takes precedence. If an entity goes bankrupt for example, all other debt must be paid off before the subordinated debt, which makes them risky, hence the term "junk bond."[26]

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[24]Lowy, 261.

[25]Mayer, 12.

[26]Also, any securities that are rated below the five highest ratings of Standard & Poor's or Moody's can be

A small number of thrifts, especially in California, invested heavily in junk bonds. Most of the junk bonds were just that -- junk -- and the thrifts lost their funds.

Most of the high-risk activities of the thrifts depended on property values to rise. The Tax Reform Act of 1986 contained provisions that ultimately caused property values to depreciate. This caused assets, that were probably overvalued anyway, to lose even more of their value. And it caused more thrifts to fail and increased the costs of cleaning up the disaster.

It is somewhat difficult to determine what part political interference played in the disaster, but it no doubt played a part. Members of Congress as well as all legislators have a interest in their constituents. It is difficult, if not impossible, to find a district without a thrift. Most have several. Political intervention on behalf of constituents worsened the disaster.

The FSLIC was chronically short of funds. It did not have the resources necessary to deal with the disaster. As stated before, extra funds for the FSLIC were provided through congressional appropriation. Without appropriations, the FSLIC's hands were tied. When thrifts started failing in the early 1980s, the FSLIC found creative ways to address the

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considered junk bonds.

consequences. The FSLIC had five different options in dealing with insolvency:

> (1) liquidation; (2) assisted merger; (3) stabilization; (4) management consignment program (MCP); and (5) supervisory merger.[27]

Liquidation was the cheapest in the long-run, but without the necessary funds, it was not possible. The other options tend to delay the inevitable. Insolvent thrifts lost money until they were closed. Options two through five kept the thrift open and operating, and losing money. Only liquidation could close a thrift. The disaster was deepened because the FSLIC did not have access to funds when it needed them in the amount that it needed them.

Another administrative problem handicapping regulatory bodies was the lack of personnel. There were several reasons for this. First, deregulation had reduced the number of regulators. Second, pay and benefits were low and it was difficult to attract, and keep, qualified people. Turnover was extremely high. Often the regulators simply moved to more lucrative jobs in the industry, often working for those they had previously regulated. Third, many of the regulators did not have the competence to unravel the complicated financial transactions of the crooked thrifts, especially the ones in California and Texas.

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[27]Barth, 31.

One other regulatory condition deeply affected the disaster. In September, 1983 the Ninth District of the Federal Home Loan Bank System moved its headquarters from Little Rock to Dallas. Only a small number of supervisory personnel made the move. So, the new headquarters had to restaff. The timing was unfortunate because 1983 to 1985 was the critical time range for the thrift industry, especially in Texas. The administrative effectiveness of the Ninth District was severely weakened by the move.

One last condition needs to be mentioned that helped deepen the disaster. The industry kept the impending thrift disaster secret, almost until the very end.[28] Members of Congress were assured that everything was fine. The U.S. League of Savings Institutions, the trade association and lobby group for the industry, never sent up any red flags. Deceptive accounting practices and the industry's soothing assurances appeased Congress and lulled its members into a false sense of security. Only the regulators were sounding alarm bells. Unfortunately, no one was listening.

Edwin J. Gray

Ed Gray was appointed FHLBB Chairman by the Reagan administration. He took office May 1, 1983. He succeeded Dick Pratt. Gray's background was in public relations and

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[28]The reasons for this are not clear. Most purported reasons amount to little more than speculation.

speech writing. He had some experience in the thrift industry but was generally unqualified to formulate any serious policy for the industry.

The job of Chairman had evolved into little more than a figurehead and the occupant was expected, by the thrifts and the administration, to champion the industry. Initially, Ed Gray seemed the perfect choice and he had universal support. Gray served with two other Board members whose responsibilities were similar to his.

Gray began his term with little understanding of the thrift industry and no idea what he was in for. Initially, he was confused because his regulators were predicting disaster, but everyone else, including the U.S. League of Savings Institutions said that nothing was seriously wrong.

At some point in late 1983, Gray came to realize the true state of affairs in the thrift industry. He immediately started setting off alarms and taking steps to re-regulate. In a period of deregulation this did not go over well. He was immediately ostracized by the thrift industry, by the U.S. League and especially by Treasury Secretary Donald Regan. Regan, who was probably Gray's most powerful enemy, worked constantly for his ouster, at one time even soliciting columnist Jack Anderson's help[29]

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[29]From a speech made by Anderson in Salem, Virginia on June 27, 1992 witnessed by the author.

Gray's activities to stem the impending thrift disaster took many forms. For this chapter, three will suffice. First, he attempted to limit brokered deposits. Secondly, he sought to limit the thrifts' ability to make direct investments. And thirdly, he sought additional funds from Congress to "recapitalize" the FSLIC. Each of these activities will be examined.

In an effort to slow the thrifts' growth and reduce reliance on brokered deposits, Ed Gray, along with the FDIC Chairman William Isaac, proposed a joint rule to limit brokered deposits to no more than five percent of a thrift's total assets -- a reestablishment of the rule that existed prior to 1980. The rule was bitterly protested but went into effect in 1985. It was immediately challenged in the courts. It did not survive. Gray then turned his attention to direct investments.

Late in December 1984, the FHLBB approved regulations limiting direct investments. The regulations took effect in March 1985. The regulations limited direct investments in all FSLIC insured institutions. They also imposed additional net worth requirements and limitations on annual growth. The regulations were largely aimed at state-chartered institutions whose activities were out-of-control, but still protected by FSLIC insurance.

The response to the regulations was immediate. In the House of Representatives two hundred and twenty members signed a resolution requesting the FHLBB to delay the rule. Hearings were held on the issue but the regulations remained.[30]

Dealing with insolvencies had drained the FSLIC. By 1985 it was dangerously short of funds and moves were taken to alleviate the situation. The FHLBB raised the deposit insurance premiums paid by thrifts. Unfortunately, that effort was not sufficient to deal with the problem. Gray started drawing up a "recapitalization" bill for the FSLIC in 1985. He was seeking $15 million in congressional appropriation to shore up its dwindling coffers.

Gray worked hard to get the recap bill passed. But, there were several factors complicating his efforts. First, everyone was still having a difficult time believing the problem was as bad as it was and so the recap bill was not viewed as necessary. So, Congress took its time in acting on the issue. Second, by that time Gray was intensely disliked and he had little influence with the Congress. Third, many members of Congress were getting complaints from their thrift constituents concerning the FHLBB's behavior. And fourth, the Texas thrift owner's appeals for help from Jim Wright, then

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[30]Complicating Gray's efforts was the perception that the regulations violated state's rights -- a strong idea in both Texas and California.

Majority Leader and later Speaker, succeeded and Wright kept the recap bill captive for several months. He later released it but the bill was reduced to just $10 million and the money could be expended only over a three year time period. The bill was finally passed in August 1987 and became known as the Competitive Equality Banking Act of 1987 (CEBA). The action was too little too late. During the time the bill languished, insolvent thrifts were kept open and operating, and losing money.

Gray's term expired in June. The recap bill was passed two months after he left office. The bill passed only after a compromise had been reached that provided for keeping most of the funds for recapitalization from being counted toward the national debt.[31]

Charles H. Keating and the Keating Five[32]

Charles H. Keating had been involved in a variety of activities throughout his life. He had a keen intellect and

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[31]For an explanation of how this was possible, see Lawrence J. White, The S&L Debacle: Public Policy Lessons for Bank and Thrift Regulation (New York: Oxford University Press, 1991), 137.

[32]For a concise summary of Keating and the Keating Five see John R. Cranford, "History of the Keating Case," Congressional Quarterly Weekly Report 48 (10 November 1990): 3791-93; John R. Cranford, "Keating and the Five Senators: Putting the Puzzle Together," Congressional Quarterly Weekly Report 49 (26 January 1991): 221-7; and Phil Kuntz, "How the Case of the Keating Five . . . Became the Ordeal of the Keating One," Congressional Quarterly Weekly Report 49 (23 November 1991): 3434-35.

he was an astute businessman. President Nixon had appointed him to a national commission on pornography and Keating operated an organization called Citizens for Decency Through Law. In 1978 Keating acquired American Continental Corporation, largely a construction company. ACC operated in Phoenix but was incorporated in Ohio.

Unfortunately, he operated very close to the edge of the law and often his activities put him over the line. He had been in some legal hot water, with the Securities and Exchange Commission (S.E.C.), prior to acquiring Lincoln Savings. The allegations accused him of receiving insider loans from a bank. In 1979, Keating signed a consent agreement with the S.E.C., without admitting any guilt, agreeing not to violate securities law in the future.

In February, 1984, Keating purchased Lincoln Savings and Loan, a state charted S&L in Irvine, California to serve as a subsidiary owned by ACC. He immediately violated his purchase agreement by dismissing the existing management of Lincoln. Keating controlled Lincoln, but he was never actually an officer or director.

Lincoln Savings, previously a small conservative thrift, began a campaign of fast growth and shady dealings that made its insolvency one of the most costly for the regulators to resolve. Lincoln was guilty of virtually every activity endemic in the thrift industry.

Once Keating had acquired Lincoln, its residential loan assets fell to only fifteen percent of its total and brokered deposits mushroomed. By the end of December, brokered deposits composed thirty-seven percent of all Lincoln deposits and the thrift was growing steadily.[33]

These brokered deposits cost Keating money. In fact, Lincoln was accused of paying more for its brokered deposits than any other thrift in the country.[34] Most of the money went into loans that subsequently went bad. By paying the loan fees and the first year's interest on the loans to itself, Lincoln was able to grow substantially. Keating was reputed to be the second highest paid thrift executive in the country.[35]

Keating was guilty of engaging in ponzi schemes typical of the industry. When regulators finally examined Lincoln in 1986 they found appraisal inadequacies, problems in real-estate underwriting, file-stuffing and backdating documents.

Also, Keating was able to get the cooperation he wanted out of the accounting and legal industry. Over eighty law firms, some of the best in the country, represented Keating

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[33]Cranford, "History of the Keating Case," 3791.

[34]Mayer, 182.

[35]Keating earned $1.9 million in salary and bonuses in 1987. See Pizzo, 271.

through the five years he struggled with the FHLBB.[36] In addition, Keating simply changed accounting firms until he got audits he liked. Lincoln engaged three different auditing firms during the time Keating owned it.[37] In addition, Lincoln had an extensive junk bond portfolio that was more or less a laundry list of bankrupt entities.[38]

Keating is perhaps best known for giving political contributions to the five senators known as the Keating Five. But Keating's political contributions did not stop there. He gave substantial contributions to a variety of politicians, both national and local. His contributions were so extensive that it would be difficult to compile an accurate list. He reputedly bragged about the influence such contributions bought him.

Regulators often went to work for those they regulated at substantially higher salaries. Accountants and auditors were often hired after performing some service for a thrift, like giving them a clean bill of health. Keating used this tool extensively. When Gray was engaged in regulatory activities that would ultimately hurt Lincoln, Keating offered to hire Gray. The offer was indirect and made through an

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[36]Mayer, 85.

[37]Lowy, 262.

[38]Mayer 184-85.

intermediary. Through his assistant, Gray refused. When this news leaked out, Keating's publicist had to confirm it but protested that Keating would not hire Gray because, "Gray wanted to be CEO of Lincoln and Keating did not think he was competent for the job."[39]

Keating claimed Gray had a vendetta against him and Lincoln. In reality, Gray never even met Keating. But the idea that Gray was out to get Keating persisted and shaped later events somewhat.

Keating energetically protested the direct investment rule that went into effect in 1985. He had Alan Greenspan, then a financial consultant now the current chairman of the Federal Reserve Board, write a letter on his behalf. Keating also engineered a letter from George J. Benston a professor at the University of Rochester. Later, Benston was considered for one of the open positions on the FHLBB.

Greenspan wrote another letter on Keating's behalf to the San Francisco FHLB regulators requesting permission for Keating to exceed the rule's ten percent limit on direct investments. Keating was denied, but that did not stop him. When regulators examined Lincoln they found that it had exceeded the direct investment rule by $600 million.[40]

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[39]Mayer, 189-90.

[40]Mayer, 189.

In early 1986, the San Francisco branch of the FHLBB began its examination of Keating and it continued for some time. The tug-of-war between Keating and the regulators took many different turns and remained intense while Keating pursued other avenues, such as engineering nominations to the FHLBB.

Gray had served on the FHLBB with Don Hovde and Mary Grigsby. When they left, their positions were not filled for some time. There is some speculation that the positions were left empty to deprive the FHLBB of a quorum and to incapacitate Gray.

Keating contacted Don Regan with his recommendations for replacements on the FHLBB and Senator Dennis DeConcini also contacted Regan supporting Keating's choices. The two names were George Benston, the professor who had already supported Keating's movement to repeal the direct investment rule, and Lee H. Henkel, another long-time Keating associate who was a personal friend of Keating and deeply in debt to Lincoln.

Benston was not appointed. Lawrence J. White, a New York University business professor, was appointed instead.[41] Both Senator Proxmire and Senator Garn were opposed to the Henkel nomination so he had little chance of confirmation. However, with DeConcini's support, the administration was pressured to

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[41]White authored The S&L Debacle: Public Policy Lessons for Bank and Thrift Executives cited earlier.

make Henkel a recess appointment while Congress was out of session. Henkel was appointed which allowed him to serve into the next congressional session.

Henkel immediately offered an amendment to the direct investment rule that would have benefitted Lincoln, although he denied proposing it for that reason. Henkel's ties to Keating were found to be so pervasive that he was forced to resign from the board in April, 1987.

Meanwhile, throughout 1986, the San Francisco Home Loan Bank Board regulators had been examining Lincoln. They had difficulty determining exactly what was wrong with Lincoln, although they knew something was. Keating's transactions under Lincoln were so complicated that the San Francisco regulators had to hire a contingent of specialized experts to examine them and some of the experts had trouble.

The regulators finally recommended that Lincoln be taken over for unsafe and unsound operations. This charge was legally vulnerable because it had not been used much and the regulators were confident that Keating would sue.

Meanwhile, Keating was soliciting help from the group of senators that came to be known as the Keating Five.

ACC was the parent company of Lincoln Savings. ACC was incorporated in Ohio, but operated largely in Arizona. Lincoln was a state-chartered thrift in California. The Keating Five were composed of Senators John McCain and Dennis

DeConcini from Arizona, Senator John Glenn from Ohio, Senator Alan Cranston from California and Senator Donald Riegle from Michigan. Keating had a hotel in Detroit and Riegle was the heir-apparent to the Senate Banking chairmanship.

Several of the senators already had a personal relationship with Keating. McCain met Keating in 1981. They hit it off and McCain and his family vacationed with Keating in the Bahamas. Glenn knew Keating from the 1970s. They interacted socially. Riegle did not meet Keating until 1986. DeConcini knew of Keating from the mid 1970s and they interacted socially. It is not clear when Cranston meet Keating, but Keating was involved in raising funds for Cranston in the early 1980s. Keating raised money, and contributed money to all the senators, although the bulk of it went to Cranston.[42]

Keating contacted all the senators about the direct investment rule. The Keating Hearings focused on the two meetings that took place between regulators and the senators regarding the direct investment rule.

Gray received an invitation to go to a meeting in DeConcini's office on April 2, 1987. All the senators, except Riegle, were present. The meeting's purpose was to inquire

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[42]All five senators received about $1.2 million, although some of it was later returned. See Cranford, "Keating and the Five Senators," 221-7.

about the prolonged examination of Lincoln and the merits of the direct investment rule. The meeting broke up when it was clear that Gray had no precise knowledge of Lincoln. Since no staff were present and no minutes were taken the content of the meeting is open to dispute.

A second meeting was held between all five senators and several San Francisco regulators on April 9, 1987.[43] This time one of the regulators took detailed notes.[44] Again, the subject was Lincoln and the direct investment rule. The meeting broke up when the regulators informed the senators that they were sending a criminal referral on Lincoln to the Justice department. This surprised the senators and several of them abandoned any further contact with Keating.

Common Cause later lodged a complaint with the Senate Ethics Committee because of these two meetings and the Keating Hearings held in 1990 and 1991 were the result of that complaint.

The two meetings were held at the end of Ed Gray's tenure as Chairman of the FHLBB. He and his staff decided to delay the criminal referral of Lincoln so as not to give credence to

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[43]Senator Cranston made only a brief appearance.

[44]The notes were typed up and submitted to Chairman Gray in a memorandum. The text of the memorandum is in Appendix B. The reader is encouraged to read this appendix. It is crucial to understanding the issues. Much of the Keating Five hearings revolved around what occurred at this meeting.

Keating's claim of Gray's vendetta against him. The matter was left to Danny Wall, the new Chairman of the FHLBB.

Danny Wall had been a top staffer to Senator Garn as well as Chief of Staff on the Senate Banking Committee. The Lincoln matter rested in his lap when he took office in 1987.

The criminal referral was not sent to the Justice Department and Lincoln was not seized. Instead, Wall decided to enter a memorandum of understanding (MOU) with Keating that required Lincoln to make certain adjustments in its operations and to end his legal action against the Board. In return, the regulatory jurisdiction over Lincoln was moved from the San Francisco office to the FHLBB headquarters in Washington D.C. and a new examination of Lincoln's activities was initiated. This action by Wall proved costly.

In late 1987 Keating distinguished himself from other crooked thrift owners by swindling ordinary people directly. He started selling junk bonds for ACC in or near Lincoln Savings offices. Over 23,000 bonds were sold for a total of $250 million.[45] The bonds became worthless in 1989 when ACC filed for bankruptcy.

Meanwhile, the FHLBB in Washington D.C., after examining Lincoln once again, seized it in 1989 and criminal referrals were finally sent to the Justice Department.

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[45]Cranford, "History of the Keating Case," 3792.

> It quickly emerged that Lincoln was a disaster even worse than its most severe critics had imagined. The five senators had the impression that Keating had rescued a failing thrift, the truth was he had taken a healthy thrift and bled it dry.[46]

Keating's legal problems continue,[47] the Keating Five Hearings are over and the S&L clean-up proceeds slowly. Several issues remain unresolved and some of the most important relate to the interaction between members of Congress and administrators. This interaction will be the focus of the chapters ahead.

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[46]Adams, 252.

[47]Keating was found guilty on all seventy-three federal criminal charges brought against him. He is already serving time on state charges and is appealing the charges.

Chapter 3: Issues Surrounding Interaction: Historical, Constitutional, Legal

Interaction between members of Congress and administrators does not occur in a vacuum. There is a plethora of issues that mold, shape and influence it. These issues reflect some of the most important concerns in our governmental system. The major issues will be reviewed.

This chapter can be roughly divided into thirds. The first third will address the constitutional and historical influences that affect interaction, such as separation of powers and concerns surrounding delegation of powers to the administrative state. The second third will address the legal issues and will review the case law that has evolved concerning interaction. In addition, it will review the ethical norms and rules that shape interaction. The final third will assess the issues and draw implications for administrators since the previous sections largely reflect the congressional perspective.

Constitutional and Historical Issues

Many difficult governmental controversies find their roots in the Constitution. The interaction between members of Congress and administrators is no exception. Power is divided, diffused, delegated, checked and balanced, causing controversy in trying to make our system operate efficiently and effectively. The constitutional issues surrounding the

interaction between members of Congress and administrators revolve around the separation of powers, delegation -- with delegation to independent regulatory agencies being particularly sticky. Each of these issues will be examined in turn.

Separation of Powers

Judicial, executive and legislative powers are all distinct entities in our governmental system but are expected to coordinate their activities. The boundaries of how, and under what circumstances, each can cross the boundaries of the other is an unsettled controversy. When members of Congress seek to affect the administrative state the issue becomes especially acute because the Constitution is relatively silent on administration. Questions of how far a member of Congress can, and should, go in interacting with administrators is a modern question that baffles even constitutional scholars.

> The contours of the separation of powers doctrine are vague and it is probably impossible to determine the precise point at which Congressional activity violates the doctrine.[1]

Concerns over separation of powers issues, when members of Congress interact with the administrative state, are not new, but are receiving increased attention. This increased attention has its roots in the 1970s when the Vietnam War and

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[1]Parnell, 1377.

the activities of the Nixon administration focused concern on congressional and executive interplay.[2]

Judicial attention has also focused on this interaction. Although power disputes between the Congress and the executive have always been common, the Judiciary did not become a player until recently. Until the 1970s, the judicial branch refused to intervene significantly in these disputes.[3] However, its activity has increased.

The number of separation of powers cases the courts are now addressing has multiplied considerably in the last twenty years.[4] One scholar even suggests that the number of separations of powers cases at the federal level has tripled over each decade since 1960.[5]

This tremendous increase in judicial attention, as well as the seriousness of all separation of powers questions,

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[2]Peter F. Quint, "Reflections on the Separation of Powers and Judicial Review at the End of the Reagan Era," George Washington Law Review 57 (January 1989): 429.

[3]Ibid. See also Nadine Cohodas, "Defining the Boundaries: Courts Play Larger Role as Interbranch Referee," Congressional Quarterly Weekly Report 47 (7 January 1989): 15.

[4]See Harold J. Krent, "Separating the Strands in Separation of Powers Controversies," Virginia Law Review 74 (October 1988): 1253; Geoffrey P. Miller, "From Compromise to Confrontation: Separation of Powers in the Reagan Era," George Washington Law Review 57 (January 1989): 404; and Todd D. Peterson, "Prosecuting Executive Branch Officials for Contempt of Congress," New York University Law Review 66 (June 1991): 563.

[5]G.P. Miller, 403.

underscore the urgency in addressing the interaction between members of Congress and the administrative state.

Delegation

The Constitution states that "All legislative Powers herein granted" have been vested in the Congress. Based on this phrase, and the writings of John Locke, there arose an assumption that delegated powers cannot be further delegated. This came to be known as the "nondelegation doctrine." If this doctrine were accepted today, it would make the entire administrative state illegitimate because Congress has delegated much of its power to the various agencies.

However, the intent behind this concept of nondelegation is still relevant, "Administrators should not have unguided and uncontrolled discretionary power to govern as they see fit."[6] Administrators are held accountable to the people by the elected representatives and the courts putting bounds on their discretion.

Strict adherence to the nondelegation doctrine became impossible with our emerging technological society. The nondelegation doctrine evolved into the notion that Congress could not delegate its power without meaningful standards. The Supreme Court has struck down only a few delegations of power for lack of sufficient standards. These cases occurred

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[6]Kenneth Culp Davis, Administrative Law Treatise, 2d., (San Diego: K.C. Davis Pub. Co., 1978), 206.

in the 1930s and resulted from New Deal legislation.[7] Further erosion of this doctrine has led Congress to delegate its power with virtually no meaningful standards at all.[8] Interestingly, the case where the Supreme Court upheld a delegation of meaningless standards dealt with sweeping powers given to the Federal Home Loan Bank Board and caused the Supreme Court to reverse the decision of a lower court which had relied on the New Deal cases mentioned above.[9]

Recently, concern over meaningless standards has resulted in a reexamination of the nondelegation doctrine. Pressures are building to urge Congress to return to the nondelegation doctrine and to legislate in more specific terms.[10] Indeed, Congress seems to be hearing this call and has attempted to put more substance into its statutes.[11] This development is

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[7]See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).; A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).; Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[8]For a dramatic statement of this position see Yakus v. United States 321 U.S. 414 (1943), especially pages 424-5.

[9]See Fahey v. Mallonee 332 U.S. 245 (1947).

[10]This movement owes much to the Theodore J. Lowi book, The End of Liberalism: The Second Republic of the United States, 2d ed., (New York: W. W. Norton & Company, 1979), especially pages 300-13.

[11]Erik H. Corwin, "Congressional Limits on Agency Discretion: A Case Study of the Hazardous and Solid Waste Amendments of 1984," Harvard Journal on Legislation 29 (Summer 1992): 516, 523.

also experiencing wide discussion in academic settings.[12] In addition, there are signals from the Court that Congress should not delegate too haphazardly and that it may be ready to revisit the nondelegation doctrine issue.[13]

Often, courts have defined the standards for agencies when legislative guidance has been largely meaningless. In addition, courts may also require agencies to interpret statutes themselves before administration and further rulemaking can take place.[14] An interesting recent development is where the courts have allowed the President, by virtue of his being an elected leader, to interpret statute and define the boundaries of legislative delegation.[15]

Delegation to Independent Agencies: The FHLBB

Controversy over delegation to agencies is most heated when applied to what have become known as the independent regulatory agencies. Independent regulatory agencies are

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[12]See for example the symposium on delegation to administrative agencies, "The Uneasy Constitutional Status of Administrative Agencies," The American University Law Review 36 (Winter 1987): 277-599.

[13]See Justice Rehnquist's concurring opinion in Industrial Development Union Department v. American Petroleum Institute 448 U.S. 607, 671 (1980), and his dissent in American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490, 543 (1981).

[14]Davis, Treatise, 182.

[15]Kenneth Culp Davis, Administrative Law of the Eighties, 1989 Supplement to Administrative Law Treatise, (San Diego: K.C. Davis Pub. Co., 1989), 70.

distinguished from executive agencies because the President does not have as much control over them and cannot remove the top administrator(s) except for cause. For this reason, independent agencies are not considered as "democratic" as executive agencies.[16]

The Congress first created independent regulatory agencies in 1889, when the Interstate Commerce Commission, only two years old at the time, was taken out of the Interior Department and given independent status. But, the constitutionality of the agencies was not questioned until the 1930s when many more were created during the New Deal. Independent regulatory agencies have never quite shed their questionable constitutional status, and interest in this issue persists.[17] In addition, this makes them more susceptible to congressional influence.

> Being outside the shelter and protection afforded by the President, independent agency officials are more open to "hits" by members of Congress and the media. With a far greater frequency than that experienced by executive officials, appointees to

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[16]Davis, Administrative Law of the Eighties, 68-69.

[17]See G.P. Miller, 43.; the symposium, "The Independence of Independent Agencies," Duke Law Journal (April/June 1988): 215-99, especially the comments of James C. Miller, III, "A Reflection on the Independence of Independent Agencies," 297-99; Harold H. Bruff, "Presidential Management of Agency Rulemaking," George Washington Law Review 57 (January 1989): 534; and Morton Rosenberg, "Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive," George Washington Law Review 57 (January 1989): 657.

dependent agencies are fair game for congressional theatrics and their supporters in the media."[18]

Being a product of the 1930s legislation, the structure of the Federal Home Loan Bank System is particularly interesting. The system was a combination of independent, executive and quasi-public powers. It resulted from the post-World War I era and the Depression, and it includes aspects of the "industrial self-policing" common to that era.[19]

The Federal Home Loan Bank Board oversaw the entire thrift system. The system was comprised of the national Federal Home Loan Bank Board, the twelve regional Federal Home Loan Banks and the Federal Savings and Loan Insurance Corporation (FSLIC). Although considered separate entities for organizational and funding purposes, the personnel and the funds were quite blended.[20]

The two responsibilities of the Bank system were to regulate the industry and make funds available to thrifts by dispensing loans. The various staffs usually reflected one of these responsibilities.

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[18]J.C. Miller, 298-99.

[19]Dirk S. Adams and Rodney R. Peck, "The Federal Home Loan Banks and the Home Finance System," Business Lawyer 43 (May 1988): 837.

[20]The system was put under the executive branch from 1939 until 1955 when it again attained "independent" status until 1989 when it was abolished.

The Federal Home Loan Bank Board decided the major policy questions of the savings and loan industry. Much of the other work was delegated to the twelve regional banks and the FSLIC. The Bank Board had a national headquarters in Washington D.C., but their field office personnel were located in the twelve regional banks.

The national office of the Federal Home Loan Bank Board was headed by three members, one of whom served as chairman. Only two could be of the same political party. They were appointed by the President and confirmed by the Senate to serve four-year terms.

The Federal Home Loan Bank Board had the authority to borrow from the Treasury, but its operations were self-supporting. It was funded by examination fees, assessments placed on the home loan banks, and FSLIC premiums. In fact, It used no tax revenues at all. The Congress had to approve its expenditures, but this was usually perfunctory.[21]

Personnel were governed according to what unit of the system they belonged to. The national office and the FSLIC were covered by civil service laws. The twelve regional banks had authority to hire, compensate and train according to their

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[21]Ernest Bloch, "The Federal Home Loan Bank System," in Federal Agencies ed. George F. Break et al., (Englewood Cliffs, NJ: Prentice-Hall, 1963), 161; Thomas B. Marvell, The Federal Home Loan Bank Board (New York: Praeger, 1969), 223.

own specifications, but they were still subject to strict supervision by the national office.

The twelve Federal Home Loan Banks, located in twelve different cities across the nation, were private corporations owned by stockholders. The stockholders were largely the thrifts that composed the bank membership. The stockholders elected some of the directors and the Federal Home Loan Bank Board appointed the rest. The elected directors were usually CEO's of the member banks.

The FSLIC was considered a separate entity, but it was under the control of the FHLBB. It too was independently funded from the same sources as the FHLBB and the regional banks, but Congress approved its expenditures in a separate authorization. However, staff were not separate and often had both FSLIC and FHLBB functions.

The FSLIC operated much as a private insurance company would.

> The FSLIC functions like most insurance companies. It signs insurance contracts, collects premiums from S&L's, carefully defines the extent of its liability and makes insurance payments when the need arises. But it is part of the government rather than a private company, mainly because S&L's want the government's strength and prestige behind the insurance.[22]

This very complicated structure of the Federal Home Loan Bank System must be kept in mind when examining the

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[22]Marvell, 84.

interaction between the senators and the administrators in the Keating Five controversy. Problems are seldom clear cut and this issue is no exception. The senators were intervening in a very messy structural environment with limited legal and ethical guidance. The legal and ethical guidance that existed will be the subject of the next section.

The Legal Issues Surrounding Intervention

Our system of shared powers results in many controversies. The courts have been called on to settle many of these disputes. A small body of case law has evolved that deals with the issue of members of Congress intervening, for whatever reason, in the administrative state. These interventions have been challenged primarily on the basis of two criteria: (1) whether undue influence has been exerted on the administrative process resulting in a violation of due process, or (2) that the agency's "decisional processes" have been tainted.[23]

The decisions handed down by the courts are by no means consistent. Broad guidelines can be drawn, but there is room

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[23]Morton Rosenberg and Jack H. Maskell, "Congressional Intervention in the Administrative Process: Legal and Ethical Considerations," A CRS Report for Congress, (Washington, D.C.: Congressional Research Service, The Library of Congress, 7 September 1990), 90-440 A, 1. I have relied heavily on this publication for this section. The report is thorough and extensive in its treatment of the intervention case law.

for doubt. There are no guarantees that any of the precedents will be followed in future decisions.

The case law that exists is built primarily on the foundation of two major cases: Pillsbury Co. v. FTC[24], known as the "Pillsbury doctrine" and D.C. Federation of Civic Associations v. Volpe.[25]

Pillsbury drew distinctions between intervention in the quasi-judicial and quasi-legislative functions of an agency. The quasi-legislative functions of the agency, largely rulemaking, follow the broad outlines of the legislative process. The court indicated that intervention is more acceptable when the agency is engaged in this activity than when it is operating in its judicial capacity.

At issue in this case was a matter pending before the Federal Trade Commission. The Pillsbury company had a matter before the Commission and was waiting for a final decision. Before a final decision was rendered, House and Senate subcommittees called various FTC officials into hearings, grilled them on their decisional processes and criticized them for not following the intent of Congress.[26]

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[24]354 F.2d 952 (1956).

[25]459 F.2d 1231 (1971).

[26]Many of these officials later recused themselves from the case because of what they were subjected to by the subcommittee.

The court determined that this was an unlawful intrusion into the quasi-judicial functions of the agency which imperiled due process:

> . . . when such an investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather in its judicial function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences.[27]

The Pillsbury case created the notion that an appearance of bias or pressure would be enough to taint an administrative proceeding if it was in the quasi-judicial area.

The court's distinction between quasi-judicial and quasi-legislative functions in an agency is helpful, but, not all controversies can be classified as such. In addition, the two concepts lie on a continuum, although the A.P.A. does seem to consider them separate, and it is sometimes difficult to neatly characterize an activity as specifically one or the other. The D.C. Federation case was structured to deal with this problem.

At issue in D.C. Federation was a comment made by a Representative on the House floor, and in other public documents, that if the Secretary of Transportation did not

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[27]354 F.2d 952, 964 (1956).

approve the Three Sisters Bridge across the Potomac river then he would do what he could to delay funding for the Washington D.C. rapid transit system. The Secretary approved the bridge and the court was asked to determine if the congressman's comment resulted in a taint of the administrative process.

The situation in D.C. Federation is neither quasi-legislative nor quasi-judicial. The court decided that the Secretary had not followed the prescribed procedure in statute when making his decision. That was enough to decide the case, but Judge Bazelon addressed the "taint" issue.[28] The court found that the congressman's threats to block funds would have been enough to invalidate the Secretary's decision to build the bridge.

The Secretary was administering a statute. The statute made explicit the criteria that must be used when the Secretary made decisions. By adding other criteria to this process the congressman tainted the process.

