

**COUNCIL FOR
HIGHER EDUCATION ACCREDITATION**

**WHO WATCHES THE WATCHMAN?
THOUGHTS ON THE FEDERAL
RELATIONSHIP TO ACCREDITATION IN
HIGHER EDUCATION**

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Who Watches the Watchman?

Thoughts on the Federal Relationship to Accreditation in Higher Education

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Judith Eaton has very generously invited me to address a series of questions dealing with the federal relationship to private accreditation in higher education. I suppose she has done so because, as I'd written about the legal aspects of this system many years ago,¹ I might conceivably have something useful to say when looking at it afresh.

I have tried to understand the run-up to the Higher Education Opportunity Act of 2008 and where matters currently stand; but, having done so, and I hope with adequate diligence, I fear that what I will say will strike most people in this room as either too obvious to require iteration or just plain wrong. I hope you will be vocal about the latter at the close.

Before proceeding a caveat is in order: my remarks will be directed to the universe of higher education as traditionally understood, i.e., public and private non-profit degree granting institutions. I will not attend to proprietary institutions providing programs of vocational training. Indeed, a serious question emerging out of the debate over the future of the recognition-reliance system since 1992 has been whether these institutions are so specially situated in function and control as to call for separate treatment. I may be quite wrong in omitting them; but the over 1,500 four-year and 1,600 two year degree-seeking institutions that enroll over seventeen million students are quite enough to contemplate for now.

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¹ Matthew Finkin, *Federal Reliance on Voluntary Accreditation: The Power to Recognize the Power to Regulate*, 1 J.L. & EDUC. 339 (1973). The question was revisited (in light of subsequent developments) in a conference on "Private Accreditation and the Regulatory State." Matthew Finkin, *The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education*, 57 L. & CONTEMP. PROBS. 89 (1994).

I. Historical Development of the Private Accreditation-Federal Government Relationship

A. The Foundation of the System: 1952–1969

The foundation of the system was laid in the Veterans Readjustment Assistance Act of 1952. It dealt with problems encountered in administering the Servicemens' Readjustment Act of 1944—the “G.I. Bill”—which relied on state approval, or direct approval by the Veterans' Administration, of education and training institutions for study in which returning veterans would receive federal financial support. The problem that government perceived as calling for public address was what it termed “fly-by-night” schools and “blind alley programs” to which returning veterans had resort. A variety of solutions were proposed, including giving the then U.S. Commissioner of Education the authority to approve courses of instruction. The upshot of it all was that the Veterans' Administration retained approval authority where the states had not exercised it and authorized the states to approve courses in an institution that had been “accredited and approved by a nationally recognized accrediting agency or association.” It authorized the Commissioner of Education to “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.” Shortly thereafter the Commissioner of Education published the criteria that that office would apply in listing recognized agencies: these consisted of a brief set of substantive and procedural requirements that tracked the status quo of regional accreditation policies and practices.

It may be worth emphasizing that the system thus erected is neither one of federal regulation of accreditation, strictly speaking; nor did it render listed agencies delegates of federal power to such a degree that they are assimilated as extensions of the state—a view to which the

courts have held constant despite the considerable changes in the system.² Accreditation is not a regulated enterprise as that term is commonly employed in administrative law because an accrediting agency need not apply for federal recognition in order to function; and, absent its submission to federal review and approval, it is subject to none of the Department of Education's strictures. As originally conceived (and as the courts continue to conceive of them), the law treats these agencies not as delegates of federal authority but as facilities: the law assumes that there *are* "nationally recognized" accreditation agencies—national recognition being accorded by the wider academic community, not by the federal government—which would go about their business irrespective of federal reliance on their decisions and whose judgments are reliable enough that the government could rely upon them in turn. The analogy would be to a government procurement policy that required UL approval for the electrical equipment the government purchases: express reliance on UL approval does not render the Underwriters' Laboratory a delegate of federal power. In this way, federal control of higher education, indirect as well as direct, would be obviated even as an adequate assurance of quality is secured.

