

3-1-1979

Reforming the Federal Relationship to Educational Accreditation

Matthew W. Finkin

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Matthew W. Finkin, *Reforming the Federal Relationship to Educational Accreditation*, 57 N.C. L. REV. 379 (1979).Available at: <http://scholarship.law.unc.edu/nclr/vol57/iss3/3>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

REFORMING THE FEDERAL RELATIONSHIP TO EDUCATIONAL ACCREDITATION

MATTHEW W. FINKIN†

In seeking to assist students and institutions of higher education, the federal government faced a conundrum. On the one hand, government sought the assurance that its funds were serving the purposes intended, that is, that tax monies would not be paying for substandard education. But, on the other, government also desired to eschew any control of education. How can government determine that the educational offerings of the institutions assisted (directly or indirectly) meet at least minimum qualitative standards without itself setting those standards? The solution, chosen first in 1952 and relied upon in much of the subsequent legislation,¹ appeared to be simplicity itself: government would be assured of institutional or programmatic quality merely by relying upon the decisions of private accrediting agencies whose determinations are widely recognized in the academic community as being sufficiently reliable for this purpose; the Commission of Education was accordingly directed simply to list such agencies.

During the past decade, however, private accreditation, and the propriety of federal reliance upon it, has come in for substantial criticism.² At the same time, and as the amount of public monies involved has come to exceed five billion dollars,³ the Office of Education has expanded its role vis-à-vis accrediting agencies until it has begun to

† Professor of Law, Southern Methodist University; A.B. 1963, Ohio Wesleyan University; LL.B. 1967, New York University; LL.M. 1973, Yale University. Parts I and II of this article are a revised and expanded version of a report prepared for the Council on Postsecondary Accreditation. The author wishes to express his appreciation to Dr. Charles M. Chambers of the Council's staff for his assistance and comments. The opinions expressed are entirely the author's and do not represent the views of the Council, its constituents or staff.

1. See text accompanying notes 5-26 *infra*.

2. See generally C. WARD, THE STATE OF ACCREDITATION AND EVALUATION OF POST-SECONDARY OCCUPATIONAL EDUCATION IN THE UNITED STATES (1970); U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, REPORT ON LICENSURE AND RELATED HEALTH PERSONNEL CREDENTIALING (1971); U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, REPORT ON HIGHER EDUCATION (1971); H. Orlans, N. Levin, E. Bauer & G. Arnstein, Private Accreditation and Public Eligibility (February 1974) (report prepared for U.S. Office of Education under contract with Brookings Institution and National Academy of Public Administration Foundation) (permission to use granted to author) [hereinafter cited as H. Orlans].

3. The figure is taken from F. DICKEY & J. MILLER, A CURRENT PERSPECTIVE ON ACCREDITATIONS 34 (1972). Considerably more money is doubtless involved today.

proximate that of a regulator of accreditation.⁴ Much of the criticism, and all of the administrative response, has simply assumed that Congress has given the Office of Education broad authority to fashion standards governing the selection of those accrediting agencies it will rely upon, so long as the standards adopted comport with current notions of how the public interest is best served. Almost unassessed in the debate is the validity of that assumption.

Consequently, the determination of the proper scope of administrative discretion under the existing statutory scheme is an essential predicate to analysis; only by first deciding what the government's statutory role in accreditation *is* can one begin to consider alternatives for what it ought to be. In addition, this threshold determination supplies a much-needed institutional focus. To conclude, as this discussion will, that the scope of administrative discretion is considerably narrower than many critics and government officials have heretofore assumed, is also to conclude that many of the proposals for change have been directed to the wrong branch of government.

Accordingly, this discussion first addresses the threshold question of the scope of administrative authority Congress has actually conferred upon the Commissioner of Education in the listing of accrediting agencies. It will next survey alternatives for reform and, to the extent criticism of the current system appears to be well founded, will propose reforms attuned to the statutory purpose.

I. THE ACCREDITATION-RELIANCE SYSTEM

A. *Establishing the Model: 1952-1968*

The model for the system of federal reliance upon private accreditation was established in 1952 by the Korean War GI Bill.⁵ Congress was concerned about "fly-by-night" schools and "blind alley" programs. State approval had, in many instances, been no more than a rubber stamp. A role for the Office of Education was proposed and, to

4. "The Office [of Education] has come increasingly to exercise with respect to accrediting agencies a regulatory function comparable in substance if not in form to that of other government regulatory bodies." H. Orlans, *supra* note 2, at 98. The Office of Education official primarily responsible for the management of the accreditation-reliance system has described his division's function as "quasi-regulatory." Memorandum from John R. Proffitt, Director, Division of Eligibility and Agency Evaluation, to John Ellis, Executive Deputy Commissioner for Educational Programs, Office of Education (June 3, 1977) (copy on file in office of *North Carolina Law Review*).

5. Veterans' Readjustment Assistance Act of 1952, ch. 875, 66 Stat. 663 (repealed 1958). The legislative history is discussed more fully in Finkin, *Federal Reliance on Voluntary Accreditation: The Power to Recognize as the Power to Regulate*, 2 J.L. & EDUC. 339, 343-46 (1973).

some extent, contested by the Veterans' Administration. As part of the resulting compromise, state approval agencies were authorized to approve courses offered by an institution that had been accredited "by a nationally recognized accrediting agency or association," and, as a facility for state approval agencies, the Commissioner of Education was authorized to list such accrediting agencies: "For the purposes of this title, the Commissioner [of Education] shall publish a list of nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by an educational institution"⁶

This solution rested upon three closely related assumptions. First, the statute assumed that "nationally recognized accrediting agencies" existed and were of sufficient reliability that state government could permissibly piggyback its own approval of courses upon the private agency's decisionmaking processes. Second, reliance upon private determinations of educational quality would obviate the threat of federal control of education. Third, the role of the Commissioner of Education in determining that such nationally recognized agencies were of sufficient reliability would be essentially ministerial. The last assumption, reflected both in language that merely directs the Commissioner to publish a list and in the legislative history,⁷ is a necessary corollary of the other two; it would be anomalous for the government to avoid the direct regulation of educational institutions by regulating the substantive standards of accrediting agencies, thereby doing indirectly what the statute was intended to avoid.

The ministerial character of the Commissioner's role is reflected as well in the agency's contemporary interpretation of the statute, which builds upon the statutory directive that the Commissioner determine whether or not an accrediting agency is nationally recognized as a reliable authority. Following enactment, the Commissioner consulted an "advisory group of educators" who were largely drawn from the accrediting community.⁸ The resulting criteria for listing by the Commissioner as a nationally recognized accrediting agency accepted current

6. Ch. 875, § 253, 66 Stat. 663 (1952) (repealed 1958).

7. The bill proposed by the House Committee on Veterans' Affairs contained a directive to the Administrator of Veterans' Affairs to publish a list of accrediting agencies in language identical to that ultimately adopted. The Committee accepted the substitution of the Commissioner of Education for the Veterans' Administration. The Committee emphasized that the "contemplated function of the Office of Education is of a professional character only." H.R. REP. NO. 1943, 82d Cong., 2d Sess. 35 (1952).

8. 17 Fed. Reg. 8,929 (1952).

accrediting practices, particularly of the regional associations. Of significance was the requirement that the agency must have "gained acceptance of its criteria, methods of evaluation, and decisions, by educational institutions, practitioners, licensing bodies and employers throughout the United States."⁹ Similarly, an agency that had been in existence for less than two years was required to demonstrate "to the satisfaction of the Commissioner . . . that it has gained the acceptance required" during the shorter period.¹⁰

The publication of the criteria was accompanied by the initial Commissioner's list, which included the six regional associations and twenty-one specialized agencies. Provision was made for additions to the list. In contrast to the adoption of the initial list, however, it was contemplated that additions to the list would be made at the request of accrediting agencies that desired to be so listed. The relationship between the Office of Education and accrediting agencies established by this provision would loom large in the Commissioner's view of his authority twenty years later.

In ensuing measures such as the National Defense Education Act of 1958,¹¹ the Nurse Training Act of 1964,¹² and the Higher Education Act of 1965,¹³ the language of the 1952 Act was looked to, in essence, as "boilerplate,"¹⁴ albeit with occasional modifications that most often allowed some unaccredited schools to be eligible for participation if their credits would be considered transferable by accredited schools or if there was reasonable assurance that they would achieve accreditation. In the Higher Education Facilities Act of 1963¹⁵ and the State Technical Services Act of 1965,¹⁶ the Commissioner was authorized in certain instances to engage in direct accreditation upon a finding that there was no reliable nationally recognized accrediting agency suitable for the purposes of those Acts. On balance, the legislative history of these and related measures indicate continued general congressional acceptance of the assumptions upon which the system of federal reliance on private

9. *Id.* at 8,930.

10. *Id.*

11. Pub. L. No. 85-864, § 101, 72 Stat. 1581 (codified in scattered sections of 20, 42 U.S.C.).

12. Pub. L. No. 88-581, 78 Stat. 908 (codified in scattered sections of 33, 42 U.S.C.).

13. Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C.A. §§ 1001-1150 (West 1976 & Cum. Supp. 1978)).

14. H. Orlans, *supra* note 2, at 106-07. Orlans suggests, however, that reliance upon the model of the 1952 Act was also the product of lobbying and political choice. *Id.* at 107-08.

