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A LEGISLATIVE TOOL FOR SUPERVISION OF ADMINISTRATIVE AGENCIES: THE LAYING SYSTEM

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BACKGROUND

THE year 1946 was significant in the history of administrative law, because in that year two acts were passed which have had a far-reaching effect on government regulation of the public. In England, Parliament passed the Statutory Instruments Act[1] and repealed the Rules Publication Act[2] enacted in 1893 which had so long been the law of the land with regard to ministerial legislation. The Administrative Procedure Act[3] was enacted by Congress in the same year in answer to the public demand for needed reforms in the Federal administrative process.[4] Among the most important features of the respective acts were the provisions for legislative supervision. As might be expected, these provisions differed substantially in many respects. Parliament put great emphasis on the laying system as a means of supervising the administrative branch; Congress completely ignored the system in its legislation. This article has been written with the purpose of exploring the worth of that system as it is presently functioning in England and of recommending its wider use by Congress.[5]

THE ENGLISH LAYING SYSTEM

Under sections 4 and 5 of the Statutory Instruments Act, supervision of delegated legislation is retained in Parliament. The former section stipulates that where any statutory instrument must be laid before Parliament[6] after being made, a copy of such instrument is to be laid before

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1. 9 & 10 Geo. 6, c.36 (1946).

2. 56 & 57 Vict., c.66 (1893). The Solicitor-General at the second reading of the Statutory Instruments Bill explained the legislative tailoring in this manner: ". . . the Government . . . starts off by repealing the Rules Publication Act and bringing back again all that was good and should be preserved in the Rules Publication Act . . ." 415 H.C. Deb. (5th ser.) 1097 (1945).

3. 5 U.S.C.A. § 1001 (1952).

4. Attorney General's Manual on Administrative Procedure Act 5 (1947).

5. "After several years of trial, the federal act (The Administrative Procedure Act) is now regarded as neither the catastrophe predicted by its severest critics nor the triumph of reform claimed by its most ardent advocates." Heady, Administrative Procedure Legislation in the States 119 (1952).

6. The procedure of "laying before Parliament" involves the presenting or filing of an instrument with each House by the department making it. All papers laid before the House of Lords are kept in the Journal Office, where they are available for examination. "When a regulation is technically laid on the Table of the House of Commons, the actual document

both Houses of Parliament, before it comes into operation with the exception that where it is essential that an instrument come into operation before copies can be laid before Parliament—as where Parliament is in recess—the instrument may come into operation, but notice must be given to the Lord Chancellor and to the Speaker so that they may notify their respective Houses. Such notice must "draw attention to the fact that copies of the instrument have yet to be laid before Parliament" and must explain why such copies were not so laid before the instrument came into operation. Section 5 sets a standard forty-day period from the laying of a statutory instrument before Parliament as the period within which action must be taken by way of negative resolution to annul the instrument.

These sections are not original or complete in themselves; rather they refer to, improve and augment the supervisory practice of Parliament which has been established for many years.[7] There has never been a statute of general applicability requiring all administrative regulations to be laid before Parliament, but many statutes which delegate the power to make regulations to an administrative agency of the government provide that the regulations made by authority of such statute be laid before Parliament. By this method of inspection, Parliament supervises all delegated legislation which it thinks requires it and avoids a plethoric schedule of review for itself concerning delegating statutes wherein there is no possible need for Parliamentary supervision.

Wherever the powers given to an administrative body are great or where the powers might be misconstrued, abused or overstepped by such body, Parliamentary review can always be provided in the enabling statute. Such a method of review has many advantages over the slower, more expensive system of judicial review. It is preventive in character, rather than remedial. The burden and costs of review are borne by the state itself through the medium of Parliament, rather than by the individual aggrieved citizen. It has the virtue of speed without injustice; it may be more thorough and exhaustive than judicial review. It is a more feared type of review, for it is a review which may come without warning, is attended by more publicity, and may result in great political reverberations.

In 1929, due to the state of public uneasiness toward alleged arbitrariness in administrative departments, a Committee on Ministers' Powers was appointed by the then Lord Chancellor, Lord Sankey, to study, *inter*

is placed in the Library of the House." For further interpretation of the meaning of "laying before Parliament", see Laying of Documents before Parliament (Interpretation Act) 11 & 12 Geo. 6, c.59, § 1 (1948).

7. An act of 1832 for dealing with a cholera epidemic provided that Orders in Council made under the provisions of the act were to be laid before Parliament. 2 & 3 Will. 4, c.10, § 10 (1832).

alia, the powers exercised by or under the direction of Ministers of the Crown by way of delegated legislation. The Committee report,[8] published in 1932, lists five separate methods of laying statutory instruments or drafts of statutory instruments before Parliament. The draftsman of a bill can choose from among these methods the type of legislative review he desires to prescribe:

"(i). Laying—with no further directions;

"(ii). Laying—with provision that, if within a specified period of time a resolution is passed by either House for annulling (in some cases for annulling or modifying) the regulation, the regulation may—or shall—be annulled or modified, as the case may be, by Order of Council;

"(iii). Laying—with provision that the regulation shall not operate, until approved by resolution; or shall not operate beyond a certain specified period, unless approved by resolution within that period . . .

"(iv). Laying in draft for a certain number of days;

"(v). Laying in draft with provision that the regulation is not to operate till the draft has been approved by resolution."[9]

It can readily be seen that methods (i) and (iv) provide the weakest type of Parliamentary supervision, if such methods can be said to provide any effective supervision at all. Section 4 of the Statutory Instruments Act requires that statutory instruments of these two types which have to be laid before Parliament after being made, shall be so laid before the instrument comes into operation, but failure to lay will not invalidate the regulation, but merely make the Minister concerned responsible to Parliament.[10] The vague, undefined "responsibility to Parliament" is no actual sanction and under this new section 4 no provision is made for actual supervision. These methods provide a purely informational function.[11]

The affirmative type of resolution, i.e., methods (iii) and (v) providing

8. Committee on Ministers' Powers, Report, Cmd. No. 4060 (1932).

9. Id. at 41-42.

10. This is the interpretation of former Solicitor General Soskice. 417 H.C. Deb. (5th ser.) 1172 (1945).

11. J.S.C. Reid, M.P., remarked that "Laying [under such circumstances] may be purely for the information of Parliament. . . ." 415 H.C. Deb. (5th ser.) 1118 (1945).

Mr. Herbert Morrison, Secretary of State for the Home Department at the time of the passage of the act, gave this explanation:

"There are, I admit, a large number of subordinate Orders under the main Orders in Council, which have to be laid before Parliament but about which there is no provision for Parliament to do anything. I admit that some are of importance, but for the most part they are of less importance and do not raise issues of principle. It is interesting to note that the phrase 'laid before Parliament' used in Statutes comes from the Rules Publication Act, and, in fact, the purpose of that Act, in providing that Rules shall be laid before Parliament, was in order that the public outside might know about these things—not that Parliament might know about them." 400 H.C. Deb. (5th ser.) 267 (1944). For a contradictory view of the origin of the phrase "laid before Parliament," see note 7 supra.

that the regulation or draft of the regulation shall not operate until approved by Parliamentary resolution, offers that legislative body the greatest degree of control over delegated legislation since it prescribes the affirmative act of approval by Parliament and allows for at least a formal recognition of the regulation or draft by Parliament. The negative type of resolution, as illustrated in the second method listed by the Committee, is not nearly as effective since there is no guarantee that the regulation will ever receive any attention at all from any members of Parliament. Such a method requires a vigilant member who is interested in the regulation[12] and is willing to lead a fight for annulment. The regulation can "slip through" due to an uninformed, uninterested or overworked Parliament. Practice has shown that it usually does. But the negative approach to the problem has some merit. It threatens the possibility of Parliamentary review without requiring it. The Minister responsible for the statutory instruments so laid before Parliament must be prepared to defend them adequately—the mere fear of questioning and debate and possible annulment may be enough to insure that the regulations will meet all possible objections by Parliament. One writer put it thus:

"No matter how legal in the strict sense the (administrative) regulations may be, the Minister must be prepared to justify them if challenged in Parliament. It is clear that no Minister of the Crown would desire to court criticism if he could avoid it; and he will not go out of his way to make regulations which the community at large might regard as harassing and unnecessary, unless the strongest possible grounds of policy required him to do so; and even in that case he must be prepared to furnish a justification which Parliament is likely to approve . . . in the administrative sphere the

12. One explanation of the purpose of such methods is given by Ungoed-Thomas, M.P.:

"There are orders made under the Merchant Shipping Act of 1932 declaring that a foreign Government has ratified a loadline Convention—a purely explanatory provision. It would be absurd and thoroughly nugatory to make that subject to a negative Resolution of the House. (Hon. Members: "Why?") Because if the House passes a negative resolution it seeks to make of no force a declaration by a foreign Government. . . .

"The next instance is that of a declaration that there is an area infected with foot and mouth disease. From that certain automatic statutory results follow, but the declaration, the order declaring that foot and mouth disease exists in a certain area, cannot be altered by a negative Resolution of this House. It would be ridiculous if it could be. It is not appropriate that the House should be responsible for deciding whether foot and mouth disease has broken out in a place." 484 H.C. Deb. (5th ser.) 1295 (1951).

