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# NOTE

## ZERO-BASE SUNSET REVIEW

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*Reformation of government has become a top priority at both the state and national level. One innovation that is sweeping the country is the sunset concept — automatic termination of agencies or programs unless repleved by the legislature. Along with zero-base budgeting — the review of spending programs from the ground up — sunset legislation is currently under consideration by Congress. Mr. Licata explains these concepts, reviews their history, and analyzes their benefits and faults. He also undertakes a critique of S. 2, the current proposal before Congress, and argues for substantial revision. The Model Federal Sunset Act which follows this Note incorporates the improvements suggested by Mr. Licata, most notably the synergistic combination of the sunset concept with zero-base performance review.*

### *Introduction*

One of the more significant issues in the 1976 presidential campaign was “big government.” The platforms of both major parties endorsed specific proposals to limit the size of the federal bureaucracy and to make it more responsive to the needs of the country.<sup>1</sup> In just the few months since his election, President Jimmy Carter has already taken several steps toward reform.<sup>2</sup>

This Note will focus on two of the most important aspects of potential reform: “sunset” legislation and zero-base budgeting. “Sunset law” is the popular name for a statute which provides

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1 The Republican Platform specifically endorsed President Ford's Agenda for Government Reform Act, S. 3428, 94th Cong., 2d Sess., 122 CONG. REC. S1739 (daily ed. May 13, 1976). See 34 CONG. Q. 2294 (1976). The Democratic Platform, while not referring to any pending legislative proposal, did endorse zero-base budgeting, mandatory reorganization, and sunset laws. See 34 CONG. Q. 1916 (1976).

2 President Carter, in his first address to the American people from the White House, endorsed the concepts of sunset legislation and zero-base budgeting. N.Y. Times, Feb. 3, 1977, at 22, col. 5. The President subsequently announced that the fiscal 1979 budget will reflect zero-base budget analysis. N.Y. Times, Feb. 23, 1977, at 14, col. 3; BUSINESS WEEK, April 18, 1977, at 160.

for the periodic termination of government agencies unless they are able to justify their existence.<sup>3</sup> Zero-base budgeting is a managerial technique which requires that each agency or department justify every budget dollar it seeks, rather than merely any requested increase over the previous year's funding.<sup>4</sup> It also requires an assessment of the impact of different levels of funding, including zero, on the operation of a program or an agency.<sup>5</sup>

The history of both concepts will be discussed, with particular emphasis on recent attempts to implement them on the state level. The Note will compare S. 2925,<sup>6</sup> a combination sunset/zero-base proposal considered in the 94th Congress, with S. 2,<sup>7</sup> the Federal Sunset Act of 1977, currently under scrutiny in the 95th Congress. S. 2 will be critiqued and proposals for its improvement will be offered. A Model Federal Sunset Act, prepared by the Harvard Legislative Research Bureau, follows this Note and combines the sunset and zero-base budgeting concepts into a single legislative proposal.

## I. SUNSET: A LIMITED LIFE

### A. *Historical Background*

#### 1. The Problem of Regulatory Failure

Richard Olney, Attorney General under President Grover Cleveland and a prominent railroad industry lawyer, may have been among the first to recognize the problem of bureaucratic malaise and the tendency of government agencies to become "captives" of their clientele when he advised his clients to drop their opposition to the first great regulatory commission, the Interstate Commerce Commission. In 1892 he counseled, "The older such a commission gets to be, the more inclined it will be

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<sup>3</sup> The term was apparently coined by Craig Barnes, a Denver lawyer active in the drive to enact the nation's first sunset law in Colorado. It refers to the unavoidable "end of the day" for terminated agencies. Simison, *New "Sunset Laws" Seek to Curb Growth of Big Government*, Wall St. J., June 25, 1976, at 1, col. 1.

<sup>4</sup> *Id.*

<sup>5</sup> Leone, *How to Ride Herd on the Budget*, NATION, May 22, 1976, at 626.

<sup>6</sup> 94th Cong., 2d Sess., 122 CONG. REC. S1044 (daily ed. Feb. 3, 1976).

<sup>7</sup> 95th Cong., 1st Sess., 123 CONG. REC. S144 (daily ed. Jan. 10, 1977).

to take the business and railroad view of things. . . . The part of wisdom is not to destroy the Commission, but to utilize it."<sup>8</sup>

More recently, Washington attorney Lloyd N. Cutler has observed the tendency of regulatory bureaucracies to become impotent: "[A]gencies 'age,' much like human beings. Almost all agencies have been viewed as more vigorous and successful in their early years, and less effective as they grow older."<sup>9</sup> Similarly, Common Cause, the "citizens' lobby," has criticized regulatory agencies on the grounds that many "operate with almost no press or public attention, are widely considered to be dominated by the special interests they were set up to oversee, and are vulnerable to conflicts of interest."<sup>10</sup> Numerous other problems, including delays, increased consumer costs, and lack of coordination between federal, state, and local agencies, also plague the federal government's regulatory agencies.<sup>11</sup>

Former United States Supreme Court Justice William O. Douglas encountered the difficulties of regulatory agencies as chairman of the Securities and Exchange Commission and was among the first to suggest a limited lifespan for government

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8 R. FELLMETH, *THE INTERSTATE COMMERCE COMMISSION* xv (1970).

9 Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1408 (1975).

10 7 IN COMMON 15 (1976).

11 Scholars and commentators have long lamented the problems of the federal bureaucracy. Much of the discussion has focused on the independent regulatory agencies, which comprise what is pejoratively referred to as the "headless fourth branch" of government. REPORT OF PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 40 (1937). These agencies exercise broad rule-making and adjudicatory powers over various sectors of the economy and are generally governed by boards whose members serve for specified terms, rather than at the pleasure of the President. Because these agencies have such a widespread impact on economic activity in the United States, they have been the subject of close scrutiny and much criticism. For varying analyses of the problems facing the federal regulatory apparatus, see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-86 (1975); M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); R. FELLMETH, *supra* note 8; REPORT OF THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION (1971); *Regulatory Reform — 1974: Hearings Before the Senate Comm. on Government Operations*, 93d Cong., 2d Sess. (1974); *Regulatory Reform — 1975: Hearings Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. (1975).

Many of the criticisms leveled at regulatory agencies may fairly be extended to the executive branch as a whole. The federal establishment has become a labyrinth of commissions, agencies, programs, councils, departments, and bureaus. Logically, the sunset concept is nearly as applicable to the rest of the executive branch as it is to the regulatory agencies. The early development, however, has largely focused on its application to regulatory agencies. The Model Act adopts this limited application, for reasons which are discussed at text accompanying notes 189-95 *infra*.

organizations.<sup>12</sup> Douglas suggested to President Franklin D. Roosevelt that every agency should be abolished ten years after creation. Roosevelt, Douglas reported, was amused by the suggestion but saw fit to ignore it.<sup>13</sup> Accordingly, a massive regulatory apparatus became one of the legacies of the New Deal.<sup>14</sup>

In a similar vein, Professor Theodore Lowi of Cornell University later advocated a mandatory termination clause for every act creating a government organization.<sup>15</sup> Such a provision, Lowi argued, would disrupt the cozy relationships between the regulator and the regulated, because, "as the end of its tenure approaches, an agency is likely to find its established relations with its clientele beginning to shake from exposure, new awareness, and competition."<sup>16</sup> A self-destruct clause, he suggested, "may ultimately be the only effective way to get substantive evaluation of a program and an agency."<sup>17</sup>

The lack of regular and systematic evaluation of all agencies is a cause of overlapping programs, inefficiency and waste.<sup>18</sup> In a 1974 study published by the Urban Institute, it was noted that "the federal government as a whole and most federal agencies have no overall system for objectively evaluating program and project effectiveness."<sup>19</sup> One reason for this shortcoming is that the sophisticated techniques necessary for evaluating federal programs, and making appropriate use of these evaluations, have not been developed.<sup>20</sup> This is largely due to the difficulty of measuring the effectiveness of bureaucratic activity. In the business world, balance sheets provide an accurate gauge of success or failure. Unfortunately, there is no equivalent method

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12 "The great creative work of a Federal agency must be done in the first decade of its existence if it is to be done at all. After that, it is likely to become a prisoner of the bureaucracy." W. O. DOUGLAS, *GO EAST, YOUNG MAN* 297 (1974).

13 *Id.*

14 Kohlmeier, *The Spurt and the Sputter*, 8 NAT'L J. 638 (1976). Not surprisingly, much of the discussion of regulatory reform post-dates the New Deal. For a brief overview of the history of various reforms aimed at the independent regulatory agencies, see L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW* 166-74 (4th ed. 1976).

15 T. LOWI, *THE END OF LIBERALISM* 309 (1969).

16 *Id.*

17 *Id.*

18 See 34 CONG. Q. 956 (1976).

19 J. WHOLEY, J. SCANLON, H. DUFFY, J. FUKUMOTO & L. VOGHT, *FEDERAL EVALUATION POLICY* 22 (1974).

20 "[T]he act of evaluating the impact of Federal programs . . . has not evolved far beyond the stage of cave-drawing." Havemann, *Congress Tries to Break Ground Zero in Evaluating Federal Programs*, 8 NAT'L J. 706 (1976).

of analyzing governmental efficiency.<sup>21</sup> Effective evaluation is further hampered by the failure of Congress to specify unambiguous goals for many legislative enactments. This lack of clarity in congressional directives obscures the evaluation of agency performance. Not only are the means of attaining congressional ends in dispute, but the ends themselves are often uncertain or discordant.<sup>22</sup>

## 2. The Inadequacy of Current Legislative Oversight

Formal congressional concern with ongoing performance evaluation, commonly referred to as oversight, dates back to the Legislative Reorganization Act of 1946,<sup>23</sup> which directed legislative committees to "exercise continuous watchfulness" of program performance in areas under their jurisdiction. A further attempt at legislative oversight was made with the adoption of the Intergovernmental Cooperation Act of 1968,<sup>24</sup> which required quadrennial committee review of grant-in-aid programs with no expiration dates. The General Accounting Office became the major instrument for Congressional review upon passage of the Legislative Reorganization Act of 1970,<sup>25</sup> which directed the Comptroller General to study and analyze the results of federal programs. The Congressional Budget and Impoundment Control Act of 1974<sup>26</sup> strengthened the oversight role of the standing committees by allowing them more flexibility in performing analysis and evaluation. In addition, the Comptroller General's program evaluation duties under the 1970 Act were clarified and strengthened by amendments which empowered him to establish an Office of Program Review and Evaluation and to develop evaluation techniques.<sup>27</sup>

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21 Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 84 (1969).