> If, in the course of reaching his decision, Secretary Volpe took into account "considerations that Congress could not have intended to make relevant," his action proceeded from an erroneous premise and his decision cannot stand.[29]

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[28]The Secretary of Transportation was charged to redecide the fate of the Three Sisters bridge using only the criteria the statute required. A new Secretary of Transportation had subsequently taken office by the time this decision was handed down.

[29]459 F. 2d 1231, 1247 (1971).

Most of the subsequent cases that deal with congressional intervention in the administrative process use one or both of these two cases as a base. Most of the later cases either explain these two cases or distinguish them while addressing other factual situations. These cases will be discussed under the categories of where they fit on the quasi-legislative -- quasi-judicial continuum or if they are separate from it. The quasi-legislative cases will be considered first.

Texas Medical Association v. Mathews[30] was decided soon after D.C. Federation. At issue was a sudden reversal of a HEW decision in an informal rulemaking proceeding immediately after a meeting with a senator, and other staffers, who served on committees dealing with HEW. HEW could not explain the sudden reversal of policy.

The court, in applying its interpretation of D.C. Federation's standard: "agency action is invalid if based, even in part, on pressures emanating from Congressional sources"[31] ruled the proceeding tainted and invalidated the agency's action.

The Texas Medical court proceeded to lecture all those involved:

> The Volpe [D.C. Federation] case teaches, and congressional sources together with administrative

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[30]408 F. Supp. 303 (1976).

[31]408 F.Supp. 303, 306 (1976).

> agency personnel must learn, that good government under law cannot and will not tolerate the kind of external and extraneous pressure and influence that the evidentiary record here established were brought to bear upon HEW's . . . administrative process by Senator Bennett and Mr. Constantine."[32]

In United States ex rel Parco v. Morris[33] Representative Rodino influenced the I.N.S. to change its policy on deportable aliens. This change made it impossible for an alien couple to extend their voluntary departure date. They challenged this change of policy relying on D.C. Federation. They claimed that the policy change was a direct result of Representative Rodino's pressure. This claim was substantiated but the court rejected the couple's challenge because the pressure occurred in a quasi-legislative setting and not a quasi-judicial setting.

> However, we see no Constitutional violation in a Congressional attempt to influence the regulatory interpretation of statutes.[34]

For the couple's challenge to stand they had to meet a more difficult level of proof. The court ruled they had not done so.

Another case dealing with a quasi-legislative setting was Sierra Club v. Costle.[35] This case dealt with an effort to

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[32]Ibid., 314.

[33]426 F. Supp 976 (1977).

[34]426 F. Supp. 976, 982 (1977).

[35]657 F.2d. 298 (1981).

influence informal rulemaking that occurred after the official comment period had ended. This "ex parte" communication, on behalf of a constituent, took place between a congressional leader and EPA officials. The "ex parte" communication was the determining factor in the EPA's decision to adopt a less stringent standard than they otherwise would have.

The court upheld the EPA's action arguing that the record fully supported the EPA's decision. They said, however, that significant post-comment communications must be docketed. They left it up to the agency to decide what communications were significant. In addition, the Senator's comments were pertinent and did not frustrate the intent of Congress.

> We believe it entirely proper for Congressional representatives vigorously to represent their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable procedure.[36]

Out of the controlling cases on intervention, these are the only ones that deal with the quasi-legislative process. The next cases considered will deal with the quasi-judicial process.

Gulf Oil Corp. v. FPC[37] involved a challenge to an order issued by the FPC citing undue congressional influence. The

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[36]647 F.2d 298, 409-10 (1981).

[37]563 F.2d 588 (1977).

congressional influence in question was the activities of a subcommittee, both in hearings and in communications with the FPC. The Court acknowledged that Pillsbury applied, but then stressed the importance of congressional oversight on the administrative state.

The court distinguished Pillsbury by saying that even though congressional influence was applied to a quasi-judicial procedure, the influence was not on the merits, but was procedural. The committee was concerned with accelerating the disposition of the case and was not concerned with the facts and did not try to argue for a particular solution. In addition, the FPC disposed of the case in the same way it had a year before. The court found no procedures had been circumvented and the congressional pressure had not compromised fairness. They ruled no improper congressional influence had taken place.

In Koniag v. Kleppe[38] the district court decided that a congressman and his oversight committee had interfered too much with the Secretary of Interior's decisions on how eligibility was to be determined under the Alaska Native Claims Settlement Act (ANSCA). In the oversight hearing, the Congressman and his staff probed deeply into the decisional processes on particular cases and found fault with how

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[38]405 F. Supp. 1360 (1975).

congressional intent was applied. Before the Secretary made his decisions, the Congressman sent him a letter asking him to postpone them. On appeal, under a new name, this case was further distinguished by the circuit court.[39] The court determined that no undue influence had taken place because the actual decisionmaker had not been influenced. The only direct influence that took place was when the letter from the congressman was sent to the Secretary. That interaction was condemned using Pillsbury and D.C. Federation, but nothing else, because all the other pressure was exerted on subordinates of the Secretary.

A slight modification to this new standard occurred in Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers[40]. In this case, a senator had been heavily involved in debarment cases of government contractors and one case in particular. Peter Kiewit Sons' Co., the subject of the debarment, argues that the Senator's interest and activities tainted the administrative proceeding.

The circuit court agreed with the district court that D.C. Federation was the controlling case, but decided that because the record did not show that the actual decisionmaker had been influenced by the Senator's activities that no taint

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[39]Koniag v. Andrus, 589 F.2d 601 (1979).

[40]714 F.2d 163 (1983).

had taken place.[41] In other words, the record had to show that the decisionmaker was aware of the Senator's activities and was influenced by them.

> . . . the proper focus is not on the content of congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator's decisionmaking process. A court must consider the decisionmakers input not the legislator's output. The test is whether "extraneous factors intruded into the calculus of consideration" of the individual decisionmaker."[42]

Close behind the Kiewit decision was Power Authority of the State of New York v. FERC[43]. In this case, a declaratory order had been issued by FERC. The argument was that because four congressmen had participated in a press conference and two had written the President a letter which had been forwarded to the FERC Chairman, the administrative proceeding had been tainted by ex parte communications.

The circuit court rejected this argument:

> Ex parte communications by Congressmen or any one else with a judicial or quasi-judicial body regarding a pending matter are improper and should be discouraged. On the other hand, the mere existence of such communications hardly requires a court or administrative body to disqualify itself. Recusal would be required only if the communications posed a serious likelihood of

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[41]Ibid., 170.

[42]Ibid., 169-70.

[43]743 F.2d 93 (1984).

> affecting the agency's ability to act fairly and impartially in the matter before it.[44]

The court further argued that the type of communications were significant in determining if ex parte communications had tainted a process. Information off-the-record, or information the parties did not have an opportunity to rebut, would be suspect. The court stated that none of the communications at issue in this case fit any of the categories. No new information was offered, and there was no opportunity to rebut, so no administrative processes were tainted.

There are three significant cases that do not fit on the quasi-legislative and quasi-judicial continuum. Each of these cases will be dealt with in turn.

At issue in American Public Gas Association v. FPC[45] was a ratemaking decision by the FPC. Although ratemaking is generally considered rulemaking, the court refused to classify the proceeding anywhere on the quasi-legislative and quasi-judicial continuum. This was highly unusual, because the D.C. Circuit court also decided Pillsbury which created the standard.

After the initial rate hearing and before the rehearing, Commission members were called before a House oversight subcommittee and grilled on their initial decision. After

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[44]743 F.2d 93, 110 (1984).

[45]567 F.2d 1016 (1977).

the rehearing, the Commission left the part the subcommittee objected to intact, which prompted the court to declare that no undue influence had tainted the proceedings because the subcommittee was unable to prevail.

Agency enforcement efforts were addressed in SEC v. Wheeling-Pittsburg Co.[46] At issue, was a Senator's pressure on the SEC to investigate a particular entity. The court condemned instigating judicial procedures for purely political reasons:

> An administrative agency that undertakes an extensive investigation at the insistence of a powerful United States Senator "with no reasonable expectation" of proving a violation and then seeks federal court enforcement of its subpoena could be found to be using the judiciary for illicit purposes. We need not lend the processes of the federal courts to aid such behavior.[47]

Quoting from law commentary, the court counseled that agencies have a constitutional duty to administer the law in a fair and impartial manner and should not allow themselves to be used in trying to "placate" congressmen or committees.[48]

Recent cases dealing with congressional intervention in the administrative process are rare. There are only two, they are: Springfield Terminal Ry. Co. v. United Transp. Union[49]

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[46]648 F.2d 118 (1981).

[47]Ibid., 126.

[48]See Parnell, 1368 as quoted in 648 F.2d 118, 125 (1981).

[49]767 F. Supp. 333 (1991).

and DCP Farms v. Yeutter[50]. Both cases follow precedent and indicate that the courts have set up the standards to be applied in the future.

In Springfield, a congressman wrote to an agency official encouraging him to accelerate disposition of a particular case. The court acknowledged that the encouragement was procedural and not based on the merits and that the congressman's plea had no effect on the pace of the proceedings. The congressman's letter was considered ex parte communications. Such communications, the court counseled should be discouraged. However:

> . . . communications aimed at acceleration of a case or scheduling in general are viewed as less serious intrusions and require a stronger showing of prejudice before a proceeding or award may be voided.[51]

In coming to its decision the court cited the Power case and Gulf Oil cases approvingly.

At issue in Yeutter was a congressman who had influenced the USDA about how farm subsidies were being determined. The court found that the influence occurred before anything that could even remotely be considered quasi-judicial. Therefore, the court declined to apply the Pillsbury doctrine, discussing the Pillsbury case at length.

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[50]957 F.2d 1183 (1992).

[51]767 F. Supp. 333, 349 (1991).

Since the contact by the congressman was not within a quasi-judicial context, the court declined to declare the interaction tainted unless the congressman caused, "the administrator to consider extraneous factors in reaching his decision."[52]

Citing D.C. Federation and the Peter Kiewit cases, the court declared that influence outside of the quasi-judicial setting could be voided only if factors which "Congress could not have intended to make relevant"[53] were considered. Citing the SEC v. Wheeling case the court instructed administrators to give congressional communication "only as much deference as [it] deserve[s] on the merits."[54]

Summary

The question of unlawful congressional influence in the administrative state was not addressed until Pillsbury.[55] Since then, the courts have constructed principles that distinguish between quasi-legislative activity, such as rulemaking, and quasi-judicial activity, such as adjudication.

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[52]957 F.2d 118, 1185 (1992).

[53]D.C. Federation, 459 F.2d 1231, 1247 (1971).

[54]648 F.2d 118, 126 (1981).

[55]Note, "Administrative Law: Congressional Criticism of FTC for Decision in Pending Case Held to Deprive Administrative Litigant of Due Process," Duke Law Journal (Summer 1966): 787.

The courts generally favor congressional intervention, unless that intervention is egregious and based on the merits.

The two cases that serve as the foundation for all intervention case law are D.C. Federation and Pillsbury. By relying on these two cases, intervention is classified according to where it falls on the continuum between quasi-legislative and quasi-judicial action. The courts grant members of Congress a great deal of leeway in intervening in the quasi-legislative area of the continuum. In order for intervention to be struck down in this area, the influence has to consist of pressure to consider factors that Congress did not intend to make relevant and that the resulting decision was based on those factors.

The courts have given members of Congress substantially less leeway when intervening in the quasi-judicial area of the continuum. However, even the barriers that have been placed have been eroded by subsequent decisions. Intervention in the quasi-judicial realm has been seen as violative because individual cases are involved and the parties deserve impartiality and due process. In order for political pressure to invalidate proceedings, it must be shown, in the record, that influence was exerted on the actual decisionmaker and that influence concerned the merits of the case.

Standards for congressional influence that fall outside this quasi-legislative and quasi-judicial continuum are less

clear. However, the intervention will be upheld if it concerns procedural issues, like the quick disposition of a case, and if the administrators give the intervention only as much attention as it deserves on the merits.

Clearly, the courts have developed a jurisprudence that encourages congressional intervention in the administrative state.

> In the final analysis, judicial deference in this area may reflect the pragmatic conclusion that maintenance of Congress' ability to communicate as freely as possible with the administrative bureaucracy is essential to sustaining the public acceptability of the modern administrative state.[56]

The Ethical Issues Surrounding Intervention

Ethical issues regarding congressional intervention in the administrative state are by no means explicit. However, some basics standards do exist. Such standards can be based in law, rules or norms. I will explain the basic framework.

The standards that do exist reside largely in congressional rules. The Constitution gives each house the power to discipline its own members.

> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.[57]

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[56]Rosenberg and Maskell, 37.

[57]Article I., Sec. 5.

Congress is not restricted to existing rules. Each house can discipline members for conduct that impairs the image of the institution.[58] In addition, the Senate has stated that it reserves the right to punish members for conduct even if it is not illegal, unethical, or against Senate rules[59] Congress' power is indeed broad. But, neither the House nor the Senate has disciplined a member for intervention in the administrative state.[60] Controversy rages, however, on whether an "appearance standard" should apply. In other words, should members be disciplined for the appearance of impropriety, even though no actual impropriety exists?[61]

Sources For Standards

Up to the time of the Keating hearings, the ethical standards that governed the Senate were very much in doubt. The Select Committee on Ethics detailed the standards that

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[58]Rosenberg and Maskell, 3.

[59]Congress. Senate Select Committee on Ethics. Investigations of Senator Alan Cranston, report of the Select Committee on Ethics, United State Senate together with additional views, 102d Cong. 1st sess., (Washington D.C: U.S. Government Printing Office, 20 November 1991), 5.

[60]Ibid., 7.

[61]The de facto existence of an "appearance standard" was a hotly contested issue in the Keating Five hearings because the Senators did not violate any law, norm or rule, but their behavior appeared bad.

applied to the Senate when it handed down its decisions on the Keating Five.[62]

The standards that existed prior to that point can only be referred to generally. There are roughly two different subject headings for these standards: criminal and institutional.[63] Only the institutional standards are important for this report.

Until the Keating Five hearings, neither the Senate, nor the House, had any rules governing interaction between members and the administrative state. There was one rule that cautioned members not to accept "compensation" for services rendered.[64] The House issued an advisory opinion in 1970 that governed conduct when engaged in constituent service.[65] The opinion was considered good guidance for the Senate as well.[66]

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[62]See Investigation, especially pages 5-16.

[63]The criminal standards generally relate to campaign contributions and revolve around the idea of bribery. See pages of 38-62 of Rosenberg and Maskell report.

[64]See Senate Rule XXXVII and House Rule XLIII, and discussion, found in Rosenberg and Maskell, 62-65.

[65]Congress, House, Committee on Standards of Official Conduct, Ethics Manual for Members, Officer, and Employees of the U.S. House of Representatives, 102d Cong., 2d sess., (Washington D.C.: U.S. Government Printing Office, 1992), 263-66.

[66]The advisory opinion can be found in Appendix A.

The House has now published an ethics manual.[67] The manual is quite extensive and chapter seven is devoted to "Casework Considerations."[68] The chapter covers a variety of topics -- even summarizing the case law covered in the last section of this chapter.

The Senate's standards remained undefined until the Keating Five decisions. However, the work of the late Senator Paul H. Douglas has always been recommended as excellent guidance. Senator Douglas is remembered for primarily two written accomplishments: (1) The report, Ethical Standards in Government[69] and, (2) his book, Ethics in Government[70]. The House and the Senate both borrow heavily from these two sources in setting up their various written standards.

Since the Keating Five hearings dealt only with Senate conduct, only the Senate standards will be summarized. However, comparisons will be made with House standards when appropriate.

Senate Resolution 338 empowers the Committee to:

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[67]Ibid.

[68]Ibid., 239-62.

[69]Congress, Senate, Labor Committee, Ethical Standards in Government, Special Subcommittee report on the Establishment of a Commission on Ethics in Government, 82 Con., 1st sess., (Washington D.C.: U.S. Government Printing Office, 1951).

[70]Paul H. Douglas, Ethics in Government (Cambridge, MA: Harvard University Press, 1952).

> "receive complaints and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, violations of the Senate Code of Official Conduct and violations of rules and regulations of the Senate . . . and to make the appropriate findings of fact and conclusions with respect thereto . . . "[71]

The phrase, "which may reflect upon the Senate" is very broad. Some have argued that because of this an "appearance standard" actually exists, but the Senate has not disciplined any member yet solely on the basis of appearance, and ultimately refused to do so in the Keating controversy.

Ethical Standards in the Senate[72]

There are ethical standards that exist for members when they are intervening in the administrative state for whatever reason. The next few paragraphs will list these standards.

Members are cautioned to honor the difference between quasi-legislative and quasi-judicial proceedings. Quasi-legislative proceedings allow for more intervention than quasi-judicial.

Ex parte communications between members and the administrative state are prohibited by the Government in the Sunshine Act.[73] This applies to all formal agency

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[71]As quoted in Investigation, 5.

[72]Footnote 36 of Investigation, indicates that the standards set for a Member also apply to the Member's staff.

[73]Ex parte communications are oral or written communications made without proper notice to all parties and which are not on the public record. See Investigation, 8.

adjudications and all formal rulemaking proceedings. However, inquiries on the status of a proceeding are not a violation. All agency personnel who receive ex parte communications are required to place such communications on the record.[74]

Congressional intervention that results in the appearance of partiality in agency adjudications is prohibited. In addition, intervention that causes administrators to consider extraneous factors is also prohibited. However, intervention that encourages acceleration of proceedings is not considered intrusive.[75]

The report also endorses many of Senator Paul Douglas' recommendations. Specifically, senators are encouraged to pursue only meritorious claims and not to intervene in a way that damages administrative processes. Also, Senator Douglas warns that the member must be explicit in that the final decision rests with the administrator.[76] The Committee acknowledged that sometimes problems unbeknownst to the senator may exist and counsels that:

> . . . a Member may turn out to be wrong as to the merits of a case [but it] does not make his or her intervention unethical. Such mistakes of judgment are between a Senator and his or her constituents.[77]

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[74]Ibid., 8-9.

[75]Ibid., 9-10.

[76]Ibid., 10.

[77]Ibid.

The Committee goes on to state that intervention on behalf of campaign contributors is a special problem. Members are entitled to accept and solicit funds from constituents. However, intervention should not be affected by whether the constituent is, or is not, a contributor.[78]

Senators are encouraged somehow to separate constituent service from campaign contribution management and are further cautioned to be aware of the appearance of any conduct. The Committee stops short of creating an actual "appearance standard" but it comes close.

> . . . the Senator must be mindful of the appearance that may be created and take special care to try to prevent harm to the public's trust in the Senator and the Senate.[79]

The committee ended the general guidelines by recommending the creation of a bi-partisan task force to consider further guidelines for senators when engaged in constituent service.[80] A task force was created on April 16, 1991. Task force recommendations resulted in the addition of Rule 43 to the Standing Rules of the Senate.[81] The task force then disbanded on July 2, 1992.

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[78]Ibid., 11-12.

[79]Ibid., 12.

[80]Ibid., 16.

[81]S. Res. 273 introduced March 19, 1992 and agreed to July 2, 1992.

The rule is an almost verbatim adoption of the guidelines in the House Advisory Opinion #1 largely based on the ideas of Senator Paul Douglas.[82] The Rule allows a Senator to:

> (a) request information or a status report;
> (b) urge prompt consideration;
> (c) arrange for interviews or appointments;
> (d) express judgment;
> (e) call for reconsideration of an administrative response which the Member believes is not reasonably supported by statutes, regulations or considerations of equity or public policy; or considerations of equity or public policy; or
> (f) perform any other service of a similar nature consistent with the provisions of this rule.

Common Cause, a public interest lobby publicly objected to the adoption of this new rule because it did not afford protection against the "appearance of improper use of influence" among other things. Majority Leader George Mitchell answered the objection by stating that the rule was not intended to solve every ethical issue, but only addressed a specific one. He further stated that there is a vast amount of "unwritten but generally accepted standards" that still apply.[83] Obviously, the standards enumerated in the Senate report are not the final word and others could indeed be applied in the future.

It should be clear from the last two sections that the courts have moved away from adopting an "appearance standard"

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[82]See Appendix C for the text of the new rule.

[83]Congressional Record, 2 July 1992, S9762.

while congressional rules and guidelines are moving closer toward them.[84] These developments, as well as other implications for administrators, will be the subject of the final section.

Implications for Administrators

The preceding analysis makes clear that members of Congress are given the advantage when intervening in the administrative state.

The administrative state still deals with problems of legitimacy. Our elected leaders are seen as legitimate members of government while the legitimacy of our unelected administrators, especially members of the independent regulatory agencies, is often questioned. This notion continues to pervade governmental interactions and shows no sign of receding. One of the major ways to make our administrators more accountable is to hold them accountable through elected members, usually through oversight. This fact will always give the advantage to members of Congress in intervening in the administrative state.

The muddled organizational structure of independent regulatory agencies makes difficult the question of to whom they answer. They are created by statute, but not really lodged under the executive. They occupy a sort of no-mans-

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[84]Kappel, 137.

land which makes them even more susceptible to disputes over responsibility. When guidance from the executive and legislative branches conflict, administrators are confused over whom to follow. These discrepancies show no sign of being settled anytime soon.

The courts have decided a series of cases that give members of Congress a great deal of leeway in dealing with administrators. They have distinguished between quasi-judicial and quasi-legislative responsibilities. They allow more intervention by members in the quasi-legislative realm. This means that administrators have very little protection from intrusive intervention by members because their informal quasi-legislative functions occupy most of their time.

> It is important to note that informal decisionmaking that is, governmental actions that are taken without an evidentiary hearing and formal record, constitute by far the vast bulk of government decisionmaking.[85]

Even though the courts have distinguished quasi-judicial functions as deserving more protection from intrusive intervention, the safeguards erected have been diminished substantially. In order to be struck down, pressure must be exerted on the person charged with making the decision. This means that members can pigeon-hole any subordinate, or superior, of the actual decisionmaker, and exert all types of

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[85]Rosenberg and Maskell, 8.

pressure, "knowing full well that their message will find its way to the relevant agency official."[86] In addition, the record has to show that the actual decisionmaker was influenced by the pressure, an even more difficult situation to prove. To prove it one would have to probe the decisional processes of the decisionmaker.[87]

Much of the law and norms governing interaction expect extraordinary moral heroism on the part of the administrator. Many intrusions into the administrative state by members of Congress are struck down only if they are successful. The courts determine that if the decisionmaker was not influenced then the administrative process is not tainted. These expectations have been explicitly set forth.

> For their part, administrators by and large should be able to weather the verbal storms that may accompany oversight. A good administrator will be able to resist "improper" pressures, such as secret attempts to influence a pending adjudication. The good administrator should also be able to discern when the voice of an individual congressman represents the view of Congress as a body or simply that individual. With good administrators, congressional oversight will function best.[88]

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[86]Kappel, 154.

[87]George J. Mager, "Administrative Law -- Scope of Judicial Review -- Administrative Agency's Decision May be Invalid if Based in Whole or In Part on Congressional Pressures," Wayne Law Review 19 (Spring 1973): 1651.

[88]Congress, Senate, Committee on Government Operations, Study on Federal Regulation, report prepared pursuant to S. Res. 71 to authorize a study of the purpose and current

This attitude is by no means unusual. It is the prevailing notion.[89] In a quasi-judicial setting, the administrator is made responsible for his or her own ethics as well as those of the member. If the administrator allows himself or herself to be influenced, then the member has been compromised as well.

Administrators are responsible for recording all ex parte communication. After a series of court cases dealing with this communication suggested that in some instances the communication needed to be docketed, the administrative state has sought to impose its own standards. Administrators are responsible for logging virtually all communication with members of Congress.[90]

Administrators have been charged with giving congressional communication only as much attention as it deserves on the merits. This leaves administrators with the responsibility of determining what the merits are -- in a sense they must determine congressional intent --a most difficult charge even if intent is made explicit.

Another complication for administrators is that the courts have not made a distinction among intervention by a

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effectiveness of certain federal agencies, vol. II, Congressional Oversight of Regulatory Agencies, 95th Cong. 1st sess., February 1977, Committee Print, 12.

[89]See Parnell, 1367 and Kappel 136.

[90]Kappel, 156.

member, a subcommittee, a committee or a complete house.[91] Each apparently holds the authority to intervene, in the name of Congress, all in the name of oversight.

Intervention in the administrative state has been struck down by the courts only twice.[92] This fact should sober administrators who deal with a plethora of congressional communication on a daily basis. If intrusive intervention in the administrative state is to be curbed it must be addressed as a disciplinary issue exerted by Congress's policing measures. But, even this may be doubtful, because the perceived illegitimacy of the administrative state gives Congress the edge.

> In the absence of formal rules or standards, however, it would appear that if a Member's ethical conduct is to be formally judged at all in this area, then such conduct should be judged not on the subjective feelings of the administrator, but on the more objective conduct of the Member involved. This will also protect against future claims of "undue influence" in even the mildest and most routine expressions of a Member's interest and concern in administrative matters, and thus protect the Member's prerogatives and oversight in such matters.[93]

Some scholars maintain that Congress does not need to resort to these informal intervention measures in order to

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[91]Richard Lewis Gelfond, "Judicial Limitation of Congressional Influence on Administrative Agencies," Northwestern Law Review 73 (December 1979): 949.

[92]Rosenberg and Maskell, 37.

[93]Rosenberg and Maskell, 77-78.

affect the administrative state. They argue that a more responsible measure would be to simply alter the statute. Intervention would then have a more legitimate basis.

> . . . if Congress dislikes the interpretation that is being given to a particular statute, it can amend the law rather than subvert the independence of the agency.[94]

Critics contend that having legislation passed at all is difficult and putting any more detail into statutes than presently exists would be even harder. Besides, no amount of detail would preclude the need for members and administrators to interact.

Congress has the advantage when dealing with the administrative state. Administrators must be conscious of this advantage when acting on congressional pressure. The representative and oversight functions of Congress are time-honored maxims and cannot be ignored. Any remedies for improving the arena for intervention between Congress and the administrative state must accommodate them, rather than fight them.

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[94]Note, Duke Law Journal, 789. See also Kappel, 159.

Chapter 4: The Senators

Having established the context for examining the intervention of the Keating Five, this study will proceed with a detailed discussion of the data extracted from the hearings. The attitudes and assumptions of the senators, the administrators and the public will all be examined in turn.

This chapter will evaluate the attitudes and normative assumptions of the senators as it emerged in the hearings. Since this chapter deals primarily with the congressional perspective, I will include the attitudes of senatorial staff, as well as comments of various congressional witnesses. Each senator, along with his staff, will be considered individually starting with Senator McCain followed by Senators Glenn, Riegle, Cranston and DeConcini.[1]

I have modified the references to the hearings transcript to allow the reader easy access, should he or she wish to check the original source. The complete reference to the hearings can be found in the bibliography. This chapter, and the next two, will refer the reader to the particular volume of the hearings transcript and the page number in the volume, even if the page in question is independently numbered. Any

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[1]McCain was the only Republican. The others were Democrats. There is some speculation that McCain was only included to give the impression that the investigation was bi-partisan. There may be some truth to this, but it is impossible to verify.

"Open Session" reference will also include the date of the testimony, since each day's numbering begins anew with page one.[2]

The Senators' Normative Values

Normative values refers to an individual's concept of how something should be conducted or practiced. In order to determine the senators' normative values, I will examine both their current practices and their attitudes on what should take place. The first topic of this examination will be constituent service, followed by intervention in the administrative state. Observations on nominations, both to the executive branch and the judicial branch, will conclude this chapter.

Senator John McCain

Senator McCain had only recently become a senator when the events attributed to the Keating Five took place. He served in the House of Representatives before entering the Senate. He was elected in 1986 and seated in 1987. The two infamous meetings occurred in April 1987. McCain's "newness" in being a senator has to be kept in mind when evaluating his activities and attitudes during this time period.

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[2]The volume references will include: Depositions of Senators, Depositions of Witnesses, Exhibits of each Senator, Exhibits of Special Counsel, and Open Session Hearings.

McCain testified he felt uncomfortable with the meetings and seemed to defer to his more experienced senatorial colleagues. This was especially evident in his judgments on banking issues -- an area in which he had no particular expertise. He also seemed conscious of his more visible, and perhaps more important status, as a senator than as a congressman. In addition, his staff sought out more experienced staffers' help in sorting through the issues.

Of the five senators, McCain was the closest to Keating. Their families had vacationed together in the Bahamas at Keating's home when McCain was a congressman. They had known each other for several years.

It is not clear when McCain was asked to go to the April 2 meeting, or by whom, but it is clear that he was uncomfortable with the idea. He claims that Senator DeConcini asked him to meet with Gray, and if that did not work, to fly to San Francisco to meet with the regulators on Keating's behalf. Senator DeConcini contests the San Francisco proposal now, although McCain's version of the story is corroborated by his Administrative Assistant (A.A.) and his banking Legislative Assistant (L.A.).

McCain, as he stated numerous times, was uncomfortable with the heavy-handed approach DeConcini was suggesting. His opinion toward constituency service was that one can raise

issues and make sure people are treated fairly, but activities on behalf of constituents should not extend beyond that.

As explained by McCain's banking L.A., Keating's difficulty was obviously casework. It required no legislation; it was simply a difficulty a constituent had with an agency.

McCain was convinced that Keating had legitimate questions that needed answers. Keating's lobbyist supplied him with a letter from Arthur Young, a big eight accounting firm, stating that the regulatory examination of Lincoln was unusually long, that Lincoln was financially sound and was being harassed by the regulators.[3] McCain instructed his banking L.A. to call the letter's author, Jack Atchison, and further confirm what the letter covered. She did so and McCain was even more convinced that Keating's complaints were legitimate.

McCain's reservations about going too far out on a limb for Keating revolved around his notion of appropriate constituent service:

> I did it because, as I stated in the second meeting, our job as elected officials is to help constituents in a proper fashion.

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[3]This letter is reproduced in Appendix D. Its effect cannot be overemphasized. Every Senator saw the letter and was impressed by it. A copy was shown to the regulators in the April 9 meeting.

> American Continental is a big employer and is important to the local economy. I would not want any special favors for them.
>
> I went to the meeting because I felt that was a way that I could get answers to legitimate, what I believed were legitimate questions.[4]

Keating was McCain's constituent. In addition, he owned a large business and had a large payroll in Arizona. Even though the personal relationship between Keating and McCain had deteriorated, the senator still agreed to find out when the regulatory examination would conclude and if Keating was being treated fairly. However, he refused to go any further. McCain's viewpoint is best summarized by his A.A. who witnessed his exchange with Keating. The A.A. testified that McCain tried in vain to explain his position to Keating.

> I can't recreate the verbiage that was used, but it was very clear to me what John was saying, which is that:
>
> You can do case work [sic]. You can look in. You can find out if an agency is treating somebody unfairly. But you can only go so far. And what Keating was asking was going too far.[5]

This was obviously bad news to Keating, whom McCain personally informed of his decision. Keating told him to drop the meeting altogether, but McCain kept repeating that he was still a constituent and a big employer in Arizona, and going to the meeting was the right thing to do.

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[4]Open Session Hearings, Part 1, November 16, 1990, 77.

[5]Depositions of Witnesses, vol 2, 1038 and 1039.

The personal relationship between Keating and McCain came to an end over this constituency service issue. Although McCain attended the meetings, he had no further contact with Keating.[6]

One of the things that troubled Special Counsel Robert S. Bennett, the attorney retained by the Senate Ethics Committee to investigate the Keating Five, was if Keating's problem was casework, why were not staff working on it? Why did senators get involved? McCain's A.A. answered that query as follows:

> Senators, I think as a general rule, would prefer to have their staff handle casework if it can be handled at the staff level. For example, the missing check in the mail from the VA or something like that to a beneficiary can usually be tracked down at a staff level.
>
> There are instances that come up where the staff person has a very difficult time, or is unable to get answers to questions that fall in the casework classification, and at that point senators do get involved.[7]

Since Keating's complaint involved a major allegation of an entire regulatory agency being out of line, then it was appropriate for a senator to become involved.

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[6]After a heated argument with McCain over what sort of intervention was appropriate, Keating called McCain a "wimp" in other offices on the Hill. The wimp comment was relayed back to McCain. The comment obviously angered him, but when the propriety of the meetings came into question the "wimp" comment worked in his favor.

[7]Open Session Hearings, Part 1, November 20, 1990, 190.

McCain's attitudes toward constituency service centered on the notion of "fairness." As his banking L.A. claimed, this was the only issue that McCain felt comfortable raising with the regulators -- any regulators.

> . . . the way we handle case work [sic] in our office, and what I was concerned about with respect to this meeting, was that we do what we always do, which is simply raise questions so that we can ascertain whether or not there's fairness on behalf of the constituents by the regulators we're talking to.[8]

An issue that particularly galled McCain was the idea of negotiating with regulators. He felt this is what Keating was asking him to do and that it was inappropriate. Keating, or his people, had supplied some of the senators with a list of things Keating would have Lincoln do if the regulators would do certain things. The list was labeled "talking points." Senator McCain and his staff decided not to use the list. In addition, they carefully went through the issues and Senator McCain decided what issues were appropriate to bring up and which were not. He settled on the two issues covered earlier.

The idea of whether or not it was appropriate to negotiate with regulators on behalf of constituents dominated much of the dialogue in the hearings. The senators and their staffs were constantly asked to define "negotiation" and expand on what their personal views of it were.

