



**MANAGING PROTRACTED AND  
DEEP ROOTED CONFLICTS  
IN THE U.S. SENATE**

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## About the Author

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## About the Institute

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The Institute for Conflict Analysis and Resolution at George Mason University in Arlington, Virginia, has as its present mission to advance the understanding and resolution of significant and persistent conflicts among individuals, communities, identity groups, and nations.

In the fulfillment of its mission, ICAR conducts a wide range of programs and outreach activities. Academic programs include undergraduate and graduate programs, doctoral and master degrees and graduate certificates in conflict analysis and resolution. The Institute's major research interests cluster around four overall themes: globalization and conflict, religion and conflict, reflective practices and dynamics of change. In addition, faculty/students practice teams analyze and address topics such as conflicts in schools and other community institutions, crime and violence, jurisdictional conflicts between local agencies of government, and international conflicts. Individual members of the faculty provide clinical consultancy services and advise in the development of academic programs on conflict resolution nationally and internationally. Last but not the least, the Institute offers public programs and educational activities that include the well known annual Lynch Lecture Series, and weekly series of conferences on the whole spectrum of the specialty.

All these activities, and the substantive body of professional literature its faculty, doctoral students and alumni generates, combine to make of ICAR a regional, national and international resource for current theory and research development in conflict analysis and resolution.

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## Abstract

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This working paper discusses actions by the U. S. Congress (primarily the U. S. Senate) to manage protracted and deep rooted conflicts in the process of making laws - current problems in managing conflicts, the traditional system for managing conflicts, the relevance of a contemporary conflict analysis and resolution approach to conflict management in the Congress, the effectiveness of the Senate in addressing conflict in five case studies, and strategies for strengthening the current approach.

The paper is based largely on my work (1990-1998) as head of a nonpartisan organization that facilitated communication and problem solving on environmental and natural resources issues for 30 western U. S. Senators. During this timeframe I had the opportunity to work closely with the Senate, participating in deliberations on many intractable conflicts. This gave me an opportunity to engage in repeated discussions of the management of conflict with parties who were involved.

I am grateful to my colleague, Dr. Dean Pruitt, for his invaluable advice and guidance on the organization and substance of this working paper.





## Introduction

Increasingly, in recent years, the U. S. Congress (U. S. Senate and U. S. House of Representatives) has been criticized for failing to legislate, in effect, to manage conflicts. Conflict management in the Congress is the purpose of the Congressional system for making laws - "...not...to resolve conflict, but...to manage it" (McCurry, 1990). The Congress manages conflicts by passing legislation in the form of general requirements or "rules" to control, avoid escalation of, modify, and infrequently, to eliminate conflicts that are causing problems.

Many members of Congress (Senators and Representatives) have suggested that one of the principal causes of this criticism is the ***failure of members to use effective interactive, consensus building and problem solving approaches in their decision making process***. Former Senator George Mitchell (D-ME) noted in 1994, for example, that the work of the Senate is "obviously difficult, and becoming more so, especially if one's concern is for fairness and openness and consultation" (Dewar, 1994, A4). Another Senator who retired in 1996 after three terms decried the "endless motion without movement, interminable debate without decision and rhetorical finger-pointing without practical problem solving," the "breakdown in civil debate and discourse," and the view that those "who seek compromise and consensus" are a "mushy middle that is weak and unprincipled" (Cohen, W., 1996). Senator Robert Byrd (D-WV) has referred to the Congress as an institution that "is more and more ceasing to perform its deliberative function....It has lost its soul" (Byrd, U.S. Congress, December 1993). Many other distinguished senators and former senators have commented publicly on the seriousness of this problem.

In an effort to improve the effectiveness of Congress in managing conflict, Representatives Timothy V. Johnson, (R-IL) and Steve Israel (D-NY) announced on February 16, 2005 the formation of the Center Aisle Caucus, an inter-party group of House members committed "to working cooperatively to promote a more respectful and civil climate for conducting the nation's business" (Johnson, U. S. House of Representatives). Senators Olympia Snowe (R-ME) and Joe Lieberman (D-CT), co-chairs of the Senate Centrist Coalition, spoke on November 16, 2004 about the critical need of their Coalition to help improve cross-party communications and provide consensus-building solutions that have bipartisan appeal (Snowe, U. S. Senate).

***I attempt to show in this paper how a problem-solving workshop approach to decision making consistent with contemporary principles of conflict analysis and resolution may help members of the U. S. Senate and House to address and manage protracted and deep rooted conflicts. The focus is primarily U. S. Senators.***

***To help set the stage for my discussion I describe the traditional U. S. Congressional system for managing conflict, including constraints or difficulties that have a significant impact on the system and approaches to decision making, and then discuss a contemporary conflict management workshop approach in the context of this system. Following my discussion of the workshop approach, I assess Senate actions in five case studies in relation to this approach and discuss strategies for strengthening the current Congressional system for managing conflict.***

## Definitions

*The following are definitions of terms that are necessary to understand conflict management in the Senate.*

These are terms that have widely differing interpretations by theorists and practitioners and need to be defined in the context of the present application.

A *problem* is any situation requiring Senate action, as provided in the *U. S. Constitution*, to develop legislation that is “necessary and proper” for the benefit of all citizens of the United States. Examples of problems are, internally, procedures and rules that have become obsolete, and externally, the serious hazardous waste problem that exists in many parts of the United States today.

A *conflict* is a dispute or differences between a member of the Senate and at least one other party, either within or outside the Senate, in the process of addressing a problem requiring legislative action by the Senate. Conflicts result most often from one or more of the following: (1) the pluralistic nature of the American government and Congressional systems, which encourages interest and value differences, (2) the American political party system, (3) flaws in formally established roles, relationships, processes or procedures within the Senate, and (4) information disputes.

*Protracted and deep rooted conflicts* in the context of the Senate clearly meet the commonly held definition of many contemporary researchers and practitioners in the field of conflict analysis and resolution. They are complex, multi-party, multi-issue conflicts that arise from parties having differences in interests and/or values that they are unwilling to negotiate, and where, typically, there are limited resources. Most, if not all, Senate conflicts relating to the development, coordination and integration of long-term policy in the form of legislation are protracted and deep rooted. For example, at the beginning of the 103rd Congress (1993), reauthorizing the Clean Water Act was said to be the highest environmental legislative priority of the newly elected Administration (President Clinton), and of the Senate Committee on Environment and Public Works. Many of the Act’s provisions had expired in 1990 and 1991, but more important, spending authority for wastewater treatment assistance would expire in 1994. In support of Senate action to address national clean water problems a coalition of 450 environmental organizations called for sweeping reforms, and the top U. S. Environmental Protection Agency water official announced that proposed Senate legislation could be a landmark bill in the history of water pollution control.

As evidence of protracted and deep rooted conflicts, there were seven principal parties, each representing diverse and heterogeneous stakeholders, many of whom held diametrically opposed views on water pollution. There were also major information disputes derived from the complexity of the issues, for example, how to control runoff pollution from non-point sources. The problems in this area are geographically and climatically diverse, and pollution abatement is often a matter of how individuals manage their land, not a matter for uniform rules and standards. Additionally, there were divergent views on how much of a response to environmental concerns is enough, and disharmony within most of the principal parties because of differences between the various stakeholders that they represented.

The need for new clean water legislation was also linked to broad national goals where results are not always easily measurable or equally relevant to all geographic areas of the nation, a circumstance that often makes relationships more adversarial and strained.