22 An egregious example of the latter difficulty can be found in the congressional directive of objectives to be furthered by the Civil Aeronautics Board in the exercise of its authority. See 49 U.S.C. § 1302 (1970).

23 Pub. L. No. 79-601, § 136, 60 Stat. 832 (1946) (current version at 2 U.S.C. § 190d(a) (Supp. V 1975)).

24 Pub. L. No. 90-577, § 601, 82 Stat. 1106 (1968) (codified at 42 U.S.C. § 4241 (1970)).

25 Pub. L. No. 91-510, § 204, 84 Stat. 1168 (1970) (codified at 31 U.S.C. § 1154 (1970)).

26 Pub. L. No. 93-344, §§ 701, 903(b), 88 Stat. 297 (1974) (codified at 2 U.S.C. § 190(d) (Supp. V 1975)).

27 Pub. L. No. 93-344, §§ 702(a), 801(a), 88 Stat. 297 (1974) (codified at 31 U.S.C. §§

Despite these mandates, congressional oversight, the "neglected stepchild" of the legislative process,<sup>28</sup> has not been conspicuously successful in providing meaningful evaluation of program and agency performance. One student of the oversight function has observed that:

The specialization of committees and the protection of their particular jurisdictions has encouraged an emphasis upon control of specific agencies and programs leading to an identification between those doing the reviewing and those being reviewed, rather than a critical evaluation of procedures. The primary outcome of the process has been to enhance a committee's position in Congress through control of access to a bureaucratic agency rather than the increased efficacy of administration.<sup>29</sup>

Equally important, the lack of meaningful analytic criteria for government programs has also hampered effective legislative oversight.<sup>30</sup>

### B. *State Experimentation*

As Justice Brandeis noted, it is "one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory."<sup>31</sup> The most innovative efforts to correct the bureaucratic syndrome and improve the legislative evaluation process have been made by the states. Much of the impetus for the current reform movement in Washington originated at the state level, and S. 2, the major pending federal sunset bill, is modelled after bills developed in various statehouses.

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1151-1154 (Supp. V 1975)). See generally S. REP. NO. 688, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3568.

28 Rosenthal, *Legislative Review and Evaluation — The Task Ahead*, 45 STATE GOV'T 43 (1972).

29 T. HENDERSON, CONGRESSIONAL OVERSIGHT OF EXECUTIVE AGENCIES 2-3 (1970).

30 See A. DOWNS, INSIDE BUREAUCRACY 24-40 (1967).

The Model Act seeks to attack these traditional oversight problems in two ways: first, specialized committees are established in the House and Senate to conduct the sunset reviews, and second, the zero-base review technique sets out a uniform system for the evaluation and analysis of agency performance.

31 *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1931) (dissenting opinion).

### 1. The Colorado Sunset Model: Development and Passage

The first attempt to implement the sunset concept was a provision in the proposed Texas Constitution of 1975. That constitution contained a sunset provision limiting all statutory state agencies having appointed officers to a ten-year lifespan unless renewed by law.<sup>32</sup> Institutions of higher education were exempted from this provision, and agencies with outstanding bonds were not to be terminated unless the legislature first provided an alternate means of servicing the debt.<sup>33</sup> Texas voters rejected the constitution in a statewide referendum, but the sunset proposal was not blamed for the defeat.<sup>34</sup>

Although the Texas sunset provision failed with the rest of the constitution, officials of the state Common Cause organization in Colorado soon laid groundwork in 1975 to secure passage of a sunset bill for Colorado.<sup>35</sup> Colorado Common Cause offered the sunset proposal after a comprehensive study of the boards and commissions within the state's Department of Regulatory Agencies.<sup>36</sup> That project concluded that "many of the agencies designed by the legislature to regulate in the public interest tended to become self-serving and protective of the profession or industry they were created to regulate."<sup>37</sup> Hearings on a sunset proposal were held throughout the state in late 1975, and additional public attention was focused on the matter by the Interim Judiciary Committee of the Colorado legislature, which had already begun studying regulatory reform.<sup>38</sup>

A bill to enact the sunset concept was introduced in the Colorado General Assembly early in 1976. The bill drew sup-

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<sup>32</sup> State Legislative Report, National Conference on State Legislatures, May 27, 1976 (on file at the *Harvard Journal on Legislation*).

<sup>33</sup> *Id.*

<sup>34</sup> Simison, note 3 *supra*.

<sup>35</sup> Kopel, *Sunset in the West*, 49 STATE GOV'T 135 (1976).

<sup>36</sup> Staff memorandum prepared for Illinois Legislative Council, Springfield, Illinois (on file at the *Harvard Journal on Legislation*).

<sup>37</sup> *Id.*

<sup>38</sup> For a more detailed discussion of the drafting of the proposal and the methods by which Colorado Common Cause attracted widespread public and press support for the concept, see *Hearings on S. 2925 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. 79 (1976) (statement of Sidney B. Brooks) [hereinafter cited as *Hearings on S. 2925*].



port from legislators of every ideological stripe.<sup>39</sup> With several refinements, it cleared the legislature with overwhelming approval and was quickly signed into law.<sup>40</sup>

## 2. The Colorado Sunset Model: An Analysis

a. *Statutory Provisions:* The Colorado statute<sup>41</sup> begins with a statement of legislative finding that state agencies and programs had proliferated without sufficient legislative oversight or regulatory accountability. A total of thirty-nine separate boards, divisions, and commissions are slated for termination over a 6-year cycle. Thirteen bodies are scheduled to expire on a rotating basis on July 1 of every odd year, starting in 1977.<sup>42</sup> The affected organizations license or regulate a broad spectrum of occupations ranging from barbers to hearing aid dealers. Agencies in related areas are to be reviewed simultaneously, facilitating consolidation of agency functions where appropriate.<sup>43</sup>

The heart of the Colorado statute is a provision which authorizes the legislature to extend the existence of any terminated agency for a period of not more than six years.<sup>44</sup> If no affirmative action is taken by the legislature, the agency is abolished. It is this action-forcing mechanism which gives sunset laws their teeth:<sup>45</sup> rather than forcing the legislature to act to abolish an agency, they require legislative action to save the agency. The burden of persuasion is not on an agency's opponents but on its supporters. All the pitfalls of the legislative process work against continuation of an agency rather than for it.<sup>46</sup>

Prior to the termination of any agency, the legislative audit committee is required to conduct a performance audit of that

39 Peirce, *Colorado's Fresh, Significant Sunset Proposal*, Denver Post, March 8, 1976, at 18, col. 1.

40 Common Cause, *Sunset: A Common Cause Proposal for Accountable Government* 7 (June 1976) (on file at the *Harvard Journal on Legislation*).

41 1976 Colo. Sess. Laws, ch. 115, § 1(1) [hereinafter cited as the Colorado Act].

42 *Id.* §§ 1(2)-(4).

43 Peirce, *supra* note 39.

44 The Colorado Act, *supra* note 41, § 1(6).

45 *Hearings on S. 2925*, *supra* note 38, at 214 (statement of John Gardner).

46 *Id.* at 73 (testimony of Gerald Kopel).

agency. This audit is to be completed at least three months prior to the termination of the agency.<sup>47</sup> The statute also mandates that public hearings on the termination of the agency be held in each house by the committee with normal legislative jurisdiction.<sup>48</sup> These committees, as well as the audit committee,<sup>49</sup> are to consider nine criteria, including the extent to which the agency has operated in the public interest, recommended legislative reforms for the benefit of the public, and encouraged public participation in making its rules and decisions.<sup>50</sup> The audit and public hearing provisions are designed to provide "a solid case for judgment" on whether or not to extend the life of an agency.<sup>51</sup>

Finally, the act provides for a one-year grace period after abolition to allow the agency to phase out its business. During this period the agency's powers and authority continue.<sup>52</sup> In addition, termination of an agency has no effect on the claim or right of any citizen against the agency, or on any claim or right of the agency which is subject to litigation.<sup>53</sup> In addition to allowing the agency to wrap up its affairs, the grace period will allow the agency to muster support for its continuation and will limit the ability of committee chairmen to "bottle up" extension legislation.<sup>54</sup>

b. *Difficulties with the Colorado Statute and Favorable Initial Results:* Proponents of the Colorado sunset legislation recognize that, as a "first draft,"<sup>55</sup> it had inherent limitations which could seriously affect its success. Because of these limitations, the Act was initially focused on regulatory agencies, rather than all departments of the state's government.<sup>56</sup>

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47 The Colorado Act, *supra* note 41, § 1(7).

48 *Id.* § 1(8)(a).

49 *Id.* § 1(7).

50 *Id.* § 1(8)(b). The other criteria are the extent to which the agency has permitted qualified applicants to serve the public, complied with affirmative action requirements, handled public complaints efficiently, and tried to assess the impact of both industry problems and the agency's actions affecting the public.

51 Peirce, *supra* note 39.

52 The Colorado Act, *supra* note 41, § 1(5).

53 *Id.* § 1(11).

54 Peirce, *supra* note 39.

55 Address by Bruce Adams, National Conference of State Legislatures' Conference on Sunset Legislation 11 (April 23, 1977) (on file at the *Harvard Journal on Legislation*).

