The development of a comprehensive body of federal environmental regulatory policy poses afresh for environmentalists the familiar dilemmas that have confronted successive generations of social reformers in the twentieth century. As intense public attention to a highly-publicized environmental crisis fades, environmentalists will face the prospect that the lofty promises of hard-won legislation will be lost as the struggle moves from the legislative to the administrative arena. This prospect is especially acute for those who view effective regulation of industry as a central prerequisite for success in the effort to enhance the relationship between man and the environment. As reformers from an earlier age can testify, the structural imperatives of administrative agencies and the political settings in which they operate can transfer Congressional intent beyond the expectations of legislative draftsmen. On the one hand, many agencies have been accustomed to pursuing mandates that were not designed to be solicitous of environmental quality as defined by the National Environmental Policy Act: three years of NEPA litigation has painfully revealed the difficulty of teaching the proverbial old administrative dogs new tricks. On the other hand, the corporate sector is well able to marshall impressive legal, political, and scientific resources in
their continuing efforts to influence the actual interpretation and administration of environmental regulations. These factors are hardly new. They reflect rather the long-term breakdown of the system by which the government has sought to regulate corporate power in the twentieth century. As an aggregate of social and organizational as well as economic power, the modern corporation has shown a remarkable ability to accommodate itself and its long-term goals to the countervailing power of social reform movements and to adjust to the regulatory character of the modern state. If it is too much to say, in the fashion of vulgar Marxism, that government is the plaything of corporate interests, it seems plausible to suggest that the modern corporation has been able to convert control into a system of regulatory partnership that works to the long-term advantage of industry. This process is, moreover, seemingly part of a wider tendency characterized by the structural convergence between organized interests in the private sector and the policy-making and policy-executing agencies of the federal government. While the trend does demonstrate some well-understood features, the post-war emergence of the military-industrial complex, the pre-eminent role of the government in scientific research and development, the growth of domestic programs that institutionalize private participation, and the expansion of regulatory structures, all signify that the rate of convergence has increased so markedly as to have acquired an altogether different character. The fusion of private corporate power and public administrative power predicted by a growing group of writers appears to have become a commonplace reality on the Washington scene. Grant McConnell sums up the situation as follows:

"More important and more characteristic of American government is the conquest of segments of formal state power by private groups and associations. Although it would be impossible to state with any precision what portion of the power of American govern-


ment has been taken possession of in this way, it is certain that the portion is substantial and the control is considerable ***. The function of policy-making is often turned over to the private groups in what amounts to delegation."5

If, following this argument, we view environmental policy less as a unique, Thoreau-inspired domain, and more as a new issue arena subject to the same imperatives as other issue arenas, we can raise the question whether environmental policy might go the way of all political-administrative flesh. In short, we can ask whether, in the words of the Calvert Cliffs court, the important legislative purposes heralded in the halls of Congress may be "lost or misdirected in the vast hallways of the federal bureaucracy."6 The question facing environmentalists is, then, who will do the losing and misdirecting, how will it be done, and under what conditions?

This article does not seek to answer this question in its largest dimensions, but only to provide some modest insight into one of the mechanisms, the advisory committee, by which the relationship between private interests and public authority is often cemented. Raising the question in the context of environmental policy, the article analyzes one industry advisory committee on environmental policy, the National Industrial Pollution Control Council (NIPCC). Established in April 1970, NIPCC functioned until 1973 as a potent means for guaranteeing businessmen routine and institutionally legitimate access to top-level federal environmental decision-makers. As a result of several statutory and political developments, NIPCC promised to become, during its most active period, a significant element in an environmental governmental-industrial partnership. It thus serves as a model of the structure of relationships that do exist between the corporate community and the federal administrative process. Despite its unforeseen termination, the example of NIPCC will demonstrate how advisory committees in general act as a conduit between the public and private sectors.

THE ADVISORY COMMITTEE AND REFORM

Advisory committees are a common but obscure method employed by federal agencies to tap the expertise of the private sector,

to solicit the advice of private groups and individuals in formulating policies and developing programs, to secure the assistance and assent of affected groups in administering programs and measuring their effectiveness and to introduce public participation into administrative activities. The complex nature of modern government has led both administrators and organized groups to accept the proposition that administrative agencies must have access to and knowledge about the distinctive needs and specialized competence of particular segments of society. Indeed, the participation of organized groups and knowledgeable individuals is regarded as a virtual sine qua non of good administrative practice. The use of advisory committees is so widespread both in the United States and elsewhere that it can be regarded as a regular and legitimate element in the structure of public administration. Advisory committees exist, moreover, not simply to provide advice and assistance in the administrative process. They are looked to by agencies for generating support from their respective social, economic, sci-


"The term 'advisory committee' means any committee, board, commission, council, conference, panel task force, or other similar group, or any subcommittee or other subgroup thereof ***, which is — (A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government ***."


entific, or functional constituencies and for providing a form of public and group endorsement for administrative programs. Naturally, the interaction between groups and agencies is complex and subject to variation. Some committees appear to have substantial influence over policies while others are little more than "social clubs," as one official put it, regarded at best as rubber-stamps for agency decisions and at worst as nuisances. Nonetheless, the utility of advisory groups is repeatedly acknowledged by both agency officials and group members. So fond are both Congress and agencies of such groups that in 1972 new groups were created at roughly the computed rate of one new committee for each 1.5 working days. In 1972, when reliable data first became available, there existed a total of 1,439 committees operating at a total cost of $25.2 million to the federal government. In 1973, the number of committees declined slightly to 1,250, but the total cost rose to $31.1 million. During the same period, 390 committees were terminated while 216 new committees were created. Overall, the system of advisory committees can be regarded as a long-standing major institutional method for linking private interests and private expertise to public authorities in the administrative process.

Despite the reliance upon advisory committees by Congress, the President and individual agencies, the untidy growth of the advisory committee system has been of some concern for more than twenty years. This concern has led both Congress and the executive branch to undertake periodic attempts to curb the lush growth of new committees. In 1962, for example, President Kennedy issued an executive order designed to regulate the use of advisory

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11. The reference to social clubs was made by an official of the Office of Management and Budget (OMB) in an interview with the author in June 1972.


15. R. Levine, supra note 8, at 219-25.
committees throughout the executive branch.\textsuperscript{16} Welcome as it was, the order did little to cure the most grievous aspects of the system. Ten years later a new executive order issued by President Nixon\textsuperscript{17} was intended to deal not only with deficiencies in the original executive order, but to deflect what by then had become increasing Congressional pressure for legislative reform of the system. This pressure began to develop in 1970 when both the House and Senate Government Operations Committees initiated extensive hearings into the advisory committee system.\textsuperscript{18} As the Hearings continued and as various bills were introduced into both the House and the Senate, it became clear that committee members in both houses were concerned with two distinct but related features of what they began to call the "Fifth Branch of Government." On the one hand, there was concern that the system was simply another example of an ever-growing and irresponsible bureaucracy; it was therefore felt that advisory committees must be subjected to tighter, more effective, and more responsible executive management and Congressional oversight.\textsuperscript{19} On the other hand, there was an equally deep and more populist concern with the nature of representation on advisory committees, with public accessibility to the committees and with the influence of alleged advisors on actual policy

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outcomes. This second and ultimately more consequential set of concerns was directed primarily at industry advisory committees.\textsuperscript{20} While industry committees were not the most common form of committee, they were characterized by their exclusivity of membership, i.e., all members were businessmen,\textsuperscript{21} and by the closed and even secretive character of their operations.\textsuperscript{22} The meetings of such top-level advisory committees as the Industry Advisory Committee of the Department of Defense, the National Petroleum Council, the Advisory Council on Federal Reports, or the NIPCC were habitually closed to outsiders who were perforce obliged to content themselves with sanitized and paltry brief minutes.\textsuperscript{23} Those intent on finding facts to fill populist stereotypes did not often have to look far: meetings of some committees were held in such places as the Union League Club of Chicago, One Chase Manhattan Plaza, and 30 Rockefeller Plaza.\textsuperscript{24} Given the high level nature of many industry committees, the importance of the subject matter on which they rendered advice and information, and their insistence on conducting business behind closed doors, it was understandable that legislation was proposed to expose the committees to public view quite as much as tidying up their operations.


\textsuperscript{21.} Exec. Order No. 11007, § 2(b), 27 Fed. Reg. 1875 (1962), defines the industry advisory committee as "an advisory committee composed predominantly of members or representatives of a single industry or group of related industries, or of any subdivision of a single industry made on a geographic, service, or product basis."

\textsuperscript{22.} An exhaustive search by the author has failed to disclose any statutory authority to hold closed meetings in pre-FACA days. Yet the testimony throughout the hearings, supra note 18, clearly indicated the uncontested assumption that many advisory committees, and all industry advisory committees, held closed meetings. See testimony by Rep. John B. Moss that "my Subcommittee has found that the long existing government policy of secret sessions for its advisory groups is based more on tradition and convenience than it is by law." Senate Hearings, pt. 1 (1970), supra note 18 at 12, and the 1968 statement by Secretary Cohen (HEW). Id. at 14. See also further testimony of Mr. Cross and Mr. Hamilton on NIPCC policy. Senate Hearings, pt. 2 (1971), supra note 18 at 406-07 and 412-13 respectively.