*Conflict management* is the primary role and responsibility of the Senate - to pass legislation designed to control, avoid escalation of and modify conflicts that are causing problems. With the extraordinary number of parties to most conflicts addressed by the Senate - directly or indirectly, close to 300 million citizens - there are far too many interests to totally resolve conflict.

The *conflict management system* in the Senate is the formal, relatively orderly, multi-step process for making a law prescribed in the *U. S. Constitution* and U. S. Senate rules and influenced, in practice, by custom and tradition. This process provides for defining and framing conflicts, developing options, deliberating, consensus building, making decisions and passing laws.

*Approaches* are the day-to-day actions of senators to implement the system, for example, how they deliberate or negotiate in the process of decision making. They are determined by the *conflict management system* as well as by the skill, knowledge, personal style and inclinations of individual senators.

## U. S. Congressional System for Managing Conflicts

The Congressional (Senate and House of Representatives) system for managing conflicts is based on principles and values underlying our American system of government - individual liberty and freedom under law, the empowerment of the citizenry, the need for laws that are necessary and proper for the mutual benefit of citizens, the settlement of conflicts peacefully, and the importance of checks and balances on human fallibility to avoid absolute power and govern by exception.

The day-to-day work of the Congress is carried out primarily through deliberations and hearings in Senate and House committees and subcommittees, action by individual members of Congress to amend or otherwise change proposed legislation, and ad hoc joint Senate and House committees established to develop a single version of a bill passed by both bodies.

***There are several constraints in the Congressional system that sometimes make it significantly more difficult for Senate and House members to address and manage conflict. These include (1) structural constraints, (2) information problems and (3) decision-making approaches of members' in addressing problems and conflicts. I discuss each of these constraints below.***

(1) *Structural constraints* are possibly the most significant of these difficulties. Greatly influenced by the views of 18th century political theorists concerning human fallibility and the self interest of individuals in power, authors of the American system of government developed a pluralistic form of governance with many checks and balances within and between the executive, legislative, and judicial branches. In the Congress every step in the process for addressing conflict, making decisions, and passing laws has many checks and balances that lead naturally to adversarialness and the slow, incremental development of policy through compromise (Corwin, as reported in

Kozak, 1995, 2). This pluralistic form of governance creates conflicts over and above those it is trying to solve. Hence, members must “settle conflicts peacefully” in a system that is inherently adversarial - that is not peaceful.

To compound this challenge *many of the steps in the process of making a law have serious structural flaws*, particularly subcommittee and full committee actions.

Typically, subcommittee actions include study, hearings and the development or modification of a draft bill for consideration of a full committee. Once hearings are concluded, the subcommittee meets to “mark up” a draft bill, considering the contents of each provision and section, amending some provisions and discarding others, and sometimes rewriting the bill altogether. When the “mark up” is finished, the subcommittee reports its version of the bill to the full committee, which is comprised of all the subcommittee members plus the chairman of the committee. The full committee may repeat the subcommittee process, holding additional hearings and further “marking up” the bill, or it may simply ratify the action of the subcommittee. A vote of committee members determines whether to report a bill favorably to the Senate or House or to “table” it.

Committees have been described as the most important phase of the legislative process, where Congress gathers information, gives intensive consideration to proposed measures, considers alternatives, and makes compromises. Committees are critical to the process of managing conflict, “to refine and enlarge public views” (Hamilton, Madison and Jay, 1787-1788). Committee members reason together, confront the major problems of the society, discuss the issues and the alternatives, and integrate “public demands, views and needs as articulated by individuals and interested groups into something broader, a collective judgment that enlarges upon these views to resolve or ameliorate these problems” (American Enterprise Institute and Brookings Institute, 1993, 16).

Eighty-four percent of the Senate and House members surveyed in 1993 expressed concern with committee operations and procedures and asked that reforms be considered, primarily because committees were generating more proposed legislation, hearings, and interest group activity than ever before, which rarely resulted in actual lawmaking (Joint Committee of the Organization of the Congress, 1993, 1 and 247-257).

A Congressional research organization reported that committees have a wide range of problems, principally “...procedural inefficiencies...overlap, fragmentation, and...incompatibilities in committee jurisdiction...difficulty in coping with the increasingly intersecting international and domestic agendas...(and) Member needs to grasp and comprehend the scientific and technical complexity that permeates much legislation...” (U. S. Congressional Research Service, March 16, 1992).

An independent research organization found that “today a consensus has developed that substantial changes in the committee system are...needed....In recent years, the deliberative nature of Congress has too rarely been on display” (American Enterprise Institute and Brookings Institute, 1992, 30-49).

Hearings have been severely criticized as brief and perfunctory with such heavy demands on legislators’ time that only a few subcommittee members with special interest in a subject are likely to participate (*Congressional Quarterly*, 1991, 45). Too often, only the chairman is present to hear testimony, or members come in for thirty

seconds to register attendance and then leave, never to return. Key debates on important issues take place with two or three lawmakers present to hear them..." (American Enterprise Institute and Brookings Institute, 1993, 29-30).

In a major reform effort in 1993, the Congress considered over 300 proposals to streamline floor or committee procedures, reduce the number of committees, and create a division of labor that would facilitate coordination. The effort failed. The ad hoc committee charged with this effort ended on a sour and partisan note with no real reform (Hook, 1993, 3249); and, notwithstanding continued interest by a few members, there has been no new reform effort.

The *American political party system* adds yet another structural source of conflict by promoting conflicting values and ideologies to help the electorate distinguish between the parties (McCurry, 1990).

Together, these three *structural constraints* - the *pluralistic system*, the *cumbersome subcommittee and committee procedures*, and the *political party system* - present U. S. Senate and House members with an extraordinary behavioral dilemma: how, from day-to-day, to make laws peacefully that manage protracted and deep rooted conflicts for the benefit of citizens.

(2) *Information problems and conflicts* are another major source of difficulty for members of Congress. A study of Congressional resources and their usage by a Congressional organization (Congressional Research Service, March 30, 1992) identified several possible information problems: information overload and lack of precision, serious time conflicts, member dependency on staff who too often lack the needed expertise, analytic superficiality, the technical complexity of issues, and insufficient impact analysis. This condition is exacerbated significantly by *members' schedules*. They are always full beyond reason, making it difficult for the members to effectively address conflicts. The never ending pressures from divergent interests -- constituents, the news media, colleagues and leaders, the president and other representatives of the executive branch, and the omnipresent lobbyists -- create no-win decision-making dilemmas (*Congressional Quarterly*, 1991, 127).

(3) *The third and last source of difficulty is the day-to-day approaches to decision making of individual Senate and House members.* Commenting on the nature of the American government system and the principles of pluralism, Ornstein noted that "it takes real skill to make major public policy in our political process, skill at finding clues to the puzzle of forging a coalition of...independent personalities representing hugely different regions, outlooks and interests, where there is not a single truth but only a series of tradeoffs..." (*The Washington Post*, May 10, 1996). It is quite obvious that some senators are significantly more effective than others at seeking a compromise or building a consensus. Senator Susan Collins (R-ME) has been at the center of several significant policy fights lately and has repeatedly demonstrated a moderate, centrist, bipartisan approach (*The Washington Post*, November 15, 2004). Senator John Breaux, (D-LA), who retired in January 2005, earned a reputation as a consummate centrist dealmaker on issues ranging from taxes to Medicare during his more than 30 years in the Congress. Two former senators who demonstrated effectiveness in using open and collaborative processes for addressing intractable conflicts are John H. Chafee (R-RI) (deceased) and Sam Nunn (D-GA). Senator Chafee was viewed by Democrats and his fellow Republican moderates as "a cherished leader on health care, welfare and the

environment, mostly because of his ability to broker middle-ground compromises on tough legislative controversies” (Serafini, December 16, 1995, 3080). Senator Nunn was often described by his peers as having “a real instinct for finding the common ground, hammering out with other members of both parties a compromise that is not merely a lowest common denominator but a coherent policy” (Towell, October 14, 1995, 3110).