This feature of the scheme was adverted to in the contentious debate over the National Defense Education Act in 1958 which, for the first time since the Morrill Act of 1862, placed the federal government squarely in the position of providing major support to higher education as such. Critics of the measure sounded the alarm that, inexorably, federal control will follow

² *Hiwasee College, Inc. v. The Southern Ass'n of Colleges and Schools*, 531 F.3d 1333 (11th Cir. 2008). Neither is there such entanglement with the federal government as to produce a contrary result:

Though SACS [the Southern Association] is delineated by Congress in the HEA [the Higher Education Act] for recognition of accrediting institutions, this alone does not outweigh the factors indicating that SACS is in fact a private, independent entity.

Id. 1335 n.3.

federal money.³ Defenders disclaimed that federal control would follow, adverting not only to the role of accreditation, but to the essentially ministerial federal role in relying on private determinations of educational quality.⁴

B. The Shift to Quasi-Regulation: 1969–1992

Starting in 1969, the Office of Education began more deeply to address what accrediting agencies must do in order to be relied upon, both in the nature of what they must assess as well as to address the rights of those being assessed. The Director of Office of Education’s Accreditation and Eligibility Staff explained in 1970 that an accrediting agency should be required to “manifest an awareness of its responsibility to the public interest *as opposed to* parochial education[al] . . . interest.”⁵ This view echoed that of the then Secretary of HEW:

With the allocation of significant amounts of public funds to students and to institutions through the eligibility for funding status provided by accrediting associations, accreditation carries with it the burdensome responsibility of public trust. Accrediting associations are functioning today in a quasi-governmental role, and their activities relate closely to the public interest.⁶

The new criteria governing federal listing published in 1974 included, among others, a requirement of public membership on the agency’s decision-making body, the fostering of non-discrimination policies in admissions and employment, and the encouragement of innovation and experimentation. The expansion of federal authority to impose these conditions was challenged by the accrediting community. The Executive Director of the then National Commission on

³ This was put colorfully by Rep. Johansen:

By adopting this legislation you will give the greatest encouragement ever given by any Congress to that small but solid and utterly ruthless core of unbinding, unblushing, brazen advocates of definite, deliberate, all-out Federal control of education.

104 CONG. REC. 16726 (1998).

⁴ As Senator Johnson put it, “We were looking for a way through which help would be extended without the control of Federal bureaucracy. And in this bill, I believe we have found it.” 104 CONG. REC. 17330 (1958).

⁵ Proffitt, *The U.S. Office of Education, Accreditation and the Public Interest*, conference paper sponsored by the USOE and the Nat’l Comm. on Accrediting (November 6, 1970) (emphasis added).

⁶ HEW, *Report on Higher Education* 14 (1971).

Accrediting even alluded to the possibility that accrediting agencies would exit the system;⁷ but, in the end, even as the accrediting agencies complained, they complied.

The policy of bringing accrediting agencies into closer conformity with the administration's conception of the public interest was revisited in 1988, to an extent reversing prior administrations' conception of how the public interest is best served: the requirement that innovation and experimentation be encouraged was abandoned; so, too, was oversight of non-discrimination, which, the Secretary of Education opined, was adequately dealt with by law; but the requirement of public membership on the agencies' governing boards was retained, apparently due to popular demand. Potentially of greater significance, the 1988 rules abandoned the policy adopted in 1952 of listing only a single agency for a specified area or purpose. The monopoly accrediting agencies had heretofore enjoyed with regard to federal listing would be supplanted with the possibility of competition. But Secretary Bennett added an assessment of student achievement to the criteria that agencies had to apply. The successor to the National Commission on Accrediting, the Council on Postsecondary Accreditation, questioned that policy, but it was adopted nonetheless.⁸

⁷ [A]ccrediting organizations have been enticed to become reluctant extensions of the U.S. Office of Education in order that the accredited schools, programs, and colleges might share in the largesse writ large. Many now would like to break off the relationship, and some have indicated they intend to do so, in order to return to the prerogative which historically and professionally has belonged to them—that of promoting and insuring quality programs of education. All are capable of doing just that and are perfectly willing to abide the scrutiny of the federal benefactor in so doing. They are not willing much longer to abide the prod which inevitably has followed the scrutiny.

