CONGRESSIONAL REVIEW OF ADMINISTRATIVE DECISION-MAKING BY COMMITTEE CLEARANCE AND RESOLUTIONS

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ABSTRACT

This study presents a description and analysis of a particular method of congressional oversight of certain types of administrative decisions. Such congressional oversight provides a means of legislative review of the use of administrative discretion. It is composed of the two devices of review by resolution and committee clearance. The first is represented by those statutory requirements that subject particular administrative decisions either to legislative approval by affirmative concurrent resolutions or to possible legislative nullification by simple or concurrent resolutions. The second device is composed of those statutory requirements and informal agreements that subject administrative decisions to the review and clearance of specified standing congressional committees.

Congressional oversight represents an institutionalization of the doctrine of "Legislative Control," which is one of the three current schemes offering alternative solutions to the problem of the proper control of administrative discretion. The description and analysis of this practice is thus cast within the theoretical context outlined by these dominant doctrines. They are the doctrine of

"Presidential Control," the doctrine of the "Judicial Formula," and the doctrine of "Legislative Control." The first points to the President to provide the necessary control of the discretionary powers of the American bureaucracy. The second doctrine emphasizes the necessity to structure the administrative process after the judicial model in order to limit and control the use of administrative discretion. The third concludes that the legislative body is the proper organ of control and direction of administrative discretion.

The genesis of each of these doctrines is found in the ideas and thoughts of three early pioneers in the formulation of the disciplines of public administration and administrative law, Frank J. Goodnow, Ernst Freund, and William F. Willoughby. The early schemes for the control of administration represented in the writings of these men are presented and their relationships to the current doctrines are analyzed and emphasized.

The British practice of parliamentary supervision of subordinate legislation is also described in order to furnish a basis of comparison with the American method of legislative oversight. The British practice was established to provide a means of parliamentary control over the uses of the delegated legislative powers of the British government. While it is similar to the American method in

that it points to the legislative body as the proper source of control, it displays several significant differences in both formal aspects and actual operation. These differences are presented and discussed.

The detailed description and analysis of the American method is composed of several elements. The description centers around an enumeration and discussion of the instances of the statutory establishment of both review by resolution and committee clearance. In the case of committee clearance, however, this survey is complemented by a presentation of several instances of the establishment of this device which are based upon informal agreements between particular congressional committees and executive agencies.

The analysis focuses upon the actual operation of the American practice. In the case of review by resolution, the role and influence of the regular legislative committees is emphasized. In the case of committee clearance, the reviewing practices of those committees presently engaged in the review and clearance of administrative decisions is the central concern. Such reviewing practices result in the de facto delegation of the clearance function. The delegations fall into three general patterns which are presented and discussed.

The analysis also includes a survey of the various arguments that have been presented to support or oppose the constitutionality of each device. This survey is accompanied by a systematic consideration of the major constitutional issues raised by both devices.

Finally, a general evaluation of the two devices as responsible tools for the control of administrative discretion in a democracy is made. Both offer certain advantages to the legislative body and the executive agencies. In the case of committee clearance, however, as contrasted with review by resolution, these advantages are outweighed by the fact that the former device does not place the final approval or disapproval of administrative decisions at a point in the governmental structure which assures that such final clearance will represent and reflect the consent of the governed. It does not represent, therefore, a promising device for assuring the responsible control of administrative discretion.

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CHAPTER I

INTRODUCTION

This is a study of a particular method for the direct congressional control of administrative discretion in the United States. This method is congressional review and clearance of administrative decisions.

Such legislative oversight is made up of two devices. The first is review by resolutions. It has taken two forms: (1) approval and disapproval of administrative decisions by concurrent resolutions of Congress, and (2) disapproval of such decisions by a simple resolution of either chamber of Congress. The second device is represented by the practice of lodging final clearance in standing committees of Congress.

Congressional clearance is an institutionalization of one of the three major doctrines of the present era that concern the control of administrative discretion. These doctrines represent three distinct schemes. Each points in a different direction to provide such control and is based upon interpretations and theoretical postulates that distinguish it from the other schemes.

The three major doctrines may be labeled simply: "Presidential Control," the "Judicial Formula,"[1] and "Legislative Control." The first declares that the President must provide the necessary control of the bureaucracy. The second doctrine concludes that the administrative process must be structured after a model of the judicial process in order to provide a check upon administrative discretion for the protection of private rights. The legislature is viewed as the proper and effective source of control of administrative discretion, according to the third theory.

The legislature, rather than the presidency or the judiciary, plays the major role in the American practice of congressional oversight. Such a practice is thus a product of the doctrine of legislative control. The two devices of which it is composed represent basically two different ways of putting the scheme into operation.

This relationship between congressional oversight and the legislative control doctrine raises a very important issue. It concerns the query as to whether the two devices of the contemporary practice actually fulfill the promises of their doctrinal progenitor.

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[1] This second term is borrowed from Frederick F. Blachly and Miriam E. Oatman, Federal Regulatory Action and Control (Washington: The Brookings Institution, 1940), pp. 4-5. It is a more appropriate label than "judicial control," for it emphasizes the important fact that this doctrine of control does not point only to an increase of judicial review of administrative decisions and actions. This doctrine also emphasizes the necessity to impose upon the administrative process procedures and safeguards that have been traditionally associated with purely judicial organs in order to structure the process of administrative decision-making for the protection of private rights.

The legislative control doctrine includes two major claims. The first concerns political responsibility. It states that legislative control and direction of administrative discretion will insure administrative decisions that reflect the consent of the governed. The second claim focuses upon the constitutionality of a system of legislative control. Such a system, according to the legislative control doctrine, coincides with the constitutionally established pattern of relationships between the chief executive, the legislative body, and the administrative organization.

It is the major purpose of this study to determine whether either of the two devices making up the practice of congressional oversight fulfills these two doctrinal claims. This evaluation rests upon two categories of description and analysis. In the first place, the development and use of each device is described. This is accompanied by an analysis of the structure and operation of each device. In the second place, the arguments presented by supporters and opponents of both devices regarding the question of constitutionality will be surveyed and analyzed.

This provides a setting for the major task of evaluation. The actual operation of each device can be measured against the norm of political responsibility contained in the legislative control doctrine. The various arguments concerning the question of the constitutionality of both devices can be used as a basis for testing the second claim contained in this doctrine. It will be possible, in this way, to

determine whether either form of congressional oversight fulfills the two major claims of those who espouse the doctrine of legislative control.

Chapters V to IX, which constitute the heart of this study, are preceded by three preliminary chapters. Chapters II and III are concerned with an analysis of the doctrine of legislative control in order to present the major framework within which congressional oversight will be evaluated. The contemporary scheme is presented in Chapter III. Its examination is undertaken in conjunction with analyses of the two other major doctrines of the present era. By presenting the legislative control doctrine in its relationship to the other two schemes it takes on a fuller meaning and significance.

All three contemporary doctrines, however, are closely related to earlier schemes for the control of administration represented by the writings of Frank J. Goodnow, Ernst Freund, and William F. Willoughby. The present doctrines are primarily elaborations of the implications contained in these schemes that emerged early in this century during the formative period of the study of public administration and its recognition as a distinctive subject. As a result of this relationship, the present theories of control become more meaningful when viewed in the context of their historical development from the earlier thoughts on this subject. Chapter II thus deals with the genesis of the present doctrines.

The material in Chapter IV rounds out the preliminary discussion. It focuses upon an analysis of English experience with parliamentary review of subordinate legislation. This furnishes two useful aids. In the first place, it presents an opportunity for a comparison between the structures and operations of the two systems of legislative control. In the second place, it provides a basis for comparison on the important issue of political responsibility. Such a comparison furnishes a broader basis upon which to make a final assessment of the American practice on this important issue.

The central part of the study is found in Chapters V through IX. Chapter V contains a description of the device of review by resolutions and an examination of its operation. This is accompanied by an evaluation of this device in terms of the norm of political responsibility. The material in Chapters VI through VIII concerns committee clearance. The first two of these chapters describe in some detail the examples of the use of this device. Chapter VIII sets forth the actual patterns of review and clearance that have evolved and assesses their coincidence with the norm of political responsibility. Chapter IX contains a survey and analysis of the arguments that have been presented to support or oppose the constitutionality of both forms of congressional oversight. It also includes a presentation of the major patterns of arguments that can be used

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systematically to approach the question of the constitutionality of the American practice.

Finally, a word must be said about the data used for this study. Since congressional clearance has received little attention in the literature of political science, the greater share of the published source material was gathered from various official government documents. The annual volumes of the United States Statutes at Large from 1930 to the present were searched in order to obtain an enumeration of the instances in which review by resolutions and committee clearance have been used. The United States Code was utilized to trace derivations and check on pertinent amendments. The legislative history of each piece of relevant legislation was obtained from the United States Congressional Record. The Federal Register and the Code of Federal Regulations also furnished sources of additional data.

A total of thirty personal interviews with professional staff members and counsel of all the major congressional committees, and with officers of the United States Bureau of the Budget and several executive departments of the national government, also provided invaluable information. Such personal conferences were important for two reasons. In the first place, they furnished a check upon the accuracy and thoroughness of the search of the

statutes. Secondly, they provided an excellent opportunity to acquire supplementary information concerning the actual operation of congressional oversight that was unavailable in any published form.

Such secondary sources as were relevant to the central problem of the study also were utilized. They included published material relating to the subjects of public administration, administrative law, and the organization and operation of Congress. Professional journals in the fields of political science and public administration were consulted. A search of the law journals provided several articles concerning the legal and constitutional aspects of congressional oversight.

Congressional clearance of administrative decisions by resolutions and legislative committees represents the organizational embodiment of the contemporary doctrine of legislative control. The presentation and analysis of this scheme should lead, therefore, to a better understanding and more meaningful discussion of congressional oversight. But the doctrine of legislative control, in turn, is best comprehended in terms of its relationship to the alternative doctrines of presidential control and the judicial formula.

CHAPTER II

THE GENESIS OF THE DOCTRINES OF CONTROL OF ADMINISTRATIVE DISCRETION

The three dominant doctrines in the United States that presently offer alternative solutions to the problem of the proper continuous control of administrative discretion have roots that reach into the past. They emerged in embryonic form in the writings of Goodnow, Freund, and Willoughby, early pioneers in the study of public administration. The contemporary doctrines are based primarily upon an emphasis and elaboration of the basic implications contained in the earlier schemes and are, in part at least, the result of this heritage of the past. The present doctrinal competition becomes more meaningful, therefore, when viewed in the context of this historical relationship.

Frank J. Goodnow and Presidential Control

Goodnow was one of the first students of government to recognize and analyze the emerging function of administration. His thoughts on this subject were based upon related concepts drawn from his interpretation of the administrative process and the place

of administration in the constitutional system of the United States. These concepts, in Goodnow's mind, formed a distinct field of study that he called administrative law. In one of his major works he declared:

> The present age . . . is devoting itself primarily to the questions which are generally referred to as "administrative." A function of government called "administration" is being differentiated from the general sphere of governmental activity, and the term "administrative law" is applied to the rules of law which regulate its discharge.[1]

Goodnow must also be credited with providing one of the first and most definitive studies of the relationship between the position of administration and the constitutional powers of the chief executive. He investigated, in a detailed manner, presidential powers and administration, and set forth a conceptual scheme concerning the control of administration at the dawn of the twentieth century that emphasized presidential control of administration.

Goodnow's entire analysis was based upon an investigation of the basic functions of a governmental system. The concepts that he formulated from such an investigation provided the foundation for his theory of administration. After pointing out the many important exceptions to the simple categorization of governmental powers into

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[1] Frank J. Goodnow, The Principles of the Administrative Law of the United States (New York: G. P. Putnam's Sons, 1905), p. 1.

three departments, Goodnow declared that any political system could be reduced to two basic functions. The initial function was that of expressing the state will; the other concerned the execution of this public will. Goodnow labeled these two functions, respectively, "politics" and "administration."[2]

These two functions, moreover, were primarily related to separate governmental organizations. The primary concern and duty of the legislature, in Goodnow's analytical scheme, was the expression of the state will. The function of administration was performed by "the executive organization of the state."[3]

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[2]Goodnow's book, Politics and Administration (New York: The Macmillan Company, 1900), contains the most extensive consideration of this whole functional differentiation. Cf. Dwight Waldo, The Administrative State: A Study of the Political Theory of American Public Administration (New York: The Ronald Press Company, 1948), pp. 104-129, for a review of the separation-of-powers doctrine in the writings of Goodnow, William F. Willoughby, and others.

[3]Frank J. Goodnow, Comparative Administrative Law (New York: G. P. Putnam's Sons, 1893), I, 5. It is important to note that Goodnow recognized that it was difficult to assign each function completely to a separate organization of government. Goodnow stated quite clearly that "no political organization, based on the general theory of a differentiation of governmental functions, has ever been established which assigns the function of expressing the will of the state exclusively to any one of the organs for which it makes provision." Goodnow, Politics and Administration, p. 15. The executive authority often has a power of ordinance which allows participation in the expression of the state will, and the legislative body, in one way or another, often participates in the executory function.

The function of the execution of the state will, or, more simply, administration, was not associated with the expression of the state will. Administration, according to Goodnow, did not involve the power of decision-making in areas of subordinate policy. It was merely the implementation of the state will, and the executive branch became simply the organizational means for accomplishing the policy objectives arrived at through the function of politics. Administration was viewed primarily as the realm of quasi-judicial decisions, or the application of general classifications to particular situations, of scientific and technical decisions that simply provided the means to predetermined goals, and of the commercial activities of government analogous in operation to private business.

The important consideration in this area of governmental activity was the efficient and uniform implementation of the state will. Furthermore, since it involved no decisions or actions that affected the expression of the state will and it involved no political choices, Goodnow stated that administration should be free from political interference and partisan considerations. These combined values of efficiency and freedom from politics could best be achieved if the function of administration were performed by a corps of permanently tenured officers, chosen on the basis of merit, who

> . . . should be free from the influence of politics because of the fact that their mission is the exercise of foresight and discretion, the pursuit of truth, the gathering of information, the maintenance of a strictly impartial attitude toward the individuals with whom they have dealings, and the provision of the most efficient possible administrative organization.[4]

Goodnow found a similar functional distinction when he turned to a consideration of the constitutional powers of the President. He claimed that the executive power, embodied in the presidency, was actually composed of two related functions. These two functions, defined as the political function and the administrative function, corresponded with the dichotomy that Goodnow had found in the realm of administrative theory. Relying upon M. Aucoc, a French writer on administration, he declared that the former function related entirely to expressing the general policy of the state in important fields of governmental activity. The political function, in other words,

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[4] Ibid., p. 85. The discretion Goodnow referred to was not that of subordinate policy-making. He spoke of discretion in the context of administration that "embraces fields of semi-scientific, quasi-judicial and quasi-business or commercial activity--work which has little if any influence on the expression of the true state will." Goodnow's scheme thus epitomized what Herbert Kaufman has called the doctrine of neutral competence in the literature of public administration. The results of the spoils system in administration, according to Kaufman, led to the emphasis upon the value of nonpartisan, permanently tenured government officers insulated from politics while executing government policy. The theoretical rationale for this normative goal was the dichotomy between politics and administration. See Herbert Kaufman, "Emerging Conflicts in the Doctrines of Public Administration," American Political Science Review, L (December, 1956), 1057-1074.

involved political choices and judgments of a policy nature that expressed the state will in particular areas of the political process.[5] The administrative function, on the other hand, was associated with the efficient and impartial execution of the laws. It involved no policy decisions, but rather referred simply to the implementation of political decisions. The administrative function was composed, therefore, "almost entirely of a scientific technical, commercial, or quasi-judicial character."[6]

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[5]Goodnow quotes Aucoc in this regard: "When we distinguish government from administration, we mean to put in a special category the direction of all affairs which are regarded as political--that is to say, the relations of the chief executive authority with the great powers of the government: the summoning of electors, for the election of senators and representatives, the closing of the session, the convocation of the chamber of deputies and of the senate, the closing of the senate, the dissolution of the chamber of deputies, the carrying on of diplomatic relations with foreign powers, the disposition of the military forces, the exercise of the right of pardon, the granting of titles of nobility." Goodnow, The Principles of the Administrative Law . . ., p. 66.

[6]Ibid., p. 68. Goodnow once again quotes Aucoc to illustrate this function: "The administrative authority has a mission altogether different. It is charged with providing for the collective needs of the citizens, which the initiative of individuals or associations of individuals could not adequately satisfy. It must gather together the resources of society, both in men and money, in order that society may continue to exist and make progress. It must play the part of the man of business of society, in its management of the various public services, as, for example, in the matter of public works. It must take measures of supervision, and must, through the exercise of foresight, preserve the property designed for the use of the public; must maintain order and further the general prosperity." Ibid., pp. 67-68.

The executive power of the President, according to Goodnow, was defined by the dominance of one or the other of these functional categories. He believed that the political function was the basic element in the conception of the executive power of the American President at the time the United States Constitution was written. He claimed that the framers of the Constitution modeled the executive power given to the President after the powers of the governors of the state governments in existence at the time of the Constitutional Convention. After a study of the office of governor, as found in the early governments of Massachusetts, New York, and Virginia, Goodnow concluded that their powers were almost entirely of a political nature and did not include any powers of an administrative chief or the headship of the administrative functions of government. Since the position of the state governors defined the conception of the executive power, he thus reached the conclusion that the President possessed only political powers and duties.

> The American conception of the executive power prevailing at the time of the adoption of the commonwealth and national constitutions, as evidenced by the examples which have been adduced, corresponded with that part of the executive power which has been called the political or governmental power.[7]

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[7]Goodnow, Comparative Administrative Law, I, p. 59. Cf., however, Charles C. Thach, Jr., "The Creation of the Presidency, 1775-1789: A Study in Constitutional History," Johns Hopkins

Goodnow could find little substantiation for the opinion that the President was granted administrative powers by the Constitution.

University Studies in Historical and Political Science, Series XL, No. 4 (Baltimore: The Johns Hopkins Press, 1922), pp. 118-125. Thach presents several pieces of evidence concerning the debate and proposals in the constitutional convention that furnish substantiation for his interpretation that the envisaged presidency, contrary to Goodnow, was to be the office of the administrative chief of the national administration. Later studies of the practices during the early years of the national government also cast considerable doubt upon Goodnow's interpretation. The conception of the executive power of the President held by a majority of the members of the early Congresses and leading figures of the executive branch under the Federalist administration, many of whom had participated in the Constitutional Convention, included the view that the President was to be the administrative chief of the national administration. This view, for example, was consistently written into law in the early statutes. The statutes almost always required that the President was to make the final decisions in matters of administration: "The laws required all major and many minor decisions to be made by the president himself; his agency was involved at every turn." Leonard D. White, The Federalists: A Study in Administrative History (New York: The Macmillan Company, 1948), p. 18. The early practices in the executive branch also manifested this conception of the executive power: "No department head, not even Hamilton, settled any matter of importance without consulting the President and securing his approval. All of them referred to the President numerous matters of detail as well as large and many small issues of administrative policy." Ibid., p. 27. See also James Hart, The American Presidency in Action, 1789: A Study in Constitutional History (New York: The Macmillan Company, 1948), pp. 134-143, for an account of Washington's actions as the head of the national administration during the first year of the operation of the national government. See further Lynton K. Caldwell, The Administrative Theories of Hamilton and Jefferson: Their Contribution to Thought on Public Administration (Chicago: University of Chicago Press, 1944), pp. 1-101, for a detailed analysis of the views of Alexander Hamilton, as a leading architect of the Federalist theory, on the presidency and public administration.

The constitutional powers of the chief executive in the American national government did not include authority to direct and control the administrative activities of the government. The investiture of the executive power by Article II of the Constitution, for example, gave the President "military and political power rather than an administrative power."[8] Goodnow also maintained that an analysis of the succeeding grants of specific powers in Article II reaffirmed this general conclusion. These specific grants, rather than specifications of an otherwise undefined executive power, provided the definition of the executive power, and they were similar in nature to the powers granted to the governors of the states.[9]

The power of appointment was the only specific constitutional power granted to the President that referred to any presidential duty relating to the function of administration. Even this power did not belong solely to the President, however, for the President shared it with the Senate in important appointments, and, in the case of inferior offices it was subject to the will of Congress. After a thorough

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[8] Ibid., p. 62.

[9] "These are the same powers possessed by the governors of the commonwealths. They are the power of military command, the diplomatic power, the limited veto power, the power of pardon, the power to call an extra session of Congress, to adjourn it in case of a disagreement between the houses, and the power to send a message to the Congress." Ibid.

investigation of the executive power of the President expressed in the United States Constitution, therefore, Goodnow declared:

> It will be seen, from this enumeration of the powers given to the President, that the conception of the executive power held by the framers of the national constitution was what has been spoken of as the political power and the power of appointment. Beyond the power of appointment the President had, so far as the express provisions of the constitution were concerned, no control over the administration at all.[10]

Goodnow recognized, however, that later political developments had changed this early constitutional position of the President. The President had, in fact, become an administrative chief. This presidential role had evolved from several important sources. In the first place, Goodnow found that legislative policy had increased the presidential administrative power. Congress had passed many statutes that conferred duties and powers upon the President directly in the execution of the laws. Other statutes passed by Congress granted the President authority to supervise and direct the details of administrative activities performed by subordinate agencies in the executive branch. By far the most important and influential development, in Goodnow's mind, however, was the congressional decision of 1789 that the removal power was vested in the President as part of the executive power. This decision was announced by Congress

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[10]Goodnow, The Principles of the Administrative Law . . ., p. 75.

during the legislative debates concerning the organic statute establishing the early Department of Foreign Affairs. This important conclusion was made by the legislative body that included in its membership many of the framers of the Constitution, and Goodnow viewed the decision as a constitutional interpretation of the first order. This interpretation of the constitutional powers of the chief executive established the President as the effective head of the administrative branch of the national government. This factor in the evolution of the presidency, moreover, was far different from the earlier factors that Goodnow mentioned, for the former factors involved matters of legislative policy, while the possession of the removal power was a point of constitutional imperative.[11]

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[11] See ibid., pp. 75-82, for Goodnow's discussion of these points. Cf., however, James Hart's study of the congressional debate concerning the establishment of the Department of Foreign Affairs. The issue of the President's removal power was argued in the debate concerning this department, and the conclusion was then applied to the bills establishing the Department of War and Department of Treasury passed in the same session. Hart's analysis reveals that the passage of the bill setting up the former department (and containing a recognition of the President's power to remove the secretary of the department) was based on a majority of twenty-nine votes classified as follows: (1) Fourteen votes were cast by members who were legislative-grant proponents--i.e., advocates of the theory that the Constitution vested in Congress, the body that created all nonjudicial officers, the power to provide for the removal of such officers by any method that it deemed desirable; (2) an equal number cast by members who advocated the theory that the power to remove such officers at pleasure was vested in the

This important addition to the President's constitutional powers had significant consequences. Since it stemmed from the Constituion, it outweighed any legislative declaration concerning the relations between the President and administrative subordinates. Goodnow recognized this point when he discussed the later congressional decision to establish a Department of the Treasury.

This organic act made no mention of the President's power of supervision and control over the Secretary of the Treasury. It also contained no grant to the President of the removal power. In Goodnow's mind, therefore, the Secretary of the Treasury was conceived by Congress as an agent of the legislative body. He thus stated that a basic distinction had been made by Congress between those departments that were organizational means for the execution of the President's political powers and those departments that were to serve as congressional agents to implement and execute congressional powers.[12]

President by deduction from the constitutional clauses of Article II --i.e., the constitutional-grant theory; and (3) one vote cast by a member Hart classified simply as "for the President." Hart, The American Presidency in Action . . ., p. 208. Goodnow's contention that the "Decision of 1789" interpreted the power of removal as a constitutional power of the President is, therefore, based on rather insubstantial grounds. As Hart concludes: "It supports the constitutional-grant theory, though not necessarily against the theory of ultimate legislative control." Ibid., p. 213.

[12]See ibid., pp. 77-79.

Goodnow declared, however, that President Jackson's removal of Duane, his Secretary of the Treasury, during the controversy concerning the removal of the funds from the second national bank had actually eliminated this distinction.[13] The legislative declaration, represented by the congressional refusal to explicitly provide for presidential direction and removal, was effectively subordinated to the constitutional power of the President, and Jackson's action clearly pointed out that the President had evolved into an effective head of the national administration. The inferred distinction between the departments was abrogated, and Goodnow declared that "President Jackson was able, through his power of removal, to exercise a power of direction as effectually over the head of the treasury department as over the head of any other department of the government."[14]

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[13] Leonard White gives a fairly detailed and very interesting account of this whole episode. See Leonard D. White, The Jacksonians: A Study in Administrative History, 1829-1861 (New York: The Macmillan Company, 1954), pp. 34-37.

[14] Goodnow, The Principles of the Administrative Law . . ., p. 80. Goodnow declared that the congressional repeal of the Tenure of Office acts in 1887 reasserted the original interpretation of the removal power. These acts, in existence for twenty years, had the effect of temporarily weakening the President's power, but "the complete power of removal had existed so long as to determine the position of the President in the national government. . . ." Ibid., p. 77.

The political and constitutional development of the presidency, based primarily upon the addition of the removal power, thus transformed the chief executive from the organizational embodiment of purely political powers into an effective and responsible national administrative chief. Goodnow also recognized (and approved) that, as an important consequence of this development, the removal power fashioned the President into the central director and supervisor of the hierarchically organized administrative activities of the national government.[15] Centralization and hierarchy were concomitants of the new definition of the executive power. Goodnow concluded that:

> The executive power in the United States, so far as the national government is concerned, embraces both the powers of which it may in theory be composed, and the chief executive authority is at the same time the political and administrative chief of the government, and has under his direction and control the actions of all the officers of the national government.[16]

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[15] "The tendency toward administrative centralization should therefore be encouraged and not hindered." Goodnow, Politics and Administration, p. 130. This development served two basic goals in Goodnow's mind. Central control and direction by the President enhanced the efficiency and uniformity of administration, and, perhaps more important, it reduced the necessity of political interference in the administrative process. The necessary harmony between politics and administration could be achieved, according to Goodnow, under such a system by party control of the legislature and presidency alone, and, due to administrative centralization, the President could direct and control the subordinate administrative officers.

[16] Goodnow, Comparative Administrative Law, I, pp. 69-70.

Goodnow's analysis of the emerging function of administration thus led to an emphasis upon presidential control of administration.[17] This major conclusion was based, however, upon a rather limited view of administration.[18] One of the most important elements in Goodnow's scheme was an interpretation of the administrative process that separated political functions and administrative activities. This latter category of his theoretical dichotomy had no relation to the expression of the state will. It was the realm of administration, and the focal point of his concern was the efficient and uniform implementation of the state will as expressed by the political organs of the national government. When Goodnow spoke of presidential control of administration, then, he referred primarily to this concept

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[17] Although he recognized the area of judicial and legislative control of administration, Goodnow devoted less attention to these two problems in his major works. Judicial control was oriented toward the protection of private rights through the regular courts. Goodnow envisaged legislative control as consisting primarily of legislative investigations of special abuses through legislative committees, legislative control of the finances, and the impeachment power. For his discussion of all three types of control see Goodnow, The Principles of the Administrative Law . . ., Book VI, "Control over the Administration," pp. 367-463.

[18] Nathan Grundstein concluded, after a study of Goodnow's theory of the relation between presidential powers and administration, that "he spoke of administration within the logic of efficiency and he had in mind the efficiency of a hierarchically organized administration staffed by professionally qualified officials." Nathan D. Grundstein, "Presidential Power, Administration and Administrative Law," George Washington Law Review, XVIII (April, 1950), 295.

of administration, and presidential direction was related to the goals of efficiency, uniformity, and impartiality. He looked to presidential control to "obtain harmony and uniformity in administrative action, efficiency in the administrative services, and uprightness and competency in the administrative officers."[19]

Despite this rather limited view of the function and goals of administration, Goodnow's analysis did contain important implications for a theory of the control of the uses of discretionary authority by executive agencies. He did refuse to accept an early enunciation of the concept of the complete unity of administration and presidential direction. After quoting an opinion by Attorney General Cushing to the effect that the President's will was to control all acts of the department heads, Goodnow declared:

> This is of course an extreme view, and it is probably not meant by it that the President has any dispensing power by which he may relieve an officer from obeying a positive direction of law, since the law, when constitutional, is always above an executive order. . . .[20]

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[19] Goodnow, The Principles of the Administrative Law . . ., p. 373.

[20] Ibid., p. 81. The opinion is quoted by Goodnow, and reads, in part, as follows: "I think . . . the general rule to be . . . that the head of department is subject to the direction of the President [this was said in relation to duties imposed by statute upon a head of a department]. I hold that no head of department can lawfully perform an official act against the will of the President and that will is, by the constitution, to govern the performance of all such acts." Ibid.

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Goodnow, therefore, did not believe that the presidential power of administrative direction included the power to absolve a subordinate from performing a ministerial duty. The outer limits of this presidential power were evidently defined, in Goodnow's mind, by the majority opinion in Kendall v. United States.[21]

The implications of the removal power within these broad limits, however, suggested a system of the control of administrative discretion that pointed toward the presidency. Since there was no judicial limitation upon the President's power of removal at the time Goodnow wrote, similar to that enunciated by the Humphrey[22] case many years later, Goodnow's scheme contained an implicit theory of a complete presidential control of administrative discretion. A continuous control of administrative decisions and actions by the President extending to the limits of the removal power was inherent in the Goodnovian analysis.

Goodnow, perhaps because he was concerned with the twin goals of efficiency and impartiality, did not draw out or dwell upon this basic consequence of his analysis. It was never mentioned explicitly, for example, in any of his discussions of the forms of

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[21] Kendall v. United States, 12 Peters 524 (1838).

[22] Humphrey's Executor v. United States, 295 U.S. 602 (1935).

control of administration. Moreover, when he discussed the control of the ordinance-making powers of subordinate executive officers, powers that involved the formulation of subordinate policy and thus epitomized discretionary authority, Goodnow also did not bother to mention the implications of the removal power as a form of control.[23]

Goodnow thus emphasized the presidency as a source of control of administration, but it was the control of an efficiency engineer and the organizational insulation of administration from the invidious consequences of the spoils system, not the politically responsible presidency that coordinated and controlled administrative discretion to assure accountability to the political bases of government. The basic implication of Goodnow's scheme certainly pointed to the President as a controlling mechanism for the latter type of control, but, if he recognized this consequence of his thoughts, he refused to elaborate upon it. A more complete doctrine of presidential powers and the unity of administration was yet to come.

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[23] Goodnow, The Principles of the Administrative Law . . ., pp. 327-328. It is difficult to see why Goodnow overlooked this important point, for he touched upon it directly in his discussion of Jackson's control of the statutory discretion delegated to the Secretary of the Treasury. See ibid., p. 80.

Ernst Freund and the Judicial Formula

The writings of Ernst Freund, another early student of administration, began to trace out the major outlines of still another contemporary doctrine of the control of administrative discretion. Although Freund wrote an early essay on the consequences of administrative centralization for the control of administrative discretion,[24] most of his writings contained an implicit scheme that pointed toward a differently institutionalized form of control.

Freund was primarily concerned with the consequences of administrative discretion for the personal and private rights of the citizen, and his studies were motivated by a predominant concern for the protection of such rights. This motivation formed the basis for two contributions that Freund made to the fields of public administration and administrative law. In the first place, Freund was one of the first to emphasize the intellectual discipline of administrative law as separate and distinct from public administration. He thus began the separation of the concepts in these two fields that Goodnow had so carefully formulated into a single and related conceptual system. Freund molded administrative law into a discipline concerned

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[24] See Ernst Freund, "The Law of Administration in America," Political Science Quarterly, IX (September, 1894), 403-426.

with the study of judicial decisions that established the legal limitations upon the administrative process for the protection of private rights. "The chief concern of administrative law, . . . as of all other branches of civil law, is the protection of private rights, and its subject-matter is therefore the nature and the mode of exercise of administrative power and the system of relief against administrative action."[25]

This emphasis upon the protection of private rights was also the basis of Freund's second contribution to the study of administration and administrative law. It prompted him to devote considerable attention to the problem of how to structure the use of administrative discretion in order to limit and control it.

He believed that discretion, in a governmental system based upon the "Rule of Law," was "unstandardized power" over private rights of person and property.[26] Such discretion had little place

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[25]Ernst Freund, Cases on Administrative Law (St. Paul: West Publishing Company, 1911), p. ix. This definition should be compared with the wider definition given to administrative law by Goodnow as represented in the table of contents of his book entitled The Principles of the Administrative Law . . ., supra, n. 1.

[26]Such discretionary power over private rights Freund described as undesirable per se and should be avoided as far as may be, for discretion is unstandardized power and to lodge in an official such power over person or property is hardly conformable to the 'Rule of Law.'" Ernst Freund, "Historical Survey," The Growth of American Administrative Law, ed. Ernst Freund et al. (St. Louis: Thomas Law Book Company, 1923), pp. 22-23.

in a government based upon the "Rule of Law." Freund found the only area of such permissible discretion in the chief executive's constitutional political functions.[27] One of Freund's primary concerns, therefore, was to promote the protection of private rights through the introduction of rule and principle into areas of discretion.

When Freund turned to the problem of administrative discretion, he concluded that the elimination of "unstandardized power" and the introduction of system and principle would be greatly promoted by the introduction of several important elements into the administrative process. These included professional attitudes and habits of thought, akin to judicial ethics and training,[28] procedural

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[27] "In a government by law discretion ought to have a very limited place in administration. Its legitimate function is indicated by the organization of a chief executive power which stands for that residuum of government otherwise subject to law which cannot be reduced to rule. Where discretion appears in inferior positions, it is either the confession of inability to discover a guiding principle, or the deliberate preference of personal influence to more objective considerations, i.e., the more or less unavowed manifestations of the shady and corrupt aspects of government." Ernst Freund, "The Substitution of Rule for Discretion in Public Law," American Political Science Review, IX (November, 1915), 670.

