

Spring 1977

## Legislative Control over Administrative Action: The Laying System, 10 J. Marshall J. Prac. & Proc. 515 (1977)

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### Recommended Citation

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## COMMENTS

### LEGISLATIVE CONTROL OVER ADMINISTRATIVE ACTION: THE LAYING SYSTEM

#### INTRODUCTION

The necessity and desirability of administrative agencies<sup>1</sup> is an accepted tenet of our American public law system.<sup>2</sup> Through grants of delegated power Congress defines what ends the agency is to guard and what means should be used in regulating both public and private activities to protect and maintain those ends.<sup>3</sup> Such grants of power, however, require safeguards to insure that agency action is in accordance with Congressional intent.<sup>4</sup> The control device best suited for this purpose is legislative in nature: the laying system.<sup>5</sup>

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1. Kenneth Culp Davis defines an administrative agency as "a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication, rulemaking, investigating, prosecuting, negotiating, settling, or informally acting." K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 1.01 (3d ed. 1972).

2. Whether administrative agencies are themselves constitutional has been long settled. It is now recognized that the existence of an administrative agency does not violate the separation of powers principle, nor does the creation of the agency involve an unconstitutional delegation of power. Legislation and administration are complementary processes which function side by side to perform many complex operations of modern government. Melville, *Legislative Control Over Administrative Rule Making*, 32 U. CIN. L. REV. 33, 33-34 (1963).

3. Schwartz, *The Administrative Process And Congressional Control*, 16 FED. B.J. 519, 520 (1956), states:

The representative legislative assembly is peculiarly inappropriate itself to perform these continuous tasks of regulation and guardianship. It has had to delegate their performance to the administrative process. Indeed, the need for an effective instrument through which these tasks could be performed has been perhaps the primary reason for the growth of that process.

4. Schwartz, *Legislative Control Of Administrative Rules And Regulations: I. The American Experience*, 30 N.Y.U.L. REV. 1031, 1032 (1955); see FitzGerald, *Congressional Oversight or Congressional Foresight: Guidelines from the Founding Fathers*, 28 ADMIN. L. REV. 429 (1976).

5. See generally B. SCHWARTZ, *ADMINISTRATIVE LAW* § 64 (1976); Andrews, *Relationships Between Administrators and the California Legislature*, 44 CAL. L. REV. 293 (1956); Boisvert, *A Legislative Tool For Supervision Of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638 (1956); Boner & Stayton, *Co-ordination in Government: A Legislative Responsibility*, 39 TEX. L. REV. 20 (1960); Melville, *Legislative Control Over Administrative Rule Making*, 32 U. CIN. L. REV. 33 (1963); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators*, 41 CAL. L. REV. 565 (1953); Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 ADMIN. L. REV. 415 (1976); Schwartz, *Legislative Oversight: Control of Administrative Agencies*, 43 A.B.A.J. 19 (1957); Schwartz, *The Administrative*

The laying system originated in the English political system.<sup>6</sup> Although there has never been a statute of general applicability requiring all administrative regulations to be laid before Parliament,<sup>7</sup> most British statutes which delegate certain powers to agencies require that regulations promulgated in pursuance of such statutes be laid before Parliament.<sup>8</sup> In this form, the laying system allows Parliament to annul or modify a given regulation if the promulgated rule, or subordinate legislation as the English term it, does not accord with Parliament's intent.<sup>9</sup> This system of review has been modified slightly in recent years, but the principle of control remains the same—to supervise the administration of delegated powers where such a grant may be misconstrued, overstepped, or abused by the administrative agency.<sup>10</sup>

In the United States the laying system has been used in two broad patterns. First, the few states that have incorporated a mechanism for legislative review in their administrative procedure acts apply the control to all administrative rules promulgated.<sup>11</sup> These provisions are mandatory and are supplemented occasionally by other types of non-legislative controls such as the requirement of attorney general approval.<sup>12</sup> Second, Congress has used the laying system only in extraordinary circumstances where it determined that direct legislative supervision was required.<sup>13</sup> Examples of this usage of the laying system at the federal level are the various Reorganization Acts from 1939 to 1971<sup>14</sup> and the atomic energy legislation of the early 1950's.<sup>15</sup> Thus, even though the use of the laying system in the United

*Process And Congressional Control*, 16 *FED. B.J.* 519 (1956); Stone, *The Twentieth Century Administrative Explosion and After*, 52 *CAL. L. REV.* 513 (1964); Note, *Laying on the Table—A Device for Legislative Control over Delegated Powers*, 65 *HARV. L. REV.* 637 (1952).

6. Carr, *Legislative Controls Of Administrative Rules And Regulations: II. Parliamentary Supervision In Britain*, 30 *N.Y.U.L. REV.* 1045, 1045-46 (1955). See generally J. KERSELL, *PARLIAMENTARY SUPERVISION OF DELEGATED LEGISLATION* (1960).

7. Boisvert, *A Legislative Tool For Supervision Of Administrative Agencies: The Laying System*, 25 *FORDHAM L. REV.* 638, 639 (1956).

8. *Id.* at 638-39.

9. *Id.*

10. *Id.*

11. *E.g.*, ALASKA STAT. §§ 24.20.400, .410, 44.62.320 (1976); NEB. REV. STAT. § 84-904 (1976); OKLA. STAT. ANN. tit. 75, § 308 (West 1976).

12. *E.g.*, CONN. GEN. STAT. ANN. § 4-169 (West Cum. Supp. 1977); MICH. STAT. ANN. § 3.560 (145) (Cum. Supp. 1976).

13. See Boner & Stayton, *Co-ordination in Government: A Legislative Responsibility*, 39 *TEX. L. REV.* 20, 26-33 (1960); Schwartz, *Legislative Control Of Administrative Rules And Regulations: I. The American Experience*, 30 *N.Y.U.L. REV.* 1031, 1035-37 (1955).

14. 5 U.S.C. § 906 (1970). For legislative history surrounding the enactment of the 1949 Reorganization Act, see H.R. REP. NO. 23, 81st Cong., 1st Sess. 5-7 (1949).

15. *E.g.*, 42 U.S.C. § 2071 (1970).

States has by no means attained the popularity that it enjoys in England, its method and purpose are generally the same—to maintain agency accountability to the legislature through legislative review of administrative actions.<sup>16</sup>

Doubts about the constitutionality of the laying system in the United States have proved a hindrance on its usage.<sup>17</sup> In 1933 Attorney General Mitchell seriously questioned the system's validity, specifically noting that it might involve separation of powers problems and the deprivation of the Presidential veto power.<sup>18</sup> New Hampshire adopted this line of reasoning,<sup>19</sup> and Wisconsin's legislature changed its legislative control system to one resembling judicial control, due to a negative report from the state's attorney general.<sup>20</sup> But the arguments in favor of the laying system have started to overcome any doubts about its constitutionality;<sup>21</sup> for example, New Jersey and Colorado courts have ruled specifically that their laying systems are constitutional.<sup>22</sup> Currently, the question is not whether the control is constitutional, but whether the laying system is the most effective mechanism to regulate the exercise of legislatively delegated power by administrative agencies.<sup>23</sup>

This comment will describe and analyze the British laying system and its new found effectiveness. Then the United States experience will be delineated critically at both the state and federal levels. Both the practicality and the constitutionality of the various systems utilized by the state and federal governments will be examined. Finally, an evaluation of which form of laying

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16. B. SCHWARTZ, ADMINISTRATIVE LAW § 64 (1976); W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 122-27 (6th ed. 1974).

17. Ginnane, *The Control Of Federal Administration By Congressional Resolutions And Committees*, 66 HARV. L. REV. 569 (1953); Jaffe, *An Essay On Delegation Of Legislative Power*: 1, 47 COLUM. L. REV. 359, 371-74 (1947).

18. 37 OP. ATT'Y GEN. 56 (1933).

19. Opinion of the Justices, 96 N.H. 517, 83 A.2d 738 (1950).

20. 43 OP. ATT'Y GEN. 350 (Wis. 1954). See Boles, *The Post-Hearing Stage Of The Administrative Rule Making Process In Wisconsin: The Conservation Commission*, 40 MARQ. L. REV. 251 (1956); Helstad, *New Law On Administrative Rule-Making*, 1956 WIS. L. REV. 407; Helstad & Boyer, *Legislative Controls of Administrative Rule Making*, 41 A.B.A.J. 1048 (1955).

21. See B. SCHWARTZ, ADMINISTRATIVE LAW § 64 (1976); Boisvert, *A Legislative Tool For Supervision Of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638, 651-61 (1956); Cooper & Cooper, *The Legislative Veto And The Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Schwartz, *The Administrative Process And Congressional Control*, 16 FED. B.J. 519 (1956); Schwartz, *Legislative Control Of Administrative Rules And Regulations: I. The American Experience*, 30 N.Y.U.L. REV. 1031, 1042-45 (1955); S. REP. NO. 232, 81st Cong., 1st Sess. 19-20 (1949).

22. *Watrous v. Golden Chamber of Commerce*, 121 Colo. 521, 218 P.2d 498 (1950); *Brown v. Heymann*, 62 N.J. 1, 297 A.2d 572 (1972).