Statement of Frank Dickey, Executive Director of the National Commission on Accrediting.

⁸ JOSEPH J. SEMROW ET AL., IN SEARCH OF QUALITY: THE DEVELOPMENT, STATUS AND FORECAST OF STANDARDS IN POSTSECONDARY ACCREDITATION 134 (1992) (references omitted):

[T]he concern about governmental influence reached new heights when Secretary of Education William Bennett promoted assessment and outcomes criteria in new rules for the government recognition of accrediting agencies. Thurston Manning, who succeeded Millard as COPA director, questioned anew the role of the federal government, and charged that the federal government was going beyond its role to influence the choice of accrediting criteria. In 1987,

C. The Legislative Confrontation Round 1: The Higher Education Act of 1992

The growing tension between the accrediting community and the now Department of Education came to a head in the fashioning of the Higher Education Act of 1992. The House version would have severed federal reliance on private accreditation, relying on state certification and federal review of financial responsibility. The basic concern, as reflected in the House Committee Report, was not with program quality but with “fraud and abuse”⁹ in correction of which it found the accreditation process to be ineffective.¹⁰ The then General Counsel of the Department of Education saw the House’s action as “calling the bluff” of the accrediting community which had, as he saw it, “professed indifference to the agencies’ unbidden role as federal gatekeepers.”¹¹ The Administration suggested instead that the proprietary vocational sector should be distinguished for approval purposes from the collegiate sector, the latter retaining the traditional connection to private accreditation, the former being made subject to separate review, but this was politically unacceptable.¹²

The result was a compromise. Congress took it upon itself to define the requirements of the recognition that had been left heretofore to administrative discretion, both substantively and procedurally. However, for the most part, the Act tracked the approach previously taken by the Department of Education—that the accrediting agency be regional or national, that its principal

during the discussions of the new legislation, the federal government’s new regulations set outcome measures as one of the criteria for recognition. The [North Central Association’s] Commission revised its materials to reflect the government’s requirements.

⁹ H.R. REP. NO. 447, 102d Cong., 2d Sess. 74 (1992), *reprinted in* 4 U.S.C.C.A.N. 334, 407 (1992).

¹⁰ *Id.* at 408:

By removing accreditation as a criteria for participation in student aid, the Committee does not intend to imply that accreditation should cease to exist. The Committee believes that the peer review process embodies in private, non-governmental accrediting bodies may serve a worthwhile function in maintaining standards in the academic community.

¹¹ Jeffrey Martin, *Recent Developments Concerning Accrediting Agencies in Postreading Education*, 57 L. & CONTEMP. PROBS. 121, 139 (1994): “While they had long expressed indifference to or disdain for the federal government’s determination to rely on their decisions, in reality they understood that the interest of schools in their services would diminish significantly if eligibility were severed from accreditation.”

¹² *Id.* at 139–40.

purpose be accreditation, and that it look to those aspects of the institution that most directly bear on educational quality, *i.e.*, curriculum, faculty, facilities, program length, student support, and the like. But the Act also provided for the Secretary to adopt regulations fleshing out the criteria for listing requiring these to include “an appropriate measure or measures of student achievement.” It reduced the prospect of “accreditation shopping” resulting from the abandonment of the policy of listing only one agency; nevertheless, that policy was not readopted. Even so, the longstanding “three letter” policy—whereby unaccredited institutions could participate in certain federal programs if three accredited institutions accepted their academic credits—was abrogated, thereby strengthening the quasi-monopoly enjoyed by listed agencies. Separate provision was made regarding the independence of trade accreditation from affiliated trade groups; and the Act dealt more extensively with the procedural rights of those subject to accreditation as well as requiring more in the way of public disclosure—“transparency”—by the agencies themselves.