But Sir Herbert Williams, M.P., who claimed to have looked at every statutory instrument which had been published in the last ten years, had a different view of the situation:

"The position is in a state of absolute and complete confusion. The Minister of Transport does not want people to travel over the Millwall Clock Spring Bridge at more than five miles per hour. That may be a good and we can pray [i.e., object] about that. If he wants to stop up a highway in Glamorganshire we cannot pray about it. When he wants to prescribe a London street and turn it into a one-way street, we can have a Prayer about that. The whole thing is so inconsistent and absurd that the time has come for the question to be investigated." 484 H.C. Deb. (5th ser.) 1293 (1951).

possibility of Parliamentary criticism supplies the strongest motive for caution and moderation, and is therefore the most powerful deterrent against any abuse of departmental powers."[13]

The Committee on Ministers' Powers found that it was "impossible to discover any rational justification for the existence of so many different forms of laying" or on what principle Parliament acted "in deciding which should be adopted in any particular enactment."[14] Although it advised standardization of such procedure,[15] its recommendation was not embodied in the act. The Solicitor General, Major Sir Frank Soskice, in moving that the Statutory Instruments Bill be read a second time, explained to the House of Commons that the recommendation was not followed because:

"Parliament must, in its choice of affirmative or negative procedure depend on the actual type of Regulation which is in question, and the actual type of enactment under which the Regulation is made . . . . I would point out to the House that the very nature of the problem does *a priori* mean that, in legislation of this nature, it is better for the Minister to decide what procedure he will or will not adopt."[16]

From a realistic standpoint, then, the Attorney General is saying that what may be needed in an enactment is the illusion of supervision alone, for if the Minister is to pick the procedure to be used, he will certainly not pick the most bothersome one. Parliament itself should prescribe the procedure, not the Minister responsible for the bill; otherwise the safeguard of supervision is short-circuited with ease.

Ungoed-Thomas, M.P., addressing the House of Commons, explained the reason for the various laying procedures in this manner:

"We have these categories . . . because there are Statutory Instruments of varying degrees of importance. It may be desirable in one case to make the order subject to an affirmative Resolution of the House before it comes into operation, while in another case the order may be of such little significance that there is no point even in laying it before Parliament at all."[17]

Following this same line of reasoning, it would be well to abolish those laying procedures which have no significance as far as Parliamentary supervision is concerned and limit the use of the laying procedure to those statutory instruments where it is of real value.[18]

13. Gwyer, The Powers of Public Departments to Make Rules Having the Force of Law, 5 J. Pub. Admin. 404 (1927), quoted in Frankfurter and Davison, Administrative Law 223 (1935).

14. Committee on Ministers' Powers, Report, Cmd. No. 4060, at 42 (1932).

15. Ibid.

16. 415 H.C. Deb. (5th ser.) 1099 (1945). Ungoed-Thomas, M.P., believes that Parliament itself decides what procedure should be adopted, rather than the Minister. 484 H.C. Deb. (5th ser.) 1294 (1951).

17. 484 H.C. Deb. (5th ser.) 1294 (1951).

18. Sir Wavell Wakefield in 1949 introduced a bill which sought to provide that all

It has been said that there is no effective supervision of Parliament over statutory instruments under even the most effective method of laying, the affirmative process, since a disinterested Parliament can make even that a routine rather than a conscious process.[19] Many studies and reports substantiate the proposition that the "laying procedure has not . . . been very effective in practice as a means of assuring Parliamentary control over delegated legislation."[20] The individual M.P. has not the time nor perhaps, the inclination, to study the ever-increasing numbers of complex statutory instruments which are being put out today.[21] Nor does Parliament as a whole have the time to devote to the flood of delegated legislation which is presently being created. Moreover, difficulties in Parliamentary procedure make it extremely difficult under some circumstances to initiate any attack on a questionable regulation.[22]

statutory instruments which are required to be laid before Parliament should be subject to annulment by a vote of either House of Parliament. The bill was defeated in Commons. 484 H.C. Deb. (5th ser.) 1296 (1951).

19. Sir Lyndon Macassey ". . . had most objection to those rules and orders which must be submitted to Parliament. These are presumably the more important matters on which a department should not have the final word; but the submission to Parliament is a formality which does not operate as a check; yet this submission makes the court less ready to exercise control over them." Fairlie, Administrative Procedure in Connection with Statutory Rules and Orders in Great Britain, 13 U. of Ill. Studies in the Social Sciences 77 (Sept. 1925).

20. Schwartz, Law and The Executive in Britain 113 (1949). In substantial agreement with this statement, see Chih-Mai Chen, Parliamentary Opinion of Delegated Legislation 92-98 (1933); Committee on Ministers' Powers, Report, Cmd. No. 4060, at 44 (1932); Allen, Law and Orders 90 (1945).

21. Commander Bower described the problem thus:

"Our contention is that whereas the process of 'laying' Orders was a perfectly right, proper and adequate safeguard in days when delegated legislation was the exception and not the rule, today, when there is such a mass of these Orders, it has become utterly inadequate, and it is physically impossible for the average Member to carry out what is his plain duty." 400 H.C. Deb. (5th ser.) 213-14 (1944).

And from Sir Herbert Holdsworth:

"As things are, it is physically impossible for any Member of this House to read one per cent . . . of all Orders which are laid on the Table of the House." 400 H.C. Deb. (5th ser.) 284 (1944).

22. Lord Banbury, speaking in the House of Lords in 1929 summed up the situation of a typical M.P.:

"I have spent many years in the House of Commons and I can confirm that which my noble friend Lord Brentwood says as to protection, . . . that a rule should lie so many days on the Table of the House being absolutely illusory. The matter can come on only after eleven o'clock, it is very difficult to keep a House and it is very difficult to find out whether there are any rules lying upon the Table or not. It took me many years before I knew where to look and see if there were any rules or not. I do not believe five members of the House of Commons know where to look or what to do if they find that new rules have been laid. If they do, they cannot do anything except after eleven o'clock, and the consequence is that nobody stays, the Government keeps a House and whoever endeavors to alter a rule or to see that a Resolution is passed is met by a solid phalanx of Government supporters

To correct such a doubtful supervisory system, the House of Commons, in 1944, set up a Select Committee on Statutory Rules and Orders[23] (now known as the Select Committee on Statutory Instruments) to consider every statutory instrument laid or laid in draft before such House upon which proceedings might be taken in either House in pursuance of any act of Parliament[24] with a view to determining whether the special attention of the House should be drawn to it for any of the following reasons:[25]

"(i). that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any Government Department or to any local or public authority in consideration of any license or consent, or of any service to be rendered, or prescribes the amount of any such charge or payments;

"(ii). that it is made in pursuance of an enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specific period;[26]

"(iii). that it appears to make some unusual or unexpected use of the powers conferred by the Statute under which it is made;

"(iv). that it purports to have retrospective effect where the parent statute confers no express authority so to provide;

"(v). that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament;

"(vi). that there appears to have been unjustifiable delay in sending a notification to Mr. Speaker under the proviso to subsection (1) of section 4 of the Statutory Instruments Act, 1946, where an Instrument has come into operation before it has been laid before Parliament;

"(vii). that for any special reason its form or purport calls for elucidation."[27]

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who have been told to stay and see that no harm is done,—no harm, I mean, from the government point of view." 75 H.L. Deb. (5th ser.) 1391 (1929).

Miss Ellen Wilkinson, a member of the Committee on Ministers' Powers: "Nothing is so dangerous in a democracy as a safeguard which appears to be adequate but is really a facade." Committee on Ministers' Powers, Report, Cmd. No. 4060, Annex VI, at 138 (1932).

23. To the effect that such a committee would not work, see Prime Minister Stanley Baldwin's statement, 226 H.C. Deb. (5th ser.) 24-26 (1929).

24. No provision is made for scrutinizing statutory instruments under methods (i) and (iv). Committee on Ministers' Powers, Report, Cmd. No. 4060, 41-42 (1932).

25. Select Committee on Statutory Instruments, Reports, House of Commons Paper No. 178, at 2 (1950). The present Order of Reference, which is slightly broader than the first reference is given rather than the original one of 1944.

26. Herbert Morrison, speaking of a provision in an enactment excluding it from court challenge, warned: "A Regulation like this is clearly one which ought to be looked at with care because, if the courts cannot intervene, Parliament must be careful before it finally lets the matter out of its grip." 400 H.C. Deb. (5th ser.) 273 (1944).

27. Herbert Morrison addressing the House of Commons with regard to the Committee explained why other powers were not assigned to it:

"It will be important that the Committee should recognize one or two things. One is that it will be dealing with legislation which the Executive is authorized to make pursuant to an Act of Parliament. There would clearly be an impossible situation if the merits of an Act of Parliament were to be re-debated in the Select Committee, because it would then become an instrument in the party game and perhaps of obstruction against the Executive.

". . . [T]he terms of reference must be such that the Committee does not try to do the

Before reporting that the special attention of the House should be called to any instrument, the Committee must afford to the department originating such instrument an opportunity of furnishing, orally or in writing, such explanations as the department thinks fit. This step is prescribed in order to give the Committee the opportunity to obtain explanations from the responsible executives about rules which are technical and difficult to understand, and to prevent the Committee from giving unsound advice to the House on technical matters without reference to the originating administrative officer.[28]

The Committee is also empowered to require any department concerned to submit a memorandum explaining any instrument which may be under its consideration or to depute a representative to appear before it as a witness for the purpose of explaining any such instrument. The Committee was not given power to require the attendance of the responsible Minister,[29] thus avoiding unnecessary publicity, political harassment of Ministers, and waste of valuable executive time. Nor is the attendance of the responsible Minister needed, for in the modern administrative scheme of things the head of any agency must of necessity have only a sketchy idea of what a particular regulation is all about. An interview with the head of the department is usually not productive or informative, since he is usually briefed on the subject only a few hours before the time he is to testify. The man in the department who formulated and drew up the regulation is the man to talk to.