23. See B. SCHWARTZ, ADMINISTRATIVE LAW § 64 (1976). See also FitzGerald, *Congressional Oversight or Congressional Foresight: Guidelines from the Founding Fathers*, 28 ADMIN. L. REV. 429 (1976).

system is best suited to control administrative action, and a determination of how this safeguard should be used to insure agency accountability to the legislature will be made.

#### THE BRITISH EXPERIENCE

##### *A Historical Perspective*

The British control subordinate legislation<sup>24</sup> in three ways. First, Parliament has the opportunity to examine the power of the agency to make subordinate legislation when it considers the merits of the proposed enabling act.<sup>25</sup> Second, many subordinate laws are required by enabling acts, what the British call parent acts, to be laid before Parliament.<sup>26</sup> Third, Parliament may consider motions which specifically question agencies concerning certain subordinate laws.<sup>27</sup> The second control, the laying system, will be discussed here.

The British laying system emerged in 1833, and has developed into an effective control device. In 1833, Parliament authorized certain judges to promulgate rules of procedure for their courts; the enabling act required that the rules be laid before Parliament and were not to take effect for six weeks. During this time period legal experts were to evaluate the rule, and Parliament had the power to annul it if it saw fit.<sup>28</sup> Thus, the negative form of laying was introduced into the English legal system, and it grew both in popularity and usage. Generally, the negative laying provisions were embodied in the enabling acts and provided that all rules promulgated in pursuance of Parliament's grant of power be laid before Parliament for a given number of days, or that rules be laid before Parliament in draft form with Parliament having the power to halt further consideration on the drafted rule.<sup>29</sup>

The affirmative laying system was introduced in 1897.<sup>30</sup> Under this affirmative system an instrument or rule was not allowed to take effect until Parliament approved the rule by a

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24. Subordinate legislation in Britain is equivalent to promulgated rules by an administrative agency in the United States.

25. J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 79 (5th ed. 1973).

26. *Id.*

27. *Id.* at 80, 95.

28. An Act for the further Amendment of the Law, and the better Advancement of Justice, 1833, 3 & 4 Will. 4, c. 42, § 1; Carr, *Legislative Control Of Administrative Rules And Regulations: II. Parliamentary Supervision In Britain*, 30 N.Y.U.L. REV. 1031, 1045 (1955).

29. Melville, *Legislative Control Over Administrative Rule Making*, 32 U. CIN. L. REV. 33, 40 (1963). See Carr, *Legislative Control Of Administrative Rules And Regulations: II. Parliamentary Supervision In Britain*, 30 N.Y.U.L. REV. 1045, 1046 (1955).

30. Military Manoeuvres Act, 1897, 60 & 61 Vict., c. 43, § 3.

positive resolution.<sup>31</sup> The affirmative method was used where matters of contemporary importance were delegated, and generally these matters consisted of levying taxes or modifying a statute's terms.<sup>32</sup> As a result, the affirmative laying system emerged as a more effective and powerful control device than its negative counterpart because procedurally affirmative approval required greater parliamentary effort. The government had to make a motion to approve the subordinate legislation, thus requiring the movant to find time for debate and to make sure that an adequate number of supporters were present.<sup>33</sup>

The advent of the Second World War and the consequent increase in subordinate legislation made revision of the laying system necessary.<sup>34</sup> The members of Parliament did not have time to consider adequately the flood of regulations issuing from British agencies. As a result of reform studies the Parliament established the Select Committee on Statutory Rules and Orders, popularly known as the Scrutiny Committee.<sup>35</sup> The Committee examined every rule laid before the House of Commons to determine whether the House's attention should be drawn to it. The Scrutiny Committee did not concern itself with questions of policy or the merits of a given rule. Rather, it was authorized to draw the House's attention to a given rule when a specified condition existed; one such condition being any unusual or unexpected use of statutory power.<sup>36</sup> The name of the com-

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31. Carr, *Legislative Control Of Administrative Rules And Regulations: II. Parliamentary Supervision In Britain*, 30 N.Y.U.L. REV. 1045, 1047 (1955).

32. *Id.*

33. *Id.* With the negative laying system, any single member of the House of Commons may move for annulment.

34. *Id.* at 1049-50.

35. *Id.*

36. The Committee was given seven grounds to judge whether House attention should be invoked:

- (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 specified period;
- (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 four of the Statutory Instru-

mittee was changed in 1946 to the Select Committee on Statutory Instruments,<sup>37</sup> and since that time it has become an effective and essential part of the laying system.<sup>38</sup> The Scrutiny Committee makes continuing supervision by Parliament possible and helps correct errors and omissions of executive departments through its legislative scrutiny.<sup>39</sup>

### *The Laying System Today*

As a general rule, British enabling or parent acts require that subordinate legislation promulgated under such an act be laid before Parliament. The laying system usually takes one of six forms. The subordinate legislation is either: laid before Parliament with no further directions; laid and made subject to annulment within forty days; laid and made subject to affirmative resolution; laid in draft and made subject to affirmative resolution; laid in draft and made subject to annulment within forty days; or laid with legal effect and made subject to annulment.<sup>40</sup> Following a brief description of each of these laying systems, proceedings in parliamentary committees will be described and the total system's effectiveness evaluated.

Laying with no further directions is, in effect, an informational device. Under this method the subordinate legislation is valid when made. Members of Parliament are not empowered

ments 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.<sup>7</sup>

507 PARL. DEB., H.C. (5th ser.) 555 (1952), cited in Carr, *Legislative Control Of Administrative Rules And Regulations: II. Parliamentary Supervision In Britain*, 30 N.Y.U.L. REV. 1045, 1050 n.21 (1955).

37. Statutory Instruments Act, 1946, 9 & 10 Geo. 6, c. 36. This Act, adopted during the time the United States was considering its Administrative Procedure Act, codified many of the former requirements of the laying system. One example of such codification was the Act's requirement that the laying period be 40 days. Strangely enough, however, the Act did not require that all rules shall be laid before Parliament.

38. The House of Lords also has an administrative reviewing committee, the Special Orders Committee. This standing committee examines all subordinate legislation to determine whether a measure can pass through the House of Lords without special attention. The Special Orders Committee works best when it is allowed to examine the merits of the subordinate legislation. If this power to examine the merits is absent, however, the Committee only guides the House of Lords in approving or rejecting the legislation. J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 88 (5th ed. 1973); Melville, *Legislative Control Over Administrative Rule Making*, 32 U. CIN. L. REV. 33, 41 (1963).

39. Boisvert, *A Legislative Tool For Supervision Of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638, 650 (1956). See Boner & Stayton, *Co-ordination in Government: A Legislative Responsibility*, 39 TEX. L. REV. 20, 34-35 (1960).

40. J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 78-81 (5th ed. 1973).

to move for the rule's annulment, nor is the government required to obtain a resolution before the subordinate legislation becomes operative. This control device simply reports the agency action and does not provide Parliament with any power to hold the agency accountable.<sup>41</sup>

Enabling acts which require that subordinate legislation be laid before Parliament and made subject to annulment within forty days are the most common control provision. An example of the language which invokes this type of control is: "Any power conferred by this Act to make regulations [etc.] shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament."<sup>42</sup> Procedurally, this negative laying system requires that every statutory instrument, equivalent to a proposed regulation in the United States, be laid before Parliament for forty days.<sup>43</sup> Within those forty days either House of Parliament may pass a resolution requesting Her Majesty to annul the subordinate legislation. Her Majesty then revokes the instrument by an Order in Council; the revocation does not affect the validity of anything done in the past and does not prevent the creation of new rules.<sup>44</sup> Generally, Parliament has the power only to accept or reject the subordinate legislation, and not to amend it. Subordinate legislation subject to this procedure is effective when made, and maintains its effectiveness unless Parliament annuls it within the forty day period.<sup>45</sup>

Affirmative laying procedures theoretically are designed for important substantive legislation. There are two types of af-

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41. *Id.* at 81. A current example of laying with no further directions is found in the National Insurance Act of 1970. Section one of the Act gives the Attendance Board, as defined and created in section five, the power to promulgate regulations for the payment of certain benefits under the Act. Section 8 (4) provides that regulations promulgated by the Board, which in effect are regulations which bring into operation parts of the Act, are not required to be laid before Parliament. National Insurance Act, 1970, c. 51.

42. J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 82 (5th ed. 1973). The Statutory Instruments Act of 1946 codified many of the modern laying provisions described herein. Before this Act was established the period of laying varied considerably, and pre-1946 language to invoke negative laying read as follows:

'Any regulations [etc.] made under this Act shall be laid before Parliament immediately after they are made, and if either House, within the period of forty days after the regulations are so laid before it, resolves that the regulations be annulled, the regulations shall thereupon cease to have effect, but without prejudice to the validity of anything previously done thereunder or to the making of new regulations.'

*Id.* at 81-82.

43. Statutory Instruments Act, 1946, 9 & 10 Geo. 6, c. 36, § 5(2).

44. *Id.* at § 5(1).