The history of the ensuing rule-making by the Secretary to carry forward the Act’s commands has been recounted by one of the participants in the process.¹³ In his view, the rules confirmed “the conversion of accreditation from a collegial, peer review process to an administrative, regulatory process.” Whatever is meant by this, it is clear that, as a condition of listing, the agencies were required to act more like an administrative agency:¹⁴ their rules and decisions must be publicly available; they must assure consistency in their application of standards; they must regularly review the adequacy of their standards; they must act promptly against institutions that they determine to fail to be in compliance with institutional standards;

¹³ Mark Pelish, *Regulations Under the Higher Education Amendments of 1992: A Case Study in Negotiated Rulemaking*, 57 L. & CONTEM. PROBS. 151, 166 (1994).

¹⁴ *Id.* at 166. The rules are set out at 34 C.F.R. § 602 (2008).

they must observe due process. The failure of an accrediting agency to comply with the statutory and regulatory criteria or its ineffectiveness in the performance of these statutory obligations may result in its suspension or termination of its listing.

D. The Legislative Confrontation Round 2: The Higher Education Opportunity Act of 2008

If the confrontation between Congress and the accrediting community in 1992 was overshadowed by the issue of financial abuse and the question of whether proprietary vocational schools should be separated from the collegiate universe, the struggle over the Higher Education Act of 2008 centered on the measurement of student achievement as part of the accrediting process in the collegiate universe. I suspect that everyone in this room knows far more than I do or could know about this matter. To an outside observer looking only at the statutory consequence after the dust had settled the result would seem to be a draw: the Act's requirement that agencies include in their criteria for institutional assessment "an appropriate measure or measures of student achievement" was refined by the added requirement that the agency "assess the institution's . . . success with respect to student achievement in relation to the institution's mission, which may include different standards for different institutions or programs, as established by the institution, including, as appropriate, consideration of State licensing examinations, consideration of course completion, and of job placement rate."¹⁵ But the Act denied the Secretary the authority to specify, define, or prescribe the standards the agencies will apply to assess student achievement;¹⁶ and it went on to commission the National Advisory Committee on Institutional Quality and Integrity, as recast by a process of political appointment, to sort it all out.¹⁷

¹⁵ 20 U.S.C. § 1099b(a)(5)(A).

¹⁶ *Id.* § 1099b(g).

¹⁷ *Id.* § 1011c.

In other words, the struggle resulted in an unstable compromise: as a condition of federal listing, accrediting agencies were compelled to address student outcomes—course completion rates, job placement rates, and other “measures of achievement,” presumably including grading standards and grade distributions—but were not to be told by the government what to do with it or how to go about doing it; and the whole issue was put over to another, politically selected body.

II. The Strength and Perceived Weaknesses of the Recognition-Reliance System

A. Strength

The major purpose undergirding the creation of the system a half century ago was the avoidance of federal control over the content or the conduct of instruction in American higher education. The regional and many of the professional accrediting agencies had been long performing the function of institutional and programmatic oversight and had achieved national recognition in performing those functions. Accordingly, the simplest way to assure institutional and programmatic quality without federal institutional inspection and supervision was to rely on the judgment of these agencies, judgments they had been making and, presumably, would continue to make irrespective of federal reliance on them.

This desideratum has been invoked by the accreditation community and its supporters under the head of “academic freedom.” This is an historically freighted concept, sometimes seeking support in the first amendment but whose constitutional contours and even its grounding are, at best, uncertain.¹⁸ Suffice it to say, an institution’s freedom from government control of the content and conduct of instruction imports a critical social value. In some circumstances,

¹⁸ *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003). *See generally* Matthew Finkin, *On “Institutional” Academic Freedom*, 61 TEX. L. REV. 817 (1983); David Rabban, *Academic Freedom*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 12 (Leonard Levy & Kenneth Karst eds., 1986).