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[8]Open Session Hearings, Part 1, November 20, 1990, 119.

McCain refused to negotiate for Keating and it was disagreement on this issue that led to the rift in their relationship. Senator McCain maintained from the beginning that it was not appropriate for senators to negotiate, to say, in effect, that the constituent would do one thing if the regulators would do another. He stated that he did not have the expertise to do that and, anyway, it was not his role.

Counsel for the other senators were particularly active in questioning on this "negotiation" theme. They liked pinning Senator McCain and his staff down and making them admit that there was no law or rule that prohibited negotiation -- it was simply their own opinion and experience, which, they noted, was not binding for the other senators. Special Counsel Bennett asked McCain, point blank, what he meant by negotiation and why he thought it would be improper. The following quote is an extract from his "philosophical" answer.

> It was my view and remains my view that it is entirely appropriate to, quote, "intervene", which has been the big buzzword in this whole case, intervene in the interest of fairness and equity under the law. And I will not waste the time of this Committee to then cite the literally hundreds of times I have, quote, "intervened" because I didn't think a constituent or an organization was being treated fairly. . . . I have not dictated the terms of how those unfair or inequitable allegations are resolved.[9]

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[9]Depositions of Senators, vol. 2, 438-39.

Senator McCain was not overly involved in any of the nominations that Keating was interested in making, either to the executive branch or the judiciary. McCain made one inquiry, however, on the request of a high American Continental Corporation (A.C.C.) official. Lee Henkel had been nominated for a seat on the FHLBB. McCain was asked to check on the status of the nomination. The senator did so and was assured by his contact that the nomination was making its way through White House channels. After the April 9 meeting, Senator McCain decided that he had no other constituency obligations toward Keating and instructed his staff to do nothing more. All interaction between Keating and McCain ended at that point.

Senator John Glenn

Senator John Glenn's involvement in the Keating Five is perhaps the most curious until one delves beneath the surface issues.

A.C.C. was an Ohio chartered corporation. That is the only obvious link that ties John Glenn at all to the Keating problems. However, he has a very expansive notion as to who his constituents are and his responsibilities in assisting them:

> But if there is some case where it appears someone is being dealt with unfairly and it comes to me from another state, I would not hesitate to pick that up and try to do something about it.

We are "United States" Senators, after all.[10]

Senator Glenn testified that he, like other Senators, receives thousands of letters a week. Staff handle ninety-nine percent of them. However, he acknowledges that a certain category of constituent problems is brought to his personal attention. When asked to define this category, this was his response:

> Oh, ones that are what we would call leadership mail, someone who is representing the State PTA or the State Labor Association or the Chamber of Commerce, which is representing a lot of other people. Those would get some priority in that they are affecting a lot of people.[11]

Under this definition, it is obvious why Keating's problems came to Glenn's personal attention. Keating represented a vast number of people and had extensive business interests.

Glenn reiterated several times, however, that when any constituent problems are handled, an effort is made to verify that the complaint is legitimate and has merit. This procedure was followed in handling the Keating complaint and any other constituent complaint.

Senator Glenn had a brief meeting with Jack Atchison, the accountant from Arthur Young who wrote the influential letter. After the meeting the senator was given a copy of the Atchison

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[10]Open Session Hearings, Part 5, January 4, 1991, 179. See also Deposition of Witnesses, vol. 2, 43

[11]Depositions of Witnesses, vol. 2, 21-22.

letter. Glenn found this evidence very persuasive and was convinced there was merit in Keating's claims. On that basis, he consented to attend the April 2 meeting. The senator had no other contact with the other senators before the April 2 meeting took place.

Other senators took efforts to investigate Keating's claims, but Senator Glenn's efforts take on added significance given other circumstances. Charles Keating's brother had been a congressman from Ohio. In addition, Keating had several people in his employ who were former staffers of Senator Glenn, including a man named James Grogan who directly lobbied for Keating on the Hill and was instrumental in engineering the April 2 meeting. James Grogan was personally friendly with several Glenn staffers at the time the incidents took place. So, in effect, Senator Glenn did not even take a friend and former personal staffer's word on Keating's complaints. He investigated them as much as any other constituents'.

What is even more instructive is a comment attributed to Senator Glenn when he was being lobbied by Len Bickwit, an attorney for Keating and a former Glenn staffer. Glenn's legislative director at the time remembers the senator saying,

"I love Len like a son, but on this issue he's just another lobbyist" and refused to take the recommended action.[12]

Senator Glenn felt strongly that his constituents were entitled to fair treatment by the administrative state, but not preferential treatment. He stated several times that he would not seek special treatment for any one constituent or individual. He specifically pointed out this would apply to rules promulgated by the agencies. He felt they should apply fairly and evenly and no one deserved a special deal.

On negotiation, Senator Glenn's beliefs mirrored Senator McCain's. He did not like the notion of presenting regulators with a "quid pro quo" -- you do this and we will get our constituent to do this. Senator Glenn felt it would be highly inappropriate and would not be privy to it if he knew one was going to be proposed. Again, counsel for the other senators forced him to admit that there was no law or rule that prohibited a senator from doing this. It was simply his personal view and standard.[13]

Shortly before the April meetings took place, Keating had a suit pending in the courts challenging the direct investment rule. When asked if knowledge of this pending litigation would have changed his views on the matter, Senator Glenn

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[12]Depositions of Witnesses, vol. 2, 5.

[13]Open Session Hearings, Part 5, January 4, 1991, 254.

responded affirmatively. At the time, he did not know that the suit had been filed. Had he known, his policy would have prevented his attendance at the meeting since he did not get involved in constituent service if the dispute had moved or was moving into the courts.

During the April 9 meeting Glenn was informed of the pending criminal referral against Lincoln. He was upset the senators were not told at the April 2 meeting or at the beginning of the April 9 meeting.[14] Had he known this in advance, he would not have gone to either meeting.

Clearly, Senator Glenn had a personal standard of not getting involved in constituent problems if litigation was current or pending.

Keating lobbied Senator Glenn and his staff heavily to support two nominations Keating favored. The first was Lee Henkel to the Federal Home Loan Bank Board, and the second was Judge Manion. The senator voted against these two nominations and explained his position as follows:

> When I was asked to support that nomination, I did not believe I had enough knowledge about Mr. Henkel's qualifications and so I refused. Then in the summer of 1986, Mr. Keating himself strongly urged -- strongly urged -- me to support the nomination of Daniel Manion to the Federal Court of Appeals.

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[14]The criminal referral was revealed substantially into the April 9 meeting after a great deal of discussion had already taken place.

> But because I disagreed with Judge Manion on a number of critical issues and did not believe that his confirmation would be in the best interests of Ohio or the Nation, I again turned down Mr. Keating's request and voted against Mr. Manion.[15]

Senator Don Riegle

Senator Riegle's involvement in Keating's manueverings is difficult to pin down. His memory of his involvement is the foggiest of all the senators'. When the Keating Five problem broke, he simply issued a statement saying that he did not remember his conduct, but was sure nothing wrong was done.

The senator was not at the April 2 meeting, although other senators expected him to be there. He attended the April 9 meeting, but his involvement with Keating ended after that. In addition, his presence at the April 9 meeting was explained by Senator DeConcini. DeConcini testified he invited Riegle because he was the ranking member of the banking committee.

Other testimony indicates that the meetings were the idea of Senator Riegle in the first place and that he was much more involved than he now admits. This is supported by all the materials Special Counsel put together, the testimony of Ed Gray, DeConcini and McCain staffers, and James Grogan, Keating's lobbyist.

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[15]Open Session Hearings, Part 1, November 16, 1990, 113-4

Riegle's somewhat shadowy activities may be explained by his attitudes toward constituency service. Keating owned a hotel in downtown Detroit and was contemplating building other structures. Riegle considered Keating a "business constituent." As such, he felt his responsibilities and his involvement with Keating's problems should be limited, as he explained several times in the hearings.

> First of all, it was not my problem in terms of how I viewed case problems that I get directly involved in. Keating and his company was a business constituent in Michigan. It was not domiciled in my state and I didn't feel that it was my responsibility to handle that case or any other case that would fall outside the boundaries of my state; that that would be somebody else's -- the senators from those states would have the responsibility for doing that. And if I was being asked in, to give an independent assessment or to come in to lend Banking Committee expertise, I wanted that spelled out, I wanted that said and made clear.[16]

Riegle felt the April 2 and April 9 meetings were very appropriate, from a senatorial point of view, and he had no problem with them. Nothing he considered inappropriate took place. He felt that if campaign contributions were not involved, then the meetings would not even be questioned at all -- a view not universally held.

There was not much questioning of Senator Riegle on the negotiation issue. That issue was primarily connected to the April 2 meeting Riegle did not attend. But, in answer to the

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[16]Depositions of Senators, vol. 2, 772-2.

one question posed to him on negotiation,def he indicated that going to bat for a constituent by issuing regulators a "quid pro quo" would indeed be improper.

The issue Riegle dwelt on, and the one he felt most strongly about, given the multitude of comments he made on the subject, was the appropriateness of the regulators' behavior at the April 9 meeting.

Riegle felt the meeting was inappropriate for two reasons. First, he felt the San Francisco regulators should have had someone from the Washington FHLBB with them. He did not say why. Second, they should have revealed the possibility of the criminal referral at the beginning of the meeting, not toward the end. The senator obviously felt strongly about the second issue because he made these sentiments known on at least seven different occasions during the hearings.

> But there was absolutely no excuse, in my view, for them coming in knowing that fact, knowing they are going to disclose that fact and not disclosing it the first words out of their mouth so we would have known what the situation was and the meeting could have been discontinued at that point.[17]

Riegle made it clear that if a regulatory matter had advanced to a criminal matter then further intervention by a senator, on behalf of a constituent, would not be proper.

Senator Alan Cranston

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[17]Special Counsel Exhibits, Part 3, 408.

Senator Cranston attended the April 2 meeting and made a brief cameo appearance at the April 9 meeting. Much of the questioning of Senator Cranston at the hearings centered on Keating's contributions to him and other causes he was involved in.

As stated in chapter two, of the five senators, Cranston received the most money from Keating. However, much of it was given to non-partisan groups, connected to Cranston, devoted to increasing voting registration across the United States. Very little went to Cranston's reelection efforts.[18] These contributions were extremely puzzling to the Ethics Committee because Keating supported right-wing conservative causes almost exclusively, and Senator Cranston was a strong liberal.

Senator Cranston testified that Keating was a constituent in his state with extensive holdings, and for these reasons he assisted Keating in his struggles with the regulators. He pointed out that Lincoln Savings was located in Irvine, California, and Keating had over one thousand employees located in the state. He argued that it was this extensive

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[18]In a recent article, noted ethics scholar Dennis F. Thompson argues persuasively that even though the money did not personally benefit Cranston the interaction was indeed improper. The interaction damaged democratic processes and this fits Thompson's definition of "mediated corruption". See Dennis F. Thompson, "Mediated Corruption: The Case of the Keating Five," American Political Science Review 87 (June 1993): 369-81.

interest that motivated him to assist Keating as a constituent.

Cranston was also provided with the Atchison letter which he stated he found very persuasive in convincing him that Keating had legitimate complaints against the regulators. What Cranston did not do, and this was the subject of extensive testimony, was try to investigate independently the merit of Keating's claim. The small efforts he made to find additional evidence were very one-sided. Cranston contacted people who could substantiate Keating's claim, but made no effort to determine the regulators' side of the story.

Cranston's activities, however, were consistent with how his staff habitually handled constituent service, as his banking aide explains:

> We were never asked to determine the validity of these allegations. We had no process to determine the validity of these allegations. What was [sic] Mr. Cranston was asked to do by Mr. Keating was to set up a meeting, call the Bank Board, ask them to meet with him, ask them to make a decision quickly. We were never asked to make a judgment about who was right or wrong in these matters.[19]

In addition, the banking aide explained that Senator Cranston almost always did whatever a constituent wanted done. She testified that "the number one rule of this game is you never kiss a constituent off."[20] Often constituents will request

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[19]Depositions of Witnesses, vol. 2, 78.

[20]Depositions of Witnesses, vol. 2, 162.

something impossible or unreasonable, so if it is something small, like arranging a meeting or making a phone call, the aide explained, any request was usually complied with.

> If it something that is innocuous and will not have any basic impact on policy, we almost always make phone calls to request meetings or interpretations, if a constituent wants it. We don't make a judgment about what they're calling about unless it's something absolutely crazy. We figure that's the least we can do for a constituent. Because most of them that come in there want you to overturn a regulatory decision or law, so a phone call, if that's all they want, that's wonderful. We can do that and make them happy. I mean, our constituency is so huge and so vast, the pressure on us to respond, I mean, we get 10,000 letters a week just in individual subject matter areas. If these guys only want a phone call, if that's all you need to do to make them happy, you do that.[21]

The aide was asked whether Keating's requests were unusual or if Senator Cranston's efforts were out of the ordinary. The aide felt that the senator's efforts were neither unusual or extreme. She claimed that the constituent service for Keating was "fairly routine."[22]

Cranston was repeatedly questioned on why there were five senators at the April 2 meeting. His response never varied. He kept insisting they simply wanted to get the regulators' attention and emphasize that many elected officials were concerned about what was going on.

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[21]Depositions of Witnesses, vol. 2, 145.

[22]Open Session Hearings, Part 4, December 11, 1990, 112.

He too was quizzed on the appropriateness of "negotiating" with regulators on behalf of constituents. Cranston stated it would not be appropriate for an elected official to give a regulator a "quid pro quo." But he also stated that it would not be inappropriate for the senator to point out various ways of resolving a problem.

Cranston's appearance at the April 9 meeting was brief. He was managing legislation on the floor and could not get away to attend the meeting. This fact must be considered when his subsequent efforts, on behalf of Keating, are examined. The information about the criminal referral, disclosed by the regulators at the April 9 meeting, was the critical information that caused three of the five senators to cease acting on Keating's behalf. Senator Cranston was not present to hear this information. In reconstructing how this information was conveyed to him, he decided that his banking aide told him about the criminal referral after reading it in a thrift newspaper.

Knowledge of possible criminal wrong doing on Keating's part did not stop Cranston from making numerous phone calls on his behalf, encouraging regulators to consider seriously the possible sale of Lincoln rather than taking it over and liquidating it. He explains his decision to act on Keating's behalf, despite the possible criminal referral.

> I checked with Caroline Jordan, my staffer, on this and she confirmed what I already felt I knew, that criminal referrals are made very, very often by bureaucrats who get frustrated by their inability to have their way on something and it is for retaliation, try to escalate the situation, and that most of those criminal referrals are never heard from again. If the Justice Department doesn't think there is anything there, they don't do anything about it. I didn't take it that seriously particularly after Caroline confirmed what was my impression of what criminal referrals are.[23]

The banking aide, Caroline [Carolyn] Jordan, testified further that agency officials will often disclose a possible criminal referral simply to "deter Congress from pursuing a case" because many Members will cease their activities if a criminal referral has been issued. Since the Justice Department cannot confirm if a referral has been made, or an investigation is underway, it is a potent tool for agency officials.[24]

In questioning Senator Cranston on when it was appropriate and inappropriate to intervene with regulators, the members of the Senate Ethics Committee started arguing amongst themselves. Senator Cranston jumped into the discussion and explained the appropriate procedure:

> . . . If there is a quasijudicial proceeding, going on, then I think intervention is questionable. . . If there is a prosecution before the Department of Justice, you shouldn't get involved in any way in that matter. If it's a matter before the judiciary, obviously you shouldn't get involved.

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[23]Depositions of Senators, vol. 1, 183.

[24]Depositions of Witnesses, vol. 2, 82.

> This was not that kind of case, not that kind of situation and the regulators are not above the law. They are not above the division of powers and the right of the government in the legislative branch to take a look at what people are doing in the Executive branch.[25]

Senator Dennis DeConcini

Of all the testimony given in relation to the Keating Five hearings, and of all the exhibits submitted, two points cannot be disputed: Senator DeConcini's office put a high priority on constituent service, and the senator himself often got heavily involved. The testimony substantiating this is overwhelming.

Keating would have had access to DeConcini's office regardless of who he was or what line of work he was involved in. What is interesting is that he had substantial access to the senator personally. In the other four cases, Keating dealt with staff more. Keating often dealt directly with Senator DeConcini himself.

DeConcini considered his efforts on behalf of Keating as constituent service, but he did not view it as casework. When asked if it was casework by Special Counsel, DeConcini replied:

> Absolutely not. A three billion dollar institution with two thousand employees in Arizona with a 49 million dollar payroll, with over a billion dollars invested in Arizona. I considered it pretty darn

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[25]Depositions of Senators, vol. 1, 132.

important[26]. . . It was darn important that I knew about it.

Keating brought his Bank Board problems to the attention of DeConcini. DeConcini asked for some substantiation. Keating supplied him with the Atchison letter from the Arthur Young accounting firm and the study on Lincoln, commissioned by Keating, written by Alan Greenspan. Ultimately, the April 2 meeting was planned and DeConcini was heavily involved in recruiting some of the other senators to attend. The April 2 meeting was hosted by DeConcini in his office.

All the senators except Riegle attended the meeting, as well as Ed Gray. There were no staff present, and no minutes or transcripts were made of the meeting. Gray's version of the meeting is disputed by all four senators. Gray insists that DeConcini offered him a "quid pro quo": if the direct investment rule was repealed, Lincoln would do certain things. DeConcini says he did not ask that and would not ask that, although he characterized his words and behavior in both meetings as aggressive.

During the hearings, the dialogue and questions focused on the definition and appropriateness of "negotiating" on a constituent's behalf. DeConcini had with him at the meeting a list of "talking points" that itemized what Lincoln was

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[26]Depositions of Senators, vol. 1, 992.

willing to do and what it wanted from the regulators.[27] DeConcini, as well as his banking aide, insisted that this was not a negotiating document. DeConcini read aloud the definition of "negotiate" from Black's law dictionary and insisted he was not negotiating on behalf of a constituent. He also stated that even if he was negotiating, there is no law or rule that prohibits it.

> I know of no rule, as Senator Inouye said, that you can't negotiate on behalf of a constituent. There are some limits of [sic] what you can do.
>
> You can't retaliate and you can't threaten, and you can't accept gifts for it.[28]

DeConcini emphasized that there were no threats and there were no gifts. His intervention was, therefore, appropriate.

The April 9 meeting was not just a meeting with the head regulator, who answers to the Congress, but with lower level regulators. When queried about the appropriateness of meeting with field regulators, DeConcini stated that since the meeting was Gray's idea in the first place, the meeting was not improper. Gray insists the meeting was requested by the senators.

At the April 9 meeting DeConcini dominated the discussion by the senators, especially at first. Since he had some experience of his own in the building profession, he was on

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[27]The same "talking points" McCain decided not to use.

[28]Open Session Hearings, Part 5, January 9, 1991, 81.

familiar ground when discussing things like appraisals with the regulators. Since this meeting was documented in the extensive minutes taken by regulator Bill Black, it is clear that DeConcini was the spokesperson at the meeting, and certainly the most aggressive in his intervention. In this meeting, DeConcini asked the regulators to go somewhat easy on Lincoln, to get some outside appraisals and to arbitrate some of the differences. He was the only senator to get that specific.

The regulators responded to his questions, but the meeting took a decidedly different turn when the regulators revealed the pending criminal referral. This revelation had an effect on DeConcini, but his tone after the revelation was still quite aggressive. However, he decided, after the April 9 meeting, that his constituency responsibilities had been fulfilled and he exerted no more effort on behalf of Keating and Lincoln for almost two years.

The Memorandum of Understanding (MOU) was negotiated between the FHLBB and Lincoln during the Danny Wall administration. DeConcini testified that since an agreement had been reached, and he heard nothing more of the criminal referral, that intervention was again appropriate. At Keating's request, DeConcini got involved again. He made several calls to a variety of officials, requesting a status report on whether the sale of Lincoln would go through. He

also encouraged officials to take a close look at the sale proposal, since a sale would be a better option than insolvency and takeover. DeConcini explains it like this:

> What he asked me to do was to see if the sale could go through. I made a judgment that a sale would be better for Arizona and the Federal Government as well, assuming it was a good faith, arm's length sale. And that's why I got involved once again.[29]

DeConcini took considerable heat in the hearings about whether his behavior was proper, and what constitutes appropriate behavior for a senator when intervening in the administrative state. DeConcini responded by repeating the rulemaking/adjudication distinction:

> It depends, to me, on where in the process of the regulatory independent agency is. [sic]
>
> If it is in the regulation area, as this was, because no cease and desist order had been issued so there was no adjudication going on [sic] --[30]

DeConcini further clarified the standard when asked if he knew of anything written that could pass for what Special Counsel Bennett was referring to as the "norms" of congressional intervention. He remarked that the only materials written on "norms" were a scattering of Supreme Court opinions. When prompted by his own counsel, DeConcini further stated that the propriety of the intervention should be judged from the perspective of the senators, not the regulators.

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[29]Special Counsel Exhibits, Part 3, 139.

[30]Open Session Hearings, Part 6, January 10, 1991, 249.

At Keating's request, DeConcini was active in nominations. Keating was almost appointed ambassador to the Bahamas, but his confirmation was derailed because of his earlier problems with the S.E.C. DeConcini had supported Keating for this position and lobbied the White House on his behalf.

DeConcini pushed the nomination of Lee Henkel to the Bank Board position, at the request of Keating. Keating had supplied DeConcini with Henkel's resume, which the senator acknowledged was impressive. He then made calls to Don Regan at the White House encouraging the appointment. Neither DeConcini, nor his staff, by their own admission, did anything to investigate Henkel's qualifications for the job.

Senator Proxmire, the chair of the Banking Committee, had learned of Henkel's indebtedness to Lincoln in a personal interview. He opposed the nomination for this reason. Apparently without learning of Henkel's indebtedness, DeConcini lobbied to make Henkel a recess appointment. This was done, but disclosure of Henkel's close ties to Lincoln and Keating forced his resignation from the Board in April 1987.

Keating also pressured DeConcini to support Judge Manion for the Circuit Court, but DeConcini refused. Manion was ultimately defeated. In addition to refusing to support Manion, DeConcini had denied Keating's appeals on a number of occasions and issues.

Other Members of Congress

One of the more memorable instances in the Keating Five Hearings came when Senator Daniel Inouye testified on behalf of the other senators. He was closely questioned and answered directly every question put to him. He testified that he had followed the hearings and read the Black notes and felt nothing inappropriate had been done by any of the senators. He went further, stating there was nothing wrong with negotiating for a constituent and that he himself had negotiated for constituents in the past. He answered specific questions on DeConcini's conduct and he stated, without any uncertainty at all, that DeConcini's conduct was proper, appropriate, common, legal, etc.

Senator Inouye's testimony had a profound impact on the committee proceedings. At the conclusion of his testimony, several other senators filed affidavits with the committee, expressing their support for Senator Inouye's testimony and emphasizing that what the senators had done was proper, common and even expected of them. Other senators who testified or filed affadavits did so to go on record as supporting Senator Inouye's statements.

How the the Keating Five Viewed the Administrative State

It is probably impossible to nail down accurately what an elected official truly thinks the role and purpose of the administrative state is. If asked the question directly, most

respondents would undoubtedly be tongue-tied. However, the question may be indirectly answered in a round about fashion by probing attitudes and opinions on related topics. That is what this section will address. It will cover the senators' general attitudes toward the administrative state and determine whether the senators made a distinction between executive agencies and independent agencies. It will also cover the senators' attitudes toward the FHLBB specifically as well as its director.

Senator McCain

Senator McCain's comments on the administrative state are sketchy; however, he does draw a sharp distinction between executive agencies and independent agencies. Senator McCain acknowledged that the FHLBB was an independent agency, set up by Congress to function differently from executive agencies.

In an example of past intervention, Senator DeConcini had brought up how he and other senators had dealt with the Pentagon regarding Apache helicopters. Senator McCain took issue with the comparison, as did his A.A. in his testimony, because the two agencies were different. Independent agencies must be approached differently from executive agencies.

> But it does not make it so independent that they are not liable to be asked questions, because I think that it is my obligation to ask questions, as

> Mr. Gray said was proper to do so, about any -- from any agency.[31]

Independent agencies, Senator McCain believes, are supposed to be more independent from congressional pressure than executive agencies. This is somewhat puzzling since the independence of the independent agencies ordinarily refers to independence from the President rather than from Congress.

The "appropriateness" of meeting with Mr. Gray and the regulators of the FHLBB was of deep concern to the senator.[32] During both the April 2 meeting and the April 9 meeting, McCain sought assurances that the meetings were proper. At the April 2 meeting, the Chairman had assured Senator McCain that it was appropriate to ask questions. Even though Gray helped set up the April 9 meeting, McCain still sought assurances that the meeting was proper.

Senator McCain had a basic uneasiness about meeting with anyone other than the head person. Clearly, this also figured into the events of the April 9 meeting when he sought assurances that the meeting was proper and attempted to put the regulators at ease.

> . . . it's one thing to meet with the head of an agency. It's something else to meet with the people who are actually working the case.

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[31]Open Session Hearings, Part 5, January 4, 1991, 107.

[32]There is some evidence to suggest that what McCain really feared was Chairman Gray's reputed vindictiveness and the political damage he could do him.

> Why? Because clearly, they would be more liable to perhaps be intimidated.[33]

When asked how he regarded the regulators and how they appeared to him, McCain testified that they appeared "knowledgeable and convincing." When pressed for more detail he responded this way:

> I think of them as I think of Mr. Gray; hardworking people doing the best that they could. . . I thought they were tense and I thought they were nervous, but I also thought that they were very eager to tell us what they knew. I think you can tell that from the transcript. They more than adequately described the situation.[34]

Senator Glenn

Senator Glenn did not explicitly state any of his attitudes on the administrative state, but his notions toward the regulators were generally positive. He stated that sometimes senators have to intervene, because regulators occasionally make mistakes. He pointed out, however, that generally he is on the side of the regulators. This is evident from the Black notes of the April 9 meeting when Senator Glenn commented that if there was wrong-doing in Lincoln, then he was on the regulators' side. But he wanted the regulators either to make specific charges against Lincoln or to back off.

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[33]Open Session Hearings, Part 5, January 4, 1991, 155.

[34]Depositions of Senators, vol. 2, 488.

The senator made a clear distinction between a regulatory situation and a more generic administrative situation. He felt that different behavior was required when dealing with each. In a cabinet department for example when a decision simply needs to be made then Glenn would not hesitate to make his position clear. But in a regulatory situation where a rule has been promulgated and the rule should apply equally to everybody then he would hesitate to get involved. The administrators need to exercise their technical expertise and apply the rule fairly.

> . . . a regulatory situation is different. . . That's a rule or regulation promulgated pursuant to legislation that we have passed here. It is then put out and defined in a way that is supposed to apply to every business and every individual equally in the whole country. That's not a matter of determining policy at that point. The law has been set.[35]

Clearly, Senator Glenn had in mind the notion that rules must be applied to everyone in an equal and impartial manner. In subsequent testimony, he underscored this idea and pointed out the inappropriateness of seeking special treatment for one constituent from a regulatory entity.

The senator felt that the regulators were knowledgeable and cooperative. He did, however, go into the situation with very negative feelings toward Ed Gray. Ohio was one of the self-insured states that experienced runs on their state-

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[35]Depositions of Senators, vol. 2, 63.

chartered thrifts. Apparently, Senator Glenn had assisted state authorities in working through the crisis and had solicited Ed Gray for help and advice. The senator felt the Chairman was not helpful. When Gray professed ignorance of the Lincoln situation during the April 2 meeting, Glenn's negative opinions of him were reinforced.

Senator Riegle

Senator Riegle had strong attitudes about the various branches of government, and the amount of power lodged in the executive branch specifically. He rejected the notion that the senators could be at all intimidating to the regulators or that the senators could have negatively affected administrative processes. Riegle felt that the administrative state could take care of itself. He was concerned about it getting out of line -- bureaucratic drift.

> The executive branch is very well represented and they are a very strong branch of government. In fact, if you want to say who is the strongest branch, I would have to say I think they are far stronger in terms of the execution of power in this country than is the legislative branch.[36]

He also stated that in his experience in government, when dealing with a constituent complaint, more often than not, the citizen is right and the government is wrong. He underscored this comment by stating it was based on nearly twenty-four years of service in Congress.

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[36]Depositions of Senators, vol. 2, 866-7.

In both his deposition and his testimony in the open session hearings, Senator Riegle constantly emphasized that he considered the regulators the superior force in the intervention. He considered them tough as nails and definitely in command of the April 9 meeting. He felt that anyone who read the notes would conclude that the regulators had the upper hand.

Like the other senators, Riegle realized he was dealing with an independent regulatory agency, rather than an executive branch agency. He understood the differences between the two and emphasized the necessity of Congress overseeing the independent agencies:

> We create the independent agencies, and we oversee them.
>
> We are the ones who conduct the hearings on them.
>
> We are the ones that keep track of them. So there is a certain tension that exists. It is a constructive tension, but in fact they are responsible to us.
>
> If not, they are not responsible to anybody because they are independent agencies.[37]

Senator Riegle's harsh analysis of the regulators can be contrasted with his very favorable analysis of Chairman Gray. He considered himself one of Gray's strongest supporters and the facts bear this out. Senator Riegle felt that Chairman Gray had an extremely tough job to do, and he did the best he

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[37]Open Session Hearings, Part 5, January 7, 1991, 225-6.

could under the circumstances. The record is very clear that Senator Riegle supported Chairman Gray during extremely controversial times and decisions.

Senator Cranston

Senator Cranston's attitudes toward the administrative state appear to be universally negative. Cranston sees his role as senator as crucial in helping ordinary individuals deal with the administrative state. He feels he needs to guide them through the administrative "maze" and help them solve their problems.[38]

> The people who have the most and the worst problems with the federal bureaucracies, as I think you all know, are businessmen and women, and most of the time they are right and the bureaucrats are wrong.[39]

Senator Cranston's negative attitude of the administrative state is mirrored by his attitudes about civil servants. Since civil servants have a type of tenure, he considers them pressure proof. On the basis of their superior knowledge of their field and the tenuous nature of an elected official, he believes civil servants think they can just wait the elected officials out until they are voted out of office. This makes it virtually impossible for elected officials to exert pressure on them.

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[38]Depositions of Senators, vol. 1, 627

[39]Special Counsel Exhibits, Part 3, 12.

The senator made a distinction between independent regulatory agencies and executive agencies, but he did not elaborate much on his viewpoint. He emphasized that "regulators are not sacrosanct" and that they are not substantially different from executive branch officials, "except that they generally exercise more power."[40] He further emphasized that this additional power does not mean they are not subject to the checks and balances applied to other government spheres. Therefor, his position differs from those of both McCain and Riegle.

Senator Cranston's banking aide Carolyn Jordan, who had been with him for years, also shared his basic opinion of administrative agencies. However, another close, long-term aide specifically stated that she did not make a distinction between executive agencies and the independent regulatory agencies and would not alter her behavior when dealing with either.

Cranston's attitudes, about the FHLBB in particular, seem to have been substantially colored by his banking aide upon whom he relied heavily. She had a thorough understanding of Bank Board and regulatory procedures and detected several missteps and curious circumstances that caused her to lose confidence in the San Francisco regulators specifically. This

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[40]Depositions of Witnesses, vol. 1, 658. These statements come from a press release issued by Cranston.

information was relayed to Cranston, who often checked his own impressions to see if they squared with hers.

A curious incident involving Senator Cranston took place. An S&L executive friend in California set up a meeting between the senator and Michael Patriarca, a regulator with the SFFHLBB and one of the regulators present at the April 9 meeting. The meeting lasted about forty-five minutes, occurred in the lobby of a hotel, and had no agenda. Both Cranston and Patriarca were a little confused over the purpose of the meeting, since all they did was chat about the problems in the industry generally. When pressed by Special Counsel to speculate on the purpose of the meeting Senator Cranston gave this answer:

> Well no, my impression is that he [Cranston's S&L executive friend] thought more highly of the regulators in San Francisco than I did, and specifically he thought more highly of Patriarca. He suggested that I see him and felt apparently that I would not feel that he was such an incompetent person.[41]

Cranston's attitudes toward Chairman Gray were universally negative and he had quite a few reasons to back up this perspective. Cranston knew Gray had no credentials for the job and that he had not been highly thought of in San Diego before being appointed to the FHLBB. Cranston had received multiple complaints from S&L's throughout California

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[41]Depositions of Senators, vol. 1, 308.

on Chairman Gray's policies and activities. Cranston had also personally tangled with Gray in a Banking Committee hearing in 1984. In addition, he was aware of the press coverage of Gray, including the Los Angeles Times piece calling for Gray's resignation.

Cranston's banking aide had similar attitudes toward Gray, but hers concerned the more technical issues. She was critical of Gray's handling of Board policies and suggested that more politically astute activities could have substantially alleviated the problems.

> And it appears that the Chairman of the Bank Board was taking an unreasonable action, and that rather than doing something reasonable that could rein these institutions in, he was choosing a path that would lead him into litigation. Meanwhile, these institutions could continue this behavior.[42]

Senator DeConcini

Senator DeConcini's attitudes toward the administrative state are quite negative. In his testimony he reiterated that people are often either mistreated by the government or dealt with in an arbitrary way. He kept saying this to reinforce the idea that this is why elected officials must intervene.