45. J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 82 (5th ed. 1973).



firmative laying procedures. First, some enabling acts provide that subordinate legislation shall be of no effect unless approved by a resolution of each House of Parliament. Second, other enabling acts provide that subordinate legislation shall cease to have effect on the expiration of a given period unless, before such period expires, it has been approved by resolution of each House of Parliament.<sup>46</sup> One main distinguishing feature between the negative laying system and the affirmative laying system is that with the latter the government must find time to make and debate a resolution. Another distinguishing feature is that a substantive law made under the negative laying system is not operative until approved.<sup>47</sup>

Rules laid in draft and made subject to either affirmative resolution or annulment within forty days involve subordinate legislation not yet made. An enabling act using the affirmative method will provide that an order shall not be made until the draft has been approved by resolution of each House.<sup>48</sup> Less common are rules laid in draft subject to annulment within forty days. If not annulled the order shall be made.<sup>49</sup> Finally, circumstances may arise which require a rule to take effect before Parliament has an opportunity to review it. To meet this situation a variation of the affirmative laying system has been developed whereby certain notice requirements must be met. Once these notice requirements are filed the rule becomes effective subject to parliamentary annulment.<sup>50</sup>

There are still situations, ever so rare, where no laying requirement exists. Generally, these involve enabling acts of specific applicability where the danger of administrative abuse of a parliamentary grant of power is slight.<sup>51</sup>

The six above methods describe the various types of laying systems employed in Britain. The effectiveness of many of these methods can be attributed directly to the parliamentary committees, which have taken the enormous burden of reviewing every regulation off the shoulders of each member of Parliament.

46. *Id.* at 83.

47. *Id.* at 84. See *Metcalf v. Cox*, [1895] A.C. 328. *Metcalf* held that where Parliament indicates that an affirmative laying system is to be used, Parliament must give its approval for the subordinate rule to become operative.

48. J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 84-85 (5th ed. 1973).

49. Statutory Instruments Act, 1946, 9 & 10 Geo. 6, c. 36, § 6.

50. *Id.* at § 4(1), as amended by Laying of Documents Before Parliament (Interpretation) Act, 1948, 11 & 12 Geo. 6, c. 59, § 2.

51. J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 86-87 (5th ed. 1973).

### *The Screening Committees*

Prior to the creation of these parliamentary committees, commentators viewed the British system as less than desirable because legislators did not have time to consider the plethora of subordinate legislation promulgated by the various agencies.<sup>52</sup> However, the parliamentary committees solved this problem. The committees now inspect the rules and give Parliament notice to consider a specific rule when the rule comes under one of the committees' eight guidelines.<sup>53</sup>

The Select Committee on Statutory Instruments in the House of Commons examines the formal results of delegated power, as it considers every rule or order promulgated by an agency. The Committee's main inquiry is whether the subordinate legislation is the type of instrument which Parliament intended or expected to emerge, and not whether such a provision is desirable or necessary. Parliament has formulated eight specific guidelines which the Committee uses to decide whether the special attention of the House should be invoked. Under these eight guidelines the Committee may investigate a regulation and call Parliament's attention to it if the regulation: imposes a pecuniary obligation on the public revenue; is not open to challenge in the courts; appears to make unusual or unexpected use of the powers conferred; purports to have retrospective effect where the enabling act grants no such authority; is delayed unjustifiably in being laid or published before Parliament; is delayed unjustifiably in notifying House officials in the case of an order not effective until laid; is deserving of special attention due to its form or purport; or is drafted defectively. The Committee has the power to require written or oral testimony from the agencies, and must give the administrator a chance to explain himself, before the Committee draws the attention of the House.<sup>54</sup> Thus the Committee, in essence, is a screening device, which reports to the House that a given rule is satisfactory or that the regulation requires Parliament's attention as judged by the Committee's set frame of reference.

### *The Laying System's Effectiveness*

Both the work load of the Committee and its contribution to the success of the laying system have been substantial. The present British legislative controls furnish a type of parliamenta-

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52. Boisvert, *A Legislative Tool For Supervision Of Administrative Agencies: The Laying System*, 25 *FORDHAM L. REV.* 638, 643 (1956).

53. *Id.* at 644-50.

54. J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 88-90 (5th ed. 1973).

ry review which is preventive in nature rather than remedial. This avoids both the expense and delay inherent in judicial review. Also, the Committee's very existence is a cogent influence on administrators, inducing them to guard against bad draftsmanship as well as outright abuses of power.<sup>55</sup> Therefore, the Committee has had a positive effect on the laying system as a whole. It has made Parliament's control over previously delegated powers more effective.

The effect of the Committee's review function not only has prevented many administrative shortcomings, but also, has saved vast amounts of valuable time for Parliament. Laying in the House of Commons has virtually ceased. Between 1966 and 1971 the Committee on Statutory Instruments examined 3,623 statutory instruments and brought only fifty-one of them to the House's attention. Twenty-eight of those brought to the House's attention overstepped the agency's legislatively granted powers, and sixteen were poorly drafted. With the Committee's establishment it can no longer be said that supervision of governmental departments and their statutory instruments by Parliament is totally ineffective.<sup>56</sup>

Thus, the British system of laying has developed into a workable legislative control. Even though there has been no parliamentary requirement that all enabling acts use this procedure, it has become an accepted, unwritten requirement in the English governmental system.

#### THE LAYING SYSTEM'S USAGE IN THE UNITED STATES

In the United States use of the laying system as a legislative control over administrative agencies differs little in principle from the British experience. In the federal system Congress uses laying only in those special circumstances where it determines that its supervision of administrative activity is required. Generally, these provisions are negative in form.<sup>57</sup> In contrast, the states which have adopted legislative controls require all rules promulgated by their state agencies to be subject to some form of legislative review.<sup>58</sup> Review ranges from a type of

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55. Boner & Stayton, *Co-ordination in Government: A Legislative Responsibility*, 39 *TEX. L. REV.* 20, 34 (1960); see Schubert, *Legislative Adjudication Of Administrative Regulation*, 7 *J. PUB. L.* 135, 137 (1958).

56. J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 90-91 (5th ed. 1973).

57. *E.g.*, 5 *U.S.C.* § 906 (1970).

58. *E.g.*, *CONN. GEN. STAT. ANN.* § 4-170 (West Cum. Supp. 1977). See Schubert, *Legislative Adjudication Of Administrative Legislation*, 7 *J. PUB. L.* 135, 138 (1958); Trubek, *Will The Connecticut Administrative Procedure Act Frustrate Environmental Protection?*, 46 *CONN. B.J.* 438, 440 (1972).

review like the English model, placing emphasis on a review committee,<sup>59</sup> to direct legislative consideration of a rule with the power to annul.<sup>60</sup> The federal system will be discussed first, and then the states' experiences with the laying system will be evaluated in order to discern how close the states' practices accord with the English model. Then, the practicality of the laying procedure will be evaluated and its constitutionality discussed.

### *The Federal Experience*

Congress has used the laying system where it determined that administrative details could be handled best by an agency, and also where it wanted to participate in making decisions which might have important policy implications.<sup>61</sup> Whether the agency rules are to be laid before a congressional committee<sup>62</sup> or before the entire legislative body,<sup>63</sup> only in the case of the Joint Committee on Atomic Energy is an English-type scrutiny committee utilized.<sup>64</sup> For the most part, all that is involved at the federal level is a simple, negative system of legislative review designed to give Congress the final word on a given administrative action.

Examples where Congress has reserved to itself the power to review changes concerning institutional bodies of government are the Reorganization Acts and the enabling legislation regarding the Federal Rules of Civil Procedure. The various Reorgan-

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59. *E.g.*, ALASKA STAT. §§ 24.20.460, 44.62.320 (1976).

60. *E.g.*, OKLA. STAT. ANN. tit. 75, §§ 308(d)-308(e) (West 1976).

61. Melville, *Legislative Control Over Administrative Rule Making*, 32 U. CIN. L. REV. 33, 43 (1963). For a list of legislative provisions subject to simple or concurrent resolution of the Congress, see Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1089-94 (1975).

62. *E.g.*, 42 U.S.C. § 2071 (1970).

63. *E.g.*, 50 U.S.C. app. § 2281(g) (1970).

64. In 1957, there was a movement to create a standing committee on administrative procedure in the House of Representatives. Among other duties, this committee would have performed many of the functions of the English Select Committee on Statutory Instruments, and would have had limited authority to examine the merits of the administrative action. This movement never succeeded. See Schwartz, *Legislative Oversight: Control of Administrative Agencies*, 43 A.B.A.J. 19, 21 (1957).

This matter has once again arisen in Congress. A number of bills have been introduced in the House, that represent Congress' first attempt to institutionalize a general policy which subjects nearly all administrative regulations to Congressional veto. For a discussion of these provisions, see Note, *Congressional Veto Of Administrative Action: The Probable Response To A Constitutional Challenge*, 1976 DUKE L.J. 285, 285-87; Stewart, *Constitutionality Of The Legislative Veto*, 13 HARV. J. LEGIS. 593, 593-97 (1976).

ization Acts from 1939 to 1971<sup>65</sup> have given the President of the United States broad powers to reorganize the executive branch of the government. Under the 1939 and 1945 Acts, a concurrent resolution by both Houses of Congress was required to keep the plan from going into effect.<sup>66</sup> The Acts of 1949 to 1971 provided that unless either House of Congress objects by concurrent resolution within a sixty day period the plan is valid.<sup>67</sup> Because the powers delegated to the President were so important, Congress deemed it necessary to establish a laying system in order to exercise direct control and to preserve its congressionally established policies.<sup>68</sup>

Also, the enabling act granting the Supreme Court power to promulgate the Federal Rules of Civil Procedure required the Chief Justice to report the proposed rules to Congress. If within ninety days Congress did not disapprove, the rules took effect.<sup>69</sup> Thus Congress reserved the power to veto any rule as a control over the Supreme Court; and the rationale was similar to that which Congress expressed in the Reorganization Acts.