institutional autonomy—the freedom from governmental control—has been made to yield to other social imperatives: the freedom to conduct research maybe restrained by rules regulating the use of toxic substances or preventing harm to human research subjects; the appointment of faculty may be subject to judicial scrutiny under civil rights laws; even the allocation of institutional resources to men’s and women’s athletics may be subject to external scrutiny although the institution’s extra-curriculum may be understood as an inextricable component of its educational mission; and a good deal more. In other words, colleges and universities have become subject to an extensive network of federal regulation unimaginable in 1958, when the National Defense Education Act was being debated, much of it geared to the receipt of federal funds. Apparently, the capacity of regulatory self-denial proclaimed by advocates of federal funding has attenuated over the years. But, thus far, there has been little in the direct federal oversight of educational programs and instruction.

The issue is not one of relative competence. The Department of Education could appoint teams of examiners to report to it on institutional or programmatic quality quite as expert in their disciplines as any involved in the private accreditation process. The issue is the insulation of the evaluation process and the institutions and programs being evaluated from the play of the popular will.

Let us turn first to judgments of institutional quality. In 1910, Kendrick C. Babcock, later Provost of the University of Illinois, was appointed to the position of Specialist in Higher Education created by an Act of Congress. He undertook to classify colleges on the basis of the rate of success their graduates had had in completing masters’ degree programs. This resulted in four categories with only 17% of institutions rated in the first group. His report was embargoed, an embargo that even President Woodrow Wilson refused to rescind. As Babcock’s successor,

Samuel Capen observed, “there are no second and third and fourth class colleges.”¹⁹ Today, every congressional district has an institution of postsecondary education. Would an effort by federal administrators to question institutional quality (probity is another matter) become ensnared in a political thicket? Or would local centers of political power welcome federal criticism in an effort to improve their institutions? Either is conceivable, but history suggests the former as a likely scenario.

Let us turn to programmatic quality. Here the concern is more of ideology than of local pride and sensibility: not that a weak institution would prove to be insulated politically from qualitative criticism but rather that, depending upon the ideological predisposition of the Secretary appointing the examiners—or the administration’s responsiveness to the expressed outrage of influential groups—programs that become ideologically suspect could be subject to coercive oversight, their institutions’ subject accordingly to indirect control, or that institutions that appoint or retain controversial faculty might be made similarly subject. This cuts to the core of the academic freedom concern—and it should not be discounted.

Note, for example, the legislative effort to bring programs of area studies, especially Middle Eastern Studies, to heel by those on the right wing of the political spectrum on the ground of the want of adequate “balance” in the professional profile of the faculty engaged in these programs. It was a high profile effort that almost succeeded. But consider the prospect of a lower profile strategy conducted by a sympathetic administration that had the power of programmatic approval, ostensibly to assure that these programs “reflect diverse perspectives and the full range of views on world regions . . . and international affairs.”²⁰ The consequence to

¹⁹ WILLIAM K. SELDEN, *ACCREDITATION: A STRUGGLE OVER STANDARDS* 46–47 (1960).

²⁰ International Studies in Higher Education Act of 2003, H.R. 3077, 108th Cong. (passed by House, Oct. 21, 2003). A proponent of the statute argued:

institutional autonomy and to academic freedom as traditionally understood would be devastating.

In other words, reliance on private accreditation is a critical safeguard against political intrusion, especially against the “tyranny of public opinion” which could threaten the academic enterprise at its core.²¹ That is the strength of the system. Are there no deficiencies?

B. Weaknesses

Issue Papers drafted for the Secretary of Education’s Commission on the Future of Higher Education reported the perceived deficiencies of the current system. These cluster under three heads: (1) the failure to strengthen quality in contradistinction to the assurance of meeting only minimum standards; (2) the want of accountability; (3) the want of transparency.²² A word on each.