> Now all three of these examples that I've just given you, the fourth one included, the military man, all of these examples demonstrate that the Government often is wrong. Not always, but often

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[42]Open Session Hearings, December 11, 1990, 12.

is wrong. And that somebody ought to stick up for them.[43]

Unlike his colleagues, DeConcini refused to acknowledge that there was any difference between independent regulatory agencies and the executive branch for purposes of congressional intervention. He acknowledged that their activities were slightly different, but these activities had no impact on intervention. Senator DeConcini's attitudes are quite defined and explicit. Given the direct question he was asked on whether he thought there were any differences for intervention purposes, his response is worth quoting at length:

> I don't, Mr. Hamilton.
>
> Independent agencies were set up by Congress to be independent of the Executive Branch of government.
>
> They are not independent of the oversight aspects and the obligation that members of Congress have when they feel there is something wrong with that regulatory agency.
>
> That is how I view it, and that is what I think was the intent when it was created.
>
> It was to get the politics out from the Executive Branch, not to deny the people's representatives the right to ask questions and to intervene.
>
> That is the way I approach regulatory agencies and that is what I think is our job.[44]

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[43]Open Session Hearings, Part 1, November 19, 1990, 22.

[44]Open Session Hearings, Part 5, January 9, 1991, 115-6.

Senator DeConcini's attitude about the regulators in the April 9 meeting was somewhat favorable, but cautious. He was impressed with their knowledge and their obvious seriousness in how they felt about their positions. But he testified that in his opinion, they had not quite made their case. He acknowledged that they had addressed his questions and concerns, but not to his complete satisfaction. He still had reservations on the merits.

Other testimony from DeConcini's banking L.A. and A.A. further indicated they felt DeConcini did not really trust the regulators. He did not like the notion of thrifts being taken over and run by regulators because they did not have the competence to do so, and the thrifts were better left in the hands of business people who knew what they were doing.

The Senator was very critical of how regulators handled the S&L crisis. He remarked that the regulators accusing senators of improper conduct was nothing more than scapegoating. The regulators were not dealing with the crisis as they should, so they were simply pointing fingers.

> Just because a couple of thin-skinned regulators didn't like being put on the hot seat, if you want to call it that, didn't like being asked questions, because the industry was collapsing and they wanted to move the onus from them to us, they are setting up a standard now of impropriety?
>
> Two regulators and maybe three, if you want to believe Mr. Gray, determined that the conduct of the Senators was improper, when there's overwhelming testimony from fellow Senators here,

> the norm, that it is not only proper, it is expected of us.[45]

DeConcini's animosity toward Chairman Gray extended back, at least, to 1985. The senator stated he had had a number of complaints about Gray from constituents. He had also read press accounts criticizing him. His California contacts had revealed a great deal of negative information about him and, of course, Keating complained about him regularly.

In 1985, DeConcini had publicly called for Gray's resignation. In addition, he had phoned the White House and relayed his complaints to both Don Regan and James Baker.

DeConcini's animosity was returned by Chairman Gray, who in 1989, two years after the meetings, wrote a letter criticizing DeConcini and released it to the Wall Street Journal. DeConcini went on the offensive and proceeded to discredit Gray by using press releases. The supposed vendetta between Gray and Lincoln was never substantiated, but a vendetta between DeConcini and Gray is uncontested. Some felt that Gray was out to get DeConcini in any way he could.

Other Members of Congress

Several members of congress testified as witnesses on behalf of the Keating Five. In addition, members of the Senate Ethics Committee periodically made statements and included responses for compilation in the record. One of the

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[45]Open Session Hearings, Part 6, January 16, 1991, 124.

strongest statements against the administrative state anywhere in the Keating Five Hearings came from Senator Trent Lott, a member of the Ethics Committee.

> And I get into arguments all the time with Cabinet officials, regulators, bureaucrats, if you will, who say, oh, I can't do that. And I'd say, why not? Is there a law that says you can't do that? Oh, no, that's a regulation. And I'd say, a regulation is not a law. . . I think quite often, departments and bureaucrats take a perfectly good law and distort it with their regulations.[46]

Exhibiting a very favorable attitude toward the administrative state, Senator Jesse Helms, another member of the Ethics Committee, counters this negative viewpoint with a much more positive one. He feels that when the administrative state is consulted for its viewpoint on a controversy, it is always helpful and willing to make its position known.

> Now we have got to give them credit for that. Sometimes they are wrong, and we will knock them around, but at least 50 percent of the time they work with us.[47]

This is a very interesting position for a staunch conservative like Helms. In the Keating Five disaster, the liberals exhibited the more negative attitude toward the administrative state.

The issue of independent regulatory commissions versus other members of the administrative state came up constantly

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[46]Open Session Hearings, Part 2, November 28, 1990, 236.

[47]Open Session Hearings, Part 5, January 8, 1993, 139.

during the hearings. In his concluding remarks, Senator Warren Rudman, the Vice-Chair of the Senate Ethics Committee emphasized the importance of this question in judging the present controversy of the Keating Five.

> The question facing the Committee is not whether intervention is appropriate, but whether there are narrow limits on what a Member can do based on the type of agency and the nature of the agency's proceeding.
>
> Are there stricter standards of conduct [governing Members of Congress toward] . . . independent agencies than for Executive departments under direct Presidential control.[48]

Little was said about the specific regulators at the FHLBB. However, there are two comments that are instructive for our purposes. Senator Jesse Helms, reflecting the content of the quote cited above, felt that if the senators or their staff had made a good faith effort to find out the San Francisco regulator's position before the April 2 meeting, they probably would have gotten a very helpful, informative, cooperative response. He criticized the participants and their staffs for not seeking out the regulators viewpoints much earlier.

Senator Warren Rudman commented to Bill Black, the San Francisco regulator responsible for compiling the Black notes of the April 9 meeting, that he appreciated his good work:

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[48]Open Session Hearings, Part 6, January 16, 1991, 194.

> I want to make an observation, because we can't lose sight of one thing. And, of course, we're talking states of mind and so forth, and that's what this has been all about.
>
> But the fact is that on May 1, 1987, you got it right. And I think, as just one Senator, I thank you for your diligence. Everybody got fooled about Lincoln for a long time. Obviously, you weren't, and I guess somebody ought to say that.
>
> That's got nothing to do with anything else in this hearing, but I do want to say that.[49]

During Michael Patriarca's testimony, several senators on the Ethics Committee complimented him for being a model public servant and a credit to his profession and thanked him for being a public servant.

Two members of Congress expressed support of Chairman Gray during his very difficult time in office. Congressman Chalmers P. Wylie even stated how helpful Gray had been during the thrift crisis in Ohio and how much he appreciated his help. Governor Elect Pete Wilson of California stated that he had known and respected Gray for many years, and that his office had not received any unusual complaints about him when he served on the FHLBB. Wilson further stated that in questions about the FHLBB, he decided to grant deference to Gray and the Board.

Summary and Analysis

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[49]Open Session Hearings, Part 3, December 6, 1990, 188.

The senators all viewed the notion of constituency service differently. Glenn had a very expansive notion of it, considering any United States citizen a constituent. Riegle, on the other hand, was edgy about involvement with Keating because he was only a business constituent. The other senators claimed Keating as a constituent because of his extensive holdings and business interests in their state.

Each senator seems to assign different levels of intervention as appropriate based on what type of constituent is involved. Since Keating represented a number of different people and entities, in addition to having extensive property and holdings in all of the five senators' states, it is not surprising that this casework situation ended up involving the personal attention of the senators and was not exclusively handled by staff.

All the senators felt that giving regulators a "quid pro quo" was inappropriate but their attitudes towards negotiating for a constituent were not as clear cut. Some of the senators, most notably McCain, did not feel it appropriate to negotiate on behalf of a constituent. DeConcini stated the fact that there was no rule or law against it, but that was not what he was trying to do for Keating anyway.

There is no legal or ethical guidance for senators to follow on what negotiating is and whether or not it is appropriate. The senators who expressed strong views against

negotiating were simply operating from their own value structure -- as counsel constantly pointed out.

The senators also viewed the administrative state differently. Some made a sharp distinction between independent regulatory agencies and executive branch agencies. Glenn and McCain felt most strongly on this issue. Glenn inferred that the distinction he thought most appropriate was whether or not the agency was a regulatory agency, either independent or executive. Agencies that promulgate rules should be more immune from intervention because the rules are set up to apply equally and impartially to everyone. Senators, by doing constituent service, should not try to alter this impartiality. McCain did not get this specific, but he felt that since a regulatory agency was involved he should be more careful how he intervened.

The other senators also made a distinction between independent agencies and regulatory agencies but insisted that the differences did not have any relevance for congressional intervention -- intervention was appropriate in either realm.

McCain felt that the independent status of the agencies meant they were more independent from the Executive. Curiously, McCain felt the status also made them more independent from Congress. No other member shared this view. Riegle, correctly, states that the independence is from the

Executive, not Congress and since Congress creates them, Congress must be conscientious in overseeing them.

The type of administrative activity the agency was engaged in when the intervention took place was also an issue. Most of the senators seemed to view this issue similarly. Intervention in quasi-legislative activities is appropriate, whereas intervention in quasi-judicial activities is inappropriate. Case law is perfectly clear on this issue.

Unfortunately, activities do not come neatly labeled as quasi-legislative or quasi-judicial, making this standard difficult to implement in practice. DeConcini felt that since no cease and desist order had been issued that the activities were not yet adjudicatory and could not be classified as quasi-judicial. Case law supports most intervention in the quasi-legislative realm.

The senators attitudes toward administrators in general certainly had an impact on how and to what extent they intervened. Glenn and McCain had relatively positive notions toward agencies and administrators and the type of jobs they were doing. Riegle saw the administrative state as extraordinarily powerful and the administrators as power figures vis-a-vis the senators. Cranston viewed them all as rather sinister. Cranston commented that administrators simply try and wait out elected officials in order to resist their ideas. If they can stall long enough the elected

officials will be voted out of office and administrators can pursue their own course of action.

This is a strong, very negative, and disappointing, statement from a seasoned United States senator. Coupled with the statement by Senator Lott on "a regulation is not a law" and how bureaucrats twist perfectly good laws, one can begin to understand how difficult it is for administrators to do their jobs when elected officials view them so negatively and mistrust their judgement and motives.

The senators' attitudes toward the head regulator, Ed Gray, seemed to have been shaped by their own personal dealings and experiences with him.

Clearly, the senators have some considerable confusion on some very fundamental points. Different attitudes exist on the differences between independent agencies and executive agencies and what intervention is appropriate and when. Unless these very fundamental points are cleared up, the case law guidance on intervention will not be very useful to the senators, or to anyone else.

Chapter five will cover the administrative viewpoint, while chapter six will cover the public's view.

Chapter 5: The Administrators

A number of administrators figured in the Keating Five drama, the most important being, of course, Ed Gray. I will cover first the normative attitudes of the administrators and then examine their attitudes toward the administrative state. Each administrator will be examined in turn. This chapter will be structured like the last.

Since the hearings' focus was the senators, the information compiled for the administrators is not extensive. Their attitudes were not as deeply probed and information on some subjects is limited. However, there is still a great deal of information, especially on Ed Gray.

The Administrators' Normative Values

Ed Gray

Constituent service is as much an experience for administrators as it is for members of Congress, but it has not been the focus of much study -- as the literature review in the first chapter pointed out. Obviously, for administrators it is a different experience.

Gray testified that in most cases of constituent service, a member of Congress would call and describe a situation with a constituent saying, "I don't care what you guys do up there. Just make a decision. Get him off my back."[1] He further

[1]Depositions of Witnesses, vol. 1, 348.

testified that most constituent complaints get handled by staffers, both in the members' office and at the FHLBB.

The April 2 and April 9 meetings were somewhat different from this norm. Gray received a message from someone on his staff inviting him to a meeting at 6 pm in Senator DeConcini's office.[2] He claims he was instructed to not bring staff and he thought this somewhat odd. Later, he testified he realized the lack of staff enabled the senators to have "deniability" of what took place at the meeting.[3] He suspected the meeting regarded Lincoln, because Senator Riegle had warned him about a month earlier that some senators out west were concerned about how thrifts were being managed and to expect an invitation to a meeting.[4] In addition, he had also read in the news about his supposed "vendetta" against Keating.

Gray went to the meeting, but it did not last long, because he had no specific knowledge about Lincoln and could not answer the senators' questions. The April 9 meeting soon followed. The senators insist that the second meeting was Gray's suggestion. Gray insists the senators requested it. Nothing happened after the April 9 meeting until a few years

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[2]Where the invitation originated and who on Gray's staff received it was never firmly established.

[3]This order not to bring staff is disputed by some of the other Senators.

[4]Senator Riegle disputes this.

later when a reporter from the Detroit News called Gray and asked for information on the meetings. The resulting article blew the issue open and resulted in the Common Cause complaint requesting the Senate Ethics Committee investigation.

It was in this particular phone conversation that a reporter informed Gray that Riegle had accepted campaign donations shortly before the meetings took place. Gray testified that this surprised him greatly. However, since Riegle's presence at the April 9 meeting had puzzled him at first, it certainly was a plausible explanation for Riegle's interest in Lincoln. When he went to the April 2 meeting, Gray was aware that Keating had donated money to both DeConcini and McCain. This was common knowledge having been published in industry newspapers.

Gray had a somewhat negative view of constituent service. He felt it was used by constituents as a vehicle to further their interests when other activities failed.

> . . . it's been clear from the history of this case that Lincoln found very many ways to combat the regulators, particularly through pressure, I believe, sir, brought through politicians.
>
> I saw it all the time. If they couldn't get it done one way, then they'd go to the politicians and try to get them to bring pressure around the back side.[5]

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[5]Depositions of Witnesses, vol. 1, 225.

Gray testified there was a general view amongst the Bank Board personnel that Keating had considerable "political clout" on Capitol Hill.[6]

Gray responded affirmatively, when queried whether he thought the Atchison letter from the Arthur Young accounting firm provided a sufficient basis for members of Congress to inquire about the regulatory treatment of Lincoln. His only problem, he said, was the way the intervention occurred. He felt in helping constituents, members often lost sight of the public interest as a whole.

> And I frankly had great problems with members of Congress worrying more about individual institutions, sometimes headed by big contributors, than worrying more about the health and safety and soundness of the financial system and the taxpayers who were going to have to pay a bill, if we ran out of money at the FSLIC.[7]

Gray, as well as Special Counsel Bennett, pointed out to the Committee that there were other constituents of the senators that were not served, when they intervened for Keating. In Gray's words:

> We have heard a lot in these hearings about the responsibility of Senators to represent constituent interests, but I have always assumed that we also send out Senators to Washington because we think they will have the sense to know when narrow

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[6]Open Session Hearings, Part 2, November 27, 1990, 99.

[7]Open Session Hearings, Part 2, November 28, 1990, 235.

> constituent demands must take a back seat to the safety of their constituents as a whole.[8]

The two April meetings were only one item in a variety of intervention efforts by numerous members of Congress. The most numerous interventions were letters, signed by various members of Congress, sent to Ed Gray. The letters he received concerning the direct investment rule usually asked him to delay action on it, extend the comment period, or something similar.

When queried about these various letters asking for an extended public comment period or deferring action on a rule, Gray conceded that he did not consider this form of intervention improper. However, he showed a less generous attitude on why these tactics were being used.

> Normally when extension or delays were requested, in our experience it was to allow the opposition, those who opposed us, to build up a head of steam and pressure.[9]

Gray did not consider these requests improper. When pushed somewhat on this attitude it becomes obvious that he suspected anything that circumvented the standard rulemaking procedure Congress had set up, even if it was Congress doing the circumventing. He did not like people suggesting

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[8]Open Session Hearings, Part 2, November 26, 1990, 230.

[9]Open Session Hearings, Part 2, November 27, 1990, 11.

additions, deletions, or other modifications to the regular rulemaking procedure mandated by law.

Gray also conceded he felt it was not improper for the senators to ask about the delay in getting the examination report on Lincoln, or to ask questions about the appraisals that Lincoln considered abnormally low. He also admitted that the Atchison letter from the Arthur Young accounting firm was a reasonable basis for a senator to contact the regulators for an explanation.

Gray had a problem with the April 2 meeting, and with Senator DeConcini in particular. He characterized DeConcini as the "leader" of the senators. He dominated the discussion and the meeting was held in his office. The others were more passive and Gray characterized their concerns as centering on the examination's length and the integrity of the appraisals.

Gray was asked if he thought anything improper occurred at the April 2 meeting. He responded that what DeConcini had asked him to do was improper. Gray characterized DeConcini's request as a "quid pro quo." In other words, DeConcini said if you withdraw the direct investment rule then "we" will get Lincoln to make more home loans.[10] The withdrawal request enraged Gray for a variety of reasons. Just getting the rule promulgated had been quite a battle. In addition, as Gray

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[10]DeConcini denies he asked for a withdrawal of the rule.

testified, every facet of administrative law had been complied with in adopting the rule. For one senator, or even a handful, to ask that it be withdrawn was a brazen request in Gray's mind.

> The laws that we operated under called on us, specifically, to enact regulations to protect the safety and soundness of the system and the Deposit Insurance Fund, and that's what we were doing. We were merely doing our job.
>
> To ask us to withdraw what we had done pursuant to law and satisfied all of the requirements of law, seemed to me to be improper, particularly in this case, when Senator DeConcini had proposed this in that meeting, knowing that Mr. Keating had fought this regulation and had filed a suit against this regulation.
>
> I thought that was improper.[11]

Gray stated that if members of Congress wanted to comment on a rule, they were perfectly free to do so during the official comment period. Communication after the fact was inappropriate because it would give an unfair advantage to the members vis-a-vis the public and interested parties in affecting the rulemaking process.

Gray also objected to the form the request took. The request was oral rather than written. When Senator Heflin asked Gray what difference it made, oral or written, all Gray could say is that as a regulator he felt it was different. It differed because he viewed oral pressure as stronger than

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[11]Open Session Hearings, Part 2, November 28, 1990, 73

written pressure. Five senators dressing down an administrator was extreme oral pressure. He regarded the April 2 meeting as "a show of force, pure and simple."[12]

Gray felt strongly that the request by DeConcini was improper. When pressed to provide a law, rule etc. that made it improper to propose withdrawing a rule, Gray could not. He stated that he simply knew it was wrong: "I know that in my mind, in my heart. I know that as a basic instinct."[13] This instinct obviously went deep:

> I felt that the whole setting and the request itself was wrong -- just plain wrong.
> I had never seen anything like this in my entire tenure as a regulator, and I feel that way today. And I'll bet you if you went to every key regulator in Washington they'd all say the same thing.[14]

Being the chief regulator, Gray had the power to withdraw the rule. His regulators could not. So, at the April 9 meeting, Gray pointed out that the senators asked only for "forbearance" for Lincoln on the rule which would exempt Lincoln from complying with it. He saw this as a logical change in DeConcini's strategy.

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[12]Open Session Hearings, Part 2, November 28, 1990, 103.

[13]Open Session Hearings, Part 2, November 28, 1990, 73

[14]Open Session Hearings, Part 2, November 28, 1990, 107.

Gray felt so strongly about intervention that he made the following statement during the Gonzalez hearings:[15]

> I've been saying since 1988 that it ought to be a criminal act to intervene in the regulatory process. That's the only thing we have. The regulatory process, of course, reports to a political kind of scheme, but -- but the integrity of the regulatory process, subject to strong formal oversight, ought to be maintained. And you know, Congress writes the laws.
>
> Now, Congress established the regulatory process and it seems to me that anything that has even the appearance of subverting that process hurts the process terribly.[16]

The above quote refers to oversight. This topic was not dealt with much in the Keating Five hearings. It seemed to be assumed, though, as if everyone understood that the senators were simply conducting oversight. This is evident from a variety of statements and the fact that only the regulators were asked questions about the appropriateness of oversight. The member of Congress accepted it as a given.

Gray testified that asking questions of a regulator is perfectly appropriate and a form of oversight. Being asked to withdraw a regulation was not a form of oversight in Gray's mind. Since Congress has set up a formal procedure for withdrawing regulations, that procedure must be followed and not circumvented.

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[15]Gray's testimony in the Gonzalez was accepted into the record in the Keating Five hearings.

[16]Depositions of Witnesses, vol. 1, 585-6.

> Well, you have a process in the Congress. It is the oversight process of the House and Senate Banking Committees, the process of the Government Operations Committee. There are regular hearings.
>
> There's a regular process that the Congress of the United States has set up to do just this very thing. And I cooperated fully with that process.
>
> It's when you go outside those kinds of processes and you have these kinds of meetings, that you get into deep trouble, when you virtually circumvent that orderly process.
>
> We saw too much of that at the time.[17]

Gray was asked why he did not protest the meetings before they occurred if he was so bothered by them. He stated that he was lobbying heavily for the recapitalization bill in Congress.[18] He met with anyone who requested his presence and did not want to make the senators mad by protesting the April 2 and 9 meeting. In addition, he did not know the Senate Ethics Committee existed, so he felt no internal controls were available. Nothing expressly illegal had been done, so complaining to the Justice Department was not an option.

One thing the hearings made clear is that the meeting did not influence the regulators. Neither Gray nor the regulators took any action because of the April 2 or April 9 meetings. When asked if he, the regulators, or the entire FHLBB felt

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[17]Open Session Hearings, Part 2, November 28, 1990, 239.

[18]The recapitalization bill, as covered in chapter two, would have infused the bankrupt FSLIC with additional appropriated funds.

that they received any retribution from the senators, Gray replied that he was not aware of any.

Gray had strong feelings about members of Congress negotiating with regulators on behalf of constituents. He did not express his feelings about negotiation in general; but as it would apply to the Bank Board, he felt it would be disastrous. There regulators had to protect the safety and soundness of the financial system. Opportunities for individuals to negotiate would produce financial chaos.

A question that Special Counsel was fond of asking was why so many senators? Why four at the first meeting? Why five at the second? Why were so many senators making calls about thrift sales? He asked Ed Gray how many senators it took to ask regulators questions. Gray replied:

> It actually doesn't even take a United States Senator. It very well, and often is a staffer and it only takes one, of course.[19]

The regulatory arena was not the only avenue the senators sought to influence. They also exerted influence on Bank Board nominations. As a regulator, Gray was not heavily involved in nomination decisions. He was more apt to be on the receiving end of them.

Gray testified that nothing at the April 2 or April 9 meeting really surprised him, although he was upset by the

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[19]Open Session Hearings, Part 2, November 29, 1990, 28.

meetings, because if Lee Henkel could be appointed to the Bank Board, anything was possible. Gray believed the Henkel nomination to be a scheme of Charles Keating. Gray was aware of the Henkel-Keating connection at the time of the nomination.

Gray also believed that Senators Garn, Riegle and Cranston arranged things so that Danny Wall, the FHLBB chair who succeeded Gray, did not have to be confirmed when the FHLBB was turned into the Office of Thrift Supervision (OTS). Since the confirmation hearings would take place after the Gonzalez hearings, Gray felt the senators wanted to avoid a messy confirmation battle in which some of their own activities in the S&L disaster may come to light. So the senators arranged it so Wall did not have to be reconfirmed.

Bill Black

Bill Black authored the famous Black notes of the April 9 meeting. His employment history with the FHLBB is somewhat complicated. Suffice it to say that he served as Director of Litigation for the FHLBB in Washington and then was detailed to working especially close to Chairman Gray. He was then hired at the San Francisco Federal Home Loan Bank Board, but remained in Washington DC for a short time, before assuming his duties in San Francisco.

Black was not questioned much on constituent service. However, he was asked if he knew of any law, rule etc. that

prohibited a senator from contacting a regulator and stating a viewpoint on behalf of the constituent. Black replied that he did not.

Black also testified that he believed he learned of the April 2 meeting the day it occurred. His advice to Gray was not to try to become an expert on Lincoln Savings in the small amount of preparation time he had, because this may force him to recuse himself later from any decisions regarding Lincoln. Black believes Gray's version of the April 2 meeting was accurate and that Gray would not have had any real knowledge concerning details of Lincoln, other than, perhaps, that Lincoln was obstructionist in the examination.

Black was one of the staff members who waited late on April 2 for Gray's return from the meeting so that he could be briefed. Black testified that Gray was extremely agitated upon his return. Black says Gray recounted what happened at the meeting and specifically described what Senator DeConcini had done -- asked that the direct investment rule be withdrawn. He said the senators had referred to Lincoln, but only made veiled references to Keating as "our friend" and Senator DeConcini had used the phrase "we" in all of his demands.

With this as background, the regulators prepared for the April 9 meeting.[20] They knew the meeting was about Lincoln and they prepared accordingly. Several hours before the meeting they met as regulators and decided to refer Lincoln to the Justice Department for criminal activity. They did not plan on disclosing this to the senators. They did not want the pending criminal referral to leak out which may give Lincoln time to destroy documents and alter records. They felt this would be a possibility if they told the senators.

The regulators felt Keating was flexing his political muscle by forcing the meeting. The regulators decided to take a different approach. They settled on a factual, almost boring presentation of all the facts and violations Lincoln was guilty of. Richard Sanchez, Lincoln's principal supervisory agent, was designated to start the presentation. Sanchez was selected for this duty for a variety of reasons. First, he was the most knowledgeable about Lincoln. Second, His factual presentation could debunk the "vendetta" myth, and lastly, Gray had mentioned him on April 2. As Black explains it:

> Sanchez is this extraordinarily quiet, reserved, non-vibrant, just plodding type person. We wanted somebody who wasn't a flamer.

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[20]Black's notes of the April 9 meeting are in Appendix B.

> Remember, Lincoln is presenting all of this as there's this great vendetta, which is made up out of whole cloth.
>
> I mean, the Supervisory Agent in this case is somebody that you have to check his pulse to make sure that he's alive from time to time.[21]

From the regulators' perspective the meeting went very badly. Sanchez began with his factual presentation, which was prepared to be extensive. However, Black pointed out that the meeting was driven by the questions and statements of the senators that led away from a factual examination of Lincoln's problems. Black said that the meeting was going badly and this is when Patriarca and Cirona joined the discussion. Black further testified that revealing the criminal referral was an act of desperation because it was obvious the senators were not getting the message.

Black testified that he did not think it improper for senators to ask questions of regulators, but often the questions are phrased in such a way that they are actually statements. When prompted by Special Counsel Bennett, Black conceded that well into the meeting, none of the senators had really asked for information about Lincoln. In the hearings, the senators had all presented this as the major reason for the meeting.

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[21]Open Session Hearings, Part 3, December 6, 1990, 127.

Black testified that prior to the April 9 meeting, none of the senators had requested any information of the regulators. Senator Heflin was obviously disturbed by this and probed Black further on the senators' attitudes. He stated that when he would request information from regulators and after they would present their case, he would often back off. He asked why that attitude did not exist at the April 9 meeting. Black did not know, but felt that was exactly what the regulators were trying to accomplish, by being:

> . . . the best friends the five Senators had. We were trying to tell them, this is not the institution you want to be going to bat for.[22]

Black felt that the senators had basically made up their minds about Lincoln before the April 9 meeting ever took place. He felt the senators assumed Lincoln was being abused and the meeting was simply a mechanism for coming after the regulators. When queried as to whether he felt the senators were simply not listening, Black responded:

> Our interpretation at the time was worse than that. They were listening and they were coming back with defense after defense after defense of Lincoln Savings, despite us laying out, in starkest terms plus the mildest terms, from Sanchez, but in great glorious detail, exactly what was wrong. And it didn't impress them.[23]

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[22]Open Session Hearings, Part 3, December 6, 1990, 122.

[23]Open Session Hearings, Part 3, December 6, 1990, 133.

Black says that some of the senators' perception of the regulators being nervous was accurate. The regulators were "strung tight as a drum" and Black felt that Keating had set up the meetings to be intimidating and he had accomplished this goal.[24] Black also testified that he had never attended a meeting like this before or since, and that all the regulators came out of the meeting shaken.

Black was particularly critical of Senator DeConcini's conduct. Black testified that DeConcini acted like a lawyer arguing the case for his client. Black knew DeConcini was an ex-prosecutor. Every time the regulators made a point, DeConcini would counter with a response. Even after the criminal referral was mentioned, Black still characterized DeConcini's conduct as aggressive.

Black was incensed that DeConcini had learned that Lincoln was in massive violation of a rule critical to safety and soundness and still wanted special treatment for it. The other senators had dropped requests at this stage of the meeting. DeConcini "wanted something special for Lincoln, after hearing that Lincoln was a travesty."[25]

Black kept hitting on this theme and emphasizing the point throughout the hearings. At one point he drew an

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[24]Open Session Hearings, Part 3, December 6, 1990, 30.

[25]Open Session Hearings, Part 3, December 6, 1990, 129.

analogy in order to illustrate the magnitude of what DeConcini was suggesting.

> . . . there's this huge violation, it's completely related to safety and soundness, but it's okay. Give them forbearance against that violation.
>
> Take it in the context of a health measure. Can you imagine if there was an unsafe and unsound drug on the market, and the regulators had said, look, there's this huge violation. There's something very unsafe and unsound. And Senators have some in and said, look, we want you to give forbearance against enforcing against this dangerous drug. [sic]
>
> This is the same thing, but in the financial realm.[26]

When asked about his attitudes toward negotiation, again Black visited this basic theme:

> To me, negotiation isn't so much the key.
>
> To me, it's, this is an institution with more than $600 million in violation of something that's central to safety and soundness.[27]

Black was forced to admit that neither DeConcini, nor any of the other senators, exacted any retribution toward them. Also, there did not seem to be any threat to the recapitalization bill, though this was a deep concern in the minds of the regulators. Black also admitted that the regulators did not alter anything regarding Lincoln because of the meetings. They took no action because of them.

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[26]Open Session Hearings, Part 3, December 6, 1990, 103.

[27]Open Session Hearings, Part 3, December 6, 1990, 102.

However, Black does believe that politics affected the operations of the FHLBB because supervisory control of Lincoln Savings was transferred from the San Francisco office to the Washington D.C. office. This was unprecedented. In addition, he believes that politics affected the Board actions in a loose, ephemeral way. He cannot state any specifics, he just feels that there was influence there. When pinned down on this by Senator Heflin, Black acknowledged that it is not a fact, but "my best judgment. It is an inference." [28]

Senator Jesse Helms drew out Black in a discourse of where on the rulemaking/adjudication continuum the situation with Lincoln was when the senators intervened. For our purposes this is worth quoting at length. After reading, discoursing upon and explaining the Congressional Research Service report cited extensively in chapter three, Senator Helms posed this question:

> How would you characterize the regulatory actions that the Board and the regulators were engaged in with respect to Lincoln S&L? Were your actions more like those of an adjudicatory action or leading to an adjudicatory action?
>
> Or were they more like a rulemaking general policy setting function?
>
> Or were they somewhere in between?

Black responded:

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[28]Open Session Hearings, Part 3, December 6, 1990, 53.

> They were of the adjudicative nature in terms of the dichotomy that you've just set out.
>
> And they were in two regards.
>
> First, the actions being contemplated were the decisions that San Francisco was making, whether to appoint a conservator, receiver, whether to recommend the appointment of a cease or desist order, a very important element of that was this massive violation of the Direct Investment Rule that might well be the subject of an enforcement action.
>
> That's one way.
>
> The second way is that this Direct Investment Rule was already under legal challenge by Lincoln at the time of both the April 2nd and the April 9th meeting. And, clearly, they were looking for -- Senator DeConcini, again, using "we," was talking about, in essence, one way of looking at it was, granting a stay.
>
> It's like if you went into court when you made the challenge. Lincoln could have asked the courts to stay or enjoin the Direct Investment Rule. It was going to get, under Senator DeConcini's proposal that effect in its litigation.
>
> For both of those reasons, I would say that it was dramatically towards the adjudicative end.[29]

As a regulator, Black did not really play a role in any of the nominations discussed previously. However, he informed the ethics committee that after an exhaustive search, the regulators concluded that the amendment to the Direct Investment Rule offered by Lee Henkel, would have possibly benefitted only one other thrift in the nation -- a thrift connected to Lincoln. However, Black acknowledged that Henkel

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[29]Open Session Hearings, Part 3, December 6, 1990, 137-8.

had voluntarily recused himself from decisions or motions involving Lincoln when he sat on the FHLBB.

One other point needs to be mentioned regarding Black. There was a campaign to remove him. Keating was intent on somehow getting rid of Black or, at the very least, suing him directly. Keating's correspondence, papers and comments attest to this. Speaker Wright was also personally hostile to Black. His office called the FHLBB asking that Black be fired.[30] All these efforts proved futile.

Michael Patriarca

Michael Patriarca was a regulator with the San Francisco Federal Home Loan Bank Board. He was one of the regulators present at the April 9 meeting.

Like Bill Black, Mr. Patriarca was not really questioned on constituent service. However, when asked whether a senator has an obligation to represent the citizens of his state, Patriarca agreed with the statement, but pointed out that he was "not certain that that obligation extends to attempting to influence the outcome of an examination of a financial institution."[31]

Patriarca's version of the April 2 meeting, which Gray related to him, squares with Black's version. Gray instructed

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[30]Open Session Hearings, Part 3, December 6, 1990, 107.