[28] "We have come to associate a due recognition of permanent principles with the administration of justice and its methods of procedure tending to emphasize the impartial and objective point of view. The judiciary has however by no means a monopoly in this regard. Similar results are likely to attend other official action,

safeguards generally associated with the judicial process, and adequate judicial review. He continually pointed to judicial procedure and professional standards, coupled with judicial review, as the model to be followed in the proper structuring of the process of administrative discretion.[29]

Freund's view of the importance of such factors is quite clear in his discussion of legislative delegation of discretionary authority to administrative agencies. These important factors, according to Freund, were not inherent in the procedure of legislative bodies.

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provided that it be sufficiently detached from the strife of interest and imbued with a sense of professionalism. It shares with judicial action the respect of precedent and the respect of expert opinion, habits of mind which distinguishes both from the irresponsible action of popular bodies." Ibid., p. 675.

[29]Freund recognized that this was not the sufficient cause that would produce by itself the necessary panacea for the ills of administrative discretion. He also looked to the legislature to write into statutes that delegated such discretion adequate and unambiguous standards of decision-making. Legislative policy standards would provide a guide to standardize administrative decisions and eliminate the capricious and strictly personal use of administrative discretion. "If the legislature has no standards of its own, may it commit the working out of standards to the administration? With regard to some matters, or as a temporary policy, that may be legitimate enough. But if the legislature asks the administration to evolve standards in matters which cannot as yet be scientifically or legally standardized, or prescribes an intrinsically erroneously [sic] or unworkable standard, no skill in devising procedural safeguards will produce just or beneficial results, and the body called upon to exercise the power will find it hard to win or retain confidence whether it be a commission or whether it be a court. . . ." Freund, "Historical Survey," pp. 38-39.

They utilized their discretionary authority without establishing guiding principles and rules to systematize their power in order to protect private rights.[30] He thus viewed the delegation of discretion to administrative bodies as the opportunity to provide the necessary standardization through the imposition upon the administrative process of procedural checks and other safeguards. Freund declared:

> Administrative action has however the indisputable, though incidental advantage, that it permits the process of establishing rules to be surrounded by procedural guaranties and other inherent checks which will tend to produce a more impartial consideration than the legislature is apt to give, and which should in course of time, if not immediately, substitute principle for mere discretion.[31]

Even the delegation of administrative discretion without adequate statutory standards, which was a violation of one of Freund's fundamental rules, was acceptable to Freund if the legislature recognized that discretion could be better standardized by the administrative agency through the operation of "judicial procedure."[32] Freund said, in this regard, that

> Even the absence or scarcity of statutory direction for the exercise of the rule-making power may be condoned if it means that the legislature believes that wiser observances will assert

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[30] Freund condemned legislatures, along with lay juries, as "irresponsible elements of government." Freund, "The Substitution of Rule for Discretion . . .," p. 671.

[31] Ibid., p. 669.

[32] Ibid., p. 675.

> themselves by the gradual operation of judicial procedure and of precedent.[33]

In Freund's mind, therefore, the evolution of administrative discretion from "unstandardized power" into a system of rule and principle was linked very closely with the use of procedures generally associated with judicial bodies.[34] Coupled with this view was an emphasis upon judicial review of the use of administrative discretion. The importance of such procedural checks and judicial review for the protection of private rights was clearly voiced by Freund in one of his later works:

> It is doubtful whether at present any machinery can be devised more effective for the protection of private interests than the combination of adequately safeguarded administrative procedure and of judicial review.[35]

It is not incorrect to state that Freund "identified administration with the legislature rather than with the executive,"[36] but it is

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[33] Ibid.

[34] Freund declared that "judicial administration secured at least some of the benefits of rule and system." Ibid., p. 670. Later in the same article Freund discussed the subject of special legislation in the English Parliament as compared to the American legislatures. He declared that "Parliament being controlled by powerful traditions curbing discretion, evolved methods of procedure in passing private acts which invested the enactment with the uniformity of judicial procedure." Ibid., p. 673.

[35] Freund, "Historical Survey," p. 35.

[36] Grundstein, op. cit., p. 325.

probably more accurate to say that he identified administration with the judiciary more than with either of the other two departments of government. His frame-of-reference was that of the judicially trained student attempting to find the proper method of controlling administration--defined in terms of administrative power over personal and property rights--in a governmental system based on the "Rule of Law." His solution pointed to the inherent checks associated with judicial procedure and judicial review. This frame-of-reference and these solutions formed the conceptual basis of Freund's scheme for the control of administration.

The thoughts and ideas that Freund brought to the early study of the control of administration--an emphasis upon private rights and the beneficial results of a judicialized administrative process--thus furnish the major contours of still another doctrine of the control of administrative discretion. This early enunciation of the doctrine of the judicial formula is a historical antecedent of one of the doctrines of the contemporary era. After the midway point in the twentieth century, therefore, Freund's scholarship still maintains a prominence in the patterns of thought concerning administration and its control.

William F. Willoughby and Legislative Control

The basic postulates in Willoughby's thoughts on the problem of the control of administration furnish the broad outlines of still another distinct scheme. Unlike Goodnow, who emphasized the role of the President, Willoughby pointed to the legislative body as the major organ of control in the governmental system. Although both of these earlier pioneers in the field of administration agreed that the administrative branch had no authority to act from any inherent presidential prerogative,[37] and owed its power and authority to congressional action, each thus looked to different governmental organs for the control of such administrative power after it was initially granted to the executive branch.

Willoughby based his conceptual system upon a theoretical division of the important functions of a political system. He concluded that, contrary to Goodnow's twofold division, there were actually five basic functions or processes of government. The five divisions included: (1) the electoral function, (2) the judicial function, (3) the legislative function, (4) the administrative function, and

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[37] Goodnow recognized no independent ordinance power vested in the President, except perhaps in military affairs. Thus, army regulations that bind the action of citizens were viewed as based upon the President's power as commander-in-chief. See Goodnow, The Principles of the Administrative Law . . ., pp. 87, 327.

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(5) the executive function.[38] Willoughby believed that the rise of popular government brought about the emergence of the electoral function as a distinct process of a political system. This function included the organized activities associated with molding the separate and autonomous wills of the electorate into agreements concerning important questions of public policy and the choice of agents to represent them in the government. The judicial function was simply the settlement of disputes between legally recognized parties by the compilation of pertinent facts, the interpretation of legal rules and applicable laws, and the application of such rules and laws to the specific factual situation. The legislative function was primarily the expression of the will of the people through the enactment of laws. It also included many other important activities, however, such as acting as an executive council, an organ of public opinion, a constituent assembly, and a board of directors for the government corporation.[39]

The definition and analysis of the administrative and executive functions assumed central importance in Willoughby's study of the

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[38]William F. Willoughby, An Introduction to the Study of the Government of Modern States (New York: The Century Company, 1919), pp. 227-408.

[39]These functions of government are analyzed in detail, ibid., Part VI, pp. 271-408.

position and control of administration in the American national government. Willoughby stated that these two important functions were clearly divided in a manner similar to the differentiation postulated by Goodnow. The executive function, for example, was composed of the powers and duties relating to representing the nation in its relations with foreign countries and in military affairs. Another important aspect of this function was the general supervision of the execution of the laws. The administrative function, on the other hand, was simply the impartial implementation of political decisions. It involved no areas of policy formulation or political judgment.

> In most, if not all political systems, and especially in those of our own country, a clear distinction is made between executive power and administrative power. The executive power, or rather function, is that of representing the government as a whole and of seeing that all of its laws are properly complied with by its several parts. The administrative function is that of actually administering the law as declared by the legislative, and interpreted by the judicial, branch of the government. This distinction is usually made by declaring the executive function to be essentially political in character; that is, one involving the exercise of judgement in its use; and the administrative function to be one concerned with the putting into effect of policies and the carrying out of orders as determined by other organs.[40]

Willoughby thus reached the same conclusion as Goodnow concerning the distinction between these two governmental functions.

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[40]William F. Willoughby, Principles of Public Administration (Washington: The Brookings Institution, 1927), pp. 10-11.

The essence of the dichotomy was that between political choices and decisions involving judgment and the nonpolitical implementation of the public will as expressed by the representative organs of government. Willoughby clearly reiterated Goodnow's earlier conclusion when he declared that "the latter function, the administrative, . . . strictly speaking involves the making of no decisions of a political character."[41]

This theoretical division of executive and administrative functions corresponded with Willoughby's view of the constitutional position of the American President. Willoughby maintained that the framers of the Constitution envisaged the President as the organizational repository of the executive power only. It was a mistake, in his view, to assume that the constitutional fathers intended to raise the presidency to the status of an administrative chief. "There can be no question but that they used the term executive in its technical

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[41] Willoughby, An Introduction to the Study of . . . Modern States, p. 385. Based on an assumption similar to Goodnow's, therefore, Willoughby reached the same conclusion that the administration of the laws should be free from political considerations and loyalties. Willoughby declared that in the execution of laws "political considerations should have no weight other than that the work ordered should be done in such a manner as to put into execution the policies decided upon." Ibid., p. 386.

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Ibid., pp. 3[illegible]

sense as covering only the political duties of the titular head of the nation."[42]

Although the actual activities involved in implementing the law were performed by organizational units considered to be part of the executive branch, Willoughby concluded that the responsibility for the administrative function and the control of administration was in the hands of the legislature. The legislature obviously could not possibly carry out the multifold duties relating to the implementation of the laws, but the control and supervision of such activities rested with the legislative body. Willoughby was very explicit about this point. In all of his major works on the subject of administration this basic concept was emphasized:

> In point of fact real administrative authority, and primary responsibility for the conduct of the administrative affairs of the government, reside, under our political system, in the

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[42] Ibid., p. 251. Willoughby gave a rather detailed review of his interpretation of the presidential power. He stated that "the chief executive shall be the titular head of the government, and as such, represent it in all cases where it needs a spokesman; that he shall especially represent the government in all of its relations with other states; that, to this end, he shall be the commander-in-chief of the armed forces of the government; that he shall be the officer to exercise the quality of mercy as evidenced in the power to grant reprieves and pardons; and, finally, that he shall have the general duty of seeing that the laws of the land are duly enforced." Ibid., pp. 338-339.

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so-called legislative, rather than in the executive, branch of government.[43]

The executive function and the administrative function were thus embodied in separate governmental organs by the Constitution. The former was found in the office of the President. The administrative function, along with the legislative, was possessed by the legislative body. The newly emerged administrative branch of the national government, in Willoughby's view, was simply the organizational outgrowth of the administrative powers of Congress. As such, it was subject to the control and direction of the legislative body.[44]

Willoughby referred to the establishment of the early executive departments to substantiate this conclusion. He found that Congress, with authority over the administrative branch and responsibility for its operation, placed the Department of Foreign

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[43] William F. Willoughby, "The Science of Public Administration," Essays in Political Science in Honor of Westel Woodbury Willoughby, ed. John Mabry Mathews and James Hart (Baltimore: The Johns Hopkins Press, 1937), p. 41.

[44] "In both our national and state governments, as the result of the principle of the separation of powers which finds expression in our political system, only the executive function, in this strictly political and legal sense, is vested by constitutional provisions in the chief executive. The administrative function, that is, the function of direction, supervision, and control of the administrative activities of the government, resides in the legislative branch of the government." Willoughby, Principles of Public Administration, p. 11.

Affairs and the Department of War under the control and direction of the President, while, at about the same time, denying such power to the President over the Treasury Department.[45] This action, according to Willoughby, was based on congressional recognition that the two former departments were the necessary organizational means for implementing the President's constitutional political duties in foreign relations and military affairs. There was little question in his mind, however, that this action was premised upon a theory of legislative grant. This becomes clear when Willoughby concludes his discussion of the enactment of these early organic statutes by

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[45] Willoughby failed to mention, however, the congressional action that occurred as a result of the famous "Gilchrist" case. Congress, in this particular instance, did specifically grant the power of control over the Treasury Department to the President. Justice William Johnson of the United States Supreme Court, sitting in the United States Circuit Court of South Carolina, decided in this case (Gilchrist et al. v. Collector of Charleston, 10 Fed. Cas. 355, 1808) that the 1808 statute amending the earlier Embargo Act of 1807 delegated discretion to the port collectors to clear any vessel for sailing if, in the mind of the collector, the vessel did not intend to violate the embargo system. See 2 Stat. 499 (1808). Such legal discretion, according to Johnson, prohibited a Treasury circular, that had been issued at the direction of President Jefferson, establishing general rules to control the discretion of the collectors. This judicial denial of presidential direction was nullified shortly, however, for Congress proceeded to pass a statute amending the 1808 act. The amending statute gave the President explicit authority to issue general rules to guide and direct the discretion vested in the port collectors. See Section 10, 2 Stat. 506 (1809), cited and discussed in Donald G. Morgan, Justice William Johnson: The First Dissenter (Columbia: University of South Carolina Press, 1954), pp. 66-67.

saying that "legally, therefore, the heads of departments, and in fact all officers of the government, are not subject to the direction of the President except in so far as Congress has expressly granted to the President this power of direction and control."[46]

Willoughby recognized that this complete power of the legislature was qualified by the President's power of direction and control of the action of many administrative subordinates, resulting from his removal power. Since the establishment of the Department of Foreign affairs by the first Congress, "Congress has repeatedly sanctioned the view that the power constitutionally resides in the President to dismiss all officers who are appointed by him alone or by and with the advice and consent of the Senate."[47] Such a power of removal, according to Willoughby, allows the President to share in the direction and control of the administrative process.[48] But this power did not give the President unlimited control of the administrative branch of the government. It allowed the chief

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[46] Willoughby, An Introduction to the Study of . . . Modern States, p. 252.

[47] Ibid., p. 255.

[48] "It must be evident that the officer possessing this power, not only shares in the responsibility for the proper conduct of the administration of affairs but is in a position where he can direct and control the manner in which the administrative power shall be exercised." Ibid., p. 257.

executive to claim a share of the otherwise complete authority of Congress over administration.[49] Indeed, at one point in his discussion, Willoughby was content to state that the President's power of removal simply strengthened his role as general manager of the administrative branch which the President assumed as an agent of Congress through legislative delegation of the powers of direction and supervision.[50] Whereas Goodnow had raised this presidential power to the status of a major theoretical postulate in his scheme for the control of administration, Willoughby relegated it to the level of secondary concern and continued to emphasize the complete power of the legislature over administration.

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[49] "[Willoughby] was, of course, quite cognizant of the pragmatic consequences for administration of Presidential possession of the power of removal, but he refused to concede that the removal power thereby gave the President an unlimited control over administrative officers in their performance of their duties. Presidential discretion was controlling only in so far as it did not conflict with applicable provisions of law as declared by the legislature and interpreted by the courts. The function of the President, as chief administrator, was primarily that of a superior law enforcement officer." Grundstein, op. cit., pp. 297-298.

[50] Willoughby stated that the power of appointment and removal merely strengthened the President's delegated powers of direction and supervision of administration. The delegated powers were, however, "primarily exercised by him but as an agent of Congress, which as a matter of expediency has conferred them upon him." Willoughby, An Introduction to the Study of . . . Modern States, p. 388.

The governmental system portrayed by the basic postulates of Willoughby's thoughts was one composed of congressional departments of administration headed by legislative agents combined with a separate and independent President who was concerned only with certain specified duties of a political nature. The conclusion flowing from such a view is that the heads of the executive departments, members of the President's cabinet, are constitutionally subject to the direction and control of Congress. Willoughby did not hesitate to draw such a conclusion. It is expressed well in one of his later writings:

> In point of fact these departments do not have an iota of executive authority. They are administrative departments pure and simple. With the exception, to a certain extent, of the State, War, and Navy Departments, they are not even under the direction of the chief executive except in so far as Congress has seen fit so to provide. In the first organization of our governments, national and state, care was taken to make it clear that the President and the Governors should, in all cases, be given the executive power. This term "executive power" was not deemed, however, to be synonymous with, or even to include, administrative power. The latter power was, as has been pointed out, vested wholly in the hands of the legislature, and is today exercised by that branch of our governments through agents directed and controlled by it.[51]

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[51] Willoughby, "The Science of Public Administration," supra, n. 43, p. 42. He quotes a Senate report (Senate Report No. 837, 46th Congress, 3d Session, February 4, 1881) to substantiate this interpretation: "The department and their principal officers are in no sense sharers of this power [the executive power of the President]. They are the creatures of the laws of Congress exercising only such

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Since the function of administration involved the nonpolitical implementation of the law, Willoughby was also concerned with fashioning an administrative structure that would embody what he considered important principles of organizational efficiency. One of these principles was the necessity for a general manager that Willoughby drew from the example of a corporate form of organization. He thus urged the strengthening of the President's role of general manager of the administrative branch to produce efficiency in administration. The legislative body, with plenary power over administration, was the source of power necessary to implement this principle, and Willoughby, therefore, recommended that Congress raise the President to the status of a general manager. This was to be

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powers and performing only such duties as those laws prescribe. . . . The Secretaries were made heads of departments; they were charged by law with certain duties, and invested by law with certain powers to be used by them in administration confided to them by the laws. They were in no sense ministers of the President, his hand, his arm, his irresponsible agent, in the execution of his will. There was no relation analogous to that of master and servant, or principal and agent. The President cannot give them dispensation in the performance of duty or relieve them of the penalty of non-performance. He cannot be impeached for their delinquency; he cannot be made to answer before any tribunal for their inefficiency or malversation in office; public opinion does not hold him to stricter responsibility for their official conduct than that of any officer. They are the creatures of law and bound to do the bidding of the law." Ibid., pp. 11-12. Willoughby maintained that this view had been given constitutional sanction by the United States Supreme Court in Kendall v. United States, 12 Peters 524 (1838). Ibid., p. 12.

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accomplished by three types of legislative delegation: (1) passing statutes conferring authority upon the President to direct, supervise, and control the operations of subordinate administrative services and activities; (2) adoption of the executive budget; and (3) reorganization of the administrative branch into an integrated hierarchy of unifunctional departments with the President as the central director.[52]

The administrative organization of the national government would then resemble a corporation with the Congress as the board of directors and the President as a general manager. The President, as the organizational embodiment of the strictly constitutional executive power, was an independent and coordinate department of government free from congressional control, but in his role of general manager the chief executive would occupy an entirely different position. He would become simply another legislative agent. "In this capacity he will be strictly a subordinate of the legislature, the agent through wich the latter exercises the powers of general administration."[53]

Since this organizational device was designed to implement the correct principles of administrative efficiency, the President's control

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[52] Willoughby, Principles of Public Administration, pp. 39-40.

[53] Ibid., p. 49.

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of administration, as a general manager, was oriented toward the attainment of this goal. In a similar fashion, the responsibility of the President to the legislature, as an agent of that body, was defined in terms of efficiency. "The primary responsibility of the chief executive to the legislature as general manager is that of seeing that the administrative affairs of the government are being honestly, efficiently, and economically run."[54] In place of Goodnow's constitutionally ordained efficiency engineer, Willoughby substituted a legislative hireling.

Willoughby and Goodnow differed in their major conclusions concerning the proper central organ for the control of administration. Willoughby pointed to the legislative body, while Goodnow emphasized the presidency. Despite this difference, however, both men formulated conceptual schemes that contained common elements. Both, for example, based their conclusions upon a theoretical distinction between the function of policy-making that involved the expression of the state will through political choices and the function related to the nonpolitical implementation of the laws. This common view of the administrative process also led both Willoughby and Goodnow to concentrate their analyses upon the twin values of efficiency and

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[54] Ibid., p. 43.

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administrative insulation from politics.[55] Since the administrative function did not involve any element of subordinate policy-making, but rather provided an almost mechanical organizational means to predetermined goals, efficiency and impartiality became the dominant motivational values in both schemes of thought.

Neither man, therefore, was concerned with the political control of the use of administrative discretion. Interestingly enough, however, both formulated schemes of thought that contained implicit solutions to this problem. The implications for a doctrine of presidential control of administrative discretion contained in Goodnow's study have been traced out earlier. It remains only to emphasize the underlying consequences of Willoughby's thoughts.

Although Willoughby spoke of presidential direction of administration, he talked in terms of a legislative agent, and he assigned central importance to the concept of congressional control of administration. The administrative agencies were constitutional organs of Congress, and they were subject to the direction and control of the legislative body. The ultimate conclusion of Willoughby's analysis was that the administrative agencies were organizational means to

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[55] Indeed, it could hardly be denied that Willoughby, as much as Goodnow, was a captive of the influence of the doctrine of neutral competence as described by Kaufman. See supra, n. 4.

allow Congess to do what it could not do itself. Congress simply delegated the necessary power and retained the function of direction and control.

The logical deduction from such premises is that Congress is the governmental organ for the continuous and systematic control over the use of the discretionary powers of administrative agencies. Willoughby did not draw this conclusion, for he was concerned primarily with administrative efficiency, but once again another contemporary doctrine lay hidden and dormant in an early scheme only to await elaboration when the problem of the political control of administrative discretion became a concern of the first magnitude.

CHAPTER III

CONTEMPORARY DOCTRINES OF THE CONTROL OF ADMINISTRATIVE DISCRETION

The three doctrines--presidential control, the judicial formula, and legislative control--that compete for dominance in the contemporary era were recognized fairly early. Blachly and Oatman noted this doctrinal conflict in 1940. Although they used different labels, the essence of the situation that they explained was the same as the central theme of doctrinal competition presented here. At that early date they declared that "three conflicting doctrines of public administration are now struggling for domination of the federal government. . . . These doctrines may be called: (1) the doctrine of executive management; (2) the doctrine of judicial formula; (3) the revisionist doctrine."[1] Wallace S. Sayre, eleven years later, while

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[1] Frederick F. Blachly and Miriam E. Oatman, Federal Regulatory Action and Control (Washington: The Brookings Institution, 1940), p. 3. Their third doctrine is a scheme based upon evolutionary and empirical views of the administrative organization: "The revisionist doctrine sees in the present administrative system a fairly satisfactory adaptation of structure and relationships to function. At the same time, it advocates certain improvements. . . . The administrative structure is not a haphazard assemblage of miscellaneous

describing the theories of administrative accountability and responsibility that prevailed during the decade beginning in 1940, also discovered a conflict among doctrines similar to those described below.[2]

Presidential Control

The contemporary doctrine of presidential control is a scheme composed of particular values and important interpretations that are woven into a fairly distinct and distinguishable conceptual system for the continuous control of administrative discretion. These theoretical postulates are perhaps best represented in several official reports

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parts. It is a system, and an organic system, in which specialized organs perform differentiated functions. Further evolution, however, can improve the system." Ibid., p. 5. This doctrine eschews theoretical schemes and emphasizes a simple empiricism. "The first step toward improvement, say the revisionists, is to understand the present system and to analyze, after careful study, its strengths and weaknesses. What is needed is not destruction of the system, but its improvement." Ibid., p. 6. Blachly and Oatman, when discussing this doctrine, obviously had in mind the 1937 report of the Byrd Committee. See United States Congress, Senate, Preliminary Report of the Select Committee to Investigate the Executive Agencies of the Government, 75th Congress, 1st Session, August 16, 1937, Senate Report No. 1275. This study was done by the Brookings Institution for the select committee established by Senate Resolution 217 of the Seventy-fourth Congress passed on February 24, 1936. Study of this report reveals that, despite the enunciations of empiricism, the revisionist doctrine contains theoretical postulates that classify it with the scheme of legislative control of administration.

[2] Wallace S. Sayre, "Trends of a Decade in Administrative Values," Public Administration Review, XI (Winter, 1951), 1-10.

and particular articles and books. For the purposes of this discussion the following sources will best serve as a basis for analysis and evaluation: (1) the 1937 "Brownlow Committee" report and a related study by James Hart,[3] (2) the 1949 and 1955 "Hoover Commission" reports,[4] and (3) an early article written by James Hart that contains one of the earliest systematic presentations of the doctrine.[5]

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[3] The President's Committee on Administrative Management: Report of the Committee with Studies of Administrative Management in the Federal Government (Washington: United States Government Printing Office, 1937). The committee, created by President Roosevelt on March 20, 1936, was composed of three eminent students of government, Louis Brownlow, chairman, Charles E. Merriam, and Luther Gulick. James Hart contributed a detailed analysis of the rule-making power of administration for this report. See James Hart, "The Exercise of Rule-Making Power," ibid., pp. 311-355.

[4] The Commission on Organization of the Executive Branch of the Government, "Concluding Report," May, 1949, and "General Management of the Executive Branch," 1949. This commission was organized pursuant to Public Law 162, 80th Congress, July 7, 1947. The Commission on Organization of the Executive Branch of the Government, "Final Report to the Congress," June, 1955. This later "Hoover Commission" was created by Public Law 108, 83d Congress, 1st Session, July 10, 1953. There were also numerous detailed studies of various aspects of the administrative organization of the national government by small groups associated with both of these commissions.

[5] James Hart, "The President and Federal Administration," in Haines and Dimock (eds.), Essays on the Law and Practice of Governmental Administration (Baltimore: The Johns Hopkins Press, 1935), pp. 47-93. See, also, Louis Brownlow, The President and the Presidency (Chicago: Public Administration Service, 1949), and E. Pendleton Herring, "Executive-Legislative Responsibilities, American Political Science Review, XXXVII (December, 1944), 1153-1166.

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One of the central elements in the contemporary doctrine is the emphasis upon the political responsibility of administrative discretion. Efficiency and impartiality, so prevalent as motivational values in the earlier doctrines of Goodnow and Willoughby, accompanied the demise of the theoretical distinction between politics and administration. The problem of structuring the discretion of the administrative branch to assure the consent of the governed has arisen to take its place.

The doctrine of presidential control relates this underlying objective to an emphasis upon the presidency as the central control organ. No detailed analysis of the President's constitutional position in relation to the administration, however, similar to that provided by Goodnow early in the history of public administration and administrative law, is included in this doctrine. Rather, in place of Goodnow's conclusion concerning the original division of the President's power, this doctrine simply concludes that the President has always been considered the constitutional chief executive and administrative chief. The Brownlow Committee declared that the presidency embodied the three functions of political leader, symbolic head of the nation, and chief executive and administrative chief, and concluded that "in many types of government these duties are divided or only in part combined, but in the United States they have always

been united in one and the same person whose duty it is to perform all of these tasks."[6] This unity of political and administrative powers in the presidency is assumed to have been present from the beginning of the national government because it is based upon original constitutional grants of power to the President. The grants of powers in Article II of the United States Constitution that vest the "executive power" in the President of the United States and declare that "he shall take care that the laws be faithfully executed"[7] are conceived as molding a President who is both an independent chief executive possessing important political powers and the administrative chief who serves as the central director and supervisor of the administrative activities of the national government.

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[6] The President's Committee on Administrative Management, p. 2. This contemporary development serves as the central theme of Grundstein's article. "The distinction between administrative power and executive power, a distinction which once had the stature of a first principle, is today on the verge of obliteration, and ready and waiting to replace it is the concept of the unity of the executive power." Grundstein, op. cit., p. 287.

[7] United States Constitution, Article II, section 2. Speaking of the administrative powers of the President, the Brownlow Committee stated, after a study of the national government organization, that "we find in the American Government at the present time that the effectiveness of the Chief Executive is limited and restricted, in spite of the clear intent of the Constitution to the contrary. . . ." The President's Committee on Administrative Management, p. 3.

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This constitutional unity of presidential powers is accompanied by an emphasis upon the unity of the presidency and the administrative branch. These two organizational units are viewed as a single interrelated organizational mechanism for the execution of the laws. Since the administrative process and the administrative powers of the President are inextricably related in the execution of the laws, the organizational counterparts of these functions are similarly intertwined. A conceptual unity of constitutional powers is thus combined with an organizational unity to present a single, integrated administrative organization of the national government. The doctrine of presidential control envisages an administrative structure that is symmetrically organized into a system of hierarchical patterns of authority leading up to the centralized direction of a political responsible administrative chief with complete constitutional powers of direction and control.[8]

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[8]This is the conceptual basis of many schemes for reorganizing the administrative organization of the national government. It was, for example, the premise for one of the major proposals of the Hoover Commission. "Establish a clear line of control from the President to those department and agency heads and from them to their subordinates with correlative responsibility from these officials to the President, cutting through the barriers which have in many cases made bureaus and agencies partially independent of the Chief Executive." The Commission on the Organization of the Executive Branch of the Government, "General Management of the Executive Branch," p. 7.

This important conclusion, a basic element in the present doctrine of presidential control, is related to the emphasis upon the importance of the political responsibility of administrative discretion. The combination of these two factors in the present scheme led to the obvious conclusion that the control and direction of administrative discretion, to provide that necessary political responsibility, must be provided by an elected President as administrative chief. The discretionary authority placed by statutory delegation in subordinate administrative units must be subject to the direction and control of the President in order to insure accountability to the governed. Hart states that the final responsibility for "the functional discretion of all administrative agencies . . ."[9] should rest in the office of the President. The continual day-to-day control of administrative discretion necessary to maintain the political responsibility of administration would thus be provided by presidential review and clearance.

The independent regulatory commissions, according to the presidential control doctrine, violate this constitutional scheme and

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[9]James Hart, "The President and Federal Administration," p. 60. The control of functional discretion was described by Hart as "control over the exercise by his subordinates of the discretion vested in them by law for the carrying out of the purposes of their respective services." Ibid., p. 51. In his discussion of administrative rule-making, Hart came to the same conclusion: "The surest way to safeguard the public is to place the exercise of this discretion directly under the control and hence under the unique responsibility of the President." James Hart, "The Exercise of Rule-Making Power," p. 314.

abrogate the proper single center of presidential responsibility and control. They represent autonomous areas of independent administrative discretion. The Brownlow Committee report, for example, condemned them as a "headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers."[10] Both James Hart, in his early 1935 study, and the Brownlow Committee made explicit recommendations concerning these commissions. Both concluded that the executive and regulatory functions of these bodies should be placed in executive departments under the control of the President. These identical conclusions emerged from a common conceptual core that emphasized both the propriety and the necessity of presidential control of administrative discretion.[11]

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[10] The President's Committee on Administrative Management, p. 40. Cf. Brownlow, The President and the Presidency, pp. 101-102.

[11] The Brownlow Committee recommended that such independent administrative units should be divided into an administrative section and a judicial section. The former section would possess the executive and regulatory functions of the commissions and would be placed in an appropriate executive department. The adjudicatory functions of these commissions would be placed in the judicial section and remain independent of the President except for "housekeeping" functions, such as budgeting, personnel administration, and materiel control. The President's Committee on Administrative Management, pp. 40-41. Hart concluded that the proper organization for presidential control required that the executive and regulatory functions, and the application of the general regulations to concrete situations, "should be the functions of an expert departmental bureaucracy under the functional control of the political superiors of the department concerned." Hart, "The President and Federal Administration," p. 78. He would thus assign the executive and regulatory powers of the commissions to an executive department

Presidential control would not only assure the political responsibility of administration, according to the contemporary doctrine, but it would also promote that control and direction of the use of administrative discretion that best approximates the public interest. The responsibility for the final choices of particular decisions and actions, in such a case, would rest with the single national public officer who is elected by a nationwide constituency. Furthermore, the President is in the best position to balance and weight the many contending political interests of society. In the first place, he obtains a more balanced view of the conflicting forces from his national office. Secondly, he is less likely to capitulate to one dominant political power bloc in society.

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and the adjudicatory functions to an administrative court that he later recommended. The first Hoover Commission did not enter this rather politically charged field. The discussions of the problem of the independent regulatory commissions were confined primarily to the internal organization of these bodies, and the major recommendation that emerged from the earlier investigation was that the chairman of each commission should be given the authority, subject to presidential direction, of an administrative manager. See The Commission on the Organization of the Executive Branch of the Government, "Regulatory Commissions" (March, 1949), pp. 5-6. The second Hoover Commission, however, did touch upon the question of the adjudicatory functions of the independent regulatory commissions. The commission approved a recommendation of one of its task force study groups to establish an "Administrative Court," composed of a "Trade Section" and a "Tax Section," which would take over the adjudicatory functions of those independent regulatory commissions concerned with these two fields. See Commission on Organization of the Executive Branch of the Government, Legal Services and Procedure (Washington: Government Printing Office, March, 1955). See also footnote 39, pp. 71-72, infra.

The President's position in the political process is thus coupled with his position in the administrative process to provide that beneficial and necessary control of administrative discretion in the name of the consent of the governed while, at the same time, promoting a coordinated national leadership. The proposal for presidential control is based on the thesis that "this is the best available means of securing a balanced combination of wholesome leadership in national purposes, intelligent experimentation, coordinated planning based upon a concert of interests, and public responsibility."[12]

It can now be seen that the contemporary doctrine of presidential control of administration is composed of several basic elements. First and foremost, it is oriented toward the goal of the control of administration in order to promote the political responsibility and accountability of the exercise of administrative discretion. It also contains a particular interpretation of the constitutional powers of the President and the relation of the President to administration which, when coupled with the view of the President in the political process, leads to a scheme of presidential control of

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[12] Hart, "The President and Federal Administration," p. 60.

administration.[13] It furnishes a solution that points to the structuring of the administrative process to establish complete and continuous control and direction by the chief executive.