After a Committee report is sent to the House, the Committee's jurisdiction ends and the responsibility for action on the statutory instrument passes to the individual member of the House. His is the responsibility for action on the floor of the House, either by moving a negative resolution or "putting down a prayer."[30]

The Committee has the power to sit notwithstanding any adjournment

work of the courts of law. It is not for the Committee to decide—indeed, it is not for Parliament to decide what is the proper, legal interpretation of a Statute, or whether Regulations are within the legal terms of the Statute. That is for the Courts, and it is constitutionally of the greatest importance that the independence and freedom from Parliamentary interference of the courts, even to the extent of Parliament not trying to interpret the law, should be guarded, otherwise we might be in some difficulty." 400 H.C. Deb. (5th ser.) 268, 274 (1944).

For a contrary view, see Hanson, The Select Committee on Statutory Instruments, a Further Note, 29 Pub. Admin. Rev. 281 (1951), who maintains that "a Select Committee can give Parliament impartial information and well considered advice even on matters that are subject to acute party controversy without interfering with ministerial responsibility or placing senior civil servants in an invidious position."

28. 400 H.C. Deb. (5th ser.) 225 (1944).

29. Id. at 269.

30. Id. at 270.

of the House and to make periodic reports of its activities. In addition, the Committee is required to report to the House any memoranda submitted or other evidence given to the Committee by any department in explanation of any instrument. It has the right to take evidence, written or oral, from His Majesty's Stationery Office relating to the printing and publication of any instrument.

A special report by the Committee[31] stated that out of 682 statutory instruments and drafts that had been examined, only seven had been called to the attention of the House.[32] Of the 682 instruments examined, 325 arose out of emergency legislation. It is significant that almost half of the Committee's work for the period covered was scrutinizing emergency instruments—in a normal peacetime existence, the Committee's load would be much lighter.

Of the seven instruments pointed out for the attention of the House, one was reported for unjustifiable delay in laying before Parliament and six under the heading of need for elucidation. In an earlier report,[33] out of a total of 1,300 instruments inspected, only five instruments were singled out for House study. Three were classified under the head of unusual or unexpected use of statutory power, one for unjustifiable delay in sending a notification to the Speaker, and one for need for elucidation.[34]

The Committee is given the assistance of the Speaker's Counsel. Sir Cecil Carr, one of the great students of English administrative law, holds that office, and his guidance and assistance is undoubtedly one of the main springs of energy for the Committee.[35] Membership in the Committee is constantly changing, so his continuing aid is of the utmost importance in keeping the new members informed of the task at hand. The figures previously cited attest to the terrific amount of work to be accomplished.

Prior to Committee meetings, members are furnished with copies of the statutory instruments within their terms of reference. Accompanying

31. Reports, supra note 25, at 10.

32. Translated into figures by legislative session, the following are available: "Whereas, in the session of 1945-46, 33 out of 947 instruments examined were brought to the attention of the House, in the session 1947-48 the corresponding number was 10 out of 1,189." Hanson, The Select Committee on Statutory Instruments, 1944-49, 27 Pub. Admin. 278, 279 (1949).

33. Select Committee on Statutory Instruments, Reports, House of Commons Paper No. 324, at 10 (1949).

34. Unfortunately no figures are available as to the disposition by the House of Commons of the statutory instruments called to its attention by the Committee.

35. Colonel Sir Charles MacAndrew, a former chairman of the Committee, lauded him warmly: "Sir Cecil Carr has, I suppose, the greatest knowledge of delegated legislation of anyone in the country, and although he has a wonderful memory, I think I am right when I say that he has forgotten more about Statutory Rules and Orders than I shall ever know." 415 H.C. Deb. (5th ser.) 1125 (1945).

these copies are memoranda from Sir Cecil Carr giving his thoughts on the various instruments.[36] Since the type of examination required of the Committee is tedious and since most members of the House of Commons have outside jobs, it is not unusual to find that the attendance of members on some occasions leaves something to be desired. But three members constitute a quorum, Sir Cecil Carr is always there, so the job gets done.

From a study of the Committee reports, it appears that most explanations from departments concerning statutory instruments are handled through written memoranda. This method avoids the fanfare and possible departmental embarrassment of the oral evidence method and allows for objectivity and exhaustive, careful work on the part of the department. Only one recent instance of a Committee request for the appearance of a departmental witness could be found.

That the Committee is getting results is indicated in several ways.[37] As Colonel Sir Charles MacAndrew foretold, ". . . it would be a deterrent on the Department pushing things which they think might get through unobserved."[38] A study of the memoranda submitted to the Committee indicates that the departments are not treating the Committee lightly, for the memoranda discloses a great deal of exhaustive work and study on their part. Some explanations run to many pages. As an example of progress, the following Committee results are interesting: In the 1945-46 session the Committee brought 27 statutory instruments to the notice of the House on the ground of delay in presentation to Parliament or in publication. In the following session only one instrument was reported for that dereliction.

From a memorandum filed by the Ministry of Health in answer to a criticism that there appeared to be an unjustifiable delay in laying certain regulations before Parliament comes this expiation:

"The Department wishes to tender their apologies to the Committee for the mistakes committed within the Department in the handling of this matter, which would not have occurred had the clear standing instruction in force been carefully observed."[39]

And when the matter was brought to the floor of the House on a motion to annul the criticized regulations, the Government was again retired in great confusion. Speaking for the Government, Blenkinsop, M.P., insured the House of its plan for reform:

"Let me say at the outset that it is perfectly true that the Ministry of Health did certainly make administrative mistakes in not laying the Order before the House

36. Schwartz, op. cit. supra note 20, at 117.

37. For a report and evaluation of the Committee's work from 1944 through 1949, see Hanson, op. cit. supra note 32.

38. 400 H.C. Deb. (5th ser.) 227 (1944).

39. Reports, supra note 25, at 8.

earlier. Already a very frank apology has been made to the Committee upstairs, and I am perfectly prepared to repeat that apology here; because we do realise the importance of ensuring that these orders are laid before the House at the earliest possible moment."[40]

In reply to a Committee opinion that a particular order of the Ministry of Supply called for elucidation, this straight-forward response was noted: "No excuse can be made for the error."[41] Another problem of elucidation is solved when the Ministry of Food promises, "to avoid the use of ditto marks with their obvious possibilities of error."[42] The Ministry of Fuel and Power confesses its need for more clear-writing draftsmen when it attempts to explain away a criticism of unintelligibilities by this statement: "The Regulation necessarily follows closely the form of the authorizing enactment, but it may be easier to follow by reference to a concrete example in which it would apply."[43] It would make it easier for the law-abiding citizen, too!

A plea for clemency accompanies this explanation of failure of the Treasury to lay certain orders before Parliament:

"We are very sorry that we did not lay and submit these orders to the Select Committee earlier, but we have only just realized that as they are now made under the Supplies and Service Act . . . they are subject to those requirements . . . I am afraid that the change in legislative background caught us unaware. We hope the Committee will not take too serious a view of this lapse in view of the fact that both orders represent relaxation of control."[44]

The Committee, through its reports, has made many recommendations to its parent body. The Statutory Instruments Act itself owes its existence in part to such a scrutinizing Committee, for it was the Committee's predecessor, the Select Committee on Statutory Rules and Orders, whose Special Report pointed out various defects in the Rules Publication Act. It has warned of the perils of unwarranted subdelegation of powers, and of unauthorized use of the dispensing powers.[45] It has encouraged intelligibility in drafting instruments and the use of explanatory notes.[46]

40. 478 H.C. Deb. (5th ser.) 403 (1950).

41. Reports, supra note 33, at 5.

42. Reports, supra note 25, at 4.

43. Select Committee on Statutory Instruments, First Report, House of Commons Paper No. 6, at 3 (1950).

44. Select Committee on Statutory Rules and Orders, First to Twenty-First Reports, House of Commons Paper No. 187 (1945-46).

45. Select Committee on Statutory Instruments, Special Report, House of Commons Paper No. 197, at 3-4 (1948).

46. Id. at 5. One example of obscure drafting cited in the Report must be quoted to be appreciated: "The Control of Sulphuric Acid (No. 2) Order, 1940, as amended, shall have effect as if for the Schedule to that Order there were substituted the Schedule to this Order." The comment by the Committee is made that a few more words would have saved research and made clear that the schedule was inserted in the 1940 Order by the amending Order of 1946.

It has championed short subject-headings and endorsed the consolidation of statutory instruments which have been heavily amended.[47]

As a result of early Committee work, delays in printing and publication of statutory instruments were virtually eliminated.[48] Other mechanical problems such as the dating of instruments and the recital of authority have been brought to the attention of the House,[49] with subsequent rectification by the offending parties. One critic of the laying system is encouraged by the work of the Committee and hopes that it "may substantially increase both Executive caution and Parliamentary vigilance."[50] An author on the workings of Parliament writes that:

". . . the conclusion seems to be that . . . the large measure of minor legislation which it is essential for Parliament to delegate to the Departments does result in instances of mistakes and delays which can profitably be exposed by a vigilance committee of the type which has now been set up."[51]

Although there are no figures available as to the manner in which the House disposed of the statutory instruments called to its attention, some results may be discovered by a perusal of House debates. In tracing some such instruments, it was found that the Committee reports were being used extensively.