[31]Open Session Hearings, Part 2, November 30, 1990, 95.

Patriarca to prepare to meet with the senators and answer questions about Lincoln. Patriarca's version of the April 9 meeting also mirrors Black's. He felt the meeting was initially hostile and that the senators had already made up their minds that the regulators were harassing Lincoln. Patriarca also felt that what they were saying to the senators was not having much of an impact until the criminal referral was mentioned. Then the meeting changed tone.

> The Senators did have an altogether different attitude about activities that violated the law, not the regulations, not something that was a reckless or unsafe practice, but they did evidence a different attitude about things that violated the law.
>
> And I believe, as I've testified, when we mentioned that we felt that some of these activities were criminal and we were making a criminal referral, the tone and the demeanor of the senators changed markedly.[32]

Patriarca testified that having a meeting or intervening in an agency for one institution was new to him. He had had numerous meetings with members of Congress but the subjects were usually more general. The April 9 meeting surprised him because of its specificity and its exclusiveness.

Patriarca was the only regulator asked about the Atchison letter from the Arthur Young accounting firm. The regulators were given a copy of it at the April 9 meeting. That is the first time any of them had viewed it. It is interesting to

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[32]Open Session Hearings, Part 2, November 30, 1990, 51.

contrast the senators' reaction to the letter with Patriarca's. The senators found it compelling and important, whereas Patriarca considered it "more Lincoln propaganda."[33]

Patriarca had some strong views on how far a senator should go when intervening. He felt that intervening on behalf of one institution was improper, but would accept it if it dealt with more than just one, or a few. If a regulator were at fault, the best method would be for the thrift to go to the courts for redress. When asked to assign any fault for improper actions in the April 9 meeting, Patriarca replied:

> I would fault the Senators who appeared to have made up their minds in advance on the basis of one side of the story, but that's anyone's prerogative to make up their mind on the basis of incomplete information.
>
> I think in my opinion, which is worth no more than anybody on the street's, it is only where the Senators attempted to influence, to change the outcome of the examination of the regulatory treatment for this specific institution that impropriety was breached.
>
> I think Senator -- my personal view -- Senator DeConcini did that.
>
> It is not clear to me that any of the others did.[34]

Patriarca clarified his viewpoint when queried by Senator Rudman. Patriarca conceded that regulators are sometimes wrong and need to be corrected. But, the appropriate recourse

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[33]Open Session Hearings, Part 2, November 29, 1990, 190.

[34]Open Session Hearings, Part 2, November 30, 1990, 28.

for an institution that considers itself ill-used by regulators is the courts, and not Congress.

In prior testimony, Patriarca had stated he felt DeConcini was negotiating on behalf of Lincoln. Patriarca was not asked his opinion of negotiating for constituents in general, but there is a distinct inference in the hearings that he opposed it.

When leaving the April 9 meeting, Patriarca overheard a conversation between Senator Glenn and Senator Riegle that further reinforced his belief it was a meeting on one constituent's behalf.[35] When queried by Senator McCain's lawyer whether he would change his opinion of the meeting if he knew Senator McCain had intervened for one to two thousand people employed in Arizona, Patriarca replied:

> Mr. Dowd, quite frankly, I don't know that that is a significant factor from my narrow perspective as the regulator recipient of the potential intervention.[36]

Senator Helms put to Patriarca the same question that he asked Black regarding the rulemaking/adjudication continuum. Patriarca stated the intervention "would be on the side of an

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[35]One Senator said to another, "What are we going to tell him?" Patriarca felt the reference was to Keating.

[36]Open Session Hearings, Part 2, November 30, 1990, 94.

adjudication, more so than a rulemaking."[37] A short time later he explained more fully why.

> This with Lincoln, I would put on the other side of the spectrum. It was an individual examination of an individual institution. That's a process that involved gathering facts that are specific to that company. And then reaching a decision on what action -- and those actions tend to be quasi judicial if they're litigated; cease and desist proceeding, enforcement actions of some variety, I think that is not on the rulemaking side. I think that's on the adjudicatory side.[38]

Oversight was again an issue in the Patriarca testimony. Patriarca admitted he believed it was appropriate for Congress to oversee regulators, but that oversight usually took place in committee rooms in typical oversight fashion. He refused to voice any view on whether oversight could take place outside that setting, stating merely that the usual environment was a committee room and the testimony was on the record. Mr. Patriarca did not consider the April 9 meeting to be an oversight proceeding.

Patriarca testified he was particularly concerned over the transfer that removed Lincoln from San Francisco's jurisdiction. He related his concerns to Jim Boland, a fellow regulator in the system, whose response was:

> There are things you don't understand. We are doing this for your own good.

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[37]Open Session Hearings, Part 2, November 30, 1990, 54.

[38]Open Session Hearings, Part 2, November 30, 1990, 55.

> These guys are so well-connected they can get you in ways where you will never know you've been gotten.[39]

Boland disputes ever making these comments, although Black says Patriarca related them to him long before ever testifying about them. Patriarca interpreted these statements to mean that Lincoln's political connections had resulted in the transfer.

Rosemary Stewart

Rosemary Stewart headed the Enforcement Division at the Federal Home Loan Bank Board in Washington D.C. Events surrounding the Lincoln situation put her office somewhat at odds with the San Francisco FHLBB. It is fair to say that her opinions about Lincoln differed sharply with those of the San Francisco regulators.

Stewart testified that congressional inquiries into the agency did not happen on a daily basis, but they were not uncommon. It was her experience however, that they were managed through the congressional relations office of the agency, although she herself occasionally was asked to call someone directly. Usually the office served as a conduit for both the member of Congress and the agency when inquiries were made.

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[39]Open Session Hearings, Part 2, November 29, 1990, 152.

Stewart was not asked many direct questions about congressional intervention, largely because she was not at the April 9 meeting. However, she was asked if any guidelines had been developed by the FHLBB setting out what was appropriate and how agency personnel should respond to inquiries by members of Congress. She knew of no guidelines.

Senator Pryor asked her if during her sixteen years of agency service if she was aware of any intervention resulting in the Board actually changing policy, rules or direction. She replied:

> I can recall one instance in which some intervention was, in my judgment, leaning pretty hard, and I think it had some effect on a decision that was made about a particular case.[40]

She also testified that the Keating Five activities had absolutely no effect on how Lincoln was dealt with. This viewpoint squares with all the other testimony from administrators.

Stewart briefed the Committee somewhat on what a criminal referral means. She stated that in examining or auditing a thrift, the agency sometimes comes upon information indicating a crime may have occurred. When this happens, a criminal referral is considered. A referral can apply to a specific individual in the institution, or to the institution as a whole. Only the Justice Department has the ability to act on

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[40]Open Session Hearings, Part 6, January 10, 1991, 270.

referrals and actually bring charges. The existence of a criminal referral in the Keating Five context could mean that one individual at Lincoln was at fault, the entire thrift was engaged in fraudulent activities or Keating himself was violating the law. Obviously, what the criminal referral was based on could have an impact on whether intervention for the institution was appropriate or inappropriate. The details of the criminal referral were never fully disclosed to the senators.

Danny Wall

Danny Wall served as the FHLBB Chairman after Gray's tenure had expired. He is the one who presided over the Memorandum of Understanding (MOU) negotiated with Lincoln. Because he was formerly a Senate staffer, the comments of Mr. Wall have to be considered as made by someone who has experience in both the legislative and administrative realms.

Mr. Wall testified he thought Senator Cranston's numerous calls to his office, when he served as chairman, were unusual. Senator Cranston seemed heavily involved in the affairs of a single institution. He also testified that Senator DeConcini had every right to be deeply concerned about Arizona thrifts since every thrift in Arizona eventually failed.

Senator Jesse Helms, visiting a familiar theme, read Wall excerpts from the Congressional Research Service report and asked him where on the rulemaking/adjudication continuum the

Board's activity fell when its members were considering approval for the impending sale of Lincoln. This was Wall's response:

> As I have indicated, it is either in the middle or intending toward rulemaking.
>
> I say it for this reason. We, like you, sat from time to time as an adjudicatory body so I have some empathy for the position you find yourselves in.
>
> We were an agency that had the regulatory responsibility and all that went with it, but we also at times had to sit ourselves as a court and review and hear what in that case an administrative law judge's decision had been and either find on one side or the other.
>
> We only did that once in the time -- in the 32 months I was there, so it does not happen very often that the adjudicatory mechanism is triggered.[41]

Clearly, Mr. Wall's opinions on this issue differ sharply from those of the other regulators.

William von Raab

Mr. William von Raab served as Commissioner of Customs in the Treasury Department from 1981 through 1989. He was submitted as a witness by Senator DeConcini's counsel. He was not connected with the Keating Five in any way. He appears to be an expert witness brought on to support DeConcini's opinions. Mr. von Raab's experiences and opinions directly counter Mr. Gray's.

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[41]Open Session Hearings, Part 3, December 4, 1990, 169.

Mr. von Raab testified he had read the Black notes and had reviewed them at length. He could determine nothing that indicated any impropriety at all on the part of the senators.

He also testified that there had never been any rules of conduct or guidelines for dealing with members of Congress. When in office, he had simply relied on his own judgment and the Congressional Affairs Office on how to deal appropriately with Congress and individual members.

Since Customs was promulgating rules based on statutes passed by Congress, Mr. von Raab felt that it was perfectly appropriate for a member of Congress to ask that the rules be changed, or to ask for a forbearance. In fact, he stated that was very common in his experience.

Mr. von Raab also had an expansive view of congressional oversight, saying that it had been quite productive for the Customs Service to have problems or mistakes pointed out and that it "served as a very real moderating influence."[42]

> I felt that since Congress has passed the laws pursuant to which the Customs Service was promulgating the regulations, that Congress had a good reason to question why we wrote our regulations in a certain way; and also what effect they were having.[43]

Mr. von Raab was critical of Gray, although not directly. He testified that it is the agency head's responsibility to

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[42]Open Session Hearings, Part 4, December 10, 1990, 29.

[43]Open Session Hearings, Part 4, December 10, 1990, 13.

deal with members of Congress and that responsibility should not be shifted to subordinates. Also, as a courtesy, Mr. von Raab feels that the potential of a criminal referral should be disclosed to the member of Congress up front so that the member of Congress can choose whether to continue involvement in the issue.

On negotiation, Mr. von Raab sees nothing wrong with it. Negotiation is appropriate and necessary. In fact, he would not put many limits at all on members' of Congress activity regarding agencies.

> I think that Congress is bound by the laws of the United States which basically I assume would prevent them from taking bribes for doing what they are doing.[44]

Clearly, von Raab is the antithesis of Gray.

Griffin Bell

Senator DeConcini's counsel also produced Griffin Bell as a witness, a man with a long history of government service in a variety of influential positions. Mr. Bell, a lawyer, had served on the Fifth Circuit Court of Appeals and as Attorney General. For the Bush administration, he served as Vice Chairman of the Federal Ethics Reform Commission which investigated many of the issues in question regarding the Keating Five.

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[44]Open Session Hearings, Part 4, December 10, 1990, 14.

Mr. Bell was first queried on House Advisory Opinion No. 1 and what he thought of it.[45] Bell testified that it coincided with his own opinions and that after sitting on a Court of Appeals, he knew the government does sometimes mistreat people, and the only recourse may be a member of Congress.

Mr. Bell was taken through some examples of intervention, based on constituent service, that were similar to what was at issue with the Keating Five. Bell felt strongly that there was nothing wrong with a member of Congress advocating a constituent's position. He further testified that since the First Amendment protects people's right to a redress of grievances, he was glad to help members of Congress with their constituents' complaints.

Mr. Bell had read the Black notes and testified that, from his perspective, there was nothing wrong with what any of the senators did in the meeting. The only fault he could see was on the part of the regulators. He felt that they should have revealed the criminal referral at the beginning of the meeting, which would have allowed the senators to cease involvement if they chose. That was his only criticism.[46]

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[45]The Opinion is reproduced in Appendix A.

[46]It is not clear whether Bell was aware of the regulators' reasons for withholding this information.

Special Counsel Bennett read parts of Bell's book, Taking Care of the Law, into the record. He focused on self-dealing, a situation where a member of Congress tries to influence government decisions in order to win points with constituents. In Bell's own words:

> Self-dealing is difficult to define or to outlaw because Congressmen properly and legitimately serve their constituents by seeking information about matters pending at the agencies.
>
> The propriety of such a contact comes into question if it is something more than a neutral request for information.[47]

Bell expanded on this theme somewhat when probed by Senator Rudman. Senator Rudman wanted to know if a member of Congress should treat quasi-legislative activities differently from quasi-judicial activities in the agencies when intervening for a constituent. Bell's answer is worth quoting at length:

> Well, on the policy matter, there can never be any problem about intervening because policy in a sense is always set by the Congress. The President may take the lead in it, and in certain Cabinet areas the President sets the policy, but by and large policy is set by Congress. So if you could not intervene in that, you would not be able to carry out one of your duties.
>
> Now on operations, you would have to be more careful about that not to interfere in some kind of an ongoing investigation, for example, or to -- you can inquire, but probably not go much beyond that.

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[47]As quoted in: Open Session Hearings, Part 6, January 10, 1991, 166-7.

> I cannot think offhand of a good example where there would be an operation in an agency, but one so-called independent agency, say the Federal Trade Commission. You would not want to get too deep into what they are doing at the Federal Trade Commission. There is probably some procedure there where you could call and see what is going on, and you might even want to write a letter about something if it bore on policy, but you would not want to get into a hearing at the Federal Trade Commission.[48]

The excerpts from the book do seem at odds with Bell's testimony in the hearings. In his book he addresses self-dealing, but in his testimony he only draws the line before it reaches bribery.

Miscellaneous

In an affidavit submitted as an exhibit, William Seidman, Chairman of the FDIC during Gray's tenure as chair of the FHLBB, supported Gray's version of the events at the April 2 meeting. Gray called and briefed him a short time after the meeting took place.

Seidman stated that Gray described the meeting and asked him if he had ever experienced anything similar. Seidman had not. He also stated he had never been contacted by four or five senators regarding one institution.

> Generally, the Members of Congress with whom I spoke were careful to avoid in-depth discussions related to pending supervisory or regulatory matters regarding a particular institution and congressional and regulatory staff were always

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[48]Open Session Hearings, Part 6, January 10, 1991, 174-5.

present. FDIC policy is to provide only a status report in response to a congressional inquiry.[49]

Shannon Fairbanks, Chief of Staff and Director for the Washington FHLBB, supported Chairman Gray's version of the April 2 meeting. In her testimony in the Gonzalez hearings, which was submitted as an exhibit, she testified that Chairman Gray had encouraged everyone to be responsive to congressional inquiries for information. She testified that she met with a number of members and thoroughly explained why the regulators were taking the actions they did. She considered these meetings status inquiries and thought they were very appropriate.

Jim Cirona, another regulator present at the April 9 meeting, stated that he felt the meeting was not a status inquiry on how events were proceeding in regulating Lincoln. He felt that senators were accusing the regulators of handling the Lincoln matter improperly. He also felt the senators knew a great deal about Lincoln, much more than he thought would be customary for them to know about one particular constituent.

In a submitted affidavit, Bruce Babbit, former governor of Arizona, and currently Secretary of the Interior, stated Keating contacted him in 1985 asking him to intervene with regulators. Babbit refused, saying "I considered it

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[49]Special Counsel Exhibits, Part 3, 954.

inappropriate for me to intervene with a regulator in the context of an enforcement proceeding."[50]

Interestingly, Babbit also stated that he ran into Senator Cranston in Washington D.C. in 1989. Cranston asked him his view of Keating. Babbit told him he thought Keating was a crook.

How the Administrators Viewed the Administrative State

Ed Gray

Gray's questions and testimony focused largely on his interaction with the five senators. However, he revealed a few comments about how he felt toward administration and its role in society. The following quote is the most telling:

> I always cared more about the taxpayers than anybody else, even the industry I represented in all their lobbying to try to keep us from bringing order and discipline to our system.
>
> I'm still very proud of that.
>
> I'm sorry I failed in my ability to protect this from happening. But I got no help from any entity of this Government but from certain individuals, from my fellow regulators, from certain leaders in Congress, very few, by the way.
>
> And I regret very much that I could not stop it from happening.[51]

Gray also had an extraordinarily firm commitment to the administrative processes Congress had set up. He constantly

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[50]Special Counsel Exhibits, Part 3, 911.

[51]Open Session Hearings, Part 2, November 28, 1990, 238.

pounded away at the theme that the senators were trying to interfere with the congressionally mandated administrative processes. This was his main complaint. He also stated, on several occasions, how important he viewed these processes. Everything he undertook at the FHLBB was carefully managed to conform to the processes Congress had set up.

> I saw my job as a regulator as that of safeguarding the health of our country's financial system and more particularly as that of protecting the federal deposit insurance system . . . I did not see my responsibility as protecting savings and loan operators and investors. This was not my role as overseer of the thrift deposit insurance fund, nor, frankly, should it be the role of any member of Congress since it is -- or ought to be -- Congress' responsibility to protect the very deposit insurance system it created in the first place and without compromise.
>
> Exhibiting respect for the integrity of the regulatory process, and supporting it against those who would subvert -- and subvert it for any reason whatsoever -- ought to be the proper response, especially in the now glaring light of this incident, which occurred in the darker privacy of a senatorial office.[52]

Gray was aware of the agency's position as an independent regulatory agency, and this shaped his behavior. He testified that even though the agency was subject to OMB, because of the unique organizational structure of the FHLBB, he felt the only oversight exercised over him was by Congress. For this reason he always gave deference to Congress and to any requests it, or individual members, made.

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[52]Depositions of Senators, vol. 2, 384.

Although independent, Gray knew the FHLBB was subject to a great deal of influence besides that of Congress. OMB and Treasury Secretary Donald Regan had a certain amount of influence because OMB could control staffing levels and Regan had a free rein on making financial policy for the Reagan administration. In addition, the U.S. League was necessary in order to get support for reform legislation.

> Freddie St Germain, who was the Chairman of the House Banking Committee, told me in 1986 -- and I had been told this other times -- that I wouldn't get any of our reform legislation unless the U.S. League gave us their support for it.[53]

As chief regulator of the FHLBB, Gray was conscious of his title and responsibilities. One of the reasons the senators were so upset with Gray is that he did not have any specific knowledge of Lincoln and the regulator's activities at the April 2 meeting. Gray challenged this by saying that since he oversaw over three thousand thrifts, it would be difficult to be conversant on a few, like Lincoln. Gray also felt it was inappropriate, and against his counsel's advice, to meet with individual thrift owners. Danny Wall did not share this view. Wall met personally with Keating, and other thrift owners, a number of times.

One of the reasons Gray was sensitive about meeting with individual thrift owners was his position as "judge" as he

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[53]Open Session Hearings, Part 2, November 28, 1990, 165.

termed his administrative law responsibilities. The decision to close down a thrift, for example, was ultimately made by the three members of the FHLBB. So, Gray felt that meeting with individual thrift owners could compromise his impartiality as a "judge" if the thrift had to be closed. This is another reason why he made no effort to get briefed on Lincoln before the April 2 meeting. He did not feel it inappropriate to discuss general policy issues and regulatory problems with members of Congress, but he was concerned about discussing a specific thrift because of his subsequent "judge" role.

Perhaps Gray characterized his thoughts best regarding his position as the director of the FHLBB when he termed it a "living hell."[54]

Bill Black

Bill Black's attitudes toward the administrative state are sketchy. However, he does have an interesting position regarding an agency's responsibilities toward Congress. He testified that since the recapitalization bill was so important and so endangered in Congress it was necessary for the regulators to respond to a request for a meeting. This is his rationale for regulators attending the April 2 and April

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[54]Open Session Hearings, Part 2, November 28, 1990, 151.

9 meeting. However, that responsibility did not extend to keeping Congress informed of details on specific institutions.

> We were not interested, it was not a goal of the Federal Home Loan Bank Board to convince Congress that there was a serious problem at Lincoln Savings.
>
> The Federal Home Loan Bank Board was using, appropriately, what Congress had told us to do. You will create regulations designed to protect safety and soundness, and you will enforce those regulations against violators.
>
> We take lots of enforcement actions. We don't go up and try to convince Congress, before we take an enforcement action, that we ought to take enforcement actions.[55]

Bill Black was also very conscious of his agency's position as an independent regulatory agency as opposed to an executive branch agency. When queried on whether or not he thought there was a certain tension between the executive branch and Congress, Black pointed out that the FHLBB was not part of the executive Branch, but "an independent regulatory agency, and a creature of Congress."[56] He stated that in the executive branch there is executive privilege and it is at times somewhat difficult for members of Congress to get the information they request. In the FHLBB, "Anything you want in our files, you can have."[57]

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[55]Open Session Hearings, Part 3, December 6, 1990, 17.

[56]Open Session Hearings, Part 3, December 6, 1990, 67.

[57]Open Session Hearings, Part 3, December 6, 1990, 68.

Michael Patriarca

The questioning of Michael Patriarca, unlike that of Bill Black, went much more into the detail of regulating Lincoln. Mr. Patriarca explained to the Committee how an examination is typically conducted. He explained how difficult examining Lincoln was. For example, Lincoln refused to provide the examiners with requested documents. All requests had to be made through Lincoln's legal counsel in New York City. This, Patriarca said, explains much of the delay Keating was complaining about to the senators. In addition, the San Francisco FHLBB had allowed Lincoln to comment and submit additional materials responding to all findings of the examination. Sometimes these submissions were superfluous and this cost time as well. When asked if any other companies being examined had ever been less cooperative than Lincoln Patriarca replied, "Never, under any circumstances, either before or since."[58]

Patriarca also went into how unnecessary the measures the senators were calling for really were, especially DeConcini's. He explained the process for appraisals, how they were independent and done by Arizona experts. In contesting them, Lincoln was just being cantankerous. It was cantankerous to protest the direct investment rule, or to ask for forbearance

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[58]Open Session Hearings, Part 2, November 30, 1990, 34.

for Lincoln. Lincoln had applied for forbearance, and been denied it, through the official processes.

He further observed that Lincoln had invested heavily in raw land in Tucson and in Phoenix. The FHLBB commissioned experts to do market surveys and absorption studies, since Lincoln, to Patriarca's surprise, had not already done them. The results indicated that "Lincoln had 40 years' worth of inventory in one of those markets and 75 years' worth of inventory in another of those markets."[59]

Patriarca stated, and the Arthur Young letter was undoubtedly in his mind, that accounting firms are not neutral parties when they conduct audits.

> . . . the notion that accounting firms are somehow completely independent of the client for whom they are conducting the audit is a myth of some significant proportions.[60]

Patriarca also expressed his views over the various warring factions of the FHLBB. The curious organizational structure of the FHLBB was certainly a criterion in how the Lincoln saga played out. Jurisdiction over Lincoln was shifted from San Francisco to Washington D.C. Patriarca was asked the reason for this. He said it occurred partly because San Francisco's accountants differed with Lincoln's. The supposed adversarial relationship between Lincoln and San

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[59]Open Session Hearings, Part 2, November 30, 1990, 44.

[60]Open Session Hearings, Part 2, November 30, 1990, 74.

Francisco also played a part, as well as the outdated examination and San Francisco's recommendations on actions toward Lincoln. When the transfer took place, Lincoln's slate was wiped clean and Washington conducted its own examination. This examination blew the violation of the tax-sharing agreement apart and resulted in the eventual receivership of Lincoln.[61] Patriarca believed that if the transfer had not taken place, then action against Lincoln could have been achieved more quickly.

Throughout his testimony, Patriarca exhibited a certain level of frustration over the senators' ignorance of FHLBB procedure. They were in the dark over how the FHLBB conducted its business and how their requests on Lincoln's behalf were unreasonable and unnecessary.

Despite his explanations and justifications for the actions of the San Francisco FHLBB, Patriarca conceded that the examiner in charge, and the field manager engaged in the Lincoln audit, were somewhat lacking in technical ability. This probably contributed to the regulatory fiasco Lincoln became.[62]

Danny Wall

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[61]The tax sharing agreement was between Lincoln and A.C.C. It was structured in such a way that most of Lincoln's assets could be shifted to A.C.C. -- leaving Lincoln dry.

[62]Open Session Hearings, Part 2, November 29, 1990, 240.

Danny Wall's involvement in the Keating Five drama is somewhat more limited than that of Ed Gray, even though he presided over the FHLBB at a critical juncture. He was chief regulator when Lincoln was selling securities for American Continental, and when the sales of Lincoln were pending. He is listed as a regulator, but he had served in staff positions in the Senate long before being the chief regulator for the FHLBB.

Wall's job as chief regulator was complicated because the San Francisco FHLBB was feuding with the Board's offices in Washington D.C. The San Francisco regulators were recommending that Lincoln be shut down. The Washington D.C. regulators, Rosemary Stewart among them, did not believe that San Francisco had made a sufficient case to justify taking that action. This internal conflict complicated efforts in dealing with Lincoln.

Also complicating things were the leaks about Lincoln. Damaging information about Lincoln was being printed in newspapers. Investigations by two different Inspectors General could not pinpoint the source of the leaks, although they stopped when jurisdiction over Lincoln was switched from San Francisco to Washington D.C.

Wall was involved in the critical decision on whether to approve Lincoln's sale. He fielded several calls from both

Senators DeConcini and Cranston urging him to look carefully at the sale. Wall was somewhat puzzled by these calls.

> . . . at the time I wondered, you know, why does somebody urge that we give serious consideration to something.
>
> We are not playing games down there. We are doing serious business at a serious time.[63]

Miscellaneous

FHLBB member Roger Martin wrote a letter -- intended for the Wall Street Journal but never sent -- regarding the status of independent regulatory agencies. Special Counsel Bennett had the letter read into the record. Below is an excerpt.

> I believe it is not improper for elected representatives to inquire into the conduct of individual regulatory matters. Independent regulatory bodies, such as the Bank Board, hold enormous power over the businesses they regulate. Where such power exists, the risk that it will be abused exists also.
>
> In our system of government, Congress is expected to, indeed must, oversee the activities of regulators to guard against abuse. When a member of Congress is approached by a constituent with an allegation that a Federal Regulatory Agency is abusing its authority, I would expect the member to inquire into the situation.[64]

In his testimony, Griffin Bell echoed the concerns about abuse of power and agreed with Senator Warren Rudman that the legislative intent in the organizational setup of being

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[63]Open Session Hearings, Part 3, December 4, 1990, 184.

[64]Open Session Hearings, Part 2, November 26, 1990, 186.

"independent" meant that the agency would only escape "Executive interference", not congressional oversight.[65]

Feelings from administrators toward their own agency were few. There were some attitudes expressed over the hostility between the San Francisco FHLBB regulators and those in Washington D.C. Rosemary Stewart was the most vocal on this subject. She testified that the first she knew of the disagreements on Lincoln's viability between San Francisco and Lincoln was the hostility she observed at the Gonzalez hearings.

In addition, Stewart's opinion of the Lincoln situation was that even though Lincoln was hostile and uncooperative toward the regulators in San Francisco, the regulators were equally hostile to Lincoln. She also believed that Bill Black was overly aggressive in his behavior toward Lincoln and had actually tried to undermine her position as Director of Enforcement.[66]

Attitudes and opinions about the FHLBB director are sketchy. The information that does exist was due largely to the attitudes of Ed Gray and Danny Wall toward their jobs. However, Senator Cranston managed to find an excerpt from the Gonzalez hearings in which Rosemary Stewart testified that she

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[65]Open Session Hearings, Part 6, January 10, 1991, 172.

[66]Special Counsel Exhibits, Part 4, 983.

thought Gray had a "hidden agenda" toward Lincoln "to punish Lincoln as an example because of its opposition to direct investment."[67]

Reading from an affidavit by Don Hovde, a former FHLBB member, Special Counsel Bennett pointed out that Senator McCain's concerns about Ed Gray may not have been far fetched.

> During my tenure on the Bank Board, it became apparent to me that Chairman Edwin J. Gray would frequently personalize what I would characterize as policy or operating disputes, and that he considered anyone who opposed his views to be his adversary.
>
> He also had a reputation at the Board as someone who would be vindictive in his treatment of people he considered his adversaries.[68]

Clearly, personalities were a factor in how the entire Keating controversy played out.

Summary and Analysis

All the administrators directly involved with the Keating Five hearings were uncomfortable with the intervention as constituent service, Bell and von Raab were the exceptions. Gray especially had negative attitudes about constituency service, viewing it more as a method of exerting pressure on the administrative state through auxiliary channels rather than as a serious attempt by the senators to represent their

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[67]Open Session Hearings, Part 1, November 19, 1990, 121.

[68]Open Session Hearings, Part 6, January 15, 1991, 75.

constituents. Both Bell and von Raab viewed it as responsible constituency service by the senators.

The other administrators acknowledged the legitimacy of oversight but did not feel that what they had been subjected to was actual oversight. They tended to view oversight in the more traditional open and manifest view. Those were the procedures they felt comfortable with and were familiar with.

The administrators certainly had a larger notion of constituents. They viewed their job as affecting the country and the industry and not just how it affected individuals. Both Gray and Patriarca emphasized that the senators seemed to have lost the bigger picture in their attempt to secure preferential treatment for one constituent. The administrators were extraordinarily concerned about the safety and soundness of the system as a whole and took their jobs as guardians of that safety very seriously. This clashing of the senators' narrow parochial view with the administrators' larger "public interest" view explains, to a large extent, what was at issue in the Keating Five affair.

The administrators all acknowledged that no guidelines existed to help them in their interaction with members of Congress. They used tradition, precedent and their own instincts. It is on the basis of this judgment that Gray, Black and Patriarca condemn Senator DeConcini as having

stepped over the bounds of propriety in his intervention on behalf of Keating. Bell and von Raab did not share this view.

Patriarca felt that senators have a responsibility to represent their constituents but he did not think that extended to affecting an examination of one institution. Patriarca felt that if an entity thought it was ill-used by regulators it had recourse in the courts. Recourse to the political arena was inappropriate and counter productive.

Whether viewed as constituency service or oversight, most of the administrators felt that the senators intervention was unusual. Bell and Von Raab were the only ones that could cite precedents for this type of intervention.

Curiously, when pinned down to absolute specifics on definitions, both Black and Patriarca viewed the intervention as having taken place on the adjudicatory end of the continuum. Danny Wall defined it as rulemaking. Most of the other administrators indicated they felt the intervention occurred during an adjudicatory function. This is in direct contrast to what exists about the senators attitudes. They viewed it more as rulemaking.

All the administrators who figured into the Keating Five hearings were conscious of their distinctive role as regulators for an independent agency and considered Congress to be their "boss." According to Black, deference to Congress, however, did not extend to keeping Congress briefed

on the activities of one particular institution. This viewpoint can also be inferred from Patriarca's testimony. He spent considerable time pointing out why all the concerns and recommendations brought up by the senators, especially DeConcini, regarding Lincoln were unnecessary, unfair, groundless or misconceived. It is clear from the testimony that the administrators were applying the expert knowledge they were charged with utilizing when their agency was set up and viewed the heightened interest of the senators as unnecessary, and in some cases, destructive.

So much of the information emerging from the Keating Five hearings deals with Gray. Gray had a firm commitment to administrative processes and was extremely concerned that the senators did not seem to share this respect. He was also very conscious of the many hats he wore as an administrator. He testified that he consciously avoided being briefed on Lincoln for the April 2 meeting in order to preserve his objectivity in a quasi-judicial proceeding if called on to make decisions about Lincoln.

It is obvious from the testimony that most of the administrators, and certainly the ones directly involved in the Lincoln affair, considered the senators' intervention inappropriate and unusual. Their attitudes toward the administrative state are much more consistent than the senators and the considerable confusion over fundamental

points like what we saw amongst the senators in the previous chapter did not exist amongst the administrators as much.

Chapter six will examine the public perspective as well as other interested parties.

Chapter 6: The Public

This chapter will not consist of a public opinion poll regarding the Keating Five. But, it will contain the public's perspective as it emerged in the hearings as well as other interested parties not represented in the previous two chapters.

A variety of people testified at the hearings and submitted exhibits for the committee's perusal. These included constituents of the five senators, as well as groups like Common Cause. As in the two past chapters, the normative attitudes of the public will be examined first and then their attitudes toward the administrative state will be explored.

Normative Attitudes of the Public

James Grogan

James Grogan worked for Keating in a lawyer/lobbyist capacity. Prior to joining Lincoln and A.C.C., he had served on Senator Glenn's staff. He was Keating's main person on the hill, and, as such, was quite active on his employer's behalf.

Grogan's reaction to the April 2 and April 9 meetings was quite different from either the senators' or regulators'. He was able to cast substantial light on how the whole Keating Five controversy got started. Grogan claimed the idea of the senators meeting with Gray was Riegle's idea, since Riegle was

personally friendly with Gray.[1] Grogan also contended that until this suggestion, the thought had not occurred to Keating or his people to have a meeting with Gray. However, they liked the idea of a banking committee member getting personally involved in their problem, and Riegle was the heir apparent to the chairmanship. Grogan testified that Riegle wanted the other senators who could claim Keating as a constituent to invite him to the meetings as an "expert" on the subject matter. Otherwise, he would be uncomfortable with his status under any other circumstances.