56 Simison, *supra* note 3.

The chief doubt about the sunset law was whether the legislature, facing many problems and limited time in session, could devote adequate attention to the essential process of critical review of the agencies slated for abolition.<sup>57</sup> The fear was that legislators may be forced to vote on the basis of insufficient information or lobbying by pressure groups. Worse yet, renewal of agency charters might become a matter of *pro forma* legislative routine, undermining the law's purpose altogether.

Another shortcoming of the Colorado Act is that it strikes only at organic statutes which *create* regulatory agencies, ignoring the substantive provisions which define the duties and responsibilities of such agencies. This raises the possibility that an agency might be abolished, while the activities it was formerly charged with conducting continue to have the force of law. Thus, state law may require cosmetologists to secure a license, but termination of the Board of Cosmetologists would eliminate the only agency authorized to issue one.<sup>58</sup> Presumably, at least some of the activities of a terminated agency would need to be continued. The Colorado legislature must be careful, then, to insure that it transfers the essential duties of a terminated agency to a different organization. There is unfortunately no provision in the Colorado Act to insure that such transfers occur.

Despite these imperfections in the Colorado Act, its initial operation is encouraging. Even before sunset reviews began, there was evidence that agencies targeted for review conducted thorough housecleanings.<sup>59</sup> Moreover, of the first five agencies reviewed by the Senate committees to date, three have been terminated and the other two received substantial changes.<sup>60</sup> Such radical results may not continue indefinitely. But as Colorado Governor Richard D. Lamm has properly pointed out, the real test of sunset review is whether agencies are more responsive and accountable, not merely how many are terminated.<sup>61</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> Address by Bruce Adams, *supra* note 55.

<sup>59</sup> *Id.* at 6. For instance, the Shorthand Reporters Board, which had been criticized for certifying less than 3% of the applicants in 1975, increased its certification rate to 50% and updated its procedures.

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Id.* at 6.

### 3. Other State Efforts

In the short time since the Colorado General Assembly enacted its sunset law, every other state in the country has examined the idea.<sup>62</sup> Ten states have enacted sunset laws,<sup>63</sup> and in two states sunset bills await the signatures of the governors.<sup>64</sup> In another dozen states, sunset legislation has passed one house of the legislature.<sup>65</sup>

The experience in some other states can illustrate the pitfalls of poorly-considered sunset legislation. The Alabama sunset law, for instance, required the legislature to vote over two hundred agencies up or down, one right after another, with a two hour limit on debate for each agency.<sup>66</sup> As could be expected, the crush of work resulted in few detailed evaluations and little reform.<sup>67</sup>

Just as debilitating to the sunset concept may be its headlong application to the whole gamut of government activity. The Alabama, Arkansas, and Louisiana legislatures may have jeopardized its efficacy by taking on too much at once. After all, sunset review is still in developmental stages and evaluative techniques have not been fully refined. An overambitious sunset law may, as a practical matter, restrict a legislature to superficial evaluation and reduce sunset review to an exercise in paper-shuffling.<sup>68</sup>

Six of the ten state sunset laws are directed primarily at regulatory activities.<sup>69</sup> Common Cause, one of the major supporters of sunset legislation, and instrumental in securing its passage in many states, has advocated this approach<sup>70</sup> and lobbied against overly-broad legislation in many states.<sup>71</sup> The

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62 *Id.* at 2.

63 *Id.* As of April 20, 1977, the states are Alabama, Arkansas, Colorado, Georgia, Florida, Louisiana, New Mexico, Oklahoma, South Dakota, and Utah.

64 *Id.* at 3. The states are Montana and Indiana.

65 *Id.*

66 *Id.* at 5.

67 *Id.* at 6.

68 See text accompanying notes 189-95 *infra*.

69 Address by Bruce Adams, *supra* note 55, at 14.

70 *Id.* at 13.

71 *Id.* at 14. The states include Florida, Iowa, Oklahoma, Nebraska, and Utah.

A quite current survey of sunset activity at the state level is included as an addendum to Bruce Adams' address.

Model Act which follows this Note adopts the same limited approach.

## II. ZERO-BASE BUDGETING: FROM THE GROUND UP

### A. *Business Origins: Private Sector Innovation*

The management technique which has come to be known as zero-base budgeting (ZBB) was first developed and implemented in the private sector and was thereafter adapted for use by several state governments. An examination of the original development and application in the private sector is helpful in understanding its potential for accomplishing meaningful reform in government.

#### 1. Development and Implementation

It is generally conceded that ZBB was first used by Texas Instruments, Inc. The man responsible for its development, Peter A. Phyrri, published the seminal article describing the concept in 1970.<sup>72</sup> As formulated by Texas Instruments, ZBB involved sectioning corporate service and support operations into a series of "decision packages." Each decision package describes a specific activity in such a manner that management can (1) evaluate and rank it against other activities competing for the same or similar limited resources, and (2) decide whether to approve it or disapprove it.<sup>73</sup> Manufacturing operations were generally exempted from ZBB review, since levels of production are determined by sales volume, and a production level necessarily dictates certain expenditures for commodities, labor, and overhead.<sup>74</sup>

Decision packages were, to the extent possible, designated at "ground level" by managers operationally responsible for the activities under consideration.<sup>75</sup> Packages were then ranked in order of decreasing benefit to the company.<sup>76</sup> The packages were initially ranked by the same managers who prepared them. The next management level would review the initial

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<sup>72</sup> Phyrri, *Zero Base Budgeting*, 48 HARV. BUS. REV. 111 (1970).

<sup>73</sup> *Id.* at 112.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 114.

<sup>76</sup> *Id.* at 116.

rankings, make modifications where necessary, and forward the results to the next higher level. This process continued until top management completed a final evaluation. To avoid inundating upper review levels with an unmanageable number of packages to assess, Texas Instruments imposed a "cutoff expense line" at each organizational level.<sup>77</sup> Reviewers at the next higher level concentrated only on activities ranked below the specified cutoff. For example, a ground-level section manager might have ranked ten packages and passed them on. At the next level, if a fifty percent cutoff were imposed, the reviewer would "skim off" from the top of the list as many packages as account for fifty percent of last year's budget for that section, and evaluate only those packages ranked below the fifty percent line.<sup>78</sup> At the next higher level of management, an eighty percent cutoff might have been established, in which case the only packages reviewed would be those given the lowest priority in the previous ranking, accounting for twenty percent of the available allocation for that division. Thus, at the final step in the budgeting process, the number of packages to be analyzed would remain manageable.<sup>79</sup>

Phyrr was enthusiastic about the approach. He found it to be a flexible and powerful tool.<sup>80</sup> He has since noted that ZBB "is readily adaptable to organizations that have significantly different operations, needs, and problems."<sup>81</sup> By 1974, the idea had spread to dozens of companies including Magnavox, Xerox, and United California Bank.<sup>82</sup> Some notable successes were reported, such as Southern California Edison Co., which used ZBB to eliminate some \$21 million in spending from its 1974 budget.<sup>83</sup>

## 2. Problems Encountered with ZBB in Business

Almost certainly, the most significant stumbling block to ZBB's success was resistance from low-level managers who had

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<sup>77</sup> *Id.* at 117.

<sup>78</sup> This may, of course, be more or less than half of the packages on the list. The fifty percent cutoff refers to a monetary percentage.

<sup>79</sup> Phyrr, *supra* note 72, at 117-18.

<sup>80</sup> *Id.* at 119.

<sup>81</sup> P. PHYRR, ZERO-BASE BUDGETING 2 (1973).

<sup>82</sup> Murray, *Tough Job of Zero Budgeting*, DUN'S REV., October 1974, at 71.

<sup>83</sup> *Id.*

the initial responsibility to designate and rank decision packages. When initially confronted with ZBB, "managers are annoyed and even fearful of a new tool that is going to probe into their bailiwicks and force them to pin down precisely every activity they run and how much it costs."<sup>84</sup> Opposition from the front-line managers can spell disaster for a budget review program.<sup>85</sup>

The process can also be onerously time-consuming and can generate unmanageable paperwork. One firm which implemented ZBB, for example, found its managers working seven-day weeks to meet their obligations.<sup>86</sup> This results mainly from the difficulty of developing a cost analysis for each separate function. Developing some sophistication with the ranking process can likewise be a trying experience.<sup>87</sup>

Finally, ZBB can become a mechanical process, stifling the creativity of management and employees, if it is performed routinely.<sup>88</sup> Top-level management may be prone to reject all new ideas and innovations summarily. Reviewers must be sure to take a fresh look at the rankings each year and make detached and objective evaluations without relying on the previous year's rankings.

## B. *Application to Government*

### 1. The Need for Reform

The traditional method of preparing a governmental budget is to start with the previous year's budget and expand upon it.<sup>89</sup>

<sup>84</sup> Murray, *supra* note 82, at 71-72.

<sup>85</sup> There is perhaps particular reason to fear bureaucratic resistance in the federal government in light of past experience with budgetary innovations like PBB and MBO. See notes 94 & 95 *infra*.

Robert Havemann, writing an overview for the Joint Economic Committee's 1969 study of PPB, identified a "basic resistance by many Federal employees to economic analysis" as a "primary impediment" of the PPB system. JOINT ECONOMIC COMM., 91ST CONG., 1ST SESS., ANALYSIS AND EVALUATION OF PUBLIC EXPENDITURES: THE PPB SYSTEM 7 (Comm. Print 1969). When the shift from PPB to the Management By Objectives system was made in 1973, the failure of agency officials to try to measure the costs and benefits of alternative programs under PPB was cited as a key reason for its abandonment. Havemann, *Administration Report/OMB Begins Major Program To Identify and Attain Presidential Goals*, 5 NAT'L J. 783, 788 (1973).

