

Private Immigration And Naturalization Bills - Equitable Safety Valves

I. INTRODUCTION

The private bill process in Congress, though much maligned and misunderstood, plays an integral role in the equitable treatment of individuals in our federal system. Historically, Congress passed these bills in a multitude of categories,¹ but at present, with few exceptions, only two types are used. Private bills may be enacted for disputed claims between the government and an individual, and for relief from administrative action taken under the authority of the national immigration and naturalization laws. This article is concerned solely with bills in the latter category.

This article will first discuss the definition of private bills and explain their role in our legislative process. Next, it will examine the constitutional underpinnings and general criticisms of private bills. Against this general background, the article will set forth the process as it functions today.

II. DEFINITION AND FUNCTION OF PRIVATE BILLS

A. DEFINITION OF PRIVATE BILLS

The definition and categorization of a bill as "private" has long been the subject of debate, and no one has adequately explained the reasons for classifying any particular bill as "private".² The only federal statute defining private bills dealt with the distribution of Congressional bills.

... The term "private bill" shall be construed to mean all bills for

¹See 4 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 247 §§ 3288-93 (1907) [hereinafter cited as HINDS]; see CONG. Q., INC., GUIDE TO THE CONGRESS OF THE UNITED STATES 335-40 (1971) for examples of past and present subject matter of private bills [hereinafter cited as GUIDE].

²In 1907 the Clerk of the House proposed the following: "A private bill is a bill for the relief of one or several specified persons, corporations, institutions, etc., and is distinguished from a public bill, which relates to public matters and deals with individuals only by classes." HINDS, *supra* note 1, at § 3285.

the relief of private parties, bills granting pensions, bills removing political disabilities, and bills for the survey of rivers and harbors.³

Congress deleted this definition in 1968 in the current version of that statute.⁴ Perhaps a more succinct and accurate description of a private bill is a bill which seeks relief for an individual who has exhausted his or her administrative remedy. The distinction between private and public bills, however, is more academic than real; any private bill could be reworded as a public bill and still serve the same function. The major significance of the distinction is that Congress handles the two types of bills differently once they have been labeled.

B. FUNCTION OF PRIVATE BILLS

Private bills, or some adequate substitute therefore, are an essential facet of our democratic system. Congressional lawmakers fall far short of omniscience, and they will never be able to foresee all the situations to which any public law will or will not be applied. In the interstices between the different public laws themselves, and between the specialized functions of the legislature and the judiciary, the private bill process is most necessary and meaningful. When an administrative body handling immigration cases lawfully⁵ denies relief to an individual, the courts will not and should not normally overturn that decision. Yet, that administrative action may offend the conscience of Congress. This highlights the value of the private bill. It enables Congress to deal with those situations in which, because of administrative inflexibility or Congressional fallibility, an administrative agency has made a decision inconsistent with the intent of Congress.⁶

III. CRITICISMS OF PRIVATE BILLS

The arguments in favor of limiting or abolishing private bills fall

³44 U.S.C. § 189 (1964), *as amended* 44 U.S.C. § 706 (1968). (Corresponds to Act of Jan. 12, 1895, ch. 23, § 55, 28 Stat. 609 *as amended* Act of Jan. 20, 1905, ch. 50, § 2, 33 Stat. 611.)

⁴44 U.S.C. § 706 (1968) *amending* 44 U.S.C. § 189 (1964). (*See supra* note 3 for history.) The original statutory definition in the Act of Jan. 12, 1895, ch. 23, § 55, 28 Stat. 609 could have been disregarded by either House under their constitutional power to make their own rules. HINDS, *supra* note 1, at § 3285, n. 3.

⁵The term "lawfully" as used here refers to two concepts: the statute under which the agency is acting is itself lawful (*i.e.* constitutional), and the agency is acting in a manner which statutes, court decisions, and its own internal rules permit.

⁶Private bills serve other important, albeit minor, functions, *e.g.*, they can focus Congressional attention on general legislation which is doing an inadequate job of handling specific types of situations. PRACTICING LAW INSTITUTE, FOURTH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 260 (1971) [hereinafter cited as INSTITUTE].

into three major groups. First, the private bill process is unconstitutional; second, the process is subject to abuses; and third, private bills take up too much of the time of Congress.

A. CONSTITUTIONAL ARGUMENTS

No one has ever seriously questioned the power of Congress to pass private bills. James Madison, in opposing a Constitutional amendment proposed at the federal convention in 1787, said that he felt the amendment would be,

... improper, ... because it will put out of the power of the national Legislature, *even by special acts of naturalization*, to confer the full rank of citizens on meritorious strangers.⁷ [*sic*] (emphasis added).

Congress derived its practice from Parliament,⁸ and has been passing private bills for varied purposes since the First Congress.⁹ The Supreme Court as recently as 1940 has upheld this process as constitutional.¹⁰

Power to pass private bills in immigration and naturalization cases derives from several constitutional sources. The Constitution gives Congress the power to pass uniform laws of naturalization,¹¹ and to take all necessary and proper action to accomplish this end.¹² Commentators have suggested that the authority to enact private bills may also derive from the power to pay the nation's debts.¹³ This includes those debts which are moral,¹⁴ honorary,¹⁵ or equitable,¹⁶ as well as those which are legal. However, this clause has limited application as a justification for enactment of private immigration and naturalization bills because in most cases these bills do not relate to any notions of "debt" owed to the beneficiary thereof. The cases which have declared that debts within the meaning of this

⁷MADISON, JOURNAL OF THE FEDERAL CONVENTION 487 (1840). This debate, which took place on August 9, 1787, concerned the number of years a person must be a citizen before he could become a Senator. The compromise reached was nine years. U.S. CONST. art. I, § 3.

⁸Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1687 (1966).

⁹GUIDE, *supra* note 1, at 330.

¹⁰*Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940). See also *Maynard v. Hill*, 125 U.S. 190 (1888).

¹¹U.S. CONST. art. I, § 8, cl. 4. The requirement for laws to be uniform under this clause seems to mean uniform as between the several states, rather than between the applicants. See Madison, *The Federalist*, No. XLII., in THE FEDERALIST 258 (H. Lodge ed. 1888); Note, *supra* note 8, at 1685.

¹²U.S. CONST. art. I, § 8, cl. 18.

¹³U.S. CONST. art. I, § 8, cl. 1.

¹⁴*Pope v. United States*, 323 U.S. 1, 9 (1944).

¹⁵*Id.*

¹⁶*United States v. Realty Company*, 163 U.S. 427 (1895). The term "equitable" is used in the sense of "ethical" rather than "jural". Bennett, *Private Claims Acts and Congressional References*, 9 JAG. L. REV. 9, 10 (1967).

clause may be moral, honorary, or equitable have all involved claims disputes¹⁷ rather than immigration or naturalization problems. Other constitutional bases proposed to account for the power to pass private bills have less applicability to the immigration and naturalization situation.¹⁸

Before a party may litigate the constitutionality of a private bill, he or she must have standing. This is a difficult barrier to surmount in the private bill situation. Though a detailed examination of the standing problem is beyond the scope of this article, it is probable that a non-resident, unadmitted alien does not have standing to question the enactment or non-enactment of a private bill,¹⁹ while a resident alien who is being deported might have such standing.²⁰ The following discussion will assume that the party bringing suit has standing to do so.

Commentators have raised several constitutional objections to the types of private bills passed in recent Congresses. The three most important objections are that they are bills of attainder, that they vitiate the federal doctrine of separation of powers,²¹ and that they violate individuals' rights to equal protection under the law.