15. Pub. L. No. 88-204, § 42, 77 Stat. 363 (current version codified in scattered sections of 20 U.S.C.).

16. Pub. L. No. 80-182, § 1, 79 Stat. 679 (codified at 15 U.S.C. § 1351 (1976)).

accreditation was built.¹⁷

That reliance was placed in question in the period from 1965 to 1968 when a struggle took place for control of nurse training accreditation. These developments shed further light on the Commissioner's authority and the institutional roles of Congress and the Office of Education in setting accreditation policy. The Nurse Training Act of 1964 extended to all categories of nurse training institutions. The Act required that they be accredited by a body or bodies approved for this purpose by the Commissioner, but permitted approval by the Commissioner if he found, after consultation with the appropriate accrediting agency or agencies, that there was reasonable assurance that the program would meet accreditation standards. The Commissioner had approved the National League for Nursing (NLN) as the sole agency for nurse training accreditation. The American Association of Junior Colleges had been especially critical of the requirement of programmatic nurse training accreditation in addition to the institutional accreditation carried on by the regional associations, and special note was made that few junior college programs had been either accredited or given reasonable assurance of accreditation by the NLN.¹⁸ The Senate Committee on Labor and Public Welfare proposed that the Commissioner be given direct accreditation authority.¹⁹ The wisdom of this proposal was questioned by HEW. Under-Secretary Cohen pointed out that regional and state accreditation applied to the institution as a whole and would not necessarily attest to the quality of a nurse training program. Moreover, he considered the proposed authority unnecessary because

under existing law there is no restriction on the accrediting body or bodies which the Commissioner of Education may recognize for the purposes of this act. If he should find, therefore, that accrediting bodies other than the National League for Nursing have developed accrediting or approval programs that give attention to the quality of nurse education programs in colleges or junior colleges he could recognize these additional bodies for accreditation purposes.²⁰

Nevertheless, Congress did grant accreditation authority to the Commissioner.²¹

17. See generally Finkin, *supra* note 5, at 348-61.

18. See generally H.R. REP. NO. 781, 89th Cong., 1st Sess. 20, reprinted in [1965] U.S. CODE CONG. & AD. NEWS 3766, 3773.

19. S. REP. NO. 1378, 88th Cong., 2d Sess. 16-17 (1964).

20. Finkin, *supra* note 5, at 364 n.173.

21. Health Professions Educational Assistance Amendments of 1965, Pub. L. No. 80-290, § 5(b), 79 Stat. 1052 (codified as amended at 42 U.S.C.A. § 298b(6) (West Cum. Supp. 1977)).

In 1967 an unsuccessful effort was made to delete the Commissioner's authority to engage in direct accreditation. The House Committee's report observed:

In general, this method of determining eligibility of institutions and programs for Federal assistance has worked extremely well; however, it must be recognized that as a practical matter the requirement that an institution or program be accredited by a private nongovernmental group to qualify for assistance permits the private nongovernmental group to be in a position to determine, in accordance with its own standards and procedures, eligibility of other groups or institutions to receive Federal aid, and thereby to a degree constitutes a delegation of legislative power to a private organization.²²

The effort to delete the Commissioner's authority was renewed in 1968. The administration stressed that it had not used the power given it "because of our deep reservations about this kind of Federal involvement in education."²³ The House Committee again addressed the issue:

As this committee pointed out in its report . . . last year, the provisions of existing law permitting a private organization to determine, in accordance with its own standards, eligibility of other institutions to receive Federal funds, constitutes a delegation of legislative power by the Congress to a single private organization. The committee feels that additional organizations should be designated as accredited bodies for purposes of the act, and has amended the bill correspondingly.²⁴

As a result, the committee opted for a deletion of direct accreditation authority, coupled with an expansion of agencies that could be relied upon by including state and regional, that is, institutional, accreditation in addition to specialized, program accreditation. As the House Committee explained:

The Commissioner would be required to publish a list of nationally recognized accrediting bodies, and State agencies, which he determines to be reliable authority as to the quality of training offered. The committee expects that this list will include the National League for Nursing, the Joint Commission on the Accreditation of Hospitals and the appropriate regional educational agencies that are nationally

22. H.R. REP. NO. 538, 90th Cong., 1st Sess. 34 (1967).

23. *Health Manpower Act: Hearings before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 2d Sess. 82-83 (1968) (statement of Dr. Phillip R. Lee, Assistant Secretary for Health and Scientific Affairs, U.S. Dep't of Health, Education, and Welfare).

24. H.R. REP. NO. 1634, 90th Cong., 2d Sess. 36, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 3379, 3399.

recognized as accreditation authorities.²⁵

Two aspects of this episode are instructive. First, the problem arose because the standards of the single, specialized agency relied upon by the Commissioner were seemingly too high to assure the production of the number of professionals that the Congress thought necessary. Second, the House reports evidence congressional awareness that federal reliance upon a private accrediting agency meant, as a practical matter, that the agency would be exercising public power. Significantly, the alternative chosen to deal with the problem was to increase the number of alternative agencies that could be relied upon, rather than to continue the system of direct federal accreditation (which had never actually been used) or to authorize administrative controls over the private agency. In fact, in the Allied Health Professions Personnel Training Act of 1966,²⁶ Congress expanded the definition of a "training center for allied health professions" expressly to include divisions within regionally accredited junior colleges, thereby delegating accreditation authority directly to the regional associations, obviating any listing (or review) by the Commissioner for the purposes of the Act. That Act and the legislative confrontation with nurse training accreditation supplies a useful datum for scrutiny of the Commissioner's authority under related statutes.

B. "The Era of Quasi-Regulation":²⁷ 1968 to Present

In 1968 the Office of Education established a special staff on accreditation and institutional eligibility and an Advisory Committee to review and recommend policy and to review and recommend accrediting agencies under the Commissioner's criteria for listing. As a major study observed, this "action was a response to the mounting administrative and policy problems resulting from the repeated statutory use of accreditation and, most immediately, from the extension of vocational loans to students at accredited proprietary schools. It was not a response to any direct legislative injunction."²⁸ In 1969 the Commissioner adopted the first revision in the 1952 criteria.²⁹ The revision expanded upon the procedures that accrediting agencies must employ. It also provided for periodic reevaluation of accrediting agencies by the

25. *Id.*

26. Pub. L. No. 89-751, 80 Stat. 1222 (codified in scattered sections of 12, 42 U.S.C.).

27. The phrase is Orleans'. H. Orleans, *supra* note 2, at 133.

28. *Id.*

29. 34 Fed. Reg. 643 (1969).

Commissioner at least once every four years. However, in sharp contrast to Secretary Cohen's observation that nothing prohibited the Commissioner from listing all accreditation agencies that otherwise met statutory standards, and in further contrast to the legislative struggle of the previous year over nurse training accreditation, the Office of Education took the position that "it is unlikely that more than one association or agency will qualify for recognition" either for a defined geographic area or in a given field or program. Moreover, in order to be listed the agency would be required to demonstrate "its capacity and willingness to enforce ethical practices among the institutions, and educational programs accredited by it."³⁰

In 1974 the Commissioner adopted a second revision that expanded the scope of the criteria even more.³¹ Procedurally, the criteria stressed far more than the 1952 and 1969 criteria that accrediting agencies were to be considered as applicants for listing and renewal. Further, it continued to expand the procedures that approved agencies must employ in the accrediting process.

Four areas of additional regulation, however, cannot be viewed simply as extensions of procedure. First, the criteria expanded the requirement that the agency "foster ethical practices" by including under that head "equitable student tuition refunds and nondiscriminatory practices in admissions and employment." Second, it required the agency to encourage "experimental and innovative programs." Third, it required that the agency take "into account the rights, responsibilities, and interests of students, the general public, the academic, professional, or occupational fields involved, and institutions." Finally, and apparently to the end envisioned by that requirement, the accrediting agency was required both to include "representatives of the public" in its decisionmaking processes and to assure that the composition of its policy and decisionmaking bodies reflects the community of interests directly affected by the scope of its accreditation.³²

These revisions express a fundamental lack of confidence that accrediting agencies adequately function to protect the public interest. They are premised upon the perceived need to make listed accrediting agencies more responsive to the demands of consumer protection, the need for educational change, and the observance of ethical institutional practices, both directly, by so providing in the recognition criteria, and

30. *Id.* at 644.

31. 39 Fed. Reg. 30,042 (1974).

32. *Id.* at 30,043.

indirectly, by changing the composition of the governing bodies of listed accrediting agencies. As the responsible official within the Office of Education wrote of the 1969 revision, the modifications in criteria reflect "a concern that a recognized accrediting agency shall manifest an awareness of its responsibility to the public interest, as opposed to parochial education or professional interest" of the accredited constituency.³³ Similarly, he observed of the 1974 revision that "the Commissioner's Criteria for Recognition has served as a stimulus for progressive and responsible change on the part of accrediting agencies."³⁴

The ensuing section will analyze whether these modifications of the Commissioner's criteria are consistent with the authority delegated by Congress. Before reaching that question, it is important to ascertain whether any congressional action during the "era of quasi-regulation" can be understood as broadening the Commissioner's authority or as altering the statutory bases for federal reliance upon private accreditation.