<sup>86</sup> Murray, *supra* note 82, at 72.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 128.

<sup>89</sup> See, e.g., A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS 136, 150

Because most of the budget is a product of previous decisions, the largest determining factor of the size and content of this year's budget is last year's budget. The budget is thus like an iceberg: By far the largest part of it is below the surface, outside the control of anyone. Long-ranging commitments have been made; this year's share is included as part of the annual budget. There are mandatory programs, such as veterans' pensions, whose expenses must be met. Powerful political support makes the inclusion of other activities inevitable. Budgeting, therefore, is incremental, not comprehensive. . . . [Those] who make the budget are concerned with relatively small increments to an existing base.<sup>90</sup>

This technique has been properly characterized as "mindless and irrational."<sup>91</sup>

Increasing attention has been given to the importance of budget policies over the past few years. Congress has begun to exercise control over the priorities for federal spending<sup>92</sup> through adoption of the Congressional Budget Act of 1974.<sup>93</sup> In the mid-1960's, the executive branch first attempted to implement a comprehensive system of budget review called Planning-Programming-Budgeting (PPB).<sup>94</sup> It was replaced in

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(1964); Smithies, *Conceptual Framework for the Program Budget*, in D. NOVICK, PROGRAM BUDGETING 24 (2d ed. 1969); D. MUNDEL & J. STEINBRUNER, A PRELIMINARY EVALUATION INNOVATION IN THE STATES 197-203 (1971); Lindbloom, *Decision Making in Taxation and Expenditure*, in NATIONAL BUREAU OF ECONOMIC RESEARCH, PUBLIC FINANCES: NEEDS, SOURCES, AND UTILIZATION 306 (1961).

<sup>90</sup> Wildavsky, *The Annual Expenditure Increment*, 33 PUB. INTEREST 84, 89 (1973).

<sup>91</sup> *Id.*

<sup>92</sup> SENATE COMM. ON GOVERNMENT OPERATIONS, REPORT ON S. 2925, S. REP. NO. 1137, 94th Cong., 2d Sess. 25 (1976) [hereinafter cited as REPORT ON S. 2925]. See, e.g., Adams, *Disarming the Military Subgovernment*, 14 HARV. J. LEGIS. 459 (1977).

<sup>93</sup> See note 26 *supra*; see generally Fisher, *Congressional Budget Reform: The First Two Years*, 14 HARV. J. LEGIS. 413 (1977).

<sup>94</sup> In 1965, President Johnson launched an ill-fated attempt to institute a comprehensive evaluation program in the executive branch, Planning-Programming-Budgeting (PPB). 2 PUB. PAPERS 916 (1965). Budgetary evaluation as contemplated by the PPB system was primarily a means of enabling decision-makers to allocate scarce funds among competing needs and demands. At its heart was a requirement for "rigorous, measurable goal specification and evaluation of outputs of alternative programs in relation to goal achievement." H. GROVES & R. BISH, FINANCING GOVERNMENT 410 (1973). A variety of techniques were employed: cost-benefit analysis, cost-effectiveness analysis, operations research, and systems analysis.

Allen Schick, in a leading article, outlined a number of reasons for PPB's failure: (1) lack of training and expertise by the program evaluators; (2) imposition of a uniform system on widely varying departments, with no freedom for the various agencies to design their own systems or procedures; (3) the Bureau of the Budget's failure to demonstrate its commitment to the program; and (4) insufficient financial and staff



1973 by a different approach in the short-lived Management by Objectives (MBO) program.<sup>95</sup> The failure of each program attests to the hazards of poorly conceived or implemented attempts at reform.

Increasing concentration on the budgetary process, however, indicates a growing awareness among high officials of the urgency of controlling the runaway growth in the federal bureaucracy. The sheer size and complexity of the federal government is awesome. There are over 1030 programs for domestic assistance, administered by 52 agencies, which in fiscal year 1976 provided nearly \$60 billion to state and local governments.<sup>96</sup> Within this maze of programs, there is wasteful duplication and division of responsibility: there are 228 health programs, 83 housing programs, and 156 income security and social service programs.<sup>97</sup> Under the broad heading of community development, a total of 259 different programs are maintained.<sup>98</sup> Even when the categorization is narrowed, the picture remains murky: 28 separate programs are concerned

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resources devoted to the concept, both at BOB and in the agencies. Schick, *A Death in the Bureaucracy: The Demise of Federal PPB*, 33 PUB. AD. REV. 146 (1973).

Another commentator has cited further lessons to be learned from the PPB experience:

The oft maligned [PPB system] . . . did not fail because of inadequacies in the concept, but because of the weight of its procedures, the amount of paper work required, and the highly technical nature of the evaluations required. The same fate easily could await zero-based periodic program review and evaluation unless major efforts are made to guard against it.

*Hearings on S. 2925, supra* note 38, at 283 (statement of David B. Walker).

95 MBO was implemented in twenty-one agencies, including the eleven cabinet departments, in a letter from President Nixon dated April 18, 1973. The process consisted of two parts: (1) setting objectives with particular emphasis on results to be achieved by the agencies themselves, review and clearance by the Office of Management and Budget, and final approval by the President; and (2) "tracking," or follow-up, to insure that programs and activities were complying with the defined objectives. Havemann, *supra* note 85. Dissent soon developed, particularly among the lower level program managers and career civil servants who found that MBO required measurement of goals that were largely immeasurable, such as eliminating "discrimination in housing," or assuring "high-quality health care for veterans." Havemann, *Ford Endorses 172 Goals of Management By Objective Plan*, 6 NAT'L J. 1597 (1974). The system went into "suspended animation" when Roy L. Ash, who supervised its implementation, was replaced by James T. Lynn as director of OMB. Havemann, *supra* note 20. MBO was last used in fiscal year 1975. For an excellent discussion of MBO, see *Symposium on Management By Objectives in the Public Sector*, 36 PUB. AD. REV. 1-45 (1976). See also R. ROSE, *MANAGING PRESIDENTIAL OBJECTIVES* (1976).

96 REPORT ON S. 2925, *supra* note 92, at 25.

97 Muskie, *Effective Government: Our Next Big Challenge*, 8 NAT'L J. 458 (1976).

98 REPORT ON S. 2925, *supra* note 92, at 26.

with veterans' medical services, 27 programs provide vocational education, and over 50 programs serve handicapped youth.<sup>99</sup>

These various programs are administered by a vast array of agencies, bureaus, commissions, and councils. The growth of such organizations has been extraordinary.<sup>100</sup> From 1960 to 1974, a total of 329 governmental bodies were created, while only 126 were abolished, for a net growth of 203.<sup>101</sup> In 1975 alone, 46 new units were created, while only five were terminated.<sup>102</sup>

As a consequence of this mushrooming federal establishment and its bewildering labyrinth of operations,<sup>103</sup> program goals are frequently thwarted by an unwieldy and unresponsive bureaucracy.<sup>104</sup> Furthermore, the government's size, a result of individual legislative initiatives enacted in piecemeal fashion,<sup>105</sup> has prevented realistic evaluation of program effectiveness. The incremental budgeting process is at least partially due to the perhaps insuperable difficulty of critically examining the individual merits of each separate spending request.

The bloated bureaucracy and the inefficiency it spawns have eroded public faith and confidence in the efficacy of government. Opinion polls have shown that a significant percentage of the American public believes that special interests dominate the bureaucratic decision-making process and that the government fails to spend money wisely.<sup>106</sup> The 1976 platforms of both major parties recognized public frustration and alienation with formal governmental processes.<sup>107</sup> Public apathy and disdain regarding government has been termed the "most dangerous social trend"<sup>108</sup> facing the nation. This wide-

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99 *Id.* at 25-26.

100 *Id.* at 27.

101 *Id.*

102 SENATE COMM. ON GOVERNMENT OPERATIONS; 94TH CONG., 2D SESS., SUPPLEMENT TO 1976 ORGANIZATION OF FEDERAL EXECUTIVE DEPARTMENTS AND AGENCIES (Comm. Print 1976).

103 For an example of complex program organization, see the chart labelled "Economic Development Programs of the Federal Government" in *Hearings on S. 2925*, *supra* note 38, at 387.

104 Muskie, *supra* note 97.

105 *Id.*

106 *Hearings on S. 2925*, *supra* note 38, at 213 (testimony of John Gardner).

107 See note 1 *supra*.

108 *Hearings on S. 2925*, *supra* note 38, at 45 (testimony of Rep. Martin Russo (D-Ill.)).

spread dissatisfaction with bureaucratic performance justifies new methods of assessing and controlling the allocation of federal dollars.

## 2. ZBB in State Government: The Georgia Experiment

As with sunset laws, the first experimentation with zero-base budgeting in the public sector occurred at the state level.<sup>109</sup> Georgia was the first to use ZBB, and the story of how the state came to do so has been frequently cited. Jimmy Carter, while waiting to be sworn in after winning the 1970 gubernatorial election, read Phyrre's article in the *Harvard Business Review* and asked Phyrre to help implement a ZBB program in his administration. Phyrre became a consultant to the Georgia Bureau of the Budget in order to oversee the experiment.<sup>110</sup>

Zero-base budgeting was initiated throughout the executive branch of the Georgia state government, which encompassed 65 "major" agencies with aggregate expenditures of approximately \$1.5 billion.<sup>111</sup> Immediate full-scale implementation in the executive branch, rather than a phased approach, was chosen partially for political reasons: Carter could not succeed himself as governor and it was thought that complete development of the concept might take several years.<sup>112</sup> Although budgets for the legislative and judicial branches were initially exempt from zero-base review, the judiciary later adopted the method in preparing its funding request.<sup>113</sup>

Operational experience with ZBB in a small pilot program led to the development of standard forms and procedures for statewide use.<sup>114</sup> Uniform review procedures for all agencies were promulgated by the budget office, and training sessions

109 The U.S. Department of Agriculture experimented with a form of zero-base budgeting in the early 1960's, but with only minimal success. Wildavsky & Hammann, *Comprehensive Versus Incremental Budgeting in the Department of Agriculture*, in F. LYDEN & E. MILLER, *PLANNING, PROGRAMMING, BUDGETING: A SYSTEMS APPROACH TO MANAGEMENT* 151, 161 (1967). That zero-base approach, however, was intermingled with PPB. See note 94 *supra*. The first governmental use of the Phyrre model was in Georgia.