## A Conflict Analysis and Resolution Approach that May Be Helpful to the U. S. Congress

*There are many contemporary conflict analysis and resolution methods that are consistent with principles and values underlying the Congressional system for managing conflict, and that may help to address the constraints or difficulties in the Congressional system.*

*In this discussion I rely primarily on the work of a contemporary conflict analysis and resolution theorist and practitioner, Herbert C. Kelman, former Director of the Program on International Conflict Analysis and Resolution, Harvard University.*

Kelman has written extensively about a problem-solving workshop approach that has a principal goal in common with U. S. Congressional committees - the development of proposals for conflict resolution that can be fed into the policy process. While not directly transferable to the Congress, many elements of this approach can be adapted for use by Congressional committees.

Kelman’s workshop approach brings academically-based, unofficial third-parties together with representatives of the parties in conflict. It creates conditions that facilitate the exploration of mutual perspectives, the generation of new ideas, and joint problem solving. Participants are expected to search for ways of redefining, fractionating, or transcending the conflict so that perceptions and attitudes are altered and innovative proposals are developed that can be fed into the policy process (Kelman, H. C., 1972, 1984 and 1992).

Kelman’s procedures vary in some of their details, depending on the purpose of a specific workshop and set of participants, but conform to a set of fundamental *principles* relating to meeting format and conditions for effective problem solving (Ibid). Principles that may be helpful to Congressional committees include: (1) ***Creating an alternative set of norms with ground rules and procedures*** to govern interactions between conflicting parties. These *norms* provide for open discussion, attentive listening to opposing views, and the adoption of an analytical approach, in contrast to the polemical, accusatory, and legalistic approach so often taken in Congress. (2) ***Creating products*** in the form of new knowledge and ideas, altered perceptions and attitudes, and innovative proposals for conflict resolution that can inform political negotiations and thus be fed into the policy process. This emphasis on *products addresses a major criticism of the Congress - it’s failure to legislate*. It frequently happens that Congressional committees do not develop new knowledge and ideas, do not alter perceptions and attitudes, and do not create products in the form of legislation that is approved by the Congress.

*With the exception of using academically-based unofficial third parties, which may not be appropriate in the U. S. Congressional system, this problem-solving workshop approach provides a “model” and “mindset” for effective inter-group and individual interaction and problem solving that addresses, in part, all of the*

*constraints identified earlier that make it so difficult for members to address and manage conflict, specifically structural constraints, information problems, and decision making approaches. Potentially, the workshop approach augments and strengthens committee operations, emphasizes information sharing and analysis, and facilitates collaborative decision making.*

*The workshop approach is also totally consistent with the principles and values underlying the Congressional system for managing conflict - to protect individual freedom and liberty, empower and effectively represent citizens, avoid the misuse of power, consider diverse views in the process of lawmaking, and settle conflicts peacefully. For example, in response to the alleged demise of fairness, openness and consultation, this approach would emphasize interaction characterized by the exploration of mutual perspectives, the generation of new ideas, joint problem solving, and empowerment.*

*As described in two of the five case studies that follow, some Senate and House committees have already begun to use policy dialogues with many characteristics of the workshop approach.*

## **Cases - Congressional Conflict Management Successes and Failures**

*To further illustrate the potential value of Kelman's problem-solving workshop approach to Congressional decision making I present below five cases that illustrate a range of Congressional actions from highly effective to ineffective. For each case, I provide background information, discuss Congressional and related actions to develop legislation, and assess these actions in relation to the workshop approach. I participated on behalf of western senators in all the cases.*

In case 1, Senate members followed the Congressional conflict management system, emphasizing principles consistent with the workshop approach, and were highly successful in developing and passing consensus legislation.

In cases 2 and 3, Senate members (and House members in case study 2) relied heavily on a policy dialogue with many characteristics of the workshop approach and succeeded in developing consensus legislative proposals.

In case 4, Senate members used their system with little or no emphasis on principles underlying the workshop approach and failed notoriously to develop legislation that was acceptable to parties who were involved.

In case 5, Senate members acted outside their system and also failed.

***Case 1 New Legislation to Reauthorize the Safe Drinking Water Act (Use of Congressional Conflict Management System with an Emphasis on Principles Underlying the Problem-Solving Workshop Approach)***

## Background

The 1974 Safe Drinking Water Act (SDWA) was enacted to protect drinking water supplies from harmful contaminants, specifically, to “ensure the quality of drinking water supplied by the nation’s 200,000 public water systems and to protect underground sources of drinking water from contamination” (Staff, Environment and Energy Study Institute, April 25, 1994, 2). Congress passed the SDWA after a nationwide study of community water systems revealed widespread water quality and health risk problems resulting from poor operating procedures, inadequate facilities, and poor management of public water supplies in communities of all sizes. In 1986 the Congress passed Safe Drinking Water Act amendments to address perceived deficiencies in the 1974 law and its implementation.

Problems continued, however, with “inept regulation, reckless land use, and irresponsible handling of chemicals...all compromising the quality of the nation’s drinking water” (Staff, *U. S. News and World Report, Inc.*, July 1991, 48), a “vast gap between the resources available and the funds needed to...implement the drinking water program” (GAO, 1992, 92-184), the widespread violation of drinking water regulations among water systems throughout the nation, and EPA’s failure to enforce the Safe Drinking Water Act (NRDC, as reported by Staff, Environment and Energy Study Institute, April 25, 1994, 2).

The specific problems to be addressed were caused by protracted and deep-rooted conflicts that arose from the number of principal parties, differences over values, and structural and resource issues.

The principal parties included the U. S. Senate and U. S. House of Representatives, the Administration including the Environmental Protection Agency, state and local governments, environmental organizations, public and private water suppliers, and coalitions and associations that support and advocate interests of state and local governments, industry, water suppliers, farmers and others who contributed contaminants or may have been affected by new legislation.

Illustrative of conflict-inducing differences over values was the issue of how risks to human health should be weighted against the cost of complying with drinking water standards. There were some who believed that risk reduction is the overarching issue when determining standards for drinking water. Others argued that the public health must be protected, regardless of cost. This was an incredibly complex issue, compounded by scientific uncertainty over what is safe and what is not safe. (*U. S. Committee on Environment and Public Works hearing report, October 27, 1993, 2*).