Many lengthy Parliamentary debates had their genesis in the Committee reports. As a result of the excellent material supplied by the Committee, the criticisms made of the Government from the floor were usually constructive and well-documented. These same reports forewarned the Government of the opposition it would expect and in some instances, the Government in reply to criticism was able to state that the particular grievance had already been corrected or was being considered. The criticism, when aired on the floor where attendant widespread publicity could be expected, had the effect also of exacting promises by the Government of reform which it otherwise would have refused to consider. This nonpartisan Committee, then, supplies the opposition party with first class ammunition and it acts as a powerful check against arbitrariness on the part of the majority party.[52]

It is also evident from the questions asked the department heads on the floor of Commons that the reports are being read and used. All this

47. Id. at 6.

48. Id. at 3.

49. Reports, supra note 25, at 11.

50. Allen, op. cit. supra note 20, at 96.

51. Gordon, Our Parliament 127 (1948).

52. "The very fact that the Departments know that their legislative instruments are being subjected to close independent scrutiny by a Parliamentary Committee which may at any time call for justificatory evidence has made them more careful about the form of those instruments and more punctilious in their compliance with constitutional proprieties." Hanson, op. cit. supra note 32, at 279.

added interest in statutory instrument problems which have been explained and simplified by the scrutinizing Committee is very promising as an effective step by Parliament to regain control over the government departments. The fact that statutory instruments may not be annulled or may be approved (as the case may be) despite such constructive criticism does not mean that such opposition is of no value, for the threat of defeat or mere adverse publicity tends to sensitize the administrative arm of the Government and keep it within its defined channel of operation.

With the establishment of the Select Committee on Statutory Instruments and the evidence of achievement it has attained so far, it can no longer be said that supervision of government departments and their statutory instruments by Parliament is totally ineffective. The Committee is looked upon with great respect.[53] Its works and studies have given all members of Parliament a knowledge of the problems of the administrative side of the Government, problems they could never fathom before.[54] Its reports have separated the instruments of doubtful validity from those in acceptable order. Those reports are the "spade work" needed by Parliament to implement constructive criticism of the Government. Such effective, continuing supervision by Parliament is restoring the power of Parliament and helping to correct the errors and omissions of executive departments accustomed to complete, but unwarranted independence of Parliament.[55]

CONGRESS AND LEGISLATIVE SUPERVISION

Could such a system of legislative supervision be inducted into our administrative process? Our Federal Constitution does not deny such a

53. "The Committee has gone far to answer the problem of securing parliamentary safeguards against the abuse of delegated legislative power. It has been successful in its task primarily because the need for securing such safeguards was recognized by leading Members of Parliament of all three parties." Stacey, The Select Committee on Statutory Instruments —A Reply to Mr. Hanson, 28 Pub. Admin. Rev. 333, 335 (1950).

"The Committee, then has not always found Parliament and the Departments ready to accept its point of view. But the list of achievements recorded and issues raised for discussion shows beyond doubt that this body has performed a real, if unobtrusive, public service." Hanson, op. cit. supra at 280.

54. By way of further improvement, a suggestion has been made "that the usefulness of this Committee might be greatly increased if it gave a wider interpretation to the phrase 'unusual or unexpected use' in its terms of reference or if it received authority from Parliament to consider the merits of a Statutory Instrument as an exercise of the powers delegated." Hanson, op. cit. supra at 281.

55. The House of Lords as early as 1924 set up a "Special Orders Procedure" by which a committee was established to examine all similar instruments and report to the House of Lords whether the provisions raise important questions of policy or principle, how far they are founded on precedent, and whether there should be any further inquiry before the resolution is moved. This procedure applies only to affirmative resolutions. May, Parliamentary Practice 809 (14th ed. 1946).

method—only practice and usage have led us to rely almost absolutely on the judiciary for supervision of administrative rules and regulations. The phenomenal growth of administrative agencies in late years requires a modern safeguard to prevent abuses of power.[56] There is very little dispute as to the need for such agencies but there is presently a great outcry for effective supervision. At a time when Congress is sensitive of its ever diminishing power and is casting about for means to restore its vitality and prestige, this method of retaining some degree of administrative control should be given careful consideration. At a time when Congress has become concerned about the peculiar growth and methods of some of its children, this type of supervision should be seriously studied.[57]

Question of the Constitutionality of the Laying System

The most formidable opposition to the installation of the laying system into our system of legislation would, of course, come from those who would claim that such a system is unconstitutional. To date, the most persistent and most valid argument emanating from that school is to the effect that the laying system would mark the end of Presidential vetoes and advisory control on a great deal of legislation. It is conceded that under the advocated system, the President would have no veto of administrative regulations within the definition of the word "veto" as generally known in the field of American political science,[58] i.e., a veto after the regulations had cleared the laying or "probation" period before Congress. However, it is strongly argued that the Presidency since 1939 has

56. "The grant of general powers, however justified, implies a responsibility for close legislative attention to the course of administration." Jaffe, An Essay on Delegation of Legislative Power, 47 Colum. L. Rev. 359, 366 (1947).

57. Words used by King-Hall, M.P., in debate in Commons, urging the creation of the Committee on Statutory Rules and Orders are most appropriate in describing Congress's present predicament:

"I feel strongly that what I have previously referred to in this House as the Public Relations of Parliament is a subject to which the House will have to give an increasing amount of attention. It is absolutely vital, if Parliament is to continue to enjoy the high esteem in the minds of the people that it has done for centuries, that the outside public should feel that this House is alive and linked up with the things which people are talking about in their own homes, and the Regulations which affect them." 400 H.C. Deb. (5th ser.) 235 (1944).

King-Hall also termed the creation of the Committee, "a step towards modernization" of Parliament. 400 H.C. Deb. (5th ser.) 236 (1944).

58. "From an early date, there have been departures from the literal constitutional command that all concurrent action of the two Houses . . . be submitted to the President. A long-recognized exception is that the President's veto has no application to the action of Congress in proposing a Constitutional amendment." Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569, 573 (1953).

created and practised a veto power in the field under discussion likewise previously unknown and foreign to our system of checks and balances which could and undoubtedly would be used to make a more effective Presidential veto of administrative regulations than is known under the present system.

What is this powerful potential veto device? It is the Executive Office of the President, otherwise known as the Bureau of the Budget. The President's "extra" veto power was first acquired by a statute approved June 10, 1921[59] setting up a national budget system wherein the duty of transmitting to Congress the Annual Budget was placed upon the President. To aid the President in this duty, the act created a Bureau of the Budget.[60] During the administration of President Roosevelt, the Bureau of the Budget grew tremendously in power and scope of operation. Its original duty of preparing the Budget for the President was eclipsed by new duties which were assigned to it by the President. By Executive Order 8248 of September 8, 1939,[61] we find that it has been given vast, far-reaching powers. Among the functions and duties allocated to the Bureau which are pertinent to this discussion are the following:

"II 2.

"(c) To conduct research in the development of improved plans of administrative management, and to advise the executive departments and agencies of the Government with respect of improved administrative organization and practice.

"(d) To aid the President to bring about more efficient and economical conduct of Government service.

"(e) To assist the President by clearing and coordinating departmental advice on proposed legislation and by making recommendations as to Presidential action on legislative enactments, in accordance with past practice.

". . . .

"(h) To keep the President informed of the progress of activities of agencies of the Government with respect to work proposed, work actually initiated, and work completed, together with the relative timing of work between the several agencies of the Government; all to the end that the work programs of the several agencies of the Executive branch of the Government may be coordinated and that the monies appropriated by the Congress may be expended in the most economical manner possible with the least possible overlapping and duplication of effort."

Especially under subsection (e) above, the power of the President over the various agencies in handling proposed legislation is implicit. Add to that, the Bureau's function of "advising executive departments and agencies with respect to improved organization and practice," and total control by the President over the agencies is accomplished.

59. 31 U.S.C. §§ 11-16 (1921).

60. The entire legislative and executive authority for the Bureau of the Budget can be found in the United States Government Organization Manual 59-62 (1956-57).

61. 4 Fed. Reg. 3864 (1939).

By Bureau of the Budget Circular No. A-19 of October 25, 1948, the provisions of Executive Order 8248 regarding proposed and pending legislation were supplemented and the Presidential power in that field was further strengthened. The circular expressly provided that:

". . . in instances involving proposals for legislation originating within the Executive Branch, agencies will submit to the Congress, on their initiative and with their endorsement, *only those proposals which do not conflict with the President's program*, and which have been coordinated within the Executive Branch in accordance with the provisions of this circular." (Emphasis added.)

Here we have the express advance veto power of the President for all proposals for legislation originating within the Executive Branch. To go one step further in such cases the President now has a veto both before the legislation is introduced and, if one can imagine an agency proceeding to introduce legislation in defiance of the above circular, a second veto if Congress passes such legislation. Obviously, such a double veto power was never contemplated by the Founding Fathers, but there it is.[62]

The President, again through the Bureau of the Budget, is also given strong powers of dominion over the agencies by the Budget and Accounting Procedures Act of 1950[63] by section 104 thereof which reads as follows:

"Sec. 104. The President, through the Director of the Bureau of the Budget, is authorized and directed to evaluate and develop improved plans for the organization, coordination, and management of the executive branch of the Government with a view to efficient and economical service."

Implicit in all these statutes[64] is the Presidential power to take over control of the rule-making power of the agencies, for if the President can control the advice of independent agencies on legislative matter by authority of such statutes, he can certainly, under the same authority, control administrative regulations. By Executive Order 8248 the en-

62. An excellent discussion of the workings of and justification for the Budget Bureau is contained in Wilkie, Legal Basis for Increased Activities of the Federal Budget Bureau, 11 Geo. Wash. L. Rev. 265 (1942). The author concludes: "Although it has been repeatedly alleged that certain of the Bureau's activities are without legal basis and constitute transgressions on the prerogatives of Congress, it is concluded that even in the absence of specific legislative authority for certain activities, such activities are nevertheless legal manifestations of the right of the Chief Executive to direct the administration affairs of the government, and involve no usurpation of Congress' constitutional power to control the purse." Supra at 301.