1. BILLS OF ATTAINDER

A bill of attainder is a bill which singles out an individual or individuals for legislatively prescribed punishment without a judicial

¹⁷See, e.g., *Glidden v. Zdanok*, 370 U.S. 530, 567 (1961), *Pope v. United States*, 323 U.S. 1, 9 (1944), *United States v. Realty Company*, 163 U.S. 427, 439 (1896).

¹⁸Congress has authority to make rules regulating land and naval forces. U.S. CONST. art. I, § 8, cl. 14. See Bennett, *supra* note 16, at 9. This could arguably be a source of congressional authority to pass private bills awarding posthumous citizenship to aliens who served meritoriously in the U.S. armed forces. The number of these bills is quite small, though. See UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, ANNUAL REPORT 127 (1968) [hereinafter cited as ANNUAL REPORT (1968)]. Individuals have the right to petition the Government for redress of grievances. U.S. CONST. amend. I.

¹⁹See text accompanying notes 70-73; see Note, *supra* note 8, at 1685. *But cf.* *Kleindienst v. Mandel*, 408 U.S. 753 (1972) from which the inference may be drawn that third persons within this country may have standing to bring an action for violation of their own rights when an alien to whom they are related in some manner is unjustifiably denied admission. This case did not involve a private bill. See Comment, *Aliens and the Federal Government: A Newer Equal Protection* in this volume for a more detailed discussion of this case.

²⁰See text accompanying notes 74-76; see Note, *supra* note 8, at 1685 n. 10.

²¹Commentators have dealt with these latter two categories as if they are distinct, so for convenience they will be treated separately here. A bill of attainder could be alternatively viewed as one facet of a separation of powers objection. "The best available evidence, . . . indicates that the Bill of Attainder Clause was intended . . . as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965).

trial.²² The constitutional prohibition against bills of attainder²³ does not apply to private immigration and naturalization bills. Private immigration and naturalization bills are invariably passed for the benefit of a person rather than to someone's detriment. Since these bills do not punish, they are not bills of attainder.²⁴

2. SEPARATION OF POWERS

A more general constitutional objection commentators have raised to private bills is that they impair federal separation of powers. The Supreme Court has rarely reviewed the subject of separation of powers in the context of a private bill dispute, and the most recent decision lends little assistance in determining whether the enactment of some private bills may be a violation of separation of powers. In *Paramino Lumber Company v. Marshall*²⁵ the Court upheld a private bill's²⁶ constitutionality, disposing of the subject of separation of powers in one sentence: "Nor can we say that this legislation is an excursion of Congress into the judicial function."²⁷ The Court cited *Johannessen v. United States*²⁸ in a footnote as support for this otherwise unqualified assertion. That case, however, involved a public bill designed to retroactively guard against fraud in the obtaining of certificates of naturalization. The bills discussed in this article are not public bills, so the *Johannessen* case is scant support for the idea that no private bills violate the separation of powers doctrine. *Paramino* should therefore be limited to the holding that Congressional enactment of private bills is not per se a violation of the separation

²² *United States v. Lovett*, 328 U.S. 303, 315 (1946).

²³ U.S. CONST. art I, § 9, cl. 3.

²⁴ If a private bill affected the relations between two parties, e.g., *Maynard v. Hill*, 125 U.S. 190 (1888), it could act to the detriment of one of them. This could be construed as legislative punishment of that individual, and the private bill would then be a bill of attainder. *But see* discussion of *Paramino Lumber Co. v. Marshall*, text accompanying notes 25-28, 53-58. (Private bill extending a statute of limitations to the detriment of one party held constitutional. The party did not argue that it was a bill of attainder.) Recent private immigration and naturalization bills do not affect the relations between two parties. The authors examined all private immigration and naturalization bills enacted between 1963 and 1972 [hereinafter cited as AUTHORS' ANALYSIS]. See Note, *supra* note 8, at 1687 for a more extensive analysis of the benefit versus detriment of a private bill.

²⁵ 309 U.S. 370, 381 (1940). See Note, *supra* note 8, at 1686-87 for an exploration and rejection of the idea that *United States v. Brown*, 381 U.S. 437 (1965) may have indirectly overruled that specific holding of *Paramino*. See text accompanying notes 53-58 for discussion of *Paramino* in the context of equal protection.

²⁶ PRIV. L. NO. 445, ch. 198, 49 Stat. 2244 (1936).

²⁷ 309 U.S. 370, 381 (1940).

²⁸ 225 U.S. 227, 241 (1912).

of powers.

The violation of separation of powers argument is theoretically unsound. Judicial power²⁹ operates retrospectively on already existing laws, while the legislative power is the power to create, repeal or amend laws.³⁰ When Congress enacts a private bill it is making an ad hoc exception to the public laws. It is not interpreting the public law and then applying that interpretation to the individual seeking the private bill; it is creating a new law to fit a situation not contemplated in the original public law. Private bills are essentially new laws or amendments to existing laws, and therefore fit squarely within the permissible functions of the legislature.

Congressional enactment of private immigration and naturalization bills is not an usurpation of judicial functions for another reason. Article III, section 2, clause 1 of the Constitution, which delineates the scope of judicial power, only extends that power to actions in which a case or controversy exists. The Supreme Court equates the terms "case" and "controversy",³¹ and these terms imply the existence of parties with present or possible adverse interests.³² The nature of the action sought by the private bill beneficiary probably would not qualify as a case or controversy because these bills do not involve parties with adverse interests.³³ Therefore, Congressional passage of these bills would not be an exercise of judicial power.

Even if one could construe the private legislative process as resembling judicial functions,³⁴ enactment of private bills by Congress

²⁹No generally accepted precise definition of "judicial power" exists. See 16 Am. Jur. 2d CONSTITUTIONAL LAW 461, 462; see *infra* note 30.

³⁰16 AM. JUR. 2d *Constitutional Law* 465. "Broadly speaking, a judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts, under laws supposed already to exist. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

³¹*Muskrat v. United States*, 219 U.S. 346, 356 (1911). Insofar as these two terms are distinguishable, it is because controversies are possibly confined to civil suits. *Id.* at 356-57.

³²*Id.* at 357; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

³³One could raise the argument that the United States itself is the adverse party. If the United States is an adverse party, a case or controversy exists. If a case or controversy exists, Congress might be exercising a judicial function. If Congress is exercising a judicial function, it may be violating the constitutional separation of powers. This argument fails, however. The separation of powers issue could only arise if the private bill were enacted. (Otherwise there would be no separation of powers issue as it cannot be argued that Congressional failure to enact a private bill is an exercise of judicial power by Congress.) When Congress enacts a private bill, it has itself determined that the interests of the United States are not adverse to those of the beneficiary. Therefore, there is no case or controversy in the enactment of a private bill.

³⁴See 1 POMEROY, EQUITY JURISPRUDENCE §§ 48-50, 55-61 (4th ed. 1918) for the idea that in passing private bills, Congress resembles an ancient court of equity, for it is exercising its conscience.

would not necessarily violate the separation of powers doctrine. Today, accepted doctrine is that the three main branches of government have functions which overlap, and the exercise by one of another's functions is not always a violation of the concept.³⁵ For example, the Constitution expressly and impliedly permits Congress to exercise judicial functions in its internal affairs, in its power of contempt, and through its power of impeachment.³⁶ The Supreme Court, furthermore, has upheld the constitutionality of Congressionally-created courts such as the territorial courts³⁷ and the Court of Claims.³⁸ These legislative courts exercise judicial functions, yet do not violate separation of powers, because Article III, section 2, clause 1³⁹ does not give exclusive jurisdiction to the constitutional courts in all cases. It sets forth several categories of cases and controversies of which some are within the exclusive jurisdiction of the constitutional courts, and some are not. Unless the judicial functions which Congress arguably exercises in the enactment of a private bill are powers exclusively vested in constitutional courts, then the constitutionally mandated separation of powers has not been violated.⁴⁰ Private immigration and naturalization bills do not fit well within any of the categories to which the judicial power extends. The category which would be most likely to include private bill adjudication is "... Controversies to which the United States shall be a Party".⁴¹ The Supreme Court clearly held in *Williams v. United States*⁴² that adjudication of cases falling within that category is not exclusively within the jurisdiction of constitutional courts. Therefore, it would not be unconstitutional for Congress to adjudicate private bill controversies.