1. *The failure to strengthen quality.* Forty years ago, Jacques Barzun observed that accreditation “benefits the small, weak, and uncertain.”²³ Not surprisingly, Congress found it a reliable system to weed out “fly by night” schools and “blind alley” programs. But today we have been told that settling for minimum standards is not enough: “Nearly all” institutions have accreditation,

Naturally, it is right and proper that projects funded by Title VI are governed according to standards of free speech and academic freedom. Free speech, however, is not an entitlement to a government subsidy. And unless steps are taken to balance university faculties with members who both support and oppose American foreign policy, the very purpose of free speech and academic freedom will have been defeated.

International Programs in Higher Education and Questions of Bias: Hearing before the Subcomm. on Select Education of the Comm. on Education and the Workforce, 108th Cong. 74 (2003) (written statement of Dr. Stanley Kurtz, Research Fellow, Hoover Institution, and Contributing Editor, National Review Online).

²¹ See generally MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (Yale U. Press 2009).

²² I have relied on three papers; all are undated. Robert C. Dickeson, *The Need for Accreditation Reform*; Vickie Schray, *Assuring Quality in Higher Education: Recommendations for Improving Accreditation* [hereinafter Schray, *Recommendations*]; and, Vickie Schray, *Assuring Quality in Higher Education: Key Issues and Questions for Changing Accreditation in the United States* [hereinafter Schray, *Issues*]. Also relevant is some of the testimony in *Higher Education Accreditation: How Can the System Better Ensure Quality and Accountability?* Hearings before the Senate Committee on Health, Education, Labor, and Pensions, 108th Cong., 2d sess. (Feb. 26, 2004).

²³ JACQUES BARZUN, *THE AMERICAN UNIVERSITY: HOW IT RUNS, WHERE IT IS GOING* 60 (1968).

Very few lose it, and thus its meaning and legitimacy suffer. . . . Basing accreditation on truly rigorous standards and differentiating among levels of quality attainment would more accurately reflect the higher education landscape. If there were levels of accreditation, institutions would compete for honored spots (much as they do now for *U.S. News* ranking) and higher education's stakeholders could differentiate among institutions, depending upon stakeholder interests.²⁴

2. *The want of accountability.* This criticism goes to the very assumption of the system: that when private accreditation functions to serve institutional purposes its determinations are sufficient for public purposes. The claim is that that is no longer so, if it ever was. A fundamental restructuring is called for:

To ensure that the public interest is served, the current self-regulation system must be expanded to allow for greater public-private involvement in accreditation and must include balanced representation from the higher education community and public and private stakeholders, including employers and federal and state governments. This broad involvement is necessary to create accreditation recognition standards and processes that address the needs of all stakeholders resulting in greater consistency and transparency across the system.²⁵

3. *The want of transparency.* This criticism transcends a demand of more from the agencies in terms of disclosure of their operations and decisions. It faults the agencies for failing to collect, disclose, and assess the implications of a broad range of institutional data that would be useful for students and parents and that would act as measures of institutional performance and improvement.²⁶ This was a flashpoint in the 2008 legislation.

²⁴ Dickeson, *supra* note 22, at 5. Schray, *Recommendations*, *supra* note 22, at 3: the guiding principle should be one of “continuous improvement with accreditation requiring institutions and programs to show evidence of continuous performance improvement as the basis of achieving or retaining accreditation.”

²⁵ Schray, *Recommendations*, *supra* note 22, at 5 (emphasis in original).

²⁶ *Id.*:

Students and parents lack reliable information about college-going, including admission requirements, available programs, actual costs, the availability and extent of financial aid, and the range of accessible postsecondary options. Accreditation should insist on greater transparency by colleges and universities in the information they share publicly, and expect that the public has complete access to relevant data about college access, costs, attainment success and the extent to which standards were enforced.