For a forceful and thorough study of the dangers inherent in such an organization, see Williams, The Office of the President: A Reorganization is Needed, 40 A.B.A.J. 285 (1954).

63. 31 U.S.C.A. §§ 2, 11, 14, 16, 18(a),(b), 22-24, 65-67, 118c, 278, 452, 504, 581-82, 687, 719, 730, 769, 785, 1597 (1954).

64. See also First War Powers Act, 1941, providing for Presidential coordination, consolidation and elimination of executive bureaus. 50 U.S.C.A. App. §§ 601, 602, 604 (1951).

abling statute was liberally interpreted to mean, *inter alia,* that the President's alter ego has the duty "to advise the executive departments and agencies of the Government with respect of improved administrative organization and practice."[65] By section 2(c) of the Administrative Procedure Act[66] a "rule" is defined in part as ". . . the whole or any part of any agency statement of general or particular applicability and future effect designed . . . to describe the *organization, procedure or practice requirements* of any agency . . . ." (Emphasis added.) Putting these two authorities together, Bureau authority to advise on the rule-making subjects of administrative organization and practice can readily be established.

The Presidential power to take over control of the rule-making power could also be justified on another count if the laying system were adopted. Under such a system, administrative rules would take on even more of the character of legislation and could then easily be brought under the purview of Budget Circular No. A-19 requiring clearance of proposals for legislation with the Bureau of the Budget. Such power could just as readily be justified under the guise of bringing about ". . . more efficient and economical conduct of Government service"[67] as were some of the earlier powers which were assumed to have been conferred upon the President by the statute which set up the Bureau of the Budget.

However, also implicit in these same statutes is the premise that since Congress has the power to give such control to the President, it can also take that control away or qualify it in any way that it pleases.

Under the proposed laying system, then, would the President, with his present effective control over the executive branch of the Government, lose his constitutional veto power as a practical matter? The answer must be a negative one. The only practical effect of such a system would be the changing of the time of veto in such matters from a veto after Congress had approved the rule-making to a veto before the Congress had approved it, for the system for vetoing beforehand is already installed and working.

Another argument against the constitutionality of the laying system is that such a device ". . . can be employed to alter completely the traditional distribution of power between Congress and the executive branch."[68] This argument is based on the supposition that agency or Presidential acts are always executive in nature and that when Congress attempts to establish a laying procedure, it is usurping the power of the executive and

65. Exec. Order No. 8248, § II, 2(c), 4 Fed. Reg. 3864 (1939).
66. 5 U.S.C.A. § 1001 (1950).
67. Exec. Order No. 8248, § II, 2(d), 4 Fed. Reg. 3864 (1939).
68. Ginnane, op. cit. supra note 58, at 611.

causing an undue concentration of governmental power in Congress. But this fundamental question must be raised—Is the rule-making power of the President and agencies executive or is it legislative and therefore properly within the purview of the Congress?[69] In England rule making is described as "legislative" and "statutory." And our courts and legal authors have often described the function as "quasi-legislative" or "delegated legislation."[70] If we change the classification of the function, then, the undue concentration of power argument automatically dies.

Further, it is difficult to understand the fear of undue concentration of power in Congress when the history of administrative law points out all too clearly that the concentration of power in our day has centered in the executive branch of our government through the phenomenal growth of administrative agencies.[71] There is no present-day problem of Congress usurping power. To provide for a laying system would merely be to give back to Congress a rightful share in the task of governing, to throw the division of powers back into balance.

It might also be pointed out that an undue concentration of power in a single executive has a much greater potentiality for usurpation of power than has a like concentration in Congress, for the executive branch of our government, composed as it is of members of one party under a strict

69. The President's Committee on Administrative Management classified federal agencies as "a headless 'fourth branch' of the Government. . . ." President's Committee on Administrative Management, Report with Special Studies 39 (1937).

President Franklin D. Roosevelt described the same agencies as "a 'fourth branch' of the Government for which there is no sanction in the Constitution."

70. One modern administrative law authority, using the vernacular, put it thus: "From the courts and the legislatures modern administrative agencies 'steal business'. . . ." Davison, Administration and Judicial Self-Limitation, 4 Geo. Wash. L. Rev. 291, 299 (1936).

Mr. Justice Sutherland in Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) said:

"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in contemplation of the statute, must be free from executive control. . . . To the extent that it exercises any executive function as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as any agency of the legislative or judicial department of the government."

71. "Administrative rule making and administrative adjudication have expanded to such an extent as to challenge the traditionally dominant roles of the legislatures and the courts." Heady, Administrative Procedure Legislation in the States, Foreword by Lederle (1952).

". . . lawyers as a group have not been overly sympathetic toward the growth of governmental regulatory programs or the development of regulatory agencies with authority combining the traditional triumvirate of executive, legislative, and judicial type powers." Supra at 119.

party discipline, has greater possibility of effective control than has our present two-party Congress composed of irreconcilable "rights," "lefts," and "middle of the roaders" in both camps.[72]

Much of the justification for the existence and growth of the Executive Branch via administrative agencies is based on the premise that there is a genuine need for such instrumentalities of government in our modern world. Certainly there exists no express basis or license in the Constitution for such agencies. Because the American people now accept the presence of Federal agencies and they are now "established" is no reason to deny the installation of the laying system simply because it is unknown or unpracticed at this late date or because the Constitution does not specifically provide for it. Must government and reform stand still? The process of checking and balancing is a dynamic function of American government, not merely an historical tenet to be studied in 1956 as an established fact. The Founding Fathers did not and could not attempt to legislate for all times and conditions but merely set up the criteria of vigilance.[73]

Objection might be made to the laying system because an administrative regulation approved by Congress by such method might be construed to have the force of a statute, although it was never voted on by either House. Where such a regulation affects private rights, would such a "statute" not therefore be unconstitutional? But the posing of the question suggests the answer and in fact underscores our present supervisory deficiency which it is hoped the laying system may remedy. For if such a "statute" be unconstitutional, a fortiori, a regulation affecting those same private rights which had no legislative sanction whatsoever (i.e., a legislative chicken soup in which the chicken is not even passed through it) is much more susceptible to the same constitutional objection. It seems then that the laying system could at least partially supply the necessary

72. "The Presidency has emerged as a distinctive agency of administrative regulation." Davison and Grundstein, Cases and Readings on Administrative Law, Preface ix (1952).

"The legislature comprises a broader cross-section of interests than any one administrative organ; it is less likely to be 'captured' by particular interests." Jaffe, An Essay on Delegation of Legislative Power, 47 Colum. L. Rev. 359 (1947).

73. Speaking of the problem of an "eighteenth-century Constitution in a twentieth-century world," one author ventured this solution:

"If we propose to continue . . . with the constitution that has served us so long and nobly, and has met the great tests of time and crisis, we must be prepared to experiment boldly with non-constitutional accessories of our three constitutional branches and take our chances on the uncertainties and pitfalls of conscious political reform. . . . Thanks to the Executive Office, the Presidency has adapted itself to the exigencies of the modern state at least as well as the courts and far more successfully than Congress." Rossiter, The Constitutional Significance of the Executive Office of President, 43 Am. Pol. Sci. Rev. 1216 (1949).

legislative deficiency (i.e., the legislative chicken soup with the chicken passed through it).

It cannot be emphasized too much that the laying system as conceived by this author would not trespass upon purely executive acts such as Presidential appointments but would be confined to *quasi-legislative* administrative functions. It could thus be distinguished from the decision in *Springer v. Philippine Islands*,[74] where the Supreme Court said:

"Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection. . . ."[75]

One of the most compelling reasons behind the delegation of powers doctrine in administrative law is that ". . . Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation . . . ."[76] If Congress can delegate power to the Executive without violating the Constitution, why cannot that same body, with equal authority, reserve or retain a certain small residue of its delegable power which it can exercise itself? The power to retain is implicit in the power to give away (i.e., to delegate). There appears to be no good reason why one of the "defined limits" within which Congress' use of the officers of the Executive Branch operates could not be the prescription of the laying system. Even those who are opposed to Congressional control of federal administration will concede that if and when vast powers are delegated to the Executive, unusual safeguards must be provided.[77]

Of persuasive interest, too, is the fact that two former Presidents of the United States, Presidents Hoover and Truman, men who are familiar with the problem first hand and whose administrations covered the period of phenomenal administrative growth, recommended to Congress that such a laying system be written into proposed legislation regarding reorganization of Government agencies.[78] Mr. Truman termed the laying system which he prescribed as a "method of executive-legislative cooperation," while Mr. Hoover described it as a "safeguard". Methods of executive-legislative cooperation might well be cultured and emphasized over provocative issues of usurpation of prerogatives. It must be pointed out that the reorganization of Government agencies is much more an executive function than is administrative legislation.

What constitutional objections have been raised to the supervisory

74. 277 U.S. 189 (1928).
75. Id. at 202.
76. Hampton & Co. v. United States, 276 U.S. 394, 406 (1928).
77. Ginnane, op. cit. supra note 58, at 609.
78. H.R. Rep. No. 23, 81st Cong., 1st Sess. 2, 4 (1949).

system of laying when it has been employed by Congress? The most notable example of such employment is in the Reorganization Acts of 1939, 1945 and 1949.[79] In the congressional debates concerning the Acts of 1939 and 1945, considerable opposition centered about the negative resolution measures which provided that the reorganizations specified in the plans submitted by the President to Congress should take effect in accordance with the plans upon the expiration of sixty calendar days after the date on which the plans were submitted, but only if during such period the two Houses did not pass a concurrent resolution stating in substance that Congress did not favor the plans. The debates in Congress to a large extent echoed the fears of many Congressmen of giving too much power to the President.[80] Others interpreted the bill as allowing the President to take over the legislative power of Congress.[81] There was some fear that the President could veto the concurrent resolution negating his reorganization and that Congress would then have to repass the resolution by a two-thirds majority.[82]

The Act of 1949 ran into a similar opposition until it was amended to provide that a majority vote of the authorized membership of either House of Congress would be sufficient to negative the proffered plan. Again the main opposition to the concurrent resolution plan seemed to center about the concentration of too much power in the Executive.