³⁵"The three great classes . . . establish three polar functions; in the polar areas is an intelligible doctrine which the courts have seen fit to enforce. But beyond those areas, logic tolerates and convenience dictates concurrent jurisdiction and combination of functions." JAFFEE AND NATHANSON, *ADMINISTRATIVE LAW* 33-34 (2d ed. 1961).

³⁶Frohnmyer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 ORE. L. REV. 211, 217 (1973).

³⁷*American Ins. Co. v. Carter*, 26 U.S. (1 Pet.) 511 (1828).

³⁸*Williams v. United States*, 289 U.S. 553 (1933).

³⁹"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

⁴⁰See *Williams v. United States*, 289 U.S. 565 (1933); *American Ins. Co. v. Carter*, 26 U.S. at 545.

⁴¹U.S. CONST. art. III, § 2, cl. 1.

⁴²289 U.S. 553 (1933).

3. EQUAL PROTECTION

a. *Applicability of the doctrine*

The third and potentially the most valid constitutional objection commentators have raised is the notion that the private bill process may violate individuals' rights to equal protection under the law. Although the Equal Protection Clause of the Fourteenth Amendment does not apply to federal actions, the Supreme Court has, in effect, read that clause into the Fifth Amendment:⁴³

Although "the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process'."⁴⁴

. . . Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment.⁴⁵

The essence of equal protection is that persons in indistinguishably similar situations will be accorded the same treatment under the law.⁴⁶ A process which provides for ad hoc exceptions to the public laws is in its very nature antithetical to the concept of equal protection, because it allows different treatment of similarly situated individuals. In enacting private bills, Congress both permits and inevitably causes that result.

b. *Factors causing different treatment*

First, individual legislators are not given any written standards or guidelines governing those circumstances appropriate for private legislative relief. Congressional adoption of such written standards could be a step in the direction of more uniform treatment of individuals seeking private bills. These standards, however, would suffer from the same limitations as public laws. They could not be comprehensive enough to anticipate all the situations which may arise. Unless Congress decided to limit relief only to those persons in circum-

⁴³The Fifth Amendment does apply to federal actions.

⁴⁴The Court cites *Frontiero v. Richardson*, 411 U.S. 677, 680 n. 5 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁴⁵*Johnson v. Robison*, 415 U.S. 361, 364 n. 4 (1974). (Denial of veterans benefits to conscientious objector who performed alternative services held not violative of the Fifth Amendment.) The Court also cites *Richardson v. Belcher*, 404 U.S. 78, 81 (1971). (Reduction of social security benefits to reflect workman's compensation payments does not violate the Fifth Amendment.)

⁴⁶The concept of equal protection under the law is not susceptible of exact definition (*Louisville Gas and Electric Co. v. Coleman*, 277 U.S. 32, 37 (1928)), but the test of like treatment in like situations has been expressed by the Supreme Court many times, e.g., *Hartford Steam Boiler v. Harrison*, 301 U.S. 459, 461-62 (1937). *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 197 (1936), *Colgate v. Harvey*, 296 U.S. 404, 423 (1935).

stances the standards anticipated, a system providing for ad hoc exceptions would still be necessary.

Second, the legislature has no formal mechanism by which it may compare the facts in the case before it with the facts in previous cases it has decided. Nor does Congress have means by which it may determine the specific reasons for the passage or defeat of previously introduced private bills. Committee reports explaining the factual background of each bill are published,⁴⁷ but no one has attempted to index these in a manner similar to the systems indexing court reports.⁴⁸ Thus, Congress has no equivalent to the judiciary's application of *stare decisis*. This defect is not easily cured. The nature of legislative discretion would make an attempt to catalogue the reasons for any private bill's enactment or defeat impractical. The opinions of one judge or nine judges on a court can be recorded, but not those of hundreds of Congressmen, unless Congress decides to make a great investment of time and energy to this end.⁴⁹

Third, the enactment or defeat of a bill may depend on factors totally unrelated to the merits of the case, thus causing different treatment of similarly situated individuals. These extrinsic factors include who introduces the bill⁵⁰ and the timing of the bill's introduction.⁵¹

Fourth, persons with influence over a legislator, or the money to hire attorneys and lobbyists to pursue their interests on Capitol Hill, are possibly more likely to have their bills enacted into law than are persons without wealth or influence. Although no one has shown this to be the case,⁵² the possibility exists. The combination of these four factors renders Congress unable to knowingly treat persons in identical situations identically.

⁴⁷These reports are not available outside of Washington, D.C., thereby making matters difficult if not impossible for interested parties in other areas of the country.

⁴⁸See Note, *supra* note 8, at 1703.

⁴⁹One proposal to offset this and other shortcomings of the private bill process has been to put the process in the hands of a quasi-judicial agency rather than in Congress'. *Id.* at 1704. Although this would undoubtedly be an improvement in some respects, Congress has not taken up the suggestion. In light of the great decrease in the volume of private bills introduced and enacted (*see text accompanying notes 121-23*), this may well be a wise forbearance by Congress.

⁵⁰Some Congressmen undoubtedly work more vigorously to get private bills enacted than others do. *See* letter from Senator Domenici to Elizabeth Perris, December 12, 1974 on file with the U.C. Davis Law Review. Interview with Doris Thomas, assistant to Congressman P. Burton, San Francisco, Calif., January 13, 1975.

⁵¹If a bill is introduced late in the term of Congress, it may never be acted upon during that Congress. Interview with Lisa Gonzales, assistant to Congressman J. Burton, San Francisco, Calif., January 15, 1975.

⁵²See text accompanying notes 77-82.

c. *Case law*

The Supreme Court has never unequivocally upheld the private bill process against an attack based on equal protection concepts. *Paramino Lumber Company v. Marshall*⁵³ is the most recent case in which the Court has considered the constitutionality of a private bill. In that case, the Court upheld a private law which provided for review of an order for compensation under the Longshoreman's and Harbor Worker's Compensation Act⁵⁴ after the final award. This review was ordered despite the fact that the applicable statute of limitations had run. The appellant, Paramino Lumber Company, suggested that if the Equal Protection Clause of the Fourteenth Amendment were read into the Due Process Clause of the Fifth Amendment, this bill would be unconstitutional.⁵⁵ The Court's ambiguous and unqualified response was, "This conclusion, however, we find untenable."⁵⁶ One may interpret the Court's rejection of the appellant's contention in two ways. Either the Court was holding that the Equal Protection Clause should not be read into the Fifth Amendment,⁵⁷ or the Court was holding that the bill would be constitutional even if the Equal Protection Clause were read into the Fifth Amendment. This latter interpretation is the stronger, given an unstrained grammatical construction of the appellant's suggestion.

The interpretation one gives to the Court's words is important because if the first interpretation is correct, *Paramino* has been overruled. The Court now reads equal protection safeguards into the Fifth Amendment.⁵⁸ If the second interpretation is correct, *Paramino* still stands as authority for the concept that private bills per se do not violate equal protection.

In the absence of direct precedent for determining whether private immigration and naturalization bills violate equal protection, the Court might look to analogous cases such as *Morey v. Doud*.⁵⁹ In *Morey*, a state law provided for regulation of "currency exchanges" in the business of selling money orders, but specifically exempted the American Express Company from the provisions of the Act. In singling out one company the legislature was, in effect, putting a

⁵³ 309 U.S. 370 (1940).