110 Wall St. J., March 1, 1977, at 1, col. 6.

111 *Hearings on S. 2925*, *supra* note 38, at 321 (testimony of Peter A. Phyrre).

112 *Id.* at 321-22.

113 *Id.* at 346.

114 *Id.* at 322. For a detailed presentation of the ZBB forms used in Georgia, see *id.* at 86-120.

were held to familiarize government officials with the plan.<sup>115</sup> The program was designed to require each agency to justify every dollar sought in appropriations requests, regardless of whether the funds were to be used to continue or expand existing programs, or to develop and implement new programs.<sup>116</sup> During its first year of operation the Georgia plan allowed each agency a great deal of discretion in deciding the lowest level within its organizational structure at which ZBB would be implemented.<sup>117</sup> In subsequent years, however, those agencies which had only partially employed zero-base review began extending it deeper into their structures.<sup>118</sup>

The program was originally scheduled for use in the preparation of Carter's first budget in fiscal year 1972. But when a shortage of \$57 million in general revenue developed, which was the equivalent of five percent of planned general fund expenditures, the ZBB method was applied retroactively to the fiscal 1971 budget Carter had inherited. Rather than ordering a uniform cut of five percent, the Carter Administration used its zero-base analysis to make reductions in the budgets of various agencies ranging from zero to fifteen percent.<sup>119</sup>

Although hard data concerning the operation of zero-base budgeting in Georgia are scarce, Phyrre has supplied some quantitative analysis: 47 state troopers in administrative positions were replaced with clerks and radio operators for a savings of \$180,000;<sup>120</sup> a mental health institution quadrupled its rehabilitative services with only a five or six percent budget increase by eliminating unnecessary maintenance activities;<sup>121</sup> and six beekeepers employed by the Department of Agriculture were "found" and promptly terminated.<sup>122</sup> Phyrre has been unable to calculate any figure on total savings realized through the implementation of ZBB in Georgia, although he points out that during Carter's administration services were expanded

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115 *Id.*

116 *Id.* at 121 (summary of zero-base budgeting procedures in Georgia).

117 *Id.* at 322 (testimony of Peter A. Phyrre).

118 *Id.*

119 *Id.* at 349.

120 *Id.* at 323.

121 *Id.* at 322.

122 *Zero-base Budgeting in Georgia*, 8 NAT'L J. 707 (1976).

without a tax increase as a result of channelling savings back into program delivery.<sup>123</sup> In contrast, a different study of the Georgia experience found that ZBB had had questionable impact and that there was considerable dissatisfaction among departmental budget analysts with the technique.<sup>124</sup> Nonetheless, Governor George Busbee, who succeeded Carter, has continued the program.

Since its adoption in Georgia, zero-base budgeting has been implemented in several other states. In New Mexico, improvements generated by the technique were found to be "neither as great as originally anticipated nor as minimal as detractors would claim."<sup>125</sup> On the other hand, New Jersey successfully utilized ZBB to cut spending by three percent, after a 21-year period in which average spending rose 14.7 percent annually.<sup>126</sup> Several other states, including Texas and Illinois, have adopted ZBB either throughout their state governments or in various departments.<sup>127</sup>

### 3. Difficulties with ZBB

Even Phyrri has acknowledged that problems may arise in the zero-base approach. A major difficulty is that "many bureaucrats feel threatened by a process which evaluates the effectiveness of their programs."<sup>128</sup> This resistance was exacerbated in Georgia because department heads had no input into the original decision to adopt ZBB.<sup>129</sup> The action of Governor Carter in presenting them with a *fait accompli* "seemed to have a detrimental effect on their attitudes toward the system."<sup>130</sup>

Another major problem is that government officials, just as business managers, are likely to experience trouble in formulat-

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123 *Hearings on S. 2925*, *supra* note 38, at 349 (testimony of Peter A. Phyrri).

124 Minnier & Hermanson, *A Look at Zero-Base Budgeting — The Georgia Experience*, 26 ATLANTA ECON. REV. 5, 3 (1976).

125 LaFaver, *Zero-Base Budgeting in New Mexico*, 47 STATE GOV'T 108, 112 (1974).

126 Scheiring, *Zero-Base Budgeting in New Jersey*, 49 STATE GOV'T 174, 177 (1976).

127 Bell, *State Administrative Organization Activities, 1974-75*, in THE BOOK OF THE STATES: 1976-1977, at 59 (The Council of State Governments).

128 Phyrri, *The Zero-Base Approach to Government Spending*, in *Hearings on S. 2925*, *supra* note 38, at 341.

129 Minnier & Hermanson, *supra* note 124, at 7.

130 *Id.*

ing decision packages, developing criteria for analysis, and ranking the packages appropriately.<sup>131</sup>

Some additional pitfalls of ZBB have been noted: (1) major efforts must be made to educate lawmakers, as well as bureaucrats, about the technique; (2) ZBB does not deter agencies from "padding" their decision packages, and padding is inevitable where legislative cuts are anticipated; (3) historical cost and performance data are rarely available by decision package, and estimates must be employed; (4) agencies may attempt to manipulate priority listings by ranking popular items lower than items which seem less likely to receive funding; and (5) budget preparation time needs to be relatively lengthy, particularly while the method is being implemented.<sup>132</sup>

In addition, the nature of justifying budget requests necessarily involves subjective judgments. To justify an appropriation for a given program, it must be shown that the anticipated benefits from that program outweigh the potential benefits obtained by spending the same money on some other program, or by cutting taxes. Obviously, there is no clear and convincing test for justification in these terms. Some argue that true justification is impossible, and that zero-base budgeting mistakenly presupposes that it can be done.<sup>133</sup>

Zero-base budgeting, as most of its advocates admit, is neither a comprehensive remedy for bloated spending nor a guaranteed method of achieving responsive government. At bottom, it may only be superior to other ways of cutting a budget.<sup>134</sup> Any decision to implement ZBB in the annual budgetary process should be made with awareness of the aforementioned problems and recognition that ZBB requires detailed and difficult work. Furthermore, there is still relatively little empirical evidence upon which to judge the merits of ZBB. Whether or not ZBB can in fact force annual performance reviews as a means of eliminating unnecessary spending

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131 Phyr, *The Zero-Base Approach to Government Spending*, in *Hearings on S. 2925*, *supra* note 38, at 341.

132 LaFaver, *supra* note 125, at 111-12.

133 L. MEREWITZ & S. SOSNICK, *THE BUDGET'S NEW CLOTHES: A CRITIQUE OF PLANNING-PROGRAMMING-BUDGETING & BENEFIT-COST ANALYSIS* 63 (1971).

134 Leone, *supra* note 5, at 626.

is a question which, like the effectiveness of sunset laws, may depend for its resolution on further experience.

#### 4. ZBB in the Sunset Review Process

Whatever its potential value as a tool for improving the annual budgetary process, ZBB techniques are complementary to the sunset review process.<sup>135</sup> A necessary component of effective sunset review is a meaningful program evaluation system. ZBB is one promising method of conducting the sunset review. In fact, Louisiana currently requires the use of zero-base procedures as an evaluative aspect of its sunset process.<sup>136</sup> S. 2925, the federal sunset bill considered in the 94th Congress, also provided for zero-base review of expiring programs. Unfortunately, S. 2, the main proposal currently under consideration, has eliminated the zero-base feature<sup>137</sup> and most of the evaluation criteria contained in S. 2925. The Model Act retains both the zero-base terminology<sup>138</sup> and the detailed performance review criteria.<sup>139</sup> This is desirable because any sunset decision must necessarily consider the consequences of the abolition of the agency or program under review. ZBB, with its emphasis on determining the impact of differing levels of program activity, including zero, seems well-suited for evaluation of agency abolition. With the adaptations contained in the Model Act, ZBB should enhance the likelihood of the sunset concept's success.

### III. THE FEDERAL SUNSET PROPOSAL

S. 2, introduced by Senator Muskie on January 10, 1977,<sup>140</sup> is a comprehensive sunset bill, affecting virtually all programs of

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135 Address by Bruce Adams, *supra* note 55, at 8.

136 See 1976 La. Sess. Law Serv. (West), Act No. 277, § 1(3).

137 The terminology was dropped because it was considered to be distracting attention from the sunset proposal itself. Interview with Lee Lockwood, Counselor to the Intergovernmental Relations Subcommittee of the Senate Committee on Government Operations (April 22, 1977).

138 See Adams, *Sunset Proposal for Accountable Government*, 28 AD. L. REV. 536-37 (1976).

139 See *id.* at 534-36. It is significant that virtually all state sunset laws contain evaluation criteria to guide the legislators and evaluators in sunset reviews. See Address by Bruce Adams, *supra* note 55, at 9.

140 123 CONG. REC. S145 (daily ed. Jan. 10, 1977). Numerous similar proposals were

the federal government. Although it has eliminated many of the specific review requirements contained in its predecessor, S. 2925, the legislation remains a substantial response to the need for more effective program evaluation.