The same opposition would not arise under a similar delegation to an administrative body. Senator Wheeler who led the fight in the Senate against the 1939 Act distinguished the two types of delegation:

"I have repeatedly pointed out a distinction. . . . Does not the Senator distinguish between the delegation of a power to a legislative arm of the Government . . . and the delegation of a power to the executive branch? . . . In one instance we are delegating power to a branch of our own, an agent of the Congress.[83] Under the pending bill it is proposed to delegate it to the executive branch . . . whose duties are fixed by the Constitution, and it is proposed to delegate to him a right or power which belongs to the Congress of the United States."[84]

79. 5 U.S.C.A. §§ 133-133r (1950); 5 U.S.C.A. §§ 133y (1-16) (1950); 5 U.S.C.A. § 133z (1-15) (1950).

80. Representative Van Zandt expressed this view:

"It is the negative action provided in the bill which is dangerous. . . . We do not want the President to effect any unwise or undesirable reorganization of the Government by the deliberate default of one House of Congress to act within the 60 day time limit. Yet that is altogether probable if a group of determined gentlemen in the body at the other end of the Capitol engaged in a filibuster. . . . Affirmative action by Congress should be required to make any reorganization proposal by the President effective." 84 Cong. Rec. 2385 (1939).

81. Recall Ginnane's apprehension (note 68 supra) that the very same system would allow Congress to take over the Executive power of the President. It would seem that the fear is all a matter of viewpoint.

82. 84 Cong. Rec. 2477 (1939).

83. It will be remembered that Ginnane classified administrative agencies as executive.

84. 84 Cong. Rec. 2965 (1939).

But even the objection on the basis of the unconstitutionality of the delegation to the President is without merit. Senator Pepper refuted that objection:

"The bill simply says that government reorganization is a very complicated matter; that it involves a great deal of detail; that it involves perhaps the executive function of analysis and criticism, and the like; and we are going to authorize an agent of ours to put into effect a reorganization plan which is perfectly within the scope of the legislative authority. We can delegate any legislative power of this sort that we care to. Then we delegate to what we regard as a competent agency this portion of our legislative power. Even if we stopped there, that would still be no violation of our legislative authority or abdication of our legislative power. But we go even further than that and we say, however, this delegation of power cannot be consummated and effectuated until the proposed exercise of it is laid before the Congress for examination, debate and judgment."[85]

Justice Roberts, speaking for the United States Supreme Court in *Sibbach v. Wilson & Co.*,[86] gave apparent approval to such a congressional device when he said:

"The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently . . . employed to make sure that the action under the delegation squares with the Congressional purpose."

In a footnote, he provided additional support:

"An analogy is found in the organic acts applicable to some of the territories, before their admission to statehood, which provided that laws passed by the territorial legislature should be valid unless Congress disapproved."[87]

Section 5 of the Ordinance of 1787 is the earliest example of such a reservation.[88]

In congressional debate, Senator Brown used *Currin v. Wallace*[89] in arguing the constitutionality of the negative resolution:

". . . we delegated to those interested in the marketing of tobacco the right to determine whether or not the law became effective in their area and the Supreme Court of the United States said in that case: 'So far as growers of tobacco are concerned, the required referendum—that is, the right to determine whether or not the law would be effective—' does not involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market 'unless two thirds of the growers voting favor it'. Similar conditions are frequently found in police regulations.

"If we can say to a group of individuals who are interested in the marketing of tobacco that a solemn enactment of Congress does not go into effect until they themselves have decided to adopt it . . . surely we in Congress can say that the President's

85. Ibid.
86. 312 U.S. 1, 15 (1940).
87. Ibid.
88. Pease v. Peck, 59 U.S. (18 How.) 595 (1855).
89. 306 U.S. 1 (1938).

order shall not go into effect until that order has come here and has remained here 60 days, and shall not then go into effect if both houses join in a concurrent resolution to the effect that the order is not to become the law of the land."[90]

The case for the affirmative method of laying, i.e., affirmative resolution to approve rules and regulations drawn up by a designated agency, is even stronger, for under that method, the affirmative resolution can also be considered by Congress as a new bill enacted into law by Congress itself and the problem of improper delegation disappears entirely.

The debates in Congress concerning the 1949 Reorganization bill showed the same fear of the legislators with regard to giving the President too much power. The same constitutional arguments presented in the 1939 debates were repeated in 1949. Senator McClellan, probably in order to allay such fears, traced the use of the negative resolution by Congress in the 1939 and 1945 Acts. He pointed out that under the 1939 Act President Roosevelt submitted five reorganization plans to Congress, none of which were rejected by either House. Under the 1945 Act, President Truman submitted seven plans to Congress, three of which were rejected by one House but became law, three of which were rejected by both Houses and failed to become effective, and one which was not opposed by either House.[91] Under the 1949 Act, providing for a rejection by either House of Congress, there can be no objection based on improper delegation, since the effect of that provision is an implied approval by both Houses of Congress in the event neither House objects to or nullifies the plan.

It would appear with regard to reorganization plans that it makes no difference from the viewpoint of constitutionality whether the President's function is classified as executive or as legislative. The latest memorandum on that point submitted by the Department of Justice with regard to the Reorganization Act of 1949 is to this effect:

"It cannot be questioned that the President in carrying out his Executive functions may consult with whom he pleases. The President frequently consults with Congressional leaders, for example, on matters of legislative interest—even on matters which may be considered to be strictly within the purview of the Executive, such as those relating to foreign policy. There would appear to be no reason why the Executive may not be given express statutory authority to communicate to the Congress his intention to perform a given Executive function unless the Congress by some stated means indicates its disapproval . . . In this procedure there is no question involved of the Congress taking legislative action beyond its initial passage of the Reorganization Act. Nor is there any question involved of abdication by the Executive of his Executive functions to the Congress. It is merely a case where the Executive and the Congress act in cooperation for the benefit of the entire Government and the Nation.

90. 84 Cong. Rec. 3044 (1939). To the same effect, see H.R. Rep. No. 120, 76th Cong., 1st Sess. 6 (1939).

91. 95 Cong. Rec. 6223 (1949).

"For the foregoing reasons, it is not believed that there is constitutional objection to the provision in section 6 of the reorganization bills which permits the Congress by concurrent resolution to express its disapproval of reorganization plans."[92]

For the sake of argument, conceding that administrative regulations are executive rather than legislative, then this same line of argument used by the Department of Justice could certainly be employed to justify the laying system.

Would the Laying System Work?

The next question to be explored in connection with the recommendation for installation of the laying system into our congressional picture would appear to be the workability of such a system.

In discussing whether such a system would meet our needs two items of difference seldom considered in comparisons of the English and American systems must be studied: the salaries of the members of the two legislative bodies and the variations in the party systems.

The salary of a member of the House of Commons since 1946 has been £1000 a year. From 1911 to that date the salary was only £400. It is obvious that the English legislator has the additional task of earning a living outside his job in Parliament; he can only devote a minimum of time to legislation. "The member who has no other financial resources than his Parliamentary salary has a rough time of it."[93] Most members of Parliament, therefore, do not regard being a member as a full-time job.

Absenteeism in the House of Commons is prevalent, some members showing up only on very rare occasions. The amount of voluntary absenteeism varies with the size of the Government's majority. If the majority be small, opposition members will be vigilant in attendance on the chance of defeating the Government and the Government members will be vigilant in attendance in order to insure that the Government is sustained in office.[94]

With such small pay and so much membership absence from Parliament, it is only natural that the Member of Commons delegates as much work to the paid administrators as he possibly can. Perhaps that is why even the skeleton legislation of Parliament has so few bones.

On the other hand, our Congressmen can subsist on the pay they receive and allowances are provided in addition to such pay.[95] None of them have active duties to perform outside their legislative duties. They are able to devote full time to the task of legislation and could, therefore, devote more time to the legislative supervision required under the laying system.

92. S. Rep. No. 232, 81st Cong., 1st Sess. 20 (1949).

93. Brown, Guide to Parliament 87 (1948).

94. Id. at 86.

95. 2 U.S.C.A. §§ 31-53 (1927). A $10,000 pay raise was voted on Mar. 2, 1955.

The party system in England contributes much to the ineffectiveness of Parliamentary supervision. One author has demonstrated that there is rarely a "free vote"[96] in the House of Commons today since the great majority of legislation consists of Government bills and the Conservative Party majority is very slim. An adverse vote amounts to a defeat of the Government "and the Members who have brought it about incur the odium of having shaken the prestige of the Government."[97]

Our party system has no such discipline over its member legislators and therefore the recommended congressional supervision would work better than in its original setting in England. The Democratic party would be amazed if some of the members of its Southern bloc in Congress ever voted to support the liberal program its leaders espouse.