Congress also has reserved the power, through laying control devices, to review rules promulgated under substantive legislation. The laying system has been used to review interstate civil defense compacts entered into by the Civil Defense Administrator. Such a compact is to be laid before Congress and is operative unless Congress, by a concurrent resolution, annuls the regulation.<sup>70</sup> In respect to alien deportation, if the Attorney General suspends the deportation of an alien such suspension must be laid before Congress. If Congress passes a concurrent resolution stating that it disapproves of the suspension of deportation during the current session, the suspension is cancelled.<sup>71</sup> And in the 1974 amendments to the National Traffic and Motor Vehicle Act of 1966,<sup>72</sup> a new section was added providing that new motor vehicle standards must be laid before Congress for a sixty day period. Such standard becomes effective unless both

65. 5 U.S.C. §§ 901-913 (1970).

66. Melville, *Legislative Control Over Administrative Rule Making*, 32 U. CIN. L. REV. 33, 43-44 (1963).

67. *Id.* See 5 U.S.C. § 906 (1970).

68. H.R. REP. No. 23, 81st Cong., 1st Sess. 5-7 reprinted in [1949] U.S. CODE CONG. & AD. NEWS 1381, 1385, 1390. See also Schwartz, *Legislative Control Of Administrative Rules And Regulations: I. The American Experience*, 30 N.Y.U.L. REV. 1031, 1036 (1955).

69. 28 U.S.C. § 2072 (1970).

70. 50 U.S.C. app. § 2281(g) (1970).

71. 8 U.S.C. § 1254(c)(2) (1970). Under subsection (c)(3), the Attorney General must cancel the deportation proceedings if Congress passes a resolution favoring suspension proceedings. 8 U.S.C. § 1254(c)(3) (1970).

72. 15 U.S.C. §§ 1391-1410 (1970).

Houses of Congress disapprove the standard by concurrent resolution.<sup>73</sup>

A further example of Congress' use of the laying system is the Federal Election Campaign Act of 1971, as amended in 1974<sup>74</sup> and 1976.<sup>75</sup> The 1971 Act as amended in 1974 provided that each rule promulgated by the Federal Election Commission must be laid before the Senate or House of Representatives with an explanation and justification of the rule. If the House or Senate, or both acting together, do not disapprove the rule so laid within thirty days, the Commission may then promulgate the rule.<sup>76</sup> In *Buckley v. Valeo*,<sup>77</sup> however, the Supreme Court held the Federal Election Campaign Act unconstitutional, but refused to consider the constitutionality of the laying system *per se*.<sup>78</sup> Justice White, concurring in part and dissenting in part, did consider the laying system and argued strongly for its constitutionality.<sup>79</sup> This prompted Congress to include the same laying controls in the new Federal Election Campaign Act Amendments of 1976.<sup>80</sup> Again, Congress has reserved to itself the last word on matters of special policy importance. Each new rule adopted by the Federal Election Commission must be cleared by the legislature.

The legislation surrounding the use of atomic energy in the 1950's presents a unique variation of the laying procedure in the federal system. The annulment power is entrusted with Congress, but the Joint Committee on Atomic Energy acts as a scrutiny committee recommending to Congress action on matters of a very specialized nature. This legislation provides that the Congressional Committee be a "watchdog" over the Atomic Energy Commission's actions. The Commission's actions are valid unless the Joint Committee recommends, within thirty or forty-five days, that a given agency rule be annulled by Congress.<sup>81</sup> The legislative intent of these provisions is to give

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73. 15 U.S.C.A. §§ 1410b (a)-1410b (d) (West Cum. Supp. 1976).

74. Federal Election Campaign Act of 1971, 2 U.S.C.A. §§ 431-456 (West Supp. 1976), as amended by The Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

75. Federal Election Campaign Act Amendments of 1976, 2 U.S.C.A. §§ 431-456 (West Supp. Sept., 1976).

76. 2 U.S.C.A. § 438(c) (West Supp. Sept., 1976).

77. 424 U.S. 1 (1976).

78. *Id.* at 140 n.176.

79. *Id.* at 284-86.

80. 2 U.S.C.A. §§ 431-456 (West Supp. Sept., 1976).

81. 42 U.S.C. § 2204 (1970) (review of electric utility contract, 30 day period for which the Committee may recommend action to Congress); *id.* § 2071 (review of what is defined as special nuclear material, 30 day period for which the Committee may recommend action to Congress); *id.* § 2078 (review of price provisions, 45 day period for which the Committee may recommend action to Congress); *id.* § 2091 (review of what is necessary source material, 30 day period for

Congress the last word in a very extraordinary policy area that is wrought with danger.<sup>82</sup> In fact, one commentator has suggested that the Joint Committee is an active board of directors, establishing policies to be implemented by management, the Atomic Energy Commission.<sup>83</sup>

These examples of the laying system at the federal level illustrate Congress' present use of and purpose in the negative laying system—to reserve the last word on matters of special policy importance. Congress has used the laying system as a legislative control over administrative agencies only when it determined that a special policy interest was present which required its special attention and review. Thus, the utilization of the laying system at the federal level does not resemble the pervasive use of the laying system in England; and, with the exception of the Joint Committee on Atomic Energy, the federal laying system does not employ scrutinizing committees as does England. In fact, the federal laying procedures present a very conservative pattern of practice when contrasted with state usage in America.

#### *The States: The Experimental Laboratory for Legislative Control*

American states have served as laboratories to determine the desirability and effectiveness of using methods of legislative control analogous to the British system. While the federal system has used the laying system only in extraordinary circumstances, state systems have been innovative in their application of legislative controls and have applied the controls generally to all rules promulgated by the states' agencies. Four patterns of usage characterize the states' laying systems. First, one state employs straight legislative annulment.<sup>84</sup> Second, some states grant annulment power to their attorney general.<sup>85</sup> Third, a few states entrust a legislative committee solely with the power of administrative review leaving the power of annulment in the

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which the Committee may recommend action to Congress); *id.* § 2153 (1970 & Supp. V 1975) (cooperation with other nations, 30 day period for which the Committee may recommend action to Congress).

82. Morrison, *Federal Support Of Domestic Atomic Power Development—The Policy Issues*, 12 VAND. L. REV. 195, 220 (1959). See Bunn, *Missile Limitation: By Treaty Or Otherwise?*, 70 COLUM. L. REV. 1, 14-15 (1970).

83. Green, *The Joint Committee On Atomic Energy: A Model For Legislative Reform?*, 32 GEO. WASH. L. REV. 932, 939-40 (1964).

84. OKLA. STAT. ANN. tit. 75, §§ 308(d)-308(e) (West 1976). See Andrews, *Relationship Between Administrators and the California Legislature*, 44 CAL. L. REV. 293 (1956).

85. IND. CODE §§ 4-22-2-5 (1974); MINN. STAT. §15.0412(4) (1975); N.D. CENT. CODE §§ 28-32-02 to 28-32-03 (1974); TENN. CODE ANN. §§ 4-510(a), 4-510(e) (2) (Cum. Supp. 1976).

legislature.<sup>86</sup> Fourth, newly revised Administrative Procedure Acts in four states have adopted a combination of attorney general, legislative committee, and full legislative review.<sup>87</sup> A fifth method of control over administrative action, which is relied upon in most states, simply leaves administrative review to the judiciary, thus not using any system of legislative control.<sup>88</sup>

### *Legislative Annulment*

One state has adopted legislative annulment as its sole legislative control over administrative action. This laying system resembles the usage of the negative procedures employed in England prior to the creation of the Scrutiny Committee.

Oklahoma state law provides that either House of the legislature may disapprove any rule promulgated by a state agency through a resolution made within thirty days after the rule has been transmitted to the legislature.<sup>89</sup> Failure of the legislature to disapprove a rule has the effect of actually favoring the rule.<sup>90</sup> Except for the thirty day time limit, this system is a replica of England's negative laying system; that is, all rules must be laid before the legislature and are valid unless otherwise disapproved by a resolution of either House of the legislature.<sup>91</sup>

At one time Virginia had a system providing for legislative annulment. Either House of the Virginia legislature was empowered to adopt a resolution declaring any agency rule null and void.<sup>92</sup> This system, however, was repealed by the Administrative Process Act,<sup>93</sup> and it now appears that Virginia will allow only judicial review of promulgated rules.<sup>94</sup>

### *Attorney General Annulment*

The second pattern of usage of the laying system in the states has been the entrustment of annulment of agency regula-

86. ALASKA STAT. §§ 24.20.400, 460, 44.62.320 (1976); KY. REV. STAT. §§ 13.087, .090 (Cum. Supp. 1976); OR. REV. STAT. §§ 171.709-713 (1975).

87. CONN. GEN. STAT. ANN. §§ 4-169 to 4-171 (West Cum. Supp. 1977); IOWA CODE ANN. §§ 17A.4, .8 (West 1976); MICH. STAT. ANN. §§ 3.560(133), .560(145), .560(146), .560(151), .560(152) (Cum. Supp. 1976); NEB. REV. STAT. §§ 84-904(2), 84-905.01, 84-908, 84-908.01 (1976).