## Senate Actions

To address these problems the Senate Committee on Environment and Public Works acted to develop new safe drinking water legislation over two time periods: (1) September 1993 to December 1994 (Democratic Congress and a Democratic President), and (2) January through November 1995 (Republican Congress and Democratic President). In both periods committee leadership communicated early their strong interest in consensus legislation that would have bipartisan support. In response, committee staff designed and implemented the following approach:



- (1) Negotiations to develop a bill would be multi-dimensional, occurring (a) first simultaneously at several “tables,” for example, separately for Administration representatives and principal parties representing industry and environmental interests, and (b) in a principal table, the Senate committee staff meeting to develop legislative proposals.
- (2) The principal table would be inclusive, representing Democratic and Republican members of the committee (sometimes committees have separate tables for Democrats and Republicans).
- (3) A special effort would be made to get the “right” staff persons to the principal table and develop and maintain a positive, constructive working relationship. The ideal right person would have negotiation skills, want a new bill, and be willing to consider incremental change.
- (4) Staff would set the framework for negotiations by mentioning early the positions and issues they thought could cause a breakdown in negotiations.
- (5) Extreme positions would be avoided except where there was a commonality of interests with other persons at the table, for example, on the overriding importance of public health.
- (6) The approach to negotiations would be characterized by (a) openness, (b) collaboration, and (c) a willingness to meet at any time to address problems, consider offers, reciprocate, and compromise. All interests would be addressed and none would be allowed to walk away from the table without being heard.
- (7) The overall negotiation strategy would be assessed periodically to assure that it was working and that the table was making progress in developing new legislation.
- (8) Faced with an impasse, every effort would be made to redefine or reframe the issues.
- (9) To keep negotiations moving efficiently the majority staff would “control the paper” - set the time for meetings, prepare the agenda, and draft, redraft, and offer proposals (oftentimes the committee process is protracted because meeting management responsibilities are dispersed in the committee and drafts are prepared by majority and minority members on the committee and special interests outside the committee).

The approach was highly effective. Staff met frequently with all principal parties who communicated their positions, interests, and preferred options, and represented these views at the principal table. The principal table convened on over 200 occasions in 1995 to discuss the interests of all principal parties, develop options, compromise, build a consensus, and develop proposed legislation (senators normally participate in committee negotiations only by exception, for example, to meet with other senators over an impasse among committee staff). All problems were addressed successfully and the committee developed a bill that passed the Senate with a unanimous 99-0 vote.

The response of the principal parties was highly positive. Several governors commented that “the bill represented countless hours of negotiation and compromise among the various interests, and that while no party gets all that they want from such a process, the final product is balanced and reasonable” (Campbell, Dean, Miller and Symington, 1995). The press reported that the bill’s success can be attributed to the assumption of the Senate sponsors that the “bill has got to be bipartisan and mainstream” (Kriz, November 18, 1995, 2861-64) and that “a consensus-building approach was the hallmark of the negotiations on S. 1316” (Staff, *Congressional Green Sheets*, December 4, 1995, B8).

#### Assessment of Senate Actions in Relation to the Problem-Solving Workshop Approach

Many of the principal parties identified two reasons for the extraordinary success of this legislation: safe drinking water was less contentious an issue than those encountered in most proposed environmental legislation, and committee leadership and staff emphasized strongly the need for a bipartisan consensus building and a problem-solving approach. The emphasis on consensus building and problem solving was not a new or significantly different approach for the committee, but was clearly a change in emphasis. The following is my view on how this change resulted in the committee following principles consistent with the problem-solving workshop approach, specifically the fundamental principles relating to creating an alternative set of norms with ground rules and procedures to govern interactions, and to creating products.

First and foremost, committee action was driven by the need to *create a product*. Committee leadership communicated early their strong interest in new bipartisan, consensus legislation. In response, committee staff had no alternative but to create *conditions that would facilitate the exploration of mutual perspectives, the generation of new ideas, and joint problem solving*. They did so by *creating ground rules and procedures* to assure open discussion and attentive listening to opposing views, generate new ideas, develop and assess options and develop a *product* in the form of new proposed legislation for the full committee and Senate. These ground rules provided, for example, that (1) committee staff participants must be open to discussion and positive in their approach (2) interests of all principal parties would be heard and considered, and (3) faced with an impasse every effort would be made to redefine or reframe the issues in dispute.

*Case 2 New Legislation to Reauthorize the Superfund Program for Cleaning Hazardous Waste Sites, and  
Case 3 New Legislation to Reauthorize the Endangered Species Act (Use of Congressional Conflict  
Management System Augmented by a Policy Dialogue with Many Characteristics of the Problem-  
Solving Workshop Approach)*

#### Background (Case 2)

Superfund or the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was enacted in 1980 to tighten hazardous waste regulations and force the cleanup of the nation’s worst sites. The legislation (1) enhanced the federal government’s authority to respond to releases or threatened releases of hazardous substances that could endanger public health or the environment and (2) enabled the Environmental Protection

Agency (EPA) to compel parties responsible for causing contamination to either clean up the contamination or reimburse EPA for the costs of doing so. Superfund was amended in 1986 and 1990.

Problems to be resolved in 1992 included the slow cleanup of hazardous waste sites and high cleanup costs, inconsistent standards for cleanup, excessive transaction costs, the system for determining liability for waste sites, federal-state relations, inadequate community involvement, and the adverse economic impact of waste sites in many cities.

Hazardous wastes were and continue to be one of the most intractable and pervasive environmental problems in the United States today, with many complex, multi-party, multi-issue, protracted and deep rooted conflicts that arise from differences over facts, interests and values, structure and resources. There are several principal parties, each representing diverse interests, including the Senate and House of Representatives, the Administration, several coalitions of stakeholders, business and industry, environmental and citizen groups, labor and public interest organizations, and state, local and tribal governments. Of particular importance are the “some 41 million Americans (who) live within four miles (of) the most dangerous toxic waste sites in the country” (Lautenberg, 1993, 32). Some of the sources of this conflict are: (1) the clean-up standards to which responsible parties are held are based on highly uncertain assessments of risk to humans and the environment, (2) the cost of cleaning up all sites has escalated so dramatically that the resources may not be available, and (3) some sites are so hazardous that it may never be possible to adequately clean them up.

#### Senate and House Actions Augmented by a Policy Dialogue

Congress, in 1992, realizing the extraordinary challenge of developing consensus legislation to reauthorize Superfund through the traditional committee approach, encouraged use of a policy dialogue by a diverse group of private stakeholders - the National Commission on Superfund (NCS) - to help develop proposals for consensus legislation.

Beginning in December 1992 NCS began to discuss options for improving Superfund under the auspices of the Keystone Center and the Environmental Law Center of the University of Vermont. Chaired by Jonathan Lash, President of the World Resources Institute, NCS was comprised of twenty-five senior leaders with widely disparate points of view from the manufacturing, chemical, petroleum, insurance, and banking sectors, environmental, citizen, environmental justice, labor, and public interest groups, municipalities, small business, state and tribal governments and academia. The Keystone Center is a nonprofit organization that provides neutral conflict management and mediation services on national and international policy disputes by involving diverse groups in a process of dialogue and negotiation.

Keystone served as the convener and facilitator for NCS discussions and, once a determination was made to conduct the dialogue, prepared “ground rules” for guiding deliberations.

These ground rules, summarized below, describe a policy dialogue process judged by some as “the best example of environmental consensus building during the last two decades” (Steinzor, 1995, 9).

The objective of the NCS is to recommend legislative changes to improve the effectiveness of Superfund; and to forcefully and actively communicate those recommendations to the public, Congress, and affected federal agencies.

The NCS will include leaders of affected interests and others who seek consensus on the goals and the current problems associated with the hazardous waste cleanup program.

NCS recommendations will reflect broad agreement among the members of the Commission. If consensus proves impossible on certain points despite good faith efforts to reach agreement, the final report will accurately describe the outcome of the Commission’s deliberations.

The scope of the discussions will be determined by the members. However, the conveners expect that all aspects of the hazardous waste cleanup program may be discussed.

The Commission will operate by consensus. Policy recommendations can be considered to have achieved consensus when there is no dissent by any member of the Commission.