The doctrine of presidential control, in its ultimate conclusion, leads to the unity of administration and presidential powers. The administrative organization becomes merely the organizational means by which the President carries out his constitutional duty of executing the laws. These units are appendages of the presidency, and, in this manner, the administration and the presidency are actually one and the same. The discretionary authority delegated to administrative units is conceptualized as presidential discretion; administrative decisions and actions become those of the President.[14] This

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[13] Blachly and Oatman use the term "executive management," but they reach a similar conclusion: "The essential feature of the doctrine of executive management is the assertion that all administrative activities of the federal government (except those of a quasi-judicial nature) should be under the control of the Chief Executive. According to this theory, the structure and the relationships of administrative authorities should be established with a view to facilitating such control." Blachly and Oatman, op. cit., p. 3.

[14] This conclusion has important consequences for judicial review of administrative action. The acceptance of this doctrinal view would either force a reinterpretation of several judicial rules or practically eliminate any judicial review of administrative discretion of subordinate administrative agencies. If administrative discretion is actually presidential discretion, then the courts will not attempt to review the exercise of such authority according to the rule of judicial noninterference announced in the early case of

fundamental conclusion, which emerges from a careful consideration of the doctrine of presidential control, is well reflected in the proposed General Executive Management Act of 1949. Section 101 of Title 1, Part 1, of the proposed bill epitomizes this basic implication of the doctrine of presidential control. That particular section enunciates the principles that should govern the execution of the executive power of the national government. It read, in part:

> (b) The President is the head of the executive branch of the Government and is responsible for the faithful execution of the whole of the executive power of the United States, including the faithful execution of the laws enacted by Congress, as provided in article II of the Constitution.
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> (c) The executive agencies of the Government exist in order to enable the responsibility of the President, as set forth in article II of the Constitution, to be discharged efficiently. Such executive agencies are classifiable . . . as principal executive agencies and subordinate executive agencies. All such executive agencies, and the heads thereof, are merely representatives of and acting for the President; and whenever any function is vested by law in any such agency or in the head thereof, such function is so vested merely for convenience. Such function should be treated as a function actually vested in the President and being exercised by the executive agency concerned, or the

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Mississippi v. Johnson, 4 Wall. 475 (1867). Furthermore, if decisions of subordinate executive agencies are to be subject to the final approval of the President as the constitutional administrative chief, the judicial doctrine of administrative finality and judicial noninterference with presidential discretion would effectively prevent judicial review also. See United States v. George S. Bush and Co., Inc., 310 U.S. 371 (1940); Chicago and Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948). See also Trans World Airlines, Inc. v. Civil Aeronautics Board et al., 184 F. 2d 66 (U.S.C.A., 2d Circuit, 1950).

head thereof, pursuant to authority so to do derived from delegations by the President. In connection with the exercise of any such function, the executive agency and the head thereof is (unless the function be quasi-judicial in nature) at all times subject, in respect of all matters relating to its exercise (including the time, manner, and extent of its exercise), to the direction and control of the President.[15]

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[15] S. 942, 81st Congress, 1st Session, February 14, 1949. Title 1, Part 1, is reproduced in full by Grundstein, op. cit., pp. 285-286. The same principles apply to the subordinate executive agencies and the heads thereof, except that they are also made subject to the control of "the head of the principal executive agency in which such subordinate executive agency exists or of which it is an organizational unit." Ibid., p. 286. It is interesting to note that Congress refused to enact this enunciation of the doctrine of presidential control, while, only one year later, it passed the Presidential Subdelegation Act of 1950. The earlier bill would have greatly altered the position of administration in relation to the presidency and the legislative body and weakened the channels of congressional direction of administration. The latter statute, on the other hand, contained no innovations and gave no added powers of administrative direction to the President. It was, in fact, merely a redundancy. It granted statutory authorization to the President to delegate his statutory powers and duties to "presidential" officers in the executive branch. See Public Law 673 (81st Cong., 2d Sess.). It is discussed and analyzed in Glendon A. Schubert, Jr., "The Presidential Subdelegation Act of 1950," Journal of Politics, XIII (November, 1951), 647-674. Such presidential subdelegation of statutory functions had already been sanctioned by the judiciary as a constitutional practice, and the statute was completely unnecessary as an authorization to the President. See Glendon A. Schubert, Jr., "Judicial Review of the Subdelegation of Presidential Powers," Journal of Politics, XII (November, 1950), 668-693. The inherent consequence of this statute was to substitute a statutory grant for a constitutional authorization, and, in this manner, to weaken the basis of presidential subdelegation.

The Judicial Formula

The primary concern of the contemporary doctrine of the judicial formula remains the same as its historical predecessor. It reiterates Freund's earlier emphasis upon the problem of administrative discretion and the protection of private rights. The present conceptual scheme for the control of administrative discretion, therefore, is established around the problem of protecting private rights and not that of insuring political responsibility. In a manner again reminiscent of Freund's early writings, the solution to this important problem is conceived as the imposition of procedures traditionally associated with judicial organs upon the administrative process, coupled with an expanded judicial review of administrative decisions and actions.

> Those who propound the doctrine of the judicial formula take the position that the thing most to be feared in federal administration is "administrative absolutism" or the impairment of personal and property rights by the "great Leviathan" of the administrative machinery. In order to deprive the administration of its alleged power to injure, they would give it very little discretion; would compel it to act in so far as possible according to the judicial formula of notice and hearing followed by a decision; and would subject to judicial review practically every act which could even remotely affect rights.[16]

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[16] Blachly and Oatman, op. cit., p. 4.

This present conceptual scheme for the control of administration had its beginning in 1933. It was in this year that the American Bar Association established its Special Committee on Administrative Law to study the problems inherent in the administrative process and formulate specific recommendations on this subject.[17] The frame-of-reference of the special committee was outlined during its first year of operation. An early report of the special committee declared that its activities would be oriented toward introducing a greater measure of "due process" into the practice and procedure of administrative agencies and more uniformity in the method and scope of judicial review of administrative decisions.[18] This initial outline of general objectives was stimulated by what was considered to be an alarming trend toward administrative discretion represented in the legislation of that period. The special committee found three particularly dangerous tendencies: (1) a tendency to concentrate legislative and judicial functions in officials or agencies responsible to the President and not independent bureaus or commissions,[19] (2) delegation of both broad quasi-legislative powers and

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[17] American Bar Association Journal, XIX (1933), 615.

[18] Ibid. Cf. Reports of the American Bar Association, LVIII (1933), 415.

[19] American Bar Association Journal, XIX (1933), 416.

quasi-judicial powers to administrative authorities,[20] and (3) the absence of any effective judicial review of administrative decisions.[21]

The original solution offered by the special committee to the problem of controlling and limiting administrative discretion centered around a proposed administrative court composed of a trial division and an appellate division. This administrative court was to absorb the quasi-judicial functions of administrative authorities and provide an organization channel for review by the United States Supreme Court.[22] This proposal was dropped in 1937, however, after it had been the subject of considerable opposition and condemnation from members of the American Bar Association itself.[23] The special

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[20] Ibid., pp. 418-423.

[21] Ibid., p. 424.

[22] American Bar Association Journal, XXI (1935), 133. Judge Joseph B. David, a member of the A.B.A., voiced his disapproval of the Special Committee on Administrative Law and their proposal for an administrative court at the fifty-seventh annual meeting of the association. He answered his own question concerning what the special committee proposed: "To turn over the legislative and judicial functions of these various boards to the courts. One would apprehend that there is some halo around the courts, and that the people in America today have more confidence in the courts than they have in these bureaus. I doubt it." Reports of the American Bar Association, LIX (1934), 148.

[23] The story of the termination of this proposal is an interesting one. The opposing forces within the A.B.A. were composed mostly of members of other committees of the association that were

committee then turned its efforts to drafting a bill that finally culminated in the Administrative Procedure Act of 1946.[24]

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concerned with problems of the independent administrative tribunals which would be abolished by the new administrative court, and members who specialized in practice before these bodies. See Reports of the American Bar Association, LXI (1936), 234, 757. The opposition maintained that such a proposal would "scrap everything that has been done to create an orderly settlement of controversies between the citizen and the government." Ibid., p. 224.

[24]60 Stat. 237 (1946). The history of these activities of the A.B.A. can be traced in the following Reports of the American Bar Association, LXII (1937), LXIII (1938), LXIX (1944), LXX (1945). The 1946 act was a compromise between the national administration and the American Bar Association. Kenneth Culp Davis, Administrative Law (St. Paul: West Publishing Company, 1951), p. 9. It did not contain the minimum requirements that the A.B.A. thought necessary to control administrative discretion. The minimum elements necessary to structure the administrative process for adequate protection of private rights are apparent in an early proposed bill drafted by the American Bar Association for introduction in Congress. It included a mandatory requirement that all rules and regulations, both interpretative and substantive, should be issued only after adequate notice and a hearing. The United States Court of Claims was to be granted jurisdiction to declare such rules valid or invalid upon the application of anyone claiming that such a rule would adversely affect him (before application of the rule to the person) by a trial de novo based upon an analysis of the facts from the administrative hearing. The proposal also included an intradepartmental board to hear and determine appeals from lower administrative regulations and orders by any aggrieved person. The decision of the board would be determined only after a hearing and would be based upon facts and conclusions from a written record. The board's decision would also be subject to full and complete judicial review by the United States Circuit Courts of Appeals or the United States Court of Claims. Reports of the American Bar Association, LXII (1937), 790-794. A draft of the proposed bill can be found in ibid., pp. 846-850.

The history of the organizational efforts of the American Bar Association reveals that its activities and various proposals were based upon a distinct conceptual foundation. This was the doctrine of the judicial formula. The protection of private rights against the activities and consequences associated with administrative discretion, according to this doctrine, demanded a structuring of the administrative process that would assimilate this process into a judicial mold of judicial procedure and broad judicial review. This doctrinal conclusion is manifested in the Administrative Procedures Act in one of the statutory requirements that represented a major victory for the American Bar Association's efforts. This was the imposition of the procedures of a trial and judicial procedure--basic elements of this judicial formula doctrine--upon all administrative rule-making required "by statute to be made on the record after opportunity for an agency hearing. . . ."[25] Freund's voice seems once again to

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[25]Section 4b of the Administrative Procedures Act of 1946, 60 Stat. 237. In a rather vitriolic attack upon the A.B.A. of 1946, Blachly and Oatman saw a sinister purpose behind the enactment of this doctrine of the judicial formula and declared that it was based "upon the desire of lawyers to have the maximum opportunity to participate in the process of administration, to block administrative action, and to subject the administrative process to judicial methods and judicial controls at every point." Frederick F. Blachly and Miriam E. Oatman, "Sabotage of the Administrative Process," Public Administration Review, VI (Summer, 1946), 226.

speak out, and his solution to the problem of "unstandardized power" becomes the clarion call of the American Bar Association.

No clearer and more emphatic statement of the doctrine of the judicial formula, however, has perhaps been made in the contemporary era than the study of legal services and procedures in the national government prepared by a task force of the recent Hoover Commission.[26] This official study reflects very clearly the conceptual elements that compose the present doctrine of the judicial

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[26]This Task Force on Legal Services and Procedures was established by the Hoover Commission created in 1953. See supra, note 4. The report was entitled Task Force Report on Legal Services and Procedures (March, 1955). The task force was composed of fourteen members who were all lawyers or judges. It included such prominent men as James M. Landis, Carl McFarland, Harold R. Medina, and E. Blythe Stason. The entire group was united in outlook and conception by a common legal background of training and experience; see Commission on Organization of the Executive Branch of the Government, Legal Services and Procedures (March, 1955), Appendix A, pp. 113-114. The study of legal procedures and the administrative process was conducted primarily by two smaller groups of the task force chaired by Carl McFarland and E. Blythe Stason. Task Force Report on Legal Services and Procedures, p. 5. The study thus maintains a close personal affinity with the earlier minority report of the Attorney General's Committee on Administrative Procedure written by McFarland, Stason, and Arthur T. Vanderbilt. The recommendations of this minority report included a complete separation of functions of administrative agencies by assigning all adjudicatory functions of such agencies to independent organs and a broadened judicial review of administrative decisions. See the Final Report of the Committee on Administrative Procedure Appointed by the Attorney General, Administrative Procedure in Government Agencies, Senate Document No. 8, 77th Congress, 1st Session, 1941, pp. 203-247.

formula. The task force report is based upon an emphasis on the beneficial and necessary relationship between the protection of private rights and adequate and uniform procedural standards to guide administrative discretion. This forms the basis for the important frame-of-reference within which the administrative process is analyzed. This conceptual framework is defined explicitly by the task force in a statement of the major policy considerations that "guided the task force in this phase of its work. . . ."[27]

> Sound administrative procedures are indispensable to administrative justice.
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> . . . . . .
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> The more closely that administrative procedures can be made to conform to judicial procedures, the greater the probability that justice will be attained in the administrative process.
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> Formalization of administrative procedures along judicial lines is consistent with efficiency and simplification of the administrative process.
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> . . . . . .
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> The Administrative process is improved and rendered more fair and efficient by uniform standards and forms of procedure.[28]

The doctrine is also vividly manifested in many of the specific recommendations of the task force. Such proposals point to the imposition of judicial procedures on the administrative process and

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[27] Task Force Report on Legal Services and Procedures, p. 138.

[28] Ibid. This statement is difficult to reconcile with the earlier statement of the task force that "problems encountered by the task force have arisen from factual analysis and not from preconceptions." Ibid., p. 3.

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an increased and expanded judicial review of administrative decisions. One of the major proposals of the study was that the separation-of-functions requirement of Section 5(c) of the Administrative Procedures Act of 1946 concerning adjudicatory activities of administrative agencies should be applied to administrative rule-making that is based upon a hearing.[29] The clear import of this recommendation is the assimilation of the process of administrative discretion into the procedural context of a public trial with cross-examination and judicial techniques for the accumulation of facts.[30] The task force

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[29] Task Force Report on Legal Services and Procedures, p. 164. "To assert that formal rule making is, unlike adjudication, not an adversary proceeding is to have regard only to the form of the proceeding and to ignore realities. In many respects, where rules are promulgated on the basis of a record made at a formal hearing involving sharply contested issues of fact, the agency is, in effect, prosecuting the proceeding against private parties to be affected in the future by the rules." Ibid. This is indeed an interesting doctrine. The task force would apply the procedures traditionally associated with the protection of private rights to a procedure that involves no infringements of private rights, but might, at some time in the future, affect some private rights by application of the administrative regulations.

[30] This proposal was criticized strongly by Louis Jaffe. "Most rule-making involves the weighing of a complex of considerations, many of them of the kind we call political; the judgements to be made are judgements of more or less, of feasibility, of prognosis. Ordinarily such decisions are the product of the staff--the technical officers embodying special knowledge and continuity of experience--and the political officers who must rely on the technical experience of the staff, but temper and direct it. This cannot be and should not be conceived as the decision of a judge." Louis L. Jaffe, "Basic

supplemented this proposal by the recommendation that such separation-of-functions should also be applied to the final agency decision itself.[31] Thus, the agency members charged with the final decision concerning important policy decisions should not be allowed to consult with agency subordinates who "worked on the case below. . . ."[32] They would simply be furnished with review staffs composed of lawyers and technically trained personnel to review the evidence and conclusions brought out in the original hearing.[33] Such recommendations reveal an obvious attempt to restructure the process of administrative discretion into a judicialized procedure of hearing and review similar to a judicial organ attempting to arbitrate a dispute involving private rights.[34]

Issues: An Analysis," in "Hoover Commission and Task Force Reports on Legal Services and Procedure: Symposium," New York University Law Review, XXX (1955), 1283.

[31] Task Force Report on Legal Services and Procedures, p. 176.

[32] Ibid., p. 179.

[33] Ibid., pp. 179-180.

[34] Jaffe's criticism of one particular proposal applies equally well to the conclusion arrived at from a perusal of the discussed recommendations. They are indeed "part and parcel of the intent which runs through these reports to minimize the policy-making function of the agency, to rob it of the mechanisms needed for its strength, and to turn the agency into a judicialized board of appeal." Jaffe, op. cit., p. 1282.

The task force also concluded that "there is a pressing need for widening the area of judicial control of the administrative process."[35] One of the major areas that necessitated increased judicial control, according to the task force, involved administrative decisions affecting privileges and benefits granted to the citizen. Although such decisions did not relate to private rights, the task force declared that judicial control was necessary on the theory that the courts must control the administrative process for Congress because Congress could not provide adequate control itself.

> Judicial review should not be denied a citizen whose claim for a benefit which the law grants to him is disallowed by an agency. The function of the courts in these matters is not to protect a right which the claimant already has under the law. It is, rather, to assure that the processes of Government are fair and impartial and that the congressional purpose in authorizing the executive branch to grant the benefit is faithfully executed. Congress cannot supervise the detailed administration of such laws. That is why discretionary authority is conferred by Congress upon the agency in the first place. Congress can be assured that its objectives are fully complied with only if claimants are given a day in court to test the exercise of administrative action pursuant to such conferred authority.[36]

Three additional areas in which a wider judicial review should operate were cited by the report. In the first place, the task force recommended that the judicial concept of "abuse of discretion" be

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[35] Task Force Report on Legal Services and Procedures, p. 206.

[36] Ibid., p. 208.

interpreted to include "a clearly unwarranted exercise of discretion."[37] Such an expanded concept would allow the judiciary to better supervise an agency's exercise of delegated statutory discretion. The task force also proposed that judicial review should be extended by a legislative declaration that findings of facts by administrative agencies would be subject to court review on the whole record to determine whether reliable and substantial evidence could be found from a distillation of all the conflicting evidence presented at the hearing.[38] Finally, the report recommended that all mixed questions of law and fact should be submitted to the judiciary for determination and that the courts should not take a restrictive view of their reviewing function over such questions.[39]

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[37] Ibid., p. 217. The latter term referred to an unwise use of discretion, for the task force was concerned that "if the matter does not involve a choice between rival claimants, there is little possibility of setting aside discretionary administrative action, no matter how unwise under the facts its decision may be." Ibid.

[38] Ibid., p. 218.

[39] Ibid., pp. 216-217. See the bill proposed by the task force, entitled "To Improve Legal Procedures in the Executive Branch of the Government through the Enactment of an Administrative Code, and for Other Purposes." Ibid., pp. 359-396. In addition to including the recommendations discussed above, the bill included the proposal to establish an "Administrative Court." Such a court would be composed of two sections, a "Trade Section" and a "Tax Section." These sections would take over the various adjudicatory activities of administrative agencies in these fields in order to provide

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These major proposals clearly elaborate, in some detail, the contemporary doctrine of the judicial formula. Like Freund's earlier thoughts on the subject of the control of administrative discretion, this doctrine is based upon a predominant concern with the protection of private rights. It also follows Freund's footsteps in pointing to the procedures associated with the traditional judicial organs and to judicial review to structure and control the process of administrative discretion in order to provide such protection. A presentation of the third major doctrine completes the picture of the current patterns of thought concerning the control of administrative discretion.

Legislative Control

The third and final dominant doctrine of control of the present era--the doctrine of legislative control of administrative discretion--

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an independent tribunal for the settlement of disputes involving private rights. A majority of the members also recommended an "Immigration Section" and a "Labor Section," but these additional sections were not included in the proposed bill. See ibid., pp. 435-442. This proposed court was conceived as an intermediate and necessary step in returning adjudicatory activities to the courts in order to preserve the "integrity of the separation of powers." Ibid., p. 250. It was the expectation of the task force that "in the future, other clearly defined areas of administrative adjudication would be transferred to the Court and that, after case law had been accumulated and experience gained, some matters of adjudication handled by the Administrative Court might be transferred to the courts of general jurisdiction." Ibid., pp. 249-250.

is premised upon a predominant concern with the political responsibility of administrative activities. In this regard, then, it is similar to the doctrine of presidential control and distinguishable from that of the judicial formula. This important emphasis also differentiates the contemporary doctrine from its historical predecessor. Willoughby's primary orientation was toward a scheme that would produce an efficient and economical administration. Such a view was compatible with his theoretical dichotomy between politics and administration. The denial of this early concept, however, has given rise to the problem of the continuous control of administrative discretion in order to maintain political accountability of administration to the governed. The present doctrine is an attempt to provide a solution to this important problem.

The solution offered by the current doctrine, however, maintains a close affinity to Willoughby's earlier thoughts. It represents primarily an emphasis and elaboration of the implications for a scheme of control of administrative discretion found in the earlier design.

There is no single published source that contains a complete and detailed representation of this doctrine. Its major outlines have to be gathered from various writings and studies. Charles S. Hyneman, stimulated by the emphasis upon presidential control of

administration represented by the report of the Brownlow Committee, however, has produced a work that contains many of the important elements of this doctrine.[40] The so-called "Byrd Committee" report is also based upon premises of legislative control.[41] There are also various recent writings, among the more important of which are those by Bernard Schwartz,[42] that point toward the continuous congressional control of administrative discretion.[43]

The writings that develop the present doctrine of legislative control contain little detailed analysis of the constitutional position of administration in the American national government. A systematic

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[40] Charles S. Hyneman, Bureaucracy in a Democracy (New York: Harper and Brothers Publishers, 1950). See also Charles S. Hyneman, "Bureaucracy and the Democratic System," Louisiana Law Review, VI (1945), 309-349, for a shorter summary of his major ideas expressed in the former work.

[41] Preliminary Report of the Select Committee to Investigate the Executive Agencies of the Government, supra, n. 1.

[42] Bernard Schwartz, "Legislative Control of Administrative Rules and Regulations: The American Experience," New York University Law Review, XXX (May, 1955), 1031-1045. Bernard Schwartz, "Legislative Oversight: Control of Administrative Agencies," American Bar Association Journal, XLIII (January, 1957), 19-23.

[43] See Ernest S. Griffith, Congress, Its Contemporary Role (New York: New York University Press, 1951); Charles E. Gilbert and Max M. Kampelman, "Legislative Control of the Bureaucracy," Annals of the American Academy of Political and Social Sciences, 292 (March, 1954), 76-88; Herman Finer, "Administrative Responsibility in Democratic Government," Public Administration Review, I (Summer, 1941), 335-351.

study of this problem is thus not presented, but the criticisms of the doctrine of presidential control and the implications of various statements reveal fundamental interpretations that do point in the direction of Willoughby's conclusions on the place of administration and its control in the American constitutional system. The Byrd Committee report contained little constitutional theory, but, after mentioning the theory of executive centralization and a hierarchically organized administrative branch, it declares that "the theoretical case for executive centralization is an attractive one, but, practically, it is by no means certain that every part of the administrative organization need be brought under immediate executive supervision."[44] This problem of constitutional theory and interpretation did not command a major share of Hyneman's thoughts either. It is clear, however, that he did not accept the idea that the Constitution intended to place all administrative activities under the control of the President, and, in this manner, to insulate them from any congressional supervision and direction. He was content to dismiss this position by simply stating that "there is very little indeed to support the point of constitutional theory. The framers of the Constitution certainly did not make it explicit that Congress was to

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[44] Preliminary Report of the Select Committee to Investigate the Executive Agencies of the Government, p. 18.

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[44] Preliminary Report of the Select Committee to Investigate the Executive Agencies of the Government, p. 18.

refrain from addressing instructions to the heads of administrative establishments."[45]

Hyneman's critique of the theory of presidential dominance also reveals that he actually accepted the concept of the legislative grant of presidential review and direction of administrative decisions and actions. As Willoughby before him, then, Hyneman viewed presidential supervision and direction, not as a point of constitutional imperative, but rather as a matter of legislative policy. This becomes quite clear when Hyneman declares:

> The statement of the Constitution that "the executive power shall be vested in a President" and that the President "shall take care that the laws be faithfully executed" does not give him authority to issue a patent or fix the standards of quality and condition of grain or determine a dam's location. The authority to do any of these things lies in the official that is authorized by statute to do it. The President cannot issue the order for the duly authorized official or modify or revoke it unless a provision of law (expressly or by fair implication) says he may do so.[46]

The power of administrative direction rests with the legislature, not the presidency. According to this view, therefore, Congress is free to determine whether or not the President shall direct and

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[45] Hyneman, Bureaucracy in a Democracy, p. 168.

[46] Ibid., p. 318. Hyneman does recognize, however, that the President has a share in administrative direction in the fields of foreign affairs and military matters through his constitutional powers in these fields. See ibid.

supervise the exercise of delegated powers by the subordinate executive agencies. The ultimate conclusion of this theoretical postulate is that the agencies are organizational means for carrying out the powers of Congress, and, as such, may not only be made independent of presidential control, but may be directed to look to the legislature for direction and supervision. Schwartz states this conclusion in a very unambiguous manner:

> The administration, in the exercise of its delegated powers, acts solely as the agent of the legislature. But if this is true, the latter must clearly possess the authority to exercise continuous control over administrative activities. For it is a fundamental law of agency that a principal retains continuing control over his agent.[47]

This constitutional position of the administrative organization, in relation to Congress, is compatible with Hyneman's interpretation of the unrealistic basis of presidential control and his view of the necessary political control of administration. His entire analysis is based upon the problem of determining the proper means for assuring "that the administrative branch of the federal government will conduct itself in accordance with the wishes of the American people

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[47]Testimony of Bernard Schwartz, "Proposed Establishment of Committee on Administrative Procedure," Hearings Before a Special Subcommittee of the House Committee on Rules, 84th Congress, 2d Session, May 22, 23, 24, 1956, p. 60. This statement was made in regard to administrative rule-making powers, but its logic applies equally well to any discretionary power delegated to administrative agencies by Congress.

as a whole."[48] The President, although recognized as a political organ for the representation of the people's will, can not possibly personally furnish the necessary continuous political control of the bureaucracy. The theory of presidential control of administration, then, instead of providing political direction and control, creates a vacuum in which narrow partisan pressures attempt to control administrative decisions and actions. Hyneman believes that "to give the President a monopoly on the issuance of instructions to the administrative branch . . . is to free administrative officials to follow their own will (respond to other pressures) where they are today required to bow to the will of Congressmen."[49] The impossibility of furnishing the necessary political control of administration through the President, therefore, leads Hyneman to look to the legislative body for such control. It is the only other alternative to provide political direction, and he sees "great advantages to be gained

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[48] Hyneman, Bureaucracy in a Democracy, p. 42.

[49] Ibid., p. 171. The Byrd Committee, in regard to the independent regulatory commissions, saw an equally unfortunate consequence of presidential control of the subordinate legislative powers of these bodies. But the channels of partisan influence, in such a case, were viewed as leading through the presidency, not around the chief executive. The influence of powerful special interests would flow through the President to the department head and thence to the bureau chief who had taken over the activities of quasi legislation, and the policy decision would thus be made in the "wrong direction." Preliminary Report of the Select Committee . . ., p. 799.

from the continuation of day-to-day direction and control by Congress."[50]

In addition to this view that political direction and control of administration by Congress is the only realistic alternative, the doctrine of legislative control also views Congress as the embodiment of two other important values associated with the control of administration. In the first place, since administrative discretion raises the problem of maintaining the consent of the governed for decisions and actions ensuing from such authority, control of administrative activities must be associated with an organ of government accountable to the people. Secondly, the controlling organ must also be independent of the executive and the administrative branch so that supervision and direction can occur in a situation free from influences and loyalties that would contaminate effective control. These important considerations reaffirm the emphasis upon the legislature as the point of control of administration in the doctrine of legislative control. Congress is pictured as "the one great

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[50]Hyneman, Bureaucracy in a Democracy, p. 170. Hyneman declared that "the withdrawal of continuing direction and control by Congress, it seems to me, will have the almost certain result of reducing the amount of political direction and control to which the administrative branch is subjected, rather than of substituting a more systematic and thorough political direction and control on the part of the President." Ibid.

organ of government that is both responsible to the electorate and independent of the executive."[51]

The combined elements of the present doctrine thus lead to the conclusion that the legislative body must furnish the continual, day-to-day control of administrative discretion necessary in a democratic political system. Hyneman recognizes, however, that congressional control is not always formalized into a systematic procedure at the present time. It is often represented only by intermittent excursions into the arena of administration by individual congressmen or congressional committees. Such activities do not detract from the conclusions concerning the necessity for legislative control, however, but merely emphasize the need to systematize such control. Hyneman maintains that "the safer way for America . . . is to reduce the meddling and regularize the excursions and forays of Congress into the administrative area; not to bar Congress from such activity on a theory of presidential supremacy over administration."[52]

Congress itself, according to Hyneman, is the only body that can reduce such unwarranted interference. The legislative body

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[51] Schwartz, "Legislative Oversight: Control of Administrative Agencies," p. 20.

[52] Hyneman, "Bureaucracy and the Democratic System," p. 336.

must discipline its individual members to prevent situations in which particular members attempt to control and direct certain administrative officials in their official duties. Furthermore, if congressional committees are going to continue to maintain a close and influential scrutiny over particular administrative decisions and activities, "it may be desirable to clarify the authority of the committee by resolution or statute. . . ."[53]

In addition to these negative and preventive measures, however, the proponents of the doctrine of legislative control also propose several devices for establishing a formalized, day-to-day congressional direction of administration. One of the devices that is proposed represents a consensus among all the students who have investigated the problem of control through a conceptual framework made up of the theoretical postulates of the doctrine of legislative control. They all agree that effective congressional supervision of administrative discretion can be established by the adoption of the legislative veto or annulment procedure. This device is exemplified by the method of congressional approval or disapproval of executive reorganization plans in the national government and the English method of annulment or approval of subordinate legislation. It is viewed as

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[53]Hyneman, Bureaucracy in a Democracy, p. 172.

a method that will achieve the necessary continuous and systematic legislative control of administration.[54]

Other proposals have also been announced. Griffith states that one of the desirable procedures for facilitating congressional direction of administration would be the practice of questioning administrators on the floor of Congress or in congressional committees.[55] Hyneman also makes additional suggestions for controlling the wide range of discretion given to administrative authorities. One recommendation is to make statutory language more precise when delegating such authority.[56] The use of joint or concurrent resolutions to provide congressional interpretation of a statute that an

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[54]This device is recommended by: Gilbert and Kampelman, op. cit., p. 84; Griffith, op. cit., p. 23; Schwartz, "Legislative Control of Administrative Rules and Regulations: The American Experience," p. 1040; Hyneman, Bureaucracy in a Democracy, p. 173. Professor Harvey Walker, in his testimony before the Senate Committee on Expenditures in the Executive Departments during the first session of the Eighty-second Congress, also recommended such a legislative veto as a method for controlling administrative rules and regulations issued by executive agencies. See U.S. Congress, Senate, Committee on Expenditures in the Executive Departments, "Organization and Operation of Congress," 82d Cong., 1st Sess., June, 1951, pp. 419-420.

[55]Griffith, loc. cit.

[56]Hyneman, Bureaucracy in a Democracy, p. 172.

administrative official is charged with enforcing and implementing is another proposal offered by Hyneman.[57]

The doctrine of legislative control offers still another solution to the important problem of the control of administrative discretion. It concludes that the political control of administrative discretion necessary to structure an administration that is responsible to the electorate must be provided by the legislative body. This conclusion is reached through a combination of several theoretical postulates that identify this doctrine as a distinct conceptual scheme.

The contemporary doctrine of legislative control is distinguishable from the other dominant doctrines of the present era. It differs from the judicial formula plan not only in major conclusions, but also in the primary motivation underlying the doctrine. The emphasis of the doctrine of legislative control is oriented toward the political responsibility of administration in order to maintain the consent of

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[57] Ibid. Although the fundamental elements of Hyneman's scheme point toward congressional control of the bureaucracy, he does recognize that the President plays an important part in the political direction of administration. He thus advocates the establishment of an official body which he calls a "General Council." This body would be composed of the President, members of his party in Congress who hold important and influential positions, the heads of the important administrative establishments, and others outside of the governmental organization who could bring advice and public support to such a group. This device, according to Hyneman, could then coordinate the formulation and execution of the government program. Ibid., pp. 557-576.

the governed. The conclusions emerging from this doctrine look to the legislature for the necessary control of administration. The doctrine of the judicial formula emphasizes the importance of private rights and the freedom of the individual from the "unstandardized power" of the administrative process. The conclusions of this doctrine point toward the judiciary and judicial review for the institutionalization of that necessary continuous and systematic control of administrative discretion.

The doctrine of legislative control, although based on a similar concern for the political responsibility of administration, also denies the conclusion in the scheme of presidential control that the President is the proper and necessary source of continuous control of administrative discretion. The former doctrine contains a hypothesis concerning the constitutional position of administration different from that contained in the doctrine of presidential control. Furthermore, it includes an interpretation of the administrative process that denies the possibility of an effective personal control of administration by the President. It is also built upon the unstated assumption that the public will and public interest is more likely to emerge out of the conflict and consensus of many local representatives and that Congress represents, therefore, the most effective channel for political control. These differences in basic postulates produce a solution

for the problem of the control of administrative discretion that emphasizes congressional direction and control.

Conclusions

The student of public administration and administrative law who desires to investigate the problem of the control of administrative discretion is the heir apparent of three ready-made alternative solutions. Each of the solutions is represented by one of the major doctrines of control of the present era. These schemes, in turn, reiterate conclusions and elaborate implications inherent in the ideas and thoughts about the control of administration that emerged at the very beginning of a conscious concern with public administration. They have not gone far beyond their historical predecessors in an attempt to resolve the important contemporary problem of the continual, day-to-day control of administrative discretion. As a result, the discussion of the control of administration from Goodnow to the present has been dominated by these doctrines.

The predominant concern with these schemes has obscured the more fruitful focus of inquiry that would provide a common approach to the study of administrative discretion and its control. Little attention has been directed to the formulation of general concepts that could be used to investigate the realities of the administrative

process. Practically no attempt has been made to combine such concepts into a systematic theory for the analysis and understanding of the exercise of administrative discretion.[58]

An examination of the three contemporary doctrines, however, serves an immediate purpose. It furnishes an analysis of the legislative control doctrine within the context of its relationship to the two other schemes of the present era. Such a comparative analysis brings to light the two major claims underlying a program of legislative control of administrative discretion.