\textsuperscript{23.} On keeping minutes, see Exec. Order No. 11007 § 6(d), 27 Fed. Reg. 1875 (1962). For an example of the nature of the minutes see NIPCC minutes cited in this paper, passim. See also, e.g., minutes reprinted in Senate Hearings, pt. 2 (1970), supra note 18, at 64-70 and 144-72.
Following nearly two years of hearings, Congress enacted in 1972 the Federal Advisory Committee Act (FACA), the first major piece of legislation regulating advisory committees. Without entering into a full discussion of the detailed provisions of the Act, it should be noted that in enacting FACA, Congress appears to have sought to implement four broad purposes with respect to advisory committees. First, the Act is a committee management law designed to create an orderly set of standards and uniform procedures for regulating the establishment, operation, administration, and duration of advisory committees. In this respect, the Act establishes clear oversight and control responsibilities for Congress, the President, the Office of Management and Budget and agency heads. It seeks to ensure, inter alia, that advisory committees perform only authorized, well-defined, and necessary functions, to check the growth of advisory committees, to establish uniform procedures for the chartering and routine functioning of advisory committees, and to provide a set of administrative guidelines and management controls for advisory committees. Second, the Act is a "sunshine law" requiring that "Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees." In this respect, the Act provides for the maintenance of public records concerning the work of advisory committees, for

24. Minutes of the CAB Advisory Comm. on Finance in Senate Hearings, pt. 1 (1971), supra note 18 at 190, 199, 201; Minutes, NIPCC Poultry and Animal-based Food Products Sub-Council, Apr. 23, 1971; Minutes, Petroleum and Gas Sub-Council, Apr. 13, 1971. [NB: unless otherwise noted all minutes of the National Industrial Pollution Control Council and its sub-councils, cited infra passim, are in mimeographed form and are published by the Department of Commerce.]

28. Id. §§ 5(b), 6.
29. Id. § 7.
30. Id. §§ 5(b), 8, 11, 12.
31. Id. §§ 5(a), (b)(1)-(2), 9(a).
32. Id. §§ 5(a)-(b), 7(b), 14.
33. Id. §§ 8, 9, 10.
34. Id. §§ 7(c), 8, 12.
35. Id. §§ 2(b)(5).
36. Id. §§ 10(b), (c), 11, 12(a), 13. Section 10(b) permits exceptions under the Freedom of Information Act, 5 U.S.C. § 552 et seq. (1970).
the submission of regular reports by the President and by Committees concerning their activities and proposals, for publicly advertised and open meetings of advisory committees, and for public participation in the work of advisory committees. The Act is, in other words, a full disclosure law requiring that Committees be open and publicly accountable. Third, the Act is a fair balance law. It requires that the membership of advisory committees be "fairly balanced in terms of the points of view represented and the functions to be performed ".

Finally, the act seeks to insure that advisory committees are advisory only, and not policy-making, and that their activities are controlled by responsible officials of the Federal Government. Clearly, both the full disclosure and fair balance provisions are of the greatest significance. If agencies responsibly and effectively comply with the Act it provides the means for the public generally and for excluded interests and public interest groups in particular to gain access into the hitherto closed conference chambers where the delicate line between advice and influence, between private claim and public authority is so often erased. Thus far, of course, it is too early to judge the potential long-term results of the Act. The record to date, however, is far from encouraging. Skeptics will not be surprised to learn that no sooner had the Act gone into effect than many agencies busily, and imaginatively set about devising stratagems for avoiding full compliance and constructing new barriers to committee openness to replace those the Act was designed to overcome. Inadequate notices of meetings, inconvenient meeting places, limited meeting space, the creation of "informal" subgroupings, the free and easy use of Freedom of Information Act exemptions, the plain refusal to comply — all these tactics suggested that evasion of FACA's restrictions might well become a

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38. Id. § 10(a). Section 10(d) permits exceptions under the Freedom of Information Act as well.
39. Id. § 10(a)(3).
40. Id. § (5)(b)(2). This section applies to advisory committees created by Congress. Section 5(c) extends the "fairly balanced" requirement "to the extent *** applicable" to the President, agency heads, or other federal officials.
41. Id. §§ 2(a)(6), 9(b), 10(e), (f).
Washington way of life. Whether the pattern of abuse uncovered by the Senate Oversight Hearings will continue is open to question. Perhaps newly revised Office of Management and Budget guidelines will correct some of the more glaring abuses.\textsuperscript{43} A handful of cases in the district court of the District of Columbia and the appeals court in that circuit suggest, however, that the courts will demand strict compliance with the Act and will look disapprovingly on agency attempts to violate either the spirit or the letter of the law.\textsuperscript{44} The difficulty, of course, lies in the absence of statutory sanctions in the Act. Litigation may be an effective weapon for changing agency policy, but it is a clumsy weapon at best against agency decisions in particular situations.\textsuperscript{45} Thus far, in sum, it is too early to judge the potential long-term results of the Act. As the example of the National Industrial Pollution Control Council between 1970 and 1973 will make clear, the question is one of some moment to environmentalists.

\textbf{NATURAL RESOURCES AND THE ADVISORY COMMITTEE}

Advisory committees have for long played an important role in the administration of natural resource policy. Advisory committees have been extensively employed under the Taylor Grazing Act in the administration of grazing on the public domain, by the Forest Service for both grazing and forest supervision, by the Bureau of Land Management, and by the Park Service.\textsuperscript{46} Whether and to what extent these advisory bodies have been effective vehicles of citizen participation is open to some question. For example, one study has concluded that advisory boards have

for all intents and purposes, controlled federal programs on the public lands. Special interest representation on some boards has all the sanctions and symbols of the public interest. The public assumes that they are, in fact, serving in behalf of the public interest. Powers, in the name of the public interest, are used to maximize the satisfactions of the special interest representatives.\textsuperscript{47}

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\item \textsuperscript{43} Cited supra note 26.
\item \textsuperscript{45} Testimony of Ronald Plesser, supra note 42, at 52-53.
\item \textsuperscript{46} See Ryan, The Role of Citizen Advisory Boards in Administration of Natural Resources, 50 ORE. L. REV. 153 (1971); Foss, Politics and Grass 117 (1960);
G. McConnell, supra note 5, at 200-11.
\item \textsuperscript{47} Ryan, supra note 46, at 163.
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Certainly this conclusion should come as no surprise to those whose concerns have been focused on other areas of environmental policy. Advisory committees, and especially industry advisory committees, have almost routinely taken their toll over the years on the development of effective environmental policies. The successful blocking of the industrial wastes inventory for seven years by the Advisory Council on Federal Reports (now the Business Advisory Council on Federal Reports) is only one of the more notorious examples of the success of advisory committees in frustrating or redirecting information gathering efforts of pollution control agencies, distorting contracted research studies, watering down criteria reports, or otherwise influencing anti-pollution efforts in hitherto closed advisory sessions. So well understood is the political role of advisory committees that interests resisting or seeking a given decisional outcome have been accustomed to falling back on advisory committees as an accepted tactic for modifying or delaying administrative action. Interests have not simply sought

48. This example, like many others, is still the subject of dispute. See Reinem, Budget Bureau: Do Advisory Panels Have an Industry Bias?, 181 SCIENCE 36-39 (1970). See also Subcomm. on Natural Resources and Power of the House Comm. on Gov't Operations, The Critical Need for a National Inventory of Industrial Wastes, H.R. Rep. No. 90-1579, 90th Cong., 2d Sess. (1968); Hearings on The Establishment of a National Industrial Wastes Inventory Before the Subcomm. on Conservation and Natural Resources of the House Comm. on Gov't Operations, 91st Cong., 2d Sess. (1970), and the report of the same subcommittee, The Establishment of a National Industrial Wastes Inventory, H.R. Rep. No. 91-1717, 91st Cong., 2d Sess. (1970). For a brief discussion of other occasions on which the Bureau of the Budget or OMB are held to have obstructed agency attempts to gather information, see testimony of Ralph Nader and others in Senate Hearings, pt. 2 (1970), supra note 18 at 209-33; reply by Charles Stewart, Chairman, Advisory Council on Federal Reports in Senate Hearings, pt. 1, (1970), supra note 18, at 36-47 and at Hearings on the Establishment of a National Industrial Wastes Inventory, supra at 98-100. On the role of the then Advisory Council on Federal Reports in stalling the National Air Pollution Control Agency's air contaminants survey for eleven months and in compelling NAPCA to sanitize the survey results when made public, see J. Esposito, Vanishing Air 75-78 (1970). On the efforts of various NAPCA advisory groups to distort the contracted research studies on different industries and pollution control processes, see testimony of William H. Rodgers, Jr. and the minutes of advisory committees entered into the record, Senate Hearings, pt. 1 (1970), supra note 18, at 15-27, 144-172. On the success of an advisory committee in watering down the criteria report for SOx upon which air standards are based, see J. Esposito supra, at 280-87.