#### A. S. 2: Provisions

Title I contains the heart of the federal sunset legislation.<sup>141</sup> It sets out the basic schedule for review and termination of programs over a five-year period.<sup>142</sup> Elimination of a program is to be accomplished by termination of all provisions of law which would authorize or provide a new budget authority for it.<sup>143</sup> A prohibition on budget authority for a program may be deferred by an extension resolution.<sup>144</sup>

Budget authority is defined in terms of the 1974 Congressional Budget Act.<sup>145</sup> The federal proposal applies only to laws

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introduced in the 94th Congress and received limited attention. Among the more important of these were: (1) The Regulatory Reform Act of 1976, S. 2812, 94th Cong., 1st Sess., 121 CONG. REC. S22,659 (daily ed. Dec. 18, 1975), which provided for termination of regulatory agency rules, with certain exceptions, if comprehensive regulatory plans were not adopted after a five-year review; (2) The Agenda for Government Reform Act, S. 3428, *supra* note 1, which embodied the Ford Administration's approach to reform and would have required an annual presidential assessment of needed changes. Congress would have had until November 15 of each year to enact the President's proposals or substitute its own. If the deadline was not met, the presidential proposal would have become the pending business in both chambers of Congress until action was taken; and (3) S. 2067, 94th Cong., 1st Sess., 121 CONG. REC. S12,101 (daily ed. July 9, 1975), which would have limited the period of authorization for new budget items and required comprehensive review of existing programs for which continued budget authority was proposed. None of these bills survived the committee stage of the congressional process, primarily due to the influence of Senator Muskie, sponsor of S. 2925, in the Senate Committee on Government Operations. See generally 34 CONG. Q. 1309-10 (1976). See note 209 *infra*.

<sup>141</sup> REPORT ON S. 2925, *supra* note 92, at 33. Throughout the discussion of S. 2, the Senate Report on S. 2925 will be cited where the provisions of the two bills are substantially equivalent.

<sup>142</sup> All programs scheduled to expire in a given year would end on September 30, the last day of the federal fiscal year. For example, all programs within the functional categories of National Defense, Recreational Resources, Farm Income Stabilization, Disaster Relief and Insurance, Health Research and Education, and Veterans Housing expire on September 30, 1979. S. 2, *supra* note 7, § 101(a). Also, the termination dates of programs are distributed by functional categories over the five-year period in such a way as to balance the workload of the congressional committees which are to review the programs under their normal legislative jurisdiction. REPORT ON S. 2925, *supra* note 92, at 32-33.

<sup>143</sup> REPORT ON S. 2925, *supra* note 92, at 33.

<sup>144</sup> See text accompanying note 179 *infra*.

<sup>145</sup> S. 2, *supra* note 7, § 2(a)(1). Budget authority is "authority provided by law to enter into obligations which will result in immediate or future outlays involving



which provide basic authorization for general appropriations bills, and focuses on individual programs rather than organic legislation creating the departments and agencies themselves.<sup>146</sup> Significantly, substantive authorization provisions for the conduct of government are not subject to sunset termination.<sup>147</sup>

Continuation of programs beyond their termination date is allowed only if Congress acts to provide specific new budget authority.<sup>148</sup> This requirement not only permits the extension of programs found to be meritorious, but also will end the practice of appropriating funds for a program under a non-specific authorization for an indefinite period.<sup>149</sup> Two major exceptions to this continuation provision are made: (1) new budget authority may be enacted without a previous authorization in the case of an emergency; and (2) new budget authority for one fiscal year beyond a program's termination date may be provided by either house of Congress if an authorization for it has been passed or reported in that house, and if new budget authority was available for the program in the preceding fiscal year. These provisions, not contained in S. 2925, are intended to give Congress sufficient latitude to meet the exigencies of an emergency.<sup>150</sup>

The Comptroller General is required to file reports identifying the programs facing termination and presenting a variety of information concerning each one.<sup>151</sup> A section which provides that neither house of Congress may consider legislation authorizing the extension of programs beyond their next review date<sup>152</sup> is the principal enforcement mechanism<sup>153</sup> of S. 2. When combined with a section providing that the next review

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Government funds, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government."

31 U.S.C. § 1302(a)(2) (Supp. V 1975).

146 REPORT ON S. 2925, *supra* note 92, at 33. A limited number of budget authorizations, providing for payment of interest on the national debt, and retirement and disability insurance, are exempted from the termination scheme.

147 *Id.*

148 S. 2, *supra* note 7, § 104(a).

149 REPORT ON S. 2925, *supra* note 92, at 36.

150 *Id.* at 36-37.

151 See S. 2, *supra* note 7, §§ 102(a), (b).

152 *Id.* § 101(c)(1).

153 REPORT ON S. 2925, *supra* note 92, at 37.

date applicable to a program is exactly five years after the last review,<sup>154</sup> the restraint on legislative action has the effect of limiting all future authorizations to five years or less. This also precludes passage of extension legislation without a favorable program evaluation.

A simplified system of conducting sunset reviews is outlined in Title II. Congressional committees are required to conduct a sunset review of each program within their legislative jurisdiction prior to the program's termination date. The sunset review is to be a systematic evaluation of a program to determine whether its merits justify its continuation at all, and if so, whether it should be continued at a level less than, equal to, or greater than the existing level. Significantly, the review "shall be undertaken in the scope and the detail the committee having jurisdiction deems appropriate."<sup>155</sup> Only minimal requirements are imposed on Committee reports, due by May 15 of the review year,<sup>156</sup> which recommend the continuation of a program. These are: (1) an identification of the problems or needs that the program is intended to address; (2) a qualitative and quantitative statement of the program's objectives and anticipated accomplishments; (3) an identification of any other programs having similar, conflicting, or duplicative objectives, and an explanation of how the program avoids duplication or conflict with such other programs; (4) an assessment of the consequences of eliminating the program, of consolidating it with another program, or of funding it at a lower level, taking into consideration similar or duplicative programs; and (5) a projection of the anticipated needs for the program, including an estimate of when, and the conditions under which, the program will have achieved its goals.<sup>157</sup>

The agency administering the program under review is required, upon request, to submit information and assistance to the reviewing committees.<sup>158</sup> Results of prior audits and reviews of a program must be submitted by the Comptroller General to the committees by October 1 of the year preceding

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154 S. 2, *supra* note 7, § 2(c).

155 *Id.* § 201(b).

156 *Id.* § 201(c).

157 *Id.* § 201(d).

158 *Id.* § 202(a).

the termination date.<sup>159</sup> In addition, the Comptroller General, Congressional Budget Office, and Congressional Research Service must furnish information and analyses upon request.<sup>160</sup>

By comparison, the zero-base review system set out in S. 2925 was considerably more detailed. According to its Title II scheme, the legislative committees responsible for a program review were to adopt plans for the conduct of the zero-base review by April 1 of the year preceding the review date.<sup>161</sup> These plans were to specify the priority to be given to the zero-base review, the criteria and standards to be applied in the review, and the information and analyses which would be required from the agency administering the program and the congressional support agencies.<sup>162</sup> The zero-base review to be conducted under S. 2925 would have been carried out under explicit statutory requirements, rather than "in the scope and the detail the committee having jurisdiction deems appropriate." Aside from the factors carried over to S. 2, these requirements included: (1) a statement of the performance and accomplishments of the program in each of the last four completed fiscal years and of the budgetary costs incurred in operating the program; (2) a statement of the number and types of beneficiaries or persons served by the program; (3) a summary for the last three fiscal years of the number and cost of personnel employed in carrying out the program, including those under contract; (4) an assessment of the effect of the program on the national economy; (5) an assessment of the degrees to which the policies of the program, as expressed in its rules and regulations, coincide with congressional objectives in establishing the program; (6) an evaluation of the reporting and record keeping requirements and activities of the program; and (7) an incremental analysis of program operation between the level below which it would not be feasible to carry on the program and the current level of operation.<sup>163</sup> At each incremental cost level, an analysis of the services to be provided, the number of employees required, a ranking of service priori-

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<sup>159</sup> *Id.* § 202(b).

<sup>160</sup> *Id.* § 202(c).

<sup>161</sup> S. 2925, *supra* note 6, § 201.

<sup>162</sup> *Id.* § 203.

<sup>163</sup> *Id.* § 204.

ties, and a statement of the impact on the national economy was required.<sup>164</sup> In addition to this more stringent burden on the Congressional committees, S. 2925 also required the agency administering the program under review to submit a zero-base review in accordance with the plan adopted by the committee.<sup>165</sup>

The final provision in Title II of S. 2 is carried over from Title III of S. 2925. The section would make changes in the Legislative Reorganization Act of 1970<sup>166</sup> designed to improve the process of ongoing program review aside from the periodic sunset review. The amendment changes section 236 of the Legislative Reorganization Act to require every executive agency which has been audited by the General Accounting Office (GAO) to report within six months thereafter to the GAO and to Congress on actions taken by the agency to correct deficiencies noted by the GAO study.<sup>167</sup>

Title III creates a "Citizens' Commission on the Organization and Operation of Government." This 18-member non-partisan commission, patterned after the Hoover Commissions, would study the organization and methods of operation of all departments of the executive branch, and report to Congress and the President by September 30, 1980.<sup>168</sup>

In Title IV, the sunset termination and review procedures of Titles I and II are extended to operate upon all "tax expenditure provisions." A "tax expenditure provision" is defined as any provision of the federal tax laws "which allows a special exclusion, exemption, or deduction in determining liability for any tax or which provides a special credit against any tax, a preferential rate of tax, or a deferral of tax liability."<sup>169</sup> The Joint Committee on Internal Revenue Taxation would develop a termination schedule for all tax expenditure provisions,

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164 *Id.* § 204(a).

165 *Id.* § 206(a).

166 31 U.S.C. § 1176 (1970).

167 S. 2, *supra* note 7, § 203(a).

Another provision contained in S. 2925, which would have amended § 201 of the Budget and Accounting Act of 1921, 31 U.S.C. § 11 (Supp. V 1975), to require the President to submit additional information pertaining to program objectives and achievements in his annual budget has unfortunately been deleted from S. 2.