⁵⁴ 33 U.S.C. § 901-50 (1927).

⁵⁵ The appellant claimed that it was denied equal protection because the statute of limitations was extended in its case, but not in the cases of all other employers. A second ground the appellant raised was that other employees were being denied the same right to an extended statute of limitations that was being granted to this employee. Brief for Appellants at 16 *et seq.* Neither the Court nor the appellees dealt with this latter issue.

⁵⁶ 309 U.S. at 380 (1940).

⁵⁷ Note, *supra* note 8, at 1684 n. 2.

⁵⁸ See text accompanying notes 43-45.

⁵⁹ 354 U.S. 457 (1957).

“private bill” rider on a public law. Another money order company brought suit alleging that this special treatment violated its Fourteenth Amendment equal protection rights. The Court agreed with this contention, holding that:

... distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved, . . . (they) cannot be so justified if “the discrimination has no *reasonable relation* to these differences.”⁶⁰ (emphasis added)

If the Court chooses to apply this “reasonable relation” concept to private immigration or naturalization bills, it could find the private bill process violative of equal protection. The nature of the process⁶¹ leaves Congress unable to show that a rejection of private bill relief for one applicant relates reasonably to differences between his or her case and all similar cases in which private bills were enacted. On the other hand, *Morey* could arguably be distinguished on two grounds. First, the “private bill” rider exempting American Express did not serve a necessary purpose. The state legislature could have accomplished the same objectives by enacting general legislation. This legislation could have exempted a class of businesses of which the American Express Company would have been a member — perhaps the only member — at that time. The objectives of private immigration and naturalization bills, on the other hand, cannot be accomplished with general legislation. The inadequacy of the public law in the first instance creates the need for these bills.⁶²

One can distinguish *Morey* on a second ground. In *Morey* discrimination in favor of the American Express Company put the petitioner in an economically disadvantageous position. In contrast, enactment of a private immigration or naturalization bill for one person is not economically disadvantageous to another person seeking similar relief. Indeed, it may not be disadvantageous in any sense to a second person.⁶³ Thus, the Court could hold that in the absence of a proven detriment to someone, the “reasonable relation” doctrine put forward in *Morey* does not apply.

Clearly the Court could find these bills violative of equal protec-

⁶⁰*Id.* at 466 citing *Hartford Steam Boiler v. Harrison*, 301 U.S. 459, 463 (1937).

⁶¹This is described in the text accompanying notes 46-51.

⁶²*See* text accompanying notes 5-6. *Cf.* *Swain v. Alabama*, 380 U.S. 202 (1965), holding that the striking of Negroes from a jury panel under the peremptory challenge system does not constitute denial of equal protection. The Court examined peremptory challenges and found them to be a valuable facet of the jury trial system. (*Id.* at 219). The Court weighed the importance of preserving peremptory challenges in jury trials against the evils of discrimination on the basis of race and held in favor of the peremptory challenges. (*Id.* at 222). By the same logic, the Court could find that the importance of the private bill process outweighs its constitutional shortcomings.

⁶³*See supra* note 24.

tion and strike down the entire process as unconstitutional. The ad hoc private bill process cannot guarantee similar treatment of individuals in like circumstances. *Paramino*'s internal ambiguities coupled with recent developments in the application of the Equal Protection Clause to the federal government render that case questionable authority on the constitutionality of private bills. Furthermore, *Morey*, by analogy, suggests that Congress may not enact a private immigration or naturalization bill unless that discrimination reasonably relates to differences between the beneficiary's situation and that of others. However, as this article indicates,⁶⁴ these bills serve important functions. The Court may, therefore, choose to search for justification of the process.

d. Justifications for private bills

The Court could ignore the *Morey* analogy, and rely on *Paramino* as authority for holding the private bill process constitutional. However, the Court has other stronger justifications at its command. The Court could look to the general acceptance and use of these bills during the entire history of this country. The Court has stated that while the existence of a governmental practice for a period of time coextensive with or even predating our national existence does not in itself render that practice constitutional, it "is not something to be lightly cast aside."⁶⁵ As the Congressional practice of passing private bills is coextensive with our national existence,⁶⁶ the Court may well be inclined to put a heavier burden on one attacking the constitutional validity of the process.

The Court may also weigh the longstanding judicial policy of deferring to Congress on matters involving aliens. In *Kleindienst v. Mandel*⁶⁷ the Court reaffirmed the principle that the power to exclude aliens is "... a power to be exercised exclusively by the political branches of government."⁶⁸ The Court quoted Mr. Justice Harlan with approval, saying:

The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention is settled by our previous adjudication.⁶⁹

⁶⁴See text accompanying notes 5-6.

⁶⁵*Walz v. Tax Commission*, 397 U.S. 664, 678 (1970). The Court then quoted with approval Justice Holmes in *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . ."

⁶⁶See text accompanying note 9.

⁶⁷408 U.S. 753 (1972).

⁶⁸*Id.* at 765.

⁶⁹*Id.* at 766. See also *Boutilier v. INS*, 387 U.S. 118 (1967); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Knauff v. Shaughnessy*, 338 U.S. 537

The Congressional enactment of private immigration and naturalization bills may be construed as within the plenary power of Congress to prescribe terms and conditions for entry of aliens. The power of the federal government concerning aliens has significance for the equal protection claims of two groups of aliens: those who are unadmitted or are non-residents, and those who are admitted or are residents.

Unadmitted, non-resident aliens have no constitutional right of entry into this country.⁷⁰ The Court has held that the admission of aliens is, rather, a privilege,⁷¹ and "whatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned."⁷² Therefore, the safeguards of the Equal Protection Clause do not extend to unadmitted, non-resident aliens. This group accounts for the vast majority of private immigration and naturalization bills.⁷³

The more difficult, but not insurmountable, problem facing the Court is the case of a resident or admitted alien who is going to be deported by the INS⁷⁴ and is refused private bill relief. Historically, the federal government has had great freedom to formulate policies pertaining to deportation.⁷⁵ Although the alien to be deported is entitled to some of the procedural safeguards of due process, his substantive rights are limited by the plenary powers of Congress under its sovereign right to expel aliens.⁷⁶ Since Congress has special power in dealing with aliens, the Court has ample grounds for holding that Congress may grant or deny the substantive relief of a private bill as it sees fit without violating the equal protection restrictions of Fifth Amendment due process.

B. ABUSES

1. INFLUENCE

Several writers have indicated that influence with a Congressman may play a role in the introduction of a private bill.⁷⁷ Others have

(1950). For a more detailed description of the nature of Congressional power over aliens, see Comment, *supra* note 19.

⁷⁰Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); Galvan v. Press, 347 U.S. 522, 530-32 (1954).

⁷¹Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

⁷²*Id.* at 544. See Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892).

⁷³See text accompanying notes 126-27.

⁷⁴United States Immigration and Naturalization Service.

⁷⁵Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953).

⁷⁶Carlson v. Landon, 342 U.S. 524, 534 (1952). See Galvan v. Press, 347 U.S. 522, 531 (1954). (Ex Post Facto Clause did not apply in deportation proceedings.)

⁷⁷See, e.g., GRIFFITH, CONGRESS: ITS CONTEMPORARY ROLE 134 (4th ed. 1967); Note, *Private Bills and the Immigration Law*, 69 HARV. L. REV. 1083, 1092 (1956).

said it is unimportant.⁷⁸ Certainly the private bill system has great potential for abuse of this sort. During the late 1940's to the mid-1950's, the role of influence in the private bill process attracted national attention when a few Congressmen introduced bills to halt the deportation of alleged Mafia members, "gangsters", and other alien criminals.⁷⁹ Very few of these bills were enacted into law.⁸⁰ No similar abuses have been reported in recent years.