The possibility of the use of the laying system in the United States as a means of improving the Federal administrative process has been explored before.[98] The Attorney General's Committee on Administrative Procedure in its Final Report did not recommend "a general requirement that regulations of agencies be laid before Congress before going into effect."[99]

The Report went on to comment that:

"Legislative review of administrative regulations . . . has not been effective where tried. The whole membership of Congress could not be expected to examine the considerable volume of material that would be before them. Even a joint committee entrusted with the task could not supply an informed check upon the diverse and technical regulations it would be charged with watching. The reporting of individual rules to Congress as they are promulgated would add little or nothing to the opportunity for congressional action, if it is desired, that would be afforded by the publication of regulations in the Federal Register when supplemented by deferred effectiveness. . . . Experience, both in England and in this country, indicates that lack of desire, rather than lack of opportunity, has accounted for the absence of legislative interference with administrative regulations."[100]

96. I.e., a vote in which the Member does not have to follow the demands of his party, but can exercise his own free judgment.

97. Allen, op. cit. supra note 20, at 93. Another author expresses the situation in these words: "The increasing importance of the Executive tends more and more to tip the balance in its favour and to decrease the influence of the House of Commons as such over its activities. The ascendancy of the Government over the House of Commons is secured primarily by the exercise of a strong Party discipline, which deprives the single Member as much of his political initiative as the process of governmental legislation has deprived him of his legal initiative. . . . Another method by which the Government has secured its supremacy over Parliament is through the adaptation of the procedure of the House to ministerial requirement." Sieghart, Government by Decree 142-43 (1950).

98. For a previous proposal urging selective use of the plan by Congress, see Note, Laying on the Table—a Device for Legislative Control over Delegated Powers, 65 Harv. L. Rev. 637 (1952).

99. Attorney General's Committee On Administrative Procedure, Final Report 120 (1941).

100. Ibid.

And further recommended:

". . . that each agency be required by statute to make an annual report of its rule making during the preceding year, embracing both the regulations adopted and a summary of the proposals, emanating from outside the agency, that were not acted upon or were rejected."[101]

It is very difficult to reconcile the last recommendation concerning the making of annual reports with the Committee's previous observation that there is a "lack of desire" on the part of Congress to interfere with faulty administrative regulations. It would appear that if experience has pointed out that Congress has no desire to interfere in such matters, then the making of annual reports would simply be wasteful, purposeless administrative window dressing with no constructive end in view. A report without an opportunity for effective supervision is just "another report" and under such a system no legislative action is prescribed for those Congressmen who desire to take positive steps to remedy a bad agency situation. Effective congressional implementation is necessary. Apparently Congress was of the same mind concerning the suggested annual report because the recommendation was not translated into the Administrative Procedure Act. Further, the experience in this country with respect to the Reorganization Acts[102] certainly does not show any "lack of desire" to interfere on the part of Congressmen where reorganization plans of agencies are concerned.

The statement of the Attorney General's Committee to the effect that "even a joint committee could not supply an informed check upon the diverse and technical regulations it would be charged with watching" might be compared with a statement made by Prime Minister Stanley Baldwin in 1929 in answer to a question put to him in the House of Commons as to the plans of the Government to set up a scrutinizing committee. He discounted the need for such a committee in these words:

". . . it seems clear that the proposed Committee would not only have to be in almost constant session, but would be unable effectively to scrutinise the material before it without hearing a mass of technical and other evidence, not only from the officials of the Departments concerned, but also from outside organizations and private individuals, and I am satisfied that the results of setting up such a Committee . . . would not be commensurate with the expenditure of time and money involved."[103]

Yet the English scrutinizing Committee is a success today and its jurisdiction covers a much greater mass of regulations than a similar congressional committee would ever have to cope with.

It might also be pointed out that the Attorney General's Committee

101. Id. at 121.

102. 5 U.S.C.A. §§ 133-133r (1950); 5 U.S.C.A. §§ 133y (1-16) (1950); 5 U.S.C.A. § 133z (1-15) (1950).

103. 226 H.C. Deb. (5th ser.) 25 (1929).

recommended no *general* requirement of laying, thus not closing the door on the practice in England of requiring only certain selected regulations to be laid before Parliament. A general requirement of laying would of course be unworkable and impractical. The Committee argued that such a system would add nothing by way of opportunity for congressional action that publication plus a deferred period of effectiveness would not supply, but it is submitted that congressional responsibility would be far more effective when delegated to an established committee given certain powers and duties. The committee system in Congress does work and such a committee would constitute a vehicle for prompt and effective protestation by the interested legislator. A deferred period of effectiveness allows only for some unorganized, ineffectual congressional protests and an organized campaign on the part of groups who can afford to maintain Washington representatives, but the general public is usually not represented.

The Committee observation that the whole membership of Congress could not possibly be expected to participate in so much review work is met by the answer that under the present English system, practically all of the work is done by the scrutinizing Committee. The compass of their work is far greater than that of any similar committee here would be. It must also be recalled that the English members have outside jobs to attend to—there is no like situation here, yet the English have turned in a successful job.[104]

The only present method of preventing faulty or ultra vires regula-

104. James M. Landis, American administrator and scholar, suggests legislative participation in the administrative process along the lines followed by Parliament. Speaking of the English affirmative and negative resolution procedures, he says:

"These techniques have several virtues. For one thing, they bring the legislative into close and constant contact with the administrative. Objections by individual members of the legislature to particular regulatory measures can easily and openly be made. With us, individual legislators who object to particular administrative regulations, place their objections before the administrative. If the administrative is still opposed and the objectors are insistent, other methods are employed to bring pressure upon the administrative with a view to having it conform to the objector's wishes. By giving the legislative a definitely recognized share in the exercise of the regulatory power of the administrative, a much more open responsibility of the administrative to the legislature is attained.

"Again, the English technique permits the administrative to call upon the legislature to assume some of the responsibility attendant upon action. The legislative thus can help to overcome a hesitancy to take responsibility for action that sometimes makes the administrative process stagnant. With us, however, legislative appraisals of administrative action are infrequently made and when made, they come by the less desirable way of Congressional investigation. By that time the regulatory record is cold, tending to lead to criticism of the administrative based upon the hindsight of intervening events." Landis, The Administrative Process 77-78 (1938).

tions from going into effect normally[105] outside of possible court action is through public participation under subsection 4(b) of the Administrative Procedure Act, which provides for participation in "rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner. . . ." However, it must be stressed that such participation may be confined to the submission of written data to the agency concerned, which need only give "consideration" (a very nebulous term) to such data. In rule making there is no constitutional or statutory right to a hearing.[106] Participation restricted to such an extent is at the most token participation. In reality the general public is seldom represented under such a procedure—it is a luxury confined to those who can afford a Washington representative. Such a method is tantamount to an illusion of supervision—a supervision without teeth.

Legislative participation in rule making would be a persuasive indication to reviewing courts of legislative approval of any regulation placed before its scrutinizing committee. The situation would be analogous to the one described in *Pinkus v. Porter*,[107] where the court said:

"Appellee . . . calls attention to the fact that his practice with respect to the issuance of subpoenas was explained to the Special Committee to Investigate Executive Agencies. . . . Its policy as to decentralization . . . was also fully reported from time to time . . . the re-enactment of the Act after such administrative construction was made known to Congress constitutes a legislative ratification of that interpretation."[108]

Such legislative participation in agency rule-making would thus give administrators a confidence in their work and would overcome their hesitancy to take responsibility for action. It would also eliminate in part the possibility of future voiding of the regulation by the courts on an ultra vires basis, since such laying could be interpreted as congressional approval of the agency regulation.

An American system of laying before Congress could be much simpler than the system known in England today. There could simply be a choice between a negative or affirmative resolution, for such a limited choice would be sufficient to allow for legislative bargaining when it was coupled in our more equal bicameral system with the additional possibility of requiring only one House to approve or disapprove the regulation.[109]

105. Where rules are required by statute to be made on the record after opportunity for an agency hearing, hearings and decisions must be had in accordance with §§ 7 and 8 of the Act.

106. Willapoint Oysters v. Ewing, 174 F.2d 676 (9th Cir.), cert. denied, 338 U.S. 860 (1949).

107. 155 F.2d 90, 93 (7th Cir. 1946).

108. Accord, Bowles v. Wheeler, 152 F.2d 34 (9th Cir.), cert. denied 326 U.S. 775 (1945); Green Valley Creamery v. United States, 108 F.2d 342 (1st Cir. 1939); Brewster v. Gage, 280 U.S. 327 (1930); McCaughn v. Hershey Chocolate Co., 283 U.S. 488 (1931).

109. See provisions of 1949 Reorganization Act, 5 U.S.C.A. § 133z-4 (1950).

Actually, though, there would be no compelling need for any restrictions on the types of laying which could be used at present. Such a system could be adopted and used by Congressmen and then limited and reformed when need arose.

At present Congress has only slow, indirect methods of requiring conformance with its wishes. It may withhold funds from the offending agency, but such a procedure does not go to the merits of the evil. The erring administrator may not even be assigned a reason for the sudden congressional parsimony. Such a disciplinary method does nothing constructive, rather it is destructive of an administrative plan conceived by Congress to eradicate some evil. Here the agency, not the evil, is eradicated.

The Senate may fail to confirm recalcitrant agency heads seeking reappointment. Congressional investigations may be launched or attacks made on the agency from the floor of either House.[110] The more quiet method of simply asking a doubtful agency for specific clarifying information may be chosen by the inquisitive Congressman. Congress may require agencies to file reports. But all these methods are unorganized and unconstructive, and in many cases, ineffective, expensive and slow.

Congress and its agencies must find a system in which cooperation and understanding can develop between the two.[111] No longer is there any doubt that administrative agencies are necessary; in a modern world such agencies have a large and vital part in the role of our federal government.