88. *E.g.*, WIS. STAT. ANN. § 227.05 (West Cum. Supp. 1976-1977).

89. OKLA. STAT. ANN. tit. 75, §§ 308(d)-308(e) (West 1976).

90. *Id.* See Harris, *Administrative Practice And Procedure: Comparative State Legislation*, 6 OKLA. L. REV. 29, 37 (1953); Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 24-25 (1964).

91. J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 81-83 (5th ed. 1973).

92. VA. CODE § 9-6.9(d) (1973) (repealed 1975).

93. VA. CODE §§ 9-6.14:1-:2 (Cum. Supp. 1976).

94. *Id.* §§ 9-6.14:9, :15-:19. For a discussion presaging the repeal of Virginia's laying system, see McFarland & Boyd, *The General Administrative Agencies Act: A Major Problem In Statutory Construction*, 46 VA. L. REV. 808, 829 (1960).



tions with the state's attorney general. This pattern goes beyond Britain's type of laying system into an area popularly termed "executive clearance."<sup>95</sup> Such provisions require that rules be approved by the attorney general before they can take effect.<sup>96</sup> Interesting variations on this general practice are found in Indiana, which requires not only the attorney general's approval but also the state governor's approval;<sup>97</sup> and in Minnesota, which sets a twenty day time period in which the attorney general must make his determination.<sup>98</sup> Thus, the state attorney general replaces the legislature as the reviewer and controller of administrative action. The state attorney general judges the legal effect of a given rule and thereby exerts control over administrative action.

### *Legislative Review Committee*

The third form of laying system utilized in the states entrusts to a legislative review committee control of agency practices with no specific annulment powers over the agency's regulation. Instead, the committee is to settle any objections it may have to a proposed regulation with the state agency concerned and with either the appropriate legislative committee or the full legislature.

Alaska, which formerly employed a straight legislative annulment system, recently formed a scrutiny committee whose main function is to recommend when the annulment power of the legislature should be exercised.<sup>99</sup> The committee, composed of members of both Houses of the legislature, has specifically enumerated powers.<sup>100</sup> It has the power to adopt rules over its own procedures, to hold public hearings, to require full cooperation of the state agency in giving the committee needed information, to examine all regulations promulgated by the state agen-

95. Schwartz, *Legislative Control Of Administrative Rules And Regulations: I. The American Experience*, 30 N.Y.U.L. REV. 1031, 1037 (1955).

96. See N.D. CENT. CODE §§ 28-32-02 to 28-32-03 (1974); TENN. CODE ANN. §§ 4-510(a), 4-510(e) (2) (Cum. Supp. 1976).

97. IND. CODE § 4-22-2-5 (1974). See Dionisopoulos, *Procedural Safeguards In Administrative Rule Making In Indiana*, 37 IND. L.J. 423 (1962). It must be noted, however, that Nebraska also requires legislative review. The attorney general must approve the rule before the rule is submitted to the legislature. After legislative approval, the governor then must approve the rule before it formally takes effect.

98. MINN. STAT. § 15.0412 (1975).

99. ALASKA STAT. § 24.20.400 (1976). The statute provides that the "establishment of the committee recognizes the need for prompt legislative review of administrative regulations filed by the lieutenant governor to determine whether annulment under AS 44.62.320 is appropriate."

100. ALASKA STAT. § 24.20.410 (1976).

cies to determine if they properly implement the legislature's intent, and to make recommendations for annulment action to the legislature.<sup>101</sup> The committee has broad powers to assure that a given agency is acting in accordance with the legislature's intent. If the committee determines that agency action contravenes the legislature's intent, it may recommend annulment to the legislature as a whole.<sup>102</sup>

In Oregon if either a person affected by a rule or a legislator requests that the Legislative Counsel Committee review a certain rule, it will do so. Committee consideration of the regulation takes into account three factors: whether the provision is in accordance with the intent and scope of the enabling act; whether it has been adopted in accordance with the law; and whether it is constitutional. The Commission's report is then sent to the agency, and further, the report and any recommendations for legislative action are submitted to the House committee in which the enabling legislation originated.<sup>103</sup> The peculiarities of this arrangement are that the Committee is not obligated to review all agency rules, and the Committee itself serves as an intermediary between the agency and the legislature in an attempt to resolve the objections imposed.

Kentucky utilizes a review arrangement similar to Oregon's system. Prior to the filing of agency rules all regulations must be submitted to the Administrative Review Subcommittee of the Legislative Research Commission. The Subcommittee determines if the regulation conforms to its statutory authority. If the Subcommittee finds that it does not conform, it reports such a finding to the Legislative Research Commission. If the agency changes the regulation to conform with the Subcommittee's findings, the Commission will approve the regulation and it becomes valid. If, however, the agency refuses to amend its original rule then that rule is referred by the Commission to the appropriate legislative committee in the legislature for its consideration.<sup>104</sup> It must be noted that the Commission's main purpose is to advise and assist agencies in the preparation of their regulations.<sup>105</sup> The Commission itself has no direct coercive powers of control.

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101. *Id.* § 24.20.460.

102. *Id.* In § 44.62.320, the annulment power of the legislature is described. This section allows annulment where the legislature adopts a concurrent resolution to annul in either one house or both. It must be noted that this veto power is very broad. Because no laying period is specified, a regulation may be annulled at any time. This is in direct contrast to the English system which has always employed some type of laying period. *Id.* § 44.62.320.

103. OR. REV. STAT. §§ 171.709, .713 (1975).

104. KY. REV. STAT. § 13.087 (Cum. Supp. 1976).

105. *Id.* § 13.090.

Both Kentucky's and Oregon's systems of legislative control seem, on their face, to be very different from the English model. In spirit, however, they are very similar. One of the underlying purposes of Britain's Select Committee on Statutory Instruments is to eliminate problems in subordinate legislation before Parliament must take extraordinary action, *i.e.*, annul the regulation.<sup>106</sup> The Committee has been very successful in minimizing such problems and reducing Parliament's workload. This minimization of objections to agency rules is also the goal that Kentucky and Oregon are trying to achieve through their respective control provisions. Although the threat of indirect coercive control through the Committee's powers to recommend annulment is ever present, such a threat is subordinated to a climate of cooperation and compromise. Hence, a working relationship between administrator and legislator is created through this system in order to insure that the legislative intent, as embodied in the enabling act, is being fulfilled.

Kansas recently has modified the annulment power of its legislature and has established a unique variation of the laying system. In April, 1976, Kansas introduced a legislative scrutiny committee concept into its system of legislative control over administrative agencies. Previously, Kansas law provided that an agency rule was effective as long as the agency did not amend or revoke it, or until the legislature disapproved or rejected the rule through a duly adopted joint resolution.<sup>107</sup> The new Kansas system is unique in that the legislature can change an agency rule only by enacting a bill and not merely by passing a resolution. The Revisor of Statutes, to whom the agency submits the promulgated rules, submits the rules to the Legislative Coordinating Council. This Council then refers such rules to the appropriate study committee for review.<sup>108</sup> The Revisor of Statutes also submits to each House of the legislature a copy of all rules given to the Revisor. If the legislature is dissatisfied with any rule, it may pass a bill modifying, approving, or rejecting the rule as submitted by the Revisor.<sup>109</sup> The new provisions clearly state that if these procedures are not followed the rule will have no force or effect.<sup>110</sup>

Thus, although Kansas has modified the legislature's annulment power, it still has retained a variation of the laying

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106. See note 55 *supra*.

107. KAN. STAT. § 77-425 (Supp. 1975), *repealed by* 1976 Kan. Sess. Laws ch. 415, § 6.

108. An Act Relating to Administrative Rules and Regulations of State Agencies, ch. 415, 1976 Kan. Sess. Laws 1483 (to be codified as KAN. STAT. § 77-426(b)).

109. *Id.* at § 77-426(c).

110. *Id.* at § 77-425.

system. The legislature now must express its dissatisfaction of an agency rule by passing a bill, and not merely a resolution, in order to correct, approve or reject agency action. Furthermore, the involvement of study committees means that the legislature is given time to examine carefully the propriety of agency action.

### *Integrated System of Annulment*

The fourth pattern of usage of the laying system utilized in the states is actually a combination of the three above control devices in one integrated system. In Iowa, Connecticut, and Michigan examination of agency rules and subsequent approval of them is required by the attorney general, a legislative committee and the legislature. In Nebraska the governor, attorney general, Legislative Committee on Administrative Agency Rules and Regulations, and the legislature all must consider and approve every agency rule. The systems of Michigan and Connecticut are especially instructive because those two states have been experimenting with administrative controls since the late 1940's. The experience which results from this experimentation is displayed both in the complexity and the integration of many different control devices which provide effective legislative regulation of administrative activities.

Nebraska combines governor, attorney general, legislative review committee, and legislative approval of agency regulations in its integrated system of legislative control. The Legislature's Committee on Administrative Agency Rules and Regulations continuously studies and evaluates rules adopted by agencies and reports its recommendations to the legislature.<sup>111</sup> The Committee has power to recommend to the legislature that "the original enabling legislation serving as authority for promulgation of such rules be repealed, changed, altered, amended, or modified in such manner as it deems advisable."<sup>112</sup> If the legislature so acts in any of these means, the agency promulgation thereunder may be void.<sup>113</sup> The Attorney General also is required to review the rule. He considers the rule's statutory authority, constitutionality, and then either adopts or annuls the rule.<sup>114</sup> Finally, the Governor must approve the legislature's action of amending, repealing, or adopting the rule in order for such action to be effective.<sup>115</sup> There are two unique variations in Nebraska's review system. First, the legislative committee, in-

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111. NEB. REV. STAT. §§ 84-908-.01 (1976).