Checks on this type of abuse are part of the process itself. They include careful scrutiny by the Congressional subcommittees which handle private bills, the opportunity for either house of Congress to vote down the bill, and potential presidential veto of any private bill.⁸¹ Except for the examination of the bills by the subcommittees, however, these safeguards are more illusory than real. The subcommittees weigh the merits of each case carefully, and if they report out the bill it will usually be enacted.⁸²

2. DELAY

The introduction of private bills for the relief of alien criminals highlights one of the more serious abuses of private bills, that of the use of such bills to delay deportation. As a matter of comity and courtesy⁸³ the Immigration and Naturalization Service (INS) customarily stays deportation when either house of Congress requests a report regarding an individual for whose relief a bill is pending. Such a stay is attractive to the alien because it permits him to remain in the United States during the pendency of the bill. During the period of the stay he has the opportunity to build up equities or qualify administratively for admission, *e.g.*, through marrying a United States citizen,⁸⁴ fathering a United States citizen,⁸⁵ or through some other preference under general law.⁸⁶ In some cases the INS has stayed the alien's deportation for years, even though his case did not deserve private legislative relief, because the Congressman sponsoring the bill reintroduced it if it was not enacted.⁸⁷

Historically, both the House and Senate subcommittees which handle private bills requested a report from INS in all cases involving nonimmigrants.⁸⁸ When it became apparent that private bills were

⁷⁸See, *e.g.*, BERMAN, IN CONGRESS ASSEMBLED 21 (1964); BAILEY & SAMUEL, CONGRESS AT WORK 157 (1952); Note, *supra* note 8, at 1703.

⁷⁹See GUIDE, *supra* note 1, at 338-39.

⁸⁰During the same period thousands of alien criminals were deported. *Id.* at 339.

⁸¹See text accompanying notes 189-94.

⁸²Note, *supra* note 8, at 1691-92.

⁸³GORDON & ROSENFELD, IMMIGRATION LAW AND PRACTICE § 7.12c (1959 rev. ed. 1974).

⁸⁴115 CONG. REC. 6073 (1969) (remarks of Representative Cahill).

⁸⁵*Id.*

⁸⁶See *id.*

⁸⁷*Id.* Interview with Doris Thomas, *supra* note 50.

⁸⁸115 CONG. REC. 6073 (1969) (remarks of Representative Cahill).

being used as a method of obtaining stays rather than for legitimate relief, however, the House amended its procedural rules regarding request for reports in order to reduce the use of the private bill as a dilatory tactic and to protect the integrity of the private legislative process. Though the Senate never adopted a similar procedure, the overall incidence of the abuse of delay is much lower now because far more private bills originate in the House than in the Senate.⁸⁹

In 1947 the House adopted a rule providing that reports would not be requested on bills for the relief of stowaways, deserting seamen, and border jumpers,⁹⁰ except in cases where extreme hardship was demonstrated.⁹¹ During the 1960's Representatives introduced private bills in great numbers.⁹² Many of these bills lacked the merits and equities⁹³ necessary for passage. As a result of such abuse, the House subcommittee amended its procedural rules in 1967 and 1969 to eliminate some categories of persons for whom reports staying deportation would be routinely requested. In 1967 it eliminated the category of transients who enter the United States en route to a third country and remain illegally.⁹⁴ A more significant change was made in 1969 when the Subcommittee eliminated visitors, exchange visitors, and students⁹⁵ from the categories of persons for whom reports would routinely be requested.⁹⁶ The effect of this change was significant, as the number of private bills introduced in the following Congress dropped by two-thirds.⁹⁷

The House changed its rule pertaining to requests for reports which stay deportation to its present form in 1971:

The Subcommittee shall not address to the Attorney General communications designed to defer deportation of beneficiaries of private bills who have entered the United States as nonimmigrants, stowaways, in transit [sic], deserting crewmen, or by surreptitiously entering without inspection through the land or sea borders of the United States.⁹⁸

⁸⁹See BERMAN, *supra* note 78, at 21 where it is suggested that this is because Representatives are more accessible than Senators. During the period 1969 to 1972 an average of 61% of all private immigration and naturalization bills were introduced in the House of Representatives, and that percentage is increasing. AUTHORS' ANALYSIS, *supra* note 24.

⁹⁰115 CONG. REC. 6073 (1969) (remarks of Representative Cahill).

⁹¹115 CONG. REC. 8158 (1969) (remarks of Representative Feighan).

⁹²UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, ANNUAL REPORT 126 (1973) [hereinafter cited as ANNUAL REPORT (1973)].

⁹³115 CONG. REC. 6073 (1969) (remarks of Representative Cahill).

⁹⁴*Id.*

⁹⁵*See Id.*

⁹⁶Eighty-five percent of the 4,846 bills pending in the House at the close of the 90th Congress (1967-1968) were for the relief of persons who entered the United States as visitors, exchange visitors, and students. The fact that during the same Congress only ten of these bills were passed illustrates the lack of merit of many of them. *Id.*

⁹⁷ANNUAL REPORT (1973), *supra* note 92, at 126.

⁹⁸HOUSE COMM. ON THE JUDICIARY, SUBCOMM. ON IMMIGRATION, CITIZEN-

This rule retains the provisions for exemption in cases of unusual hardship⁹⁹ while minimizing the use of private bills for delay rather than relief.¹⁰⁰

3. BRIBERY

From May 1967 to September 1969, many bills¹⁰¹ were introduced for the relief of "Chinese crewmen" who allegedly jumped ship and wished to remain in the United States. According to newspaper articles,¹⁰² improprieties, such as bribery of Senators and their aides and payoffs to the lobbyists¹⁰³ and attorneys who were instrumental in having the bills introduced, surrounded the introduction of these bills. These abuses were not widespread, however, as only four law offices handled 80% of these bills.¹⁰⁴ Although the Select Committee which studied these charges found that the introduction of the bills did have ill effects,¹⁰⁵ it concluded that Senators had improved their office procedures to guard against this type of abuse,¹⁰⁶ and that no Senators or aides had accepted bribes.¹⁰⁷ The Senate recognized that rules changes had enabled the House to avoid these problems,¹⁰⁸ but made no formal changes in its own rules.

Although individuals have abused the private bill process in the past and will undoubtedly find new ways of doing so in the future, Congress has shown its ability to rectify those abuses which come to its attention. Because Congress enacts very few private immigration and naturalization bills now, it may scrutinize each bill with greater care to guard against abuse. The possibility that abuses may exist is not enough to warrant substantial change of the process as it presently functions.

SHIP, AND INTERNATIONAL LAW, RULES OF PROCEDURE (PRIVATE LEGISLATION), in 117 CONG. REC. 10143 (1971) (remarks of Representative Rodino) [hereinafter cited as HOUSE SUBCOMMITTEE RULES]. The 1971 rule embodies the basic provisions of the 1969 rule but groups some specific categories into the general category "nonimmigrants". *Id.*

⁹⁹*Id.*

¹⁰⁰ 115 CONG. REC. 6073 (1969) (remarks of Representative Cahill).

¹⁰¹ There were at least 657 of these bills introduced between May 1967 and September 1969, compared to 96 bills introduced for crewmen of all nations in the 88th Congress (1964-1964). SELECT COMM. ON STANDARDS AND CONDUCT, INTRODUCTION OF PRIVATE IMMIGRATION BILLS IN THE SENATE FOR CHINESE CREWMEN, 90TH AND 91ST CONGRESS, S. REP. NO. 911, 91st Cong., 2d Sess. 2 (1970).

¹⁰² *Id.* at 1.