Unlike the legislative histories of much of the earlier legislation that, save for the dispute about nurse training, dealt little, if at all, with the accreditation system, congressional attention was drawn extensively to asserted deficiencies in the accreditation-reliance system in hearings dealing explicitly with accreditation, and especially in connection with abuses of the guaranteed student loan program.³⁵ The congressional response in the Education Amendments of 1972³⁶ was to give the Commissioner authority to prescribe regulations to provide for a "fiscal audit" of the institutions participating in the insured student loan program, to establish "reasonable standards of financial responsibility" for the institutions, and to suspend or terminate the eligibility of institutions that fall afoul of the regulations.³⁷ This power was expanded

33. Address by John R. Proffitt, The U.S. Office of Education, Accreditation and the Public Interest, Meeting sponsored by United States Office of Education and National Commission on Accrediting (November 6, 1970), *quoted in* Finkin, *supra* note 5, at 369.

34. Address by John R. Proffitt, Accreditation and the Federal Government or The Federal Connection, Conference of Academic Deans of Southern States (December 14, 1976) (copy on file in office of *North Carolina Law Review*).

35. See *Accreditation of Postsecondary Educational Institutions: Hearings Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. (1974); *Guaranteed Student Loan Program: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. (1975).

36. Pub. L. No. 92-318, 86 Stat. 235 (codified in scattered sections of 7, 12, 16, 20, 29, 42 U.S.C.).

37. *Id.* § 132E (codified as amended at 20 U.S.C.A. § 1087-1 (West 1978)).

by the Education Amendments of 1976³⁸ to include all aid programs authorized under title IV.³⁹ Moreover, the latter enactment required institutions to carry out a program of dissemination of specified information to current and prospective students. The Commissioner was given additional power to suspend or terminate the eligibility of an institution for substantial misrepresentation of the nature of its educational programs, its financial charges, or the employability of its graduates.

The impetus behind these legislative efforts was the widespread abuse of the guaranteed student loan program. A report of the House Committee on Government Operations in 1974 concluded that the accreditation-reliance system was inadequate as a check upon abuses of the program. It noted:

Government reliance on accreditation . . . has extended well beyond the area of educational quality. The accreditors have responded to complaints from Government agencies regarding advertising, business practices, refunds, and other alleged wrongdoing While they have cooperated, and state that they desire to continue doing so, the accrediting associations also say that they are not Government regulatory agencies, and should not be used as such.⁴⁰

The Senate Committee on Government Operations held hearings on the Guaranteed Student Loan Program in December 1975. Its suggestions were communicated to the Senate Committee on Labor and Public Welfare, then considering the Education Amendments of 1976, by letter of Senators Nunn and Percy. They indicated that the "accreditation process" presented one problem among a number of others that "could be corrected by new or revised regulations or administrative procedures" and recommended that the Committee on Labor and Public Welfare "might want to consider including in pertinent legislation a directive that HEW promulgate regulations in these and other specified areas."⁴¹

Shortly before the Labor and Public Welfare Committee received this recommendation, the administration's bill was introduced. With

38. Pub. L. No. 94-482, 90 Stat. 2081 (codified in scattered sections of 20 U.S.C.). *See also* H.R. CONF. REP. NO. 94-1701, 94th Cong., 2d Sess. 77, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 4877, 4903.

39. Pub. L. No. 94-482, §§ 131, 133, 90 Stat. 2081 (1976) (codified in scattered sections of 20 U.S.C.).

40. H.R. REP. NO. 93-1649, 93d Cong., 2d Sess. 31 (1974).

41. S. REP. NO. 94-882, 94th Cong., 2d Sess. 24, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 4713, 4736.

respect to accreditation, it would have given the Commissioner's Advisory Committee statutory status and would have altered the Commissioner's authority to list accrediting agencies by requiring the Commissioner to determine not only that they are a reliable indicator of educational quality, but also that they are a reliable authority concerning "the probity" of the institution.⁴² The Senate Committee on Labor and Public Welfare reacted to both proposals:

One item of particular interest among the Government Operations Committee recommendations was their discussion of the relationship between private accrediting associations and eligibility for Federal student assistance programs. The Committee [on Labor and Public Welfare] in recent years has held several hearings regarding this critical area. In strengthening the existing Title IV, the Committee took no direct action affecting the existing and historically developed relationship between the U.S. Commissioner of Education and accrediting associations. An Administration proposal for statutory changes in this area was presented to the Committee at such a late date that realistic consideration was impossible The Committee is willing at an appropriate future time to review this important matter of accreditation and eligibility and consider legislative improvements.⁴³

Thus the Senate Committee on Labor and Public Welfare rejected the Commissioner's effort to secure express statutory authorization to require accrediting agencies to determine the "probity" of the institutions they accredit as a condition for being listed; the Committee thought this addition a novel departure from the existing and historically developed statutory scheme, requiring less hasty legislative consideration. Accordingly, neither the House Committee's 1974 report nor the Senate Committee's 1976 report can be read as endorsing the Commissioner's view of his authority under then-existing law. In contradistinction to the authority that the Commissioners sought, the 1972 and 1976 enactments increased regulatory power only in areas in which particular abuses were perceived, by direct delegation to government officials, and eschewed any alteration in the existing statutory authority of the Commissioner with respect to the accreditation system. From this perspective it is clear that nothing in the legislation enacted after 1968 represents any change in the basic statutory assumptions of the

42. H.R. 11939, 94th Cong., 2d Sess. (1976) (introduced Feb. 21, 1976, 122 CONG. REC. 3682 (1976)).

43. S. REP. NO. 94-882, 94th Cong., 2d Sess. 26, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 4713, 4737.

accreditation-reliance system. On the contrary, the post-1968 legislation indicates that when Congress sought to tighten controls over institutional activity, unrelated to educational quality, to effect policies of consumer protection or financial responsibility, it chose to act directly by means unrelated to the system of institutional or programmatic accreditation.

II. THE COMMISSIONER'S CRITERIA AND THE SCOPE OF ADMINISTRATIVE DISCRETION

A. *Substantive Requirements*

The system of federal reliance upon private accreditation is premised upon the assumption that accrediting agencies exist and are sufficiently reliable indicators of educational quality that it is legally permissible for government to depend upon their determinations as a factor in the dispensation of public monies.⁴⁴ The Commissioner of Education, however, has adopted three substantive criteria for the listing of accrediting agencies that, at the threshold, would seem to be inconsistent with that assumption: the requirement of public membership in the agency's governing body, the requirement that the agency police institutional observance of ethical practices, including, specifically, discrimination in employment and admissions, and the requirement the agency encourage educational innovation.⁴⁵ Whereas these modifications are premised upon a concern that private accrediting agencies become more attuned to the "public interest, as opposed to parochial . . . interest,"⁴⁶ and that the Commissioner's criteria serve as a stimulus for progressive and responsible change, the statutes that authorize the publication of a list of accrediting agencies are premised upon the assumption, akin to the Invisible Hand, that when accrediting agencies act in

44. A memorandum from the Office of General Counsel, HEW, relied upon this factor in concluding that the accreditation-reliance system did not constitute an impermissible delegation of public power to a private group.

[P]rivate agencies undertake to accredit schools for many reasons other than Federal aid eligibility. Accreditation is generally considered to be the single most reliable indicator of institutional quality in higher education, and private accrediting agencies play a broad role *The Federal-aid statutes merely take cognizance of this well-established system.*

Office of General Counsel, U.S. Dep't of Health, Education, and Welfare, Working Paper on Congress' Power to Rely upon Determination of Private Accrediting Agencies as Basis of Eligibility for Federal Educational Assistance (June 1970) (emphasis added) (copy on file in office of *North Carolina Law Review*).

45. Orlans did not fully endorse this view. H. Orlans, *supra* note 2, at 133-34. The report was, however, either critical of the wisdom or cynical about the effectiveness of these policies. *Id.* at 158-212.

46. Address by John R. Proffitt, *supra* note 33, quoted in Finkin, *supra* note 5, at 369.

their own narrow parochial interests, their determinations are sufficiently reliable for the government to accept; thus, nothing in the statutory authority for the Commissioner's list would appear to authorize him to require that otherwise reliable agencies alter their policies to achieve what the Commissioner deems to be progressive social policy.⁴⁷

Nevertheless, the responsible official within the Office of Education has offered several justifications for these substantive requirements; thus, the question is whether, as a matter of administrative law, the reasons supporting the expansion of the Commissioner's authority should be considered sufficiently persuasive to rebut what would otherwise appear to be a *prima facie* instance of administrative action *ultra vires* the enabling legislation.