The first claim concerns the promotion of politically responsible administrative decision-making. Legislative direction and control of administrative discretion assures that administrative decisions

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[58] J. Leiper Freeman has formulated a theoretical scheme to describe and analyze what he calls the "Political Subsystem" in which important policy decisions are made. This subsystem is composed of the fairly regularized patterns of interactions between administrative agencies, congressional committees, and special-interest groups. It is a distinct part of the larger political system outlined by the presidency, Congress, and the political parties. This type of approach could be utilized to focus especially upon the process of administrative discretion and its control. See his short work entitled The Political Process: Executive Bureau-Legislative Committee Relations (New York: Doubleday and Company, Inc., 1955). Elias Huzar has also offered some tentative generalizations concerning the relationship between the expansion and contraction of legislative control of administrative discretion and specified conditions found in the political process. See his article entitled "Legislative Control over Administration: Congress and the W.P.A.," American Political Science Review, XXXVI (February, 1942), 51-67.

will reflect and represent the consent of the governed. The second claim centers around the question of constitutionality. The legislative control doctrine asserts that a program of legislative control represents an accurate implementation of the constitutionally ordained position of the legislative body as the organ of direction and control of administration.

These two claims provide a basis for the evaluation of each device of congressional oversight. The actual operation of each device can be assessed in terms of its fulfillment of the claim of political responsibility. The arguments that have been presented to support or oppose the constitutionality of each can be examined. An evaluation of each device can then be made in regard to their fulfillment of the claim of constitutionality found in the legislative control doctrine.

Before turning to the analysis and evaluation of congressional oversight, it will be instructive to look at the British practice of parliamentary review of subordinate legislation. Such a practice has become an important element in the system of control of administrative decision-making in that country. Its presentation offers an opportunity to view congressional oversight in a comparative context, and, in this manner, promotes a fuller understanding of the American practice.

CHAPTER IV

PARLIAMENTARY REVIEW OF SUBORDINATE LEGISLATION IN ENGLAND

Introduction

The English system of parliamentary review of subordinate legislation is a method that has been adopted in Great Britain for the control of the delegated rule-making powers of the executive. Its use and popularity in England grew as Parliament found it increasingly necessary to delegate broad legislative powers to the government departments. It was a device that was little known to England of the nineteenth century. As England entered the twentieth century, however, Parliament began to use this form of control of administration much more frequently, and today parliamentary review has become the central element in the system of the control of delegated legislation in England.

Before turning to a detailed analysis of this method of control, however, it is necessary to emphasize two features in the English governmental system that differentiate it from that of the United States. Parliamentary review in England and the new experiment of

legislative control in America operate in different constitutional systems and governmental structures, and these important differences must be kept in mind in any comparison of the two procedures. The control of administrative discretion by the legislative body in England takes place within a political system that is based upon two important basic principles. These two principles are parliamentary supremacy and the position of administration as a result of the parliamentary cabinet form of government.

The principle of parliamentary supremacy means, in general, that the Parliament of England is the supreme legislative body in the political system. The statutes passed by this body form part of the fundamental law of England and cannot be abrogated by any body other than Parliament itself. This principle clearly differentiates the constitutional systems of England and the United States. The United States Congress is limited to the powers and authority expressed in or by the United States Constitution, and the use of such powers is subject to review and nullification by the national judiciary.

Although the English theory of parliamentary supremacy is based upon the conception of a Parliament composed of three parties --the English monarch, the House of Lords, and the House of Commons--the actual locus of political power in the system of parliamentary government has for some time been the House of Commons.

The lower house, the representative organ of the electorate in England, is, therefore, the important force in Parliament. The function of the English monarch in the legislative process is today merely formal. The House of Lords in England has no important power of legislative veto at the present time. The peers of the upper house can obstruct and delay, but they cannot prevent important policies from becoming enacted into law. "The essential function of the House of Lords is to debate matters of policy which do not require legislation and to make or accept technical amendments in Bills."[1] The reality of the pattern of political authority in England, as opposed to the theory of parliamentary government, makes the two terms "the House of Commons" and "Parliament" practically synonymous in any discussion of parliamentary supremacy.

> The popular view that "Parliament" and "House of Commons" are interchangeable terms is based on political realities. The Queen has withdrawn from Parliament for all except formal purposes; the House of Lords performs useful services but they are neither spectacular nor fundamentally important; the real work of Parliament is done in the House of Commons. Its preeminence rests on its authority as the representative House.[2]

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[1] Sir Ivor Jennings, The Law and the Constitution (4th ed.; London: University of London Press, Ltd., 1954), pp. 172-173.

[2] Sir Ivor Jennings, The Queen's Government (Melbourne: Penguin Books, 1954), p. 76.

The position of administration in the central government of England is best understood in relation to the English cabinet.[3] This governmental body has become one of the central elements in the system of political authority in Great Britain. The English cabinet evolved from the earlier Privy Council and is actually unknown to English law. It originally functioned to assist and advise the monarch of England in some of his important governmental duties. This original organization has now evolved, however, into the modern English cabinet. It has taken over the important functions of the earlier monarchs and is now the effective executive authority in the English governmental system.[4]

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[3] A discussion of the cabinet and supplementary studies of the relationships existing between the cabinet and Parliament and the cabinet and the civil service can be found in several good articles published in Parliament: A Survey, ed. Lord Gilbert Campion. See Rt. Hon. L. S. Amery, "The Nature of British Parliament Government," pp. 37-72; Sir Arthur Salter, "Cabinet and Parliament," pp. 105-121; H. E. Dale, "Parliament in Relation to the Civil Service," pp. 121-141.

[4] This development of the cabinet into the actual executive authority in English government is the culmination of the historical development stemming from the parliamentary victory over the theory of kingship represented by the Stuart kings of the seventeenth century. The interesting combination of events that produced this development is analyzed in Sir John A. R. Marriott, English Political Institutions: An Introductory Study (4th ed.; Oxford: The Clarendon Press, 1938), pp. 69-100; and N. H. Gibbs (ed.), Keith's British Cabinet System (2d ed.; London: Stevens and Sons, Ltd., 1952), pp. 12-21.

The administration of the activities of the central government of England is primarily carried out by government departments directed by ministers who collectively form the British cabinet. The authority for such activities is based upon powers delegated by Parliament to the departments or the ministers and the remaining prerogative powers of the Crown. Although these prerogative powers are legally vested in the Crown, the appropriate minister of the cabinet now actually exercises the powers. The statutory and prerogative powers that are the basis for the administration of governmental functions are exercised, therefore, by ministers of the government who are subject to the general direction of the cabinet.[5] The cabinet, in turn, is politically responsible to the House of Commons for the exercise of these powers and the administration of the governmental programs and activities.

Both the responsibility and the authority for administration in the central government of England thus centers in the cabinet. The cabinet, composed of members of Parliament who are considered the party leaders of the majority political party of the House of Commons, is responsible to the House for the exercise of these powers. This institutional arrangement provides a clear channel for the control of

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[5]Jennings, The Law and the Constitution, pp. 178-182.

administration. The conflicting claims to the control and direction of administration in the United States, made possible by the separately elected and independent executive and legislative branches, is eliminated in England by the system of the parliamentary cabinet form of government.

These two important principles of the English governmental system form the context for the operation of parliamentary review of delegated legislation. This procedure for the control of administrative discretion, when viewed in the light of these principles, does not involve the problems that are associated with the American practice of legislative control. In the first place, parliamentary review in England raises no important constitutional issue. The principle of parliamentary supremacy allows the establishment of this type of procedure for the control of administration. The procedure established by Parliament becomes a part of the governmental process, and it is not subject to abrogation because it is contrary to any fundamental arrangement dictated by a written constitution. The second principle, the cabinet form of government, eliminates the conflicting claims to the control of administration that have been raised to the level of doctrinal conflicts in America. The absence of separately elected and equal and coordinate executive and legislative departments possessing overlapping powers in relation to

administration excludes such a conflict. The cabinet system in England provides a governmental system in which the control of administration is ultimately in the hands of Parliament. Parliamentary review of subordinate legislation, based upon such factors, does not raise the same issues as legislative oversight of administrative discretion in the United States.

Subordinate Legislation

Parliamentary review in England is related to the control of administrative discretion that generally is defined as the delegated authority to formulate general rules and regulations in particular areas of governmental activity. It is the power of rule-making that is delegated by Parliament to the executive. Such administrative discretion takes the form of subordinate or delegated legislation, which forms an important part of the lex scripta in England. Subordinate legislation may be exercised through a wide variety of official documents. "They may be called rules, regulations, orders, schemes, by-laws, licenses, directions, warrants, instruments of approval, minutes."[6] Furthermore, there is no accepted distinction between these various labels. It is almost impossible to generalize

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[6] J. A. G. Griffith and H. Street, Principles of Administrative Law (London: Sir Isaac Pitman and Sons, Ltd., 1952), p. 32.

about the particular function of each of these various forms of delegated legislation.

> The terms "regulations" and "rules" are used mainly for instruments of a fairly high degree of importance, "rules" being used for matters of procedure and where appropriate elsewhere. The term "order" is very much a maid of all work, and the contents of orders are often indistinguishable in their nature from the contents of regulations. "Scheme" is generally used for establishing some authority and defining its powers and duties or for laying down the framework within which detailed administration will proceed. The term "by-laws" is usually confined to instruments which are local in character, while "warrants" are used for financial matters such as authorities for pay, pensions, charges, etc. It is difficult to distinguish the nature of "directions" from that of regulations or orders, but very often "directions" are used for instruments, authorised by orders, which work out in specific detail the provisions of the orders.[7]

The Statutory Instruments Act of 1946 attempted to bring some systematization into this rather bewildering nomenclature. This statute directed that all subordinate legislation should take the form of "statutory instruments." This is a generic term now used to describe the vast bulk of delegated legislation in England.[8] The definition of this term, however, is a rather complicated procedure. It

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[7] "Subordinate Legislation," Public Administration, XXX (Autumn, 1952), 237. It should be noted here that, although the prerogative powers of the Crown form part of the source of the legislative powers of the administration, the exercise of this power, usually by "Order in Council," is not considered subordinate legislation. This is not a delegated power, but is rather an original power of legislation.

[8] Griffith and Street, op. cit., p. 34.

varies with the date of the passage of statutes delegating legislative powers to the government departments and administrative agencies. In general, the 1946 act specified that all subordinate legislation based upon authority contained in acts passed after 1947 that had to be exercised through orders in council or by a minister of the Crown and that authorized the formulation, confirmation, or approval of orders, rules, regulations, or other delegated legislation, would in the future be called statutory instruments.[9]

A different formula applies for statutes passed before 1948. The new term applies, in such cases, to any document that is used to exercise the power to make statutory rules within the meaning of the Rules Publication Act of 1893.[10] Furthermore, in order to be included in this category, the instrument has to be of a "legislative" nature. Section 4 of the Rules Publication Act defined statutory rules as rules, regulations, or by-laws either made under any act of Parliament by Her Majesty in Council, any other government department, and other specified government agencies, or that relate to any court in the United Kingdom or the procedure in such courts.[11]

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[9] Ibid., pp. 44-45.

[10] Ibid., pp. 45-46.

[11] Section 4 is quoted in ibid., p. 46.

There is no general definition of "legislative" for the purposes of the second requirement of this category.[12] Although it is an important part of the question concerning whether or not a piece of subordinate legislation based upon a pre-1948 statute is a statutory instrument within the meaning of the Statutory Instruments Act of 1946, the Reference Committee,[13] to which such questions are submitted, never gives a separate and direct decision on this point.[14]

Such statutory instruments, furthermore, may be either of a local or general nature. The distinction is made on the basis of the applicability of such instruments and generally follows a similar differentiation between acts of Parliament. "Instruments are certified by the responsible authority as general when they are in the nature of public general Acts of Parliament and as local when

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[12]There is also no general criterion to determine what kind of decisions or actions are "executive" in nature. Some particular functions that have been considered executive include the following: communications addressed to individual persons in respect of particular circumstances, exercise of a licensing power, remittance of a penalty, function of inspection, holding inquiries, and internal directions to department officials. "Subordinate Legislation," op. cit., pp. 238-239.

[13]The Reference Committee was established by Section 8 of the Statutory Instruments Act. Ibid., p. 239.

[14]"The Reference Committee gives no direct decisions on this point . . . though the question whether a document is 'legislative and not executive' is one which may be material to the decision." Ibid.

in the nature of local personal or private Acts. . . ."[15] The major importance of this distinction is that the local instruments are not printed in the annual volume of statutory instruments, but are merely listed at the end of the volume.[16] Instruments that are considered to be of a general nature include those that apply to all or a major part of Great Britain or to England, Scotland, and Wales individually. Those instruments that are local in application but are part of a national system of governmental activity or regulation are also included in this category. Regulations for Hyde Park and Kew Gardens and regulations concerning notification of specific infectious diseases in particular districts are examples of local instruments.[17]

The particular government official or agency that is to exercise such subordinate legislative powers is generally specified in the delegating statute. Such authority is delegated generally, however, to one of three points in the governmental organization. The most common recipients of the power of delegated legislation is Her Majesty in Council, ministers of the Crown, or government departments.[18] Subordinate legislation by Her Majesty in Council

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[15] Ibid., p. 240.

[16] Ibid.

[17] Ibid.

[18] Griffith and Street, op. cit., p. 33.

takes the form of orders in council. "Orders in Council are made at a formal meeting of the Privy Council. They do not differ in substance from departmental regulations, but it is sometimes appropriate to lend the dignity of an ancient institution to the making of an important legislative instrument."[19] Authority for subordinate legislation is more usually delegated by Parliament to a minister of the Crown or a government department. Since the passage of the Statutory Instruments Act of 1946, however, there is no real distinction between these two points. Section 11(1) of this act provides that when the power to formulate and issue delegated legislation is conferred upon a government department it will be deemed to be

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[19]Orders in council are made at meetings of the Privy Council held at court with the monarch presiding. "These orders very often do not originate in the Privy Council Office, but are prepared in the Government Department concerned in the subject matter, and forwarded to the Office for formulation and submission to Her Majesty for approval. The procedure followed at a Council depends on the business which has to be dealth with. In the case of statutory Orders in Council, the various items are read out by the Lord President from what is known as the List of Business, and the Queen, who knows in advance what is to be submitted, then declares Her approval in the presence of the Privy Counsellors who form the quorum." "Subordinate Legislation," op. cit., pp. 236-237. In a few rather unimportant cases delegated legislation takes the form of "Orders of Council." These are formulated by the Lords of the Privy Council at a meeting not held at court and not presided over by the monarch. Such orders of council are utilized to approve regulations formulated by the Dental Board and the Statutory Committee of the Pharmaceutical Society, to approve particular actions of the Council of the Royal College of Veterinary Surgeons, and to govern elections to the General Medical Council. Ibid., p. 237.

conferred on the minister of the government charged with the responsibility for that particular department.[20]

The broad delegation of authority for subordinate legislation to departments and agencies in the government of England began to emerge about the middle of the nineteenth century. It became an important part of the governmental process when the English government began to attempt to control the consequences of the Industrial Revolution. The use of such powers of subordinate rule-making, however, was not unknown to England before that time. Allen traced the beginning of the delegation of the legislative powers of Parliament back to the reign of Henry VIII in the sixteenth century. The Statute of Proclamations was passed in 1529. It authorized the King in Council to issue proclamations that were to have the same effect as acts of Parliament. There were, however, several restrictions that accompanied this grant. The proclamations were not to infringe upon property rights, abrogate the common law, or issue

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[20]Griffith and Street, op. cit., p. 45. The question as to whether or not any particular government agency is a department for this purpose and, if so, what minister is in charge of the department is submitted to the Treasury for an answer. Ibid. "In determining whether any body or person is a Government Department, the Treasury is guided by the practice under the Rules Publication Act, 1893; and any body or person which was regarded as a Government Department for the purposes of that Act is regarded as such for the present purpose." "Subordinate Legislation," op. cit., p. 239.

instructions contrary to the statute law of the period.[21] This early example of delegation of legislative powers was repealed in 1547, shortly after the death of Henry VIII, and the last two Tudor monarchs and the first two Stuart kings preferred to rely on their prerogative powers rather than delegation of powers by Parliament.[22]

Delegated legislation was limited primarily to two types of situations during the next two hundred years. One category was composed of the grant of legislative powers to local governments by parliamentary delegation. The second use of subordinate legislation was associated with emergencies which demanded swift government action and, therefore, could not be adequately met by the slow and deliberate processes of Parliament.[23] An example of this early delegation of legislation powers for the latter situation is the

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[21] Carleton Kemp Allen, Law and Orders: An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in England (London: Stevens and Sons, Ltd., 1945), pp. 20-21. Another important enactment of Parliament during the reign of Henry VIII was the Statute of Sewers. Allen states that this was the earliest example of the delegation of broad powers to a statutory body to make laws, ordinances, and decrees. Such subordinate legislation was to have the same authority as statutes once it was submitted to the Chancery and received the approval of the King. Ibid., p. 21.

[22] "Subordinate Legislation," op. cit., p. 229.

[23] Allen, loc. cit.

delegated authority to issue quarantine regulations for a sudden outbreak of smallpox or plague.[24]

The eighteenth century was a period of reaction against the powers of the Crown. Parliament had just emerged victorious from the struggle with the Stuarts and their theory of prerogative powers in the preceding century, and the delegation of parliamentary powers was viewed with jealousy and distrust. This led to a fairly sharp reduction in the use of delegated legislation. Parliament attempted to administer government policy itself by detailed and specific statutory language.[25] This practice of detailed legislative direction carried over into the early years of the nineteenth century. Sir Cecil Carr, one of the foremost students of English administrative law, describes the consequences of this practice very well:

> If we go back a century to the years 1819 and 1820, we find plenty of talk of "regulations" in Acts of Parliament, but they are regulations actually contained in the Acts not regulations to be made by some other authority. Thus in the factory and workshop legislation of a century ago the ages of employees in cotton mills are specified; the hours of work are fixed; there is a definite time for breakfast and a definite time for dinner. There is no margin for elasticity; nothing is left to be arranged by departmental order; we were not yet so elaborately administered. The Acts of the period are full of almost grotesque

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[24] Ibid.

[25] Ibid., pp. 22-23.

> detail for want of the practice of entrusting minor matters to subordinate legislation.[26]

Such detailed parliamentary control of the execution of the laws, however, could not long continue. It soon became apparent that the control of the ravages and consequences of the Industrial Revolution demanded technical legislation and swift and continuous government action. Parliament was not equipped to provide this type of governmental action, but the earlier limited use of delegated legislation served as a repository of tradition and experience that could be drawn upon in providing the necessary governmental control. As Allen declared, "there was a continuous tradition of the delegation of powers, though it developed unevenly in different ages; and it is to the nineteenth century that its great and rapid extension belongs."[27] The increased use of subordinate legislation in the nineteenth century commenced with the enactment of the Poor Law Amendment Act of 1834. This statute established a body of Poor Law Commissioners and gave them fairly broad powers of rule-making for the purpose of protecting the poor and impoverished citizens of England. The act provided that, in order to execute the powers of the statute, the commissioners

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[26]Cecil Thomas Carr, Delegated Legislation (Cambridge: Cambridge University Press, 1921), p. 49.

[27]Allen, op. cit., p. 23.

> . . . shall and are hereby authorised and required, from Time to Time as they shall see Occasion, to make and issue all such Rules, Orders and Regulations for the Management of the Poor, for the Government of Workhouses and the Education of the Children therein . . . and for carrying this Act into execution in all other respects as they think proper.[28]

Since this early delegation of legislative powers, English government has been conspicuous for its reliance upon broad and fairly unlimited delegated discretionary authority in the governmental process. An act of 1909, the Housing, Town Planning Act, for example, delegated authority to the local government board to confirm schemes of local governments for the compulsory purchase of land and the construction of buildings for local housing developments. The final approval of such activities was left completely to the discretion of the board.[29] Another interesting example is the Factories and Workshops (Cotton Cloth Factories) Act of 1929, which was based upon a very technical report concerning the use of artificial humidity in cotton-cloth manufacturing establishments. Parliament, either unwilling or unable to convert the recommendations of the report into statutory language, simply relied upon delegated legislation, and wrote into the act that the Secretary of State was authorized to

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[28] Quoted by Griffith and Street, op. cit., p. 37.

[29] Bernard Schwartz, Law and the Executive in Britain: A Comparative Study (New York: New York University Press, 1949), p. 37.

"make regulations for the purpose of giving effect to the recommendations contained in the Report."[30] The Furnished House (Rent Control) Act of 1946 furnishes a more recent example of this broad delegation of legislative powers. Section 8(d) of the act states that regulations may be made "generally for carrying into effect the provisions of this Act."[31] This use of broad delegations of legislative powers to the executive in England reached a high-water mark during the last world war. The British Parliament passed an act in May, 1940, popularly known as the "Everything and Everybody Act," that delegated practically unrestricted discretion to the executive in order to expedite the war effort. The act read:

> The powers conferred on his Majesty by the Emergency Powers (Defence) Act, 1939 . . . shall . . . include power by Order in Council to make such Defence Regulations making provision for requiring persons to place themselves, their services and their property at the disposal of His Majesty as appears to him to be necessary or expedient for securing the public safety, the defence of the Realm, the maintenance of public order or the efficient prosecution of any war in which His Majesty may be engaged, or for maintaining supplies or services essential to the life of the community.[32]

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[30] Quoted in ibid., p. 49.

[31] Quoted in Griffith and Street, op. cit., p. 90.

[32] Quoted in Sir Cecil Thomas Carr, Concerning English Administrative Law (New York: Columbia University Press, 1941), pp. 19-20. This was the Emergency Powers (Defence) Act, 1940. 3 and 4 Geo. VI, c. 20.

Another manifestation of the expanded scope of delegated legislation in the modern era in England is the so-called "Henry the VIII clause." This particular type of subordinate legislation was "named after that monarch in disrespectful commemoration of his tendency to absolutism."[33] It refers to provisions found in several early statutes of the late nineteenth and early twentieth centuries that authorize the executive, by subordinate legislation, to amend the provisions of the enabling act or other relevant statutes in order to bring the parent act into effect. The Donoughmore Committee[34] found nine examples of this use of delegated legislation dating from the Local Government Act of 1888.[35] Section 67 of the Rating and Valuation Act of 1925 furnishes an example of the use of this device. This particular section empowered the Minister of Health, by orders, to remove any difficulties to bringing the act into operation.[36]

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[33]Allen, op. cit., p. 100.

[34]See infra, n. 77.

[35]Allen, loc. cit.

[36]Schwartz, op. cit., pp. 57-58. Carr believes that such legislative grants are not, however, a prelude to tyranny or executive dictatorship. "Anyone who will look to see what sort of orders have been made under this power will find them surprisingly innocuous. The device is partly a draftsman's insurance policy, in

These examples point out the expanded score of subordinate legislation in the history of the development of the executive rule-making power in England. The importance of delegated legislation is also reflected in the increased use of this device. This is vividly pointed out in a summary of the increasing number of pieces of subordinate legislation published by the Stationery Office through the years:

> The yearly average between 1894 and 1913 was 1238, the actual number varying from 950 (in 1895) to 1899 (in 1904); this latter figure was large because of the effect of the Education Act, 1902. The yearly average for the 1914-1918 period was 1461. The yearly average for the period 1919-1929 was 1677; for the first three years of this period the total exceeded 2000 but in the last three years averaged 1248 only. In 1937 the figure was 1231; in 1938 it was 1661; in 1939 it rose to 1946. In the six years 1940-45, the average was 2049. In 1948, 1949, and 1950 the figures were 2858, 2467, and 2144, respectively.[37]

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case he has overlooked something, and is partly due to the immense body of local Acts in England creating special difficulties in particular areas." Sir Cecil Thomas Carr, Concerning English Administrative Law, p. 44.

[37]Griffith and Street, op. cit., p. 38. This total evidently included both local and general statutory instruments published annually by the Stationery Office, for Carr quotes a different total for approximately the same period. Carr's statistics are based upon only the latter type of regulations. It is interesting to note, however, that this class of subordinate legislation has also shown a steady, but rather fluctuating, increase through the years: "Taking the general class alone, one finds that from 1894 to 1913 the average annual total was about 210. During the First World War the figure soared. In 1918 it was over 1,200. When that war ended, there was a fairly

Judicial Control of Subordinate Legislation

The role of the judiciary in England has not been particularly important in the control of subordinate legislation. The limited role of the courts in relation to this problem results from several factors. In the first place, many statutes delegating the power of subordinate legislation to the executive have expressly precluded judicial review of the delegated legislation enacted under them. This is usually accomplished in one of two ways. Parliament often writes into the parent statute that a particular decision by the recipient of the delegated power is "conclusive evidence" that the subordinate legislation was properly exercised. Thus, in the Housing Act of 1925 the Minister of Health was authorized to confirm schemes involving the compulsory purchase of land for slum clearance, and such confirmation was "conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made

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swift recovery from emergency to normal conditions. From 1922 to 1931 the average remained fairly steady around 400--twice as large as in pre-war years, but a smart drop from the high record of 1918. From 1932 it climbed again and straddled 600. In 1938, the year of Munich, it rose (for the first time since 1920) over 800. The seven years of the Second World War produced further increase. The total just topped 1,900 in 1942, sank again by nearly a half to just over 1,000 in 1944, went up steadily to over 1,500 in 1948, dropped below 1,400 in 1949 and fell again to 1,211 in 1950." Sir Cecil Carr, "Delegated Legislation," Parliament, A Survey, ed. Lord Gilbert Campion (London: George Allen and Unwin, Ltd., 1952), p. 241.

and is within the powers of this Act."[38] Parliament has also utilized another device to preclude judicial review of delegated legislation. This device involves a declaration in the delegating statute that subordinate legislation made under the authority of the parent act is to have the same effect as if written into the act itself. Since parliamentary acts are themselves immune from judicial review, the delegated legislation enacted under their authority is, therefore, also exempt from such review. This particular technique was used, for example, in the Patent, Designs, and Trade Marks Act of 1888. It authorized the Board of Trade to make such regulations as were, in the opinion of the board, necessary to give effect to the

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[38]Quoted in Schwartz, op. cit., p. 63. Whether or not this actually precludes judicial review remains a moot point in the eyes of the English judiciary. Justice Darling, in Ex parte Ringer 25 T.L.R. 718 (1909), declared that such a statutory phrase did preclude review regarding the question of vires. Ibid., p. 189. The decision in two other cases, however (see Corporation of Waterford v. Murphy, 2 I.R. 165 [1920], and Attorney-General v. Hanwell Urban District Council, 2 Ch. 377 [1900]), arrived at the opposite conclusion. This finding was based on an interesting bit of logic. It was decided that the phrase did not eliminate judicial review entirely, for the orders made under the statute had to be within the general purpose of the statute authorizing such powers. In other words, the orders were unreviewable if they were not ultra vires, but the determination of this basic jurisdictional question was not beyond the reach of the judiciary. Ibid., pp. 192-193. When Parliament closed the front door the judiciary came in the rear entrance. This conflict of judicial decisions has not been passed upon by the House of Lords, so "any conclusions regarding its scope and effect must, therefore, be highly tentative and intended more as a guide to the courts than as a precise statement of the existing law." Ibid., p. 194.

statute, and such regulations were declared to "be of the same effect as if they were contained in this Act."[39]

Judicial review of subordinate legislation is limited, however, even in the absence of such statutory preclusion. There are only two principal types of judicial review. They are known as review

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[39]Quoted in ibid., p. 177. The House of Lords has dealt with this question, but it has only been in the form of dicta. In an early case, Institute of Patent Agents v. Lockwood, A.C. 347 (1894), Lord Herschell announced the dictum that the phrase precluded all judicial review since the regulations were part of the statute itself. Ibid., pp. 177-178. The English judiciary, in two other cases involving this question, Rex v. Electricity Commissioners, 1 K.B. 171 (1924), and Rex v. Minister of Health; ex parte Davis, 1 K.B. 619 (1929), decided that regulations enacted under statutes containing the phrase were subject to judicial review on the question of ultra vires. These latter two cases were distinguished, however, by the fact that the courts reviewed the delegated legislation before it received final confirmation by the appropriate minister. The sublegislation was not legally complete at that point and, therefore, was not part of the parent statute. Ibid., pp. 177-185. In a more recent and famous case, Minister of Health v. Rex; ex parte Yaffe, A.C. 494 (1931), the court issued a dictum contrary to that in the Lockwood case. The National Federation of Property Owners decided to bring a test case to court to determine whether the "as if enacted in this Act" phrase prevented judicial review if the regulations had been validated by ministerial confirmation. This group waited until a local slum-clearance project had been approved by the Minister of Health according to the terms of the Housing Act of 1925. It then brought a case to court. The House of Lords issued a decision without ruling upon the disputed phrase directly. The opinions in this case, however, do contain dicta that assume that the court could review subordinate legislation to determine whether or not the particular action was within the limits of the parent statute; i.e., whether the action was intra vires. Ibid., pp. 185-189. This series of cases concludes, therefore, with no authoritative decision on this interesting point.

for procedural ultra vires and substantive ultra vires.[40] In regard to the first type of review, the English courts can review subordinate legislation to determine whether it has been made according to the required statutory procedure. "If . . . a statute requires certain forms to be observed, or certain preliminaries to be completed, before delegated powers are exercised, failure to comply with these requirements constitutes a failure for vires."[41] In such a case, the court may declare the subordinate legislation invalid.

The English judiciary can also review delegated legislation to determine if it is within the powers delegated by the parent statute. The extent of the application of this form of vires depends upon two factors. "It depends on the generality or otherwise of the empowering provisions and it depends on the attitude which the courts adopt."[42] A consideration of these two factors points out the limited role of the English courts under the category of substantive ultra vires. In the first place, a great many of the statutes delegating powers of legislation to the executive are phrased in such broad terms that it is practically impossible for the judiciary to declare that the

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[40] Griffith and Street, op. cit., p. 104.

[41] Allen, op. cit., p. 133.

[42] Griffith and Street, op. cit., p. 110.

administrative decisions are not within the statutory grants.[43] In the second place, the English courts have adopted the attitude that they can not invalidate any subordinate legislation by any test of "unreasonableness" or "natural justice."[44] Broad statutory language and the attitude of the courts, therefore, have limited judicial control of delegated legislation under this form of judicial review.

Parliamentary Review of Subordinate Legislation

The absence of an effective judicial review and control of delegated legislation by the English courts, however, has not meant that the executive in England has had a completely free hand in

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[43] See supra, p. 105.

[44] In a recent case, Berney v. A.-G., L.J.R. 983 (1947), an English court refused to declare that an order made under a defense regulation was invalid because it was "repugnant to natural justice and to the common law of England." Quoted in Griffith and Street, op. cit., p. 112. This concept of "natural justice" has formed an important part of judicial review of administrative rule-making in the United States. Cf. Local Government Board v. Arlidge, A.C. 120 (1915) with Morgan v. United States, 298 U.S. 468 (1936). The English courts have also denied that they have power to invalidate central government regulations by the use of any test of "reasonableness." See Sparks v. Edward Ash Ltd., K.B. 223 (1943), and Taylor v. Brighton Borough Council, K.B. 736 (1947), discussed in Griffith and Street, op. cit., pp. 113-114. In the case of by-laws or ordinances of local government corporations, on the other hand, the courts have interpreted their function much more broadly and have subjected such local government regulations to the test of "reasonableness." Ibid., p. 111.

exercising the powers of rule-making delegated by Parliament. Parliament has replaced the traditional judicial review with a procedure of parliamentary oversight of subordinate legislation in order to control the exercise of such delegated legislative powers. Since the early years of this century it has become a common practice in England for Parliament to include in the parent statute delegating broad powers of rule-making a requirement that subordinate legislation made under the parent statute must be submitted to both houses of Parliament for a certain period. Such a requirement is also accompanied by the stipulation that the legislative instruments must be either approved by both houses or may be disapproved by either chamber during the laying period.[45] There is, however, no uniform procedure for this parliamentary review. It takes a rather wide variety of forms.[46]

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[45]Disapproval by both chambers through concurrent negative resolutions is not common in the British practice. The requirement of approval by a single chamber only is also rarely used. This latter requirement is limited primarily to cases involving the approval of certain financial orders of the Treasury by the House of Commons. See, for example, section 19(2) of the Import Duties Act of 1932 and section 2(4) of the Emergency Powers (Defence) Act of 1939. "Subordinate Legislation," op. cit., pp. 250-251.

[46]The best sources for a description of the major forms of parliamentary review of subordinate legislation are Griffith and Street, op. cit., pp. 84-99. A briefer description can be found in "Subordinate Legislation," op. cit., pp. 249-251.

One method that has been utilized is commonly referred to as the "procedure by negative prayer."[47] This type of review, the most common in England, requires that all subordinate legislation made under the parent statute must be submitted to Parliament as soon as the delegated legislation is made. The period during which such regulations remain before Parliament varied before the passage of the Statutory Instruments Act of 1946. Section 5(2) of that act, however, established a uniform period of forty days of parliamentary session for this type of legislative review.[48] Any subordinate legislation submitted under this procedure is subject to annulment by resolution of either chamber during this laying period.[49] Such a

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[47] Griffith and Street, op. cit., pp. 85-87.

[48] Ibid., p. 85.