¹⁰³ Lobbyists had commonly received \$750 for each bill introduced. *Id.* at 2.

¹⁰⁴ *Id.*

¹⁰⁵ The Select Committee reported, "(I)mproper administration of legislation in some Senators' offices, the commercialization of requests for private bills, the overburdening of the Subcommittee on Immigration, and the anguish suffered and the expense incurred by many of the Chinese beneficiaries." *Id.*

¹⁰⁶ *Id.* See text accompanying notes 83-87.

¹⁰⁷ *Id.* at 1-2.

¹⁰⁸ *Id.* at 3.

C. TIME WASTING

Perhaps the most frequent objection to the continuation of the private legislative system is that it consumes an undue amount of the time of individual Congressmen, the Senate and House subcommittees on immigration and naturalization,¹⁰⁹ and the President.¹¹⁰ In 1832 President John Quincy Adams noted that the House had spent two hours debating which days it should consider private bills and then commented, "There ought to be no private business before Congress . . . One-half of the time of Congress is consumed by it."¹¹¹ President Grover Cleveland said in 1891:

The people have a right to claim from their representatives their best care and attention to the great subjects of legislation in which the entire country is interested. This is denied them if their representatives take their seats burdened with private bills . . . They are thus led . . . to a neglect of a study and understanding of the important questions involved in general legislation.¹¹²

As Representative Robert Luce put it, burdening Congress with private bills "is penny wise and pound foolish."¹¹³ Recent law review articles also point to the private bills process as an unreasonable drain on Congressional time and resources.¹¹⁴

This criticism was valid at one time, at least in regard to the total number of private bills of all types. In the 59th Congress (1905-1907), for example, private bills outnumbered public bills nine to one.¹¹⁵ The number of private bills introduced and enacted into law, however, has drastically decreased in the past several years.¹¹⁶

Several rules regarding private immigration and naturalization bills adopted by the House of Representatives are responsible for this decrease. The most dramatic decrease in the number of bills introduced was a result of the 1969 rule change limiting stays of deporta-

¹⁰⁹ See *infra* part IV for a discussion of the procedures followed by these committees.

¹¹⁰ See text accompanying notes 189-90.

¹¹¹ GUIDE, *supra* note 1, at 349.

¹¹² *Id.*

¹¹³ *Id.* at 350.

¹¹⁴ See Note, *supra* note 77, at 1093; Note, *supra* note 8, at 1703-04. This note encompassed all categories of private bills. Therefore, its conclusions and recommendations should be scrutinized before they are applied to immigration and naturalization bills only. The Congressmen contacted by the authors of this article all stated that the amount of time they devoted to private immigration and naturalization legislation was minimal. Of those who mentioned a specific number of hours, twenty-four hours per year was the highest estimate given. Letter from Marilyn Elrod, assistant to Representative Dellums, to Elizabeth Perris, November 1974, on file with the U.C. Davis Law Review.

¹¹⁵ GUIDE, *supra* note 1, at 330.

¹¹⁶ See *Id.* at 346-48 for examples of the major factors contributing to the drastic decrease in the number of private bills introduced; see also BERMAN, *supra* note 78, at 20-21.

tion.¹¹⁷ The Subcommittee on Immigration and Naturalization eliminated another large category¹¹⁸ of private naturalization bills when it refused to hear bills granting retroactive residency to foreign doctors. These bills had enabled doctors to acquire citizenship immediately,¹¹⁹ and thus qualify immediately under state laws requiring citizenship for licenses to practice medicine. By fiat, the Subcommittee decided to put the matter in the hands of the states. As a result of this change if the states want these doctors to practice medicine, they must amend their laws to allow doctors to practice without first obtaining citizenship.¹²⁰

While 7,293 private bills were introduced in the 90th Congress (1967-1968), only 2,866 were introduced in the 92nd Congress (1971-1972).¹²¹ This number has decreased to only 1,085 in the 93d Congress (1973-74).¹²² The total number of private bills enacted has also fallen significantly in recent years. In the 84th Congress (1955-1956) 1,227 were enacted,¹²³ whereas Congress enacted only 63¹²⁴ during the 93d Congress (1973-1974). At some future time private bills may again be an onerous burden, but the private bill process is not currently taking up an inordinate portion of Congress' time.

IV. THE PRIVATE BILL PROCESS

A. CONGRESSIONAL PROCEDURES

Recent formal and informal changes in Congressional procedures for handling private bills have effectively countered some of the past abuses of the private legislative process and the objections to Congressional time wasting. Congress has not, however, sacrificed the goal of providing fair consideration of meritorious cases. This section will examine the types of private immigration and naturalization bills, practices of individual legislators, the procedures of the Con-

¹¹⁷ Letter from Joshua Eilberg, Chairman of the Subcommittee on Immigration, Committee of the Judiciary, House of Representatives, to Elizabeth Perris, December 12, 1974, on file with the U.C. Davis Law Review.

¹¹⁸ One hundred and seventy-three of these were enacted between 1966 and 1968, or well over one-third of all private immigration and naturalization bills. AUTHORS' ANALYSIS, *supra* note 24.

¹¹⁹ See, e.g., PRIV. L. NO. 5, 81 Stat. 989 (1967).

¹²⁰ INSTITUTE, *supra* note 6, at 261. See also *In re Griffiths*, 413 U.S. 717 (1973) (Classifications based on alienage, being inherently suspect, are subject to close judicial scrutiny. Unless a State can show the classification is necessary to the maintenance of high professional standards, the exclusion of aliens will be held unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.)

¹²¹ ANNUAL REPORT, (1973), *supra* note 92, at 126.

¹²² UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, ANNUAL REPORT 132 (1974).

¹²³ *Id.*

¹²⁴ *Id.*

gressional committees involved, and the chronology of events for passage of each bill.

1. TYPES OF BILLS WHICH BECOME LAW

Private immigration and naturalization bills enacted between 1963 and 1972 fall into three general categories.¹²⁵ Bills in the first, and most numerous, category permit entry for permanent residence of otherwise ineligible persons. Most of these persons were ineligible because of the unavailability of a quota number,¹²⁶ although a few were ineligible due to mental or physical defect, criminal or subversive activities, illiteracy, or other reasons.¹²⁷ The second category consists of bills which confer citizenship benefits. The vast majority of these bills waived naturalization requirements, though a few restored or posthumously granted citizenship.¹²⁸ The third, and smallest,¹²⁹ category includes those bills which granted permanent residence to deportable aliens. Most of these aliens were deportable for illegal entry, visa fraud, or violation of non-immigrant status, while some were deportable because of mental or physical defects, criminal or subversive activities, immoral activities, or for other reasons.¹³⁰

2. HOW LEGISLATORS HANDLE REQUESTS FOR SPONSORSHIP

The practices of individual Representatives and Senators vary considerably.¹³¹ One of the key differences, from the constituent's perspective, is the legislator's view of what situations lend themselves to private legislative relief. Most Congressmen will sponsor a private bill if an individual's case presents "extreme hardship".¹³² Some legis-

¹²⁵ The number of private bills enacted in each of these three major categories is declining in both houses of Congress. See text accompanying notes 98 and 99; AUTHORS' ANALYSIS, *supra* note 24.

¹²⁶ *Id.*

¹²⁷ See ANNUAL REPORT (1968), *supra* note 18, at 127. This is presently the largest category, though it was not during 1968; e.g., PRIV. L. NO. 154, 86 Stat. 1565 (1972).

¹²⁸ *Id.*; e.g., PRIV. L. NO. 5, 81 Stat. 989 (1967).

¹²⁹ AUTHORS' ANALYSIS, *supra* note 24.

¹³⁰ See ANNUAL REPORT (1968), *supra* note 18, at 127; e.g., PRIV. L. NO. 97, 77 Stat. 908 (1963).