Unless otherwise determined consensus agreements reached during the course of deliberations will be considered tentative agreements until a complete package of agreements has been reached that address the concerns of all members.

The Commission believes that it can do the Congress, the Administration, and the country a great service by forging agreements on how to revise the Superfund law, and therefore, agrees to strive to reach consensus on each significant issue and to avoid minority reports in its final report.

Staff drawn from the Keystone Center and the Vermont Law School will facilitate meetings, draft agendas, summarize meetings, compile research, provide administrative support, raise funds, and provide other staff support to the Commission as necessary and as funds allow.

All Commission meetings and the NCS process as a whole will be private and off-the-record in order to foster a frank and open exchange of views among Commission members.

Because of their positions as leaders in the respective sectors and interest groups, Commission members are encouraged to solicit advice and input from other leaders, constituent groups, and colleagues who are not participating in the NCS. However, Commission members have been asked to participate as individuals rather than representatives of an organized interest group or constituency and, as such, agree to represent their own views and not purport to speak for or bind others.

Written materials generated by the Commission process will be confidential and not for public circulation until the Commission determines it is appropriate to make them public.

As the recommendations of the Commission become final, Commission members agree to discuss how the recommendations can most effectively be carried forward into the legislative debate.

The work of the dialogue group was “unprecedented” - 25 private citizen stakeholders provided the Congress with consensus proposals which they translated into new legislation. While approved by major committees of both Houses of Congress, this legislation was not advanced for a full vote because of influences beyond the scope of the policy dialogue. It happens frequently that circumstances such as legislative priorities and the time available on the legislative calendar negatively affect passage of legislation developed and approved at the committee stage in the process of making a law.

Typical comments by dialogue participants (parties of interest) and members:

“The formation of consensus was remarkable, in both historical and political terms” (Steinzor, 1995, 2, 7, and 8).

“We’ve all come to really value the compromise....from a raw politics perspective, it’s great” (Kriz, June 4, 1994, comments of Linda Greer, Natural Resources Defense Council, 1291).

“A similar negotiation process could be used to solve other seemingly intractable public policy problems” (Kriz, June 4, 1994, comments of John D. Dingell, Chairman, House Energy and Commerce Committee, 1291).

“The 1990’s mark the end of an era when pitched legislative battles can lead to either sound or timely public policy. Rather, the formulation of consensus by a critical mass of private-sector stakeholders is the only way to achieve the timely reauthorization of superfund and may be the best (if not the only) way to break the gridlock that paralyzes other legislative debates” (Steinzor, 1995, 2).

### Assessment of Congressional and NCS Actions in Relation to the Problem-Solving Workshop Approach

The NCS dialogue process was highly consistent with principles underlying the problem-solving workshop approach. The Commission's first action was to *prepare ground rules* that would facilitate the exploration of mutual perspectives, the generation of new ideas, and joint problem solving. The effect of these ground rules was to create an *alternative set of norms* to the adversarial norms that are inherent in the American pluralistic form of governance and political party systems, and often have an adverse effect on the work of the Congress. NCS ground rules, for example, required selection of a diverse group of parties at interest, systematically worked to assure a high degree of empowerment for parties, focused on interests and problem solving, followed an analytical process, developed consensus options for the benefit of all parties, and included an experienced and credible third party. Most importantly, the objective of the NCS was to *create products* in the form of policy recommendations for the consideration of the Congress, and it succeeded in doing so.

**Case 3, which follows, is quite similar to case 2. It discusses Senate action to develop legislation to reauthorize the Endangered Species Act (ESA) with the assistance of a policy dialogue process.**

#### Background (Case 3)

Enacted in 1973, the ESA made it a federal offense to kill, injure, trap, harass, or otherwise "take" any animal or plant that is deemed endangered or threatened. Its purpose is to protect all species, especially species that are endangered or threatened and to consider habitat protection as an integral part of that effort. Congress amended ESA in 1978, 1982 and 1988. Full reauthorization had been stymied for several years in a debate over how to address complaints of private landowners that enforcement of the Act interfered with their right to control and use their property. Rewriting of the Act "pitted two very different, but equally heartfelt American ideals against each other: the nation's fierce obsession with self-determination and private property versus its love of the wilderness and compassion for wildlife" (Kriz, December 16, 1995, 3090).

#### Senate Action Augmented by a Policy Dialogue

In 1995, with the support of the Chairman, Senate Subcommittee on Drinking Water, Fisheries and Wildlife, Committee on Environment and Public Works, the Keystone Center convened a "policy dialogue" to discuss proposals to create incentives or remove disincentives for private landowners to protect endangered species. The purpose of the dialogue was to help the committee in its efforts to develop consensus proposals for new Endangered Species Act (ESA) legislation.

The principal problem to be resolved in the policy dialogue was the lack of attention to disincentives and incentives and possible incentives for private landowners to protect endangered species on their land and related issues. Several members and others were hopeful that providing "carrots" to landowners in the form of incentives as well as "sticks" would facilitate reauthorization. The ESA had generated controversy because "it has been all stick and no carrot" according to Michael Bean, attorney with the Environmental Defense Fund. Providing private landowners incentives under ESA was considered "one of the many important issues that Congress must address

during ESA reform efforts” (Staff, Bureau of National Affairs, August 2, 1995, A1). Illustrative of the complexity of the problem, the following are questions that the policy dialogue was required to address:

- (1) What disincentives currently exist in the Endangered Species Act, i.e., what keeps private landowners from promoting endangered species conservation on their lands? What can be done to eliminate or lessen these disincentives? What are the political, administrative and financial barriers to eliminating these disincentives?
- (2) What positive incentives would encourage landowners to protect and conserve endangered species on their land? Have incentives such as these been tried at a state or local level? Which incentives could be supported by a diverse group of individuals? What are the political, administrative and financial barriers to implementing these incentives?

Dialogue participants included 32 individuals representing environmental, mining, ranching, and agriculture organizations; private landowner groups; forest product companies; the Senate; federal and state agencies; and other organizations. All were individuals who had a stake in the subject of the dialogue, had credibility, scientific or political, as representatives of a particular viewpoint or interest, and who were actively involved with the issues or able to affect the eventual implementation of an agreement that might be reached in the policy dialogue process. A Keystone project director served as a neutral third party and facilitator. I participated in the dialogue as a representative of western senators.

Participants agreed on five ground rules: (1) they would participate as individuals, not as formal representatives of their interest group or organization; (2) all conversations were off-the-record and not for attribution; (3) documents produced in meetings or by a participant could be circulated to others outside the group for comment, with the explanation that they were draft discussion pieces only and did not represent the consensus of the group; (4) consensus meant that participants could live with a proposal, not necessarily support a proposal; and (5) the final report would not be released to the public until agreed to by the entire group.

The policy dialogue was highly successful in developing consensus options and many of the dialogue recommendations were included in proposed legislation. The principal product was a consensus report containing 18 proposals on incentives for private landowners to protect endangered species for the consideration of the Senate committee. These proposals were discussed in a public hearing by the chairman of the committee who indicated that they were “excellent suggestions” that would be “an extremely important tool in our efforts to rewrite the Endangered Species Act.” Three months following release of the dialogue proposals, the Senate introduced a comprehensive bill reauthorizing the ESA and two companion bills that included incentives proposed by the dialogue participants.

The following are typical of the many positive comments made by principal parties.

“It is very encouraging that this diverse group could develop some positive steps forward to address this need” (Rob Olszewski, Georgia-Pacific Corporation, dialogue participant).