[49] Ibid. Under this procedure, or any of the following forms of parliamentary review, it is seldom possible to amend the statutory instrument. Parliament usually has only the power to accept or reject it in toto. The Nurses Registration Act of 1920, the Electricity (Supply) Act of 1919, and the Gas Regulation Act of 1920 are exceptions to this general rule. Ibid., p. 86. Six American states have established a similar procedure for the control of administrative rules and regulations. Administrative rules may be annuled by resolution of either house in Virginia. In five other states--Connecticut, Michigan, Nebraska, Kansas, Wisconsin--administrative rules or regulations may be rejected by concurrent resolution of the legislature. Bernard Schwartz, "Legislative Control of Administrative Rules and Regulations: I, The American Experience," New York University Law Review, XXX (May, 1955), 1038. See also infra, n. 92.

resolution takes the form of an "Address to Her Majesty" requesting that the regulation be rescinded. The revocation is accomplished by an order in council and does not affect the validity of any action taken under the regulation.[50] Such revocation also does not prevent the enactment of a new regulation covering the same subject in an almost identical manner.

A second method involves the requirement that statutory instruments must be submitted to Parliament and are subject to affirmative resolutions of both houses of Parliament. This method of legislative oversight includes two related categories. In the first category the subordinate legislation has no effect until approved by resolutions of both chambers. This is the more common of the two procedures included in this method. The second procedure includes the requirement that the legislation shall have no effect after a stated period of time unless an affirmative resolution is passed by the House of Commons and the House of Lords before the period has expired.[51] It is difficult to distinguish between the uses of these methods of review by affirmative resolution and the former type of oversight by negative prayer. "Theoretically, this affirmative

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[50] Griffith and Street, op. cit., p. 85.

[51] Ibid., p. 87.

procedure is used for more important subordinate legislation but it is impossible to find, or perhaps, to make, any clear distinction."[52]

Another method of parliamentary review requires that subordinate legislation must be laid before Parliament in draft form. The drafts of statutory instruments must then be validated by affirmative resolutions of both houses of Parliament. The major difference between this method and the first two is that the regulations submitted under this category have no legal existence until approved by a resolution of each house of Parliament.[53]

A less common type of review involves the annulment of regulations laid before Parliament in draft form by either house of Parliament within a certain period. The laying period for such procedure was standardized at forty days by the Statutory Instruments Act

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[52] Ibid. This lack of any general and distinguishing criterion for the use of the negative and affirmative procedures was the subject of a question in the House of Commons in November, 1947. The Prime Minister was asked if the government contemplated requiring that statutes delegating authority to modify statutes or impose taxation should include review by affirmative procedure. He answered that "the Government considered in each case in the light of the precedents whether the affirmative or the negative procedure would be the more appropriate; but the matter was one for determination by Parliament, and it would be unwise to attempt to formulate any precise rules which would fetter the discretion of Parliament and of the Government." "Subordinate Legislation," op. cit., p. 251.

[53] Griffith and Street, op. cit., pp. 87-88.

of 1946 for all statutes requiring this type of review passed before 1948.[54] Furthermore, Section 6(1) of the same act established a general rule for all statutes passed after 1947 that require the draft to be submitted to Parliament but do not specifically require affirmative resolutions of both houses. In such cases, the laying period is standardized at forty days and all draft regulations are subject to annulment by a negative prayer of either chamber of Parliament.[55]

A few statutes require simply that subordinate legislation made under them must be submitted to Parliament. They do not grant power to Parliament either to annul the regulations or to approve them by affirmative resolutions.[56] It is simply a way by which Parliament can be informed about regulations made under the delegated authority at the time the subordinate legislation is actually made. The Statutory Instruments Act of 1946 made an important change in this particular procedure. Section 4(1) of the act requires that all such instruments to be laid before Parliament under this

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[54] Ibid., p. 88.

[55] Ibid.

[56] Ibid., pp. 84-85.

procedure shall not become effective until actually so laid.[57] This requirement was written into law in order to prevent cases in which the administrative agency issuing the regulations never laid them before Parliament.[58] A proviso in Section 4(1) states that an

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[57] Ibid., p. 88. Under such a statutory procedure situations arose in which regulations that were desired to be made could not be submitted to Parliament because Parliament was not in session. The subordinate legislation had to be postponed, therefore, until the next session of Parliament. The House of Commons attempted to correct this situation by a standing order, but the House of Lords refused to accept the standing order on the basis that it attempted to change the operative statutes by modifying the statutory meaning of "laid before Parliament." In order to solve this problem, Parliament passed the Laying of Documents before Parliament (Interpretation) Act of 1948. The act declares that both houses of Parliament are authorized to determine what "laid before Parliament" means by a standing or sessional order. Ibid., pp. 89-90. Each house subsequently formulated a standing order. These standing orders provide, in general, that a statutory instrument is deemed to be laid before Parliament if it is submitted to particular offices during the existence, and not only the session, of Parliament. See Standing Order No. CV of the House of Lords and Standing Order No. 110 of the House of Commons in "Subordinate Legislation," op. cit., Appendix, p. 257.

[58] This was not merely a theoretical possibility, for just such an incident occurred during World War II. It was discovered in 1944 that the Home Office had failed to lay a whole series of National Fire Service Regulations before Parliament as required by the Fire Services (Emergency Provisions) Act of 1941. Twenty-three sets of regulations that had been issued between August 25, 1941, and June 12, 1944, were involved. Allen, op. cit., p. 107. These regulations had not been submitted to Parliament even though the parent statute had required that they were to be laid "as soon as may be" and had made them subject to a negative resolution of either house. The House of Commons finally passed an "Act of Indemnity" on August 1, 1944, freeing the Home Secretary from any responsibility for the consequences of this oversight. Ibid., p. 108.

administrative regulation can become operative under certain exceptional circumstances before it is laid before Parliament, but notification must be sent immediately to the Lord Chancellor and the Speaker of the House of Commons explaining the circumstances and reasons.[59]

Parliamentary oversight of delegated legislation has become a prominent part of the English system of control of administration in the twentieth century. It has become a common technique for parliamentary control of the powers of legislation that are delegated to the executive. The use of this device was not unknown to the nineteenth century, but it was the exception rather than the rule. Sir Cecil Carr traced the use of the procedure of annulment by negative prayer back to 1838. In that year a statute was passed authorizing certain judges to make procedural rules for their courts. The act directed that the rules had to be submitted to Parliament and had no effect for six months. Any of the rules laid before Parliament could be vetoed by royal proclamation or by a resolution of either house of Parliament during the laying period.[60] The Lunacy Regulation (Ireland) Act of 1871

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[59]Griffith and Street, op. cit., p. 89.

[60]Sir Cecil Thomas Carr, "Legislative Control of Administrative Rules and Regulations: II, Parliamentary Supervision in Britain," New York University Law Review, XXX (May, 1955), 1045-1046.

also reserved authority to either house to annul any regulations made under the statute.[61] Carr also found the first example of the requirement of an affirmative resolution for the approval of subordinate legislation in the Military Manoeuvres Act of 1897.[62]

The most common type of parliamentary review in England is the procedure for annulment of subordinate legislation by negative prayer. The government departments have generally opposed the affirmative procedure, because "it makes the future of Rules and Orders more precarious than it would be ordinarily."[63] The government is required to find time to introduce resolutions to approve all subordinate legislation subject to the affirmative procedure. Such a procedure, according to its opponents, also necessitates the introduction of resolutions that are then subject to debate and possible rejection,[64] whereas the statutory instruments subject to negative prayers are often approved by default--i.e., by the absence of a

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[61] Allen, op. cit., p. 26. The negative resolution procedure, in connection with a thirty-six-day laying period, was also included in a statute passed in 1850 (unspecified). "Subordinate Legislation," op. cit., pp. 235-236.

[62] Carr, "Legislative Control . . .," p. 1047.

[63] Allen, op. cit., p. 66.

[64] In the light of the actual practice concerning affirmative resolutions in the House of Commons, this would seem to be a fairly inconsequential problem in that chamber. Cf. infra, pp. 124-125.

motion or debate--and, therefore, present less chances of rejection. Furthermore, an incautious use of the latter type of review would obviously defeat the purpose of the parliamentary delegation of legislative power. Such power is generally delegated because Parliament itself has neither the time nor the necessary information to formulate the regulations. To require approval of each regulation, therefore, would force Parliament to spend more time on such detailed and technical rules than it originally thought desirable or possible.[65]

The procedure in connection with parliamentary oversight is quite similar in both houses. In the House of Lords, notice of all regulations, draft regulations, and official papers concerning these instruments is printed in the Minutes of Proceedings. A separate list is published every two weeks which lists the statutes under which each statutory instrument and draft regulation was submitted, the date each was submitted, and the length of the laying period. The actual drafts and instruments themselves are available for perusal in the Printed Paper Office.[66] When such drafts, regulations, and official papers are submitted in the House of Commons, notice appears daily in the Votes and Proceedings. A separate list is

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[65] "Subordinate Legislation," op. cit., p. 251.

[66] Schwartz, Law and the Executive in Britain . . ., p. 110.

published each week containing a listing of each instrument that can be annulled, the parent statute, the date of submission of each regulation and draft, and the laying period. The actual regulations, drafts, and papers are placed in the library of the house.[67]

Despite the apparent popularity and increased use of parliamentary review of delegated legislation in Britain, experience with this device has revealed several basic problems and deficiencies. The particular problems and deficiencies, and their consequences for an effective control of delegated legislation, vary with the particular method of parliamentary review--i.e., the negative prayer and affirmative resolution procedures--and the house of Parliament involved.

One of the problems associated with effective parliamentary control of subordinate legislation, for example, is the necessity to find available time to introduce and debate a negative prayer to annul a statutory instrument. This problem is less important in the House of Lords than in the lower house. Because of the slower pace of legislative activity in the upper house, the time for the introduction of a negative resolution and debate on such a resolution is more readily available. Any member can find available time to introduce

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[67] Ibid., pp. 110-111.

a motion of annulment, and "any peer can move the resolution to annul and, if necessary, divide the House."[68]

Although it is technically possible for any member of the House of Commons to introduce a motion to annul a statutory instrument, it is very difficult for the individual member to obtain the necessary time. The opportunity for such a motion is almost never available during the regular business of the House of Commons. Control of delegated legislation by the negative procedure in the lower house is reduced, therefore, to two rather unfavorable alternatives. In the first place, a member can raise the question of annulment on the motion for adjournment. The time available for such a question is limited, however, to the period between 11:00 P.M. and 11:30 P.M. The Speaker of the House generally adjourns the chamber at the end of this period, and no division on the question is allowed.[69] The second possibility is to introduce the prayer after 11:00 P.M. as "exempted business." Standing Order No. 1(6) of the House of Commons declares that proceedings undertaken in pursuance of an act of Parliament are "exempted business." Since the procedure for annulment is written into the parent statute, a

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[68] Ibid., p. 111.

[69] Ibid., p. 112.

motion to reject the statutory instrument may be introduced as "exempted business" at 11:00 P.M., after the regular business of the house. This procedure allows a full debate. The Speaker cannot interrupt or terminate the proceedings. It also provides for a division on the question. The lateness of the hour, however, drastically restricts the effectiveness of this procedure. There is little interest among the members of the lower house to remain after a regular session, at such a late hour, to introduce and debate a motion to annul subordinate legislation unless an important political question or major statutory instrument is involved.[70] These are the only practical alternatives available to an individual member of the house. As Allen declares:

> Otherwise he can hope to wring from the Government an allocation of time during the ordinary business of the House, and that is a rare privilege, the more so in this case because no Minister is likely to grant time for attacking one of his own powers or ordinances.[71]

The procedure by affirmative resolution in the House of Commons, although technically affording an opportunity for more effective control of delegated legislation, is equally affected by this problem of available time. The government, rather than introducing such

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[70] Ibid., pp. 111-112. These two alternatives are also discussed in Allen, op. cit., pp. 91-92.

[71] Allen, op. cit., p. 92.

motions during the regular proceedings of the house and providing an opportunity for extended debate, generally introduces the necessary motions of approval as "exempted business" at 11:00 P.M., after the regular daily session. At this time the government can introduce the affirmative resolutions and bring them to a vote, even though they may be opposed. The lateness of the hour usually dissipates any effective opposition. This technique allows the government to circumvent any detailed control by the lower house. The resolutions "are, in fact, almost invariably agreed to at that time, the necessary resolutions being rushed through en masse, with little actual consideration by the House."[72]

There is more opportunity in the upper house of the British Parliament to review delegated legislation by debating an affirmative resolution, but the House of Lords has relied primarily upon a special committee in that chamber for the review of subordinate legislation requiring an affirmative resolution. This committee, known as the Special Orders Committee of the House of Lords, was established in 1925 to review all statutory instruments and drafts of subordinate legislation laid before Parliament that required approval

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[72]Schwartz, Law and the Executive in Britain . . ., p. 114.

by affirmative resolution.[73] It is a sessional committee that "examines such regulations and orders and reports, in effect, 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 [of approval] is moved."[74]

Cabinet control of the House of Commons introduces still another problem in the control of delegated legislation by the lower house. Majority control of the House of Commons by the government's party can reduce parliamentary review to a mere semblance of an effective device for the control of subordinate legislation. Even if a member of the opposition party obtains the opportunity to introduce a motion concerning one of the statutory instruments, the motion is almost doomed to defeat. If a division is taken, the government leaders can exert pressure upon the members of the government's party to vote to validate the instrument. Such party control assures the defeat of any negative prayer and the passage of affirmative resolutions.[75]

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[73] "Subordinate Legislation," op. cit., p. 252.

[74] Schwartz, Law and the Executive in Britain . . ., p. 115.

[75] "And with the intensification of party politics, parliamentary control has also, in effect, disappeared; when, with the aid of a substantial majority, the Government side has secured the enactment of the parent statute, the Opposition side has little hope of

A basic difficulty involved in parliamentary review that applies to both houses equally is the sheer number and technicalities of statutory instruments laid before Parliament. Sir Cecil Carr has estimated that about 70 per cent of all general statutory instruments are subject either to annulment by negative prayer or to approval by affirmative resolution. Furthermore, these enormous numbers of instruments are usually based upon technical considerations that are beyond the capabilities of even the most informed member of Parliament.

> A permanent official always speaks about the matter coming before Parliament as though that were in fact a real safeguard, but when the average Member of Parliament is expected to have expert knowledge on all subjects from the Charing Cross Bridge to diseases in potatoes, all in the same day, is it not a fact that all this so-called criticism is in fact a farce[?][76]

The Select Committee on Statutory Instruments

The problems of parliamentary review of delegated legislation in the House of Commons were compounded by reliance upon the

success in moving a motion for the annulment of the resultant Statutory Instrument." Carr, "Delegated Legislation," p. 248, supra, n. 37. Debate on these motions to annul or affirm a statutory instrument, however, has been recognized as having some beneficial consequences. They do publicize the practices and policies of the government and allow the opposition to "make a record" for the next appeal to the electorate. See Griffith and Street, op. cit., p. 86.

[76]Quoted by Schwartz, Law and the Executive in Britain . . ., p. 113.

initiative of individual members to carry out such review. The practical difficulties facing the individual member led to the scarcity or inconsistency of continuous parliamentary review in the lower house. The Donoughmore Committee[77] recognized this fundamental problem of parliamentary review and recommended, in its report published in 1932, that a committee similar to the Special Orders Committee of the House of Lords be established in the House of Commons to scrutinize, not only statutory instruments that required affirmative

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[77]The official title of this committee was the "Committee on Ministers' Powers." It was established by Lord Sankey, the Lord Chancellor, in 1929, because of growing public criticism by students and officials about the widespread delegation of judicial and legislative powers to the executive. It became widely known as the Donoughmore Committee, after its first chairman, the Earl of Donoughmore. "Subordinate Legislation," op. cit., p. 232. In addition to the chairman, the committee included sixteen members. There were (1) six members of the House of Commons, (2) five lawyers, (3) three experienced civil servants, and (4) two scholars, Professors Holdsworth and Laski. Carr, Concerning English Administrative Law, p. 26. The committee was directed "to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law." Quoted in "Subordinate Legislation," loc. cit. The committee gathered a great deal of written and oral evidence concerning this problem, and published its report in April, 1932. Ibid. "Its reports, together with the memorandum and minutes of evidence, form constitutional documents of the highest value." Allen, op. cit., p. 42.

resolutions, but all delegated legislation laid before Parliament subject either to affirmative or negative resolutions.[78]

There was a great deal of opposition to such a proposed committee on the part of representatives of various government departments appearing before the Committee on Ministers' Powers. It was claimed that such committee review would be impractical and ineffectual.[79] No committee such as that proposed was thus established at that time or for many years later. The impossibility of a careful review of the mass of war regulations enacted by the government departments during the second world war, however, crystallized the pressure for the establishment of such a committee in the House of Commons. Finally, in 1944, the government set up a committee in the lower house to scrutinize the regulations that had to be submitted to Parliament and were subject either to an affirmative resolution or to a negative prayer. This sessional committee was originally called the Select Committee on Statutory Rules and Orders. Since the passage of the Statutory Instruments Act of 1946, however, it has been known as the Select Committee on Statutory Instruments.[80]

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[78] Schwartz, Law and the Executive in Britain . . ., p. 115. See also Griffith and Street, op. cit., p. 92.

[79] Schwartz, loc. cit.

[80] Ibid., pp. 115-116.

The select committee presently consists of eleven members. The number of members representing each party on the committee is based upon party strength in the House of Commons.[81] This committee has the able assistance of Sir Cecil Carr, the counsel to Mr. Speaker. Sir Cecil Carr was editor of the annual volumes of the Statutory Rules and Orders from 1923 to 1943[82] and has been for some time one of the foremost experts on delegated legislation in England.

Mr. Molson, the author of the motion that led to the establishment of the Scrutiny Committee,[83] declared that its duty should be to call the attention of the House of Commons to subordinate legislation that, although "perfectly legal and lucid," was "bureaucratic, vexatious, embarrassing and harassing to the subject."[84] The committee then, according to Molson, was not intended to be a substitute for judicial review provided by the courts. Its function

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[81] Carr, "Legislative Control . . .," p. 1054, supra, n. 60.

[82] S. A. de Smith, "Delegated Legislation in England," Western Political Quarterly, XI (December, 1949), 521.

[83] This is the popular title for the Select Committee on Statutory Instruments.

[84] Quoted by A. H. Hanson, "The Select Committee on Statutory Instruments, 1944-1949," Public Administration, XXVII (Winter, 1949), 278.

was viewed as a screening device to assist the individual members of the lower house in reviewing delegated legislation submitted to Parliament. The function of the committee has been described by the 1946 chairman as follows:

> If members of Parliament were all perfect and able to do an inestimable amount of work, they would read all the statutory instruments through themselves and, if they desired, they could put down a prayer against any particular one but to save them doing that, this Committee is set up. Our function is to go through them and report to the House for their action if we think there is anything unexpected or any unjustifiable delay or something that calls for elucidation.[85]

The committee has no power either to annul or to approve statutory instruments, but is directed to scrutinize the delegated legislation to determine whether or not the statutory instruments represent an exercise of the powers delegated by Parliament that was intended by the legislative body. The select committee, however, is not allowed to inquire into the merits or policy of any particular subordinate legislation.[86] It is hoped that in this manner partisan

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[85] Quoted in Griffith and Street, op. cit., p. 93.

[86] This differentiation of the function of parliamentary oversight into review of policy and review of the exercise of delegated powers is well stated by Griffith and Street. The review of statutory instruments, according to the authors, can be viewed in two ways: "First, their likely effect may be looked at, and examination is then directed to their merits to see if their provisions are desirable. Secondly, they may be considered as the formal results of the delegated power, in which case the question is whether they are the type of instrument which the Legislature intended or expected to emerge." Ibid., p. 92.

considerations will not enter into the committee's review and that the scrutiny of the statutory instruments will be based upon impartial and objective considerations.

At the present time, therefore, the committee is directed to call the attention of the house to delegated legislation only on the following grounds:

> (1) 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 licence or consent, or of any service to be rendered, or prescribes the amount of any such charge or payments:
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> (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:
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> (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:
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> (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 (I) of section four of the Statutory Instruments Act, 1946, where an Instrument has come into operation before it has been laid before Parliament:
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> (vii) that for any special reason, its form or purport calls for elucidation.[87]

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[87]Quoted by Schwartz, Law and the Executive in Britain . . ., pp. 116-117. The limitation against looking into the merits of a regulation and the direction to review for any unusual or unexpected use of the delegated powers is sometimes difficult to reconcile. Griffith and Street discuss this problem on the basis of Carr's distinction. Carr declared: "The

The committee meets every Tuesday during the parliamentary session. This allows the members of the committee to study the important instruments over the weekend.

> Along with copies of the instruments which they are to scrutinize there will have been circulated a memorandum prepared by the Speaker's Counsel who is directed to assist them. This takes the form of a list of the instruments, arranged according to their subjects, with his comments on any points that may have occurred to him. The chairman goes through the list, pausing over any points raised by the memorandum or by members. As the Committee's reports merely state in a few general words the ground for bringing an instrument to notice, the members' decision is quickly made. The number of instruments to be dealt with at each meeting naturally varies; it may be as low as 25 or, when the House has reassembled after the Long Vacation, as high as 150 or 200. The meeting may last an hour or be over in ten minutes.[88]

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line taken from the beginning has been: if you have a price-fixing order for potatoes . . . and the price goes up 2d. or down 2d., that is policy and merits, but, if you found it went up suddenly by 10s., that was something you might regard as an unusual or unexpected use of the power." Quoted by Griffith and Street, op. cit., p. 93. According to the writers, this distinction does not solve the dilemma: "The decision to increase the price by 10s. clearly indicates a change of policy whereas the variation of a few pence may, for example, be seasonal only. It seems simpler to disregard the question of 'policy and merits' and to say that the Committee draws the attention of the House to the exercise of discretion which seems to pass beyond the limits within which Parliament intended the power to be exercised." Ibid., pp. 93-94. This standard is strikingly similar to the substantive due process concept that was used so effectively by the American courts at the turn of the century to invalidate legislative efforts at regulation of the economic process. Both standards are based upon a reduction to a fundamentally similar test; i.e., the "reasonable-man" concept.

[88]Carr, loc. cit. See also Schwartz, Law and the Executive in Britain . . ., p. 117.

The committee must allow the government department that has issued a particular regulation or draft that is to be called to the attention of the house by the committee to present any explanation that the department feels appropriate and necessary. Such explanation may be either in writing or orally, as the committee directs.[89] The committee, after hearing the oral explanations or studying the explanatory memorandum, then decides whether to still call the attention of the house to the statutory instrument. If the committee's original decision remains unchanged, the explanations are submitted to the House of Commons along with the instrument and the committee report.[90]

Since the committee does not deal with the merits or policy of particular statutory instruments, this review is conducted in an atmosphere of harmony and consensus. Partisanship and conflict are almost entirely absent. This is reflected in the fact that the chairman has never had to take a formal vote on any committee

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[89]The document establishing the select committee declared that "before reporting that the special attention of the House should be drawn to any Rule, Order, or Draft the Committee do afford to any Government Department concerned therewith an opportunity of furnishing orally or in writing such explanations as the Department think fit." Quoted in "Delegated Legislation," Public Administration, XXII (Summer, 1944), 120.

[90]Schwartz, loc. cit.

decision.[91] Furthermore, the chairman does not serve as the committee spokesman during debates concerning motions to approve or disapprove instruments submitted to the house by the committee, and the committee members seldom participate in such debates. They prefer to maintain a separation from such conflicts so that the integrity and respect of the committee will be maintained.[92]

The work of the committee has been increasing over the years since its establishment. This results from the growing number of statutory instruments submitted to Parliament. A total of 947 instruments were examined by the committee in the 1945-1946 session

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[91] Carr, loc. cit.

[92] K. C. Wheare, "Controlling Delegated Legislation: A British Experiment," The Journal of Politics, XI (November, 1949), 766. Connecticut and Michigan, two American states, also have each provided for the establishment of a legislative committee to assist the legislature in its oversight of administrative rules and regulations. Schwartz, "Legislative Control of Administrative Rules . . .," p. 1038; supra, n. 49. The Connecticut legislature, however, has not established such a committee. Personal interview with Mr. Louis J. Tapogna, clerk, Office of Secretary of State, state of Connecticut, June 13, 1957. The Michigan legislature, on the other hand, has set up the Joint Legislative Committee on Administrative Rules for such a purpose. It has become the actual source of the control of such administrative rules, and it has not operated as the British Scrutiny Committee, in an atmosphere of nonpartisanship and objectivity. See Glendon A. Schubert, Jr., Helenan Sonnenburg, and George Kantrowitz, The Michigan Athletic Awards Rule, ICP Case Series: No. 29 (University, Alabama: University of Alabama Press, 1956).

of Parliament.[93] The succeeding session, that of 1946-1947, included a total of 795 instruments that were reviewed by the committee. The committee scrutinized 1,189 pieces of delegated legislation in the next session, and the number increased to 1,300 in the 1948-1949 parliamentary session.[94]

The summary totals for the period from the committee's first meeting in 1944 to the end of the 1950 parliamentary session show that the select committee examined approximately 5,200 statutory instruments.[95] The total number of instruments called to the attention of the house during this period was only sixty-seven.[96]

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[93]Hanson, op. cit., p. 279; supra, n. 84.

[94]Griffith and Street, op. cit., p. 98.

[95]Ibid., p. 94. Beet reports that, during a period extending from July, 1945, to November, 1953, covering nine parliamentary sessions, the select committee examined 7,246 statutory instruments. Ernest H. Beet, "Parliament and Delegated Legislation, 1945-53," Public Administration, XXXIII (Autumn, 1955), 325.

[96]Griffith and Street, op. cit., p. 96. This total of sixty-seven regulations to which the committee called the attention of the House of Commons is broken down into three major categories of the committee's terms of reference. The select committee pointed to (1) nineteen instruments that appeared to make an unusual or unexpected use of the delegated powers, (2) fourteen instruments that called for elucidation, and (3) thirty-three regulations that appeared to involve an unjustifiable delay in publication or laying before Parliament. Ibid. The select committee, during this same period, did not "discover" any regulation that imposed a charge on the public revenues or that was made pursuant to a parent statute that explicitly excluded the regulations made under the

The committee also issues special reports in addition to the reports that accompany the instruments submitted to the house. Such a report is generally issued about once in each session and deals with the technical aspects of delegated legislation.[97] In these reports the committee "deals with matters affecting statutory instruments as a whole and provides comments, criticisms and suggestions, both in detail and in general, upon the exercise of delegated powers."[98] These committee reports are not without an important effect. A special report issued by the committee in 1944, for example, emphasized the inefficient and unsystematic technicalities in parliamentary review of subordinate legislation. The report stressed the confusing number of different labels used to describe subordinate legislation. It also pointed out the needless inconsistencies in the

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act from challenge in the courts. Ibid. If this last conclusion is based, as the former findings are, upon instruments "reported" by the Scrutiny Committee, it may be misleading. Carr, at least, implies that regulations containing such provisions may still be enacted by the government, examined by the committee, and not reported to the House of Commons. He states that instruments imposing a charge, having retroactive effect, or escaping judicial review "are seldom reported, because, when they are discovered, it is usually found that the parent statute has expressly authorised them. It is hardly worthwhile to tell the House that a Minister has done something which Parliament said he might do." Carr, "Legislative Control . . .," p. 1050.

[97] Carr, "Delegated Legislation," p. 25; supra, n. 37.

[98] Wheare, op. cit., p. 756.

laying period for parliamentary review found in the different statutes. This committee report gave impetus to the search for a solution to these problems, and it was recognized that the report "assisted considerably in securing the passage of the Statutory Instruments Act, 1946."[99] Later reports of the select committee have focused attention upon other basic problems associated with parliamentary oversight, such as the necessity to consolidate overamended regulations and the desirability of short descriptive titles in regulations. The reports have also encouraged the increased use of explanatory notes to accompany technical regulations that are submitted to Parliament and may become binding upon the citizens.[100]

The usefulness of the select committee in the House of Commons has been a subject of debate since its inception. One of the serious shortcomings of the committee, according to some students, is its inadequacy as a screening device for the individual members of the lower house. It has not functioned to sift out of the mass of statutory instruments those that are of most interest to the individual members. This results from the fact, mentioned previously, that the committee is not allowed to review the merits of subordinate

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[99] Ibid., p. 757.

[100] Griffith and Street, op. cit., pp. 96-97.

legislation. Parliamentary members who are interested in maintaining control over delegated legislation, however, are primarily concerned with this aspect of particular statutory instruments.

> Now the "merit" of a statutory instrument is the aspect of it which interest [sic] Parliament more than any other. The occasions are comparatively rare when instruments are subjected to motions of annulment solely on grounds of their constitutional impropriety; for, after all, it is quite unusual for a Department to use delegated powers in a way that violates accepted constitutional understandings.[101]

There are few statistical data to test such a conclusion. One study[102] of this problem, however, did include a limited statistical analysis. The study was based only on the 1947-1948 parliamentary session and focused on the House of Commons. During this session there were thirty debates on motions and prayers to annul particular statutory instruments. It was found that only six debates were concerned with questions about the instruments or the parent statutes that fell within the committee's terms of reference.[103] The number of opposition votes involved in each of fourteen motions to annul instruments that ended in a division were then correlated with the

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[101] Hanson, op. cit., p. 281.

[102] Christopher J. Hughes, "Prayers to Annul Delegated Legislation--House of Commons, 1947-1948," Public Administration, XXVII (Summer, 1949), 111-114.

[103] Ibid., p. 113.

basic issue of the debate accompanying each motion. This correlation revealed that the major interest (in terms of number of opposition votes) centered around price controls and rationing--i.e., the merits of the statutory instruments--rather than any issue falling within the committee's purview.[104]

This hiatus between the committee's jurisdiction and the members' major interest regarding statutory instruments greatly reduces the effectiveness of the Select Committee on Statutory Instruments. Since the issue of delegated legislation that is of most interest to members is beyond the scope of the committee's jurisdiction, it has not functioned as a particularly effective screening device to relieve the individual member of the burden of being aware of, and acquainted with, the enormous number of instruments submitted to Parliament. Since the control of delegated legislation by the House of Commons depends upon the introduction of motions by individual members, the select committee has not, therefore, promoted a more effective system of parliamentary control by reducing the almost insuperable burden of the individual members.

> As it is, there has been very little saving of time, no means of assisting the conscientious M. P. who faces the formidable task of assessing the merits of each of the more

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[104] Ibid.

> important instruments as it appears, and no reinforcement of parliamentary control, except in respect of that very narrow territory which lies between vires on the one hand and policy on the other.[105]

Another student who has studied the functioning of the select committee, however, views the results of the presently circumscribed scrutiny by the committee optimistically.[106] The committee, according to Stacey, has produced beneficial results without entering into the partisan area of the policy and merits of statutory instruments. Under the category of "unusual or unexpected uses of the powers conferred," the committee has been able to emphasize the more dangerous abuses of the delegated powers of legislation. Stacey pointed out that the committee was able to report to the House of Commons, under this category, the regulation by which the Ministry of Food raised the price of raw cocoa in 1947 from 51s to 119s a hundredweight. The committee, under this category, also called the attention of the house to an order in council of November 16, 1945, that amended Regulation 42 CA of the Defense Regulations of 1939 and gave broad powers of arrest without warrant to any constable "who suspected a person of having been at a gaming party some days or weeks before."[107] In this latter instance, a prayer was

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[105] Hanson, loc. cit.

[106] See F. A. Stacey, "The Select Committee on Statutory Instruments--A Reply to Mr. Hanson," Public Administration, XXVIII (Winter, 1950), 333-336.

[107] Ibid., p. 334.

moved to annul the instrument. The government capitulated in the face of the publicity given such a broad and almost unlimited use of the delegated power and accepted the prayer.[108]

Most students who have studied this committee have agreed, apart from the controversy surrounding the committee's terms of reference, that the mere existence of the select committee has produced some noticeable improvement in the use of subordinate legislation. The fact that there is a committee in the lower house to carefully scrutinize each statutory instrument submitted to Parliament has produced caution and restraint on the part of the government. As one student puts it,

> 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 these instruments and more punctilious in their compliance with constitutional proprieties.[109]

The debate concerning the select committee can be best summarized by turning to the general evaluation of its role by Sir

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[108] Ibid. Cf. A. H. Hanson, "The Select Committee on Statutory Instruments: A Further Note," Public Administration, XXIX (Autumn, 1951), 281-283, in which Hanson reasserts his positions that the Scrutiny Committee is relatively ineffective as a "watchdog" body and that the question of merits should be included as part of the committee's frame-of-reference.

[109] Hanson, "The Select Committee on Statutory Instruments, 1944-1949," p. 279. Griffith and Street conclude, on this point, that "the value and importance of this work are undeniable. The very existence of the Committee must prevent more shortcomings than the Committee detects. . . ." Griffith and Street, op. cit., p. 98.

Cecil Carr, probably the one person closest to the actual operation of this committee. Carr's conclusions are based upon a close personal association with the Select Committee on Statutory Instruments since its inception. His experience leads to a rather pessimistic conclusion concerning the role of the committee in the English system of parliamentary review of delegated legislation:

> This latter body [the select committee] studies something like a thousand instruments in the year, but too much must not be expected of its patient labours. Its routine reports convey little; they may state the opinion that an instrument requires elucidation or appears to make some unusual or unexpected use of the power conferred by the parent statute, but they do not specify the grounds for their opinion. . . . The Committee's virtue is that it acts with independence and without partisanship; it can do so because it is debarred from reporting on matters of policy or merits; it is entirely uninfluenced by the Executive, and it has established the interesting convention that its chairman must be a member of the Opposition. But its work is imperfectly geared in with the machinery of parliamentary control. Members of the House usually table their motions for annulment long before the committee has reported on, or perhaps even seen, the challenged instrument; and the reasons for their challenge will probably be reasons which the committee was debarred from considering. Neither House has set up the potentially more valuable committee to examine Bills which contain proposals of delegation and thus to give Parliament the chance to lock the stable doors before the horses are stolen.[110]

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[110] Carr, "Delegated Legislation," pp. 250-251. The establishment of a committee to scrutinize bills delegating legislative powers to the executive was one of the major proposals of the Donoughmore Committee. Schwartz, Law and the Executive in Britain . . . , pp. 128-129.