168 S. 2, *supra* note 7, at §§ 303(a)-(b).

169 *Id.* § 401(a)(1).

which the 95th Congress would adopt.<sup>170</sup> The schedule is to provide for termination of each provision on December 31 of one of the five consecutive years after 1978.<sup>171</sup> The sunset reviews, to be conducted by the House Ways and Means Committee and the Senate Finance Committee, would "determine if the merits of the tax expenditure provision justify its continuation rather than termination, or its continuation at a level less than, equal to, or greater than the existing level."<sup>172</sup> Like Title I,<sup>173</sup> Title IV contains a basic enforcement mechanism which prevents enactment of any new tax expenditure provision without a termination date, and also prevents continuation of an existing provision absent completion of the sunset review.<sup>174</sup> These reviews, like their Title II counterparts,<sup>175</sup> are to be conducted in whatever scope and detail the committees find appropriate, and again, requirements for the contents of the review are minimal:

an assessment of the degree to which the original objectives of the tax expenditure provision have been achieved (including a statement of the number and types of beneficiaries or persons served) expressed in terms of the performance, impact, or accomplishments of the provision and the problem it was intended to address, and an analysis of the costs of the provision.<sup>176</sup>

As in Title II, there are provisions requiring the Department of the Treasury, Comptroller General, and congressional support agencies to assist the committees in preparing the reviews.<sup>177</sup>

Finally, Title V is devoted to a number of miscellaneous provisions. Each federal agency must submit to Congress the same statements of requests for new budget authority and estimated outlays in a fiscal year that the agency submits to the President or the OMB.<sup>178</sup> Perhaps the most significant provision is the definition of the "extensive resolution," which

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<sup>170</sup> *Id.* § 402.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* § 401(a)(4).

<sup>173</sup> See text accompanying notes 152-54 *supra*.

<sup>174</sup> S. 2, *supra* note 7, § 403.

<sup>175</sup> See text accompanying notes 155-57 *supra*.

<sup>176</sup> S. 2, *supra* note 7, § 401(a)(4).

<sup>177</sup> *Id.* § 412.

<sup>178</sup> *Id.* § 501(a).

under Title I may be used to defer for one fiscal year the operation of the sunset termination. The section empowers Congress to adopt a joint resolution to accomplish the deferral, and sets out various parliamentary rules, such as time deadlines, debate limits, and quorum requirements.<sup>179</sup>

Two significant features of S. 2925 not present in S. 2 are: (1) a requirement that the OMB study the feasibility of establishing a zero-base budgeting system for the Executive Branch in its annual budgeting process;<sup>180</sup> and (2) a provision which would have terminated the principal bill at the end of the first five-year review cycle. Thus, S. 2925 provided for its own sunset, in order to force a review of whether or not it had been effective.<sup>181</sup>

## B. S. 2: *Significant Problems*

### 1. Lack of ZBB Provisions

It is important to recognize that neither S. 2 nor its predecessor originally required zero-base budgeting in the preparation of annual budgets. S. 2 has abandoned all references to the ZBB concept, and S. 2925 dodged the issue by requiring an OMB study of the matter. Thus, the bills provide no congressional response to the general problems of incremental budgeting.<sup>182</sup>

As discussed earlier,<sup>183</sup> zero-base budgeting would require careful implementation and time for adjustment. But if the zero-base review provisions of S. 2925 are restored to S. 2, the sunset review will be harmonized with the annual ZBB procedures President Carter will implement in 1979.<sup>184</sup> The continuity, experience, and expertise which would develop could then be readily transferred to the sunset evaluations. Employment of ZBB in the preparation of annual federal budgets, therefore, will not only be a welcome response to the budget

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179 *Id.* § 504.

180 S. 2925, *supra* note 6, § 601. This issue may have been mooted by President Carter's announcement that he will implement annual ZBB review. *See* note 2 *supra*.

181 S. 2925, *supra* note 6, § 606.

182 *See* text accompanying notes 85-91 *supra*.

183 *See* text accompanying notes 129-34 *supra*.

184 *See* note 2 *supra*.

control dilemma, but could also enhance the quality of the sunset review process.

President Carter, by taking the initiative in introducing ZBB to the federal government, has provided executive impetus to the budget reform movement. Executive-sponsored attempts to implement annual zero-based budgeting, without a congressional imprimatur, may face the same fate as PPB and MBO.<sup>184a</sup> Although there is much reason to question whether zero-base budgeting, relying on low-level management to develop decision packages and initial rankings, can actually help eliminate waste from the vast federal establishment, it is clear that the key to its ultimate success lies with the bureaucracy itself. The front-line public servants must accept ZBB and commit themselves to making it work. PPB and MBO were launched by executive edict, and were undone in large part by the administrators, who were unwilling to devote the time and energy necessary to make them work.<sup>185</sup> Zero-base budgeting, if accomplished by an Act of Congress after a full airing in legislative process, may receive a better reception from the managers who must carry it out. The text of S. 2925 provided a convenient location for the inclusion of a zero-base budgeting directive.<sup>186</sup> S. 2, in eschewing the zero-base terminology, presently contains no logical nexus for the convenient insertion of such language. It may be, therefore, that congressional action on zero-base budgeting might more easily be contained in separate legislation. Several bills have been introduced in the 95th Congress which would require use of ZBB in the congressional budgeting process.<sup>187</sup>

The Model Act makes no provision for the use of ZBB in the preparation of annual budgets. This is primarily because it is designed to serve only as a sunset bill, and as such, is not as

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184a See text accompanying notes 94-95 *supra*.

185 See notes 85, 94 & 95 *supra*. Numerous factors, of course, contributed to the downfall of the two concepts. Notable among these was objection to the considerable amounts of paperwork generated by each. See *Yesterday's Panacea, PBB Is Out; Today MBO Is In*, 5 NAT'L J. 788 (1973).

186 See note 167 *supra*.

187 Three different bills in the House of Representatives would require the use of zero-base budgeting in the congressional budgetary process by amending the Congressional Budget Act of 1974. H.R. 521, H.R. 612, & H.R. 978, 95th Cong., 1st Sess. (1977).

concerned with the incremental budgeting problem. But it is almost certain that implementation of annual ZBB would complement and enhance the use of ZBB in sunset review, if merely by unifying budget makers under a single system. In any event the ZBB/sunset combination, applied at first on a limited basis, seems desirable. The two processes "are complementary — not competitive — approaches; they can coexist as a comprehensive set of procedures for legislative and executive review of government programs and expenditures."<sup>188</sup>

## 2. The Scope of S. 2

S. 2, as a sunset proposal, has serious deficiencies. The worst of these is that S. 2 takes a comprehensive approach, imposing termination dates on almost all entities of the federal government. It tries to cover a plethora of programs and tax expenditure provisions rather than to attempt a trial run in a limited area. This reflects the Senate Government Operations Committee's position that selecting out certain programs or agencies for the initial trial runs would jeopardize "the principle of neutrality, thereby conceivably making the process politically unworkable."<sup>189</sup> In support of its all-inclusive approach, the committee examined the impact of a comprehensive sunset law on committee workloads and ordered the termination schedule in S. 2925 in a way designed to equalize the burden. The workload nonetheless remains heavy.<sup>190</sup> Although the termination schedule in S. 2 has been further refined, the workload under any comprehensive sunset scheme will be extensive. The Senate Labor and Public Welfare Committee examined its review responsibilities under S. 2925 and concluded that implementation of a sunset law applicable to programs in its jurisdiction would require the addition of 44 staff members within five years and an annual additional "consultative budget" of \$50,000.<sup>191</sup>

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<sup>188</sup> *Hearings Before the Task Force on the Budget Process of the House Comm. on the Budget*, 94th Cong., 2d Sess. 51 (1976) (statement of Allen Schick).

<sup>189</sup> REPORT ON S. 2925, *supra* note 92, at 15.

<sup>190</sup> One improvement that would reduce the burden is to lengthen the review cycle to ten years rather than the present five. See Adams, *supra* note 138, at 529. This suggestion has been incorporated into the Model Act.

<sup>191</sup> *Hearings on S. 2925 Before the Senate Comm. on Rules and Administration*, 94th



The conclusion of the Government Operations Committee notwithstanding, it is likely that the sunset concept could be unfairly discredited by taking on too much too soon and being swamped by the sheer size of the federal establishment.<sup>192</sup> The broad, across-the-board implementation of the PPB evaluation has been cited as a contributing factor in that program's downfall.<sup>193</sup> Evaluation is a difficult task, requiring substantial commitments of time, labor, and funding. To seek comprehensive evaluation through an all-encompassing sunset bill may be to burden the system prematurely.

Another drawback of the broad sweep of S. 2 is that it sets all budget authority on a five-year renewal schedule. This emanates from the Government Operations Committee's concern over the increase in use of permanent authorizations. A persuasive case can be made, however, on behalf of at least some permanent authorizations.<sup>194</sup> Furthermore, the termination of a great many federal programs is simply beyond the realm of possibility.<sup>195</sup> While improved oversight of such agencies may be desirable, it is unwise to subject them to the threat of sunset and thereby jeopardize the concept's workability in areas where it is more critically needed.

The Model Act is limited to the major federal regulatory agencies. This will allow an immediate study of an area under considerable criticism<sup>196</sup> and refinement of the review techniques in a limited context before their extension to wider areas of the federal bureaucracy. Given recent criticism of the quality of congressional oversight of the regulatory apparatus,<sup>197</sup> the

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Cong., 2d Sess. 37 (1976) (memorandum of Senate Committee on Labor and Public Welfare).

192 Adams, *supra* note 138, at 530.

193 Schick, *supra* note 94, at 148.

194 A number of the permanent provisions involve assuring individuals of a basic income or necessities. An example is Supplemental Security Income, which operates under a permanent authorization, 42 U.S.C. § 1381 (Supp. V 1975), and provides for the subsistence needs of aged, blind, and disabled persons. It seems unnecessary to subject impoverished, elderly, and handicapped persons to the threat of losing their benefit payments. *Hearings on S. 2925 Before the Senate Comm. on Rules and Administration*, *supra* note 191, at 50-53 (memorandum of the Senate Committee on Finance).