"I feel certain that the proposals identified and assessed during this dialogue will be extremely valuable to policy makers during the ESA reform process" (Tim Leftwich, Santa Fe Pacific Gold, dialogue participant).

"The dialogue process demonstrates that, when we get beyond the rhetoric, industry and environmental groups are not as far apart as people might think" (Keystone Center press release, August 1, 1995).

"...an extremely important tool in our efforts to rewrite the Endangered Species Act" (Kempthorne, Senate Subcommittee on Drinking Water, Fisheries and Wildlife, Committee on Environment and Public Works, 1995).

#### Assessment of Senate and Keystone Actions in Relation to the Problem-Solving Workshop Approach

The assessment of Senate and Keystone actions in relation to the problem-solving workshop approach is similar to that in case study 2. The dialogue process, driven by the *ground rules* created an *alternative set of norms* to those ordinarily used in the Congressional conflict management system. Primarily, this provided an opportunity for participants to identify and address directly their basic concerns and needs, develop a common understanding of the complex and controversial issues, analyze options by interaction, writing, reviewing, discussing, and rewriting, and develop a *product* -- consensus proposals to help shape public policy. One of the most important similarities was that the Keystone staff serving as the convener and facilitator of both dialogues. Keystone is a nonprofit organization that provides neutral conflict management and mediation services with highly trained facilitators and mediators.

There were also some differences between the NCS and ESA policy dialogues. NCS was organized by the stakeholders themselves while the ESA dialogue convened only after encouragement from the Senate Committee on Environment and Public Works. Also, NCS addressed overall Superfund problems while the ESA dialogue focused narrowly on incentives, and NCS participants were senior leaders of affected interests, while ESA dialogue participants included individuals in mid to top level policy positions.

#### *Case 4 New Legislation to Reauthorize the Clean Water Act of 1972 (Use of the Congressional Conflict Management System with Little or No Emphasis on Principles Underlying the Problem-Solving Workshop Approach)*

#### Background

During the 1991-1994 timeframe, Congress attempted to reauthorize the Clean Water Act of 1972, the principal law governing pollution in streams, lakes, and estuaries in the United States. The objective was to "restore and maintain the chemical, physical and biological integrity of the Nation's water" which was "severely polluted." Notwithstanding significant progress and many amendments, the Act's goals had not been achieved by the 1991-1994 timeframe when reauthorization was attempted.



## Senate Actions

Senate committee members followed their usual conflict management process, holding a series of eight hearings with 91 witnesses followed by committee discussion of options, the development of proposed legislation, and negotiations.

The challenge was enormous with seven principal parties and many protracted and deep rooted problems and conflicts. Principal problems to be addressed included funding levels for states and local communities to implement the Act, the need to identify pollutants that are highly toxic or that travel up the food chain, watershed planning and non-point sources of pollution, municipal water pollution control, wetlands, and enforcement.

The results were a monumental failure. Principal parties felt that the committee consistently failed to respond to their interests. Relationships with all principal parties were openly adversarial. None of the principal parties were happy with the proposed legislation. Opposition was so strong that the principal parties with most at stake - all the state and local governments - chose to develop their own version of clean water legislation outside the Senate. Further action by the Senate ended in June 1994.

The following are significant committee and principal party interactions that occurred during the August 1993 to August 1994 timeframe to discuss and negotiate changes in the proposed Senate bill.

**August 1993** The National Governors' Association (NGA) and the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), representing state and local governments, expressed serious reservations about the proposed Senate bill and suggested options for improvement. Notwithstanding an appearance of openness and willingness to consider changes, committee staff did not follow up with specific options for improvement and, from the perspective of ASIWPCA and NGA, they did nothing positive which added to the fast-growing disillusionment of state and local government parties with the Senate committee.

**October 1993** Other principal parties began to oppose specific provisions in the Senate bill. According to one Environmental Protection Agency (EPA) source, the strongest support for the bill was coming from "some Senate staffers and a few EPA bureaucrats" (Staff, Inside EPA, October 29, 1993, 13).

**January 1994** Committee staff appeared optimistic while the nation's governors continued to express concern with the Senate bill. In a January 24 press release the Senate committee announced it had "reached out to all sides of the debate" in "countless hours of consensus-building and would "complete work on the new bill by late February" (U. S. Senate committee press release, January 24). From the perspective of all principal parties, there was a significant gap between the committee's assertion that there had been "consensus building" and the reality of committee actions.

**February 1994** The Senate committee received support from the Administration notwithstanding escalating conflicts with virtually all principal parties.

**March 1994** The Senate approach to addressing problems and conflicts was seriously challenged by virtually all principal parties. Of particular significance the NGA convened an ad hoc “clean water working group” comprised of governors and staff from NGA and ASIWPCA to develop their own version of a clean water bill. The *National Journal* (3/94) reported that “of some half-dozen coalitions that have emerged to lobby on clean water issues, virtually none is happy with pending reauthorization legislation. Environmentalists say that the proposals on the table are too lax. Industry leaders and state legislators counter that proposed regulations are too costly and burdensome and may bring little environmental benefit. The debate has become so polarized that some wonder whether an agreement can be reached at all this year” (Carney, March 19, 1994, 664).

**May 1994** The states continued to work with the committee on possible changes and committee staff appeared determined to make whatever changes were needed to achieve a consensus among principal parties.

**June 1994** Three principal parties signaled a vote of no confidence in work of the committee and further committee action was virtually stopped.

**July-August 1994** Senate action to develop a clean water reauthorization bill was proclaimed dead by the principal parties and the Senate.

Needless to say, the Senate conflict management system did not work. Typical comments by the principal parties:

“I’ve never seen the process not work to the degree that we are seeing with this reauthorization” (Staff, Bureau of National Affairs, May 2, 1994, A23).

“We just feel the approach adopted by the (Senate) is unworkable” (Staff, *Inside EPA*, March 4, 1994, 14).

By mid-summer, 1994, most principal parties felt that the process was so bad that “no bill is best” (Congressional Research Service, September 15, 1994).

#### Assessment of Senate Actions in Relation to the Problem-Solving Workshop Approach

There were undoubtedly many influences that contributed to Senate actions to develop new clean water legislation. A congressional research organization (Congressional Research Service) attributed the committee’s failure largely to (1) disharmony within principal parties, (2) lack of support from traditional interest groups, (3) involvement of a major new interest group, the agricultural community, (4) less involvement by the industry community, (5) the emergence of new over-arching issues, (6) the complexity of the issues and (7) an overly ambitious agenda. I feel, based on many discussions with committee staff, that a significant contributing influence was the failure of the committee to interact with principal parties in a way that was critically needed to

engage in problem solving. The committee did not, for example, as occurred in cases 1 to 3, establish ground rules and procedures that would help assure effective communication, and did not appear to listen attentively to opposing views and adopt an analytical approach. The norm was clearly polemical, accusatory and legalistic. There was virtually no consistency with principles underlying the problem-solving workshop approach. It is truly extraordinary when a principal party to legislation representing governors are so disillusioned with the congressional system that they attempt to develop their own legislation outside this system.

***Case 5 New Legislation to Improve the Administration of Livestock Grazing on Public Lands (A Failed Effort of a Small Group of Senators to Bypass the Congressional Conflict Management System)***

Background

There had been ongoing conflict over the ownership, management, and use of federal rangeland since the early days of the American West, beginning with that between native Americans and pioneer settlers. Specific rangeland problems addressed in this case include doubts about the accuracy and validity of fair market value estimates for federal lands grazing, disagreement on whether other criteria such as sustaining ranching or maintaining resource-based rural economics should prevail over fair market value or cost recovery in setting grazing fees, disagreement on the impact of fee increases, and disagreement on the environmental benefits and costs of cattle grazing and of changes in grazing levels.