Conclusions

Parliamentary review and congressional oversight can be compared on two points. The first point involves certain major similarities and differences. The second concerns the question of the promotion of politically responsible administrative decisions.

The basic similarity between the two practices centers around the use of concurrent and simple resolutions. Parliamentary review and congressional oversight both include the use of affirmative concurrent resolutions and simple negative resolutions.

There are many differences. In the first place, parliamentary review has become the central means of controlling subordinate legislation in England. Congressional oversight can not claim a similar standing in this country. It is a more recent innovation and has not tended to replace the more familiar methods of control. In the second place, England has made a conscious effort to improve its system. The Select Committee on Statutory Instruments and the Statutory Instruments Act of 1946 represent such efforts. No similar attempt has been made in this country to systematize the various requirements and reduce the wide variety of procedural differences found in the American practice. Lastly, neither chamber of Congress has seen fit to establish a scrutiny committee similar to those found in each house of the British Parliament. Each chamber has preferred to rely upon standing

legislative committees for initial review, in the case of review by resolution, and for final control, in the case of committee clearance.

The concern in England for improvement in the program of parliamentary review does not mean that all the problems have been solved. The major problem of the British practice has resisted solution. This is the apparent lack of effectiveness of parliamentary review. The effectiveness of the British practice as a device for the control of delegated legislation, when measured by the instances in which statutory instruments have actually been rejected by Parliament, has not fulfilled expectations.

The available evidence reveals that few statutory instruments have been rejected by Parliament during the history of parliamentary review. Sir William Graham Harrison found that only about four negative resolutions to nullify delegated legislation had been passed during a twenty-five-year period preceding 1931.[111] Allen, writing in 1944, was unable to find any significant number of instances in which delegated legislation had been rejected by the defeat of affirmative resolutions.[112] The available evidence concerning a more recent period reveals a similar lack of parliamentary control. There were no instances of the passage of a negative prayer or the defeat of an affirmative resolution in connection with statutory instruments during

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[111] Cited by Allen, op. cit., p. 95.

[112] Ibid.

a period of about five years extending from the end of World War II to the last month in 1949.[113]

The relative ineffectiveness is a function of several related factors. They include the procedure in the House of Commons, the party system, the technicality and amount of statutory instruments, and the limited terms of reference of the Select Committee. The basic cause, however, is the development of the cabinet into the organ of central direction and control of legislative activities. The cabinet, with its control of a disciplined majority party in the lower house, is able to prevent or defeat any major attempts to nullify subordinate legislation.

This has resulted in a situation in which the cabinet actually has the final control over the exercise of delegated legislative powers. Although it has defeated the primary aim of parliamentary control,

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[113] S. A. de Smith, "Delegated Legislation in England," Western Political Quarterly, II (December, 1949), 520. Beet found, however, that during the period from 1945 to 1953 five prayers were successfully moved to reject statutory instruments. Three of these resolutions were moved against the wishes of the government, but "they were accidental or 'snap' defeats with no real expectation that Government policy would be modified as a result, and the S.I.'s concerned were replaced by identical ones, though of course there were protests from the Opposition." Beet, op. cit., p. 328; supra, n. 95. Since this period overlaps with the period upon which De Smith bases his analysis and the specific dates of the prayers cited by Beet are not given, it is impossible to determine whether Beet offers contradictory evidence or deals with resolutions passed after 1949. In either case, however, the conclusion that emerges from the two studies is that very few statutory instruments have been rejected by Parliament in recent years.

this development is perhaps the best assurance that subordinate legislation will reflect the majoritarian political consensus of British society. The cabinet owes its existence and dominant position to a majority party in the House of Commons, which in turn is based upon an agreement among a majority of the electorate. The cabinet, in approving or promulgating subordinate legislation, will be necessarily cognizant of this basis of support. It will hesitate to issue or allow delegated legislation that reflects policies or views that might lead to any large-scale disaffection among large segments of this electorate majority. It is likely, then, that the subordinate legislation finally approved by the cabinet will tend to reflect a majoritarian political consensus that makes up the consent of the governed in a democratic society.

The British practice has thus actually developed into a system of cabinet control of delegated legislation. This system operates in such a way as to provide a pattern of control that promotes politically responsible administrative decision-making.

Review by resolution, one of the forms of congressional oversight, furnishes a system of control that meets equally well this basic norm. Committee clearance does not. This becomes clear in the subsequent chapters dealing with the American practice.

CHAPTER V

REVIEW OF ADMINISTRATIVE DECISION-MAKING BY CONGRESSIONAL RESOLUTIONS

Introduction

The British practice of legislative oversight of administration has not been unknown to the American scene. Congress, in the last quarter of a century, has included requirements in several statutes that the exercise of discretionary authority delegated by Congress must be approved by the legislature by concurrent resolutions of Congress or may be disapproved by such concurrent resolutions or simple resolutions of either house.[1] Approval by concurrent resolution and disapproval by a simple resolution of either house is similar to the English method of oversight by affirmative resolution and negative prayer, respectively. The disapproval of administrative decisions by concurrent resolutions is, however, an American innovation in legislative oversight.

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[1] Such legislative review was first established in a 1932 statute. See U.S., Statutes at Large, XLVII, Part 1, 382. Also see infra, p. 154.

The review of administrative decision-making by such concurrent and simple resolutions has enabled Congress to delegate rather broad discretionary powers to executive departments or administrative agencies, while, at the same time, reserving to itself the opportunity to maintain a check upon the use of such discretion in the administration of particular governmental programs. It thus represents a fairly new device in the American national governmental system for the control of administrative discretion.[2] The American

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[2]It is not the first time, of course, that Congress has attempted to take an active role in the administration of statutes that it has enacted. Congressional participation in the past, however, was generally accomplished by requiring that the membership of an organization established to administer a particular statute was to be composed in part of members of Congress. Such congressional membership often constituted a majority of the directing organ. One of the oldest examples of this type of participation is the Board of Regents of the century-old Smithsonian Institution. The board, which is directed to conduct the business of the governmental organization, is composed of the Vice-President of the United States, the Chief Justice of the United States Supreme Court, three members of the United States Senate, three members of the House of Representatives, and six other persons who can not be members of Congress. The Smithsonian Institution and the Board of Regents were established by an act of August 10, 1846. See United States Code, XX, Section 42. Another perhaps less famous example was the Public Buildings Commission established by the Legislative, Executive, and Judicial Appropriation Act of 1920. U.S., Statutes at Large, XL, Part 1, 1213. This commission, composed of a majority of congressmen, was made up of two senators appointed by the President of the United States Senate, two members of the House of Representatives chosen by the Speaker, the Superintendent of the Capitol Buildings and Grounds, and the Supervising Architect of the Treasury. U.S., Statutes at Large, Part 1, 1270. The functions of this commission were transferred to the National Park Service of the Department of Interior,

experience with this method of legislative oversight of administration has been the subject of only a few general studies.[3] The present chapter will be devoted, therefore, to a review and analysis of the American practice of legislative review by resolutions.

Before beginning a detailed consideration of the American practice, however, it is necessary to examine an important point raised by such congressional oversight of administration. It involves the approval and disapproval of administrative decisions by concurrent resolutions that are not submitted to the President for his apporval or veto. Article I, section 7, of the United States Constitution states:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by Two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

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and the Public Buildings Commission was abolished by Executive Order No. 6166, June 10, 1933. See United States Code, V, 132.

[3] The two most recent and complete studies of this type of legislative control are: Robert W. Ginnane, "The Control of Federal Administration by Congressional Resolutions and Committees," Harvard Law Review, LXVI (February, 1953), 569-611; and Cornelius P. Cotter and J. Malcolm Smith, "Administrative Accountability to Congress: The Concurrent Resolution," Western Political Quarterly, IX (December, 1956), 955-967. See also "Laying on the Table--A Device for Legislative Control over Delegated Powers," Harvard Law Review, LXV (February, 1952), 637-648. A much shorter and somewhat dated article is Howard White, "Executive Responsibility to Congress via Concurrent Resolutions," American Political Science Review, XXXVI (October, 1942), 895-900.

Despite this seemingly unambiguous constitutional requirement, Congress has for many years used concurrent resolutions for several matters without submitting them to the chief executive for his signature or veto. Such concurrent resolutions have been used since an early date to: (1) propose constitutional amendments, (2) deal with congressional printing matters, (3) create joint committees, and (4) express the opinion of Congress on various subjects.

The proposal of constitutional amendments is considered to be an exercise of the constituent power of the legislative body. The President's veto power does not extend to such cases. Concurrent resolutions that are not submitted to the President, therefore, are the normal means of exercising this power. The succeeding cases enumerated above involve matters that are considered to be nonlegislative in nature; they are viewed as subjects of legislative mechanics and procedural matters that do not involve questions of public policy and, therefore, do not require presidential participation.[4] This differentiation between legislative mechanics and legislation or policy formulation and the related convention that only concurrent resolutions involving the latter category must be submitted to the President has been sanctioned by long practice. It was defended in a Senate report of the late nineteenth century. Whether or not the President must be allowed to exercise his veto power over concurrent resolutions, according to this report, depends

[4] See Ginnane, op. cit., p. 573.

> . . . upon the fact whether they contain matter which is properly to be regarded as legislative in its character and effect. If they do, they must be presented for his approval; otherwise, they need not be. In other words, we hold that the clause in the Constitution which declares that every order, resolution, or vote must be presented to the President, to "which the concurrence of the Senate and House of Representatives may be necessary," refers to the necessity occasioned by the requirement of the other provisions of the Constitution whereby every exercise of "legislative powers" involves the concurrence of the two Houses; and every resolution not so requiring such concurrent action, to wit, not involving the exercise of legislative powers, need not be presented to the President. In brief, the nature or substance of the resolution, and not its form, control [sic] the question of its disposition.[5]

The use of concurrent resolutions for congressional review of specific administrative decisions taken pursuant to law obviously can not be sanctioned as an exercise of the constituent power of the legislative body. The question as to whether such use of concurrent resolutions involves matters of legislative mechanics or enters the realm of legislation and policy is certainly a moot point. Repeated use of this type of resolution in the American practice of congressional oversight, however, has seemingly sanctioned the view that it is not submitted to the President in such cases.[6]

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[5] U.S., Congress, Senate, Committee on the Judiciary, Senate Report 1335, 54th Cong., 2d Sess., 1897. Quoted in Ginnane, op. cit., p. 574.

[6] Cf., however, President Franklin D. Roosevelt's statement in 1938 that "such a resolution [concurrent resolution] cannot repeal executive action taken in pursuance of a law." Quoted in John D. Millett and Lindsay Rogers, "The Legislative Veto and the Reorganization Act of 1939," Public Administration Review, I (Winter, 1941), 181, and Ginnane, op. cit., p. 578. The concurrent resolution has also been used by Congress in other related areas of executive-legislative relationships without submitting it to the President for

Congress has thus been able to use both simple and concurrent resolutions to control the exercise of powers that it has delegated to the executive branch, while at the same time circumventing presidential participation in such control and direction of administration through the use of the veto power. The President's veto power in such cases is limited to acceptance or rejection of the statute containing such a requirement of legislative review. Statutes containing the requirement of congressional review of administrative decisions, once approved by the President, shift the focus of administrative direction and supervision from the presidency to the legislative body. Such a device for the reorientation of

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his signature. The reservation of authority to Congress to terminate or repeal statutes by concurrent resolution has been included in eleven emergency statutes enacted since 1941. Cotter and Smith, op. cit., p. 959. See their list in ibid., p. 965. Cf. Ginnane, op. cit., pp. 587-590. This use of the concurrent resolution in the Lend-Lease Act of 1941 was also condemned by President Roosevelt as an unconstitutional circumvention of the President's role in the legislative process. Roosevelt signed the bill that became the 1941 act, but he took the rather unprecedented step of writing a legal opinion to his Attorney General concerning his views about the unconstitutionality of such a requirement. See Robert H. Jackson, "A Presidential Legal Opinion," Harvard Law Review, LXVI (June, 1953), 1353-1361. The concurrent resolution has also been used to initiate executive action. Ginnane, op. cit., pp. 590-592. Congress has also directed that members of the board of directors of the Tennessee Valley Authority could be removed by concurrent resolution of Congress. Ibid., p. 592.

the control and direction of administration has been included in many statutes enacted in the past several years.

Review by Resolution

One of the major areas of governmental activity in which concurrent and simple resolutions have been used most extensively to establish congressional control of administration is that of presidential reorganization of the executive branch. The Economy Act of 1932[7] furnishes the earliest example[8] of such congressional control. Title IV of this statute delegated discretion to the President to regroup and consolidate the agencies in the executive branch and to transfer functions among them in order to promote economy and efficiency in administration by reducing overlapping and duplication. The proposed reorganizations were to be embodied in executive orders that had to be submitted to Congress. Such executive orders had to lay before Congress for sixty days of legislative session, and during this period the whole or any part of each order could either

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[7] U.S., Statutes at Large, XLVII, Part 1, 382.

[8] Such reorganization powers had first been delegated to the President by the Overman Act passed in 1918. U.S., Statutes at Large, XL, Part 1, 556. The only limitation on the President's authority, in this case, was that it had to be "exercised only in matters relating to the conduct of the present war." Ibid.

be approved by an affirmative concurrent resolution or disapproved by a simple resolution of either house.[9] In the former case the executive order, or the part approved, went into effect immediately and the remainder of the laying period was waived. If such an order, or part of the order, was disapproved by either house by a simple resolution, however, the reorganization proposal, or the part disapproved, was nullified and could not be put into effect. If Congress took no action on such an executive order it became effective at the end of the sixty-day period.[10]

This 1932 act granted permanent authority to the President to reorganize the executive branch. Title IV of the Economy Act approved March 3, 1933,[11] however, limited this authority to two years after the enactment of the 1933 statute. It also eliminated the requirement of congressional review by simple and concurrent

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[9]Title IV stemmed from an amendment first introduced by Rep. McDuffie during the consideration of the bill by the House. It provided only for nullification by either house. See U.S., Congressional Record, 72d Cong., 1st Sess., 1932, LXXV, Part 8, 9065-9066.

[10]"These provisions were enacted without any discussion in either House of the constitutional problem." Ginnane, op. cit., p. 576. President Hoover submitted eleven executive orders to Congress under this act and the House of Representatives, controlled by the Democrats, rejected each one. Millett and Rogers, op. cit., p. 178.

[11]U.S., Statutes at Large, XLVII, Part 1, 1489.

resolutions and provided simply that Congress could waive the laying period "by law" if it so desired. The pertinent language stated:

> Whenever the President makes an Executive Order under the provisions of this title, such Executive Order shall be submitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall by law provide for an earlier effective date of such Executive order or orders.[12]

A little over two weeks later, Congress again changed the procedure. In the Economy Act of March 20, 1933,[13] Congress eliminated the requirements that executive orders concerning reorganization had to remain before Congress for sixty days of continuous legislative session. It was under this amended procedure that President Roosevelt accomplished some of his most important reorganizations. He submitted the proposals to Congress on June 10, 1933, only six days

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[12] U.S., Statutes at Large, XLVII, Part 1, 1519. Under this procedure, according to Millitt and Rogers, Congress could veto proposed reorganization only by a joint resolution. Such a resolution would be sent to the President for approval or disapproval. Millett and Rogers, loc. cit. Ginnane states that this change was prompted by views expressed by Attorney General William D. Mitchell in a written opinion. Mitchell declared that the nullification of executive orders by a resolution of either house raised "a grave question as to the validity of the entire provision in the Act of June 30, 1932, for Executive reorganization of governmental functions." 37 Opinions of the Attorneys General of the United States, 64. See Ginnane, op. cit., p. 577.

[13] U.S., Statutes at Large, XLVIII, Part 1, 8. See Title III, p. 16.

before the legislature adjourned, and they became effective at the end of sixty days.[14]

After the grant to the President contained in the 1933 acts expired, Congress did not again establish a plan for the reorganization of the executive branch until 1939.[15] In that year the Reorganization Act of 1939[16] was passed. This statute granted authority to the President until January 21, 1941. It once again established a method of congressional review of reorganization proposals, but it contained several important changes in the procedure for such review. In the first place, reorganization proposals were to be embodied in plans and not in executive orders.[17] The second innovation was the requirement that such plans, which had to lay before Congress for sixty days, could be nullified only by a concurrent resolution passed

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[14] Millett and Rogers, loc. cit.

[15] Bills embodying delegation of reorganization powers to the President introduced in 1937 and 1938 failed of passage. The 1937 bill provided for congressional veto by joint resolution. Nullification by concurrent resolution was substituted in the 1938 bill. See ibid., p. 179, and Ginnane, op. cit., pp. 578-579.

[16] U.S., Statutes at Large, LIII, Part 2, 561. Legislative debate regarding the bill that became the 1939 act is summarized by Ginnane, op. cit., pp. 579-581.

[17] "The designation of the form in which the President was to submit reorganization details to Congress was changed principally to suggest that the President was to act not in an executive capacity but as a legislative instrument." Millett and Rogers, loc. cit.

by Congress during the laying period. This requirement of rejection by concurrent resolution marked a change from the earlier reorganization acts and also represented the first instance of the use of concurrent resolutions to reject reorganization proposals.[18] The 1939 act also declared that reorganization plans could be rejected only as a whole. Congress could no longer disapprove objectionable parts of a plan, but had the choice only of approving or rejecting the entire proposal. Finally, the 1939 act included written rules of procedure concerning resolutions introduced in regard to any reorganization plan to prevent obstructionist parliamentary tactics that would prevent a final vote on any resolution.[19]

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[18]But it was not the first instance of the use of concurrent resolutions to disapprove the exercise of delegated powers by the executive branch. See U.S., Statutes at Large, LXVII, Part 1, 564. See also infra, p. 177.

[19]See U.S., Statutes at Large, LIII, Part 2, 564. If a committee, to which a resolution to disapprove a reorganization plan had been referred, did not report the resolution out within ten days, a motion to discharge the committee could be made. Such a motion was highly privileged. Debate on the motion was limited to one hour, no amendments were possible, and no motions to reconsider the vote on the discharge motion were permitted. A motion to consider the resolution once it was reported by the committee or brought before the chamber by discharge action was not debatable. No amendments to the motion could be moved, nor was a motion to reconsider the vote on the motion possible. Debate on the resolution was limited to ten hours, and no amendments were possible. The resolution could not be recommitted, and motions to reconsider the final vote on the resolution were prohibited. Such written rules of procedure

Congress renewed the authority for presidential reorganization of the executive branch in the Reorganization Act of 1945.[20] Once again, however, Congress refused to enact a permanent statute delegating reorganization powers, but rather limited such authority to April 1, 1948. The provision for congressional review remained the same as the 1939 act. Congress reserved to itself the power to reject reorganization proposals by concurrent resolution during a sixty-day laying period.

Congress enacted the Reorganization Act of 1949[21] in the year following the expiration of the 1945 act. The method for congressional review was changed in this statute to allow either house to disapprove a reorganization plan by a simple resolution. The statute declared that a proposed plan would become effective if it were not disapproved by a simple resolution of either house during a period of sixty days of continuous congressional session after it

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were embodied in all subsequent statutes delegating reorganization authority to the President. The only instance of the inclusion of such rules in a statute outside the field of executive reorganization, however, was a 1953 statute providing for legislative review of the disposal of rubber-producing facilities owned by the national government. See U.S., Statutes at Large, LXVII, 408. See also infra, p. 173.

[20] U.S., Statutes at Large, LIX, Part 1, 613.

[21] U.S., Statutes at Large, LXIII, Part 1, 203.

had been submitted to the legislature. The substitution of the one-house veto, a device for facilitating the disapproval of presidential plans and thus strengthening congressional control, was a necessary compromise between the administration and Congress. The House of Representatives had included "special package" treatment for seven agencies in the reorganization bill that it passed. Although the agencies were not completely exempt from reorganization, the bill required that any reorganization proposal concerning any of the seven agencies would have to be included in a separate plan. In this way, the proposed reorganization of any of the seven agencies could not be accomplished by including it in a plan composed of a group of reorganization proposals that had general support among members of Congress. The administration opposed such exemptions. The Senate agreed to eliminate this provision, but it demanded the establishment of the procedure for disapproval by either house of Congress. This one-house veto requirement was thus inserted in the Senate bill and became a part of the 1949 act.[22]

The disapproval of reorganization plans by a simple resolution of either house combined with the sixty-day laying period form what has apparently become the standard method of congressional

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[22]See Ferrel Heady, "The Reorganization Act of 1949," Public Administration Review, IX (Summer, 1949), 165-175.

control in this area of governmental activity. This method has been re-enacted through successive renewals of presidential reorganization authority since the 1949 act.[23] At the present time, therefore, a device similar to the British practice of annulment by negative prayer is the basic method for controlling administrative reorganization in the American national government.

A study of the statistics concerning congressional oversight of presidential reorganization proposals reveals three important points. In the first place, in comparison to the British practice of review by negative prayer, the American experience with congressional supervision by both simple and concurrent resolutions of disapproval shows that it is much less difficult to find an opportunity to challenge the exercise of delegated powers by the introduction of resolutions. The statistics also point to the conclusion, however, that the introduction of such resolutions do not necessarily lead to the actual nullification of reorganization proposals. In fact, in the majority of cases, American experience reveals that it is exceptional for a resolution of disapproval to be carried successfully. The third point is that the degree of congressional control, when measured by the actual number of reorganization plans rejected by

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[23] U.S., Statutes at Large, LXVII, 4; U.S., Statutes at Large, LXIX, 14.

Congress, has not increased significantly since the change in the method of review embodied in the 1949 act.

Under the 1939 and 1945 reorganization acts, which required concurrent resolutions of disapproval, a total of twelve reorganization plans were submitted to Congress.[24] Although fourteen resolutions of disapproval were introduced in one or the other chamber, only three concurrent resolutions were successfully enacted to reject three of the twelve plans (25 per cent).[25] Since the passage of the 1949 reorganization act and the re-establishment of the one-house veto, a total of fifty-five plans have been sent to the legislature. Only eighteen plans went unchallenged by either house. Thirty-seven of these plans were the subject of fifty-one negative resolutions introduced in either the Senate or the House, or, in some cases, in both legislative chambers.[26] Only thirteen of these plans (23.6 per

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[24] Heady, op. cit., p. 173. But see Ginnane, op. cit., p. 581.

[25] Cotter and Smith, op. cit., p. 965.

[26] Nine of these plans were challenged by the introduction of negative resolutions in each house, while one, Reorganization Plan No. 1 of 1950, was the subject of twin resolutions introduced in the Senate. Three resolutions of disapproval, at least one from each chamber, were introduced to reject each of two other challenged proposals.

cent) were finally rejected by adverse action of one or the other chamber.[27]

Another important area of governmental activity in which congressional control of administrative discretion by resolution has become a prominent feature is that of the deportation of aliens. It first appeared in the Alien Registration Act of 1940.[28] This statute amended the Immigration Act of 1917 by adding a new subsection (c) to Section 19[29] of the earlier act. The amendment delegated broad discretion to the Attorney General to suspend deportation of certain classes of aliens if he found that "such deportation would result in serious economic detriment to a citizen or legally resident alien

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[27]These findings are based upon statistics gathered from various sources. A complete list of the reorganization plans submitted to Congress since the passage of the 1949 act can be found in U.S., Congress, Senate, Activities of the Senate Committee on Government Operations, 85th Cong., 1st Sess., 1957, Senate Report No. 1, Appendix A, pp. 101-102. The plans that became effective are listed in the back of the bound annual volumes of the U.S., Statutes at Large. The resolutions that were introduced in either chamber to disapprove any of the submitted plans can be found in the annual Congressional Index (Commerce Clearing House, Inc., Washington, D.C.). The final disposition of such resolutions can be traced in the preceding source or in the history of bills and resolutions available in the index of the United States Congressional Record.

[28]U.S., Statutes at Large, LIV, Part 1, 670. The events leading up to the enactment of this statute can be found in Harvey C. Mansfield, "The Legislative Veto and the Deportation of Aliens," Public Administration Review, I (Spring, 1941), 281-287.

[29]U.S., Statutes at Large, XXXIX, Part 1, 874.

who is the spouse, parent, or minor child of such deportable alien."[30] Such decisions of the Attorney General, however, were subject to review and possible nullification by Congress. If the suspension was in effect for over six months, the Attorney General was directed to submit all of the facts and pertinent provisions of law concerning each case to Congress ten days after the beginning of its next regular session. The suspension was to become effective only if Congress failed to pass a concurrent resolution during the session declaring that it did not favor the suspension.

The large number of suspension cases submitted to Congress by the Attorney General, and the necessity on the part of both houses to take positive action and come into agreement in order to veto any particular decision, however, led to the impracticality of this procedure as a method of congressional control. From the establishment of the act to June 30, 1947, the Attorney General had submitted 20,444 proposed suspensions. In none of these cases had Congress passed a single concurrent resolution of disapproval.[31]

Congress changed the review procedure in 1948 by the enactment of H.R. 3566 in order to provide a better opportunity to

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[30] U.S., Statutes at Large, LIV, Part 1, 672.

[31] Ginnane, op. cit., p. 583.

disapprove such suspension cases.[32] The House version of this bill provided for a simple negative resolution of either chamber for the nullification of any particular suspension.[33] This eliminated the necessity of obtaining the assent of both houses in order to veto the decision of the Attorney General. The Senate, however, substituted the procedure of approval by concurrent resolution in order to promote a closer congressional scrutiny of the suspension cases.[34] The procedure under the earlier statute, according to the Senate Committee on the Judiciary, led to the approval of the suspension cases without any careful review of them because they could be approved by default; i.e., by neglecting to introduce and pass a concurrent resolution. The committee report maintained that the procedure of approval by concurrent resolution would require that both chambers review the cases more carefully since positive approval by each house had to be given to each suspension.[35] The proposed Senate procedure was accepted by the House and was written into

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[32] U.S., Statutes at Large, LXII, Part 1, 1206.

[33] See U.S., Congress, Senate, Committee on the Judiciary, 80th Cong., 2d Sess., 1948, Senate Report No. 1204 to accompany H.R. 3566, p. 2.

[34] Ibid., p. 1.

[35] Ibid., pp. 3-4.

the 1948 statute. The statute required that any suspension made by the Attorney General that had been in effect for six months had to be reported to Congress. The time of reporting was changed so that he was required to submit such cases on the first and fifteenth days of each month that Congress was in session. The decisions of the Attorney General became effective, under the changed procedure, only if Congress passed a concurrent resolution specifically approving such decisions during the session in which the case was introduced or before the end of the succeeding session.

When Congress passed the Immigration and Nationality Act in 1952[36] revising the laws relating to immigration and nationalization, it again changed the method of congressional scrutiny of suspension cases. This statute, which is presently in effect, includes two procedures for reviewing such cases, which are, in turn, related to two general classifications of aliens whose deportation can be suspended by the Attorney General. Although there are many technical and complex criteria that differentiate these two categories, one of the major differences is the inclusion of aliens in one category who are deportable because of criminal acts concerning immorality, narcotics, or carrying concealed weapons, or because of the advocacy of

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[36] U.S., Statutes at Large, LXVI, 163. 8 United States Code, Chapter 12.

subversive doctrines or affiliation with subversive organizations.[37] The suspension of the deportation of aliens in this category by the Attorney General can not become effective until approved by Congress by the passage of a concurrent resolution stating that it favors such suspension. Such suspensions can also be nullified by a simple negative resolution of either house.[38] The time for reporting such cases and the laying period during which such proposed suspensions must remain before Congress remain the same as that found in the 1948 act. The other procedure included in the present act relates to a separate category of deportable aliens. This category is composed, in general, of those aliens who do not fall into the former category and who are deportable under any law of the United States. It requires an identical reporting system and laying period. The decisions of the Attorney General concerning the suspension of deportation of aliens in this category become effective unless during the laying period either house of Congress passes a simple resolution disapproving such an exercise of the delegated discretionary authority.[39]

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[37] See Section 244(c), U.S., Statutes at Large, LXVI, 216.

[38] Ibid

[39] See Section 244(b), U.S., Statutes at Large, LXVI, 216.

Congress also included in this statute a requirement for congressional review of another category of decisions by the Attorney General. Section 246(a)[40] of the 1952 act declares that the Attorney General is authorized, any time within five years after the suspension of a particular deportation and the adjustment of the alien's status, to revoke the suspension of deportation and the adjustment of status if he finds to his satisfaction that the alien was not eligible for such a grant. The alien then loses his acquired status if, after the Attorney General has submitted his decision to Congress under a reporting procedure and laying period identical to that established earlier in the act for suspension of deportation cases, Congress passes "a concurrent resolution withdrawing suspension of deportation. . . ."[41] The 1952 statute, which now governs the suspension of deportation, thus offers an example of congressional oversight that combines both the one-house veto, or, as it is called in England, the procedure by negative prayer, and the concurrent resolution of approval, similar to the British practice of affirmative resolutions.

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[40] U.S., Statutes at Large, LXVI, 217.

[41] Ibid., p. 218.

Congress has also included the requirement of congressional oversight of delegated discretion by resolutions in two other statutes relating to the field of immigration and naturalization. The Attorney General is authorized, according to the Displaced Persons Act of 1948,[42] to adjust the status of any displaced person residing in the United States to that of a permanent resident if the displaced person meets certain statutory requirements set out in section four of the act. The decision of the Attorney General must be submitted to Congress and can not become effective unless Congress passes a concurrent resolution approving such a decision during the session in which a case is reported or before the end of the next session. If no such resolution is passed during this laying period the Attorney General "shall thereupon deport such alien in the manner provided by law."[43]

The Refugee Relief Act of 1953[44] contains the procedure for review by affirmative concurrent resolutions and also by simple negative resolutions.[45] The statute applies to aliens who have

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[42] U.S., Statutes at Large, LXII, Part 1, 1009. 50 (Appendix) United States Code 1953.

[43] U.S., Statutes at Large, LXII, Part 1, 1011.

[44] U.S., Statutes at Large, LXVII, 400.

[45] See Section 6, U.S., Statutes at Large, LXVII, 403.

lawfully entered the United States prior to July 1, 1953, as nonimmigrants and who can not return to their places of birth, nationality, or last residence because of fear of persecution on account of their race, religion, or political opinion. Such persons may apply to the Attorney General for an adjustment of their status to that of an alien lawfully admitted to this country for permanent residence. The Attorney General is given discretionary authority to grant such an adjustment if he finds that the nonimmigrant meets certain statutory requirements. His decision can become effective, however, only if, during a laying period identical to that established by the Displaced Persons Act of 1948, Congress passes an affirmative concurrent resolution and neither house passes a simple resolution of disapproval.

Although Congress has devised an elaborate procedure for the control of these different decisions of the Attorney General under these various statutes, his decisions are almost always accepted by Congress and seldom raise any controversy.[46] The statistics concerning congressional oversight of such decisions during the

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[46]Interviews with Mr. William R. Foley, general counsel, Committee on the Judiciary (January 7, 1957), and Mr. Fred M. Mesmer, staff member, Subcommittee on Immigration and Naturalization, Senate Committee on the Judiciary (January 11, 1957).

Eighty-fourth Congress tend to substantiate this point.[47] The Attorney General submitted 2,029 cases of suspension of deportation to the Eighty-fourth Congress under the provisions of the Immigration and Nationality Act of 1952. In addition to this large number, 537 cases were pending at the beginning of this Congress. Congress approved well over half of this total of 2,566 cases en masse by enacting five concurrent resolutions approving 1,550 cases. Only thirty-nine cases of this large number of decisions submitted to Congress were not approved. The Attorney General withdrew twelve cases, and there were 965 pending at the end of the Eighty-fourth Congress. There was a similar tendency on the part of Congress to approve the decisions of the Attorney General that were submitted under Section four of the Displaced Persons Act of 1948. During the Eighty-fourth Congress the legislative body was requested to pass upon a total of 881 cases, 474 being cases that were pending at the beginning of the Eighty-fourth Congress and 407 cases that were introduced during the two sessions of this Congress. Five concurrent resolutions that were successfully enacted approved a group of 766 decisions of the Attorney General. Only fifty-four

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[47]The following statistics are from U.S., Congressional Record, 84th Cong., 2d Sess., 1956, CII, No. 134, Appendix, A6448-A6454.

cases were not approved by Congress. The Attorney General withdrew only three, and ten were held for further information. Forty-eight cases were still pending at the close of the Eighty-fourth Congress. The statistics concerning congressional oversight of decisions based upon the Refugee Relief Act of 1953 reveal a slightly higher percentage of disapprovals in comparison to approvals. Under the provisions of this statute the Attorney General submitted a total of 4,767 cases to the Eighty-fourth Congress, which, when combined with the 41 pending at the beginning of the Congress, gives a total of 4,808 cases that Congress was required to review. Over half of the decisions, 2,740, were approved by five concurrent resolutions. Approval was withheld, however, in 330 cases. Thirty-one cases were held for further information, and 24 were withdrawn by the Attorney General. A total of 1,683 were still pending at the end of the Eighty-fourth Congress.

Executive reorganization and immigration and naturalization are the two major areas of continuing governmental activity in which congressional control of administrative discretion by resolutions has been used most extensively. When Congress decided to dispose of the twenty-seven government-owned rubber-producing plants, however, it once again established this type of congressional oversight in order to control the administration of the disposal program.