110. In the report of the Subcommittee of the Senate Committee on Labor and Public Welfare, titled Ethical Standards in Government, the following proposed measures were marked for study and consideration:

"Assertion of the rule of fair play in debates on the floor of the House and Senate. Administrative officials attacked on the floor of either House should, under the rules, have protection equal to that afforded Members of the House; and agency heads who are subject to personal attack on the floor should be given an opportunity to make an immediate or early reply in the same forum.

"The principle of fair procedures is as imperative in the legislative as in the administrative and judicial processes. The Standing Rules of the Senate and House of Representatives should provide for fair procedure in the investigating activities of committees." 82d Cong., 1st Sess. 5 (1951).

111. The Senate Subcommittee on Labor and Public Welfare also listed and discussed this proposed measure:

". . . a more extensive use of frequent informal meetings of administrators with legislative committees in lieu of the formal hearings which have a courtroom atmosphere. On the latter point it is argued that formal hearings tend to be inquisitorial and to provoke hostile feelings on both sides even though the intent is friendly. If legislators and administrators could sit down together and think through their problems, there would be greater understanding and less conflict. To do this successfully, of course, administrators would have to be not only very well prepared, but also completely frank; and legislators would have to try to see things from the administrators' point of view as well as their own." Id. at 57.

No one disputes the fact that Congress cannot manage the entire mass of detailed legislation alone. Neither can an agency do the job alone. It must have funds; it must be able to attract capable personnel. It must always remain an agency—an agent of Congress. It must not develop autocratic ways. It must carry out the announced policy of Congress.

It is not enough that Congress should father an agency, only to leave it to its own designs. It is a weak system which provides for correction and discipline only after the damage has been done. Like a responsible father, Congress should provide for continuing supervision over its children—a supervision which could prevent many mistakes and evil practices in our administrative system. The successful supervisory system now in practice in England is an attractive solution to this problem.

All authorities appear to be in agreement that an attempt by Congress as a whole to supervise administrative agencies would end in failure. On the other hand, a conscientious congressional committee patterned along the lines of the Select Committee on Statutory Instruments would provide a very effective, continuous and constructive system of surveillance. It will be recalled that in a Select Committee report it was shown that out of 682 statutory instruments examined, only seven had to be called to the attention of the House, even though 325 of the 682 instruments arose out of emergency legislation! Under such a system, Congress as a whole would have little added work.

In America a single joint scrutinizing committee would probably be the best arrangement. Our legislative bodies are equally powerful; the two bodies acting through one committee could do much by way of effecting compromises and saving time. Herbert Morrison, in discussing the mechanics of setting up the House of Commons committee, gave these advantages of a single joint committee:[112] a single committee would avoid duplication of time in hearing witnesses with the resultant waste to all concerned, and the single committee system would be less expensive. As in England, outside help could be assigned to aid the committee. Members of the respective offices of Legislative Counsel could be assigned to assist the group, and a small permanent staff could gradually be educated and developed. The work of the committee would not be nearly as great as that of its English parallel, since the scope of our Federal administrative action is much less than in England. Nor is our Congress troubled with the great bulk of emergency legislation that England still has. Such emergency legislation constitutes one-half of the English Committee's work.

Congress through such a committee could give a more thorough supervision to the administrative than the courts can under the present uncer-

112. 400 H.C. Deb. (5th ser.) 271 (1944).

tain arrangement of judicial review. The Attorney General's Committee recognized that:

". . . judicial review is rarely available, theoretically or practically, to compel enforcement of the law by administrators. . . . To assure enforcement of the law by administrative agencies within the bounds of their authority reliance must be placed in controls other than judicial review. . . ."[113]

And the Committee which previously had denied the possibilities of legislative review recommended "responsibility to the legislature" as one of the controls! No suggestion was made as to how such legislative control would be exercised. The laying system might well have been considered.

Such matters as ambiguity of regulations and general problems of administrative draftsmanship could be handled with greater ease, less expense and more thoroughness by a committee than a court through its decision. Many times, too, a court would not deign to discuss such problems, particularly if the matter was not decisive of the issue presented. Judicial review is uncertain;[114] it must always wait on a "case or controversy" in order to give the courts jurisdiction and a case of sufficient financial importance to bear the terrific expense of court-room litigation. The court may confine itself to the narrow issues of the case. The tremendous savings in time and money which could be made by correcting faulty rules in advance of their effectiveness would be a blessing to be welcomed by civilian, court and Congressman alike.[115]

113. Report, supra note 99, at 76.

114. In a recent case, Justice Frankfurter in delivering the opinion of the Court set down the proposition that the most certain thing about judicial review of administrative action is its uncertainty:

"A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work . . . .

"Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

115. "In some other cases the harm to be caused by administrative action is done before the stage for judicial review is set and cannot be undone by the review." Report, supra note 99, at 77.

For a recent interference by the Supreme Court at an unusually early stage, see Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 141 (1951), where the Court, through Justice Burton, made this statement concerning the Attorney General's action in placing the petitioners on a "subversive list" which was published in the Federal Register:

"It is unrealistic to contend that because the respondents gave no orders directly to the petitioners to change their course of conduct, relief cannot be granted against what the respondents actually did. We long have granted relief to parties whose legal rights have

Committee action would be less formal than court action. As shown earlier, its scope would be broader, yet its work could be equally as objective as the judicial approach. By the utilization of written memoranda by the administrative in explanation of any criticized rule, the committee could accomplish the same end that it now attempts by congressional investigation with less fanfare, greater objectivity, and less damage to both the prestige of Congress and the agency concerned. Strained relations between administrators and Congressmen could be avoided. More administrators could be induced to stay on.

It has been said that a Congress interested in dramatics would turn the work over to employees,[116] but that possibility of delegation, if it is such a danger, is not confined to this particular type of work alone, but is inherent in the entire system of Congress and congressional committees and in our administrative agencies. Certainly our limited experience with the laying system does not bear out such skepticism, for the various reorganization plans submitted by Presidents Roosevelt and Truman were extensively studied and debated by our Congress, not their employees. It has been shown that under the English scrutinizing system great reliance is placed upon Sir Cecil Carr, The Speaker's Counsel for guidance. Certainly dependency upon a competent staff would not be a novel situation on Capitol Hill, nor is there any cause for complaint about such a delegation when the final action or inaction remains in the hands of Congress. It might be pointed out that the English under their system go still further along these lines since membership in a Parliamentary committee is not confined to members of Parliament. Outside help is frequently recruited on important problems and such recruits are listed as members of the committee.

The suggestion that Congress would turn such scrutinizing work over to employees, also calls to the mind that such sluggishness and "under-

been violated by unlawful public action, although such action made no direct demands upon them."

The Supreme Court has indicated that it will interfere under some circumstances:

"The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications which may follow, the results of which the regulations purport to control." Columbia Broadcasting System v. United States, 316 U.S. 407, 425 (1942).

116. Gellhorn, Administrative Law, Cases and Comments 155 (1947). Gellhorn does not use the same arguments against the scrutinizing committee in the more recent edition of his casebook, but rests his case this time with this personal assertion: "The even larger number of exertions of delegated power in this country causes one to be skeptical that routinized legislative review is feasible." Gellhorn and Byse, Administrative Law, Cases and Comments 157 (1954).

ambition" to tackle the difficult problem might also be properly attributed to the Executive Branch of our Government. It is a well-known fact among Government employees that many Cabinet Officers of the past have shown a marked disinclination for even appearing at the office for weeks at a time. They, too, are interested in postprandial oratory and tours of inspection. This administrative situation is, in effect, an effective argument for congressional supervision and, even though it only be employees of Congress checking on employees of the various agencies, supervision is established.

The high rate of change in legislators is also pointed out in derogation of such a system.[117] But that argument is equally applicable to the whole legislative system and to the policy-level group in our administrative agencies. A permanent staff or permanent legislative counsel and a certain degree of continuity in committee membership would be sufficient to do the work. The idea of rotation in membership is not a bad feature, when it is recalled that legislative ignorance of the administrative process is one of the deficiencies to be overcome by the advocated system. Congress needs a closer contact with and a greater understanding of its administrative creations at a time when such agencies are so heavily relied upon by Congress to do such vital legislative work. It is true that there is a tremendous amount of criticism emanating from Congress regarding the administrative process, but little of it is helpful or constructive.

A quick, more comprehensive, less expensive method of administrative supervision must be found. Experience in England has demonstrated that the system of laying before Parliament as presently handled is successful. Experience has further shown that a scrutinizing committee program can be inaugurated which will preserve the prerogatives of Parliamentary government and at the same time develop and guide an administrative system capable and effective in its delegated realm.

Congress is now faced with a serious dilemma—it cannot do all of its legislative work unaided, yet it fears to give legislative power to an agent it cannot manage and often openly distrusts. Judicial control is incomplete, slow and piecemeal. The laying system with its companion scrutinizing committee is the answer to agency supervision today. The mere fact that such a system met with some difficulties with reference to the Reorganization bills is no argument against the system. Most delegations by Congress would be to the agencies where the political fears of too much concentration of power in the President of the United States would be, of course, absent. When the laying system was employed by Congress, there was certainly no lack of interest manifested. That system, when fortified by a good scrutinizing committee, would streamline and modernize our

117. Ibid.

legislative process within the framework of our Constitution and would provide a legislative machinery geared to produce good administrative rules and regulations.

That system also has a secondary utility which should not be overlooked. It may be used by one party in Congress interested in the passage of a bill as a compromise instrument to persuade those fearing too great a concentration of power in one agency or executive to go along with the measure. That use was demonstrated very clearly in the Reorganization Acts. It is safe to say that these laws could never have been enacted had it not been for the laying system, a system which guaranteed Congress that the legislative function in such important matters would remain with Congress.