First, it is argued that

accrediting bodies are performing an increasingly important societal role—a role in service to the broader society rather than one solely in service of the narrower educational community. And if the Federal Government is going to be justified in continuing strong reliance upon private accreditation, the accrediting associations will need to more explicitly recognize their obligation to protect the public interest.⁴⁸

The argument is premised upon the assumption that there is residual authority under existing statutes to revise the Commissioner's criteria in order to secure conformity with evolving notions of what best serves the public interest. By this reasoning, the failure of the administration's 1976 legislative proposal to expand the Commissioner's statutory power would not necessarily foreclose the Commissioner's fuller exercise of authority he possesses under existing law. Supporters of this position would be expected to look to the decision of the United States Supreme Court in *United States v. Southwestern Cable Co.*,⁴⁹ which affirmed the Federal Communications Commission's assumption of jurisdiction over CATV, despite the FCC's previously expressed doubt that it had jurisdiction and the failure of legislative efforts expressly to give it such jurisdiction. Mr. Justice Harlan opined,

“[U]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative

47. Finkin, *supra* note 5, at 369-72.

48. Address of John R. Proffitt, *supra* note 33, quoted in Finkin, *supra* note 5, at 371.

49. 392 U.S. 157 (1968).

process possess sufficient flexibility to adjust itself to these factors.”⁵⁰ . . . Congress in 1943 acted in a field that was demonstrably “both new and dynamic,” and it therefore gave the Commission “a comprehensive mandate,” with “not niggardly but expansive powers.”⁵¹

The analogy to *Southwestern Cable* is analytically useful, for, upon examination, the decision explains why the Office of Education’s argument fails. As Louis Jaffe noted, the FCC was “created at least in the image of the ‘regulatory’ agency. It has been given the trappings of authority”⁵² In contradistinction to the FCC, the Office of Education has not been given a “comprehensive mandate” with “expansive powers.” On the contrary, when the subject of regulation impinges upon the determination of standards of educational quality, a subject traditionally shielded from federal regulation,⁵³ a clearer expression of congressional intent should be required before ministerial language can be converted by administrative act into a regulatory mandate.⁵⁴

The ministerial nature of the Commissioner’s role is illustrated by contrasting the language authorizing the publication of a list of nationally recognized accrediting agencies with the direct designation of the regional associations as determinants of federal eligibility in the Allied Health Professions Personnel Training Act, and with other statutes that rely without more upon the fact of accreditation. Because there is no governmental review of the regional associations under the Allied Health Professions Personnel Training Act to assure conformity with the public interest, the question would be presented whether that Act contains an impermissible delegation of public power to a private group. James O. Freedman has explained that the United States Supreme Court

50. *Id.* at 172-73 (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)) (footnote added).

51. *Id.* (quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943)).

52. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1193 (1973).

53. The statutory prohibition upon federal control of education contained in 20 U.S.C. § 1232a (1976) is discussed in Oulahan, *The Legal Implications of Evaluation and Accreditation*, 7 J.L. & EDUC. 193, 231-34 (1978).

54. It is helpful to compare *Southwestern Cable* with *American Trucking Ass’n v. United States*, 242 F. Supp. 597 (D.D.C. 1965), *aff’d*, 382 U.S. 373 (1966). The question was whether the Interstate Commerce Commission had jurisdiction to determine standards of safety for railway-highway crossings. In holding that the ICC lacked jurisdiction, despite the seemingly encompassing language of the Safety Appliance Act, the court noted the deletion of a provision that would have expressly included such devices and stressed that the subject matter had traditionally been regarded as a state matter; thus, the court required a clearer expression of congressional intent to authorize an expansion of federal administrative authority into an area long regarded as a state prerogative. *Cf.* *National Cable Television Ass’n v. United States*, 415 U.S. 336 (1974) (determining proper measure of fees imposed by FCC upon CATV systems pursuant to statute). *See also* *Kent v. Dulles*, 357 U.S. 116 (1958).

has proceeded on the sensible premise that delegations to private parties are constitutional when they serve important public purposes and give promise of adequately considering and protecting the interests of all those subject to regulation. . . .

For example, courts commonly have sustained delegations to private parties in the form of statutes that attach public consequences to decisions that the delegate has made or would be making in any event for purposes quite independent of giving content to the legislation.⁵⁵

The Allied Health Professions Personnel Training Act does not impermissibly delegate public power to a private group because, as Congress has determined, the regional associations will continue to function pretty much as they did before the system of federal reliance, and, as Congress has concluded, when they so function they are reliable enough determinants of educational quality to permit the government so to rely. Similarly, a number of statutes administered by federal agencies other than HEW (including at least one that antedates the Korean War GI Bill) require institutional or programmatic "accreditation," but without reference to any explicit approval or review authority by those agencies.⁵⁶ Instinct in such provisions, however, is

55. Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 333 (1976). See also Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 681-83 (1975) (treating educational accreditation statutes).

56. The National Science Foundation Act of 1950, ch. 171, 64 Stat. 149 (current version at 42 U.S.C.A. §§ 1862-1863, 1873 (West 1978)), allowed the Foundation to award fellowships for scientific study at accredited institutions. The Office of Education has made note of "third party" use of the Commissioner's list. Accrediting Agency Evaluation Branch, Division of Eligibility and Agency Evaluation, Analysis of the U.S. Office of Education's Role in Recognizing Accrediting Agencies (January 15, 1978) (copy on file in office of *North Carolina Law Review*). The Office of General Counsel, HEW, has pointed out that the Immigration and Nationality Act, governing student visas, and the Housing Act, governing college housing, rely upon institutional accreditation. Office of General Counsel, U.S. Dep't of Health, Education, and Welfare, Responsibility Conferred on U.S. Commissioner of Education to List Accrediting Agencies Under Statutory Provisions Related to Program Eligibility of Accredited Institutions (Jan. 20, 1978) (copy on file in office of *North Carolina Law Review*). That list is not exhaustive; cursory research has revealed several approaches. Some statutes, like the State Technical Services Act, 15 U.S.C. §§ 1351-1368 (1976) (which the General Counsel does note), or grants to graduate schools of social work under 42 U.S.C. § 908(d)(2) (1970), delegate to the Commissioner of Education the authority to publish a list of accrediting agencies, employing the now customary boilerplate. On the other hand, for the purposes of scholarship, grants and contracts to assist students in, and educational programs of, water quality treatment, the Administrator of the Environmental Protection Agency is substituted for the Commissioner of Education in the familiar boilerplate. 33 U.S.C. § 1262(a)(1) (1976). See also H.R. REP. NO. 91-127, 91st Cong., 2d Sess. 27-28, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 2691, 2709. Similarly, the Secretary of the Interior is given authority to enter into contracts for nursing education of American Indians with schools of nursing "accredited by a body or bodies approved for such purpose by the Secretary [of the Interior]." 25 U.S.C. § 309 (1970). Other statutes simply rely upon the fact of "accreditation." See, e.g., 7 U.S.C. § 2014(c), 10 U.S.C. §§ 2102(a), 2120(3), 4314, 33 U.S.C. § 902(18)(B) (1976).

the requirement that the agency administering the relevant act determine whether or not the institution or program is validly accredited; thus, the administering agency must determine, for the purposes of such an act, the reliability of the accrediting agency as a recognized determinant of education quality. The express statutory authority of the Commissioner of Education merely to publish a list of the agencies does not differ qualitatively from these other enactments. Just as these other federal agencies may not endeavor to alter the internal policies of otherwise well-recognized agencies as a condition of reliance upon them, neither may the Office of Education.

There is, to be sure, a related but more subtle argument for the imposition of administrative controls; that is, that many of the accrediting agencies on which government now relies have come into existence less in response to the antecedent demands of the academic community than to government's need to rely upon them. Turning Freedman's formulation around, it could be argued that because these novel agencies have come into existence only to give content to the federal scheme, in the absence of regulation of their policies government simply lacks adequate assurance that they do in fact "give promise of adequately considering and protecting the interests of all those subject to regulation."

Had this been the gravamen of the Commissioner's argument, it would pose the truly fascinating question whether an administrative act, which is otherwise *ultra vires* the unequivocal statutory scheme, can be taken in order to save the legislation from constituting an impermissible delegation of public power to a private group. Congress was fully aware that new agencies would arise to fill the need that the legislation created.⁵⁷ Further, the determinations of these new agencies, particularly those concerned with proprietary vocational training, may be crucial to the institution's very existence. The resulting pressure upon the agency to grant accreditation may compound the "cronyism" of which accreditation in general has been accused.⁵⁸ Nevertheless, the legislation assumed that such agencies would be readily cast in the mold of their more well-established counterparts.

57. See, e.g., *Higher Education Act of 1965: Hearings on S. 600 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 89th Cong., 1st Sess. 1069 (1965) (statement of Walter J. Tribbey).

58. See Address by Roger W. Heyns, *The Improvement of Self Regulation in Higher Education*, COPA Conference on Accreditation (February 3, 1977) (copy on file in office of *North Carolina Law Review*). For a more polemical statement see Koerner, *The Case of Marjorie Webster*, 20 PUB. INTEREST 40, 58-59 (1970).

It suffices to say, however, that the Commissioner has not distinguished between established agencies, like the regional associations, that raise no question of impermissible delegation, and novel agencies that require greater supervision because of their suspicious, or less suspicious, origins. Nor could he. The Commissioner has sought to bring all listed agencies into conformity with his policies; the foregoing argument would compel the Commissioner to concede that, at least to certain of the more well-established agencies, portions of his listing criteria need not apply. Finally, and perhaps more important, this argument for greater administrative supervision flows from the suspicion that some agencies, because of the critical role they perform in eligibility for federal program participation and so in institutional survival, may be softening the rigor of their educational assessment. The criteria at issue here deal with that question not at all.