It appears that neither Grogan nor Keating was all that conscious of which senators' constituent they were. Riegle seems to have been, by Grogan's account, anyway. Grogan testified that Riegle's involvement was welcomed by Keating, not because Keating had built structures in his state, but because Riegle was on the banking committee:

> . . . it made a very deep impression on the management of our company, because we were excited that finally a Senator who was active on the Banking Committee had an idea that there may be a way to create a resolution, and that was very important to us.[2]

Other statements, however, indicate that the constituent status may have had some meaning for Keating:

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[1]Riegle disputes this.

[2]Open Session Hearings, Part 4, December 15, 1990, 54.

> But there's no question that he [Keating] thought that it was good for our company for the regulators to know that they would be accountable for their actions. That there were Senators interested in their constituents who were watching the actions of the regulators.[3]

Although the issues surrounding campaign contributions are secondary to concerns here, it was the central theme of all the Keating Five hearings. Grogan felt that the contributions given to the various senators had had no effect on their "willingness to carry out their duties as a Senator."[4]

Interestingly, Grogan laid out several situations in which he had asked senators to do certain tasks, or take certain positions, and was refused. One significant case is one in which Grogan asked Cranston if he could contact Gonzalez and ask him not to hold hearings on Lincoln. Cranston told him no. This sort of thing happened a number of times, and it indicates that the five senators were not controlled by Keating as much as was feared.

Grogan admits he played a role in setting up the April 2 meeting. He also concedes that Senator DeConcini was probably considered the principal senator when it came to communicating between Keating and the other senators.

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[3]Open Session Hearings, Part 4, December 14, 1990, 88.

[4]Depositions of Witnesses, vol. 3, 1354.

Grogan claims the idea of the senator's meeting with regulators was simply to find out when the examination would end. So, their goals were quite limited concerning the meetings, at least at first.

Grogan dismisses as ludicrous the notion that Keating wanted the direct investment rule withdrawn. He would not admit that this request even played a part in the decision making. Grogan claims that from his perspective, it is a fabrication. They never had that intent and they would not have pursued it. Keating and Grogan did not consider it realistic.

Interestingly, Grogan testified a number of times that between the April 2 and April 9 meeting some things changed. The modest requests and expectations for the senators were expanded. Grogan explains that as the April 9 meeting came together, Keating saw opportunities to expand the meeting and have it cover more issues. Grogan believes this desire, and information, was communicated to Senator DeConcini, the main senator among the five. Grogan did not communicate these new requests to the other senators, but he distributed material listing these new requests to them. It was this material that indicated DeConcini was negotiating on behalf of Keating, since he took a copy of the "talking points" to the April 9 meeting.

Grogan challenged the notion that any negotiation occurred, or was suggested by any of the five senators.

> But, I never got the impression, and I think it's an absurd concept, that these Senators were going to somehow negotiate a detailed settlement of this extremely complex regulatory problem.
>
> All we saw this meeting as, at best, was a catalyst, to get something started where our lawyers and our business people could then sit down with the regulators and have some communications, get communication going again, and work out the problems with a peaceful resolution.[5]

Grogan testified that Keating was quite pleased with the second meeting and was optimistic about Lincoln's problems -- until they received the examination report from the regulators.

Keating found no indication in the examination report that the regulators would be willing to discuss, compromise, or do anything else to address Lincoln's problems. Keating declared the two meetings a critical mistake and believed they actually increased the wrath of the regulators. With this in mind, Keating then decided to back off from any political solutions and to pursue various legal alternatives.

Of all the senators Keating and his people asked to support his favored nominations, Senator DeConcini was clearly the most willing. There is a substantial amount of documentation to suggest that the senators were all requested

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[5]Open Session Hearings, Part 4, December 14, 1990, 65.

to support Judge Manion and Henkel. Senator DeConcini, on the sole basis of information supplied to him by Keating, enthusiastically supported the two appointments. No other senator supported either nominee on this basis. They all testified that independent verification of credentials and analysis of ideology and voting records further guided their decisions.

One insight that James Grogan's testimony added to these findings is that Keating was not the initiator of the Benston nomination to the FHLBB.[6] Grogan testified Keating was surprised and pleased that Benston's name had surfaced and rallied to his support. According to Grogan, he also did nothing to change the perception that he was the engineer of Benston's nomination. Ultimately, Benston was not confirmed.

Grogan further testified that Keating's reasons for wanting Henkel on the Bank Board were legitimate. Keating knew Henkel and knew he shared his views on deregulation. He also felt Mr. Henkel's background was ideal for the position. In addition, Keating believed that "the Bank Board was woefully lacking in business experience and leadership."[7]

Miscellaneous

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[6]Benston had authored a study that reflected Keating's viewpoint on deregulation and the direct investment rule.

[7]Depositions of Witnesses, vol. 3, 1086.

Keating's personal view also seems to be reflected in the views of his company as a whole. This is evident in the report A.C.C. filed with its legal papers when it took out bankruptcy. This report directly addresses the constituent question:

> There is, of course, nothing improper about a constituent raising issues of possible regulatory impropriety with elected representatives and the inference that lawful contributions compel men of integrity to act otherwise is simply unjustified. Similarly, it should be no surprise that the regulatory harassment and threatened destruction of the employer of thousands of people in several states should pique the interest of elected officials charged with responsibility for oversight of those regulators.[8]

In another statement, this time in a press release, Keating commented that his soliciting help from the senators was nothing more than what our system of democracy is set up to do. He claimed that there is a "contract between the voter and the politician" and that voters have a right to seek the politician's help when necessary.[9]

David Stevens, A.C.C.'s former director of taxation, felt similarly. In a letter to Senator DeConcini, Stevens told him he felt he had been unfairly pinpointed as the main culprit of the five senators, when he had done nothing more than what any citizen had a right to expect from an elected official.

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[8]Special Counsel Exhibit, Part 4, 501-2.

[9]Depositions of Witnesses, vol. 2, 791.

Stevens echoed Grogan's viewpoint on the meetings. He considered them an appropriate challenge to the regulators, and would feel very uncomfortable if the Keating Five hearings resulted in senators hesitating to challenge regulators. He declared that regulators "should never be immune from an appropriate challenge, even though I'm sure it bothers them greatly."[10]

Other constituents felt very positive toward the senator and were concerned about what would have happened without his assistance. Senator DeConcini and his counsel brought in some constituents from Arizona and related a few instances to show how responsive the senator was to appeals from constituents -- any appeals.[11]

One of these individuals was the CEO of a non-profit organization that provided a multitude of services to substance abusers. Much of the organization's funding came from state and federal sources. Senator DeConcini intervened several times in helping the organization obtain block grants

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[10]Open Session Hearings, Part 4, December 10, 1990, 114.

[11]The senator had compiled an extensive portfolio of constituency service, but only three of these cases were presented in the hearings.

and retain prior funding sources.[12] He even called the Arizona governor on one occasion in order to secure state funds.

The CEO stated he once sought assistance from the senator when he was likely to lose funding because his organization had not been ranked high enough to ensure it. He indicated that DeConcini's influence was used when there was administrative discretion available to bypass the more objective ranking system in awarding funds.

The CEO never contributed to DeConcini's campaigns and he seriously doubted any of his staff did. Given the nature of his clientele he was certain that it did not contribute either. It is clear from this example that money was not a factor and that DeConcini gave his constituents a high level of assistance.

This CEO testified in the hearings after calling DeConcini to offer his help because he felt that the senator was not getting fair treatment. He wanted to debunk the notion that DeConini's assistance was available only for a price.[13]

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[12]In an affidavit filed as part of the hearings, one of the federal administrators contacted by DeConcini, on behalf of this organization, was taken aback by DeConcini's persistence. She had never been contacted by a Member of Congress before and DeConcini tracked her down at a hotel while she was travelling and personally chatted with her.

[13]Open Session Hearings, Part 4, December 10, 1990, 57-71.

Also brought in to testify on DeConcini's behalf was the sheriff of Pima county. The sheriff had had numerous dealings with DeConcini, especially when all other avenues of redress had failed. The senator helped him obtain funding from a number of sources and had organized, at the sheriff's request, other southwestern members of congress to have their states declared high narcotics trafficking areas in order to get additional funds to deal with their unique border problems. In addition, at one point, the senator alerted him to possible funding sources that he did not know were even available.

The Sheriff had high praise for the senator:

> In my judgment, based on my knowledge of how politicians and how politics operates, the kind of cooperation and the kind of response, and the kind of leadership, I might add, that we get out of Senator DeConcini, is unprecedented. He in fact is not only a voice for the people of Arizona for the law enforcement community, but the law enforcement community as a whole.[14]

The sheriff was grateful for the senator's help. He indicated that when dealing with administrative officials he often felt very powerless and at "the mercy of the Executive Branch of Government."[15] Having the senator's assistance made a tremendous difference.

A disabled veteran of World War II was the last constituent to testify on Senator DeConcini's behalf. He had

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[14]Open Session Hearings, Part 4, December 10, 1990, 79.

[15]Open Session Hearings, Part 4, December 10, 1990, 77.

received assistance from the Senator on a number of occasions, both personally and for the other veterans he helped through his involvement with the Disabled American Veterans organization (DAV).

The veteran had once needed a particular surgery done. Policy stipulated that the surgery be done in Tucson because that is where his home was. He wanted it done in Phoenix because of the medical expertise there. A call from Senator DeConcini to the administrator in Phoenix changed the policy clearing the way for the surgery. The veteran related several similar stories of assistance like this from the senator for both himself and others.

Senator DeConcini was also active in getting funding for veterans in Arizona. He was able to secure supplemental appropriations for a hospital unable to provide veterans services because of a lack of funding. He was also able to help additional veterans facilities to be built in the state.

The veteran's attitude toward Senator DeConcini mirrored that of the Pima county sheriff cited above:

> Senator DeConcini has been the greatest and the biggest advocate for veterans in Arizona. I don't know of any that have been turned [down] by him whenever they approached and asked for constituent service.[16]

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[16]Open Session Hearings, Part 4, December 10, 1990, 92.

Perhaps the most extraordinary story of constituent service by Senator DeConcini was one that he himself related. A man he had run against in an election needed his assistance. It was a bitter campaign with considerable bad feelings. But, as the senator pointed out, the man's dilemma had merit and he needed assistance, which the senator provided.

Common Cause viewed the whole Keating Five situation much differently from the other public perspectives we have seen. Common Cause initiated the hearings by filing a complaint with the Senate Ethics Committee over the existence of the April 2 and April 9 meetings.

In their complaint, Common Cause stated that the Senators' motivation in helping Keating was irrelevant. It encouraged the Committee to view the situation from the viewpoint of a reasonable person and what that person would conclude. Common Cause suggested that the fact that the meetings were even held was inappropriate. It further suggested that meetings between regulators and senators were extraordinary and simply a show of force. Common Cause concluded that the intervention itself was wrong. The meetings would be wrong even if no campaign contributions were involved.

> Actually the Senators after receiving the benefits not only jointly intervened with the Federal Home Loan Bank Board on Keating's behalf but their combined intervention took an extraordinary form seemingly designed to put the maximum Senatorial

> pressure upon the Board to accede to Keating's wishes. Such favors are not available to other citizens. The extraordinary concerted action of four and then five Senators quite apart from the benefits they received, was preferential treatment violating the Code of Ethics and thus 'improper conduct which may reflect upon the Senate.'[17]

The Public's Attitudes Toward the Administrative State

James Grogan

Grogan often testified for Keating at the hearings, giving what he believed to be Keating's opinions and biases. So this section has to be read with that in mind.

Keating was apparently very critical of regulators/bureaucrats in general, although he liked elected officials. This can be explained by the fact that his brother was a congressman. Grogan testified that Keating felt elected officials should be admired for giving up business opportunities in order to render service to their country.

Keating was extremely critical of administrators, especially the regulators that had jurisdiction over him. He felt they were inept and unwise and he criticized them because they did not know anything about business and were therefore wrecking his enterprise.[18] Grogan's personal opinions of the

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[17]Special Counsel Exhibits, Part 1, 33.

[18]Depositions of Senators, vol. 1, 93.

regulators seem to mirror Keating's. Several senators testified that Keating complained about regulators constantly.

Keating apparently felt that if Lincoln went into receivership there would be massive problems, because the regulators would not know how to manage Lincoln's assets. He felt professional managers were needed. Apparently, Keating's feelings were especially hostile to the FHLBB itself.

> . . . one of Mr. Keating's major concerns was, he felt very strongly that this was an agency that was pursuing very bad public policy, from his perspective, that was going to cost billions of dollars for the American public, and he felt that they considered themselves an agency accountable to no one.[19]

According to Grogan, Keating sought to make the regulators accountable through the courts, only he had a very difficult time trying to sue -- either individuals -- or the agency itself.[20] Grogan testified that accountability was in fact one of the purposes of the April 2 and April 9 meetings, because it would help make the regulators feel more accountable if they knew senators were keeping an eye on them.

Keating's particular complaint with the direct investment rule was that it completely overruled state law. Keating had bought Lincoln precisely because it was a state-chartered

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[19]Open Session Hearings, Part 4, December 14, 1990, 89.

[20]Keating's claims had no merit and this fact became painfully evident in court. In one decision the judge thoroughly criticized Keating, Lincoln and A.C.C. Litigation proved more effective for Keating as a stalling technique.

thrift in California. California thrifts had broad investment powers. Not long after Keating bought Lincoln, the FHLBB proposed a rule which nullified any direct investment power held by state chartered thrifts in California. The fact that this new policy was being done by unelected administrators was especially galling to Keating.

> . . . on its face there was a basic states' rights issue that you had a federal unelected regulator passing a regulation that emasculated a state law that had been passed by elected representatives of the house and senate of the State of California.[21]

Keating's animosity toward regulators and agencies got more personal. Keating created a supposed "vendetta" with Chairman Gray. He was also particularly concerned about Bill Black, whom he thought to be very aggressive toward Lincoln. Keating explored the idea of suing Black directly --a subject he discussed with Speaker Jim Wright who had his own complaints about Black's activities against Texas thrifts. Keating also had a lawyer/lobbyist check around to see if Black profited financially from his attacks on Lincoln. Nothing was ever discovered. Keating also tried to get Black fired. In a meeting he had with Danny Wall, Grogan testified that Keating told Wall:

> There is a red-bearded lawyer that's a real problem.

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[21]Depositions of Witnesses, vol. 3, 1079.

> If you took care of that problem, you would get along much better with Speaker Wright.[22]

In a press release put out by Keating when the Lincoln situation came to a head, he spent considerable space criticizing the FHLBB and regulators in general. Some passages are worth quoting at length.[23]

> . . . If need be to challenge in court those who would destroy us, and call for a full federal investigation of the abuse of power by one or more regulatory offices [sic].[24]

> . . . I am particularly anguished about the fact that a few nameless bureaucrats who ostensibly charged with enforcing our laws and regulations, have misused their position of authority . . .[25]

> I have taken every action appropriate to rectify the unwarranted bureaucratic assault that some malicious bureaucrats in Washington D.C. have waged against me and my company.[26]

> Do you not find this most troubling. Who regulates the regulators? Where does one go to protest if you feel you have been the victim of a corrupt or abusive process? In America, there must be a way. We intend to find out. Meanwhile, I wonder if those in the press know who the regulators are, those in the FSLIC and FDIC and the FHLBB -- all those agencies that take cover behind their initials. Who are they? What are their credentials, their qualifications?[27]

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[22]Depositions of Witnesses, vol. 3, 1258.

[23]Depositions of Witnesses, vol. 2, 787-98.

[24]Depositions of Witnesses, vol. 2, 788.

[25]Depositions of Witnesses, vol. 2, 789.

[26]Depositions of Witnesses, vol. 2, 790.

[27]Depositions of Witnesses, vol. 2, 792.

Grogan testified that none of their efforts seemed to have any effect on the regulators. They were not able to get the FHLBB to reconsider or delay the direct investment rule. They could not get the examination ended. The meetings with the senators seemed to have no effect. They were not the moving force for getting Lincoln out of San Francisco's jurisdiction and transferred to Washington D.C. And they did not feel that anything that happened under Gray's jurisdiction had any effect on the Memorandum of Understanding (MOU) negotiated for Lincoln under Chairman Wall. In fact, by Grogan's account, Keating was rather powerless against the regulators.

Miscellaneous

When one of A.C.C./Lincoln's staff attorneys was queried on his view of how the regulators treated Lincoln, he indicated that they were not treated honestly by the regulators. He illustrated this opinion by saying that the regulators could have told Lincoln early on that the sale was not going to be approved, and why it was not going to be approved.[28]

David Stevens, A.C.C.'s Director of Taxation, also felt that the regulators had not treated Lincoln well. He would not go so far as to state that Lincoln could have ultimately

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[28]Depositions of Witnesses, vol. 3, 416.

worked its way out of its problems if left alone, but he believed that the regulators made a bad situation worse. This sentiment can be detected in the following comment:

> I sold my Arizona home at a tremendous loss due to a sagging real estate market caused in large part by the actions of federal regulators who didn't seem to care what they were doing to the Arizona economy.[29]

In a telephone conversation he had with Senator DeConcini, Stevens told him that the Keating Five hearings were slanted to make the regulators look like saints, even though they were responsible for mistakes. According to Stevens testimony, DeConcini agreed with him.[30]

Even one of the constituents brought in by Senator DeConcini expressed a negative attitude toward regulators.

> . . . by and large, when agencies get into turf battles and conflicts and they have deleterious effects as to what's going on in a very critical area, and an agency decides it's going to take a position and not change that, we're kind of powerless, we're kind of at the mercy of the Executive Branch of Government.[31]

There is nothing to indicate any member of the public, connected with the Keating Five, made any distinction between executive branch agencies and independent regulatory agencies

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[29]Open Session Hearings, Part 4, December 10, 1990, 116.

[30]Open Session Hearings, Part 4, December 10, 1990, 150.

[31]Open Session Hearings, Part 4, December 10, 1990, 77.

-- except Common Cause, which authored the complaint that resulted in the Senate Hearings.[32]

Attitudes toward Chairman Gray and Chairman Wall were expressed most by the senators and regulators and have been covered earlier. The only member of the public who expressed feelings about the Director was James Grogan.

According to Grogan, Keating complained constantly about the FHLBB and Chairman Gray in particular -- to whoever would listen -- especially members of Congress. Grogan testified that Keating's bond with Senator Cranston was, in part, based on their mutual dislike of Chairman Gray. This made them natural allies. Keating also had meetings with other influential individuals, like Don Regan and George Bush, and Grogan believes that Keating communicated this information to them as well.

Keating's dislike of Gray was not based solely on what had happened to Lincoln under Gray's tenure. Keating, apparently, thought Gray was unqualified for his position right from the beginning. He also philosophically disagreed with Gray on almost every financial issue possible.

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[32]This conclusion can be drawn from the statement in Common Cause's official complaint: "FOR A SENATOR TO INTERVENE IN THE CONDUCT OF A MATTER BEFORE THE EXECUTIVE BRANCH OR AN INDEPENDENT AGENCY . . . . See Special Counsel Exhibits, Part 1, 21.

Undoubtedly all this was involved when Lincoln filed an official motion asking Gray to recuse himself from any involvement in decision making about Lincoln. Grogan testified Keating believed the law required an official to recuse him or herself if there was even an appearance of bias. Apparently, Keating felt the "appearance" requirement had easily been met.

Given the stormy tenure of Chairman Gray, one would think Keating would have welcomed Wall's chairmanship. However, Grogan testified that Keating opposed Danny Wall's nomination so there does not appear to be any evidence that Keating welcomed the changing of the guard.

Summary and Analysis

Constituency seems to have meant little to Keating. He pursued members of Congress whom he felt to be allies whether they represented him, served on a relevant financial committee or had no connection to him whatsoever. The Keating Five assisted him, but Keating solicited help from numerous sources. Keating seemed pleased with whatever help he got, regardless of the source.

Little evidence exists to suggest that any members of the public had refined notions of what it means to be a constituent and be entitled to constituent service. However, the public does seem to think that an elected leader is obligated to try to help. There was a general sense of

obligation the public understand but there is nothing to suggest the public had a defined normative standard. Self-interest seemed to be the motivating factor.

On other issues, Grogan scoffed at the idea that the senators were negotiating on their behalf. He did not believe that the senators had enough information to do so and the meeting was not engineered with that in mind. His ideas on whether or not they should were never explored. Stevens, an A.C.C. employee, felt strongly that regulators should be challenged by representatives of the people in order to make them accountable.

Keating was in the curious position of liking elected officials and disliking unelected officials -- especially the regulators over him. Keating was heavily critical of administrators because they had no business experience. His interaction with all administrators that figured into the Keating Five hearings can be described only as stormy.

Keating specifically hated the FHLBB. He felt that it was pursuing bad policy that would be detrimental to the country and especially to him. He criticized the entity numerous times for being unaccountable and faceless. With the benefit of hindsight, it is interesting to note how groundless these criticisms by Keating really were.

All members of the public and the interested parties involved in the Keating Five hearings had generally negative

attitudes toward administrators and administration in general. Whether it is a genuine attitude or simply copycat bureaucrat bashing is difficult to tell, but the destructive influence on the administrative state and the public servants who work in it is surely the same.

This is the last chapter to examine the various actors in the Keating Five drama and their attitudes. Chapter Seven concludes this study.

Chapter 7: Conclusions

This chapter will explore the questions highlighted earlier in chapter one. It will attempt to bring together all the various issues examined and draw conclusions and implications from them. The first section will be a summary and examination of the data presented in chapters four, five, and six. Each participant was dealt with individually in the chapters. This section will consider all the actors together under the respective categories and draw some conclusions. The second section will extend this examination by drawing on the general data of chapter one, primarily the literature review, and the legal, historical and normative requirements as presented in chapter three. The next section will bring all the various issues together and will also highlight other concerns and implications. The final section will cover recommendations for the future. It will highlight what the senators and administrators could have done as well as possible rules and norms for future intervention.

Summary and Evaluation of the Data

The purpose of this study was to examine the normative and ethical attitudes of the various Keating Five participants as well as their attitudes toward the administrative state. This section will address those issues by first addressing the

senators', the administrators', and then the public's attitudes.

The Senators

All five of the senators considered Keating a constituent and were therefore willing to help him. However, Riegle considered him only a "business constituent" and felt the other senators owed Keating more than he did. Glenn stated that he is a "United States" senator and would not narrow his constituency to one state. He would intervene for anyone if he thought the case had merit.

Keating's status as a constituent may be secondary to the fact that he was known to be a particularly generous campaign contributor. He was also personally acquainted with the senators in a variety of ways. Undoubtedly, there were other considerations for the Senators' involvement besides Keating being a constituent. It is conceivable that not every constituent with large holdings in a state would have received the first class treatment from the Senators that Keating received.

In addition, it was not so much that Keating himself was a constituent in difficulty, but the fact that he represented extensive holdings in several states as well as many employees. All the senators emphasized that this played a part in their efforts to assist Keating. This was especially true of Senator McCain, whose personal relationship with

Keating was permanently broken, but who went to the two meetings anyway. He went because of what he felt he owed all his Arizona constituents with connections to Keating.

Senators' personal involvement in constituency service is somewhat rare. Normally it is done by staff. However, the testimony made clear that a senator is more apt to get involved if there are problems concerning more than just one constituent and especially if there are large numbers of people involved. This is what Senator Glenn termed "leadership" constituency problems. If there is evidence to suggest that an entire agency is out of line, as explained by McCain's A.A., this will also trigger a senator's personal involvement.

The Keating Five situation involved both of these aspects. Although, it is instructive to point out that personal involvement usually occurs after staff have made attempts and determine the senator's personal involvement is necessary. Staff played a very small role in the Keating Five activities. DeConcini is apt to get personally and heavily involved in just about anything, but he is the exception.

McCain and Glenn were particularly concerned that Keating be given fair treatment by the regulators, but not special treatment. In this vein, they both considered "negotiating" for a constituent to be inappropriate. No "quid pro quo" should be given to regulators. Senators Riegle and Cranston

also felt that a quid pro quo was inappropriate, but Cranston felt it was acceptable simply to highlight various solutions. One wonders if Senator Cranston really believes that administrators would not be aware of various solutions. It is more reasonable to assume Cranston intended to illustrate what solution he preferred in order to exert influence. Senator DeConcini insisted he was not negotiating for Keating, but declared that nothing was wrong with negotiating unless one takes gifts or threatens regulators. He pointed out that Senator Inouye supported him in this attitude. This is hardly a surprising viewpoint from a legislator, since most legislative activity is negotiation and compromise. What neither Senator DeConcini nor Senator Inouye addressed is whether negotiation is appropriate in administrative activity and processes.

Only three senators gave their attitudes on whether it is appropriate to intervene when legal action is pending or currently exists. Senator Glenn strongly felt that under either of these conditions it would be inappropriate for a senator to get involved. Senator Cranston had a very casual attitude toward criminal referrals, possibly reinforced by his banking aide. He did not consider them a deterrent to intervening in the administrative state on behalf of a constituent. Although, he drew the line in intervening when the Justice department was actively involved, as did Riegle.

It is interesting that Cranston did not consider a criminal referral a "red flag" suggesting that closer scrutiny would be in order. This casual attitude toward criminal referrals is disturbing, although it may be warranted in at least some cases.

Another curious issue is how each office dealt with the constituency service. Keating seemed to make the same request to all of the offices. Senator McCain refused to bring up many of Keating's complaints and insisted the only thing he could do was inquire when they would get their examination and see that they were being treated fairly. McCain's staff exerted effort in determining whether Keating's claim had merit. And, he and his staff engaged in a lively debate on what were, and what were not, appropriate questions to pose to regulators.

Senator Glenn's activities were similar to McCain's. Senator Cranston's office apparently does only what it is asked to do and Keating did not ask his office to verify the merits of the case, so no independent verification took place. This attitude indicates contempt for administration and no awareness that ethical questions and decisions may be warranted -- a disturbing attitude for a senator.

Senator DeConcini's office accepted the information Keating provided and did not attempt any verification at all. Much of DeConcini's constituency service resembled elaborate

attempts to please constituents with no acknowledgement that bigger issues and important questions may also be at stake.

The senators also reacted quite differently to Keating's requests for their votes on nominations he favored. Senator Glenn refused to support Keating's candidates because he did not know enough about them. On the basis of the same information Senator DeConcini strongly lobbied for them. Although, in fairness, he did not accede to all of Keating's other requests. This again shows DeConcini's single minded attitude to please constituents.

Two senators were asked where intervention was appropriate on the rulemaking/adjudication continuum. Senator Cranston would hesitate to intervene in regulatory activity located in the quasi-judicial realm. Senator DeConcini noted that intervention was appropriate in the quasi-legislative arena, but not in the quasi-judicial realm. He did not feel that the regulatory activity at issue in the Keating hearings was located in the quasi-judicial realm. However, there is no indication at all that these questions were even examined before effort on behalf of Keating was undertaken. These attitudes may have been simply reflections after the fact.

This is a disturbing finding. The case law, found in chapter three, that exists to guide members of Congress in their interaction with the administrative state is based on the difference between whether the activity is rulemaking or

adjudication. If the activity cannot easily be identified as such then the standards applied will not be uniform. And with no clear guidelines on what is and is not rulemaking or adjudication, the standards will not only be non-uniform but meaningless as well.

The senators' attitudes toward the administrative state vary greatly. Those senators with the more negative attitudes tended to intervene more aggressively than the senators with positive attitudes.

Senators Glenn and McCain both exhibited generally positive and supportive feelings toward the administrators. McCain's attitudes focused on the particular agency in question whereas Senator Glenn exhibited positive attitudes toward regulators in general. He conceded, however, that regulators do occasionally make mistakes.

The other three senators had generally negative attitudes toward the administrative state and indicated that members of Congress must intervene for constituents because the government so often mistreats people. Senator Riegle felt strongly that the executive branch was much stronger than the legislative. But, he seemed to belabor the obvious when he asserted that the executive branch is, "far stronger in terms of the execution of power in this country" than the legislative branch.

All the senators made distinctions between executive agencies and independent regulatory agencies. This distinction affected how, and to what extent, they intervened.

Senator McCain voiced the rather extraordinary opinion that independent agencies were intended to be more immune from congressional pressure than executive agencies. He did not explain the basis of this opinion. Senator Glenn stated that when rules are developed they must apply to everyone equally. That is one reason why intervening in a regulatory agency is so inappropriate. Senators Cranston, Riegle and DeConcini all agreed that regulatory agencies are not independent, or immune from congressional oversight. Congress is the only vehicle to make them accountable to anyone. Riegle and Cranston both make a distinction between independent regulatory agencies and executive agencies, and Cranston adds that independent agencies normally have more power. Senator DeConcini refused to acknowledge any difference between independent agencies and executive agencies when it came to intervention. The only independence independent agencies have, in his opinion, is from the executive branch.

Most of the senators did not have very positive attitudes toward the FHLBB regulators. Much of the information driving this opinion was based on hearsay.

Senator Cranston seemed to get his negative notion of the regulators from all of the feedback he got from unhappy

constituents and thrift people in his state. DeConcini's attitudes mirror Cranston's. However, it is interesting to note that former Senator Pete Wilson did not receive any unusual complaints from California constituents about the regulators. One wonders why Senator Cranston received them all. Senators McCain and Glenn were somewhat more positive, being impressed with the regulators they met in the two meetings.

The senators also differed in their feelings toward the chief regulator of the FHLBB, Ed Gray. McCain was uneasy about Gray's reputation for vindictiveness. Glenn was upset with Gray over his lack of assistance with Ohio's thrift crisis. DeConcini had an extensive history of animosity with Chairman Gray. Cranston had received negative feedback on Gray from constituents as well as from his banking aide who was critical of how Gray did his job. Gray's one strong supporter, amongst the senators, was Don Riegle, although other members of Congress submitted supportive testimony.

The Administrators

The administrators were not quizzed as extensively on constituent service as the senators. However, many statements were made and some themes have emerged.

Gray and Stewart agreed that most of the constituent service they had been involved in was done by staff and was coordinated by the congressional relations office.

Additionally, Gray felt that constituents would try to use the member of Congress to further their own interests when other opportunities had failed. Regulators would know whether a constituent had availed him or herself of all administrative remedies before going to elected officials. Elected officials would have trouble determining this easily.

Gray also felt that members of Congress lose sight of the broader public interest when intervening for one constituent. Black was somewhat more skeptical of members of Congress making inquiries into administrative activities. He pointed out that so-called questions are often thinly disguised statements.

The administrators were obviously more comfortable with status inquiries and letters from members of Congress than other forms of intervention. There were a number of letters drafted by members and sent to Gray covering a variety of topics. Gray did not feel these letters were improper. And, as Special Counsel Bennett pointed out, these letters were on the record. Gray felt more comfortable with written intervention, such as letter writing, than he did with oral intervention, which is what happened at the meetings.

Both Black and Patriarca were critical of the meetings for a variety of reasons. They felt the senators had already made up their minds. They were disturbed the senators were intervening for only one institution, which they thought was

improper. Patriarca especially felt that way. He believed that the recourse for an institution that felt it was being mistreated should be the courts, and not a constituent effort by a member of Congress. Patriarca felt that a senator trying to influence a financial examination was constituency service gone too far.

Patriarca's statement needs to be underscored. The courts are available for redress if individuals and institutions are treated unfairly. The senators' need not consider themselves the only avenue for help when constituents have problems. In addition, the agency itself has appeal procedures and officials, such as administrative law judges, separate from an agency's other functions, to assess and judge these types of issues.

As chief regulator, Gray felt even stronger than his two subordinates. He felt that interfering with the congressionally-mandated administrative process should be a felony. He is the only administrator to take such an extreme view. And one wonders if his strong statement should be taken more as an emphatic indication of the importance he attributed to these issues than a prescription for the future.

One thing the main three regulators agree on is that Senator DeConcini went too far. Gray thought DeConcini's

quid pro quo in the first meeting was inappropriate.[1] Black and Patriarca felt that he was too aggressive in the second meeting when he still suggested compromises after learning that Lincoln was a disaster. Both administrators felt that DeConcini stepped over the line of appropriate behavior in intervention. DeConcini's suggestions were clearly indicative of his lack of faith in the regulators' technical expertise.

Patriarca was particularly disturbed that all the senators, who expressed concern that there were criminal problems, did not seem to care about the numerous regulatory violations Lincoln had committed. Gray also expressed concern that the senators did not seem to care about "safety and soundness" of the system. Whether this was simply myopic on the part of the senators' is difficult to determine. Clearly, they did not, and perhaps could not, grasp the significance of the violations.

The two guest administrators, von Raab and Bell, did not feel any of the senators had acted inappropriately. A member of Congress asking an administrator for forbearance on a rule for a constituent was not unusual, in von Raab's opinion, or improper.

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[1]Although the existence of an actual "quid pro quo" is difficult to determine given the meeting content was not documented and the senators deny it.

William von Raab was all for negotiating as well, something that Gray thought abominable. Black side-stepped the issue of negotiation, but Patriarca seemed opposed to it. Gray felt there would be chaos in the system if members of Congress were allowed to negotiate on behalf of their constituents.

The administrators also differed somewhat on their attitudes toward the rulemaking/adjudication continuum. Black and Patriarca made strong statements for why the intervention occurred on the adjudication end. The only question posed to Danny Wall regarded where on the continuum the senators' calls about the pending sales would fit. He put that intervention on the rulemaking end, although it is clear from his statements that he had a very narrow notion of adjudication. William von Raab felt that what had occurred was in the rulemaking realm but expressed concern about intervention at the adjudicative end where he felt it would not be appropriate.