Congress passed a statute setting up such a program and establishing the Rubber Producing Facilities Disposal Commission in 1953.[48] This act delegated discretionary authority to the commission, composed of three members appointed by the President, to negotiate contracts for the sale of the government-owned rubber-producing facilities to private enterprise. Thirty days after the termination of a stated negotiating period (or not later than January 31, 1955), the commission was directed to submit a report to Congress listing the proposed sales and the relevant data concerning each sale. Each proposed sale was subject to possible nullification by a negative resolution of either house of Congress during a required sixty-day laying period. Section 9(b) stated:

> Upon the expiration of sixty days of continuous session of the Congress following the date upon which the report is submitted to it the Commission shall proceed to carry out the contracts and proposals, as outlined in its report, to the extent that such contracts and proposals are not disapproved by either House of Congress by a resolution within the sixty-day period.[49]

One of the major reasons for including this procedure in the statute is revealed in the House debate concerning the bill. Representative Celler was concerned that the facilities would be sold to the larger private plants unless adequate safeguards were included

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[48] U.S., Statutes at Large, LXVII, 408.

[49] U.S., Statutes at Large, LXVII, 412.

in the proposed statute. Representative Durham, a member of the House Armed Services Committee that considered the bill, answered Celler by saying "that is exactly why we put these provisions in the bill. It comes back here and the Congress has to approve within 30 days any contract made by any person who purchases one of these plants."[50] One of the important reasons for the inclusion of congressional oversight, therefore, was the establishment of a procedure whereby Congress could carefully supervise the use of the delegated discretion to prevent an increase in the control of the production of rubber by the larger producers and to promote the growth of the small independent producers.

Congress extended the authority of the Rubber Producing Facilities Disposal Commission twice in 1955 and once in 1956 in order to allow the commission to negotiate contracts for the sale of three of the government-owned plants. In March, 1955, Congress

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[50] U.S., Congressional Record, 83d Cong., 1st Sess., 1953, XCIX, Part 6, 7314. The House version of the bill had contained a laying period of only thirty days. See U.S., Congress, House, Committee on Armed Services, 83d Cong., 1st Sess., 1953, House Report No. 593 to accompany H.R. 5728, p. 74. This report declared: "While it is not intended that this section will create a forum for rejected bidders to air their complaints, nevertheless it will give the representatives of the American people an opportunity to pass upon and, if necessary, reject the proposed transfer of a great Government industry to the hands of private industry." Ibid.

passed S. 691,[51] which extended the commission's authority so that Plancor Number 877, located at Baytown, Texas, could be sold. The proposed contract had to be submitted to Congress no later than ten days after a specified negotiation period. The contract, in this case, had to lay before Congress for only thirty days of continuous session, and it was to become effective only if neither house passed a resolution disapproving the proposal during this period. Public Law 336,[52] passed the same year, again extended the authority of the commission in order to dispose of Plancor Number 980 at Institute, West Virginia. It contained the same procedure for congressional review, including the shortened laying period. The next year Congress once again extended the commission's authority in order to dispose of Plancor Number 1207, a Louisville, Kentucky, plant, and the procedure of congressional oversight of the delegated discretion was identical to the earlier 1955 acts.[53]

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[51] Public Law 19 (1955).

[52] Public Law 336 (1955).

[53] Public Law 443 (1956). The commission ceased to exist on September 23, 1956. Its duties, powers, and functions were transferred to the Federal Facilities Corporation by Executive Order 10678 of September 24, 1956, which was authorized by Section 6(d) of Public Law 433 (1956). The transferred powers and duties of the corporation were made subject to "direction and control by the Secretary of the Treasury." Federal Register, XXI, No.

The commission submitted proposals to Congress to sell each of the twenty-seven plants.[54] Three House resolutions and four Senate resolutions were introduced to disapprove of one or more of the proposed contracts. Six of these resolutions were unsuccessful in the chamber of origin, and in only one instance was a negative resolution passed to nullify a proposed sale.[55] As in the case of congressional oversight of executive reorganization, the American experience with legislative control of the rubber plant disposal

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185 (1956), p. 7199. The Federal Facilities Corporation was created by the Secretary of the Treasury pursuant to Executive Order No. 10539 (June 22, 1954) and Section 10 of the Rubber Act of 1948 on July 2, 1954. Department of the Treasury, Office of the Secretary, Federal Register, XIX, No. 128 (1954), p. 4041.

[54]By April 30, 1956, twenty-six of the twenty-seven government plants had been sold. Message from the President of the United States, "Report Concerning the Nation's Rubber Requirements and Resources," House Document 391, 84th Cong., 2d Sess., April 30, 1956, p. 1. A proposal to dispose of Plancor No. 1207, located at Louisville, Kentucky, which was authorized by Public Law 433 (1956), was later submitted to Congress.

[55]Congressional Index, 84th Cong., Commerce Clearing House, Inc., Washington, D.C. House Res. 524 of the 84th Cong., 2d Sess., was successfully carried to reject the proposed sale of Plancor No. 1207, Louisville. Ibid. H.R. 2528 was introduced at the beginning of the first session of the Eighty-fifth Congress to authorize the Federal Facilities Corporation to renegotiate for the sale of Plancor No. 1207. The proposed bill again reserved to either house the authority to disapprove the sale by simple resolution within a thirty-day laying period. See U.S., Congress, House, Committee on Armed Services, 85th Cong., 1st Sess., 1957, House Report No. 4, p. 7. It passed the House on February 5, 1957, but had not been reported out by the Senate Committee on Banking and Currency as of April, 1957.

program reveals that the introduction of negative resolutions by no means insures the nullification of an exercise of discretionary authority.

Congress has also provided for legislative review of administrative decision-making by resolutions in two other special instances. Both involve the use of concurrent resolutions. Public Law 240[56] was enacted in 1932, just one day after the practice of legislative review of executive reorganization by concurrent and simple resolutions was first established in the Economy Act of 1932. It delegated discretionary authority to the Secretary of the Interior to adjust or eliminate the debts owed by Indians or Indian tribes to the national government. The Secretary was simply directed to exercise this discretion "in such a way as shall be equitable and just in consideration of all the circumstances under which such charges were made."[57] Any decision made by the Secretary pursuant to this authority, however, had to be submitted to Congress and could not become effective for sixty legislative days. Moreover, Congress reserved to itself the power either to approve or to disapprove each decision by concurrent resolution within this period.

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[56] U.S., Statutes at Large, XLVII, Part 1, 564. 25 United States Code 386a.

[57] Ibid.

Thus, Congress could reject any such decision by passing a negative concurrent resolution. On the other hand, the decision of the Secretary could be approved by Congress either by an affirmative concurrent resolution or by failure to take any action within the laying period.[58]

This particular procedure resulted from a compromise that emerged out of the conference committee established to settle the differences between the House and Senate bills concerning this subject. The House version of H.R. 10884 delegated complete discretion to the Secretary of the Interior to adjust or eliminate the debts of the Indians or Indian tribes. The only requirement contained in the House bill was that the Secretary had to submit an annual report setting forth the action taken under the delegated authority during the preceding year.[59] When this bill came before the Senate for debate, however, Senator King threatened to object to consideration

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[58]The actual proviso read: "That any proceedings hereunder shall not be effective until approved by Congress unless Congress shall have failed to act favorably or unfavorably thereon by concurrent resolution within sixty legislative days after the filing of said report, in which case they shall become effective at the termination of the said sixty legislative days." U.S., Statutes at Large, XLVII, Part 1, 565.

[59]See U.S., Congress, Committee of Conference, 72d Cong., 1st Sess., 1932, House Report No. 1725 to accompany H.R. 10884, p. 2.

of the bill unless an amendment that he proposed were accepted. The King amendment required that any decision by the Secretary concerning the elimination or adjustment of such debts would not be effective until "approved by Congress."[60] Senator King declared that, in the face of information that was available to the Senate Committee on Indian Affairs, he was "unwilling that this unrestricted and unlimited authority shall be granted to the Bureau of Indian Affairs to extinguish liabilities of individuals, no matter how fair they may be, of millions of dollars unless reports are made to Congress and approved by Congress."[61] The Senate accepted this amendment, and the different positions of the two chambers on this point were reconciled in the conference committee by the substitution of the procedure that became the congressional review requirement now contained in the statute.[62]

Section six of an act passed in 1946[63] also established legislative review of particular administrative decisions by concurrent

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[60] U.S., Congressional Record, 72d Cong., 1st Sess., 1932, LXXV, Part 13, 13829.

[61] Ibid.

[62] See supra, n. 59, p. 178.

[63] U.S., Statutes at Large, LX, Part 1, 897. 34 United States Code 546f-k.

resolution. This requirement was written into S. 1547, which was passed by both houses. Section one of the statute authorized the Secretary of the Navy to transfer, by gift or otherwise, obsolete or condemned United States Navy ships or captured vessels to any state or local governments, American territories or possessions, or to certain nongovernmental groups. Section two similarly authorized the Secretary to transfer other articles of war and historic interest. The Secretary of the Navy was given complete discretion to effect such transfers "upon such terms and conditions as he may in his discretion prescribe. . . ."[64] Accompanying such a grant of discretion, however, was the requirement that all decisions made by the Secretary on the basis of this authority had to be submitted to Congress and were subject to nullification by a concurrent resolution of disapproval within a certain period of time. The laying period varied according to the particular section of the statute under which the Secretary acted. In the case of a transfer based upon the first section of the act, any proposed transfer would take effect only if Congress did not enact a negative concurrent resolution within a period of sixty days of continuous session after the decision had

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[64] U.S., Statutes at Large, LX, Part 1, 897. For an instance of apparent abuse of administrative discretion under an earlier statute which made no provision for congressional review, see Levinson v. United States, 258 U.S. 198 (1922).

been submitted to Congress. Any transfer undertaken in pursuance of the authority delegated by section two was subject to the same method of nullification, but the laying period was shortened to thirty days.

The most recent use of concurrent resolutions to control administrative decisions is found in the Federal-Aid Highway Act of 1956.[65] Section 108 of this statute concerns the completion of the "National System of Interstate and Defense Highways." It authorizes annual lump-sums for federal aid to state highway construction for a period extending from fiscal year 1957 to fiscal year 1969.[66] Authority is delegated to the Secretary of Commerce to apportion the funds among the several states for the construction of the state's portion of the national highway system. For the first three years, however, the Secretary is required to apportion the funds according

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[65] Public Law 627 (1956).

[66] Such a long-term authorization of funds was unusual. Up to this time it had been the practice of Congress to authorize highway appropriations for only a two-year period. Witnesses from the road-construction industry, however, according to the House report accompanying the reported House bill, persuaded the House Committee on Public Works to authorize funds for the twelve-year period so that there would be no interference with the construction of highways and thus "inefficient and expensive build-ups and let-downs" in the road construction industry. U.S., Congress, House, 84th Cong., 2d Sess., 1956, Committee on Public Works, House Report No. 2022 to accompany H.R. 10660, p. 8.

to a definite formula. One-half of each state's grant for these three years is to be in proportion to "the ratio which the population of each State bears to the total population of all the States. . . ."[67] The other half of the funds is to be determined by an apportionment based upon the formula used for the federal-aid primary system.[68] The specific proportion of the annual funds for each fiscal year from 1960 to 1969 granted to each state is to be determined by "the ratio which the estimated cost of completing the Interstate System in each state . . . bears to the sum of the estimated cost of completing the Interstate System in all the states."[69] The actual estimate of the annual cost of construction in each state is left to periodic determination of the Secretary of Commerce in cooperation with the state highway department in each state. The statute simply directs that the determination of such costs must be based upon a consideration of the previous grants made under this act in the preceding years and such other standards and rules that the Secretary may adopt and apply uniformly to all the states.[70]

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[67] Sec. 108(c) of Public Law 627 (1956).

[68] Ibid. See U.S., Congress, Committee of Conference, 84th Cong., 2d Sess., 1956, House Report No. 2436 to accompany H.R. 10660, p. 29.

[69] Sec. 108(d) of Public Law 627 (1956).

[70] Ibid.

In order to control the use of this delegated discretion, Congress once again relied upon legislative review by concurrent resolution. Section 108(d) of the statute requires the Secretary of Commerce to submit to Congress, within ten days after January 2, 1958, a detailed estimate of the projected costs of construction in each state for the fiscal years 1960, 1961, and 1962. If this schedule is approved by Congress by concurrent resolution,[71] the Secretary shall utilize the approved estimates to apportion the annual lump sums to each state for each of the specified years. The estimates worked out by the Secretary and the state highway departments covering the fiscal years 1963 to 1966, inclusively, must be submitted to Congress no later than ten days after January 2, 1962, and are subjected to the same requirement of congressional approval by concurrent resolution. Beginning in 1966, and continuing through 1968, the Secretary is required to submit annual estimates of costs no later than the second of January of each year, and the proposed estimates become effective only if they are approved by concurrent resolution.

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[71] There is no statutory specification of a period during which such a resolution must be passed.

Review by Resolution and Legislative Committees

Congress has not established a committee in each house that is charged with the single responsibility of reviewing the exercise of delegated powers similar to the scrutiny committees found in British practice. The administrative decisions that are submitted to Congress are referred to the standing legislative committee that has jurisdiction over the governmental activity involved for review and recommendation.

The members of Congress are generally able to perform such review individually. They thus rely to a great extent upon the study and recommendations of the reviewing committees. The relatively large numbers of decisions submitted to Congress, the complexity and technicality of most of these decisions, and the demands upon the time of individual members are all factors which limit the possibility of individual consideration and lead to reliance upon committee scrutiny and recommendation.

It is likely that such a situation promotes the influence of the reviewing committees in the final legislative disposition of administrative decisions.[72] It is difficult to test this, because there is no

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[72]It may be that in many cases the full committees merely serve to ratify the recommendation of an established subcommittee

single accurate measure of this influence. Some general indication can be obtained, however, by looking at the available figures concerning the results of simple negative resolutions that have been the subject of recommendations by the reviewing committees. Committee influence can be defined as the concurrence between the final decision of the chamber and the committee recommendation concerning such resolutions.

By using this measure a distinguishable pattern of committee influence is found in the operation of review by resolution. Such a pattern can be seen in the case of congressional review of executive reorganization and the government operations committees by looking at the results of resolutions of disapproval that have been introduced

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or the committee staff. In such cases the source of major influence can be traced to these levels of the committee hierarchy. The data that were obtained for this analysis of congressional review by resolution do not furnish proof for this point. There are also no published works available that present any concrete documentation of the power and influence of subcommittees and committee staff in the process of committee decision-making. There are some related pieces of evidence, however, that do lend some support to this supposition. The evidence relating to the part played by the subcommittees of the judiciary committees in the review of suspension of deportation cases (see infra), for example, illustrates the influential role of subcommittees in one particular case of congressional review by resolution. Furthermore, the predominant influence of both subcommittees and the committee staff in many of the instances of committee review and control discussed in the succeeding chapters offers further closely related evidence. See specifically Chapter VIII, infra.

to reject particular reorganization plans since 1949. From 1949 until the end of the Eighty-fourth Congress a total of thirty resolutions of disapproval, on which the reviewing committee expressed a recommendation, were brought to a final vote in the chamber of origin.[73] The final decision of the chamber differed from the committee recommendation on only six resolutions. The disposition of twenty-four of them coincided with the initial committee recommendation.[74]

A similar pattern is found in connection with resolutions introduced to disapprove proposed disposals of government-owned rubber-producing facilities. Seven resolutions were introduced during the Eighty-fourth Congress to disapprove either one or several of the proposed sales of the government plants. These resolutions were referred to the Armed Services Committee in the House and the Committee on Banking and Currency in the Senate. In each case, the reviewing committee made specific recommendations concerning the resolutions. The House committee reported two resolutions of

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[73]This includes one resolution, H. Res. 236 (1953) to disapprove Reorganization Plan No. 2 of 1953, that had to be discharged from the committee. Such action reflects opposition to the negative resolution on the part of the committee, and it was thus included in the above category of resolutions that were the subject of committee recommendations.

[74]This information was obtained from the sources cited in supra, n. 27, and committee reports accompanying the resolutions that were reported to Congress by the reviewing committees.

disapproval adversely and approved another such resolution. The Senate committee recommended adverse action for five resolutions. In each of these cases the final vote of the chamber of origin concurred with the committee recommendation.[75]

The experience with congressional supervision of the proposed suspensions of deportations submitted under the terms of the 1952 statute reveal a somewhat similar picture. In this case, however, it is not the committees on the judiciary, but rather subcommittees of such committees, that wield major influence. Each committee has an established subcommittee perform the initial study and analysis of proposed decisions. The full committees almost invariably adopt the recommendations of their subcommittees concerning these proposals. Those recommendations for approval are embodied in affirmative concurrent resolutions by the committees and submitted to Congress. Few attempts are made to reject such resolutions. They are generally ratified by Congress with little or no debate.[76]

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[75]These figures were obtained from the source cited in supra, n. 55.

[76]Personal interviews, see supra, n. 46. State experience with legislative review of administrative rules and regulations reveals that the legislative committees have become the major source of influence in such a review process. This has been the result, for example, in the state of Connecticut. In this state all rules and regulations are required to be periodically submitted to the legislature

It must be remembered that there have been instances in which the full chamber has overruled the reviewing committee's initial decision concerning an administrative proposal. Such instances are significant. They serve to underline the fact that review by resolution does leave open a channel of appeal to the full chamber. They also reveal that such a channel has been utilized from time to time to veto the recommendations of the committees.

This recognition of the availability of a channel of appeal and its occasional successful use serves to point out a significant

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and are subjected to possible nullification by concurrent resolution of the legislative body. Bernard Schwartz, "Legislative Control of Administrative Rules and Regulations: I, The American Experience," New York University Law Review, XXX (May, 1955), 1038. Although provision has been made for the establishment of a legislative committee to assist the legislature in this oversight function, the Connecticut legislature has chosen to rely upon the regular legislative committees. The practice has been for the appropriate committee in each chamber to review the administrative rules falling within its jurisdiction. If they approve the regulations, notification to this effect is sent to the Connecticut Secretary of State. The legislative chamber is notified only if a committee favors disapproval of any regulation. This takes the form of a recommended decision of disapproval. The legislative chamber almost invariably follows such committee recommendation and simply incorporates it in an official proposed concurrent resolution of disapproval. Personal interview with Mr. Louis J. Tapogna, Clerk, Office of Secretary of State, State of Connecticut, June 13, 1957. A similar pattern of committee influence also has developed in the case of the Michigan Joint Legislative Committee on Administrative Rules. See Glendon A. Schubert, Jr., Helenan Sonnenburg, and George Kantrowitz, The Michigan Athletic Awards Rule, ICP Case Series: Number 29 (University, Alabama: University of Alabama Press, 1956).

distinction between this American device and both the British practice, which already has been discussed, and the second American device of committee clearance to be presented in succeeding chapters. It has already been shown that in the British practice the cabinet, for all practical purposes, has achieved complete control over the legislative dispositions of statutory instruments submitted to Parliament. The development of review by resolution has not led to an analogous position for the reviewing committees. Although they do exert a good deal of influence over the operation of the American device, they can be, and have been, overruled. The development of the American device, in other words, has still left the legislative body with a mechanism for asserting its final power and authority in any particular case. This point also becomes significant when review by resolution is compared with committee clearance. This latter device places the final approval and disapproval of administrative decisions in particular legislative committees. In such cases neither chamber has an opportunity to overrule the decisions of the committees.

Conclusions

Review by resolution has a history that dates back twenty-five years to 1932. During this period a total of eighteen statutes

have been passed containing the requirement of congressional oversight by resolutions. It is presently included in seven operative statutes.[77]

Such figures do not reflect a movement to establish this device as the central element in a program of legislative control of administrative discretion. In the first place, such a device has been used only sparingly. Eighteen statutes is a small amount of the undoubtedly large number of statutes passed during this period that involved the delegation of discretionary authority to the national bureaucracy. In the second place, Congress has shown no propensity to use this device in a great many of the widely dispersed fields of governmental activities involving administrative decisions. The large majority of these statutes have concerned only three major fields.

Six statutes out of the total of eighteen have involved the initial establishment and subsequent renewals of presidential authority to reorganize the executive branch of the national government. Another group of five has centered around the activities of the United States Attorney General in the field of immigration and naturalization.

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[77]See Appendix I for a listing of all the statutes that have included the requirement of review by resolution. Appendix II lists the statutes containing this requirement that are presently in effect.

Four other statutes concerned the government's program for the disposal of government-owned rubber-producing facilities.

Only three out of the eighteen statutes imposed review by resolution in other areas of governmental activity. They were, moreover, unrelated areas. They included the adjustment of Indian debts, the sale of naval ships and articles of war, and the apportionment of federal aid funds to states for highway construction.

Congressional oversight by resolutions has thus not attained a status similar to that of parliamentary review in England. Nor, indeed, has Congress attempted to establish such a broad and widespread system of legislative control of bureaucratic discretion. Congressional use of this device has seemed, rather, to be based upon expediency. American experience suggests that this device has been used by Congress in those particular instances in which it found itself either unable or unwilling to carry out a detailed governmental program and yet particularly reluctant to divest itself of close and direct control over the specific administration of the program. Review by resolution has offered a useful and convenient way out of this dilemma.

In the case of executive reorganization, for example, Congress found itself ill-equipped to carry out detailed plans of reorganization and generally unable to agree upon any particular reorganization pattern. By using this device Congress was able to delegate discretionary powers to the President and still provide an opportunity to maintain a close control over the use of such powers. The same pattern

is discernible in the case of the suspensions of deportations and the adjustments of the status of aliens by the Attorney General of the United States, and in the rubber facilities disposal program. The latest instance of the use of this device, in the Federal-Aid Highway Act of 1956, is a vivid example of this pattern. In that case Congress found itself faced with a need to establish cost estimates for each state's contribution to the construction of the federal highway system over a continuous period in which the basis of the estimates would be constantly changing. In order to relieve itself of this rather complicated task and still maintain control over the authorization basis for federal appropriations, Congress turned to the device of delegating fairly broad discretionary powers to the Secretary of Commerce with an accompanying requirement of review by resolution.

One final point must be discussed before leaving this analysis of review by resolution. This concerns the question whether the operation of the device fulfills the claim of the promotion of politically responsible administrative decisions contained in the doctrine of legislative control.

Such an evaluation must be based upon a recognition of the important point that review by resolution places the final power of decision-making, regarding the approval or disapproval of administrative proposals, in the full chambers of Congress. This is seen most clearly, of course, in those cases in which the full chamber has overturned initial recommendations of its reviewing committee.

It is not vitiated, however, by the other instances which have pointed to an apparent pattern of influence by the reviewing committees. It is equally operative, but less apparent, in the majority of cases in which final action of a chamber has concurred with the initial committee recommendation.

In order fully to understand this last point, it is necessary to take a careful look at such situations of concurrence, which actually include two possibilities. In the first place, the concurrence may result from a pro forma acceptance of initial committee action. This generally occurs when administrative proposals are routine and noncontroversial. It is likely that many proposals subject to review by resolution fall into this category. A similar concurrence, however, may also result from an entirely different situation. Such a concurrence may often involve a final decision by the full chamber that emerges from a situation of concern and controversy about a particular proposal. The concurring decision by the full chamber in such a case represents not a pro forma acceptance of the committee recommendation, but rather a final judgment that emerges out of the conflict and compromise among the members.

In both instances the disposition of administrative proposals rests with the legislative chambers. In the former case the administrative proposals are disposed of by pro forma ratifications of committee recommendations. The final decisions of the chambers thus represent a consensus of acceptance of the recommendations.

The administrative proposals are also disposed of by the full chambers in the latter case. In such instances, however, the final action does not rest upon a basis of routine acceptance and ratification of committee action. Rather, it represents an agreement emerging from the conflict and compromise of the decision-making process of the full chambers. The final disposition of administrative proposals in both situations represents a consensus of the full chambers of Congress.

The operation of review by resolution involves three patterns of decision-making by the full chambers. In the first the decisions of the chambers overrule the initial recommendations of the reviewing committees. In the second and third patterns the final action of the full chambers follows the committees' recommendations. In each pattern, however, the decisions represent a final legislative judgment.

This final consensus, according to the legislative control doctrine, is the best representation of the consent of the governed. Review by resolution thus operates in such a manner as to insure that administrative decisions will be based upon such consent. It fulfills one of the basic claims of its doctrinal progenitor.

The next question is whether committee review and clearance similarly satisfies this test of evaluation. First, however, this second device must be described and its actual operation presented.

CHAPTER VI

FORMAL COMMITTEE REVIEW

Introduction

The use of the regular standing congressional committees to review and approve the exercise of discretionary powers of the bureaucracy in the American national government is another method that has been used to provide a channel of continuous legislative control of administrative decision-making. It is an indigenous device that, unlike congressional oversight by resolutions, has no counterpart in the English practice of parliamentary supervision of delegated legislation. It appeared on the American scene a little over a decade later than the former American method of approval by resolutions and thus represents a more recent innovation in the system of legislative control of administration in this country.

Such committee clearance of administrative decisions in the American practice rests upon either a formal or an informal basis. In the former case the requirement of committee review and approval is included in a statute passed by Congress and approved by

the President. Informal committee control, on the other hand, does not rest upon any such explicit statutory basis. In some cases it results from an informal agreement between a particular executive agency and a congressional committee of one house or related congressional committees in both chambers. In other instances such committee review and approval develops from a statutory requirement that merely requires "prior reporting" of proposed administrative decisions to particular congressional committees before action is taken.

Committee clearance of the decisions of executive agencies, whether formal or informal, has received practically no attention in the published literature of political science and public administration.[1] The next three chapters, therefore, will be devoted to a detailed exposition of this method of legislative control of administrative decision-making. This chapter will concentrate on the instances of such committee review that rest upon a formal statutory

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[1] The only published work dealing with this topic is Robert W. Ginnane, "The Control of Federal Administration by Congressional Resolutions and Committees," Harvard Law Review, LXVI (February, 1953), 569-611. Part of one chapter of an unpublished Ph.D. dissertation also discusses this device. See Kenneth Theodore Kofmehl, "Congressional Staffing, with Emphasis on the Professional Staff" (Ph.D. dissertation from Columbia University [microfilm date, 1956], University Microfilms, Ann Arbor, Michigan, Publication No. 17,063), pp. 206-223.

requirement. The succeeding chapter will present the occasions on which informal committee control has been established. This will be followed by a third chapter concerning the procedures associated with both types and the resulting locus of the actual function of review and clearance produced by such procedures.

Committee Review and Clearance

Congressional committee review and approval of administrative decisions was first established in a 1944 naval public works statute[2] passed near the end of World War II. This statute authorized the Secretary of the Navy to establish and develop naval shore facilities by acquiring and disposing of land and constructing necessary public works. The acquisition and disposal of land for such facilities, however, could be effective only after review and approval

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[2] U.S., Statutes at Large, LVIII, Part 1, 189. Technically, such committee review was used earlier in a joint resolution passed in 1935 that required the Joint Committee on the Library to approve any site selected by the Fine Arts Commission for the erection of a statue of Grover Cleveland in Washington, D.C., by any association organized for that purpose. See U.S., Statutes at Large, XLIX, Part 1, 424. The model of the statue and the pedestal also had to be approved by the commission and the joint committee. Ibid. A joint resolution of 1937 established the same procedure for the erection of a statue of Albert Gallatin within the grounds surrounding the Treasury Building in Washington, D.C. See U.S., Statutes at Large, L, Part 1, 260. These are, however, rather inconsequential instances. The recent trend toward using this device in important areas of governmental activity actually began with the 1944 statute.

by the naval affairs committees of Congress. A general proviso included in this statute declared, in reference to real estate activities of the Navy Department,

> That prior to the acquisition or disposal, by lease or otherwise, of any land acquired for naval use under the authority of this, or any other Act, the Secretary of the Navy shall come into agreement with the Naval Affairs Committees of the Senate and of the House of Representatives with respect to the terms of such prospective acquisitions or disposals.[3]

This requirement was written into the statute at this time, according to Representative Vinson, in order to provide a system of authorization that would meet the strategical requirements of the Navy Department that was then engaged in full-scale war and, at the same time, to provide a method for maintaining congressional control over the real estate activities of that department. The acquisition and disposal of land was closely related to requirements for naval shore facilities that shifted and changed rapidly to meet military necessities. Control of land transactions by the usual method of itemized and detailed authorizations and appropriations covering a fairly long future period prevented such necessary

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[3] U.S., Statutes at Large, LVIII, Part 1, 190. This represents the first of several such requirements, both formal and informal, concerning the real estate and construction activities of the military establishment. The majority of instances of congressional committee review have related to the armed services departments, and, in most such cases, involved the above activities.

flexibility. Committee review was thus intended as a requirement that would provide both the needed flexibility and the desired congressional control by delegating broad discretion[4] to the Navy Department with the stipulation that the particular uses of this discretion had to be approved in each instance by the naval affairs committees of Congress. As Vinson explained, "we have done two things in this bill: We have given flexibility and we have tried to retain control over the acquisition and disposition of property."[5]

This statutory requirement, as it related to land acquisition, actually only wrote into law an informal arrangement that had existed for over a year regarding the acquisition of property by the Department of the Navy.[6] Secretary of the Navy Frank Knox and

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[4]The Secretary of the Navy was authorized to acquire the necessary land for various classes of projects of naval shore facilities. There was no specification in terms of location or particular facility. See U.S., Statutes at Large, LVIII, Part 1, 189.

[5]U.S., Congressional Record, 78th Cong., 2d Sess., 1944, XC, Part 3, 3218. Vinson outlined the purpose of requiring committee approval: "First, because it lets Congress know what is going on; and, second, in the interest of economy it allows Congress to have a hand in the acquisition or sale of property." Ibid.

[6]Kofmehl states: "This merely wrote into the law a clearance procedure which the Navy Department had been observing voluntarily for over a year--according to John J. Courtney, original draftsman of Public Law 289, 78th Congress, who at the time was on loan from the Justice Department to the Navy Department for the express purpose of handling the latter's real-estate transactions (interview with Mr. Courtney on July 1, 1952)." Kofmehl, op. cit., p. 218, n. 28.

the House Committee on Naval Affairs entered into an agreement in 1942 that established a clearance procedure in which all acquisitions of land by the Navy Department would not become effective until approved by the naval affairs committees of Congress.[7] This agreement continued for two years and was finally formalized as an important part of the 1944 statutory requirement.

Particular real estate transactions of the armed services were further subjected to committee clearance by a statute approved in 1949.[8] This statute authorized the Secretary of the Air Force, or either secretary of the other two military departments that might be designated by the Secretary of Defense, to acquire necessary lands or the rights to the use of the land for the establishment of a proving ground for guided missiles and other weapons. Before any particular decision under this authority could become effective,

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[7]Representative Vinson, during debate on a bill in 1951, said: "Back in 1942 and 1943 an agreement was entered into by the old Committee on Naval Affairs with the administration and with the then Secretary of the Navy Knox, whereby all acquisitions of real estate of every character and all leases would be submitted to the Naval Affairs Committees of the Senate and of the House of Representatives." U.S., Congressional Record, 82d Cong., 1st Sess., 1951, XCVII, Part 4, 5435.

[8]U.S., Statutes at Large, LXIII, Part 1, 66. The Senate Committee on Armed Services, during committee consideration of H.R. 1741, inserted the requirement in the bill. See U.S., Congress, Senate, 81st Cong., 1st Sess., 1949, Senate Report 216 to accompany H.R. 1741.

however, the Secretary of the Air Force had to obtain the approval of the committees on armed services. Section two stated that:

> Prior to the acquisition under the authority of this section of any lands or rights or other interests pertaining thereto, the Secretary of the Air Force shall come into agreement with the Armed Services Committees of the Senate and the House of Representatives with respect to the acquisition of such lands, rights, or other interests.[9]

This reservation of the power of approval to such congressional committees, interestingly enough, established a situation in which the armed services committees could take part in activities in the field of international affairs and foreign relations that are generally assumed to be the sole function of the President and the Senate. The review requirement, according to the conference report accompanying the bill that became the 1949 statute, applied to all international agreements and treaties involving the acquisition of rights to the use of lands in foreign nations to be used for missile testing grounds and ranges. The report declared:

> The Senate amendment is applicable not only to the acquisition of lands or rights or other interests pertaining thereto located within the United States but also to the acquisition of any lands or rights or other interests pertaining thereto through any type of agreement or treaty with any foreign nation.[10]

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[9] U.S., Statutes at Large, loc. cit.

[10] Conference Committee Report to accompany H.R. 1741, U.S., Congressional Record, 81st Cong., 1st Sess., 1949, XCV, Part

Public Law 155,[11] a construction authorization statute for the three military departments, was enacted in 1951 and provides the next example of committee oversight of administrative decision-making. Section 601 of Title VI[12] of this statute established a general procedure by which most activities of the military departments and the Federal Civil Defense Administration relating to the acquisition and disposal of real estate--i.e., land and other real property --are now reviewed by the armed services committees. This section, which is still in effect, requires prior committee approval of all real estate transactions of the Departments of the Army, Navy, and Air Force and the Federal Civil Defense Administration that involve an estimated value in excess of $25,000. The secretaries of the military departments and the Administrator of the Federal Civil Defense Administration, according to the statutory requirement,

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4, 5610. The Secretary of the Air Force has taken the position that executive agreements to acquire the use of lands for this purpose in foreign nations can not be subjected to congressional committee approval. He has continued to honor the requirement, however, in order to prevent the controversy between the Air Force Department and the armed services committees that would result from the refusal to follow the statutory requirement. Interview with Mr. John A. Johnson, general counsel, Department of the Air Force, January 8, 1957.

[11] U.S., Statutes at Large, LXV, 336.