112. *Id.* § 84-904(2).

113. *Id.*

114. *Id.* § 84-905.01.

115. *Id.* § 84-908.

stead of recommending changes to the proposed rule, evaluates the underlying enabling legislation and suggests action by the legislature to cure certain defects in the enabling legislation. Second, the requirement of governor approval eliminates the constitutional objection made to the laying system that the governor's veto power is superseded.

In Iowa, if the attorney general or the Administrative Rules Committee objects to a proposed rule because it is arbitrary, capricious, or otherwise beyond the delegated authority of the agency, the agency concerned is notified. If the agency then tries to enforce the rule without changing it the agency has the burden of proof in court to establish why the changes were not made.<sup>116</sup> The Administrative Rules Committee, in addition to this control, may refer the rule to the appropriate legislative committee, and this committee may in turn recommend that the rule be overturned by the full legislature.<sup>117</sup> Thus, Iowa's control procedure integrates the attorney general, the Administrative Rules Committee, and the Iowa legislature into one mode. Three aspects of Iowa's system, however, must be noted. First, the Committee's role in the system is more in the nature of an arbitrator than a controller, as is the case in Kentucky and Oregon. Second, only the legislature has annulment power over agency regulations in Iowa. And third, the legislature's annulment power can be exercised only through passage of a bill.

Since 1945 Connecticut has required that all agency rules be subject to approval by the state attorney general and be subject to annulment in the legislature.<sup>118</sup> The 1975 amendments to Connecticut's Administrative Procedure Act retained the spirit of the 1945 controls, but further refined those controls into a three step process. First, the attorney general has thirty days after receiving a proposed regulation to rule on its legal sufficiency. The rule is not operative until his approval is given. If he fails to disapprove the rule within the given time period his approval is assumed and the rule is deemed operative.<sup>119</sup> Second, all regulations are laid before the Legislative Review Commission for sixty-five days. If the Commission fails to give notice of disapproval to the agency within the sixty-five day period the regulation is deemed approved. But if the Commission does give notice of its disapproval, the agency may take no further action to implement the regulations unless the legislature

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116. IOWA CODE ANN. § 17A.4, .8 (1975).

117. *Id.* § 17A.8.

118. CONN. GEN. STAT. ANN. §§ 4-46, 4-49 (West 1969) (repealed 1972).

119. *Id.* § 4-169 (West Cum. Supp. 1977).

holds otherwise.<sup>120</sup> Third, each regulation disapproved by the Commission is laid before the General Assembly. The General Assembly either disapproves the rule or takes no further action. If the General Assembly takes no action during its regular session, it is deemed to have approved the rule, and thus the regulation becomes operative.<sup>121</sup>

Thus, Connecticut also has an integrated system of administrative control. The attorney general operates under a negative laying system; unless he disapproves a regulation within thirty days he is deemed to have approved the rule. The Legislative Review Commission also operates under a negative laying framework; unless it gives notice of disapproval to the agency within sixty-five days the regulation is approved. And finally, the legislature itself is under a negative laying system; unless it approves of the disapproval by the Commission, the regulation becomes effective despite the Commission's disapproval. This three-tiered process of laying, which is a hybrid of the basic English annulment system, reflects a desire for an effective system of review involving both executive and legislative authorities.

Michigan's system of legislative controls over administrative agencies dates back to the late 1940's,<sup>122</sup> and presently, its system resembles Connecticut's. Yet, like all other state systems previously discussed, it too has its own peculiarities.

Michigan sets out its current system of control in its Administrative Procedures Act of 1970.<sup>123</sup> After the Legislative Service Bureau certifies the propriety of the form of a given regulation, and the attorney general deems the regulation legal, it is transmitted to the Joint Committee on Administrative Rules.<sup>124</sup> If the Committee approves the regulation it is filed by the agency with the Secretary of State and becomes operative. If the regulation is disapproved a concurrent resolution is introduced in either of both Houses of the legislature to annul the regulation. If the legislature adopts the resolution the agency cannot file its regulation with the Secretary of State<sup>125</sup> because legislative certification is denied; thus the regulation is not promulgated and is not effective. But if the legislature does not

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120. *Id.* § 4-170. Connecticut also empowers its Legislative Review Commission to consider any past rule. *Id.* § 4-170a.

121. *Id.* § 4-171.

122. Schubert, *Legislative Adjudication Of Administrative Rule Making*, 7 J. PUB. L. 135 (1958).

123. MICH. STAT. ANN. §§ 3.560(101)-.560(215) (Cum. Supp. 1976).

124. The statutory provisions for the creation and procedures of the committee are *Id.* §§ 3.560(135)-.560(136).

125. The statutory provision for the filing of regulations is *Id.* § 3.560(146).

adopt the resolution in a three month period it is deemed to have given certification; thus the agency may file the rule despite the Joint Committee's disapproval.<sup>126</sup>

Thus, in Michigan's system of control over administrative action the attorney general and state legislature have specific annulment powers which may stop further application of a given regulation. Similar to the Connecticut and Iowa systems, the executive and legislative authorities in Michigan combine to provide a thorough system of control over administrative excesses.

### *Judicial Annulment*

The fifth device utilized by the states to control administrative action does not involve an implementation of the laying system. States with no laying system rely solely on judicial review as their control over agency abuse. Although the absence of laying provisions is rare in England, the opposite is true among the states. In fact, both Virginia and Wisconsin have abandoned their laying systems in favor of judicial review. Wisconsin's experience is especially instructive in demonstrating the vulnerability of the laying system to attacks of unconstitutionality.

In 1953 Wisconsin formally introduced the laying system, applying it to all rules promulgated by state agencies.<sup>127</sup> One year later, however, the Wisconsin legislature abandoned the annulment system because the state attorney general ruled that the system was unconstitutional.<sup>128</sup> It is interesting to note that it was the supposed unconstitutionality, and not the ineffectiveness of laying, that led to the system's demise.<sup>129</sup> The Wisconsin legislature subsequently created a legislative review committee. This committee was empowered to recommend changes to the agencies regarding rules they promulgated, but the committee had no coercive control.<sup>130</sup> In 1966, Wisconsin seemingly returned to a system of judicial review,<sup>131</sup> as the legislature

126. *Id.* § 3.560(145). Michigan also provides a review procedure for past rules promulgated and filed, and allows the joint committee to suspend the effect of a questionable rule when the legislature is not in session. *Id.* §§ 3.560(151)-560(152).

127. WIS. STAT. ANN. § 227.031 (1957).

128. 43 OP. ATT'Y GEN. 350 (Wis. 1954). See Boles, *The Post-Hearing Stage Of The Administrative Rule Making Process In Wisconsin: The Conservation Commission*, 40 MARQ. L. REV. 251 (1956); Helstad, *New Law On Administrative Rule Making*, 1956 WIS. L. REV. 407, 428-29; Helstad & Boyer, *Legislative Controls of Administrative Rule Making*, 41 A.B.A.J. 1048 (1955).

129. 43 OP. ATT'Y GEN. 350 (Wis. 1954).

130. WIS. STAT. ANN. § 227.041 (1957) (repealed 1966).

131. *Id.* § 227.05 (West Cum. Supp. 1976-1977).

repealed the legislative review committee provisions.<sup>132</sup> Thus Wisconsin's legislative controls over administrative action were eroded slowly over a thirteen year period. Only Virginia has followed Wisconsin's example in abolishing its legislative control system.<sup>133</sup>

Therefore, the states, in contrast to the federal system, provide many diversified patterns of legislative controls. These systems use variations of the basic British laying devices. One state uses only simple annulment while others use committee review in conjunction with the threat of legislative disapproval. Just as the English system grew from simple annulment to committee involvement, so have many of the state systems. Even though the British and American systems may differ in form and detail, their substance and purpose remain the same—to provide effective control over the administrative process.

*An Evaluation of the Laying System's Use  
in the United States*

Legislative control of administrative rulemaking seems to be a preferable system to other forms of control.<sup>134</sup> Yet, the laying system has been adopted in few states, and has been used infrequently by Congress. The main reasons for this infrequent use seem to be a fear that the laying system is too cumbersome, and a general prejudice that such systems are unconstitutional. After discussing the practicality of the laying system, the constitutional arguments for and against laying will be discussed and assessed.

*The Practicality of Laying in Achieving Effective Control over  
Administrative Action*

The laying system has been criticized for being too cumbersome and impractical because legislators do not have the time to consider every rule promulgated by each of the various administrative agencies.<sup>135</sup> Authorities who looked to the English laying system before the creation of the Scrutiny Committee generally concluded that a procedure of laying each rule before the

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132. *Id.* § 227.041 (1957) (repealed 1966).