49. See authorities listed supra note 48, and infra note 51. For the role of advisory committees in the administration of the Federal Insecticide, Fungicide and Rodenticide Act of 1947, 7 U.S.C. § 135 et seq., (1970), see H. Wellford, Sowing the Wind 335, 339-40, and House Comm. on Gov't Operations, Deficiencies in the
to utilize their strength on various committees (and even partial membership can be advantageous) but they have also lobbied Congress to establish advisory committees as a means of boxing in an administrative agency or constraining an administrator. Insofar as such technical questions as pollution control technology, insecticides and herbicides, or toxic materials involve significant economic stakes, not even the prestigious National Academy of Sciences is immune from the politics that swirl about scientific advisory committees. As recent controversies over the reports of advisory committees on 2, 4, 5-T, MSG, and the biological effects of airborne lead have shown, the distinction that might be drawn between purely industry advisory committees and what might be termed scientific committees is more formal than real.

FACA should make a considerable difference by virtue of its openness provisions. But well before the passage of FACA and within months of its establishment, the Environmental Protection Agency took a number of steps to provide greater balance between industry and non-industry representation and to provide greater public accessibility to and knowledge of advisory committees. In late 1971, in anticipation of the forthcoming executive order, EPA opened its advisory committees to the public both as observers and as non-member participants. With past difficulties in mind, EPA also announced that reports of scientific advisory committees would be made public at the time they were delivered to the EPA Administrator, i.e., before a final agency decision was made. Dur-


50. J. Esposito, supra note 48, at 280-82.


53. Id. at 831.
ing the same period, EPA abolished five of the industry committees it had inherited from its various predecessor agencies; by 1974 EPA carried only two industry committees on its roster. For environmentalists who had long suffered their exclusion from the advisory committee system, EPA's moves to open its advisory committees in terms of public access and a greater degree of balanced representation were refreshing news. Industrialists now rub elbows with representatives of state, municipal and federal agencies, with university scientists, and with representatives of public interest groups on such committees as the Advisory Committee on the Revision and Application of Drinking Water Standards or the Water Pollution Control Advisory Board. In general, EPA's management procedures breathe a willingness to comply with the spirit and letter of FACA. Whether and to what extent these changes in EPA will enable public interest and environmental groups to make themselves felt is an open question: in this context, more research is needed not only on the membership of the various groups but on the nature of the advice they render. In any event, EPA is only a part of a larger structure of decision-making that affects the environment; its advisory committees are only one part of a structure that affects environmental quality.

NIPCC

The importance of environmental policy as a new area of concern to the business community was signaled by the establishment in April 1970 by President Nixon of the National Industrial Pollution Control Council. The presence of the newly formed council guaranteed that industry could expect to be consulted, if not actively involved, in environmental decision-making at the highest levels of government. Its functions, its membership, its operating procedures, its influence on policy, and the role carved out for it by its leading spokesmen all suggested that the creation of NIPCC may well have been a first step toward transforming the regulation of industry by a set of environmentally defined criteria into an industrial-government partnership that would seek to safeguard

55. See rosters contained in First Annual Report, pt. 4, supra note 13, at 4701-52.
57. The discussion that follows draws in part on the author's testimony in
industry's values at a time when they ought not perhaps be wholly secured.57

**NIPCC Functions**

That NIPCC was not intended to play a secondary role in environmental policy-making was assured by President Nixon's announcement creating the Council. Asserting that the effort to restore the environment "cannot be successful unless the public and the private sector are both intensively involved," the President termed NIPCC "an important mechanism for achieving this coordination." As he conceived it, NIPCC was to be an active and continuing participant and not merely a deferential hand-maiden in environmental policy-making. As President Nixon said, it would "help chart the route which our cooperative ventures will follow."58 Although the Council was attached to the Department of Commerce and responsible to him through it, the President indicated in his statement that the Council's advice should be directed to the White House as well as to the agencies responsible for environmental affairs. NIPCC, in short, was to be the pivotal link between industry and government in the development of environmental policy. As Secretary Stans enthusiastically asserted, the Council's "total objective" was to secure "the maximum input from the business community in coordination with the Government's effort to resolve the environmental problem ***."59

More concretely, the Council's functional tasks were set forth in some detail by Executive Order 11523.60 The Council was charged by the order to

(1) survey and evaluate the plans and actions of industry in the field of environmental quality; (2) identify and examine problems of the effects on the environment of industrial practices and the needs of industry for improvements in the quality of the environment, and recommend solutions to those problems; (3) provide liaison among members of the business and industrial community on environmental quality matters; (4) encourage the business and industrial community to improve the quality of the environment; (5) advise on

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*Senate Hearings, pt. 2, (1971), supra note 18, at 365-81. See also testimony of the Executive Director of NIPCC, Walter A. Hamilton and of the Chairman, Bert S. Cross. Id. at 382-431.*


59. Office of the White House Press Secretary, Press Conference of Maurice Stans, Apr. 9, 1970.

plans and actions of Federal, State, and local agencies involving environmental quality policies affecting industry which are referred to it by the Secretary or by the Chairman of the Council on Environmental Quality through the Secretary.\footnote{61}

Though these functions undoubtedly require expertise on matters of technical, scientific, and industrial complexity, the real question posed by the presence of the Council is whether its responsibilities were discharged within a public or private hierarchy of values.

Certainly, the Council was never modest in taking under its purview an ambitiously wide range of problems related to environmental policy. The limiting condition established by Section 2(5) of Executive Order Number 11523, that the Council consider only matters referred to it, appears to have been only a formal nicety. In fact, the Council was quickly given a blank check by the Administration. At its second meeting, Secretary Stans observed that “the aim of NIPCC is to marshal the resources of the business community to deal with this country’s industrial pollution problems ***.” The Secretary indicated that “we need to know the problems of each industry, what each is doing about its particular problems, and how long it will take to solve them.”\footnote{62} The Council was not bashful in asserting in its first report that it would seek to “inform itself in advance concerning those areas of priority attention on which its advice may be sought ***.”\footnote{63} In light of these statements, the original charge of the Executive Order and of the President’s April 9, 1970 statement must be read not as a set of modest guidelines requesting technical or specialized advice, but as a broad invitation to a quasi-public body composed of representatives of private interests to participate — at least in a \textit{de facto} if not \textit{de jure} capacity — in the process of environmental policy making. While the Council’s role may formally have been advisory only, it is by no means clear that the broad role envisaged for the Council upheld the inevitably ambiguous distinction between advice and policy. The reason for this is obvious: the control of information, advice, and support to policy-makers and the granting or withholding of cooperation to policy-enforcing agencies is a potent power resource for an industrial advisory committee with the mandate like the one given NIPCC. It could hardly have been otherwise, considering that NIPCC sought for itself the prerogative of

\footnote{61. \textit{Id.} § 2.} \footnote{62. Minutes, NIPCC Meeting 2 (July 14, 1970).} \footnote{63. NIPCC, First Progress Report (July 14, 1970) (emphasis added).}
being, according to Bert S. Cross, its first Chairman, "a central source of industry information and planning concerning control problems," "the communication mechanism between plans and programs of the government and the activities, responsibilities and programs of the industries most closely involved in the industrial pollution problem," and "the principal consulting organization as to economic problems of proposed standards and/or criteria and schedules being considered by National, State, or local governmental bodies." 64

NIPCC spokesmen rather consistently demonstrated thereafter a vision of the Council's role that reached beyond a common sense understanding that an advisor speaks only when spoken to. In his initial remarks to NIPCC, Cross urged industry to develop a "practical formula" — that is, policies — "of its own rather than being forced to tailor its operations to formulas legislated upon them." 65 Yet this is surely what regulatory statutes and administrative orders are — formulas enacted by public authority. In asserting that NIPCC's role was to develop its own "formulas," then, Cross was also claiming for the Council a role as an influential actor in the policy process and not simply as a peripheral advisory body or a rubber-stamp for agency decision-makers. The expansive role envisaged for the Council in 1970 continued to be reflected in NIPCC statements. Secretary of Commerce Dent referred approvingly of NIPCC's function of "providing an important two-way communications channel between American industry and the Federal Government" at the Council's 1973 meeting. 66 A 1973 memorandum issued by the Council described its accomplishments as including the provision of "a legal entity to bring chief executives of American industry together in partnership with government," the reduction of "adversary attitudes between government and industry," and provision of "a major source of industrial information for Commerce and other government agencies on industrial pollution activities." 67 By 1973 the Council could regard itself as an informational and technical "interface" between industry and government. On a technical level, for example, contacts

between NIPCC staff and EPA had become frequent. The Council prided itself, in short, as being a major conduit between government and the corporate sector.

These claims were large ones and they invariably gave rise to a host of questions concerning both the role of NIPCC and of other similarly situated groups. Certainly, there can be little doubt that at some point the competence, expertise, and cooperation of industry would be necessary for any long-run strategy for redressing the ecological imbalance. Certainly industry has not been wholly unresponsive to the environmental situation. It may well be that NIPCC played a major role in awakening American industry not only to the fact of environmental degradation but to its responsibilities under federal regulations and to its need to develop a forward looking approach to industrial pollution. The Council claimed to have stimulated industry to initiate cost-benefit studies on pollution controls and to have compelled an attentiveness to the cross-industry and multi-industry nature of industrial pollution. Nonetheless, the structure, the operation, and the performance of NIPCC no less than its formal mandate—or the perceptions of its leading personalities—suggest that NIPCC sought to meet the initial expectations of Cross and Stans by playing a role that is denied to other interested parties.