In sum, it may well be that absent alterations in the composition of their governing boards, greater interest in educational reform, and greater sensitivity to the ethics of accrediting institutions, existing accrediting agencies—no matter how much their judgments are recognized in the academic community as reliable indicators of educational quality—are not serving adequately as ensurers of a larger public interest. But Congress has not delegated authority to the Office of Education to define that larger interest and assure conformity with it as a condition of federal reliance. If the Commissioner is correct—if accrediting agencies should be reformed before they are relied upon by government—then the reformation must be effected by the legislature.

A second justification offered by the Office of Education stresses the voluntarism of the Commissioner's list. In refuting the existence of any federal intrusion into the affairs of accrediting agencies, the director of the responsible agency stressed "the complete freedom of these organizations [accrediting agencies] to resign from the Commissioner's List."⁵⁹ The unarticulated premise of this justification is that applicants who voluntarily choose to apply for listing cannot complain of the standards to which they must conform.

The threshold requirement of an application for listing is within the scope of the Commissioner's discretion. Even though the enabling

59. Address by John R. Proffitt, *supra* note 34. See also Accrediting Agency Evaluation Branch, Division of Eligibility and Agency Evaluation, *supra* note 56, at 11 ("From the Office of Education's perspective, application for listing . . . by the Commissioner is entirely voluntary. No agency has ever been recruited for listing by the Office.").

statutes read as a directive to the Commissioner to list nationally recognized accrediting agencies, and can be read as a command to the Commissioner affirmatively to seek those agencies out, it is unlikely that the Commissioner could successfully recruit an uncooperative agency. Further, the Commissioner's contemporaneous reading of the 1952 Act did provide that subsequent listing would be at the "request" of the heretofore unlisted agency. Moreover, the courts have traditionally given federal administrative agencies great leeway in procedural matters; it cannot be said that the adoption of an application procedure is arbitrary, capricious, an abuse of discretion, or ultra vires the authorizing statutes.

Nevertheless, the infirmity in this justification is that it uncouples the Commissioner's criteria for listing from their statutory source; that is, it assumes that because the relationship is voluntary, the Commissioner is free to adopt any condition of recognition that arguably serves the public interest, unencumbered by limitations imposed by the statutes that authorize the publication of the Commissioner's list. Being derived from statute, however, the Commissioner's authority cannot rise higher than the statutory source. The question remains one of determining the permissible scope of administrative discretion, authorized by the relevant statutes, and on that question the voluntarism of the listing procedures is simply irrelevant.

The final justification offered by the Office of Education does return to the statutory source. The Director of the responsible agency has stated:

In order for accrediting agencies to merit the support and acceptance of government, and of society as a whole, they must keep themselves current with legitimate educational issues and trends. In this context, I find that some accrediting agencies have been derelict during the past several decades in not recognizing the socially-related character of educational quality. Thus, in an era of accelerated societal change, accrediting agencies often have found themselves cast in unduly conservative and obsolete postures. Two cases in point are the tardiness of some accrediting associations . . . in accepting the factors of discrimination and institutional probity as components of the educational quality equation. Concepts of quality must be expansive, rather than restrictive; fluid rather than static.⁶⁰

60. Address by John R. Proffitt, *supra* note 34. The "finding" that accrediting agencies have been "derelict during the past several decades" in failing to recognize the relationship of discrimination to educational quality is mildly surprising since the Commissioner did not discover the relationship until 1974. It suffices to say, wholly apart from the misconstruction of the statutory concept of educational quality, that the addition of yet another, albeit informal, mechanism to remedy discrimination is not necessarily helpful. Cf. Meltzer, *Labor Arbitration and Overlapping*

The infirmity in this argument is that the concept of educational quality, as employed in the relevant statutes, is simply not an elastic, "socially-related" one that would allow federal administrators to incorporate almost any factor they deemed socially progressive as part of the criteria for listing by the Commissioner.⁶¹ As Mr. Justice Frankfurter put it: "[L]aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends."⁶² The legislative end sought by reliance upon private accreditation was to assure that the instruction offered would meet minimum content standards of educational quality without federal regulation of those standards. When institutions have abused federal programs or fallen short of perceived societal needs unrelated to the quality of their educational offerings, such as the failure to afford better protection of the student consumer, Congress has chosen to legislate directly to correct those deficiencies rather than rely upon accrediting agencies for that purpose. In sum, the administrator's expansive and flexible definition of quality finds no statutory support and is inconsistent with the legislative scheme.

B. Procedural Considerations

Much of the Office of Education's refinement of the procedural standards that accrediting agencies must employ, while debatable in terms of the wisdom of requiring inflexible uniformity on the part of all accrediting agencies, cannot be said to be arbitrary or an abuse of administrative discretion. Similarly, the requirement of periodic reevaluation of listed agencies is well within the ambit of discretion. The Office of Education, however, has not confined itself only to the listing of those agencies whose activities can be shown to relate to eligibility

and Conflicting Remedies for Employment Discrimination, 39 U. CHI. L. REV. 30 (1971) (discussing problems with overlapping remedies under grievance procedures and under Title VII of the Civil Rights Act of 1964).

61. Orlans states:

Finkin cites the requirement that an accrediting agency "enforce ethical standards" as one which is irrelevant to a determination of educational quality, *as indeed it is*; but it is not irrelevant to the public acceptance of an agency as being a "reliable" authority since one can hardly be reliable without being honest.

H. Orlans, *supra* note 2, at 134 (emphasis added). The ethical practices criterion does not require that the accrediting agency be ethical—surely a necessary aspect of reliability—but that it undertake a new policing function vis-à-vis accredited institutions. The Commissioner could require such an undertaking only if the observance of ethical practices by institutions is a necessary aspect of educational quality, which, Orlans agrees, it is not.

62. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947).

for specific federal programs. Because the statutory authority to list accrediting agencies is not a delegation to the Commissioner of Education to list accrediting agencies in general, but only those that will serve as an adequate determinant of educational quality for the purposes of particular legislative programs, an argument has been made that the Commissioner's failure to limit the list only to those agencies that serve a function under an identifiable federal program exceeds the discretion conferred by the authorizing legislation.⁶³

Five considerations have been offered in rebuttal.⁶⁴ First, it has been argued that, given the especial amorphousness of the GI Bill, the Office of Education simply cannot know the nature of each and every program for which accreditation could be relied upon by an appropriate state agency, and that, in effect, the Commissioner's list includes only accrediting agencies that do, at least potentially, perform a function in determining eligibility for some federal program.⁶⁵ Second, it is not always clear whether a particular statute contemplates program (specialized) accreditation or institutional accreditation.⁶⁶ Third, and closely related,

As a consequence of the fact that the Commissioner's function in recognizing accrediting agencies relates primarily to the question of quality, we see no legal reason why he could not grant recognition to a specialized accrediting agency even where the institution or its students are otherwise able to participate in programs of Federal financial assistance because the institution has been institutionally accredited. . . . [A] probable nexus to Federal spending must be shown, even if such nexus consists of increased assurance of the quality of training provided in that institution in relation to eligibility to receive federal funds by the institution or its students.⁶⁷

Fourth, the listing of accrediting agencies that seem to perform no precise function in determining eligibility dates from the original 1952 criteria and list; thus, the policy is sanctioned by contemporaneous and

63. Council on Postsecondary Education, A Brief Analysis of the U.S. Office of Education's Role in Recognizing Accrediting Agencies (Dec. 2, 1977) (copy on file in office of *North Carolina Law Review*).

64. The rebuttal is contained in Accrediting Agency Evaluation Branch, Division of Eligibility and Agency Evaluation, *supra* note 56. Supporting legal argument is supplied in a paper prepared by M. Conway, Office of the General Counsel, U.S. Dep't of Health, Education, and Welfare, The Commissioner's Authority to List Accrediting Agencies and Associations: Necessity for an Eligibility Issue (May 25, 1978) (copy on file in office of *North Carolina Law Review*).

65. M. Conway, *supra* note 64, at 5-8.

66. *Id.* at 10.

67. *Id.* at 15-16.

long-standing administrative practice.⁶⁸ Finally, the Commissioner's list is looked to as a matter of practice or policy by other federal agencies that administer statutes that rely upon the fact of accreditation; the listing of accrediting agencies that may be unrelated to statutes that authorize the Commissioner to prepare a list of agencies is simply a service of the Office of Education to those other agencies. The Office of Education need not secure express statutory authorization to perform such a service for these other federal agencies, less expert in educational matters and less experienced with the vagaries of accreditation, merely as an adjunct to the listing function that the Office of Education would otherwise perform.⁶⁹

The last argument is not entirely to the point. Even if other federal agencies rely upon the Commissioner's determinations for the purposes of their statutes, it does not follow that the Commissioner is thereby free to list accrediting agencies at large, without a showing that they perform a function under *some* statute. The argument concerning improved quality is similarly troublesome. Regional accreditation attests to the quality of the institution as a whole, but not necessarily to the quality of any one of its programs or offerings; thus, it is logically possible for an institution to be regionally accredited while none of its programs would withstand an objective evaluation of educational quality. Accordingly, this limb of the Office of Education's position is that it is in keeping with the overall legislative purpose—improving educational quality by encouraging accreditation—for the Office of Education to list specialized agencies even though regional accreditation would suffice for eligibility purposes. This argument, however, assumes that Congress legislated to encourage accreditation per se without reference to eligibility under any particular statute. Further, assuming *arguendo* that some statutory references to accreditation are unclear about whether specialized or institutional accreditation is intended, the Office of Education has made no effort to secure legislative clarification or to indicate in the list itself what overlapping agencies have been designated because of identifiable statutory uncertainty.