¹³¹ To a certain extent, varied policies and practices are reflected in the number of private bills which individual legislators sponsor. Among thirteen Congressmen contacted, the number of private bills sponsored during the 93d Congress (1973-1974) ranged from zero (interview with Eileen Costello, assistant to Congressman Ryan, San Mateo, Calif., January 13, 1975), to thirty (interview with Doris Thomas, *supra* note 50).

¹³² The differences in the Congressmen's definitions of the term "extreme hardship" leads to varying standards regarding the types of cases which are appropriate for private legislative relief. Examples of the operational definitions of "extreme hardship" used in Representatives' offices are: (1) Extreme hardship is usually defined as hardship to a United States citizen or immigrant. Interview

lators will sponsor a bill if the person seeking to immigrate would be an asset to the country.¹³³ Congressmen have different attitudes about what constitutes "extreme hardship",¹³⁴ what types of people would be an asset to the country, and how willing they are to introduce a bill which has only a slim chance of passage.¹³⁵ As a consequence of these discrepancies Congressmen apply different standards in evaluating each case.

Representatives and Senators as groups also take different approaches. Some Senators see their role vis-a-vis private legislation differently from Representatives. They may routinely refer the constituent to his Representative,¹³⁶ because Representatives are generally closer to their constituency, and because certain House procedures not followed in the Senate may prove advantageous to the applicant.¹³⁷ Some Senators will not introduce a private bill unless the applicant's Representative is unable to help.¹³⁸

In an effort to avoid potential criticisms,¹³⁹ certain legislators have developed policies regarding lobbyists and lawyers¹⁴⁰ who represent individuals seeking relief through private legislation. Some will deal only with the individual involved.¹⁴¹ Others will work with representatives of the constituent, once the constituent authorizes the Congressman's office to do so.¹⁴² Still others will require the attorney

with Nelda Barrett, assistant to Congressman Corman, Van Nuys, Calif., November 12, 1974; (2) the hardship requirement is a difficult test to prove. The mere fact that a person wishes to remain in this country is not sufficient. The lack of friends, employment, etc., in the home country are not, under any circumstances, sufficient circumstances. Interview with Joan Williams, assistant to Congressman McCloskey, Palo Alto, Calif., January 13, 1975; (3) Extreme hardship means unusual personal hardship, such as illness and separation of families. Interview with Lisa Gonzales, *supra* note 51.

¹³³ Interview with Doris Thomas, *supra* note 50.

¹³⁴ See discussion of the definition of "extreme hardship", *supra* note 132.

¹³⁵ For example, Congressman P. Burton will go ahead with a bill if it will possibly help someone. Interview with Doris Thomas, *supra* note 50. Senator Cranston takes a "hard position" on the types of cases he will sponsor private legislation for, so as not to give people false hopes. Telephone interview with Ms. Cannon, assistant to Senator Cranston, January 9, 1975.

¹³⁶ Telephone interview with Ms. Cannon, *supra* note 135.

¹³⁷ See discussion of the differences between the House and Senate procedures, text accompanying notes 149-88.

¹³⁸ Telephone interview with Ms. Cannon, *supra* note 135.

¹³⁹ See discussion of criticisms, text accompanying notes 101-08.

¹⁴⁰ Whether registration under the Regulation of Lobbying Act (2 U.S.C. § § 261-70 (1946)) is required for attorneys receiving compensation for assisting with private bills has not been decided. WASSERMAN, IMMIGRATION LAW AND PRACTICE 215 (1973).

¹⁴¹ Interview with Nelda Barrett, *supra* note 132. Interview with Doris Thomas, *supra* note 50. Interview with Joan Williams, *supra* note 132. Most offices will keep the attorney abreast of developments in the case by sending him copies of communications about the case.

¹⁴² "The case, not the person who comes to us, is what's important. Language difficulties sometimes make it impossible to work with the individual." Interview with Ms. Cannon, *supra* note 135; "An individual is entitled to representa-

representing the constituent to submit an affidavit that he is not receiving any fees for assistance in connection with the private bill before they will sponsor such legislation.¹⁴³

The first step the Congressman's assistant takes is to ascertain all the relevant facts.¹⁴⁴ The assistant communicates with the constituent himself, contacts the administrative agencies involved,¹⁴⁵ and acquires other helpful background data.¹⁴⁶ Some legislators also request the staff of the subcommittee handling private immigration and naturalization legislation to evaluate the case.¹⁴⁷ The Congressman then decides whether he should draft and introduce a bill.¹⁴⁸

3. IN THE HOUSE

A private bill follows much the same course as a public bill,¹⁴⁹ with some important differences. Unlike public legislation, potential beneficiaries generate virtually all private legislation.¹⁵⁰ Furthermore, the House has developed special procedures for handling private legislation.¹⁵¹ After its introduction, the Speaker assigns the bill to the House Judiciary Committee for study.¹⁵² The chairman of the Judiciary Committee refers all private immigration and naturalization bills to the standing Subcommittee on Immigration, Citizenship, and International Law, whose actions are critical to the fate of the bill.¹⁵³

tion." Staff members may assume that a person went to a lawyer because he wanted to be represented. Telephone interview with George Moses, assistant to Congressman Leggett, January 15, 1975.

¹⁴³ WASSERMAN, *supra* note 140, at 216.

¹⁴⁴ See letter from Senator Domenici, *supra* note 50 and letter from Marilyn Elrod, *supra* note 114.

¹⁴⁵ Some legislators routinely contact the appropriate administrative agencies. Interview with Joan Williams, *supra* note 132. Reports from governmental agencies are evaluated to determine if the agency has acted properly. The Congressman may challenge the agency at this time if he has determined that the agency has taken improper action. Sometimes such challenges are successful. Telephone interview with George Moses, *supra* note 142. Other legislators will contact the appropriate administrative agencies if more information is needed. Interview with Lisa Gonzales, *supra* note 51.

¹⁴⁶ Information from employers, family members, and other concerned individuals and organizations may be utilized. See letter from Marilyn Elrod, *supra* note 114.

¹⁴⁷ *Id.* Telephone interview with Ms. Hobbie, assistant to Congressman Moss, January 8, 1975. Interview with Lisa Gonzales, *supra* note 51.

¹⁴⁸ Sometimes the investigation reveals the constituent has not exhausted all of his administrative remedies. Usually the staff of the legislator involved will assist the constituent in taking the proper actions in such cases. Interview with Doris Thomas, *supra* note 50.

¹⁴⁹ GUIDE, *supra* note 1, at 340.

¹⁵⁰ *Id.*

¹⁵¹ See text accompanying notes 88-100 for discussion of House Subcommittee procedures regarding private bills for the relief of nonimmigrants.

¹⁵² H.R. DOC. NO. 377, 93d Cong., 2d Sess. 10 (1974); Note, *supra* note 77, at 1083.

¹⁵³ Note, *supra* note 77, at 1083.