As with the senators, there was considerable confusion with the administrators over where exactly the intervention occurred, rulemaking or adjudication. Although it is clear that the regulators closest to the issue felt it was during adjudication.

Given the confusion, it would be logical and rational to accept the administrators' views. They are the ones

intimately familiar with the administrative processes and best qualified to judge where on the continuum the activity lies.

Both Gray and Patriarca were adamant when they stated that neither the April 2 meeting, nor the April 9 meeting was oversight in their view. Black had no specific statements on oversight, but he commented he considered the meetings as Keating pressure and nothing more. The two meetings cannot be considered any form of typical oversight and this position by the senators may be considered a rationalization after the fact.

Several administrators noted that they knew of no guidelines explicitly stating how administrators should conduct themselves when members of Congress intervene. If the Keating Five Hearings do nothing else, they do illustrate the importance and need for such guidelines.

Griffin Bell made a comment also raised by several senators. He felt that the administrators were remiss in not revealing the pending criminal referral at the beginning of the meeting, although it is not clear whether he knew their motive for not doing so. If they had, then several senators would have ceased all their activities, although it is clear it would not have stopped DeConcini or Cranston.

By revealing the criminal referral, many of the fears of the regulators may have been realized. And, the criticism of Senator's Cranston's banking aide may have been realized as

well. Administrators can hide behind it and use it as a reason to resist information inquiries.

The administrators' attitudes toward the administrative state are much more difficult to determine. It is obvious that Gray had a great deal of respect for administrative law and administrative processes. He was critical of members of Congress sidestepping these processes especially since they had created them. William von Raab felt that since Congress created them, they had leave to sidestep them if they saw fit. Although it should be pointed out, Congress was not sidestepping them, individual senators were.

Gray also had a very broad view of his job. He felt he was responsible for the soundness of the system and was annoyed that members of Congress were trying to get him to focus on one institution. Bill Black seemed to share this view. He acknowledged responsibility to Congress, but did not think it extended to informing its members of enforcement actions against one institution. Obviously, administrators cannot inform Congress of all individual enforcement actions. This is something the courts are better set up to address and redress if administrative wrong-doing occurs.

Both Black and Gray testified they made the distinction between executive agencies and independent regulatory agencies, and that they were subject to congressional oversight because of this structure. But this fact does not

give them leave to intervene at will in administrative processes. Griffin Bell advised that the agency's independent status protects it from executive interference, but not from congressional oversight. Other administrators acknowledged that congressional oversight was appropriate and expected, despite the agency's independence. But, again, the issue for the Keating Five was the extent of the oversight.

Both Patriarca and Wall exhibited frustration and exasperation with congressional intervention when it extended into specific activities. Patriarca was able to prove how unnecessary, redundant, or unwise many of the compromises DeConcini suggested were. Wall felt similarly over the repeated requests he received to look closely at the sale proposals of Lincoln -- as if he would do anything else.

Ed Gray was very conscious of his quasi-judicial responsibilities. He knew he would have to possibly sit as a judge over some institutions, and this figured into how he conducted himself as an administrator.

The Public

James Grogan was the main individual profiled illustrating the public's perspective. He spoke for himself and for Keating throughout the hearings. Keating did not appear to be all that cognizant of his constituent status. Grogan testified that Keating was excited when Riegle showed an interest in helping them because he was a member of the

banking committee. Also, they were excited about Cranston's involvement. They were pleased to discover that Speaker Wright did not like Gray either and was a possible ally. It seems their solicitation of congressional help dealt more with whom they viewed as allies, than which members actually had constituent responsibility over them.

It does not appear that Keating and Grogan were aware of the larger ramifications of the meetings they set up between the members of Congress and the regulators. They do not seem to have had any other motive than their own self-interest. Indeed, this simply underscores the importance of members of Congress and administrators assessing the larger ramifications.

It is clear they did not intend the senators to negotiate on their behalf, largely because they did not prepare for such an event. Although the April 9 meeting did expand for Keating as he considered what might be accomplished in it and conveyed these additional possibilities to Senator DeConcini.

In addition, the Henkel nomination seemed to be legitimate from Keating's point of view. He simply found a colleague, qualified for the Board, who directly mirrored his attitudes.

Not being a direct participant in all of this, Common Cause viewed what happened as simply preferential treatment, and inappropriate, significant, pressure exerted on

regulators. It was extremely critical of what occurred at the meetings, and that the meetings had taken place.

The public's attitude toward the administrative state is somewhat sketchy, but some conclusions can be drawn. Keating, as well as DeConcini's guest constituents, had a very negative view toward the administrative state and in fact, seemed to view it as illegitimate.

Keating was skeptical of all administrators/bureaucrats because they were unelected and unaccountable. He had a very positive concept of elected officials. This "unelected" and "unaccountable" theme plays a part in many of Keating's quotes and much of the material dealing with him. With this mind set it is not surprising that he did not have much faith in the processes for redress lodged in the administrative agencies.

He singled out the FHLBB administrators for special criticism. He disliked the fact that none of them had any business experience, and if they took over Lincoln they would not know how to run it. He felt the FHLBB was pursuing very bad policy. Not surprisingly, Keating's negative attitudes about the FHLBB also extended over to its two chairmen, Gray and Wall, who presided over the Lincoln affair. Keating's attitude is interesting since history proves he did not know how to run Lincoln well himself.

No member of the public seems to have made any distinction between executive agencies and independent

regulatory agencies, except Common Cause. Unfortunately it did not elaborate on whether or not this distinction should have affected the proceedings in any way.

Intervention Issues

This section will discuss oversight and constituency service and conclude with a legal and ethical analysis, by using the findings presented in chapters four, five and six, and evaluating it in light of what was learned in chapters one and three.

Evidence presented in chapter one suggested that Congress can get out of control just as easily as the administrative state. The Senate Ethics Committee agreed, based on what it concluded in the Keating Five affair.

Although somewhat overshadowed by the Committees' disciplining of Senator Cranston,[2] the Committee concluded that Senator DeConcini's aggressive conduct with regulators was inappropriate.[3] From an administrative perspective, what DeConcini did was much more disturbing than what Senator Cranston did.

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[2]Senator Cranston was disciplined for having too close a connection between fundraising and legislative activities, generally and in particular as it related to Keating. He was also disciplined for breaking Senate rules over using official Senate space and equipment for fundraising.

[3]Investigation, 56. However, DeConcini broke no specific law or Senate rule.

Without determining the merits of Keating's claim, DeConcini lobbied for nominations Keating pushed, called the White House complaining about Gray, set up two meetings between administrators and senators, and called to encourage the sale of Lincoln. The Ethics committee labeled this behavior inappropriate. This was a subjective judgement and no specific guidelines were cited by the Committee as having been violated. Perhaps this is why the Committee chose not to discipline DeConcini.

This is a dramatic conclusion, and a strong statement, from a Committee very concerned over what implications the Keating hearings would have over future conduct. Senator Warren Rudmann's concern was echoed by other senators.

> It would be a tragedy if these hearings serve in any way to have a chilling effect on the willingness of Members of Congress to intervene with federal agencies when appropriate -- and I underline "when appropriate."[4]

In the hearings, the Committee underscored the importance of congressional intervention, in both the executive branch and in independent regulatory agencies. Oversight in general, and oversight in casework specifically, is an important function for representatives in government. However, appropriate intervention must be maintained. This delicate balance is extremely troublesome. In Senator Heflin's words:

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[4]Open Session Hearings, Part 6, January 16, 1990, 193.

> A standard of conduct which places too much restraint upon the Legislative Branch could produce a legislature so timid in its contacts with the Executive that, for all practical purposes, it will have abandoned its oversight responsibilities.
>
> Likewise, the affect [sic] of a standard of conduct which leaves the legislature unrestrained in its dealing with the Executive Branch could lead to arbitrary and capricious interference with the proper execution of the nation's laws.[5]

Other senators expressed similar concern over the balance of powers in government.

The difficulty in attaining that balance is the lack of guidance that exists on when it is appropriate to intervene and when it is not. Senator Pryor commented: " . . . we need far more definitive rules and regulations as it relates to dealing with agencies and regulatory matters."[6] The Senator did not indicate from where that guidance should come.

Some recent guidance has emerged from ethics scholar Dennis F. Thompson.[7] In his article on mediated corruption he goes beyond the notion that constituent service is appropriate when done from noble motives and high principles. For Thompson, the overall effect on democratic processes must be considered as well.

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[5]Open Session Hearings, Part 1, November 15, 1990, 11.

[6]Open Session Hearings, Part 5, January 4, 1991, 160. The only result is the new Senate rule adopted by the Senate in 1992 almost identical to House Advisory Opinion #1. For the text of this rule see Appendix D.

[7]Thompson, 372.

> . . . constituent service is not a wholly beneficial practice even when legitimately performed. Even if the casework done by each individual member is perfectly proper, the collective consequences may not be so beneficial for the system as a whole.[8]

Thompson also contends that appropriate constituent service cannot take place unless there is dialogue on what democratic processes we wish to encourage. Also, the service must be tailored to the specific administrative proceeding since procedures used in lawmaking may not be appropriate when carried into administration.[9]

As oversight, what happened in the Keating Five situation was hardly typical. The intervention did not follow traditional oversight procedures. It was not done by a committee, and it was not on the record. Only two members of the Keating Five were members of the Banking Committee. The oversight that occurred was latent and informal. In addition, it was also narrow and parochial -- resembling too closely preferential treatment for one institution. The Committee criticized preferential treatment, direct or implied, as an abuse of a senator's representational role.[10] The oversight excuse, may simply be a rationalization.

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[8]Ibid., 373.

[9]Ibid.

[10]Investigation, 11.

Intervention for one constituent is not necessarily the seeking of preferential treatment. The Committee underscored the importance of constituent service and rejected the politics/administration dichotomy as an appropriate guiding philosophy. The spheres cannot be held separate and distinct. A great deal of interaction between politicians and administrators must occur as a matter of course.

Special Counsel Bennett pointed out that some important issues got lost in the justification that Keating was a constituent, and constituent service was therefore justified. He pointed out that the senators have many constituents, most of whom are "silent." There were people who lost their savings and there are taxpayers who will ultimately pay for Lincoln's failure. Bennett argued that, "All these people had constituent rights."[11]

If pressing a claim for one constituent jeopardizes the public interest as a whole, then the effort may indeed be improper. Pressing a claim for one constituent that is in the public interest would not be inappropriate, but elected officials must examine the total picture.

One of the criticisms of the senators during the Keating hearings was that they made little or no effort to determine the regulators' viewpoint and seemed to assume, without doing

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[11]Open Session Hearings, Part 1, November 15, 1990, 75.

any independent checking, that Keating's complaints were valid.

In its final resolution on the Keating Five the Committee also condemned this lack of verification. Thompson, in his article, mirrors the Committee's view.

> . . . the higher the stakes, the greater the responsibility to investigate the merits of a claim. More generally, simply pressing claims without any regard to their merits is to promote a policymaking process moved more by considerations of power than of purpose.[12]

Special Counsel Bennett urged the Committee to adopt Senator Paul Douglas' standard that "A legislator should not immediately conclude that the constituent is always right and the administrator is always wrong."[13] He went on to say that the senator should try to determine the merits of each situation.

The Committee agreed with Bennett and in its conclusions criticized Senator DeConcini for still aggressively pursuing Keating's case even after discovering Keating had not been above board with him in the past. The Committee also criticized Senator McCain for not seeking the regulators' side of the issue more aggressively. They inferred that his close personal relationship with Keating demanded that he be more

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[12]Thompson, 373.

[13]As quoted in Open Session Hearings, Part 1, November 15, 1990, 81.

vigilant in determining the regulators' position.[14] The Committee further counseled that a member of Congress needs to research the merit of the situation according to the level of action he or she plans to take.[15] Although not stated directly, this seems to infer that Senator DeConcini's behavior was too aggressive, given the unknown merits of Keating's case.

The assumption that seemed to pervade the senators' thinking and behavior was verbalized by Amy Sabrin, a member of Special Counsel Bennett's staff:

> . . . there is an automatic assumption that they're [the Bank Board] wrong and any information that you get from Keating or Lincoln, there seems to be an assumption that they're right.[16]

Shannon Fairbanks, the Executive Director of the FHLBB, directly under Gray, verbalized concern over this same attitude and felt that perhaps the burden of proof generally ought to operate in the opposite direction -- that the regulators are acting lawfully, and in good faith.[17] It is clear from the Ethics Committee's judgment, and the dialogue in general, that members of Congress must assess the merits of

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[14]Investigation, 17.

[15]Ibid., 10.

[16]Depositions of Witnesses, vol. 2, 125.

[17]This was a comment from the Gonzalez hearings testimony, submitted as an exhibit in the Keating hearings, see Depositions of Witnesses, vol. 1, 581.

the claim and that it must determine their level of intervention.

The most troublesome issue in the hearings was the location of the intervention on the rulemaking/adjudication continuum. In its conclusions, the Committee acknowledged the continuum and stated that the intervention at issue in the Keating Five hearings was neither formal adjudication nor formal rulemaking.[18]

The Committee did not say what the intervention was. Since the Committee refused to classify the intervention it makes it difficult to know where the intervention is covered in the Pillsbury case or its progeny cases. Pillsbury held that congressional intervention could endanger a person(s)' or entity's right to due process in adjudication by violating the appearance of impartiality. In addition, intervention is suspect in rulemaking if decision makers take into consideration other factors Congress did not intend them to. Procedural intervention, such as status inquiries, are appropriate.

The senators who stated an opinion claimed that the intervention was not on the adjudicative end of the continuum and that it fell on the rulemaking end, although it was not formal rulemaking.

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[18]Investigation, 9.

The administrators felt that the intervention occurred in the adjudicative realm. This was a strong statement by both Black and Patriarca. Danny Wall felt the intervention was more on the rulemaking end; however, he had more of a background in the Senate than as an administrator. If it's on the adjudicative end, then severe restrictions should be placed on the intervention.

Obviously there is no agreement on where the senators' intervention occurred, whether rulemaking, adjudicative, or not on the continuum at all. Without a clear answer to this fundamental question the guidelines that do exist cannot be applied to this case. A more careful classification of agency activity must be done, if the court's rulemaking/adjudication test will mean anything at all.

The Administrative Procedures Act (APA) is also somewhat unhelpful. It seems to make a firm distinction between the two functions suggesting the concepts consist of a dichotomy but later acknowledges in sections 556 and 557 that the standards for adjudication can be applied to formal rulemaking, supporting the continuum idea.

A simple tactic for the senators could have been to request a status report on Keating from the regulators and attempt to determine where on the continuum the regulatory action fit and whether activity on Keating's behalf was appropriate. Since status inquiries are safe, in light of

present confusion, this tactic could go a long way in helping members of Congress avoid impropriety, or the appearance of impropriety.

This is also the difficulty with judging the senators' ex parte communication, because both the legal guidelines and the senate rules revolve around what type of administrative activity was at issue, although procedural issues, like status inquiries are always upheld. Again, a written status inquiry could be an enormously helpful tool in guiding the member in appropriate behavior.

A great deal also centers on whether or not the administrator was actually influenced. All the administrators in the Keating Five hearings said that the senators' activities had no direct effect on any administrative activity. But again, I must emphasize the difficulty for the administrator in this scenario, because the member of Congress is compromised only if the administrator is influenced. This puts a double burden on the administrator.

This is much too difficult a standard to be useful. Influence is difficult to determine and impossible to measure. If we are to have meaningful guidelines for how members of Congress and administrators interact, it must be based on something more substantial.

Concerns and Implications

In his insightful commentary on ethics, former Senator Paul Douglas made this comment:

> The ethical difficulties and failures occur where the government by its action or inaction can make or lose fortunes for individual men or corporations. This in turn gives to the relatively few involved a powerful incentive to corrupt government in order to influence the decisions which must be made.[19]

Of all the criticisms, analyses and commentary that have been made about the Keating Five situation, perhaps one has been left out: The administrators were not influenced at all. Keating ultimately failed in his attempt to exert pressure on the regulators. This can be considered a victory for the administrative state.

The most immediate behavioral result from the Keating controversy seems to be that everyone is attempting to document their interactions with the administrative state. The motto is: "Make it public."[20] So, tape recorders and other resources are being used. Scholarly opinions seem to be in line with this notion.

> The most feasible means of controlling the pressure may be to make it as public as possible. All political contacts, letters, telephone calls,

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[19]Douglas, 22.

[20]Phil Kuntz with Janet Hook, "Even Without New Guidelines, Senators Tiptoe to Safe Side," Congressional Quarterly Weekly Report 49 (March 2, 1991): 525.

> meetings, should be recorded in a public file, with full transcripts.[21]

This may have the effect of simply documenting abuse of influence, rather than eliminating it. But, it would allow us to assess the actual events by providing us with undisputed documentation of what occurred. The question of whether it should occur can be examined with more confidence.

The simple solution of documenting intervention activity would be a protection if later questions were raised. Forcing documentation would undoubtedly cause individuals to give more thought to their actions.

Senator DeConcini was criticized in the final report for his inappropriate behavior toward regulators, but he was not disciplined. The Ethics Committee was convened to review if any of the senators had violated laws, ethical standards or rules of the Senate. Cranston obviously did and was disciplined by the committee. His financial dealings with contributors followed too closely along with his constituent service.

The timing and frequency of campaign contributions and constituent service has little to do with members of Congress intervening in the administrative state. This dissertation has focused on the intervention between members of Congress and administrators. From an administrative point of view what

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[21]Adams, 280.

Senator DeConcini did was much more disturbing than the activities of Senator Cranston. The Committee viewed DeConcini's activities as inappropriate and laid out the reasons for its decision. What they could not do is tie his activities to any specific law or rule.

Throughout the hearings, Special Counsel Bennett was trying to point out that the senators were powerful figures and their presence alone could be intimidating. Ed Gray obviously knew this when he made the distinction between written and oral intervention. It is doubtful that a letter to Gray, signed by the Keating Five, would have had the same influence as the two meetings. Abuse of influence is an issue that gets too little attention. And it is an issue particularly relevant to public administrators, because they are usually on the receiving end.

> As far as public officials are concerned, mediated corruption works its wiles less through greed than through ambition and even a misplaced sense of duty.[22]

By identifying, mediated corruption, Thompson has provided us with an additional tool for evaluating intervention. He asserts that the senators had a "misplaced sense of duty" and their activities on behalf of Keating were inappropriate because of this misplacement. In their zeal to render constituent service, they did not acknowledge or

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[22]Thompson, 377.

realize what effect their activities would have on democratic processes. A misplaced sense of duty can result in undue influence which it obviously did in this case.

Given that it was a Senate hearing, the emphasis was on the possible wrongdoing of the senators. Be that as it may, little attention ever really focused on the ethical responsibilities of administrators. The only evidence of that in the Keating hearings, were the comments by Senator Riegle and Griffin Bell that the regulators should have revealed the existence of the criminal referral at the beginning of the meeting, instead of waiting toward the end.

The administrators considered the disclosure of the referral dangerous regardless of what time it was disclosed. Disclosing it to what was viewed as Keating advocates could have jeopardized their abilities to enforce the rules whether it was done at the beginning of the April 9 meeting or towards the end. Obviously the timing was important to the senators, but not to the administrators.

I do not have an answer to this dilemma. Revealing the criminal referral was a last ditch attempt to make the senators more fully aware of the extent of the wrong-doing after other arguments had failed. The senators were impervious to arguments based on the safety and soundness of the system and how Keating's activities violated them. Why were they concerned about illegality, but not dangerous

practices? Perhaps the administrators should have revealed the existence of the referral early on, and perhaps the senators should have accepted the safety and soundness evidence as sufficient.

Dialogue about the ethical responsibilities of administrators must consider their expanded constituency. The senators had a very limited constituency, only the people that resided in their respective states. This parochial viewpoint drove their intervention. The regulators had a very broad constituency, and their viewpoint was very much a national one. This was obvious from the regulators protests about all that effort on behalf of one entity, while the regulators were concerned about "safety and soundness" and the industry as a whole. Administrators should operate with a broad perspective.

Perhaps Senator Glenn really captured the true difficulty the regulators had with the intervention in this case, when he made reference to the fact that regulatory agencies are set up so that their actions will apply equally to everybody. For that reason, intervening on behalf of one constituent is particularly inappropriate -- a fact the other senators did not seem to appreciate. Policy was set, the application of policy should be uniform. In fact, the senators overlooked other disturbing aspects of constituent service:

> The senators -- and even the Ethics Committee at times -- seemed to assume that if what a member does is constituent service and breaks no law, it is never improper. If the conduct does not involve bribery, extortion, or an illegal campaign contribution, it is not only acceptable but admirable.[23]

Professor Thompson's argument is that what the Keating Five did damage was democratic processes, and for this reason is objectionable. Ed Gray's complaint about what the senators did is that it damaged administrative processes. The difference is that the senators helped create the administrative processes they violated, and some feel they are justified in violating them. Perhaps an assessment of how important administrative processes are to democratic processes is needed in order to answer that question.

I would submit that administrative processes are democratic processes and should be given equal weight in assessing mediated corruption. Administrative processes have been set up to provide for information disclosure, public input, reasoned analysis and other mechanisms to make them consistent with democratic values. Administrative processes are democratic processes. In effect, these are the checks and balances on the administrative state.

In evaluating what went wrong and what went right in the whole Keating Five situation, some ideas demand some

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[23]Thompson, 372.

acknowledgement. Administrative agencies were set up with the intent that they would use their technical expertise to further define, refine, and implement the statutes that Congress set up. The FHLBB utilized its expertise. Only those with technical expertise were really able to know what was going on in the financial community in the mid-1980s. Everyone, except the regulators it seems, was fooled into thinking that nothing was seriously wrong in the industry. If the agency had not existed, and Congress had been trying to administer the system, the disaster would have been much worse.

Because of their technical and administrative expertise, agencies should at least be given the benefit of the doubt when issues and activities are questioned. Elected officials must seek out the administrators' side before accepting the constituent's side as valid. A more balanced investigation by members of Congress must be the norm, not the exception.

Recommendations

Abuse of influence or power has been somewhat ignored in the preoccupation of the Keating Five wrongdoing. Yet, it is the underlying issue that must be examined in order to propose solutions to questions the Keating Five situation raised.

The Founding Fathers were conscious of possible power abuses and worked in all sorts of checks and balances to contain it. The separation of powers is the obvious example

of their efforts and concerns. Whether or not the senators violated a law, rule or norm is secondary to the larger question of whether they violated the power that had been entrusted to them and the necessary separation of other powers. This study concludes that in subverting administrative processes consistent with democratic processes the senators' violated principles on which our government rests.

Ethical responsibility is not confined to the senators. Administrators have ethical responsibilities and must operate with more awareness of them.

Ed Gray was uncomfortable about the meeting in DeConcini's office and the instruction to come without aides. He had a responsibility to protect democratic processes as much as the senators since he was sworn to uphold the Constitution. Knowing that the space between the Congress and the administration of laws was about to breached, he had a responsibility to question the environment in which it took place. He as well as the senators' should have questioned the appropriateness of the meeting. Making intervention public and on the record is a good solution and protection for administrators as well as for members of Congress.

In addition, the administrators should be obligated to inform the member of Congress of where on the rulemaking/adjudication continuum the intervention may occur.

Since the member is not in a position to judge this, it falls to the administrator to convey that information, or at least make an educated judgement.

Institutional rules, both in the House and the Senate should encourage a status inquiry before questionable intervention takes place. Some intervention is clearly beyond reproach and the status is well known to all members of government. Some activity is questionable and members should be encouraged to seek a status inquiry when intervention is in doubt. Administrators should volunteer this opinion when they deem it appropriate. Possible intervention can then be contemplated with more confidence.

Members of Congress must be more cognizant of the power they hold. Each house of Congress should seek to educate and inform its members that they are viewed as power figures in the administrative state because they control the purse strings. With power comes responsibilities. Each house must reinforce to their members what these responsibilities are.

Since there is so much confusion over what constitutes quasi-legislative and quasi-judicial activity, some guidelines must be suggested. Keating complained not about the administrative regulatory procedures, but in how the procedures were being applied to him. This should indicate that the activity fell into the quasi-judicial realm. Had he complained about the procedures in general this would have

indicated activity in the quasi-legislative realm, because the procedures were intended to apply uniformly to all savings and loans. Members of Congress can use this guideline when evaluating complaints by constituents. Procedures, versus the application of procedures can be a helpful distinction in this very murky area.

Even though Keating represented significant holdings and large numbers of employees, Lincoln was still one entity. Members of Congress should hesitate to get overly involved in the affairs of one institution regardless of how many constituents the involvement might represent. Rulemaking is applied to an industry. This is the quasi-legislative realm. Enforcement is usually applied to one individual or one entity. Enforcement indicates the quasi-judicial realm, even though an order can then be used to apply to the industry.

The Keating Five situation should convince us that administrative agencies are a necessary addition to our democratic system:

> The larger question is what can be done to foster a climate of good faith and trust that permits agencies to carry out laws with minimal congressional interference.[24]

The answer to this question has eluded us for some time. It is a perceptual problem rather than a legal or ethical one and must be addressed on that basis. Faith and trust between the

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[24]Fisher, 155.

various branches of government cannot be legislated or dictated. The Keating Five situation has simply reinforced the urgency in finding a solution.

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APPENDIX A

HOUSE ADVISORY OPINION #1

COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

ADVISORY OPINION NO. 1[1]

SUBJECT

On the Rule of a Member of the House of Representatives in Communicating With Executive and Independent Federal Agencies.

REASON FOR ISSUANCE

A number of requests have come to the Committee for its advice in connection with actions a Member of Congress may properly take in discharging his representative function with respect to communications on constituent matters. This advisory opinion is written to provide some guidelines in this area in the hope they will be of assistance to Members.

BACKGROUND

The first Article in our Bill of Rights provides that "Congress shall make no law . . . abridging the . . . right of the people . . . to petition the government for a redress of grievances.: The exercise of this Right involves not only petition by groups of citizens with common objectives, but increasingly by individuals with problems or complaints involving their personal relationships with the Federal Government. As the population has grown and as the Government

[1]Issued January 26, 1970. This opinion should be read in conjunction with subsequent legislation, regulations, and rules, such as 5 U.S.C. Section 557(d), relating to prohibited ex parte communications to administrative agencies.

has enlarged in scope and complexity, an increasing number of citizens find it more difficult to obtain redress by direct communication with administrative agencies. As a result, the individual turns increasingly to his most proximate connection with his Government, his representative in the Congress, as evidenced by the fact that congressional offices devote more time to constituent requests than to any other single duty.

The reasons individuals sometimes fail to find satisfaction from their petitions are varied. At the extremes, some grievances are simply imaginary rather than real, and some with merit are denied for lack of thorough administrative consideration.

Sheer numbers impose requirements to standardize responses. Even if mechanical systems function properly and timely, the stereotyped responses they produce suggest indifference. At best, responses to grievances in form letter or by other automated means leave must [sic] to be desired.

Another factor which may lead to petitioner dissatisfaction is the occasional failure of legislative language, or the administrative interpretation of it, to cover adequately all the merits of legislation intended. Specific cases arising under these conditions test the legislation and provide a valuable oversight disclosure to the Congress.

Further, because of the complexity of our vast federal structure, often a citizen simply does not know the appropriate office to petition.

For these or similar reasons, it is logical and proper that the petitioner seek the assistance of his Congressman for an early and equitable resolution of the problem.

REPRESENTATIONS

This Committee is of the opinion that a Member of the House of Representatives, either on his own initiative or at the request of a petitioner, may properly communicated with an Executive or Independent Agency on any matter to:

request information or a status report;

urge prompt consideration;

arrange for interviews or appointments;

express judgments;

call for reconsideration of an administrative response which he believes is not supported by established law, Federal Regulation, or legislative intent;

perform any other service of a similar nature in this area compatible with the criteria hereinafter expressed in this Advisory Opinion.

PRINCIPLES TO BE OBSERVED

The overall public interest, naturally, is primary to any individual matter and should be so considered. There are also other self-evident standards of official conduct which Members

should uphold with regard to these communications. The Committee believes the following to be basic:

1. A Member's responsibility in this area is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations.

2. Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role.

3. A Member should make every effort to assure that representations made in his name by any staff employee conform to his instruction.

CLEAR LIMITATIONS

Attention is invited to United States Code, Title, 18, Sec. 203(a) which provides in part:

> Whoever , otherwise than as provided by law for the proper discharge of official duties, directly or indirectly -- demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either receives or agrees to receive, either personally or by another --
>
> (A) at a time when such person is a Member of Congress . . . ; or

> (B) at a time when such person is an officer or employee of the United States in the . . . legislative . . . branch of the Government . . . in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission . . .
>
> shall be subject to the penalties set forth in section 216 of this title.[2]

Section 216 provides for imprisonment for up to one year for engaging in the conduct, and for imprisonment for up to five years knowingly engaging in the conduct, plus fines.

The Committee emphasizes that it is not herein interpreting this statute but notes that the law does refer to any compensation, directly or directly, for services by himself or another. In this connection, the Committee suggests the need for caution to prevent the accrual to a

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[2]As amended by the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716.

Member of any compensation for any such services which may be performed by a law firm in which the Member retains a residual interest.

It should be noted that the above statute applies to officers and employees of the House of Representatives as well as to Members.

APPENDIX B

THE BLACK NOTES

Edwin J. Gray

Chairman

April 10, 1987

William K. Black

Deputy Director, FSLIC

April 9, 1987 Meeting of FHLBSF Personnel with Senators Cranston, DeConcini Glenn, McCain & Riegle

At your request I am providing you this memorandum, which reflects the substance of yesterday's meeting with Senators Cranston, DeConcini, Glenn, McCain and Riegle. The Federal Home Loan Bank of San Francisco ("FHLBBSF") personnel who attended the meeting were James Cirona, (President and Principal Supervisory Agent), Michael Patriarca (Director of Agency Functions), myself (General Counsel) and Richard Sanchez (the Supervisory Agent for Lincoln S&LA of Irvine, California). The meeting commenced at 6:00 p.m. and ended at approximately 8:15 p.m., with two breaks of approximately 15 and 10 minutes during which the Senators voted. Senator Cranston was present only very briefly, because of his

responsibilities on the Senate floor. The other Senators were present for substantially the entire meeting.

This Meeting was the product of an earlier meeting among yourself and Senators Cranston, DeConcini, Glenn and McCain. At that meeting, as related by you (and by these same Senators in yesterday's meeting) each of the Senators raised their concerns regarding the examination of Lincoln by FHLBSF, and you noted your unfamiliarity with any specifics of the examination, your confidence in FHLBSF, and your suggestion that the Senators hear from FHLBSF our supervisory concerns regarding Lincoln.

I was the only one at the April 8 meeting who took notes. While not verbatim, my notes are very extensive. At your request, I called you last night and read these notes to you. I have attached a copy of those notes to this memorandum. I have used these notes and my independent recall of the meeting to prepare this memorandum and provide the fullest possible record of the discussions at yesterday's meeting. I have circulated this memorandum to Messrs. Cirona, Patriarca and Sanchez for their review to ensure the accuracy of this memorandum. I believe that this memorandum is an accurate and complete record of the substance of yesterday's meeting.

Cirona: I am Jim Cirona. I am President of the Federal Home Loan Bank of San Francisco. I have held that position for four years. I am here in my capacity as Principal Supervisory Agent. We have jurisdiction over California, Arizona and Nevada savings and loans. Before becoming President I was in the industry for 20 years.

DeConcini: Where?

Cirona: In New York.

DeConcini: Did you know Bud Bavasi?

Cirona: Yes. Bud is a good guy.

DeConcini: Yes. He's great

Cirona: With me is Mike Patriarca, head of our agency function. Mike has joined us recently from the Comptroller of the Currency, where he was in charge of Multinational banks. Before that he was a lawyer for seven years.

McCain: We won't hold that against you.

Cirona: You were a litigator.

Patriarca: No, I was in enforcement for seven years.

Cirona: Also with me is Bill Black, our General Counsel. Bill was formerly the Director of Litigation for the Bank Board for three years. Next to Bill is Richard Sanchez. He's been with the San Francisco Bank for ____ years, before that he was an auditor for a commercial bank, and before that he was in school.

DeConcini: Thank you for coming. We wanted to meet with you because we have determined that potential actions of yours could injure a constituent. This is a particular concern to us because Lincoln is willing to take substantial actions to deal with what we understand to be your concerns. Lincoln is prepared to go into a major home loan program -- up to 55 percent of its assets. We understand that that's what the Bank Board wants S&Ls to do. It's prepared to limit its high risk bond holdings

and real estate investments. It's even willing to phase-out of the insurance process if you wish. They need to deal with, one, the effect of our reg . . . Lincoln is a viable organization. It made $49 million last year, even more the year before. They fear falling below 3 percent and becoming subject to your regulatory control of the operations of their association. They have two major disagreements with you. First, with regard to direct investments. Second, on your reappraisal. They're suing against your direct investment regulation. I can't make a judgment on the grandfathering issue. We suggest that the lawsuit be accelerated and that you grant them forbearance while the suit is pending. I know something about the appraisal values [Senator Glenn joins the meeting at this point] of the Federal Home Loan Bank Board. They appear to be grossly unfair. I know the particular property here. My family is in real estate. Lincoln is prepared to reach a compromise value with you.