Nevertheless, the Commissioner's arguments to the furtherance of overall educational quality and to contemporaneous, longstanding interpretation might be given deference to the extent the policy is simply

68. Accrediting Agency Evaluation Branch, Division of Eligibility and Agency Evaluation, *supra* note 56, at 2.

69. *Id.* at 5-9.

in aid of, and presents no fundamental inconsistency with, the legislative scheme. On the other hand, deference is less likely to the extent the practical effects of the policy invade interests that Congress had not intended to reach.

One effect of the Commissioner's indifference to whether a listed agency actually serves as a determinant for eligibility for federal funds concerns institutions. A claim by a listed accrediting agency to accredit a particular school or program carries with it a tacit presumption that, because the agency is listed, it does perform a function as a determinant not of educational quality at large but of eligibility with respect to some federal funds; thus, institutional administrators faced with an accreditation request by a listed accrediting agency may give the agency greater attention than would otherwise be deemed prudent or necessary. The result contributes both to the proliferation of accrediting agencies and to the leverage they are able to assert. This is, of course, precisely the consequence intended by the policy, that is, the improvement of educational quality at large by encouraging accreditation; but, it is accomplished essentially by misleading the institutions.

In view of these implications and the clear wording of the authorizing statutes, the listing of agencies that perform no identifiable statutory function, without more, would appear to constitute an abuse of discretion. The Commissioner could go far to salvage the policy, however, by mitigating these institutional consequences. The Commissioner could simply indicate in the published list which accrediting agencies do actually serve as determinants of eligibility and under what specific programs, and which are listed simply for their potential or ancillary usefulness. This would dispel the uncertainty that confronts institutional administrators faced with a claim by a listed accrediting agency. In addition, a modification simply in the form of the list that would maximize "consumer" information would be particularly fitting for an agency whose expressed concern for almost a decade has been to broaden consumer protection in education.

A second effect, however, concerns accrediting agencies and derives from the relationship of this policy to the closely related policy adopted by the Office of Education in 1969 that, subject to exception, limits the list to but a single accrediting agency for a given geographic area, field, or program. The ostensible justification for this limitation is the prevention of a proliferation of accrediting agencies. It is more

than likely, however, that an accrediting agency with lower (but acceptable) standards would continue to be better subscribed than an overlapping agency with higher standards, even if both were listed by the Commissioner. Thus the question here, as in the foregoing, is whether this policy is simply in aid of the larger legislative purpose or invades interests that Congress sought not to reach.

It is entirely uncertain whether this policy is actually in aid of the legislative purpose at all. One argument in support of the Office of Education's indifference to whether a listed agency actually fills a statutory need points to the listing function simply as a facility for other federal programs. The Office of Education's role in performing this service function does not logically require that it certify the soundness of only one agency in each field. More troublesome is that many of the relevant statutes speak in the plural of the agency or agencies, body or bodies, that the Commissioner may list in conjunction with the particular federal program involved.⁷⁰ Secretary Cohen observed of just such a statute that no statutory limit had been placed upon the number of accrediting agencies that might be listed; and, in the struggle over nurse-training accreditation, Congress chose expressly to expand the universe of accreditation agencies that might be relied upon. Accordingly, it remains to be seen whether, in light of statutes that expressly contemplate a variety of accrediting agencies, the Commissioner is entirely free to adopt a blanket limitation to a single listing, in lieu of making a particularized determination of the suitability of a limitation to a single agency under a particular statute.

The bootstrap effect of this policy is underlined by the Commissioner's insistent reiteration of the argument that insofar as private agencies are relied upon as determinants of federal eligibility they become delegates of the government and so shall be more closely supervised by government. Congress was acutely aware of the problems posed by governmental reliance upon private agencies, as the House reports over nurse training amply evidence.⁷¹ Significantly, the alternative chosen was not to require greater supervision of an exclusive

70. For example, the Public Health Service Act, 42 U.S.C. § 295(h) (1970), which authorizes grants for certain graduate programs in health administration and planning, is just such an Act. The regulations recently adopted speak directly to the issue in terms that parallel Secretary Cohen's earlier understanding: "[U]nder these regulations, if another body were given initial or expanded recognition by the Commissioner to include these areas, institutions with programs accredited by such body would also become eligible for grants under this subpart." 43 Fed. Reg. 26,443 (1978).

71. See text accompanying notes 22-25 *supra*. The debate on accreditation and nurse training reflected this concern. "I do not know why the Government of the United States should

franchisee, but to soften the effect of reliance by expanding the variety of agencies that might be relied upon.

The significance of the generalized limitation to listing but a single agency is magnified when it is coupled with the Commissioner's refusal to tie listing to a showing that the accrediting agency performs an identifiable function under any statute. The practical result is that the Commissioner of Education has become the dispenser of an exclusive seal of approval—tantamount to a franchise⁷²—upon accrediting agencies at large. Whether this combination of ingredients has contributed to or dampened the proliferation of accrediting agencies is highly debatable;⁷³ what it does accomplish is to provide a strong incentive for accrediting agencies to seek listing by the Commissioner, which, in turn, gives the Commissioner added leverage to induce accrediting agencies to conform to social policies that the Commissioner deems desirable but that are otherwise ultra vires the statutory scheme.

III. A PROPOSAL FOR REFORM

The need for reform in the existing system requires an assessment of the criticism leveled against private accreditation, and so against federal reliance upon it. Essentially two very different objections have been raised. The first, directed to the model of the preeminent specialized agency, views accreditation as an exercise of professional monopoly power, fostering the profession's special interest at the expense of the larger public interest.⁷⁴ The second, directed primarily to the regional associations of institutions (and, perhaps, to some of the newer

require a private group to spell out the standards" 111 CONG. REC. 22461 (1965) (remarks of Rep. Moss). "I do not think we ought to make these junior colleges go to a private organization—a private organization—to get their clearance before tax dollars are given to nursing schools and students" *Id.* at 22462 (remarks of Rep. Rogers).

72. In a 1976 speech, the Director of the Office of Education's Division of Eligibility and Agency Evaluation quoted with approval the following statement of the Office of Education's role: "[T]he government is exploring a new kind of role for itself: this is not the role of the accreditator nor the regulator. . . . The role of government would seem to be to franchise the regulator by setting standards and recognizing the private agency for its compliance with the standards." Address by John R. Proffitt, *supra* note 34 (quoting address of Samuel P. Martin to the Commissioner's Advisory Committee (October 1975)).

73. Compare Accrediting Agency Evaluation Branch, Division of Eligibility and Agency Evaluation, *supra* note 56, with H. ORLANDS, *supra* note 2, at 171-76.

74. See, e.g., Letter from Daniel C. Schwartz, Acting Director, Bureau of Competition, Federal Trade Commission, to Edward Aguire, U.S. Commissioner of Education (Nov. 11, 1976) (urging delisting of Liaison Committee on Medical Education) (copy on file in office of *North Carolina Law Review*); Statement of Daniel C. Schwartz Before the Advisory Committee on Accreditation and Institutional Eligibility (March 24, 1977) (copy on file in office of *North Carolina Law Review*). See generally U.S. DEPT OF HEALTH, EDUCATION, AND WELFARE, REPORT

vocationally oriented agencies), sees the major deficiency in the lack of policing to assure consistent adherence to standards by currently accredited institutions or programs.⁷⁵ As a leading study observed: "Accrediting agencies are not policing bodies. They make an overall judgment about whether a school or programs [*sic*] meets the bulk of the standards, and that is their major judgment. They do not monitor and enforce obedience to all standards or the degree of compliance with any single standard."⁷⁶ The problem, it seems, is that accrediting agencies are either too powerful or too weak.

Assuming that government should be concerned about the quality of the education supported by federal funds or received by students receiving federal support,⁷⁷ the obvious alternative is direct federal accreditation, either as a complete substitute for, or a supplement to, the current system. The difficulties with this approach are killing, wholly apart from the current climate of antagonism to increased federal regulation. Under such a system, the government would adopt standards of educational quality governing the multitude of federal programs of student and institutional assistance, send out teams of government inspectors to ascertain conformity with the standards, and, most likely, provide for agency review (and institutional challenge) of the inspectors' reports, subject, perhaps, to judicial review. Because thousands of institutions and programs are involved, the task would be truly Herculean. More important, such a massive federal effort, entailing scrutiny of curriculum, selection of instructional material, teaching methods, and faculty quality, would engender significant first amendment questions. Finally, because every congressional district has at least one affected institution, and, often, a great many more, it remains to be seen how a system of federal inspection could efficiently function, even assuming an adequate budget and a competent staff, in what would doubtless be a charged political atmosphere.

The advantage of the current system lies, as Congress had intended, in the insulation of qualitative judgment from governmental

ON LICENSURE AND RELATED HEALTH PERSONNEL CREDENTIALING (1971); Newman, *A Preview of the Second Newman Report*, CHANGE, May 1972, at 28.