Examples of some of the opinions that produced conflict are: (1) environmentalists contended that federal grazing fees amounted to a subsidy for a small number of ranchers and that grazing on federal lands had caused environmental degradation, (2) many western senators said that “higher fees would put the smaller rancher out of business” (Staff, *New York Times*, October 29, 1993) and “signal an end to a way of life” (Bennett, 1994, 14), (3) western governors proclaimed that “federal decisions regarding the management of grazing on public lands simply must take into account the effects of those decisions on the economic viability of western communities” (Western Governors’ Association, 1994), and (4) ranchers who grazed their livestock on public rangeland argued that they are the “family farmers” of the West and affordable public land for livestock grazing is crucial to U. S. cattle and sheep production.

On August 9, 1993 Secretary of the Interior Bruce Babbitt (Democratic Administration) announced draft rules to implement “Rangeland Reform ’94” including a proposal to more than double grazing fees over three year and to substantially modify federal rangeland policy. This was part of a new Administration initiative to eliminate many natural resource subsidies and increase fees for many federal services. Many members of the Senate (which had a Democratic majority) viewed the Secretary’s action as an infringement on their authority to legislate and immediately took action to block his plans.

### Senate Actions

In the September-October timeframe a small group of Democratic senators acted to develop new legislation to manage western rangeland and grazing fees outside the Senate committee of jurisdiction and without the involvement of three principal parties -senators who had a special interest in the issues, ranchers who would be affected by the legislation, and states with a significant stake in the outcome.

The western Democratic senator who led this initiative outside the committee process organized a “negotiation team” comprised of himself, on behalf of several western Democratic senators, key House Democrats and the Secretary of Interior. As one of his first steps he invited western Republican senators to participate, but they chose not to do so because they felt that any changes in rangeland policy should be initiated by the Congress through the traditional committee process. Support for the “negotiation team” was provided by staff of the team members.

The negotiation team met on several occasions over a one-month period, often in long sessions extending late in the evening, and developed a compromise proposal. Western Republicans in the Senate vowed to fight the compromise, branding it a back-room deal that would devastate the cattle and sheep industries (Camia, October 9, 1993, 2723). One prominent Republican senator said: “I am deeply disappointed by the Democrats. No Republicans were part of it, and I fear it will result in unnecessary pain and economic suffering for thousands of...ranchers and small townspeople. It will irreparably damage a rural way of life” (Schneider, October 7, 1993).

On October 21, 26 and 28, Senate Republicans and Democrats who had not participated in developing the compromise and disagreed with it successfully filibustered to prevent a vote by the full Senate.

This initiative was well intentioned, but failed. Several state governors and other public officials wrote disapprovingly to the Senate about its failure to involve all principal parties and use an inclusive, open and collaborative process in developing proposed legislation. The Secretary of Interior, who had worked with the small group of senators, acknowledged publicly the need for a more inclusive process in the future and, in fact, used such a process later in addressing related issues administratively. The full Senate blocked passage of this legislation.

Typical comments by principal parties:

“My sense of the (process you have followed) based on our common notions of public participation in a democratic society, is that it represents the worst of all possible (approaches)....it’s a back room (approach) that violates our principles of participatory government” (Symington, Governor of Arizona, 1993).

“We need an open and deliberative process to solve this complicated set of issues” (Romer, Governor of Colorado, 1993).

“The most outrageous fact about this proposal (new legislation) is that it is the result of a backroom deal” (Senate Chamber, State of Colorado, 1993).

“I am opposed to both the product and process with which we are now faced...(Sullivan, 1993).

#### Assessment of Senate Actions in Relation to the Problem-Solving Workshop Approach

This was a case where politics appeared to significantly influence the outcome - a Democratic Administration and Senate proposing action that was not acceptable to Republican members. However, western Democratic and Republican members (30) often collaborated in common interests affecting western states, and this initiative was opposed and defeated by both Democratic and Republican members of the Senate. I believe, based on direct involvement in the situation and comments of many of the principal parties, that a major contributing factor was a failure of the negotiation team to follow workshop principles, most notably, creating conditions for problem solving with ground rules and procedures that would facilitate effective communication and assure that all principal parties would have the opportunity to advocate their own views and be listened to attentively.

### Summary

In summary, this working paper describes the widely acknowledged failure of Senate and House members *to consistently use effective approaches* in addressing problems and conflicts in the process of lawmaking. I have attempted to make a clear distinction between causes of this failure that are structural or informational, and those based on approaches used in decision making. To illustrate the need for improved decision making, I detailed Senate and House action to pass legislation in five cases.

I conclude this discussion with some lessons learned from my activities working with the Senate and, in particular, my involvement with the five cases described above. I will present each lesson as a research finding and reference the case studies that support the finding.

**Lesson I.** The conflicts addressed by the Congress are usually protracted and deep rooted, with some more so than others. (All cases)

**Lesson II.** The work of the Congress is extraordinarily difficult because it is hard to “settle conflicts peacefully” in a system that is inherently adversarial. (All cases)

**Lesson III.** The Senate most often follows the traditional congressional conflict management system prescribed in the U. S. Constitution and Senate rules. (Cases 1-4)

**Lesson IV.** Principles and values underlying the American system of government and Congressional conflict management system are consistent with principles underlying Kelman’s workshop approach. (Discussion, pages 6-7, and cases 1, 2, and 3)

**Lesson V.** The Senate was successful in developing and passing legislation when it used approaches consistent with the Kelman's problem solving workshop principles. (Cases 1, 2, and 3)

**Lesson VI.** The Senate was notoriously unsuccessful when it acted inconsistently with these principles. (Cases 4 and 5)

**Lesson VII.** The Congress has demonstrated a willingness to consider augmenting its traditional system with a policy dialogue approach that is consistent with many of the principles underlying Kelman's workshop approach. (Cases 2-3)

## Strategies for Strengthening Current Approaches

I suggest the following *specific strategies* for strengthening Congressional approaches to managing protracted and deep rooted conflicts in the process for making laws. I believe that these strategies will help members in both the Senate and House of Representatives.

### Strategy I. Strengthen Committee Operations

The time certainly appears "ripe" to augment committee approaches to addressing and managing protracted and deep rooted conflicts in the process of developing legislative proposals. There are structural flaws in the committee system as discussed on pages 4 to 5, and there is significant evidence (cases 2 and 3) that policy dialogues consistent with Kelman's workshop principles and approach can be helpful to committees in developing legislative proposals.