Cranston: [He arrives at this point]. I'm sorry I can't join you, but I have to be on the floor to deal with the bill. I just want to say that I share the concerns of the other Senators on this subject. [Senator Cranston leaves]

DeConcini: I'm not on the Banking Committee, and I'm not familiar with how all this works. I asked Don Riegle to explain to me how the Federal Home Loan System works because he's on Senate Banking. He explained it to me and that's why he's here.

McCain: Thank you for coming. One of our jobs as elected officials is to help constituents in a proper fashion. ACC is a big employer and important to the local economy. I wouldn't want any special favors for them. It's like the Apache helicopter program that Dennis and I are active on. The Army wants to cutback the program. Arizona contractors make major components of the Apache helicopter. We believe that the Apache is important to our national defense. That's why we meet with

General _____ and try to keep the program alive.

I don't want any part of our conversation to be improper. We asked Chairman Gray about that and he said it wasn't improper to discuss Lincoln. I'd like to mention the appraisal issue. It seems to me, from talking to many folks in Arizona, that there's a problem. Arizona is the second fastest growing state. Land values are skyrocketing. That has to be taken account of in appraisals.

Glenn: I apologize for being late. Lincoln is an Ohio chartered corporation, and . . .

Cirona: Excuse me, Lincoln is a California chartered S&L.

Glenn: Well, Lincoln is wholly-owned by ACC.

DeConcini: You said Lincoln was Ohio chartered, its California.

Glenn: Well, in any event, ACC is an Ohio chartered corporation. I've known them for a long time, but it wouldn't matter if I didn't. Ordinary exams take maybe up to 6 months. Even the accounting firm says you've taken an unusually adversary view toward Lincoln. To be blunt, you should charge them or get off their backs. If things are bad there, get to them. Their view is that they took a failing business and put it back on its feet. It's now viable and profitable. They took it off the endangered species list. Why has the exam dragged on and on and on? I asked Gray about this. Lincoln has been told numerous times that the exam is being directed to continue by Washington. Gray said this wasn't true.

Riegle: I wasn't present at the earlier meeting. There are things happening that may indicate a pattern that do raise questions. There is broad concern on the Banking Committee about the American Banker article on the FADA and FSLIC fued. Gray has great confidence in you as a team. He says you are some of the finest people in the system. The appearance from a

distance is that this thing is out of control and has become a struggle between Keating and Gray, two people I gather who have never even met. The appearance is that it's a fight to a death. This discredits everyone if it becomes the perception. If there are fundamental problems at Lincoln, OK.

I've had a lot of people come through the door feeling that they've been put through a meat grinder. I want professionalism and your backgrounds attest to that professionalism. But I want not just professionalism, not fairness and the appearance of fairness. So, I'm very glad to have this opportunity to hear your side of the story.

Glenn: I'm not trying to get anyone off. If there is wrongdoing I'm on your side. But I don't want any unfairness against a viable entity.

Cirona: How long do we have to speak to you? A half hour, an hour?

DeConcini: As quickly as possible. We have a vote coming up soon.

Cirona: First, if there's any fault to be had concerning the length of the examination, it's on my shoulders. We determine how examinations are conducted. Gray never gave me instructions on how to conduct this exam or any other exam. At this meeting you'll hear things that Gray doesn't know.

DeConcini: Did Gray ever talk to you about the examination of Lincoln?

Cirona: Gray talked to me when that article ran in the Washington Post.

Patriarca: Gray asked for a written response from us to the Washington Post article about the length of our exam at Lincoln. Jim is correct. We received no instructions from Gray about the exam of Lincoln. We decide how to do the exam.

Cirona: This meeting is very unusual, to discuss a particular company.

DeConcini: It's very unusual for us to have a company that could be put out of business by its regulators. Richard you're on, you have 10-12 minutes.

Sanchez: An appraisal is an important part of underwriting. It is very important. If you don't do it right you expose yourself to loss. Our 1984 examination showed significant appraisal deficiencies. Mr. Keating promised to correct the problem. Our 1986 examination showed that the problems had not been corrected, that there were huge appraisal problems. There was no meaningful underwriting on most loans. We have independent appraisals. Merrill Lynch appraised the Phoenician. It shows a significant loss. Other loans had similar losses.

DeConcini: Why not get an independent appraiser?

Sanchez: We did.

DeConcini: No, you hired them. Why not get a truly independent one or use arbitration, if you're trying to bend over backwards to be fair. There's no appeal from your reappraisal. Whatever it is you take it.

Sanchez: If it meets our appraisal standards.

Cirona: The Phoenician reappraisal process is not complete. We have received Lincoln's rebuttal and forwarded it to our independent appraisers.

[At this point the Senators left to vote. We resumed when Senators DeConcini and Riegle returned.]

Sanchez: Lincoln had underwriting problems with all of their investments, equity securities, debt securities, land loans and direct real estate investments. It had no loan underwriting policy manual in effect when we began our 1986 exam. When the examiners requested such a manual they were informed that it was being

printed. The examiners looked at 52 real estate loans that Lincoln had made since the 1984 exam. There were no credit reports on the borrowers in all 52 of the loan files.

DeConcini: I have trouble with this discussion. Are you saying that their underwriting practices were illegal or just not the best practice?

Cirona: These underwriting practices violate our regulatory guidelines.

Black: They are also unsafe and unsound practice.

DeConcini: Those are two very different things.

Sanchez: You need credit reports for proper underwriting.

[Senator Glenn returns at this point.]

Riegle: To recap what's been said for Senator Glenn, 52 of the 52 loans they looked at had no credit information. Do we have a history of loans to folks with inadequate credit?

Sanchez: $47 million in loans were classified by examiners due to lack of adequate credit to assure repayment of the loans.

Patriarca: They're flying blind on all of their different loans and investments. That's what you do when you don't underwrite.

Glenn: How long had these loans been on the books?

[Senator McCain returns at this point.]

Sanchez: A fairly long time.

Glenn: How many loans have gone belly-up?

Sanchez: We don't know at this point how many of the 52 have defaulted. These loans generally have interest reserves.

Glenn: Well, the interest reserve should have run out on many of these.

Cirona: These are longer term investments.

Black: I know that Lincoln has refinanced some of these loans.

Glenn: Some people don't do the kind of underwriting you want. Is their judgment good?

Patriarca: That approach might be OK if they were doing it with their own money. They aren't, they're using federally insured deposits.

Riegle: Where's the smoking gun? Where are the losses?

DeConcini: What's wrong with this if they're willing to clean up their act?

Cirona: This is a ticking time bomb.

Sanchez: I had another case which reported strong earnings in 1984. It was insolvent by 1985.

Riegle: These people saved a failing thrift. ACC is reputed to be highly competent.

Black: Lincoln was not a failing thrift before ACC acquired it. It met its net worth requirement. It had returned to profitability before it was acquired. It had one of the lowest ratios of scheduled assets in the 11th District, the area under our jurisdiction. Its losses were caused by an interest spread problem from high interest rates. It, as with most other California thrifts, would have become very profitable as interest rates fall.

DeConcini: I don't know how you can consider it a success story. It lost $24 million in 1982 and 1983. After it was acquired by ACC it made $49 million in one year.

McCain: I haven't gotten an answer to my question about why the exam took so long.

Sanchez: It was an extremely complex examination because of their various investments. The examiners were actually in the institution from March to October -- 8 months. The asset

classification procedure is very time consuming.

McCain: What's the longest exam you ever had before?

Cirona: Some have technically never ended, where we had severe problems with a shop.

McCain: Why would Arthur Young say these things about the exam -- that it was inordinately long and bordered on harassment?

Glenn: And Arthur Anderson said they withdrew as Lincoln's prior auditor because of your harassment.

Riegle: Have you seen the AY letter?

Cirona: No.

Riegle: I'd like you to see the letter. It's been sent all over the Senate. [Hands Cirona the letter]

Patriarca: I'm relatively new to the savings and loan industry; but I've never seen any bank or S&L that's anything like this. This isn't even close. You can ask any banker you know about these practices. They violate the law and regulations and common sense.

Glenn: What violates the law?

Patriarca: Their direct investments violate the regulation. Then there's the file stuffing. They took undated documents purporting to show underwriting efforts and put them into the files sometimes more than a year after they made the investment.

Glenn: Have you done anything about these violations of law?

Patriarca: We're sending a criminal referral to the Department of Justice. Not maybe, we're sending one. This is an extraordinarily serious matter. It involves a whole range of imprudent actions. I can't tell you strongly enough how serious this is. This is not a

profitable institution. Prior year adjustments will reduce that reported $49 million profit. They didn't earn $49 million. Let me give you one example. Lincoln sold a loan with recourse and booked a $12 million profit. The purchaser rescinded the sale, but Lincoln left the $12 million profit on its books. Now, I don't care how many accountants they get to say that's right, it's wrong. The only thing we have as regulators is our credibility. We have to preserve it.

DeConcini: Why would AY say these things, they have to guard their credibility too. They put the firm's neck out with this letter.

Patriarca: They have a client. The $12 million in earnings was not sound.

DeConcini: You believe they'd prostitute themselves for a client?

Patriarca: Absolutely, it happens all the time.

[The Senators left at this point for another vote.]

[We resumed when senators DeConcini, McCain and Riegle returned.]

Cirona: I also wanted to note that the Bank Board has had a lot of problems with AY, and is thinking of taking disciplinary action against it.

Black: Not for its actions here. Primarily because of its Texas office, which has never met a direct investment. They think everything is a loan. This has quite an effect on the income you can claim.

Empire of Texas is a perfect example. It did acquisition, development and construction loans that were really direct investments because the borrowers had no equity in the projects. It booked all the points and fees up front as income. It created interest reserves so the loans couldn't go into default. It provided takeout financing and then end loans so that the loans couldn't go into default for many years. All of this led it to report record profits. Even when the losses started, as long as it grew fast enough

and could book new income up from it could remain "profitable". It gets to be kind of a pyramid scheme with rapid growth. Lincoln has grown very fast.

Many Congressional hearings have been very critical of the Bank Board for not acting more quickly against unsafe and unsound practices. Representative Dingell our . . . our, I grew up in the 16th Distinct; his hearings were very critical about Beverly Hills, which has a clean accounting opinion and then, at last count is over $900 million insolvent.

Then there was Sunrise, also with a clean opinion, and it is expected to cost FSLIC over $500 million. And Congressman Barnard's hearing was very critical there.

Cirona: Also San Marino.

Black: Yes. I can tell you from my experience as former Litigation Director, where I sued for many of these failed shops, that it is routine for the accounting firm to serve as

management's expert witness and adopt an extremely adversarial tone.

What it all comes down to is that Congress has been on our ass, and many of us think rightly, to act before an institution fails. That's what we're doing here, and I think it is laudable.

DeConcini: What?

Black: Laudable.

Sanchez: Our exam has found that million has to be written off Lincoln's books. That will leave them with a regulatory net worth of $25 million. They will fail to meet their net worth requirement. They have $103 million in goodwill on their books. If this were backed out they would be $78 million insolvent.

Patriarca: They would be taken over by the regulators if they were a bank.

DeConcini: You're saying they're insolvent.

Black: They'd be insolvent on a tangible capital basis, which is basically the capital standard for banks.

DeConcini: They'd be insolvent if they were a bank, but by law you have to use a regulatory capital standard, and under that standard they have $25 million in capital. Is that what you're saying?

Patriarca: By regulation we have adopted a regulatory capital standard.

DeConcini: And you'll take control of them if they fail your net worth standard, you'll take operational control of them.

Cirona: That's speculative. We'd take steps to reduce their risk exposure.

Riegle: What would you require them to sell?

Cirona: We'd probably have them decrease their growth. Time and again we've found rapid growth

associated with loss. Lincoln has grown rapidly.

Black: Are you sure you want to talk about this? We haven't made any recommendation to the Bank Board yet. The Bank Board decides what action to take. These are very confidential matters.

DeConcini: No, then we don't want to go into it. We were just asking very hypothetically, and that's how you [indicating Mr. Cirona] were responding.

Cirona: That's right.

DeConcini: Can we do something other than liquidate them?

Cirona: I hesitate to tell an association what to do. we're not in control of Lincoln, and won't be. We want to work the problem out.

McCain: Have they tried to work it out?

Cirona: We've met with them numerous times. I've never seen such cantankerous behavior. At one

point they said our examiners couldn't get any association documents unless they made the request through Lincoln's New York litigation counsel.

Riegle: Well, that does disturb me, when you have to go through New York litigation counsel. What could they do? Is it too late?

Cirona: It's never too late.

McCain: What's the best approach? Voluntary guidelines instead of a compulsory order?

DeConcini: How long will it take you to finish the exam?

Patriarca: Ten days.

Glenn: Have they been told what you've told us.

Patriarca: We provided them with our views and gave them every opportunity to have us hear what they had to say. We gave them our classification of asset materials and went through them loan

by loan. This is one of the reasons the exam has taken so long.

Sanchez: We gave our classification materials on January _____. On March 9 we received 52 exhibits, amounting to a stack of paper this high (indicating approximately two feet of material) responding to that. We went through every page of that response.

Patriarca: We didn't use in-house appraisers. We sent the reappraisals out to independent appraisers. We sent the reappraisals to Lincoln. We got rebuttals from Lincoln and sent them to the independent appraisers. I don't think there was any case that Lincoln agreed with the reappraisal.

Sanchez: Non where the reappraisal indicated insufficient collateral.

Patriarca: In every case. after reviewing the rebuttal, the independent appraiser has stood by his conclusion.

DeConcini: Of course, they have to.

Patriarca: No. The rebuttals claim specific problems with the independent appraiser's reappraisals; you didn't consider this feature or you used the wrong rental rate or approach to value. The independent appraiser has to come back to us and answer those specific claims by saying: yes I did consider that, and here's why I used the right rate and approach.

DeConcini: I'd question those reappraisals. If you want to bend over backwards to be fair I'd arbitrate the differences.

The criminality surprises me. We're not interested in discussing those issues. Our premise was that we had a viable institution concerned that it was being over regulated.

Glenn: What can we say to Lincoln?

Black: Nothing with regard to the criminal referral. They haven't, and won't be told by us that we're making one.

Glenn: You haven't told them?

Black: No. Justice would skin us alive if we did. Those referrals are very confidential. We can't prosecute anyone ourselves. All we can do is refer it to Justice.

DeConcini: They make their own decision whether to prosecute?

Black: Yes. I also want to mention that we are already investigating Arthur Anderson because of their role in the file stuffing. We don't know whether they knew the purpose for which they were preparing the materials. I don't want to get harassed . . . no, that's not the right word; I don't want to get criticized if we find out that AA was involved criminally and we have to make a referral on them. Don't want them to claim retaliation. We're in a tough spot.

With regard to what you can say to Lincoln, you might want to simply have them call us. If you really want to talk to them you can say

that it will take us 7 to 10 days to finish the exam.

Riegle: Is this institution so far gone that it can't be salvaged?

Patriarca: I don't know. They've got enough risky assets on their books that a little bad luck could nail them. You can't remove the risk of what they already have. You can reduce what new risks they would otherwise add on.

Black: They have huge holdings in Tucson and Phoenix. The market can't absorb them for many years. You said earlier that ACC was extremely good, but ACC has gotten out of its former primary activity, homebuilding. I'm not saying they're bad businessmen, but they had to get out of one homebuilding market after another. They had to get out of Colorado when they had bad models and soil problems. They also had to get out of their second leading activity, mortgage banking. They're now down to Arizona.

That's not a bad market, but no one knows how well it will do over the many years that it would take to absorb such huge holdings in Tucson and Phoenix.

DeConcini: So you don't know what you'd do with the property even if you took them over.

Black: Bill Black doesn't. Bill Black is a lawyer. We hire experts to do this work. Our study of their Arizona holdings was done by top experts. Our study of below investment grade corporate debt securities; what folks usually call junk bonds, but I avoid it because I don't know where you stand on such bonds; was done by top outside experts. I see in this Arthur Young letter that they criticize us for having an accountant with "only" eight years of experience -- well I think . . . I don't see how you can claim eight years as inexperienced. But we didn't simply rely on him, we had, wasn't it Kenneth . . .

Sanchez: Yes. Kenneth, Laventhol.

Black: We had Kenneth Laventhol, outside accountants, work on this. These are also some of the reasons the exam took time.

Patriarca: I think my colleague Mr. Black put it right when he said that it's like these guys put it all on 16 Black in Roulette. Maybe they'll win, but I can guarantee you that if an institution continues such behavior it will eventually go bankrupt.

Riegle: Well, I guess that's pretty definitive.

DeConcini: I'm sorry, but I really do have to leave now.

[The meeting broke up at this point, approximately 8:20 p.m.]

APPENDIX C
THE ATCHISON LETTER

March 13 (Riegle) 17 (DeConcini and McCain), 1987

Dear Senator:

(Riegle version) During a meeting with you on February 28, 1987 you raised certain questions with regard to Lincoln Savings,
(DeConcini and McCain version) Certain questions have been raised by you and others with regard to Lincoln Savings,

. . . a California-chartered savings and loan association, which is wholly owned by American Continental Corporation (ACC) and its experience with the Federal Home Loan Bank Board (FHLBB). The following sets forth such questions and what I believe are objective answers to the questions.

1. What is Lincoln Savings' financial condition at December 31, 1986 and its operating results for the year then ended?

   My firm, Arthur Young & Company, examined the financial statements of Lincoln Savings at and for the year ended December 31, 1986, and issued an unqualified opinion dated February 17, 1987 on such financial statements. Lincoln Savings' consolidated statement of financial

condition at December 31, 1986 reflected stockholder's equity, as determined in accordance with generally accepted accounting principles (GAAP), of $193,024,000 (or approximately 6.8% of its FSLIC-insured deposits) at that date. Its consolidated statement of operations reflected earnings before income taxes of $81,689 and net earnings of $48,958,000 for the year ended December 31, 1986.

2. In determining its earnings and stockholders' equity, did Lincoln Savings make provisions for potential losses?

Yes, the above-cited stockholder's equity is after valuation allowances of approximately $28,000,000 at December 31, 1986 and the pretax earnings for the year are net of provisions for losses of $32,500,000. In the course of my firm's examination of Lincoln Savings' financial statements, the firm tested the valuation allowances and the bases therefor and concluded such allowances were fairly stated in all respects material to Lincoln Saving's financial statements taken as a whole.

3. Is the Federal Home Loan Bank Board currently conducting an examination of Lincoln Savings?

Yes, the FHLBB began an examination in approximately March 1986, and as of this date has not yet concluded such examination. Accordingly, such examination has been ongoing for approximately one year. One team of examiners conducted procedures from March to May 1989 and another group conducted comparable, and in many instances identical, procedures during the period August to October 1986. Since October, the FHLBB continues to seek additional information from Lincoln Savings, some of which has been previously provided to and been reviewed by the field examiners.

4. In your experience, is the duration of the FHLBB examination unusual?

Yes, examinations generally are conducted over a period of two to three months by field examiners, and final reports are usually issued within six months from the start of the examination. Hence, the duration of this examination appears to be clearly outside normal standards.

5. Have the procedures conducted by the examiners appeared to be different or more extensive than you believe is typical?

While I don't have first-person knowledge of the examiners' procedures, I have discussed the procedures with Lincoln Savings' management and legal counsel. Based on these discussions, the extent of loan file reviews, the number of appraisals ordered, the nature of the appraisal process including the location and the nature of the appraisal process including the location and experience of appraisers selected, the redundant procedures and requests for data, and the types of transactions examined, are unusual. By way of example, the examiners asked to (a) review loan files for loans which had been fully collected by the time of the examination, (b) review files for proposed securities transactions where, after analysis, the securities were not purchased by Lincoln Savings and hence no transaction occurred, (c) review data which had been reviewed in a previous examination, and (d) re-appraise properties using appraisers who were unfamiliar with the markets in which subject properties were located. These requests are not, in my experience, typical.

6. Was the unusual duration of the examination and type and extent of the procedures used caused by the nature of Lincoln Savings operations?

While Lincoln Savings is not a typical association in that it is not a significant single family residential lender but rather tends to concentrate on land development and construction lending, it engages in transactions comparable to those entered into by other associations in Arizona and California. The focus of the FHLBB examination appears to have been centered on (a) land development projects, (b) investments in equity and noninvestment grade debt securities, and (c) commercial and construction loans. Because of the nature of the population growth patterns and economic climate in the western states, savings and loan associations in this area tend to rely more heavily on land development and commercial and construction lending to invest their resources, particularly since 1983, than do associations in other parts of the country.

Land development and commercial and construction lending tend to result in fewer transactions but transactions of greater dollar size than does residential lending. Thus it may be perceived that such lending activities bear greater risk. This perception, which is clearly held by the FHLBB, may not be accurate or realistic.

The residential lender is subject to interest rate risk. If rates rise rapidly, fixed rate loans lose their value rapidity and interest rate spreads quickly erode. And, because variable rate loans usually have annual and life-of-loan interest rate caps, such loans are also highly subject to interest rate risk. The evidence of such risk is the failure of thrifts in the period 1979-1983. During this period, which was prior to deregulation, virtually all failures related to interest spread erosion by single family residential lenders.

In February 1984, when ACC acquired Lincoln Savings, Lincoln was in the position of other traditional thrifts in that its interest spread was insufficient to provide a level of profitability. Since ACC's primary business was land development and home-building, it looked to what it knew best to improve Lincoln's profits and reduce risk. After its acquisition, Lincoln acquired parcels of prime real estate in Arizona and other growth states, increased its construction lending, and sought other nontraditional investments. Since this strategy was put in place, Lincoln has realized aggregate after-tax earnings of more than $141,000,000

Because the experience of most of the FHLBB's more senior examiners is with traditional single family lenders, Lincoln Savings is different from their prior experience. Also, the more junior examiners generally lack the business acumen to understand complex real estate development projects or complex investment strategies. Hence, while the examiners' decision to focus on real estate, commercial and construction lending, and equity and debt investments may have been proper, they appear to have had neither sufficient experience nor knowledge to deal with Lincoln's transactions effectively, thereby causing the examination to be more protracted than necessary.

Moreover, because Lincoln does not concentrate on single family residential lending, it does not fit the pattern for member institutions that the present FHLBB leadership has espoused based on my observations, led to unusually antagonistic positions and actions by the FHLBB towards Lincoln. This is difficult to fully understand because Lincoln's strategies have thus far proved successful and have turned an association headed for failure into a strong and viable financial entity. And, as stated earlier, Lincoln's strategies are not that different from other successful thrifts in the West. Most engage in

real estate development, either directly or through joint ventures, many have far greater construction and commercial loan portfolios (as a percent of assets and in dollar volume) than Lincoln, and many have much heavier concentrations of noninvestment grade securities. Many of the associations with these characteristics are among the most profitable in the country and are considered to be the best managed by knowledgeable analysts.

Thus, the nature of Lincoln's operations should not have resulted in the protracted period of the examination or the unusual procedures employed. But, because the examiners did not have the requisite experience or knowledge to evaluate the types of transactions entered into by Lincoln, the nature of the business did, in fact, cause the examination to be inordinately protracted.

As to the nature of the procedures employed, the experience factor contributed to some of the redundant procedures. Others, I believe, based on observations of FHLBB personnel, were the result of the FHLBB's resistance to Lincoln's nontraditional business profile and the fact that Lincoln does not fit into the mold desired by the FHLBB leadership.

7. Lincoln Savings' representatives have asserted that the FHLBB examiners were unreasonable in their decision making and that at times their conduct bordered on "harassment." Did you observe personally any such conduct by the FHLBB?

The following support Lincoln's assertions:

a. With respect to certain loans, a separate report was requested from Lincoln's independent accountants (the firm which preceded our firm) regarding the appropriateness of Lincoln's accounting for such loans. That firm issues a report concluding that Lincoln's accounting was appropriate under relevant professional literature. The FHLBB did not accept this report and requested a second opinion by another firm. Our firm was contacted by both ACC and the FHLBB to render the second opinion. Our firm independently reviewed the subject loans and issued an opinion concurring with the other accountant's opinion. The FHLBB has subsequently rejected our opinion as well. Such rejection was made by a person with less than eight years' experience in accounting practice. Thus a person with relatively little experience has

rejected the opinions of two international accounting firms.

b. On February 6, 1987, the FHLBB notified Lincoln that it had determined that specific reserves in the amount of $36,634,000 were required to be recorded. Such reserve request did not (a) take into account the reserve already established by Lincoln, (b) data supplied to the FHLBB by Lincoln which clearly indicated that certain appraisals on which such reserves were predicated were incorrect, or (c) that certain assets were not subject to their reserve procedures because they were operating properties and not investment assets. Moreover, the notice states, "The loss reserve directed by the Supervisory Agent must be established before any such subsequent reappraisals will be accepted for consideration." As the Supervisory Agent had been informed that Lincoln believed the requested reserves to be based on erroneous date, the issuance of such a notice and the terms thereof are unreasonable and unusual based on my prior experience with the FHLBB.

c. On at least two occasions that I am aware of the supervising agent, in group meetings, indicated the examination was complete and a final report would be forthcoming shortly. Additionally, the agent was specifically asked if all issues of concern to the FHLBB had been communicated to Lincoln, to which question the agent answered affirmatively. At this date new issues have been raised and a final report has not been issued. This is in spite of the fact that a draft report was prepared and provided to Lincoln in early November 1986 and again in December 1986.

d. The examination became a fluid event. The first period examined was through December 31, 1985; then through June 30, 1986; and then through September 30, 1986. Draft reports have been issued at various dates stating, "The following agenda items, subject to final review, summarize the results of our examination of Lincoln Savings and Loan Association as of . . ." However, after each draft, and apparently after the field examiners concluded they had completed the examination, new inquiries have been made and additional data has been requested from Lincoln. I have specific

knowledge that this has caused Lincoln great expense and has distracted its management from the daily operations of the thrift's business.

e. Data requests from the examiners have clearly been redundant and, based on my experience, excessive as to the amount of date and level of detail requested.

f. Lastly, the examiners' interpretations of accounting principles and their own regulations and examination guidelines have been consistently and unreasonably pejorative to Lincoln. In meetings I've attended the FHLBB personnel have appeared, without apparent cause, to be openly hostile and inflexible towards Lincoln personnel and their representatives.

8. Do you believe the eventual outcome of the examination will be detrimental to Lincoln's well being?

Based on the draft reports presented to Lincoln, I believe the results will indicate Lincoln fails to meet the minimum net worth requirement as determined by the FHLBB staff. I don't believe the facts and circumstances

will, if objectively viewed, support such a conclusion. Thus, the final report will in all likelihood be detrimental and inappropriately so. This is not to say that Lincoln could not, or should not, improve certain of its internal procedures. But based solely on my personal observations to date, the final report can be expected to be unduly harsh.

I trust the above has been responsive to your questions: I have attempted to answer each question objectively and without bias either towards Lincoln or the FHLBB.

Yours truly,

Jack D. Atchison
Managing Partner, Phoenix Office

APPENDIX D
THE NEW SENATE RULE

RULE XLIII

REPRESENTATION BY MEMBERS[1]

1. In responding to petitions for assistance, a member of the Senate, acting directly or through employees, has the right to assist petitioners before executive and independent government officials and agencies.

2. At the request of a petitioner, a Member of the Senate, or a Senate, or a Senate employee, may communicate with an executive or independent government official or agency on any matter to --

(a) request information or a status report;

(b) urge prompt consideration;

(c) arrange for interviews or appointments;

(d) express judgment;

(e) call for reconsideration of an administrative response which the Member believes is not reasonably supported by statutes, regulations or considerations of equity or public policy; or

(f) perform any other service of a similar nature consistent with the provisions of this rule.

3. The decision to provide assistance to petitioners may not be made on the basis of contributions or services, or promises of contributions or services, to the Member's political

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[1]Rule established by S. Res. 273, 102-2, July 2, 1992.

campaigns or to other organizations in which the Member has a political, personal, or financial interest.

4. A Member shall make a reasonable effort to assure that representations made in the Member's name by any Senate employee are accurate and conform to the Member's instructions and to this rule.

5. Nothing in this rule shall be construed to limit the authority of Members, and Senate employees, to perform legislative, including committee, responsibilities.

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FIELDS

American Government
Administrative Law
Administrative Ethics

EDUCATION

Ph. D. Candidate, Center for Public Administration and Policy, Virginia Polytechnic Institute and State University (Entered Fall 1988).

M.P.A., with Distinction, Brigham Young University (April 1987).

B.A., Political Science, Brigham Young University (August 1985).

Attended Brigham Young University -- Hawaii Campus, Laie, Hawaii (1983).

EMPLOYMENT AND OTHER EXPERIENCE

Assistant Professor, Northern Michigan University, Department of Political Science, Marquette, Michigan, teaching both undergraduates and graduate students. Primary teaching responsibilities include American Government, Public Personnel Administration Administrative Law and Administrative Ethics. (1993 to present).

Instructor, Hollins College, Department of Political Science, Roanoke, Virginia, teaching Ethics and Politics, Introduction to Public Administration, the American Presidency, U. S. Congress, Parties and Elections and State and Local Government (1990 to 1992).

Also taught two January Short-Term courses entitled, "Law, Politics and Regulation" and "Political Memoirs and Exposes of the Reagan Administration."

Graduate Teaching Assistant, Political Science Department, Virginia Polytechnic Institute and State University, Blacksburg, Virginia, teaching Introductory Public Administration and Administrative Law (1989 to 1990).

Graduate Assistant, Dr. John A. Rohr, Center for Public Administration and Policy, Virginia Polytechnic Institute and State University, Blacksburg, Virginia (1988 to 1989).

Library Assistant, Blacksburg Area Library, Montgomery-Floyd Regional Library System, Blacksburg, Virginia (Summer 1989 and 1990).

Part-time Faculty, Institute of Public Management, School of Management, Brigham Young University, Provo, Utah (1987 to 1988).

Research Consultant, Office of Legislative Research and General Counsel, Utah State Legislature, Salt Lake City, Utah (1987 to 1988).

Research Assistant, Dr. David K. Hart, Institute of Public Management, School of Management, Brigham Young University, Provo, Utah (1986 to 1987).

Research Intern, Utah State Tax Commission, Salt Lake City, Utah (1986).

Intern, Republican Study Committee, U. S. House of Representatives, Washington, D. C. (1985).

Serials Clerk, J. Reuben Clark Law School Library, Brigham Young University (1983-1985).

I currently serve as the editor for the political science undergraduate newsletter and the graduate public administration newsletter.

Helped coordinate two major academic conferences while at Brigham Young University sponsored by the School of Management, "Papers on the Ethics of Administration", 1987 and "Ethics and Business in the Pacific Rim", 1988.

Various positions with my political party: delegate to the state convention, 1982; delegate to the county convention, 1982; voting district vice-chairman, 1982; committee worker in the county convention, 1980.

HONORS AND AWARDS

Member of Phi Kappa Phi and Beta Gamma Sigma.

Graduate School of Management Dean's List, Winter 1986, Fall 1986, and Winter 1987. National Dean's List, 1986.

RESEARCH EXPERIENCE

Primary research assistant for William G. Scott and David K. Hart, Organizational Values in America (New Brunswick, NJ: Transaction Books, 1989). Acknowledged in the Preface.

Graduate Assistant for John A. Rohr, Ethics for Bureaucrats: An Essay on Law and Values, 2d ed., (New York: Marcel Dekker, Inc., 1988). Acknowledged in the Preface.

Primary graduate student organizer, research assistant, and copy editor for N. Dale Wright, ed., Papers on the Ethics of Administration (Provo, UT: Brigham Young University, 1988). Referred to in Acknowledgments. Also, footnote acknowledgement in David K. Hart's chapter, "The Sympathetic Organization".

COMMITTEE EXPERIENCE

Member, Marquette County Board of Health, Marquette, Michigan, 1996 to present.

Holocaust Education Committee, Northern Michigan University, 1994 to present.

Green Ribbon Committee, Marquette City, Michigan, Produced "Alternative Revenue Study" on April 10, 1995. Served from 1994 to 95.

Served on Task Force on University Reorganization, Study Group #1, Office of Vice President for Academic Affairs, 1995.

Faculty Advisory, Latter-Day Saint Student Association, Northern Michigan University, 1993 to present.

SPEAKING ENGAGEMENTS AND WORKSHOPS

Panelist, "File Paper Prep Workshop", Graduate Association of Public Administrators (GAPA), Northern Michigan University, February 1995 and March 1996.

Panelist, "Great Lakes College Radio Conference" Northern Michigan University, February 1995.

"Jobs in Political Science/Public Administration" for Career Awareness Week, Northern Michigan University, November 1994.

Panelist, "Professional Development Workshop", Graduate Association of Public Administrators (GAPA), Northern Michigan University, October 1994.

"Individualism" for the Leadership Institute, Northern Michigan University, March 1994.

"What Can I Do With This Major?" for Career Awareness Week, Northern Michigan University, November 1993.

Delivered the graduate student's address at the School of Management Convocation exercises at graduation, Brigham Young University, April 1987.