75. See, e.g., C. WARD, *supra* note 2.

76. H. Orlans, *supra* note 2, at 547.

77. The initial recommendation of the Newman Committee implied that eligibility should be determined without regard to accreditation, and thus without regard to quality, so long as the institution had disclosed an honest educational prospectus akin to an SEC submission. It nevertheless would have required a showing that the institution "conducts a program of some educational value for some clients," leaving the whole matter rather up in the air. These recommendations are presented and criticized in H. Orlans, *supra* note 2, at 564-72.

determination. To the extent reform is in order, the deficiencies of the current system should be dealt with separately, as consistently as possible with the premises of the system. Congress, for example, has dealt with institutional financial integrity and consumer information. The administration of these enactments, unconcerned with educational quality, is beyond the scope of the system of federal reliance upon accreditation, despite the Commissioner's efforts to goad or induce accrediting agencies to take on these issues. By the same token, it is generally recognized that proprietary vocational institutions pose special problems. To the extent that deceptive trade practices by proprietary institutions are involved, the Federal Trade Commission has assumed an active policing function;⁷⁸ the FTC's administration of that statute is similarly beyond the scope of this discussion. Concern for reform in the system of federal reliance upon private accreditation is more narrowly and properly focused upon the question of their determination of educational quality.

A. Correcting Abuses of the Power to Accredite

One criticism, directed essentially to specialized accrediting agencies, considers their standards "too high" relative to some external standard of minimal acceptable educational quality. In effect, it is argued, the profession is using its power over accreditation to enhance the bargaining power of the discipline vis-à-vis an institution's central administration or state government, to restrict the supply of professional manpower by insisting upon artificially high standards, thereby increasing the economic return to graduates, or to impose a uniform, ideological straitjacket upon the content of professional training, thereby discouraging desirable innovation.⁷⁹ In all of these, by acting in its own professional self-interest, it is argued that the powerful accrediting agency's actions are adverse to the larger public interest.

One means of correcting these perceived abuses would be to have the government pass upon the standards adopted by the agency to assure they are not being abused—for example, to see that they are not

78. See Oulahan, *supra* note 53, at 217-22.

79. See, e.g., Letter from Daniel C. Schwartz, *supra* note 74; Statement of Daniel C. Schwartz, *supra* note 74; Letter from Professors Clark C. Havighurst and Gaylord Cummins to Ernest C. Boyer, U.S. Commissioner of Education (March 9, 1977) (urging delisting of Liaison Committee on Medical Education) (copy on file in office of *North Carolina Law Review*).

artificially high or ideologically narrow. The fatal defect in this approach is that it injects the government into the determination of educational standards measured not by acceptance in the academic community, but by its own notions of what is educationally desirable; this device would achieve indirectly what has long been thought government ought not do directly. Moreover, it remains to be seen why it is necessarily inadvisable for government to rely upon the qualitative judgments of a candidly elitist accrediting agency; high standards are no less high for being perceived by some as artificially so.

An alternative, however, lies readily at hand. It has been argued earlier that the Commissioner of Education lacks the power to adopt a blanket limitation to listing a sole agency for a given geographic area or specialty. Abandonment of that policy is not only compelled as a matter of administrative law, but would go far to dampen an exercise of excessive power by specialized agencies. The opening of alternatives to a particular agency would mean that, so long as the standards of an alternative agency achieve sufficient acceptability in the academic and professional community, there need not be a single, constricted model of what a particular professional must know or how he must be educated. This seems to be the real goal of critics of the "excessive power" school. Note, for example, the expected (and desired) consequences of delisting the Liaison Committee on Medical Education, the archetypal "too powerful" accrediting agency:

It is quite likely that one or more organizations would step forward with proposals and that one or more other private foundations would welcome the chance to catalyze the formation of a new body . . . capable of performing in the public interest the important function of accrediting the nation's medical schools.⁸⁰

There is no doubt that delisting would have had a catalytic effect, and that something would have to be done to fill the vacuum. But the cost of that action would be the assumption by the Commissioner of Education of the power to pass upon the ideological purity of medical accreditors as measured by his own notion of what is good medical education.

On the other hand, the kind of private action contemplated could be accomplished, if at a more stately pace simply because of the absence of the catalyst, but for the Commissioner's policy of listing only one agency. There is no sound reason for such a restriction on competing models of what good professional education is. If a foundation

80. Letter from Professors Clark C. Havighurst and Gaylord Cummins, *supra* note 79.

would welcome the chance to assist in the formation of an alternative accrediting agency for medical education—one more concerned with primary care and cost effectiveness and more attuned to the production of physicians for prepaid group practice—there is no valid reason why it should not fairly have a chance to have its model accepted by schools, practitioners, hospitals, health maintenance organizations, and the public. Once a sufficient degree of acceptance has been achieved, there is no reason why such an entity should not be listed by the Commissioner.

To be sure, a new entrant that has not yet achieved any national recognition of the reliability of its determinations labors under a considerable handicap in establishing itself. That handicap, however, need not be made insurmountable by the Commissioner. Given the universe of schools, departments and programs, it is not at all inconceivable that over time a new entrant could command enough support, even if only as a respectable minority, to warrant listing by the Commissioner. Even a moderate effort toward that end might result in a restructuring of the incumbent or a modification in its policies to attend to the special concerns of the competing organization. Alternatively, if an incumbent chooses to adhere rigidly to its established view of professional education and the differences between the two are clear, then consumer choice in the kind of professional education a student may select, and the public's choice in the kind of professional service it receives, is increased. In fact, this effect of the abandonment of the exclusive listing policy has consequences that transcend the powerful specialized agency. As a leading study observed:

A weakness of regional accreditation is that it has, for most practical purposes, stopped making quality distinctions. That will be denied, but we believe it is true and even axiomatic, for how can distinctions be drawn when all, or virtually all, eligible institutions are accredited? The accreditors' response that all accredited schools are of minimal quality . . . and yet constantly improving is too Panglossian to be convincing. Even were it true, it would not help the public to choose. Nothing would do more to revive the value of accreditation to the public than a restoration of the classifications of institutional quality or character which were widespread in its formative years A useful substitute . . . is the replacement of accrediting monopolies by multiple accrediting in the same field or region, particularly if the standards and purposes of each agency are clearly distinct.⁸¹

81. H. Orlans, *supra* note 2, at 556-57.

A second problem of abuse of the power to accredit concerns both institutions and accrediting agencies. Even with an expansion in the menu of recognized agencies, a refusal to accredit or a disaccreditation may have severe consequences to an institution's eligibility for federal program participation.⁸² Given the financial consequences of programmatic ineligibility, the institution labors under considerable pressure to litigate upon the theory of a wrongful act by the accrediting agency. Because most accrediting agencies are not especially well financed, the mere threat of a significant volume of litigation may dampen the ardor of an otherwise conscientious and perseverant accrediting agency to enforce its standards. Accordingly, it has been suggested that, insofar as the determinations of the accrediting agency affect the institution's eligibility for federal funds, it would be appropriate for Congress to establish an agency to entertain appeals from schools or programs concerning a refusal to accredit or a revocation of accreditation, when the effect of denial or revocation is to render the institution ineligible for federal program participation.⁸³ This proposal merits serious consideration. First, review of the accrediting agency's action would be analogous to judicial review of administrative action under the Administrative Procedure Act; thus, the government would not be establishing its own standards of educational quality but would be deciding, with due deference to the accreditor's expertise and by reference to the universe of institutions or programs enjoying unchallenged accreditation, whether the refusal or revocation was arbitrary, capricious or an abuse

82. The National Defense Education Act allowed an unaccredited institution to be eligible if there was "satisfactory assurance" that the institution would ultimately be accredited or if the credits of the institution "are accepted, on transfer, by not less than three (fully accredited) institutions." 20 U.S.C. § 403(b)(1976). The satisfactory assurance or "three letter" alternatives have been adopted in some later legislation, notably for the purposes of eligibility for insured student loans. *See, e.g.*, 20 U.S.C. § 1085 (1976). In 1965, apparently as a change in policy, the Office of Education interpreted the three letter clause to mean that three accredited institutions have actually accepted transfer credit from an unaccredited college. Nevertheless, to the extent that accrediting agencies do assume an effective policing role, these alternatives to outright accreditation may require some tightening.

83. *Guaranteed Student Loan Program: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 374, 379 (1975) (joint statement of Richard A. Fulton, Executive Director and General Counsel, and Dana R. Hart, Executive Secretary, Accrediting Commission of the Association of Independent Colleges and Schools). They stressed that this procedure "would *not* be an alternative to eligibility. It would merely be available *only* after the institution either had been denied accreditation or has been stripped of it." *Id.* This aspect of the proposal varies sharply from that made 11 months before to establish an alternative system of direct, federal accreditation. *Accreditation of Postsecondary Educational Institutions: Hearings Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 278-79 (1974) (letter and draft legislation of Richard A. Fulton).

of discretion. In essence, the actions of the listed agency would be accorded presumptive soundness by the government, subject to review upon notice and hearing in contested cases. Second, the availability of such an appellate mechanism should reduce the threat of litigation and so eliminate a barrier for vigorous and consistent administration of accrediting standards by the agencies themselves. Because the damages sought in a lawsuit arising out of a refusal to accredit or a disaccreditation would turn, at least in part, upon the loss of federal program eligibility, and because such an appellate procedure would test precisely whether the institution ought nevertheless to be eligible to participate, one would expect the doctrine of exhaustion of administrative remedy to come into play in such litigation. As a practical matter, affected institutions would have to pursue the appellate machinery. If successful, their reputations would be vindicated and their eligibility for federal participation secured. If unsuccessful, the prospect of securing judicial vindication would be sufficiently remote that it would constitute no more than a nuisance for accrediting agencies.