133. See note 94 *supra*.

134. An example of non-legislative control over administrative action is judicial review. Judicial control is inadequate because it is by nature incomplete, piecemeal, very slow and very expensive. Also, the courts cannot effectively exercise day-to-day review of agency action. See Stone, *The Twentieth Century Administrative Explosion and After*, 52 CAL. L. REV. 513, 523-25 (1964); Boner & Stayton, *Co-ordination in Government: A Legislative Responsibility*, 39 TEX. L. REV. 20, 34-35 (1960).

135. Boisvert, *A Legislative Tool For Supervision Of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638, 667 (1956).



legislature was ineffective.<sup>136</sup> The backlog of rules and the consequent inadequate review of agency action by Parliament made the laying system more of a burden than a benefit to efficient government.

Now that the Select Committee on Statutory Instruments has made the English control system a success, however, commentators agree that the laying system, consisting of legislative annulment only after a select committee examines each rule, is a practical and noncumbersome control device.<sup>137</sup> The main advantage of the laying system is its direct control over administrative agencies. Such a system allows legislatures to regulate agencies to insure that administrators stay within their delegated powers. As is shown so poignantly in the English system, the use of a body of legislative specialists to review each agency regulation, rather than the cumbersome supervision by an entire body of legislators, has made the laying system workable. Each individual legislator no longer must examine each rule. Rather, only those agency rules which the reviewing committee determines merit full legislative consideration reach every legislator.<sup>138</sup>

The practicality of the laying system is demonstrated also in Michigan's control provisions.<sup>139</sup> Three stages of consideration mold an operative and effective system in that state. First, the legality of every regulation is fully analyzed by the Attorney General. Second, discrepancies between the legislature's intent and the agency's rule can be worked out in a noncoercive fashion through legislative specialists who form the legislative review committee. And third, coercive powers of the legislature are available if the agency refuses to cooperate. The full legislature need consider the rule only if the agency refuses to compromise after the attorney general and the committee recommendations have been made. In this manner, ultra vires administrative activity is checked even though the legislature does not consider the merits of every rule.

The recent adoption of the concept of a legislative screening committee to assist the legislature in controlling agency action in Alaska,<sup>140</sup> Nebraska,<sup>141</sup> and Kansas<sup>142</sup> further evidences the practicality of the laying system. All three states previ-

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136. Schwartz, *Legislative Control Of Administrative Rules And Regulations: I. The American Experience*, 30 N.Y.U.L. REV. 1031, 1035-36 (1955).

137. See note 56 *supra*.

138. Boisvert, *A Legislative Tool For Supervision Of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638, 667 (1956).

139. MICH. STAT. ANN. §§ 3.560(101)-.560(215) (Cum. Supp. 1976).

140. ALASKA STAT. §§ 24.20.400, .460 (1976).

141. NEB. REV. STAT. § 84-904(2) (1976).

142. KAN. STAT. §§ 77-426(b) to 77-426(c) (1977).

ously employed straight annulment systems, but have switched to a laying system integrating committee review and full legislative annulment. Upon review of each of their Administrative Procedure Acts, these three states further refined their laying systems, rather than abandoning them altogether. This recent development in the states evidences acceptance of the laying system as a useful tool of control.

Therefore, the practicality of the laying system is clear. A legislative committee given strict standards of review replaces the full legislature as the chief screening device of excessive agency action. Each legislator, not having to consider the merits of every regulation, may still be assured that agency action is within its delegated boundaries. In addition, the laying system provides a continuous and certain method of review without unduly burdening the legislature and it leaves each legislator free to consider more important matters.

#### *The Prejudice against the Constitutionality of the Laying System*

A belief by some legal scholars that legislative controls are unconstitutional has retarded the laying system's use in the United States. Springing from an unfavorable Attorney General's report in 1933,<sup>143</sup> a prejudice developed against the constitutionality of the laying system. However, that prejudice is on the wane today. Even though the Supreme Court has never ruled definitively on the constitutionality of the laying system the present weight of the law favors such a system and holds it constitutional.<sup>144</sup>

Opponents of the laying system generally point out two constitutional flaws. First, they argue that the laying system represents an unconstitutional attempt by Congress to take legislative action without the concurrence of the President and thus violates his veto power. Second, they contend that laying provisions represent attempts by Congress either to assume executive functions which the Constitution requires to be performed by the President or by other executive officers, or to vest legislative powers in a single House.<sup>145</sup> The first argument deals with the President's veto power as contained in article I, section 7 of the United States Constitution; the second argument refers to the "separation of powers" doctrine.<sup>146</sup>

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143. 37 OP. ATT'Y GEN. 56 (1933).

144. See Stewart, *Constitutionality Of The Legislative Veto*, 13 HARV. J. LEGIS. 593 (1976).

145. Ginnane, *The Control Of Federal Administration By Congressional Resolution And Committees*, 66 HARV. L. REV. 569, 569-70 (1953).

146. U.S. CONST. art. I, § 7, cl. 3: "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President . . . ."

Both New Hampshire and Wisconsin have held their respective laying provisions unconstitutional on the theory that such procedures abridge the Executive's veto power. The Reorganization Acts of New Hampshire, which gave the governor power to rearrange his executive agencies subject to annulment by the legislature, was found unconstitutional. In the *Opinion of the Justices*,<sup>147</sup> the New Hampshire Supreme Court held that the Reorganization Act was invalid since its annulment provisions did not follow the well understood parliamentary procedure of governor approval.<sup>148</sup> The Wisconsin Attorney General followed a similar theory. A statutory enactment which gave the Wisconsin legislature the power to annul an agency rule was held unconstitutional on the ground that it vitiated the governor's veto power. The reasoning behind that conclusion was as follows: the legislature was carrying out an activity which constituted the making of a law; a law must be submitted to the governor for his approval by virtue of his constitutionally delegated veto power; since there was no governor approval under this system, it is unconstitutional.<sup>149</sup>

Thus both New Hampshire and Wisconsin found their laying systems violative of the veto power. In both situations the annulling legislative action was considered a law which must be subject to the governor's review and veto. If the legislative action is not subject to the governor's veto, the traditional mode of legislative-executive lawmaking is not met and the spirit of the state constitution is violated.

The second argument against the constitutionality of the laying system is that the legislature is violating the separation of powers doctrine by assuming executive functions. This position contends that the laying system unlawfully grants to the legislature powerful executive duties—the administration and execution of the laws.<sup>150</sup>

Unsupported by clear precedent, this second argument is the weaker of the two presented. Commentators generally cite

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147. 96 N.H. 517, 83 A.2d 738 (1950).

148. *Id.* at 519-21, 83 A.2d at 740. In 1970, the New Hampshire Supreme Court held that a legislative committee veto power over proposed salary changes prior to the governor's and council's approval violated the separation of powers provisions of the New Hampshire Constitution. *Opinion of the Justices*, 110 N.H. 359, 266 A.2d 823 (1970).

It must be noted, however, that this holding relates only to a veto power vested in legislative committees, and not the full legislature. In fact, the court intimated that if the full legislature would have retained control, such veto power would be constitutionally sound. The court stated, "[s]ince the legislature may delegate its power to fix salaries and to name civil officers, it may properly impose conditions upon the exercise of such delegated authority." *Id.* at 364, 266 A.2d at 826.

149. Melville, *Legislative Control Over Administrative Rule Making*, 32 U. CIN. L. REV. 33, 49-50 (1963).

150. *Id.* at 48.

Attorney General Mitchell's 1933 opinion in support of the separation of powers theory. That opinion concerned the constitutionality of the power of a joint legislative commission to review and rule on the validity of tax refunds.<sup>151</sup> The main theme of the Attorney General's opinion was that a joint committee does not have power to make decisions concerning the validity of tax refunds.<sup>152</sup> In dicta, the Attorney General expressed constitutional reservations concerning the laying provisions of the 1932 Reorganization Act.<sup>153</sup> But in all of the laying systems which employ a legislative scrutinizing committee, the committee only recommends to the legislature that actions be taken. The committee does not determine conclusively the regulation's validity; rather, the legislature annuls the obtrusive rule. Thus the Attorney General's opinion may not support conclusively the proposition that the laying system is unconstitutional because it violates the doctrine of separation of powers.

Supporters of the laying system argue that there are no separation of powers or veto problems present. First, they contend that to disapprove a proposed regulation is not to enact a law, hence there exists no law for the executive to veto.<sup>154</sup> Second, they maintain that the separation of powers principle is not a strict doctrine dividing the branches of government into rigid governmental compartments. Rather, the boundaries defined by separation of powers are flexible and vague.<sup>155</sup> The branches of government were designed to work together to attain a more effective government. Under this conception the laying system is valid; the legislature delegates powers, reserving in that grant the power to hold administrators to their legislative guidelines. Commentators contend that a failure to preserve controlling powers is just as obnoxious to separation of powers as is an unchecked delegation.<sup>156</sup> Thus, supporters of the laying system find no problems with its constitutional status.

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151. 37 OP. ATT'Y GEN. 56 (1933).

152. *Id.* at 63-64.

153. *Id.* at 58.

154. Cooper & Cooper, *The Legislative Veto And The Constitution*, 30 GEO. WASH. L. REV. 467, 473-501 (1962); Schwartz, *Legislative Control Of Administrative Rules And Regulations: I. The American Experience*, 30 N.Y.U.L. REV. 1031, 1044 (1955).