**NIPCC Membership**

That the tasks and roles assigned the Council by the President were not simply hollow expressions are confirmed by the nature of the membership of the NIPCC. The membership consisted not of industry technicians, experts, or public relations staff, but, without exception, of senior executives or chief executives, e.g., presidents and chairmen of the board, chief executive officers of many major American corporations and trade associations. They constituted, as Secretary Stans told the President at a White House meeting, "a very large part of the industrial might of the country." Bert Cross of the Minnesota Mining & Manufacturing Co.

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70. Office of the White House Press Secretary, Remarks of the President and
served as chairman until February 1973 when he was replaced by Willard F. Rockwell of Rockwell International Corp. Serving on the Council with Rockwell were such major corporate figures as Charles C. Tillinghast, Chairman and Chief Executive Officer of Trans World Airlines, Inc., Edward N. Cole, President of General Motors Corp., L. (Lee) Iacocca, President of Ford Motor Co., C. B. McCoy, President of E. I. duPont deNemours & Co., Howard J. Morgens, President of Procter & Gamble Co., Ralph Evinrude, Chairman of Outboard Marine Corp., J. K. Jamieson, Chairman of Exxon Corp., Donald M. Kendall, Chairman of the Board of Pepsico, Inc., Donald C. Burnham, Chairman of Westinghouse Electric Corp., and Rodney C. Gott, Chairman of U.S. Steel Corp. to name but a few. In all some 63 chief executives drawn from the major industrial sectors sat on the Council itself, while over 160 more were added to serve on approximately thirty sub-councils dealing with various categories of industrial activity. Despite the earlier requirement of Executive Order 11007 that membership "shall be reasonably representative" of the industries represented on a committee,71 the corporations represented on NIPCC were mostly big blue chip companies: few if any small businesses were represented among them. Nor, despite the clear mandate of Section 5(b) (2) of FACA, was the membership modified after the passage of FACA to achieve a fair balance of representation. Not one member was drawn from the responsible ecological groups, conservation organizations, labor unions, local governments, consumer groups or public-interest law firms which share a direct interest in the control and abatement of industrial pollution. In addition to the formal Council and sub-council membership of 225, there existed what might be termed as informal membership, consisting of a shifting body of observers who attended Council and sub-council meetings. The observers at sub-council meetings consisted for the most part, of representatives of non-member corporations or trade associations;72 observers at Council meetings were

Hon. Maurice H. Stans, Secretary of Commerce, to the National Industrial Pollution Control Board [sic] (Feb. 10, 1971). Bert S. Cross, the first chairman of NIPCC was recently indicted "on charges of income tax conspiracy involving almost $634,000 in allegedly fictitious deductions for illegal political contributions." N.Y. Times, Jan. 24, 1975, at 8, col. 3.


72. See, e.g., Minutes of the following Sub-Councils: Mining and Non-Ferrous Metals Sub-Council (Mar. 8, 1971); Electric and Nuclear Sub-Council (June 30, 1970); Beverage Sub-Council (June 23, 1970).
more likely to consist of government officials from such agencies as CEQ, EPA, CEA and the White House. The size and nature of the membership was, in sum, such that it could readily provide an effective transmission belt between all major segments of the corporate community and relevant government agencies.

**NIPCC Operations**

The Council was an active advisory body. The full Council met an average of three to four times a year to discuss matters of current interest, to receive briefings from government officials, to engage in continuing development of Council positions on long term matters and to receive reports of sub-councils. Individual sub-councils tended to meet somewhat less frequently. For the most part, they were chiefly concerned with preparing reports (discussed below) that surveyed and evaluated the pollution problems of a given industrial sector, with assessing the projected clean-up plans of a given industry and with publicizing industry responses to environmental problems. More importantly, however, the sub-council meetings provided a forum for intra-industry liaison, communication, and planning. While many of the sub-councils energetically devoted their time to drafting position papers and public reports, other sub-councils became closed arenas for crucial industry efforts to influence EPA’s regulatory activities — and apparently successfully so. The overall record of work is rather impressive to the outsider. Within three years the Council managed to generate more than 50 sub-council reports, three volumes of industry “commitments” to pollution clean-up, one volume of “case studies” of industry clean-up efforts, and a variety of position papers and studies. The record of meetings is equally impressive.

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73. See, e.g., Minutes, NIPCC Meeting (Nov. 5, 1971). A more diverse and open body of observers was on hand for the first Council meeting following passage of FACA; see Minutes, NIPCC Meeting (Feb. 14, 1973).

74. Testimony of William H. Rodgers, Jr., Hearings on Implementation of the Clean Air Act Amendments of 1970 (Title I) before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, pt. 1, 92d Cong., 2d Sess. 132-33 (1972) [hereinafter cited as Clean Air Implementation Hearings]. See also Minutes, Meeting of the Mining and Non-Ferrous Metals Sub-Council (Mar. 8, 1971); Minutes, Joint Meeting of Chemicals Fertilizer and Agricultural Chemicals, and Petroleum and Gas Sub-Councils (Jan. 27, 1971); Minutes, Meeting of Petroleum and Gas Sub-Council (Apr. 5, 1972).

75. Hearings on Agriculture-Environmental and Consumer Protection Appropriations for 1973 Before the Subcomm. on Agriculture-Environmental and Con-
Here, however, the public data provided by the Council is marked by unexplained discrepancies. Thus, the Council claims to have held more than 150 council and sub-council meetings between 1970 and 1973. The Council itself held nine of these meetings. In calendar year 1971 sub-councils held a total of 72 meetings whereas in fiscal year 1972, 55 sub-council meetings were scheduled but, apparently, only 18 were held. In 1972 only one full Council meeting was held. But the same Council statement also indicates that in 1972 175 meetings were held, while in 1973 a total of 205 meetings were either held or planned. The discrepancy between these figures is curious indeed, e.g., in 1972 175 meetings were held of which one Council and 18 sub-council meetings were publicly identified. What of the remaining 156 meetings? As I suggest below the explanation for these meetings is revealing of the pattern of activity one may expect to find associated with industry advisory committees — perhaps even in the FACA generation. Thus it appears that far from being an honorific group that met ceremonially from time to time in the Rose Garden to applaud governmental anti-pollution efforts, the Council was very much a hard-working body.

Hard-working though it may have been, it has been virtually impossible for an outsider to judge reliably the impact of NIPCC on the policy process. Ideally, of course, definitive answers to such questions turn upon an analysis of the interaction between NIPCC and the White House, the Office of Management and Budget, CEQ, EPA and other relevant agencies and upon some estimate of the extent to which its recommendations and thinking have influenced key administrative policy-makers. Unfortunately, the full data for this kind of analysis is unavailable and is unlikely to see the light of day in the near future. Like other industry advisory committees, NIPCC was a closed body for most of its lifetime. Until the passage of FACA, its meetings were closed to the public and its exclusive and secretive mode of operation was confidently defended in public and private. Indeed, representatives of ten...
environmental and conservation groups were emphatically denied admission to the autumn 1970 NIPCC meeting. At the same time, the Council declined to keep verbatim minutes. Summary minutes of pre-FACA meetings were available, but they could be secured only by running a red tape obstacle course or by examining them at the Department of Commerce.

Neither Executive Order Number 11671 nor FACA appeared to improve the situation and may well have driven NIPCC underground. Following the passage of FACA, for example, Council staff members began to suggest both on and off the record that NIPCC could not continue to function effectively under the Act. There is evidence that they were correct. As indicated above, the number of sub-Council meetings scheduled for 1972 was cut by two-thirds; the autumn 1972 meeting was cancelled; and the February 1973 Council meeting consisted solely of ritualistic speeches by government officials with none of the follow-up discussion that characterized earlier meetings. The Council and sub-council structure began, moreover, to wither away as informal mechanisms were employed to escape the stiffened requirements of public accountability. It should, of course, be remembered that even before the passage of FACA, industry advisory committees were required to meet minimal standards of public accountability. The matter of the 156 unexplained meetings, referred to above, illuminates the emerging pattern with dramatic clarity. Private inquiry revealed that these meetings constituted precisely the pattern of behavior

78. N.Y. Times, Oct. 15, 1970, at 40, col. 3. The matter was discussed briefly within the closed NIPCC chamber itself. Minutes, NIPCC Meeting at 4 (Oct. 14, 1970). Typically, the Minutes resort to the passive tense to explain that "it was noted that NIPCC is an industry advisory group created by Executive Order *** and that other forums have been created specifically to provide advice from other interests." Absent any sense of irony, the Minutes noted that one of these other forums, the relatively ineffectual Citizens' Advisory Committee on Environmental Quality, had as members the Vice Chairman of NIPCC (Mr. Willard F. Rockwell, Jr.) and the Vice Chairman of the Utilities Sub-Council (Lelan F. Sillan, Jr.). Following the discussion of this contretemps, the meeting proceeded to move on to other matters including "communication with the public about what industry is actually accomplishing." Id. at 11.

79. 15 C.F.R. § 4.1 et seq. (1974) provides for access to Commerce Department records. In mitigation, it must be recorded that even in the pre-FACA mode of operation, NIPCC staff were uniformly most courteous and helpful in aiding the author.

80. 1974 Appropriations Hearings, supra note 68, at 840.

FACA was designed to interdict: they were "informal consultations with individual members and their staffs on pollution problems."

Evasion of the emerging standards of openness became the order of the day as informal contacts, the creation of informal sub-groupings, and similar methods were used by NIPCC, and indeed by other advisory groups, to keep the sunshine out.