B. Assuring Adherence to Standards

By far the stronger and more serious criticism is that accrediting agencies are woefully inadequate as policemen of their own standards. Once accredited, an institution or program is subject to periodic reinspection at relatively long intervals. Given the current and projected exigencies of institutional financing, enrollment, and the lack of growth or actual retrenchment, such periodic reinspection may be too little, too late in terms of attesting to educational quality in the interval. More important, a great many accrediting agencies do not seriously undertake to reexamine the institution or program in the interval on the basis of complaints of a significant departure from the agency's standards. Some might attribute the relative toothlessness of accrediting agencies to the manner in which they are composed.⁸⁴ A leading study has been

84. A polemic on point puts it thus:

Normally regional accreditation is a rather quiet, clubby enterprise that seems to have a special appeal for professional educators, small college presidents, and other sorts of educational administrators. With their convoluted structure of committees and commissions and boards, the regionals operate in a manner that suggests mutual back-scratching and logrolling, or what an uncharitable critic might call academic incest. The same people are found serving year after year on one or another body, perhaps visiting other people's institutions one year and in turn being visited by them the next, or serving on a review group one year to carry out the policies of a higher body and serving on the higher body the next.

Koerner, *supra* note 58, at 58.

more sympathetic:

With few exceptions—the Liaison Committee on Medical Education may be one . . .—accrediting agencies appear to be harassed and frail operations, shoring up with earnest labor and heaps of paper an edifice that can be firmly secured only with far more money and widespread commitment than it has yet received. Accreditors may believe deeply in what they are doing but many unto whom they do it suggest that it is an unavoidable nuisance, and the less time and money it costs, the better.⁸⁵

The study concluded, nevertheless, that “educational standards are important; that better, stricter, and more carefully delineated, not fewer and laxer standards are needed. We would criticize accrediting agencies not . . . for maintaining standards but rather for relaxing them.”⁸⁶

The remedy suggested by the study was the creation, with government financing but by private action, of a new agency that would designate nonaccredited schools or programs as nevertheless satisfactory for federal program purposes, and would maximize consumer information by rating schools. In effect, the study argues for a new, catchall accrediting agency unfettered by direct disciplinary, professional or institutional control.

Although the authors termed the proposal a “modest measure,” it is anything but that, for it contemplates nothing less than a single, all-encompassing alternative accrediting agency to deal with every program and institution that has chosen to eschew resort to the existing programmatic or institutional agency; as in direct accreditation by a federal agency, the task is Herculean. Further, there is no assurance that any agency so constituted and funded would, over time, do a significantly different or better job than existing agencies; in fact, the organization’s dependence upon federal financial support might make it more amenable to external political influence than existing agencies.

An alternative approach to the problem of wrongful accreditation is a variation upon the proposed appellate function of the government in instances of wrongful refusal to accredit. Congress could create in that same agency the power to determine, after notice and hearing upon a record, that an accredited institution or program falls sufficiently afoul of the standards of its accrediting agency that it ought to be declared ineligible for program participation despite the accrediting agency’s declination to proceed against the institution. The power to

85. H. Orlans, *supra* note 2, at 570-71.

86. *Id.* at 571.

initiate such an ineligibility proceeding would rest with an independent, prosecutorial branch within the agency. It would have discretion to act, after investigation, either upon a complaint that raised a question of significant noncompliance with accrediting standards, or *sua sponte*. Unlike a refusal to accredit, a wrongful accreditation does not automatically produce a party directly aggrieved by the action. For this reason, the prosecutorial branch should be given the power to act in the absence of a complaint. Nevertheless, student, faculty or other groups may properly raise a question of serious institutional departures from accepted norms. It would be expected that such complaints would first be referred for the consideration of the relevant accrediting agency, if it had not previously considered the matter. Similarly, the preliminary findings of an investigation would be brought to the agency's attention before commencing a proceeding to contest eligibility.

The benefits of this approach are several. The standards against which the institution or program would be measured would not be established by the government, but would be set by a private agency that has been determined to be a generally reliable authority in the academic or professional community. The initial application of these standards to the institution or program would also be privately determined; as in cases of wrongful refusal to accredit, the agency's determinations would be accorded presumptive soundness. In addition, the prospect of initiation of governmental action should be expected to serve as a goad to greater attentiveness by accrediting agencies to the policing of their standards, and so to greater consistency in the application of their standards. It suffices to observe that a series of adjudications determining that a particular agency has been extraordinarily lax in the application of its standards should provide sufficient grounds for delisting the agency.

This proposal does have the disadvantage of adding to government regulation of education and to the current environment of "creeping legalism." To the extent the lack of adequate policing of educational quality by established accrediting agencies has led to educationally substandard schools or programs receiving federal support, however, some corrective action is required. The instant proposal narrowly circumscribes the federal role, both substantively and procedurally; it would rely upon the standard-setting function of recognized private agencies and would separate eligibility from accreditation on the basis of an adjudication.

Moreover, as Robert M. O'Neil has recently pointed out, ingenious (or desperate) counsel have commenced lawsuits against institutions based upon the failure to provide basic quality in education; these suits have not been dismissed out of hand as presenting nonjusticiable claims.⁸⁷ As a consequence, the educational value of an institution's programs may be subject to sporadic scrutiny by the courts at the behest of disgruntled students. The additional external intrusion into the affairs of institutions and accrediting agencies required by the proposed legislation would not, in fact, differ substantially from what an accrediting agency currently confronts in a suit for a refusal to accredit or a disaccreditation, or from what an institution currently confronts in a suit by students for failing to provide an education of satisfactory quality.

The more serious difficulty with this proposal lies in the power of the prosecutorial branch to commence an ineligibility proceeding. The impact of the initiation of a proceeding upon the reputation of the institution or program, with its likely effects upon enrollment, faculty retention, or even institutional survival, would give considerable bargaining power to the prosecutor to decline action in return for concessions that arguably might not relate to any significant departure from accreditation standards. The institution might have no realistic alternative to such a "plea bargain" but to accede. To be sure, this is not a new issue in administrative law; but, a check upon the exercise of prosecutorial discretion would be found in the accreditation-reliance system itself. Although the prosecutorial branch would be structurally separate from the agency, its function must be seen as part of the larger, cooperative system of federal reliance upon private determinations. To the extent an accrediting agency has done its job—has thoroughly reviewed the problems brought to its attention and has either found them insufficient to raise a significant question of continued accreditation or worked out a resolution with the institution—the likelihood of an abuse of prosecutorial discretion would be minimized. Consequently, the proposal's most significant impact lies not in the likelihood of actually

87. Address by Robert M. O'Neil, First Annual Conference on Legal Problems of Independent Higher Education, University of Notre Dame (Oct. 18, 1978) (copy on file in office of *North Carolina Law Review*). He observed:

What we are likely to see in this country, as has already occurred in some European countries, is an increasingly resourceful adaptation and evolution of legal theories toward the protection of student interests. I do not decry this development, nor do I applaud it; rather, it seems to me simply an inescapable consequence of the growing accountability of all institutions, including those which provide higher education.

commencing such proceedings but in the implications the mere availability of such a procedure would have for assuring consistent policing of their standards by accrediting agencies themselves.

IV. CONCLUSION

This discussion seems to have come full circle. It started out by arguing that the Office of Education lacks the authority to regulate at least some of the internal affairs of listed accrediting agencies; it concludes that, to the extent the government sees educational quality as a real concern in the management of the billions spent in aid of education, more regulation is required. But there is a difference both practically and institutionally. The instant proposal accepts the basic premises of the current system; reform is directed exclusively to the perceived deficiencies of accrediting agencies as reliable determinants of educational quality. The Commissioner's criteria at issue here largely ignore the serious criticism leveled at accreditation; instead, the Commissioner has attempted to require accrediting agencies to assume a regulatory function over issues they are neither interested in nor competent to handle. As the foregoing has evidenced, much of what the Commissioner has done is inconsistent with the premises of the statutory system.

From an institutional perspective, it is irrelevant whether the instant proposal is accepted or, for that matter, whether the problem of educational quality is of such a dimension as to warrant any change in the current system. That determination, as well as the fashioning of a suitable corrective, is for the Congress, not the Commissioner of Education. This is not because the legislature is inherently wiser than the Office of Education in its understanding of the educational system. It can be persuasively argued, for example, that because regional accreditation does not attest to the educational quality of any one program, the congressional confrontation with nurse training produced a result that makes no educational sense. The question is one for Congress, not because the legislature is educationally competent, but because it is institutionally competent. How the government is to be assured of educational quality raises fundamental questions of social policy implicating a delicate balancing of public power and institutional autonomy; the wise expenditure of public funds and the sound administration of federal programs, on the one hand, and, on the other, the freedom of institutions to teach, research and grope for knowledge unfettered by the regulatory power of the state. At least initially, such "controverted

issues of public policy are properly decided, as nearly as effective political and institutional arrangements will permit, in forums closest to the sources of popular representation.”⁸⁸

88. Freedman, *supra* note 55, at 317-18 (footnote omitted).