Its disapproval, which is frequent,¹⁵⁴ will generally end further consideration of the bill. Its approval virtually assures enactment.¹⁵⁵

The Subcommittee will refuse to consider a bill if an administrative remedy exists, or if court proceedings are pending for the purpose of adjusting or changing the immigration status of the beneficiary.¹⁵⁶ If no administrative remedy exists and no judicial proceedings are pending, the Subcommittee will request reports from the INS, the Department of State, and other administrative agencies with information about the case.¹⁵⁷ These reports contain the pertinent facts, including information on how the administrative agency has handled the case.¹⁵⁸ The Subcommittee will not give a bill favorable consideration until it has considered the proper departmental reports.¹⁵⁹ In cases where deportation is imminent, INS will grant a stay of deportation during pendency of the bill¹⁶⁰ if the Subcommittee requests a report, but the Subcommittee will not request a report unless the nonimmigrant applicant demonstrates extreme hardship.¹⁶¹

After the Subcommittee receives the departmental reports, it may place the private bill on a hearings calendar.¹⁶² In addition, the Subcommittee staff makes a tentative decision on the merits of the bill.¹⁶³ If it is favorable, the staff so notifies the author of the bill.¹⁶⁴ If the Subcommittee contemplates adverse action, it notifies the author of the bill and gives him an opportunity to submit additional material pertinent to the case.¹⁶⁵

Subcommittee hearings are nonadversary in nature. In cases in which the Subcommittee staff decides that the bill should be acted upon unfavorably, the Representative or his legislative assistant may appear to explain why the bill should be reported out favorably.¹⁶⁶ More often, the Representative will submit such material in writing.¹⁶⁷ He will also submit affidavits by persons affected by the outcome of the bill and a statement highlighting the meritorious aspects

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ HOUSE SUBCOMMITTEE RULES, *supra* note 98, Rule 5.

¹⁵⁷ Some Congressmen try to expedite consideration of a bill by seeking prompt submission of the necessary administrative agency reports to the subcommittee evaluating the bill. Telephone interview with George Moses, *supra* note 142.

¹⁵⁸ See Note, *supra* note 8, at 1690; interview with George Moses, *supra* note 142.

¹⁵⁹ HOUSE SUBCOMMITTEE RULES, *supra* note 98, Rule 6.

¹⁶⁰ GORDON & ROSENFELD, *supra* note 83, at § 7.12c.

¹⁶¹ HOUSE SUBCOMMITTEE RULES, *supra* note 98, Rule 4.

¹⁶² See Note, *supra* note 8, at 1690.

¹⁶³ 117 CONG. REC. 10143 (1971) (remarks of Representative Rodino).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Interview with Doris Thomas, *supra* note 50.

¹⁶⁷ *Id.*

of the bill.¹⁶⁸ Representatives of INS and the Department of State attend the hearings to provide the Subcommittee members with pertinent factual and legal information when needed.¹⁶⁹ The Subcommittee makes its decision on whether to report out the bill in executive session.¹⁷⁰

The Judiciary Committee routinely reports out those bills the Subcommittee approves. The bills are then placed on the Private Calendar. The entire House considers private bills on the first and third Tuesday of each month the House is in session.¹⁷¹ To expedite passage, each of the political parties appoints three "official objectors" who study the bills and factual summaries.¹⁷² Though any Representative, not just the "official objectors", may object to any bill, the present system minimizes objections from other Representatives. An objection by any Representative causes the bill to be passed over, allowing later reconsideration.¹⁷³ Two objections cause it to be returned to the Committee, effectively killing it.¹⁷⁴ In the absence of objections the bill is considered passed unanimously and is delivered to the Senate.¹⁷⁵

4. IN THE SENATE

Private bills which originate in the Senate, as well as those from the House, are referred to the Senate Judiciary Committee.¹⁷⁶ Though the duties of the Senate Judiciary Committee are the same as its House counterpart with respect to private legislation, some of its operating procedures differ. As in the House, the private immigration and naturalization bills are referred to the Immigration and Naturalization Subcommittee.¹⁷⁷ Unlike the House Subcommittee, however, the Senate Subcommittee routinely requests reports from INS.¹⁷⁸ Thus, introduction of a private immigration bill in the Senate invariably results in a stay of deportation.¹⁷⁹ In addition to the report from INS, the Subcommittee requests reports from other administrative agencies familiar with the case.¹⁸⁰ The Subcommittee's staff con-

¹⁶⁸ Interview with George Moses, *supra* note 142.

¹⁶⁹ Note, *supra* note 8, at 1690.

¹⁷⁰ *Id.*

¹⁷¹ H.R. DOC. NO. 377, 93d Cong., 2d Sess. 22 (1974).

¹⁷² *See Id.*

¹⁷³ Note, *supra* note 8, at 1691.

¹⁷⁴ *Id.*

¹⁷⁵ *See* H.R. DOC. NO. 377, 93d Cong., 2d Sess. 22 (1974); Note, *supra* note 77, at 1084.

¹⁷⁶ Note, *supra* note 8, at 1691-92.

¹⁷⁷ S. REP. NO. 69, 93d Cong., 1st Sess. 2 (1973).

¹⁷⁸ *See* INSTITUTE, *supra* note 6, at 262; telephone interview with Ms. Junghann, staff member of the Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary, U.S. Senate, May 19, 1975.

¹⁷⁹ *Id.*

¹⁸⁰ Interview with Ms. Cannon, *supra* note 135.

siders these reports, along with information submitted by the bill's sponsor, in analyzing the merits of the bill.¹⁸¹ Presentation of a strong case in such written material is crucial since the Subcommittee normally does not hold hearings on private bills.¹⁸²

After examining the bill and the supporting material accompanying it, the Subcommittee staff will recommend one of three actions. First, if an administrative remedy will be available in the near future, the staff will recommend that the Subcommittee hold the bill until such time as the administrative remedy is granted.¹⁸³ Second, if the bill has merit, the staff recommends passage.¹⁸⁴ Third, for all other bills the staff recommends the adverse action of indefinite postponement.¹⁸⁵ The Subcommittee almost always follows the recommendation of its staff.¹⁸⁶

Bills reported out of Committee are placed on the Calendar of Business¹⁸⁷ which the Senate considers each legislative day. Unlike the House, the Senate usually passes private bills as a matter of course once the Judiciary Committee has reported favorably on them.¹⁸⁸

B. EXECUTIVE ACTION

Bills enacted by Congress go to the President for his approval. Before the President actually sees the bill, the Bureau of the Budget and the Special Counsel to the President review it. If either has questions¹⁸⁹ regarding the merit of the bill, the Special Counsel prepares a memorandum outlining the problems. The memorandum and the bill are then forwarded to the President for his consideration.¹⁹⁰

A presidential veto, though rare, almost always kills the private bill. Congress has not overridden any of the thirty vetoes of private bills¹⁹¹ since 1960.¹⁹² One study of presidential vetoes of private bills pinpointed two reasons for the apparent Congressional acceptance of such vetoes. Usually these bills pass through the House and Senate because of lack of opposition rather than because of enthusiastic

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Interview with Ms. Junghann, *supra* note 178.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See H.R. DOC. NO. 377, 93d Cong., 2d Sess. 36 (1974); telephone interview with Ms. Machaver, assistant to Senator Tunney, May 20, 1975.

¹⁸⁸ GORDON & ROSENFELD, *supra* note 83, at § 7.12b.

¹⁸⁹ In the case of private immigration and naturalization legislation the issues usually involve questions about the beneficiary's character and desirability. See Note, *supra* note 8, at 1692.

¹⁹⁰ *Id.*

¹⁹¹ Figure includes all types of private legislation, not just immigration and naturalization legislation.

¹⁹² GUIDE, *supra* note 1, at 346.

support.¹⁹³ Second, many Congressmen feel that because of the petty nature of private bills, to examine in detail those vetoed would be a waste of Congress' time.¹⁹⁴

V. CONCLUSION

During the past decade stricter Congressional attitudes toward private legislation and changes in Congressional procedures have resulted in a dramatic reduction of the number of bills introduced and enacted, thereby blunting many of the criticisms of the private bill process. Congressional movement toward utilizing private legislation only in those rare and unusual cases which compel equitable relief brings closer the ideal of equal protection under the laws with fairness in the unforeseen situation.

Elizabeth L. Perris
Christopher Dworin

¹⁹³ Berdahl, *The President's Veto of Private Bills*, 52 POL. SCI. Q. 531 (1937).

¹⁹⁴ *Id.*