* * *

C. Some Thoughts on the Criticism

Essentially, the first two criticisms challenge reliance on any self-regulatory body for regulatory theory tells us that an institutional self-regulatory agency would be aggressive enough “to maintain consumer confidence and forestall further regulatory intervention,” but would not be expected to “enforce standards rigorously against institutions in which quality lapses were not sufficiently serious to cause public scandal.”²⁷ Almost thirty years ago, speaking not only as a sociologist but as a participant-observer of institutional accreditation, David Riesman criticized the Office of Education’s posture toward regional accreditors, viewing them as “ ‘special interests,’” for “failing to appreciate that the survival of the great majority depends on elimination, through withdrawal of accreditation or refusal to grant it, of the scandalous abuses of a few.”²⁸ It is ironic that, having chosen self-regulation as the best means of obviating political control, the government should discover that these agencies perform more or less the way theory tells us we should expect them to.

Interestingly, a persistent criticism of agencies that accredit education for the professions, which, in some cases, extends to free-standing professional schools, is quite to the contrary: that their standards are self-aggrandizing, that they create arbitrarily high barriers that inure to the profession’s benefit—by curtailing the supply of qualified practitioners—but to the public’s

Accrediting organizations do not all agree that the public either needs additional information or that sharing it is wise. Some accreditation leaders fear that more public disclosure will result in: an adversarial, rather than collegial, accreditation process; a smothering of trust critical to self-analysis; unwanted press coverage of school problems; and schools withholding information. Still other accreditation leaders deny the very existence of public demand for more information and point out that typical accreditation reports do not contain the kind of information that the public wants. Finally, some accreditation leaders understand that more information is necessary, and observe that other countries’ institutions provide it without negative effect.

²⁷ Timothy Stolfus Jost, *Medicare and the Joint Commission on Accreditation of Healthcare Organizations: A Healthy Relationship?*, 57 L. & CONTEMP. PROBS. 15, 31–32 (1994) (reviewing the literature).

²⁸ DAVID RIESMAN, ON HIGHER EDUCATION 332–33 (1980). He also attributed some of the slow-footedness of accrediting agencies to the fear of litigation.

and the institutions' detriment. This criticism has been constant from Samuel Capen's famous "Seven Devils" speech in 1939²⁹ to Lamar Alexander's lament in 2004.³⁰

The third criticism is even more puzzling as the government is free to require the production and disclosure of all the information the critics have called for without awaiting the work of accrediting agencies. In fact, the Student Right to Know Act of 1990 requires institutions participating in programs funded by the Higher Education Act to carry out

²⁹ WILLIAM SELDEN, *supra* note 19, at 3–4.

³⁰ Statement of Sen. Alexander, Hearings before the Committee on Health, Education, Labor, and Pensions, 108th Cong., 2d sess. 15 (Feb. 26, 2004):

I arrived at the United States Department of Education in 1991 as Secretary with a chip on my shoulder about accrediting agencies and it really hasn't gone away. One, I had been a university president and I got tired of people coming in and telling me I had to spend \$40 million on a law school when I thought I was president of the university and I would rather spend it on this or that or this core curriculum or that teacher.

“information dissemination” including disclosure of “the completion or graduation rate of certificate—or degree-seeking, full-time, undergraduate students” entering the institution.³¹ The Higher Education Act had already required the disclosure of placement information and of the results of alumni and student satisfaction surveys gathered by the institution from all relevant sources.³² Congress could require a good deal more, as it has with respect to campus crime statistics.³³ Interestingly, analogous arguments have been made for the transparency of health care information—to allow for more informed consumer choice and as a check on the quality of physician and hospital performance—which agenda has recently been actively pursued by the federal government and by various private initiatives, and *not* by reliance upon the accrediting system which agencies have, from what appears, been slow—or loathe—to act in that regard.³⁴

III. The Relationship of Accreditation to Other Forms of Self-Regulation

This question requires a full address. The literature is rich, both in theory and in case studies, on systems of self-regulation, cross-regulation, and mixed public-private quasi-regulatory models in health care, product standards, safety standards, and more. So, too, there is a substantial literature on models of “soft law” which seek the adoption of “best practices,” instead of command-and-control forms of regulation, involving voluntary forms of monitoring and public reporting.³⁵

³¹ 20 U.S.C. § 1092(a)(1)(L).

³² 20 U.S.C. § 1092(a)(1)(R), (S).