155. *Springer v. Phillipine Islands*, 277 U.S. 189, 211 (1927) (Holmes, J. dissenting). The Court in *Springer* held that a Congressional committee exercising the executive power of appointment is unconstitutional. Justice Holmes in his dissent stated, "we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires." *Id.* at 211.

156. Cooper & Cooper, *The Legislative Veto And the Constitution*, 30 GEO. WASH. L. REV. 467, 501-16 (1962). Boisvert makes a third argument. He claims that the President does not need formal veto powers, because he has the most powerful veto of all: control over the budget. Boisvert,

There is precedent in both the federal and state systems which supports the pro-laying arguments. This authority seems to outweigh the paucity of precedent which opponents of the laying system present.

Attorney General Clark's testimony before the Senate concerning the Reorganization Act of 1949 clearly grants constitutional sanction to laying procedures in the federal system.<sup>157</sup> Directly noting the 1933 opinion of Attorney General Mitchell which suggested that the laying system is unconstitutional, Attorney General Clark answered the constitutional objections raised by opponents to the Reorganization Acts. He stated that,

[I]n 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.<sup>158</sup>

Thus, in clear language the Attorney General reversed former Attorney General Mitchell's dicta and held the laying system constitutionally valid. Attorney General Clark found no intrusion on the President's veto power since Congress did not legislate beyond the Reorganization Act. And he found no transgression of the separation of powers doctrine since the Executive branch did not abdicate any of its functions to Congress.

State and federal courts also have upheld the validity of the laying system. In *Sibbach v. Wilson & Co.*,<sup>159</sup> the Supreme Court, while ruling on the validity of two of the Federal Rules of Civil Procedure, expressly upheld, in dicta, the use of the laying system. The enabling act granting the Supreme Court power to promulgate the Federal Rules of Civil Procedure required the Chief Justice to report the proposed rules to Congress. Unless Congress took action within ninety days, the rules would become operative. Although the Court's precise holding dealt with the validity of the two Federal Rules of Civil Procedure, the Court did give its explicit approval of the negative laying system.<sup>160</sup> Also, the 1932 Reorganization Act, which incorporated laying provisions, was upheld in the lower federal courts.<sup>161</sup> These provisions also incorporated a negative laying

*A Legislative Tool For Supervision Of Administrative Agencies: The Laying System*, 25 *FORDHAM L. REV.* 638, 652 (1956).

157. S. REP. No. 232, 81st Cong., 1st Sess. 1 (1949).

158. *Id.* at 20.

159. 312 U.S. 1 (1940).

160. *Id.* at 15. See *Pease v. Peck*, 59 U.S. (18 How.) 595 (1856).

161. *Isbrandtsen-Moller Co. v. United States*, 14 F. Supp. 407, 412 (S.D. N.Y. 1936), *aff'd on other grounds*, 300 U.S. 139 (1937); *Swayne & Hoyt, Ltd. v. United States*, 18 F. Supp. 25, 28 (D.D.C. 1936), *aff'd on other grounds*, 300 U.S. 297 (1937).

procedure, giving Congress the opportunity to invalidate a given reform proposal before it took effect.<sup>162</sup> And recently the Supreme Court had the opportunity to discuss the laying system in *Buckley v. Valeo*.<sup>163</sup> Even though the Court refused to consider the question of the constitutionality of the laying system,<sup>164</sup> Justice White, concurring in part and dissenting in part, did consider it.<sup>165</sup> Justice White opined that a rule laid before Congress no more invades the President's veto power than does such a rule which is not laid before Congress. In his view, "the provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto."<sup>166</sup> The Court's refusal to consider the constitutionality of the laying system in *Buckley* when it clearly had an opportunity to do so, and Justice White's views supporting the constitutionality of the laying system, clearly lend credence to the validity of such a system of legislative control.<sup>167</sup> Therefore, the lower federal courts, and even the Supreme Court, have voiced their approval of the laying system.

Furthermore, recent state cases also have supported the laying system's constitutionality. In *Watrous v. Golden Chamber of Commerce*,<sup>168</sup> the Colorado Supreme Court held that the use of a joint resolution to approve an agency action, which otherwise would not be effective without such legislative approval, is constitutional. The court determined that a laying procedure is not legislative in character, and thus, the governor has no role in approving the legislature's action.<sup>169</sup> In *Brown v. Heymann*,<sup>170</sup> a negative laying provision in New Jersey's Reorganization Acts was upheld by the New Jersey Supreme Court. The court distinguished the 1950 New Hampshire decision, *The Opinion of the Justices*,<sup>171</sup> and cited that decision as not standing for the proposition that the laying system is unconstitutional, but rather as standing for the proposition that if there is no clear delegation of power to the executive to carry out reorganization functions, the governor's power to do so is invalid.<sup>172</sup> The court

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162. 5 U.S.C. §§ 901-913 (1970).

163. 424 U.S. 1 (1976).

164. *Id.* at 140 n.176.

165. *Id.* at 284-86.

166. *Id.* at 286.

167. *Contra*, Note, *Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge*, 1976 DUKE L.J. 285, 294-300.

168. 121 Colo. 521, 218 P.2d 498 (1950).

169. *Id.* at 544-46, 218 P.2d at 509-10.

170. 62 N.J. 1, 297 A.2d 572 (1972).

171. *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (1950).

172. *Brown v. Heymann*, 62 N.J. 1, 7-8, 297 A.2d 572, 576 (1972).

thus circumvented the New Hampshire case and held that New Jersey's Reorganization Acts, and the laying provisions therein, were constitutional; there was a valid delegation of power by the New Jersey legislature. In so holding, the court ascribed to a flexible separation of powers doctrine, stating that it is assumed the executive and legislative branches will coordinate their activities to fulfill a common end: effective government.<sup>173</sup> Thus both state and federal precedents support the premise that the laying system is a constitutional exercise of legislative control over administrative agencies.

Although there has been no decision by the United States Supreme Court on point, it appears that the laying system is constitutionally viable in the federal and state systems, with the exception of New Hampshire and Wisconsin. The present state of the law, however, does not give a clear indication as to what conditions must exist for the laying system to be deemed constitutional. The differential between a constitutional and unconstitutional determination appears to lie in the interpretation courts and the legislatures give to their respective constitutions, and not in a set number of prerequisites which, if met, will assure constitutionality. A literalist will tend to hold that the laying system is unconstitutional. Since the head of state does not approve the legislative action, his veto power is violated. And since the legislature is reviewing an executive act, separation of powers, as implicitly set forth in the Constitution, is violated. A broad constructionist, however, will generally take a more pragmatic view. He views the legislative action annulling a given agency rule as not constituting a law, hence the veto provisions never come into play. Furthermore, he sees separation of powers as a flexible device to assure a well-functioning government; and the laying system certainly aids governmental efficiency. Even though the prejudice of unconstitutionality appears, to a great extent, to be unfounded, a ruling on the constitutionality of a given legislative system very much depends on what view of the constitution the court adopts in evaluating each given system.

#### CONCLUSION

Legislative control over administrative rulemaking through a laying system is desirable, effective and constitutional. As shown above, a laying system may embody many diverse forms and patterns. Within these different forms a common goal persists—to give the legislature direct control over administrators to assure both that the intended ends of the enabling act are met

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173. *Id.* at 10-12, 297 A.2d 572, 577-78.

and that the powers exercised by the administrators in meeting those ends are within the realm of authority so delegated to them.

But will this legislative review of administrative actions be so political in nature that an irresponsible legislative minority will be able to block the advancement of the public interest? These fears have been expressed frequently by commentators,<sup>174</sup> and probably would be realized in a system where the legislative review committee is allowed to question the merits of the regulation.<sup>175</sup> The success of the English system can be attributed to the limits imposed on legislative review of administrative rules. Such limits disallow the legislative review committee to evaluate the merits of agency rules, but do permit the committee to compare agency action against set legislative standards.<sup>176</sup> The effect of this restriction is to limit committee review to an examination of the agency's power and authority to enact a given rule. With these review restrictions in effect, which some state systems have already adopted,<sup>177</sup> legislative review works as a device whereby legislative majorities check the abuse of power by a bureaucratic minority.

Legislative controls, if used properly, seem essential to any system involving legislative delegation of power to administrative agencies. The laying system is one method of legislative control which is best suited to assess and control the rulemaking power of the various administrative agencies on a day-to-day basis. The ideal system of control should consist of two factors. First, a scrutiny committee of the legislature, armed with specific guidelines, should examine all rules to be certain the agency is within its delegated powers. Second, if needed, the legislature should retain coercive powers to keep the agency in line by annulling a rule which the committee determines is excessive, and which the agency refuses to change. Through a system such as this, both state legislatures and the United States Congress could solve the problem of agency accountability to the legislature. There no longer would be inadequate and ineffective controls over administrative action.

David E. Alms

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174. Trubek, *Will The Connecticut Administrative Procedure Act Frustrate Environmental Protections*, 46 CONN. B.J. 438, 440 (1974). See Schubert, *Legislative Adjudication Of Administrative Legislation*, 7 J. PUB. L. 135, 161 (1958).

175. *E.g.*, NEB. REV. STAT. § 84-904 (1976). This section allows the legislature to consider the merits of the rule by giving them the power to amend, alter, or modify the regulation.

176. See note 36 *supra*.

177. *E.g.*, OR. REV. STAT. §§ 171.709, 171.713 (1975).