**NIPCC Public Relations**

Despite the relative absence of reliable information, some preliminary judgments about the Council's role from 1970-1973 can be made. First, the Council undertook as one of its priority tasks a massive public relations job both in terms of industry's own self-image and its public image. Underlying the Council's work was an almost obsessive concern that, as one set of minutes laconically put it, "industry, in general, has had difficulty communicating to the public both its environmental accomplishments and understanding of its problems."

A pervasive feeling existed throughout the Council's life that industry was publicly on the defensive against the Nader-like critics of the world. From the very outset the Council leadership sought to drive home to Council members the need "to encourage and assure effective communication with the public concerning industrial pollution control efforts." At an early meeting the

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82. Letter from Mr. Thomas W. Jackson, former Technical Director of NIPCC to author Aug. 21, 1973.

83. NIPCC's Technical Assistant Service through which technical personnel were made available upon request to government agencies constituted one such mechanism. See Memorandum to All NIPCC Sub-Council Chairmen and Vice Chairmen from Walter Hamilton (Apr. 14, 1971); Minutes, NIPCC Meeting, App. B (May 6, 1971); Closing Remarks of Bert S. Cross, Minutes, NIPCC Meeting, Attachment 8 (Feb. 10, 1971). NIPCC staff members were also a conduit for transmitting industry's point of view, as they did on the question of auto emission standards, 1974 Appropriations Hearings, supra note 68, at 840. Discussion with NIPCC staff members in spring 1973 suggested that Council members were inclined to meet informally in the NIPCC tent. This fact was stated for the public record when Acting Executive Director, John L. Sullivan, observed that FACA's requirements were "tough" but that "we handle a lot of business today by telephone and through meetings on a 1-on-1 basis." Id. See also Oversight Hearings, supra note 42, at 83.

84. Minutes, Steel Sub-Council (Oct. 30, 1970).

85. Informal interviews with various members of the NIPCC staff, Spring 1973. See also the plaintive complaints of one (unidentified) NIPCC member. Minutes, NIPCC Meeting at 5 (Oct. 14, 1971).

86. Statement by Bert Cross, supra note 64. This is a continuing motif; see, e.g., Comments by Secretary of Commerce Dent, Minutes, NIPCC Meeting (Feb. 14, 1973) (pages unnumbered).
Council agreed to inform both Government and the public about industrial efforts to check pollution. Members of the Council were asked to send in "before-and after case stories drawn not as public relations or propaganda pieces but as factual, informative and dramatic proof of action." Shortly thereafter the NIPCC staff earnestly solicited Council members "to get going on a communications — P.R. program," remarking that "the P.R. aspects of industry and pollution and what industry is doing is a tough nut to crack." The result was the issuance of what the Council called a *Casebook of Pollution Cleanup Actions*. In the words of the Council, the 100 cases in the book — drawn from over 1000 submitted "cases" — illustrated "what industry has done to improve the environment ***. The *Casebook* will provide a central reference source for governments, industry, and the public." To say the least, however, the *Casebook* is a curious publication. Consisting of reprints from newspapers, trade publications, and house organs of individual firms, the *Casebook* is little more than a compilation of public relations handouts that resemble TV commercials touting industry's environmental conscience. The environmental cases lack any of the scientific detail and reliability needed for a serious assessment of industry's anti-pollution efforts.

The *Casebook* was, however, secondary to the publication of sub-council reports. These forty-some reports cover a wide range of subjects on such well-known pollution problems as land and water pollution from recreational use or mercury to more exotic subjects such as acid mine drainage, deep ocean dumping of baled refuse or the animal slaughtering and processing industries. De-

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signed as "information papers" describing the thinking of the industries directly concerned with a particular problem, the reports are, in truth, fairly insubstantial contributions either as technical reports or position papers. Although they provide a moderately useful introduction to both a particular problem and an industry's view of that problem, and although they are regarded as a major input from NIPCC, there is little evidence that the reports have been reflected in, say, the work of either CEQ or EPA. When read side-by-side with the self-congratulatory Casebook, the reports can reasonably be viewed as evidence of the Council's desire to clean up the image of industry quite as much as the environment and to sell the new image through a government agency.\footnote{ Nonetheless, the Council was told that the reports were "read at every level." Russell Train sought to reassure the skeptical by stating that "while specific responses to suggestions and recommendations have not been forthcoming, many of these [the reports] have been reflected in policy action and legislative recommendations." Minutes, NIPCC Meeting at 1 (Feb. 16, 1972). Interestingly, these reports were also integrated into company and trade association public relations efforts, e.g., by being sent out to persons on selected mailing lists; see, e.g., Esmark, Inc., press release (July 17, 1973).}

\textit{NIPCC Intra-Industry Liaison}

A second role assumed by NIPCC flowed from the mandate of the Executive Order to "provide liaison among members of the business and industrial community to improve the quality of the environment."\footnote{Exec. Order No. 11523, § 2, 35 Fed. Reg. 5993 (1970).} Under this portion of its mandate, the Council sought to alert industry to the implications of the environmental problem for industry, to awaken industry to the dimensions of the growing body of Federal environmental regulations, and to generate forms of industrial collaboration on industrial problems. Although the sub-council reports have a distinctly public relations purpose, both the reports and the sub-council operations constituted one method for bringing industry together to deal with the linked problems of industrial pollution and government regulation.
In addition to these activities the Council also created a loose cadre of industrial technical personnel to provide "the best possible technical advisory groups in industry on any particular environmental technical question of interest or concern to CEQ and EPA." The Council has also stimulated an unspecified number of trade associations and organizations to survey the state of pollution control and abatement in their respective industries; in particular, it has led to the creation of a non-profit corporation, the National Center for Solid Waste Disposal, Inc., an industry organization which was designed to serve as a center for intra-industry communication, research, and study. Closely related to its public relations efforts, the Council also exacted from its members a massive number of so-called "leadership commitments" which purported to demonstrate what individual firms have done to "end one or more environmentally damaging practices."

But beyond such matters lies a more serious issue unaddressed by the termination of NIPCC in 1973. The national debate over environmental policy underlines one reality, namely, that pollution control regulations will be costly and that the development of extensive pollution abatement technology will introduce new factors into the industrial system. There has already been some indication that industry — supported by organized labor — may be inclined to work cooperatively in developing this technology. Advisory committees composed exclusively or predominately of corporate representatives are well-organized to help rationalize this new force as well as to influence the emergence of a new growth industry in pollution control. Certainly, the Nixon Administration showed itself ready to encourage government-industry cooperation and voluntary industrial cooperation — of which the NIPCC

94. NIPCC, Report of the National Industrial Pollution Control Council to the President of the United States and to the Chairman, Council on Environmental Quality 12-13 and App. E (Feb. 10, 1971); 1974 Appropriations Hearings, supra note 68, at 811.
96. Comments of John Riccardo, President, Chrysler Corp., N.Y. Times, June 1, 1971, at 78, col. 4.
Commitments was one sign — in the fight against pollution.\textsuperscript{77} If advisory councils generally continue to apply themselves in the post-FACA period to intra-industry efforts at collaboration, they may well become a focal point for a measure of industrial self-government in the area of environmental policy. By any reckoning, NIPCC was headed in that direction. With Executive Director Hamilton's observation late in 1971 that the Council's "environmental leadership" had already produced "a re-ordering of priorities in work sponsored by industry association ***," the promise appeared to have acquired a measure of reality.\textsuperscript{8} Although NIPCC has been terminated, advisory committees such as the National Petroleum Council are still active. By linking government to industry, on the one hand, and by exercising "leadership" in the corporate sector both directly and indirectly, on the other, high level advisory committees unavoidably provide a quasi-corporate character to the institutional connection between the industrial community and the environmental bureaucracy.\textsuperscript{89}

\textit{Influence and Policy of NIPCC}

The Council also sought, to develop a policy framework that can reasonably be regarded as having represented a broad corporate consensus on environmental policy. While the Council's interests touched on a number of significant environmental issues, one


\textsuperscript{8} \textit{Report of the Executive Director, Minutes NIPCC Meeting} (Oct. 14, 1971) (pages unnumbered); see Rockwell testimony, \textit{supra} note 97, at 833-34.

example might illustrate the direction the Council took. From the start, the Council was concerned with the tangle of conflicting regulation, overlapping governmental jurisdictions, and inconsistent and often costly standards which characterize environmental regulatory policy and which can obstruct even well-meaning efforts by industries to control pollution. Overcoming such barriers involves, as the Council's first report recognized, the determination of "national priorities compatible with our economy and our society ***."\(^{100}\) The last point is crucial. One of the priority-setting decisions that must be made, the all important question of costs, is one that NIPCC consistently dealt with following its establishment. Because the costs of pollution control and abatement are substantial, it is important to decide what portion of the costs will be absorbed by the public sector as against the private sector. It is equally important to decide how costs in the private sector will be met. No doubt the American public, as the cliche goes, will be willing to pay to improve the environment. But it does matter whether and to what extend individual persons will bear the costs as taxpayers or as consumers and to what extent industry itself must absorb the costs.