195 It is highly unlikely that, for example, the Tennessee Valley Authority, the Center for Disease Control, or air traffic controllers would be abolished. 34 Cong. Q. 3258 (1976).

196 See note 11 *supra*.

197 See, e.g., N.Y. Times, Feb. 10, 1977, at 1, col. 5.

Model Act's focus seems particularly appropriate. In addition, the Model Act proposes the creation of special committees in the House and Senate to conduct the zero-base reviews. This is a short-term solution to the workload problem, but is designed to allow the development of a pool of expert staff which could then be distributed to the regular standing committees should a decision be made to extend the sunset provisions to other areas of the government.<sup>198</sup> Finally, the Model Act mitigates the committee workload obstacle by requiring that the detailed zero-base reviews be prepared by the Comptroller General. The committees would be free to devote more time to studying the report and holding public hearings.

### 3. The Review Process

The elimination of specific zero-base criteria contained in S. 2925 leaves S. 2 without significant guidelines for program reviews. The Title II requirements of S. 2925 were continually subjected to complaints that they were too burdensome and restrictive. The Rules Committee, for example, found the requirements too rigid and disruptive of existing committee timetables.<sup>199</sup>

If the congressional record of oversight activities were more impressive, these contentions might have merit. But, historically, congressional attempts at oversight have been sporadic, haphazard, and inadequate.<sup>200</sup> A major goal of sunset legislation is to assure that programs are thoroughly reviewed in order to allow an educated decision on whether the agencies should be abolished.<sup>201</sup> Permitting each congressional committee to set the applicable review standards can only perpetuate inadequate oversight. Detailed evaluation provisions should be

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198 It will also mitigate the problem of oversight committee co-optation. *See* notes 29 & 30 *supra* and accompanying text.

199 SENATE COMM. ON RULES AND ADMIN., REPORT ON S. 2025, S. REP. NO. 1263, 94th Cong., 2d Sess. 10-11 (1976).

200 "We in Congress have too often satisfied ourselves with the rhetoric of legislation, leaving the hard work of oversight — fundamental Congressional responsibility — to be carried on in a hit-or-miss fashion rather than with the steady diligence it deserves." 123 CONG. REC. S144 (daily ed. Jan. 10, 1977) (remarks of Sen. Muskie). *See generally* N.Y. Times, *supra* note 197.

201 *Hearings on S. 2925 Before the Senate Comm. on Rules and Administration, supra* note 191, at 53 (memorandum of Senate Committee on Finance).

added to S. 2 if it is to achieve its purposes. Clearly-delineated guidelines for review will not be an onerous burden, particularly if the scope of the Act is narrowed to review of regulatory agencies.<sup>202</sup> The Model Act retains the detailed zero-base review provisions of S. 2925.

#### 4. Interest Group Influence

Whether sunset legislation can function effectively in the face of interest group activity is an open question. Professor Lowi has pointed out that much of the tangled array of federal agencies and programs is due to "interest-group liberalism" — the policy of seeking to satisfy all who make concerted demands and protect vested interests rather than restructuring and real-locating government resources to meet changing needs.<sup>203</sup> Early in the 95th Congress, attempts to reform the Senate committee system were turned back largely due to the lobbying activities of powerful organizations.<sup>204</sup> Many interest groups may view their role in the sunset process as maintenance-oriented. They will support the extension of agencies which treat them as a clientele. In a political system "uniquely designed for maintenance,"<sup>205</sup> sunset legislation is designed to improve the position of reformers because all the pitfalls of the legislative process will now militate against continuation of a program. If, however, interest group pressure is able to override a committee's finding on the floor of the legislature, or, more likely, influence the development of the committee finding itself, sunset could be sapped of its potential. The best antidote for interest group pressure may be to insure representation of the "public interest" in the review process by such groups as Common Cause or public interest law firms. Unfortunately, at present it seems that the only way to guarantee such input would be through a government agency devoted to

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202 See text accompanying notes 189-95 *supra*.

203 T. Lowi, *supra* note 15, at 310.

204 S. RES. 4, 95th Cong., 1st Sess., 123 CONG. REC. S8 (daily ed. Jan. 4, 1977) would have reorganized the standing committee system by reducing the number of committees from 31 to 15. This plan was vitiated by extensive lobbying, resulting in the reinstatement of 10 of the 16 committees originally proposed for abolition. 35 CONG. Q. 279 (1977); N.Y. Times, Feb. 5, 1977, at 1, col. 3.

205 T. Lowi, THE POLITICS OF DISORDER 54 (1971).

representing the public interest in the sunset evaluation. This potential solution in itself has an obvious drawback: the agency might soon succumb to the same bureaucratic malaise which has infected many agencies of high purpose before, especially since the "public interest" is difficult to determine in many situations. Moreover, creation of another government agency is symptomatic of the type of thinking which has led to the need for a sunset law. In short, one may have to fall back upon a general faith in the legislative process, bolstered by the new leverage of reformers.

### 5. Agency Impact

Sunset legislation necessarily has implications for agencies which administer programs scheduled for evaluation. Agency independence could be threatened. An organization which aggressively pursues its duties invariably makes enemies. The legislative process is fraught with roadblocks and an agency or program could conceivably be eliminated in the legislative maze by an influential legislator. The fear of rankling a key legislator could well have a chilling effect on an agency's activity.<sup>206</sup>

Another drawback of sunset review is its potential impact upon agency morale. The periodic trauma of threatened program abolition, with its resultant loss of jobs, may dishearten agency personnel. Advocates of sunset, of course, argue that a periodic review will give agency employees, lulled into complacency by heretofore unchallenged job security, a much-needed jolt. But the periodic termination threat could result in unease, uncertainty, and distraction as the sunset deadline approaches, particularly if a renewal bill becomes mired in the legislative mill. This potentially adverse effect on agency *esprit de corps* should not be ignored.

### 6. Good Faith Review

Perhaps the most crucial question facing the sunset concept is whether legislators will carry out the reviews in good faith. The successful operation of sunset legislation depends upon candid,

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<sup>206</sup> Licata, *Sunset Laws: Limited Lifespan for State Agencies?*, ILL. ISSUES, February 1977, at 22 (on file at the *Harvard Journal on Legislation*).

objective assessments of program performance. If legislators use the upcoming termination process to exert a chilling effect on potential regulatory decisions, the sunset system could do more harm than good. Similarly, the tradition of legislative "logrolling" — the practice of trading votes in a coalition-building process — could give rise to difficulties. Obviously, a series of votes on the continuation of government programs offers lawmakers numerous opportunities to "cut deals" and "swap votes" for the rescue of pet programs. Sunset laws contemplate evaluation of programs on the basis of their merits and are not intended to furnish a source of political chits. If legislators bargain away votes on continuation of programs, the concept will be undermined.<sup>207</sup>

One might also be concerned where scandal erupts in a program immediately before or during the review process. Years of good performance could conceivably be overshadowed by the adverse publicity of a scandal, which may be exaggerated for a brief period. Temporary public pressure might force the ill-advised termination of an entire program. This is a possibility which bears on the advisability of enacting a sunset law, though there is no apparent way to fashion a legislative remedy.

#### IV. CONCLUSIONS

The difficulties involved in zero-base budgeting and sunset laws are not insubstantial, but neither are the problems they seek to solve. Uncontrollable spending, a mushrooming federal establishment, and declining public support for government are complex and knotty matters. It is unlikely that any remedy will be without faults or latent shortcomings. Sunset laws periodically force the legislative branch to examine what it has created; whether this will produce constructive results is debatable. Similarly, zero-base budgeting is a method of requiring administrators to identify the waste in their operations; whether waste will be eliminated is uncertain. It may well be that the federal government has become too big to be effectively harnessed. The gravity of the problem, however, urges

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<sup>207</sup> *Id.*

innovation,<sup>208</sup> and both concepts have numerous benefits. If merged so that the strengths of each concept complement the other, meaningful reform seems possible.

The Model Act adopts a three-part approach: (1) Title I establishes new committees of the House and Senate to conduct the intensive review of government agencies contemplated by Title III; (2) Title II establishes a format for the repeal of provisions of law which create certain independent regulatory agencies; and (3) Title III outlines the process by which agencies may be continued in existence, with a periodic in-depth zero-base review.

This Act was drafted with sensitivity to the possibility of its later extension to additional areas of the federal government. In its present form, it is intended to operate as a "pilot test" for the sunset concept. It must be remembered that there is to date a paucity of experience with sunset laws. To attempt too much too soon could result in the failure of the sunset concept. It must be given an opportunity for testing and experimentation: sunset should be phased in slowly or it is likely to depart quickly. This Model Act provides a solid foundation upon which a comprehensive sunset program can be built — after Congress has had an opportunity to study and refine the process.<sup>209</sup>

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208 Launching the "Hundred Days" of legislation to pull America out of the Depression, President Franklin D. Roosevelt implored his New Dealers: "Take a method and try it. If it fails, try another. But above all, try something." W. MANCHES-TER, *THE GLORY AND THE DREAM* 80 (1973).

209 As this Note was going to press, a new bill, the Regulatory Reform Act of 1977, S. 600, 95th Cong., 1st Sess. (1977), was introduced by Senators Percy, Byrd, and Ribicoff. It adopts some features of the Model Act, including a limited scope emphasizing the independent regulatory agencies. S. 600 also wisely lengthens the review period to an eight-year cycle, but perhaps goes too far in that direction by providing for a ten-year hiatus between each review cycle. The bill also provides detailed review criteria, though it relies upon existing standing committees rather than create a new review committee as suggested in the Model Act. Nor does S. 600 utilize the zero-base review concept. In other respects, S. 600 meets many of the criticisms raised about S. 2 by this Article.