I suggest that the Congress consider augmenting its current committee system by institutionalizing the policy dialogue approach, specifically by (1) providing committees with flexibility to establish or endorse the use of policy dialogues to develop legislative options for their consideration, (2) prescribing a model similar to the Keystone model, (3) specifying problems and conflicts within the scope of committees that can be addressed appropriately by policy dialogue groups, for example, scientific and technical issues that have been traditionally difficult for committees to address, are not highly partisan, and where the Congress is truly seeking options, (4) delegating authority for establishing or endorsing dialogues to chairmen of Senate and House committees, and (5) providing full Congressional funding for dialogues or seed money and guidelines for supplementary funding. ***It's important that this option be viewed as augmenting rather than replacing in any way the current committee system and that decision making on when to use this option be retained by the committee leadership. Any effort to change the structure of the traditional system or the power of the leadership will almost certainly result in failure.***

### Strategy II. Develop New and Improved Approaches to Decision Making

I suggest that a non-profit organization or academic institution that has high credibility nationally for its work in the field of conflict analysis and resolution focus on helping the Congress develop new and improved approaches to decision making. Ideally, this would be a source that has, as its mission, research on the nature, origins, and types

of social conflicts of interest/relevance to the Congress, has the capability for collaborating (with the Congress) to develop new and improved approaches for Congressional action, and is capable of providing training to members and staff. Contemporary conflict analysis and resolution theories are uniquely relevant to the problems and needs identified in this paper, for example, addressing basic needs and concerns of the parties (citizens), respecting individual liberty and freedom (inherent in the system), an analytical approach and problem-solving orientation (through committees and related actions), and settling conflicts peacefully in the form of laws. ***I suggest that any effort to help the Congress with approaches be directed to sources within the Congress that are most inclined to have an interest, for example, possibly, the House Center Aisle Caucus and Senate Centrist Coalition referred to in the Introduction.***

### **Strategy III. Formalize Training for Members and Staff**

I suggest that a formal training program in conflict analysis and resolution methods be established and mandated for all members and staff. This training should include, as a minimum, negotiation skills needed to address protracted and deep rooted conflicts in the legislative process, contemporary conflict analysis and resolution theories, and principles underlying the problem-solving workshop approach. Negotiation is the most common method used by members to interact, address problems and build consensus, contemporary theories are uniquely relevant as described above, and Cases 1 to 3 illustrate well the value of principles underlying the problem solving workshop approach to decision making. ***Based on my interactions with members and staff, virtually none have had any formal training in conflict analysis and resolution, and all appear to lack understanding of how conflict analysis and resolution methods may help to strengthen their current approach to addressing and managing intractable and deep rooted conflicts.***

## Comments on Richard Coccozza, “Managing Protracted and Deep Rooted Conflicts in the U.S. Senate” *Kevin Avruch, Professor of Anthropology and Conflict Resolution, Associate Director, ICAR*

Richard Coccozza writes as a double insider: a longtime Senate staffer and now an independent consultant to that body on the one hand, and a Ph.D. in Conflict Resolution from ICAR (1998) on the other. The strength of this working paper reflects both of these positions. As a Senate insider he writes with some authority on the dysfunctionality of adversarial decision making in Congressional committees. As a specialist in conflict resolution, and insider to that field, he offers a solution long endorsed by the field for deep rooted conflicts: the interactive problem solving approach, aiming to produce, for difficult and complex disputes, integrative agreements in a spirit as close to consensus as we are likely to get outside bills endorsing motherhood and apple pie.

In the 1970s another kind of double insider worked on Capitol Hill, on the staff of Ohio Senator John Glenn. Jack Weatherford, Ph.D., was trained in ethnography and cultural anthropology. His book, *Tribes on the Hill* (1981), was part satire (using traditional terms from old fashioned ethnology—clan, bigman, mana and taboo), in juxtaposing Congressional culture to tribal ones, and part all too serious analysis. One of the latter points was the observation that more and more of the *public* face of Congress—speeches made by members from the floor, remarks noted in the *Congressional Record*, were ritualistic in that they were mostly performance, aimed at constituents back home. Politically speaking, they were empty. The real “politics,” Weatherford noted, the real decision making, took place elsewhere, in caucus room or in committees, mostly closed to the public. The resulting problem was twofold. First, excessive ritual has a way of choking political systems, as the court at Versailles just before the Revolution illustrated. Secondly, the essence of the democratic process, participation and accountability, is weakened if the decisions lawmakers publicly debate and vote on were in fact already made elsewhere and out of sight.

One might well bemoan this as a recent deformation of our grand democracy, a sin of the last administration or the one before that. Weatherford quotes a Boston Congressman who lamented that the House in which he served “acts, reasons, and votes and performs all the operations of an animated being, and yet, judging from my own perceptions, I cannot refrain from concluding that all great political questions are settled elsewhere than on this floor.” So saying, he quit Congress and returned to Massachusetts. He was neither Republican nor Democrat. He was a Federalist, his name was Josiah Quincy, and the year he left (eventually to become president of Harvard, no less) was 1813. Nowadays, thanks to C-Span, committees are usually not closed to the public—on the whole a good thing. But following Weatherford, we might expect in a post C-Span world, that as committees move from “backroom” secrecy to public view, they too become “theatrical,” sites of performance.

Nowadays, too, in a nation and a political system characterized by deep ideological rifts and increasing incivility in the public sphere (another sign of deep rooted conflict), the “theatre” in view is one of adversarial confrontation and partisan posturing. No longer just “playing to the gallery,” one now plays to the Senate or House controlled camera, focused almost always exclusively on the speaker or the panel, rarely on the chamber itself. (Congress still does not allow C-Span control of the cameras in either chamber, since viewers might then see their elected representatives eloquently declaiming to empty houses, or rushing in from basketball with their tennis shoes still on to register their votes. This latter from C-Span CEO Brian Lamb; see <http://www.cspan.org/about/company/debunk.asp?code=DEBUNK2>.)

In this working paper Richard Coccozza shows us a way around the present disability of the adversarial committee structure for decision making. Based on the work of Herb Kelman and many others in our field who have developed the interactive problem solving method, and based on five case studies of mainly environmental disputes, Coccozza shows how collaborative problem solving can bring all the relevant parties or stakeholders “to the table” for reasoned and creative negotiation, and then bring the results back to the principals in the committee. In one sense, of course, these “workshops” are yet another “elsewhere,” removed from the committee and doubly removed from the House or Senate floor—proving Weatherford (and Josiah Quincy) right. But when the workshops are rightly organized, that is when they are open to all the relevant parties and concerned stakeholders, they possess the virtue of bringing us back to the democratic ideals of participation and accountability, and away from the closed backrooms and cloakrooms.

Not all the problems of legislation and governance are addressed herein. The lobbyist makes an appearance here and there in Coccozza’s essay, but not, I suspect one that reflects the full influence on the process that they in fact wield today. And it remains to be seen how the problem solving workshop and rational decision making can “work” in deeply rooted conflicts around deeply held values—conflicts around abortion, say, or capital punishment. But Coccozza has chosen his case material wisely and appropriately, and this working paper is a real contribution to



making the work in our field, and the techniques suggested by this work, relevant to the world and demands of governance and public policy.

## Richard Cocozza's Reply

Many thanks to Dr. Avruch. I appreciate his assessment of my paper, his commentary on Jack Weatherford's book, *Tribes on the Hill*, and his personal views on problems in the U. S. Congress. Both Dr. Avruch and Dr. Weatherford have identified weaknesses in committee processes and floor action that make it significantly more difficult for Senate and House members to address, deliberate on and attempt to resolve conflict through the legislative process.

There are many other problems. The Congress is an extraordinarily complex institution, created to settle conflicts peacefully and pass legislation in a system that is inherently adversarial - that is not peaceful. Members often have difficulty getting the information that they need to make responsible decisions. They have frenetic schedules and staff turnover is high. Most members lack any formal training in conflict analysis and resolution including negotiating skills that are critically needed.

There is an extraordinary window of opportunity now with the change in party leadership for the conflict resolution community to help with many of these problems, and I believe the Congress would be receptive to the strategies for strengthening current approaches suggested in this paper.

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