The decision as to who pays how much and who gets what is, of course, a political question. It is thus a delicate matter of public policy for the government, industry and the public to decide how to meet "the economic consequences of pollution control *** in the establishment of environmental standards and in the enforcement or inducement of desired reduction in pollution."\(^{101}\) On this issue the Council grew increasingly strongminded. Its guiding assumptions, as stated in its February 1971 Report to the President, involved, first, an endorsement of what it termed "the decision of the Nation to require the social costs consequences of pollution to be reflected in the cost of the production of goods ***" and, second, the belief that "this decision" must not impair "the effectiveness of the marketplace as a regulator of the system ***" and that environmental laws and regulations "take into account the basic requirements of the system both for freedom to innovate

\(^{100}\) U.S. Dep't of Commerce News, First Report of the National Industrial Pollution Control Council (July 14, 1970).

\(^{101}\) Report of NIPCC to the President, supra note 96, at 17.

\(^{102}\) Id. at 13.
and for stability of operating framework [sic], including access to a Nation-wide market.\textsuperscript{102}

Although both points are debatable given the controversy over the possibility of a steady state economy, they were never questioned by the Council. Nor was the Council content with merely stating the proposition; at the invitation of Administration spokesmen, it undertook to sponsor a number of studies and position papers elaborating this view in more rigorous cost-benefit terms.\textsuperscript{103} By late 1971, its interest in economic impact had become its "major new activity."\textsuperscript{104} Its concern in the matter was, moreover, far from academic. While sub-council reports were issued to the public, member firms were submitting to NIPCC substantial volumes of very precise information detailing the economic consequences of what Hamilton now chose to call "the rising ride of environmental regulations."\textsuperscript{105} The data was sent to Secretary Stans who, in turn, rapidly conveyed it to the President and the upper circles of the Administration.\textsuperscript{106} The Council's message came across loud-and-clear. It was that "the extent of impact of environmental regulation was both more severe and more disruptive and that the benefits of pollution expenditures in the near term are unlikely to occur in such a way as to offset the specifics of unemployment and other economic disruptions in prospect."\textsuperscript{107}

One result of this process of information gathering and position development was the creation of a major Task Force drawn from CEA, CEQ, OMB, EPA, NIPCC, Commerce, and the President's Science Adviser; its task was to carry out a detailed study of the economic impact of environmental actions. Another result was the rising tide of "environmental backlash" speeches from high administration officials — topped off by Stans' by-now famous "Wait a Minute" speech.\textsuperscript{108} Another consequence was Presi-

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\item \textsuperscript{103} NIPCC, Environmental Policy Advisory Comm. Report, Economic Policy Issues and Environmental Deterioration (Jan. 5, 1971); see also, comments of Bert S. Cross and Secretary Dent, Minutes, NIPCC Meeting (Feb. 14, 1973).
\item \textsuperscript{104} Report of Executive Director, supra note 98.
\item \textsuperscript{105} Id.
\item \textsuperscript{106} Id.
\item \textsuperscript{107} NIPCC Discussion Paper, Economic Impact and Transitional Compliance Assistance 3 (Oct. 14, 1971).
\item \textsuperscript{108} Secretary Stans' speech was delivered early in 1971 before another advisory council, the National Petroleum Council at its 25th Anniversary Meeting, reprinted in Not Man Alone, Jan. 1972, at 12-13. A NIPCC discussion paper attributes the speech to the work of the Council, supra note 107, at 2. The speech
dent Nixon's call for "a strong sense of realism" in the approach to the environment.\textsuperscript{109} Nor did NIPCC's efforts to meet the "urgent need" for "sound realistic data on which to base environmental policy and implementation actions" find favor merely in the executive branch: conservative elements in Congress were no less supportive of NIPCC attempts to clarify the economic impact on industry of environmental regulations.\textsuperscript{110}

Insofar as the Council's positions on the economic consequences of environmental regulation were reflected in an emerging Administration policy, one can fairly judge that NIPCC successfully performed its role as "adviser" to Executive Agencies and the President. It did so by energetically helping to shape the director of decision-making by means of the positions it developed, the harsh words it had for elements of existing policy, and above all by supplying technical and economic information. At a time when environmental policy was still in an early stage, the ability to stimulate and coordinate the provision of hard technical and cost data was a crucial resource that established the context for Administration policy. Indeed, NIPCC recognized the importance of technical expertise when in Spring 1971, it moved to create technical assistance groups to assist CEQ and EPA.\textsuperscript{111}

It can be said that NIPCC provided such a volume of persuasive argument, information and experience that in terms of the intra-Administration, climate of opinion it contributed to outcomes that might not otherwise have occurred. This is precisely the advantage afforded interests so homogeneously represented on an advisory committee. In all likelihood, an advisory body composed of a more diverse membership and open to the outside participation of environmental groups would have produced a volume of apparently became an important rallying symbol for embattled businessmen. See Minutes, NIPCC Meeting 4 (Oct. 14, 1971). See also Steck, \textit{Nixon and the Environment: A Critique}, ALTERNATIVES 17-18 (Wint. 1972).


\textsuperscript{110} See 1974 Appropriations Hearings, supra note 68, at 812. The Agriculture-Environmental and Consumer Protection Subcommittee recommended for fiscal 1974 an additional $1 million over the NIPCC budget request of $323,000; the extra funds were to be spent on a "major study of the effect of environmental requirements on the competitive position of American business." \textit{REPORT ON AGRICULTURE—ENVIRONMENTAL AND CONSUMER PROTECTION APPROPRIATION BILL, 1974}, H.R. \textsc{Rep.} No. 93-975, 93d Cong., 1st Sess. (1973).

\textsuperscript{111} See note 83 supra.
argument, information, experience, and feeling resulting in a different set of values and policy outcomes. Another kind of advisory group might well have generated more balanced and unbiased advice. It is quite possible, for example, that the value of a restored environment outweighs various immediate consequences to industry — especially if a more broadly defined social calculus is employed. The immediate point, however, is that in matters like this the advice of an advisory group like NIPCC is liable to carry weight on the sort of tough, practical, complex matters which do not form the common discourse of mass ecological Earth Days. One can well understand why the Executive Director of NIPCC could congratulate the Council at its October 1971 meeting on having developed a "new and more intensive role *** as adviser to the Administration."

As the foregoing suggests, the Council's policy role was directed in large measure toward establishing a general framework within which specific policy decisions could be made. But this activity constituted more than an abstract exercise. The Council did after all enjoy an enviable proximity to the policy process. Administration officials and agency personnel regularly attended Council and sub-council meetings. On such occasions they were frequently called upon to provide advance briefings on the Administration's legislative program, or on forthcoming administrative developments. Understandably, some sub-councils found themselves with little to do other than to prepare their respective sub-council reports. But others had the satisfaction of being urgently solicited for help in solving problems of policy or in assisting in the development of legislative proposals, as when the Fertilizer and Agricultural Chemicals Sub-Council was asked to hurry its report on agricultural chemicals so as to provide "a useful imput in the development of Administration draft proposals for amendment to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)." Sub-councils were often asked to designate technical

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112. Report of the Executive Director, supra note 98.
contact personnel or to create technical panels “to provide ready advice to EPA and others considering feasible criteria and standards for pollution measurement and abatement.” Differences of tone and stance did exist: EPA sought technical assistance and information, but mindful of its regulatory role and broader constituency, EPA officials appeared concerned to remind the Council of the realities of life and of the “formal and arms-length” relations between EPA and industry. Such moments notwithstanding, Administration officials routinely displayed a deferential posture before the Council.

Nor did Council members pass up the opportunity to use the Council and the sub-councils as a forum for pressing industry’s views or as a channel for transmitting particular claims, suggestions, and complaints. Agency officials attending Council meetings were fairly regularly treated to Council members singing the corporate blues: the minutes of the Petroleum and Gas Sub-Councils state at one point that “the consensus of the sub-council was that the conclusions drawn from the study could be seriously misleading and may significantly understate the real economic impact of air and water pollution abatement on the refineries.” Thus, although individual industrialists, industries, and firms had other points of access available to them, it seems fair to conclude that Council membership was quite useful in opening doors that might not otherwise have been opened. As the Acting Director succinctly put it:

117. Leisure Sub-Council, supra note 113. See also comments of Bert S. Cross and Walter A. Hamilton, Minutes, NIPCC Meeting at 1 (May 6, 1971).

118. Comments of Mr. Robert Fri, Deputy Administrator of EPA in Minutes, NIPCC Meeting at 4 (Feb. 16, 1972). See also the comments of EPA Administrator a year earlier, Industry and the Environmental Crisis — A Challenge and an Opportunity, Minutes, NIPCC Meeting, Attachment 6 (Feb. 10, 1971).

119. For example, on the question of controlling oil spills in port areas see letters (1) from the Chairman and Vice-Chairman of the Petroleum and Gas Sub-Council to Chairman Cross (May 6, 1971); (2) from Mr. Cross to Secretary Stans (May 5, 1971); (3) from Secretary Stans to President Nixon (uncertain date: apparently May 5 or May 6, 1971), in Minutes, NIPCC Meeting, App. C (May 6, 1971).

For the view of some NIPCC members on the vexed question of the industrial wastes inventory, see Minutes, Automotive Sub-Council Meeting (Sept. 30, 1971). Questions inevitably arise, of course, from the fact that nearly a score of member firms have had civil or criminal proceedings against them under various anti-pollution laws. See author’s testimony, supra note 57, at 377-81; see also letter from Department of Justice to Congressman Dingell, 117 Cong. Rec. at E 7830 (daily ed. July 16, 1971) and 117 Cong. Rec. at E 8808, pt. II (daily ed. Aug. 4, 1971).