³³ 20 U.S.C. § 1092(f).

³⁴ A speech by the former deputy secretary of the Department of Health and Human Services (HHS) explaining the federal initiatives can be found at <http://www.heritage.org/research/healthcare/h1986.cfm>; and a Web site that collects information on such initiatives is <http://www.abouthealthtransparency.org>. HHS has recently announced a system to rate nursing homes, <http://www.meidcare.gov/NHCompare/Include/DataSection/Questions/SearchCriteriaNEW.asp?version=default&browser=Safari%7C2%7CMacOSX&language=English&defaultstatus=0&pagelist=Home&CookiesEnabledStatus=True>. But, apart from requiring the disclosure of medical errors to patients the Joint Commission on Healthcare Organization, the Medicare accrediting body, has done little. I am indebted to my colleague David Hyman for educating me in this area.

³⁵ On disclosure as a regulatory form see W.M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701 (1999).

What is remarkable is how little the system of educational accreditation has been studied, how little we know of how these agencies actually function.³⁶ To take but one example: in 1992 Congress confirmed the requirement of “public” membership on the governing boards of listed accrediting agencies, presumably as a corrective to excessive guild loyalties; but there has been no follow-up on who these public members are, how they are selected, and, most important, what the practical impact their membership has had.

Surely one task of the National Advisory Committee on Institutional Quality and Integrity should set for itself, first up, is to commission thoughtful engagements with both the political science and the practical workings of these agencies. We ought to know, or know more, about the world we might seek to change before we seek to change it.

Equally, we ought to be quite clear about what we should expect an accrediting system to do. Note that much of the criticism canvassed above proceeds from the perceived failures of higher education—it too often delivers too little, it doesn’t tell us enough, it costs too much—and lays the blame at the feet of the accrediting agencies. Putting aside the extent to which these attacks are empirically well-grounded, the assumption is that the accrediting mechanism must be made to deal with them, which assumption passes untested; alternative, possibly more effective measures are not mentioned.

These are important questions; and looming over them all is the critical importance of institutional autonomy. I have mentioned in passing parallel problems in other sectors that rely on self-regulation, especially health care, which, too, may become subject to drastic overhaul involving much greater public accountability. Reliance on private accreditation for Medicare

³⁶ I believe the only broad-based (and critical) assessment was done some years ago by Harold Orlans and his associates, *PRIVATE ACCREDITATION AND PUBLIC ELIGIBILITY* (1975).

eligibility is historically analogous to the higher education recognition-reliance system,³⁷ with one key difference. The nation has demanded and is increasingly demanding that the practice of medicine and the delivery of health care be closely regulated. The nation has, thus far, been persuaded that close public regulation of the content and process of study in higher education would be antithetical to the public good. Howsoever the system is refashioned, that essential commitment must not be eclipsed.³⁸

IV. Public Reliance on Private Oversight of Private Accreditation

Without the results of the kind of empirical and analytical engagement I have argued is a necessary precondition, it would be a bit premature confidently to venture yet another model whereby some private entity would assume oversight on behalf of the government, whether CHEA or some other. But I would add a sobering note of caution: in view of the history of the claim of regulatory self-denial by Congress in attaching conditions to the receipt of federal funds, and the accordion-like policies of the Office and later the Department of Education on what they expect accrediting agencies to do, I do not think we can be confident that, howsoever the arrangement is structured, the government can be kept out altogether. *I.e.*, even if we ratchet oversight up a notch, whereby government does not accredit the accreditors but accredits the accreditor of the accreditors, the question will still persist: Who watches the watchman?

³⁷ Jost, *supra* note 27.

³⁸ The proposal for the greater involvement of stakeholders—employers, governmental entities, and, one would think, unions and other interest groups—in accreditation would seem to speak loudly to vocational training; though the proposal assumes that these stakeholders have no other, effective means to be heard. But who are the “stakeholders” to accredit liberal arts or Middle Eastern Studies? And how would according them power of approval or disapproval avoid the problems of political control of academic decisions?

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