In the area of guidelines that EPA is putting out heavily, which we have commented on, they have asked for our comments well before the final decisions were made on them. We have sat around the table with them and with members of industry to discuss the potential problems of the guidelines that they might have as an interim, and they have been happy to receive the comments; and have not always liked them.121

To suggest from this that the Council was in a position single-handedly to dictate policy would be simplistic and misleading. Nonetheless, the Council was at times involved in high-level lobbying on matters of policy to an extent sufficient to raise the question whether the Council exceeded the limits normally associated with advisory committee functions. It is, of course, difficult to measure the Council’s influence with precision. The circumstances surrounding any given case are too murky to satisfy strict methodological objections. Given closed doors, summary minutes, and informal staff-member-agency contacts, it could hardly be otherwise. Still, the evidence suggests that the Council did enjoy influence in the policy-process and that it may well have significantly contributed to the directions environmental policy took under the Nixon Administration. The Council’s role in the Administration’s handling of water pollution control legislation illustrates the point.

To begin with, the Council was deeply disturbed about the economic implications of increasingly severe pollution control standards. Its February 1971 report to the President, for example, brought forth the complaint that “increasing public concern with the pollution consequences of our affluent society has inspired responses at some levels of government which are incompatible with the economic health of our society. Standards have been established which are unachievable with presently available technology or are unattainable at economically tolerable costs.”122 That complaint, or ones similar to it, may well have influenced the initial language of the Administration’s bill on water pollution control.123 Council members were distressed by the economic implications of the water pollution control bill that passed the Senate early in November 1971 by an 86-0 vote. That anxiety was communicated to the Administration even before its all-out campaign to induce

121. 1974 Appropriations Hearings, supra note 68, at 842.
123. N.Y. Times, March 1, 1971, at 17, col. 4.
the House Public Works committee to modify the provisions in the Senate bill (S. 2770). Three days following the Senate vote, a hasty unscheduled meeting of the Council was held with a number of Administration officials, including three White House aides, and at least two key industry representatives in attendance as "invited observers/participants." Within days of the meeting the Administration launched its all-out attack against the bill. The nature of the meeting remains obscure. To Secretary Stans it was simply an opportunity for "obtaining Council members' views on the impact of S. 2770, and for the purpose of responding to numerous requests from Council members for a briefing on the views of the Executive Branch ***." Press reports put it somewhat differently, describing the meeting as a grand strategy session and generally attributing a catalytic role to the Council. But whether it was a modest briefing or not is a question of semantics. The meeting was indubitably the outcome of a mutual desire by like-minded parties, industry and the Administration, to confer on matters of mutual urgency. The central point is that the Administration chose the NIPCC as the opportune and legitimate method for so doing, that no contrary opinions were solicited by the Administration through similar top-level institutional channels; there was a "general consensur [sic], without formal vote or resolution ***" that the House Committee should hold further hearings and "a number of the members indicated their willingness in their private capacities to encourage direct comment on S. 2770 to the House Public Works Committee and to urge public hearings." Even disregarding the extent to which the minutes understate what transpired, it is evident that an important measure of joint Administration-industry coordination was arranged on the han-

125. Minutes, NIPCC Meeting (Nov. 5, 1971). The representatives in attendance were Mr. John Coffey of the Chamber of Commerce and Mr. J. William Haun, Vice-President of General Mills and a member of the National Association of Manufacturers' Committee on Environmental Quality. Nat'I J., supra note 127. See also N.Y. Times, Dec. 11, 1971, at 1, col. 1.
126. N.Y. Times, Nov. 8, 1971, at 1, col. 4.
127. Minutes, NIPCC Meeting at 1 (Nov. 5, 1971).
129. Minutes, supra note 127, at 3.
dling of the attack of S. 2770. And this occurred at a meeting barely three weeks after the October 14 meeting at which Chairman Cross had once again defended the "privacy" of NIPCC meetings. Although the Council may not have been the primary force behind the Administration's strategy on S. 2770, still, environmentalists favoring the bill might well have coveted the institutional advantages afforded industrialists for mobilizing their persuasive forces against the bill.

A more revealing insight into the nature of the role played by the Council and its sub-councils is demonstrated by the case of the EPA guidelines for state implementation plans for achieving air quality standards under the Clean Air Act Amendments of 1970. The proposed guidelines were published by EPA in the Federal Register on April 7, 1970 and under the normal rule-making procedures comment was invited by EPA. During the subsequent five weeks EPA received over 400 sets of comments from various private groups, state and local governments, industries, trade associations, federal agencies, and citizen groups. EPA then proceeded to prepare a final version of the guidelines; by June 28 the final revisions appeared to be finished so that the Deputy Assistant Administrator for Air Programs could recommend their approval by the EPA Administrator. At this point, the guidelines had been revised in a fashion that environmentalists regarded as responsive to comments received from them by EPA. Before EPA could publish the guidelines, however, they were referred at the last moment by the White House to the Office of Management and Budget for an interagency "review" for the ostensible purpose of judging the economic impact of the guidelines. While under review, heavy pressure was reportedly brought by several agencies, including the Department of Commerce, for changes in the June 28 revisions of the guidelines. Numerous changes were made in

133. Clean Air Implementation Hearings, supra note 74, at 47-48, 56-64.
136. AYERS, COPELAND AND MILLER, supra note 134. N.Y. Times, Aug. 6, 1971, at 33, col. 5.
the guidelines as they were finally published on August 14, 1971. From the point of view of environmentalists, at least, the changes were decidedly for the worse. Among the most disturbing revisions, for example, were those that added new language that encouraged states to take economic and social impacts into consideration in developing control strategies. Environmentalists also pointed with dismay to the abandonment of EPA's formula for the control of sulphur dioxide emissions from copper, zinc, and lead smelters. Despite protestations from EPA to the contrary, it seemed evident that the guidelines as published were less stringent, at best, from the April 7 and June 28 drafts.

Whether NIPCC was directly responsible for the new language or whether it was simply one of several like-minded agencies with sufficient clout to back up its persuasive eloquence is hard to ascertain. But there is no dispute over the claim that NIPCC did participate or did expect to participate generally not only after the five weeks of public comment was concluded, i.e., during the OMB


141. Environmental Protection Agency, Office of General Counsel, Memorandum of Law: Response to Senate Staff paper, Feb. 23, 1972, in Clean Air Implementation Hearings, supra note 74, at 311-15. See also comment of William D. Ruckelshaus:

"OMB did not get any final crack at the regulation. OMB is nothing more than a conduit to insure that other Federal agencies who want to comment on any regulation that we might issue are given that right to comment. The final determination as to what ought to be in these guidelines is mine ***. [T]hose changes have been made by me and not OMB ***. I would be glad to defend that decision as to those substantial changes which you [Senator Eagleton] think are in the final guidelines and which you think in some way weakens them, because I think there have been a lot of misrepresentations about what is in those final guidelines and how weak they really are."

Id. at 243.
review, but before the initial publication of the proposed regulations as well. The policy-related nature of the intervention is best described in the following exchanges in the Subcommittee hearings between NIPCC's Executive Director and Senator Eagleton. Hamilton's written statement to the subcommittee initiated the exchange:

The Council has proved to be a prompt source of practical information about how proposed environmental policies and programs would in fact work from the viewpoint of the industrial community. The main benefit of this information is as a source of technological, practical, and economic judgments which can be made available to the statutory decision makers in their administrative deliberations aimed at achieving the results sought by legislative or regulatory mandate. This source of information can serve to prevent operating in a "vacuum" separated from the real world. In this way, estimates of the practical problems likely to be encountered in implementing a given policy are identified promptly and can be weighed prior to embarking on control strategies.

SENATOR EAGLETON: In the proceedings held to review EPA actions and regulations, could you describe the scope of NIPCC or Department of Commerce participation? How much did you participate, and in what form? *** You say you do participate in some of EPA decisions ***.

MR. HAMILTON: No, I don't participate in the decisions. I have participated to the extent of bringing information to the attention of EPA representatives in the so-called coordination process.

SENATOR EAGLETON: Is it economic cost, technical feasibility, or what?

MR. HAMILTON: Sometimes it is economic feasibility; sometimes it is technical information obtained from council members.

SENATOR EAGLETON: You have 50 large companies or so that comprise that NIPCC Council, and you get information from them of a technical nature, and you testified earlier you pass it on to EPA, identifying the source from whence you got it.

MR. HAMILTON: That is correct.

SENATOR EAGLETON: And this occurs at a time later than when the public, whether that includes Government officials, industry officials, have commented under the Administrative Procedures Act.

MR. HAMILTON: Most commonly, this occurs prior to publication for comment.

SENATOR EAGLETON: Oh, well. That is even more interesting. Then you have an input that the public doesn't have before the initial rules are even promulgated for comment.

MR. HAMILTON: That is correct.

SENATOR EAGLETON: Frankly, that is worse than I thought. You have an input that the public doesn't have and cannot avail them-
selves of even before the tentative rules are first published in the Federal Register.

MR. HAMILTON: No, sir; I think you may misunderstand what I have said. What I am saying is that, prior to the promulgation for comment on material, there is an attempt to make sure that relevant facts with regard to the operability of what it is that is to be proposed are on the table.

SENATOR EAGLETON: I hear you loud and clear.142

As for the change in the formula for reduction of smelter emissions of sulphur oxides, the role of NIPCC and of its Mining and Non-Ferrous Metals Sub-Council has been well documented.143 Within three months of the formation of NIPCC, the Sub-Council had become a major vehicle for the smelting industry's attack on the 90% standard that had been first suggested by the National Air Pollution Control Agency (NAPCA) in 1970 and was subsequently contained in EPA's April 1971 proposed guidelines. Over the course of the next nine months the Mining and Non-Ferrous Metals Sub-Council carried out a series of meetings to formulate a common industry policy against the 90% standard. This part of the offensive reached a climax at a March 8, 1971 meeting attended by two sub-council members and fifty-three invited observers from individual firms, the American Mining Congress, and ten federal agencies and offices.144 At this meeting the work of the previous months reached a conclusion with a well-coordinated comprehensive attack directed against the 90% standard at both the state and federal levels. But even before this, the Council and its staff had been working on the subject: sometime before February, Council "comments [were] provided for the advice and consideration of the Administration ***" on the subject of "Copper Smelter Sulphur Dioxide Emission Standards vs. Ambient Standards".145 In February a staff report on "Air Pollution by Sulphur Oxides" was submitted to the White House.146 Following the publication of EPA's April proposals, the copper industry returned to the offensive. At the May 1971 meeting of the full NIPCC, the copper industry laid out the full horror story of an industry forced by overly harsh anti-pollution standards to face the prospect of a 30% increase in capital and operating expenses, and thus driven withal

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142. Clean Air Implementation Hearings, pt. 2, supra note 74, at 600, 580-82 (emphasis added).

143. See testimony of William H. Rodgers, Jr., supra note 140; ROGERS, CORPORATE COUNTRY 73-79 (1973); testimony of Walter A. Hamilton, supra note 142, at 600-01.

144. Minutes, Mining and Non-Ferrous Metals Sub-Council Meeting (Mar. 8, 1971).

145. Supra note 94, at 10 (1971).

146. Testimony of Walter A. Hamilton, supra note 142, at 601.
to a non-competitive position in the world market.\textsuperscript{147} With EPA’s August modification of the emissions standard for smelters, the desired result seemed substantially achieved. NIPCC was not, of course, the only forum utilized by the industry. Along the way, for example, a top level White House meeting on the subject was held.\textsuperscript{148} But it cannot be doubted that NIPCC voices entered into the process in a manner denied to non-industry groups. Nor can it be doubted that on this kind of low visibility issue, on which technological and micro-economic factors lie at the core of the decisional equation, NIPCC was an ideal forum for enabling industry to forge an impressive political, economic, and technological solidarity.\textsuperscript{149}

Undoubtedly, sinister explanations of the Council’s policymaking role are exaggerated. The Council did not sit conspiratorially at the right hand of Messers. Ruckelshaus and Train. Even before events overtook it, the Council had a lesser role in environmental decision-making than defense industry has in the military-industrial complex. NIPCC was only one of several industry devices for influencing decisions. Still, its potential was considerable, exemplified by its part in the campaign against S. 2770 and in the evolution of the implementation guidelines.\textsuperscript{150} The Council effec-

\textsuperscript{147}. Minutes, NIPCC Meeting at 2 (May 6, 1971).

\textsuperscript{148}. Testimony of William H. Rodgers, Jr., \textit{supra} note 140, at 146.

\textsuperscript{149}. In defending NIPCC’s actions in the matter, Hamilton simply underlined the Council’s role as a conduit and screening device for economic and technological information. In February 1972, he told the Council:

“There have been a number of somewhat erroneous reports in public media about the activities of the Council and its staff with regard to the micro-economic studies which have been conducted under the so-called McCracken Task Force, as well as the role of the Council in the Administration’s review of EPA’s State Implementation Plan Guidelines for meeting National Ambient Air Quality Standards. *** Technical and cost information relevant to Administration review of EPA’s State Implementation Plan Guidelines was requested from and submitted by many Council and Sub-Council members. The Council was not asked either to take a position on the Guidelines or to express specific views. But the information made available was helpful in the final promulgation.”

Minutes, NIPCC Meeting, App. D (Feb. 16, 1972). That the Council was not dropping the matter was made abundantly clear. Hamilton went on to say:

“EPA has received the Implementation Plans from the States and these are now under review. The Council has been asked to stand ready to provide information about technical and cost effects should the reviewing group so desire. While the Council is not a direct party to the review process, your inputs may well be needed on short lead time.”

\textit{Id.}

\textsuperscript{150}. For a situation where NIPCC intervention apparently added up to very
tively employed its strategic location, its control of information, the prestige and status of its members, and its off-the-record mode of operation to advance the interests of its exclusive membership and to provide persuasive inputs to administrative agencies. But this is only the logic of the advisory committee system. As Secretary Stans proudly told the Council two months after the final EPA implementation guidelines were published and three weeks before the battle over S. 2770 began:

[T]his Council is an effective new institutional communication and leadership link for industry and Government. Virtually no major move is made in environmental policy without drawing on your advice and criticism. The rough spots in administration of environmental laws, standards, and implementation actions have been easier to spot and smooth out because you are always available to give help.151

CONCLUSION

A casualty of events unforeseen in the early days of the Nixon Administration, NIPCC was terminated and dropped from the Department of Commerce roster of advisory committees on January 4, 1975.152 Its departure was produced by the concatenation of several factors linked by a growing public hostility to unchecked, closed, aggregations of private power. First, NIPCC’s demise was hastened by FACA’s requirement that advisory committees broaden their membership and open their work to public view. Suggestions that NIPCC’s work might better be served by includ-
ing environmentalists, trade unionists, scientists, and the like along with industrialists was not embraced by NIPCC spokesmen who evidently preferred the privatized and ex parte opportunities of the existing arrangement. Unwilling to open itself to the public, NIPCC allowed its structure to wither away. At the same time, FACA's requirement that advisory committees be terminated if not renewed at the end of two years condemned NIPCC to a natural death in the absence of a postive presidential decision to renew its charter. That decision was not forthcoming. Second, congressional attacks on NIPCC proved fatal. By refusing in 1973 to appropriate requested funds for NIPCC's staff for Fiscal Year 1974, Congress weakened the staff infrastructure that had effectively linked the Council's members to the administrative process. Third, the Watergate atmosphere probably made it impossible for the paralyzed Nixon administration to rescue NIPCC.

There are, however, other troubling considerations that NIPCC's termination does not dispel. NIPCC represented an institutionalized means for segments of the corporate community to acquire a quasi-participant role in the political process and to enjoy disproportionate influence in one policy arena. Its existence also nourished the tendencies McConnell described when he warned that "the large extent of autonomy accorded to various fragments of government has gone far to isolate important matters of public policy from countervailing influence." One might describe such segmented and bounded policy arenas as self-sustaining, quasi-autonomous complexes, similar to the military-industrial complex. Collectively, they make up a shared community of interest and dependency between the state and the corporate sector in the fashion that Miller describes as the "techno-corporate state." The Nixon Administration may have pushed the tendency along, but it did not originate it.

154. During the House debate on H.R. 8619, Department of Agriculture and Environmental and Consumer Protection Agencies Appropriations, 1974, Congressman Dingell successfully moved a point of order against the appropriation of monies to NIPCC. 119 Cong. Rec. H. 4808 (daily ed. June 15, 1973). On June 18, 1973, Senator Fong moved an amendment in the Senate to restore part of the recommended appropriation that was stricken in the House; the amendment was defeated by a vote of 48-44. 119 Cong. Rec. at S. 12391-94 (daily ed. June 18, 1973). The money was not restored in Conference.
155. G. McConnell, supra note 5, at 164.
156. Miller, supra note 4, at 15.
157. See Green & Petkas, Creeping Corporatism: Nixon's Industrial State, New Republic, Sept. 16, 1972, at 18-21. In a recent article on the relationships of
As a matter of speculation, one can conclude that NIPCC was a preliminary if aborted element in the growth of an environmental governmental-industrial complex. Admittedly, NIPCC did not monopolize the flow of advice, information, and expertise on environmental matters; nor did it always get its way; nor is environmental regulation comparable to military-industrial policy. Nonetheless, by its formal and informal advisory roles, its prior knowledge of government thinking, its ability to supply decision-makers with data and expertise, its cloak of legitimacy, it was well located to define the alternatives facing the government. No doubt differences of opinion existed within its closed meetings rooms, but these were probably secondary compared to the basic hierarchy of values that informed its advice and to the common obligation necessarily owed by its members to their stockholders, to national corporate management, and to their commitment to growth and expansion. Environmentalists were left to wonder whether these values were consistent with those contained in the National Environmental Policy Act,158 the Clean Air Act Amendments of 1970,159 or the Federal Water Pollution Control Act Amendments of 1972.160 And despite FACA's salutary impact, it remains to be determined the extent to which other advisory groups still influence policy in similar fashion. Lest there be any doubt that basic values are involved, consider the declaration by Secretary Stans in announcing NIPCC's establishment:

We expect the Council to be totally constructive in analyzing the problems and measuring their size and significance in selecting alternatives means of dealing with them and in recommending courses of action to the Administration.161

As any student of politics knows, the ability to define alternatives is a decisive instrument of influence in the policy process.