[12] Ibid., p. 365, 10 United States Code 2662, recodified August 10, 1956.

are directed to "come into agreement with the Committee on Armed Services of the Senate and of the House of Representatives with respect to those real estate actions. . . ."[13] The following real estate transactions involving the minimum statutory value were included in the requirement of committee approval: (1) acquisition of real property by sale or lease, (2) leasing of government-owned real property, (3) transfer of property between the military departments or such departments and other federal agencies or a military department and a state, and (4) reports to a disposal agency of excess government-owned real property.

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[13] Ibid. An earlier proviso of this statute also established such a committee approval requirement. It was included in a fifty-million-dollar authorization for Army depot facilities in the continental United States. The statute declared: "That prior to the acquisition of lands and the construction of facilities under this authority the Secretary of the Army shall come into agreement with the Armed Services Committee of the Senate and the House of Representatives with respect to the acquisition of such lands and the construction of such facilities." Ibid., p. 342. There is no evidence available as to why this particular activity was singled out as a subject of committee review. This particular proviso, as compared with Section 601 of Title VI of the same statute, does not include a minimum value limitation. Evidently, if both statutory requirements were operative, the Department of the Army was subject to a more complete committee review when involved in the acquisition of land under this latter category. In addition, this proviso also required committee approval for the construction of depot facilities in the continental United States by the Department of the Army.

Section 601 was inserted in the statute authorizing military construction as a general proviso after an earlier bill[14] containing a similar requirement of committee approval of real estate activities of the same executive agencies had been vetoed by President Truman earlier in the session. President Truman vetoed this bill because of what he conceived to be the resulting inefficiencies and disadvantages of the committee approval procedure. He declared that the procedure would impose unnecessary additional burdens upon the executive branch in the administration of the real estate program. Such a requirement, according to the President's veto message, would require a report of almost all real estate actions of the specified executive agencies and would result in a serious delay in the execution of such transactions. It would also necessitate an uneconomical centralization of the approval of such transactions that had previously been consummated in the field.[15]

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[14]See H.R. 3096, U.S., Congressional Record, 82d Cong., 1st Sess., 1951, XCVII, Part 3, 4190.

[15]Only one short paragraph of the veto message touched upon the constitutionality of the approval procedure. President Truman declared: "Finally, I am concerned by what appears to me to be a gradual trend on the part of the legislative branch to participate to an even greater extent in the actual execution and administration of the laws. Under our system of government it is contemplated that the Congress will enact the laws and will leave their administration and execution to the executive branch. The delays discussed above,

The President vetoed the bill on May 15, 1951. The House of Representatives entered upon a full-scale debate of the bill and the presidential veto immediately and repassed the bill over the presidential veto just two days later.[16] The Senate failed to act on the vetoed bill. When H.R. 4914 (which later became Public Law 155) was before the House Committee on Armed Services later in the session, however, the committee took advantage of the situation to insert the requirement of committee approval included in the vetoed bill into the construction bill as a general proviso.[17] After further minor amendments by the Senate Committee on Armed Services and consideration by the conference committee established to eliminate the differences in the two versions of the bill, the committee approval requirement, as found in Section 601, was included in the bill.[18]

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which would inhere in the enactment of H.R. 3096, testify to the wisdom of that constitutional policy." U.S., Congressional Record, 82d Cong., 1st Sess., 1951, XCVII, Part 4, p. 5375.

[16] Ibid., pp. 5444-5445. This is one of the few times that any extended debate concerning the constitutional implications of such committee approval has taken place in either chamber. The issues and arguments on this subject will be presented later. See infra, Chapter IX.

[17] U.S., Congress, House, Committee on Armed Services, 82d Cong., 1st Sess., 1951, House Report 767 to accompany H.R. 4914, p. 20.

[18] See U.S., Congress, Conference Committee, House Report 974 to accompany H.R. 4914, Congressional Record, 82d Cong., 1st Sess., 1951, XCVII, Part 9, 11531.

The conference report, containing the bill worked out by the conference committee, was not issued until September 14, 1951. It was accepted by both chambers the same day with little debate.[19] President Truman, because of the passage of the bill late in the session and the need to have some sort of authorization statute for continued military construction during the Korean emergency, had no choice but to approve the bill. The approval of the bill by the President established the statutory basis for committee review of real estate transactions of the military departments and the Federal Defense Administration that is still operative at the present time.

The military construction bill that was passed one year later also contained a similar requirement of committee review of real estate transactions relating to classified military installations and facilities.[20] In addition to the acquisition and disposal of real property, however, this statute also specifically required the costs of construction of such facilities to be approved by the armed services committees of Congress. The secretaries of the military departments were authorized to use a general lump-sum grant of funds to establish and develop such classified projects under the direction of

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[19] Ibid., pp. 11531, 11362.

[20] U.S., Statutes at Large, LXVI, 606.

the Secretary of Defense.[21] In order to control the exercise of this discretionary authority, Congress included a proviso that the secretary of the military department, in the case of each public work, had to "come into agreement with the Committee on Armed Services of the Senate and of the House of Representatives with respect to the cost of construction of such public work, including those real estate actions pertaining thereto."[22]

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[21] See Sections 102, 202, and 302 of the statute. U.S., Statutes at Large, LXVI, 609, 613, and 622, respectively.

[22] Section 407, ibid., p. 625. The statistics concerning review by the Armed Services Committee under the three latest statutes are not available. Because of other pressing matters, the House Armed Services Committee was unable to make such statistics available. The Senate Committee on Armed Services does not compile such statistics, since to do so "would require a much larger staff than is presently allowed under Senate rules." Letter from Mr. Harry L. Wingate, Jr., chief clerk, Senate Committee on Armed Services, February 14, 1957. The House Armed Services Committee, however, has issued a report of its activities for each Congress beginning with the Eighty-third Congress. The report covering the Eighty-third Congress contains no statistics concerning committee review of real estate or military construction. The report for the Eighty-fourth Congress gives only general statistics that are not specified in terms of the statute under which the proposed action was authorized. During the Eighty-fourth Congress the House committee reviewed 356 proposals, 195 during the first session and 161 in the second session. Only three proposed transactions were disapproved by the House committee in the first session and four in the second session, for a total of seven disapprovals out of 356 proposed transactions. See "Report of the Activities of the House Committee on Armed Services," for the Eighty-fourth Congress, August, 1956, pp. 2-3.

The first of two instances in which the Department of Defense has been required to obtain approval of the appropriations committees before taking particular proposed action occurred in 1953. The Supplemental Appropriation Act for fiscal year 1954[23] contains such a proviso in Chapter VIII. Section 805 of that chapter delegated discretion to the Defense Department to use funds appropriated for specified subjects in 1953 or prior years for public works of any of the military departments authorized by any law enacted during the first session of the Eighty-third Congress. Before any action could be taken under this general authorization, however, the department was required to obtain the approval of the committees on appropriations. The proviso read:

> That no funds shall be obligated under the authority contained in this section on any project authorized in the 1st Session of the 83d Congress until the Department of Defense has come into agreement with the Committees on Appropriations of the House of Representatives and the Senate.[24]

This particular provision was included in the bill because the appropriations committees did not have time to carry out a detailed review of the requests of the military departments. These requests for additional funds were submitted late in the first session of the

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[23] U.S., Statutes at Large, LXVII, 418.

[24] Ibid., p. 429.

Eighty-third Congress. Rather than appropriate additional funds, Congress authorized instead a general transfer of funds already available among the various programs of the military departments. The requirement of prior committee approval served as a convenient device to control this rather broad discretionary authority that was necessary if no new appropriations were to be granted.

The second instance of review by the appropriations committees of the exercise of discretionary authority by the Defense Department occurred in the Department of Defense Appropriation Act for fiscal year 1956. This statute, Public Law 157, was approved in the first session of the Eighty-fourth Congress. It contained Section 638 which prohibited the use of the appropriated funds for the discontinuance and disposal of any government-owned manufacturing or commercial facilities operated by the military departments in order to provide material and services for the support of the military establishment--such as the Ropewalk at the naval shipyard in Boston, paint manufacturing plants operated by the Navy, and recruiting publicity printing plants--unless the approval of the appropriations committees was obtained in each instance.

The House Committee on Appropriations inserted this proviso in the appropriations bill at about the same time that a general movement was underway in the executive branch to eliminate all

unnecessary government competition with private business. The executive branch initiated a policy that proposed such elimination early in 1955 when the Bureau of the Budget issued Budget Bulletin No. 55-4 on January 15, 1955. This bulletin declared that "the Federal government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels."[25] A little less than a month later the Defense Department also issued a directive stating that a review would be undertaken to determine what industrial and commercial activities operated by the military services could be eliminated without jeopardizing military strength and national security.[26]

The House Committee on Appropriations became concerned about the contemplated elimination of the commercial and industrial facilities operated by the Defense Department. Although the committee did not disagree with the basic policy, it believed that in some instances such disposal would "result in a loss of trained personnel and know-how within the departments with the dispersal

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[25]Bureau of the Budget Bulletin No. 55-4, January 15, 1955, p. 1.

[26]See Department of Defense Directive No. 4100.15, February 8, 1955, as reissued April 27, 1955.

of tools and facilities and result in an actually greater cost to the Government over a period of years."[27] The House Committee on Appropriations thus inserted an amendment in the Department of Defense appropriation bill which established a system of control over such disposals by requiring that each proposed disposal of any commercial and industrial facility by the Defense Department had to be reviewed and approved by the appropriations committees of Congress. After slight amendment by the Senate Committee on Appropriations and rewording in the conference committee, the amendment was included in the bill as Section 638. This proviso read:

> No part of the funds appropriated in this Act may be used for the disposal or transfer by contract or otherwise of work that has been for a period of three years or more performed by civilian personnel of the Department of Defense unless justified to the Appropriations Committees of the Senate and House of Representatives, at least ninety days in advance of such disposal or transfer, that its discontinuance is economically sound and the work is capable of performance by a contractor without danger to the national security: Provided, That no such disposal or transfer shall be made if disapproved by either committee within the ninety-day period by written notice to the Secretary of Defense.[28]

President Eisenhower was opposed to this particular provision, but he signed the bill because the funds provided by it were urgently

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[27] U.S., Congress, House, 84th Congress, 1st Sess., 1955, House Report 493 to accompany H.R. 6042, p. 14.

[28] Section 638 of Public Law 155.

needed for the continued operation of the military departments. His signature was accompanied by a message announcing his opposition to Section 638. The President declared that the requirement of committee approval was an unconstitutional invasion of the functions of the executive branch. It allowed Congress to participate in the administration of a statute, according to the President's message, in a way contrary to the constitutional rule of the separation-of-powers. President Eisenhower also served notice on Congress that the requirement of committee clearance of the disposal of commercial and industrial facilities by the Department of Defense would be "regarded as invalid by the executive branch of the Government in the administration of H. R. 6042 unless otherwise determined by a court of competent jurisdiction."[29]

Despite this presidential challenge and the announced policy of the executive branch, however, the Department of Defense submitted fourteen proposed disposals to the committees on appropriations for review on August 8, 1955. The Senate Committee on Appropriations reviewed these disposals immediately and temporarily

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[29] U.S., Congressional Record, 84th Cong., 1st Sess., July 13, 1955, CI, No. 118, 8997. Attorney General Brownell wrote an opinion which concluded that the disapproval of such decisions by a committee of Congress was unconstitutional. Advance (slip) Opinions, Opinions of the Attorneys General of the United States, July 13, 1955. The opinion will be discussed below. See infra, Chapter IX.

disapproved only one of them. The House committee requested that the Defense Department postpone any disposal until the committee could meet and review the proposals in detail. The Defense Department notified the House committee on November 3, 1955, that it would postpone the disposal of the fourteen facilities for ninety days.[30] This postponement allowed the House committee to begin the review of the proposals during the second session of the Eighty-fourth Congress.

The statistics concerning the operation of this proviso in the Eighty-fourth Congress reveal that the committees on appropriations exercised their power to nullify particular proposals of the Defense Department in only a few cases. A total of 112 proposed disposals were submitted to the committees by the Department of Defense. The Senate committee rejected only two such proposals.[31] A slightly higher number were rejected by the appropriations committee of the

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[30] See Kofmehl, op. cit., supra, n. 1, pp. 222-223, n. 37. The Defense Department may have been prompted to accept this request because of a decision by the Comptroller General. On August 20, 1955, Representative Porter Hardy announced that he had received a written notification from the Comptroller General that any expenditures made by the Defense Department under Public Law 155 in violation of Section 638 would be disallowed by the General Accounting Office. Ibid.

[31] Letter from Mr. Everard H. Smith, chief clerk, Senate Committee on Appropriations, February 9, 1957.

lower chamber. The House committee disagreed with the Defense Department in seven cases and thus rejected a total of seven proposed disposals.[32]

The requirement of committee review was not renewed in the 1957 Defense Department Appropriation Act. The House Committee on Appropriations included it in the defense appropriation bill for 1957 as Section 633, but it was eliminated by action of the House when the bill was being considered by the House of Representatives.[33] This successful opposition to the proviso was led by the proponents of a reduction in government competition with private business in manufacturing and commercial enterprises who viewed committee review as an unnecessary delay in the disposal of competitive government facilities operated by the Department of Defense.

Congress has also found this device of committee review and approval useful in providing a means of controlling the proposed

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[32]The House committee did not respond to a written request for the relevant statistics concerning this matter. The total disapprovals of the House committee can be obtained, however, by subtracting the disapprovals of the Senate committee from the total rejections. There were a total of nine disapprovals. See "Activities of the Senate Committee on Government Operations," for the Eighty-fourth Congress, Report of the Senate Committee on Government Operations, 1957, p. 63.

[33]Statement by Representative Vinson in U.S., Congressional Record, 84th Cong., 2d Sess., 1955, CII, No. 125, 12606.

action of executive agencies other than the military departments. In 1954, for example, Congress relied upon such a requirement to control the broad discretion delegated to the Administrator of General Services and the Postmaster General in the "Public Buildings Purchase Contract Act of 1954."[34] This statute established a new system for the acquisition of additional space needed for the activities of the national government. It amended the Public Buildings Act of 1949 by adding a new authorization that allowed both the Administrator of General Services and the Postmaster General to enter into lease-purchase contracts for the construction of the necessary buildings.[35] Such contracts could be entered into with any person, partnership, corporation, or other private or public entity. The contracting party would then build the required building and lease it to the national government. The annual payments for the lease would be applied against a determined total purchase price and at the end of a stated period the national government would acquire ownership of the building.

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[34]U.S., Statutes at Large, LXVIII, Part 1, 518. 39 U.S.C. 901, Supplement III, and 40 U.S.C. 356, Supplement III.

[35]Contracts to meet the general space requirements of the national government were under the jurisdiction of the former officer. The Postmaster General was granted authority to enter into such contracts only for meeting the requirements for additional space relating to postal activities.

The delegated discretion of both executive officers was limited by only two general statutory standards. They were authorized to enter into lease-purchase contracts if they found that the needed space could not be met by existing government buildings in the area and that the best interests of the United States would be served by such contracts.[36] Such discretionary authority was limited, however, by the requirement that each exercise of the authority had to be approved by resolutions of the committees on public works of Congress. Section 411(e), for example, concerned the Administrator of General Services, and declared:

> No appropriations shall be made for purchase contract projects which have not been approved by resolutions adopted by the Committees on Public Works of the Senate and House of Representatives, within three years after the date of enactment of this Act.[37]

This marks the first time that the requirement of committee approval was enforced by the congressional power of appropriation. The statutory language establishing this relationship emerged from the consideration by the conference committee of the bill that became

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[36] U.S., Statutes at Large, LXVIII, Part 1, 519 and 521. Each contract had to be approved by the Director of the Bureau of the Budget by a written statement that "the execution of such agreement is necessary and is in conformity with the policy of the President." Ibid., p. 519.

[37] The discretion delegated to the Postmaster General is limited by a similar proviso. See ibid., p. 522.

the 1954 statute. It was substituted for an amendment to the bill that had been inserted by the Senate Committee on Public Works. The Senate committee amendment required that the Administrator of General Services had to "come into agreement" with the committees on public works in regard to each proposed contract that involved more than $20,000 per year.[38] This requirement, according to the conference report, was opposed by the executive branch as an unconstitutional prohibition upon the delegated discretion contained in the bill and it was dropped for the amendment of the conference committee, which was satisfactory to both the executive branch and Congress. The conference report states:

> Certain questions concerning the constitutionality of these amendments were raised by the executive departments. Although the Senate conferees were not convinced of the validity of those questions, they have agreed to alternative language which it is understood will remove the constitutional objections of the executive departments and which still retains the same degree of legislative responsibility as in the Senate amendments.[39]

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[38] U.S., Congress, Senate, Committee on Public Works, 83d Cong., 2d Sess., 1954, Senate Report 1084 to accompany H.R. 6342, pp. 3-4.

[39] U.S., Congress, Conference Committee, 83d Cong., 2d Sess., 1954, House Report 1923 to accompany H.R. 6342, pp. 5-6. President Truman had "pocket vetoed" a somewhat similar bill in 1952 because of a committee approval requirements similar to the Senate committee amendment. He had withheld his approval of H.R. 6839, introduced in the second session of the Eighty-second Congress, and entitled the "Post-Office Department Lease-Purchase Act of 1952,"

A total of 150 proposed contracts were submitted to Congress under this 1954 statute during the Eighty-fourth Congress. This number included eighty-three post office projects involving an estimated cost of $69,573,565. The remaining sixty-seven projects were proposed contracts for the construction of federal buildings. They involved an estimated total cost of $667,588,830.[40] The post office projects ranged from a high of $19,670,000 for a post office building and garage facilities at New Orleans, Louisiana, to a low of $49,000 for a post office building at Fort Mill, South Carolina. The federal building projects involved considerably more expense. The highest proposed expenditure in this category was $65,100,000 for a federal office building and customhouse at New York City. A motor-vehicle shop and garage at Atlanta, Georgia, costing $252,644, involved the lowest cost.[41]

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because it reserved authority to the committees on post office and civil service and the committees on public works of both houses to disapprove any proposed contract entered into by the Postmaster General. He objected because the requirement gave "committees veto power over executive functions authorized by the Congress to be carried out by executive agencies." U.S., Congressional Record, 82d Cong., 2d Sess., 1952, XCVIII, Part 7, 9756.

[40] "Summary of Legislative Activities, Committee on Public Works, United States Senate, Eighty-fourth Congress," August, 1956, p. 18. See complete list on pp. 18-20.

[41] Private copy of listed projects received from Mr. Robert F. McConnell, committee counsel, House Committee on Public Works, February 11, 1957.

Neither committee on public works failed to approve any of these projects. The Senate committee approved every contract that was submitted to it during this period.[42] The House committee approved 149 of the proposed contracts while deferring action on one.[43]

The agriculture committees have also been engaged in a similar procedure of committee clearance of administrative decision-making since the Watershed Protection and Flood Prevention Act[44] was approved in 1954. This statute authorized the Secretary of Agriculture to assist local organizations (e.g., soil or water conservation districts) in planning and building small structures on tributary streams in order to prevent periodic flooding of farmlands and to promote soil conservation. The responsibility for the initiation of such a project[45] and the actual construction rested with the local agencies, but the Secretary of Agriculture was empowered to cooperate in studies and plans for such projects. Furthermore, the

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[42] "Summary of Legislative Activities . . .," loc. cit., supra, n. 40.

[43] Letter from Robert F. McConnell, committee counsel, House Committee on Public Works, February 11, 1957.

[44] U.S., Statutes at Large, LXVIII, Part 1, 666. 16 U.S.C. 1001, Supplement II.

[45] No project under this statute could exceed 250,000 acres nor include any single structure that provided more than 5,000 acre-feet of total capacity.

Secretary was also authorized to enter into agreements with these local organizations to furnish federal financial assistance for the construction of such watershed projects. A local organization desiring to establish such a project was required to submit a proposed plan to the Secretary of Agriculture. If, after investigation and analysis, the Secretary determined that the plan was financially feasible and met certain statutory standards, he could enter into agreements with the organization to furnish financial and other assistance.[46]

The statute required the Secretary to submit a copy of each proposed plan of agreement and the justifications for such plan to Congress forty-five days before the plan was to go into effect. This requirement was included in the statute in order to allow Congress to review the plan and take action to reject it or modify it by the regular legislative process if the plan or any part of it were objectionable to Congress.[47] Certain proposed plans, however, were

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[46]U.S., Statutes at Large, loc. cit. The Secretary could approve such applications for assistance only if they had been submitted to, and were not disapproved by, the state agency having supervisory responsibility for the program in each state within a forty-five-day period. If there was no such state agency the state governor was charged with the responsibility for reviewing the applications.

[47]U.S., Congress, Senate, Committee on Agriculture and Forestry, 83d Cong., 2d Sess., 1954, Senate Report 1620 to accompany H.R. 6788, p. 4.

subject to the further restriction of committee review and approval. Section two of the statute stated:

> No appropriation shall be made for any plan for works of improvement which includes any structure which provides more than twenty-five hundred acre-feet of total capacity unless such plan has been approved by resolutions adopted by the Committee on Agriculture and Forestry of the Senate and the Committee on Agriculture of the House of Representatives, respectively.[48]

This committee review procedure was amended in the second session of the Eighty-fourth Congress by the enactment of Public Law 1018. This statute divided the jurisdiction for committee review and approval between the agriculture committees and the public works committees of Congress. According to the terms of the new statute, the committees on agriculture now review all proposed projects involving more than a $250,000 federal contribution or including any structure between 2,500 and 4,000 acre-feet of the total capacity of the watershed project. If the project includes any structure that provides more than 4,000 acre-feet of the total capacity, however, approval must be obtained from the public works committees of the House of Representatives and the Senate.[49]

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[48] U.S., Statutes at Large, loc. cit.

[49] Public Law 1018 (1956), p. 1. This division of the function of review and clearance of the proposed projects between the agriculture committees and the public works committees was the result of a compromise worked out by the conference committee established

Only six projects requiring committee approval under the earlier 1954 statute were submitted to the agriculture committees during the Eighty-fourth Congress, and each project received the necessary approval of the committees.[50] Only one project, up to March, 1957, had been submitted to the agriculture committees under the amended statute. It received the necessary approval of the House committee, but has not yet been cleared by the Senate Committee on Agriculture and Forestry.[51] The committees on public works

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to settle the differences in the Senate and House versions of H.R. 8750. The House version assigned this function to the agriculture committees as in the earlier 1954 statute. When the bill came to the Senate, however, it was assigned to the Senate Committee on Public Works rather than to the Agriculture Committee. The Public Works Committee amended the bill to read that the projects had to be reviewed and cleared by the committees on public works. See the Senate bill in the United States Congressional Record, 84th Cong., 2d Sess., 1956, CII, No. 66, 12429. This amended requirement was included in the bill finally passed by the upper chamber. In order to eliminate this deadlock between the Senate and House versions of the bill, the conference committee arrived at the solution whereby the function of committee review and approval was divided between the agriculture committees and the public works committees.

[50]Letters from Mr. James M. Kendall, assistant chief clerk, Senate Committee on Agriculture and Forestry, February 8, 1957, and Mr. John J. Heimburger, counsel, House Committee on Agriculture, March 12, 1957. Five of the approved projects were the subject of a Senate committee hearing held during the second session of the Eighty-fourth Congress. See "Watershed Projects"--Hearings before the Committee on Agriculture and Forestry, United States Senate, 84th Cong., 2d Sess., May 7 and 29, 1956.

[51]Letters from Mr. Kendall and Mr. Heimburger, supra, n. 50.

have not had occasion to review any proposals that have been submitted under the amended procedure established by the 1956 statute.[52]

Committee approval of the exercise of delegated discretion by an executive agency was also established in the Small Reclamation Projects Act of 1956.[53] The purpose of this statute was to establish a system for assisting local organizations in the seventeen reclamation states of the West in developing water-storage projects. In order to achieve this purpose, the Secretary of the Interior was authorized to assist in the construction of such projects by loaning or granting funds to local organizations. The Secretary was directed to negotiate and enter into a contract of assistance with any qualified local organization desiring to obtain federal aid for the construction of a small project.

The Secretary cannot proceed to execute any such contract, however, until sixty days after it has been submitted to Congress for "consideration by the appropriate committees thereof. . . ."[54] The

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[52]Letters from Mr. T. W. Sneed, staff member, Senate Committee on Public Works, February 12, 1957, and Mr. Robert F. McConnell, supra, n. 43.

[53]Public Law 984 (1956).

[54]Ibid., Section 4(c).

proposed contract may be disapproved during this laying period by either committee--in this case, probably either committee on interior and insular affairs--by a resolution of disapproval and notification in writing to the Secretary that the proposal is disapproved by the committee.[55] If the proposed contract is disapproved by either committee the Secretary of the Interior cannot proceed to execute the contract unless it is specifically approved by a regular act of Congress. The statute reads that "in the event either committee disapproves the project proposal, the Secretary shall not proceed further unless the Congress has approved the same."[56]

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[55] Ibid.

[56] Ibid. This language resulted from a compromise that was worked out in the conference committee established to settle the differences between the House and the Senate versions of the bill that became Public Law 984. The House bill required only that the proposed contract lay before the interior committees for sixty days before it could be carried out. The committees were not specifically given the power of approval or disapproval. The Senate, however, preferred approval of each contract by Congress. In order to satisfy both chambers, therefore, the conference committee rewrote the section concerning committee review of the contracts so that the committees were vested with the power of nullification, and disapproved contracts could be executed only if they were approved by a regular act of Congress. See "Accomplishments of the House Committee on Interior and Insular Affairs," during the 84th Congress, Committee Print No. 18, September 1, 1956, p. 9. This latter addition regarding congressional approval of a disapproved contract seems entirely redundant when viewed either as a safeguard against the Secretary of the Interior disregarding committee nullification or as a grant of authority to the President and Congress to approve a

President Eisenhower once again challenged the authority of Congress to include such a requirement of committee clearance in a statute. Although he signed the bill, the President declared that he would have withheld his signature if Congress had been in session because of "constitutional defects" represented by the statutory requirement of committee approval of the contracts entered into by the Secretary of the Interior. He went on to say:

> Because of the general merit of this measure, I am approving it. The Secretary of the Interior will review project proposals received by the Department and will prepare to take action as soon as appropriations are made to implement the bill and section 4(c) (the review procedure section) has been removed or revised. If the Congress will act promptly after it convenes in January, there need be no delay in starting this program.[57]

Representative Engle introduced H.R. 2146 on January 7, 1957, to amend the approval requirement of the Small Reclamation Projects Act of 1956. The bill amended the section of the earlier statute that was the center of controversy to read that appropriations could be made for any project only if it were not specifically

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contract by a regular legislative act. In the former case the statute specifically prohibits the Secretary from executing a contract that has been rejected by either committee. As far as the latter case is concerned, it would seem that even in the absence of a statutory grant the President and the Congress have plenary power to override a decision of a committee of the legislative body by a regular statute. A statutory grant of such power seems entirely unnecessary.

[57]Quoted in ibid., p. 9.

disapproved by a resolution of either committee on interior and insular affairs.[58] The House Committee on Interior and Insular Affairs reviewed this bill and, after rewording it slightly, reported it to the House favorably.[59] The committee amendment, in turn, was reworded during the consideration of the bill on the floor of the House and then passed by the lower chamber.[60] The final House version thus read:

> No appropriation shall be made for financial participation in any such project prior to 60 calendar days (which 60 days, however, shall not include days on which either the House of Representatives or the Senate is not in session because of an adjournment of more than 3 calendar days to a day certain) from the date on which the Secretary's findings and approval are submitted to the Congress and then only if, within said 60 days, neither the House nor the Senate Interior and Insular Affairs Committee disapproves the project proposal by committee resolution.[61]

The House bill was sent to the Senate and referred to the Senate Committee on Interior and Insular Affairs. As of May, 1957, however, the Senate committee had not reported the bill to the Senate.

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[58] U.S., Congress, House, Committee on Interior and Insular Affairs, 85th Cong., 1st Sess., 1957, House Report 25 to accompany H.R. 2146, p. 1.

[59] Ibid.

[60] U.S., Congressional Record, 85th Cong., 1st Sess., April 11, 1957, CIII, No. 64, 4931.

[61] Ibid.

In one particular instance the decisions of an executive agency have been subject to the review and approval of the chairman of a single House committee. This requirement was first established in the Supplemental Appropriations Act for fiscal year 1953[62] and marked the first time that the function of the clearance of administrative decisions was delegated to the chairman of a committee rather than to a related committee in each chamber of the legislative body. Section 1413 of this 1952 statute stated that the director of the Bureau of the Budget could change or amend Bureau of the Budget Circular A-45 only with the approval of the chairman of the House Committee on Appropriations.[63]

The Budget circular that was the object of control in this particular case established criteria and general procedural requirements that were to be followed by agencies of the national government in setting and administering rents and service charges for quarters furnished by such agencies to their employees.[64] The

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[62] U.S., Statutes at Large, LXVI, 637.

[63] Ibid., p. 661.

[64] See Bureau of the Budget Circular No. A-45, July 9, 1951, and Bureau of the Budget Circular No. A-45 (Revised), June 3, 1952. The circular does not refer to any statutory authority as a basis for its promulgation. Section 3 of a 1928 statute (45 Stat. 162) authorizes the head of a government department, executive agency, or

requirement of approval by the chairman of the House Appropriations Committee was directed toward assuring that the legislative body could maintain a control over the general scheme for determining the rent charged government employees living in housing furnished by the national government.

This method of review and control of the decisions of the director of the Bureau of the Budget regarding the amendment of Bureau of the Budget Circular A-45 has been re-established in each successive year since it first appeared in 1952.[65] It thus represents a fairly well established and unique part of the present pattern of formal committee clearance of administrative decisions.[66]

The instances of formal committee clearance, when viewed chronologically rather than by programmatic areas, reveal that such

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independent establishment, under certain conditions, to provide quarters for their employees and charge them a reasonable rent for such accommodations. The Bureau of the Budget circular establishes a general policy to be followed in exercising this authority and may be based, therefore, upon the President's assumed authority as chief executive and head of the administrative branch.

[65]See U.S., Statutes at Large, LXVII, 418, Section 1312; U.S., Statutes at Large, LXVIII, Part 1, 829, Section 1309; Public Law 110 (1955), Sec. 208; Public Law 578 (1956), Sec. 208.

[66]A listing of all the statutes containing the requirement of committee clearance that have been passed can be found in Appendix III, infra. A list of these statutes that are presently operative follows in Appendix IV, infra.

a device has become fairly popular in Congress in recent years as a method of controlling bureaucratic discretion. It has been included in a total of fourteen statutes beginning with the naval construction statute enacted in 1944. Although five years separated the first and second uses of this device, it was utilized for the third time in 1951, only two years after its second appearance. The remaining eleven statutes containing the requirement of committee review and clearance have all been passed in the five-year period from 1952 to 1956, exclusively. Two of these statutes appeared in 1952. One statute, containing two separate requirements of committee review, was enacted in the following year. In 1954 the total number of statutes increased to three. Two statutes were enacted in 1955, and the following year the number increased once again to three.

The popularity of this device in recent years is also reflected in the fact that Congress has begun to expand the application of the committee clearance requirement to new areas of governmental activities and to different executive agencies. The earlier uses of this device were primarily associated with the programs administered by the military departments and the Defense Department. Five of the six statutes containing this requirement that were enacted during the period extending from 1944 through 1953, for example, were concerned primarily with the activities of these executive agencies. The

only exception was the 1952 statute setting up the procedure for changing or amending Bureau of the Budget Circular A-45.

Since 1953, however, the majority of statutes containing this requirement have not concerned these agencies. Only one of the eight statutes enacted since that date concerned any of these departments. Three of the statutes involved the annual re-enactments of the procedure for changing Bureau of the Budget Circular A-45. The remaining four statutes established new governmental programs that were to be carried out by several different executive agencies. One of these four statutes established a new system whereby the Administrator of General Services and the Postmaster General could acquire federal buildings by lease-purchase contracts. One of the 1954 statutes and an amendatory statute enacted in 1956 were concerned with establishing and perfecting a program of federal assistance to local organizations constructing small watershed projects. The Agriculture Department was charged with the administration of this program. Still another of the four statutes delegated authority to the Department of the Interior to carry out a similar program of federal aid to local organizations setting up small reclamation projects in the reclamation states.

A significant expansion in the use of the device of committee clearance, therefore, has taken place in the three-year period from

1954 to 1956. No longer is it primarily associated only with the programs and activities of the national military establishment. The recent uses of the committee clearance requirement reveal that Congress has turned to this device to provide a means of controlling the discretion of several different executive agencies charged with the administration of new governmental programs. The application of this device has thus been recently extended by the legislative body beyond its earlier limited use in connection with the activities of the military departments and the Defense Department.

An enumeration and discussion of the instances of this statutory (or formal) requirement of committee review, however, gives an incomplete picture of the use of this device for the control of administrative decisions in the American national government. In several instances in recent years such committee clearance has been established on an informal basis. These nonstatutory instances of committee approval form an integral part of the total picture of the extent to which this particular device has been used and must now be presented and discussed.

CHAPTER VII

INFORMAL COMMITTEE REVIEW

Introduction

In several cases committee review and approval of administrative decisions has been established on an informal basis to control the discretionary powers of particular executive agencies. The instances of such informal committee control technically differ from the examples of formal committee review previously discussed in that they do not rest upon a specific statutory requirement. This is actually only a formal distinction, however, for, as a practical matter, the results of both types of review are basically similar. In both cases the administrative decisions are submitted to the reviewing committees in the form of proposed uses of the discretionary authority of the executive agency and the committees retain the final power of approval. Informal committee review thus forms an important part of the fairly new system of congressional committee control of the exercise of the discretionary powers of the executive agencies.[1]

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[1] The instances of informal committee control set out below were obtained from personal interviews with members of the professional

Committee Review and Clearance

Some of the activities of the military departments and the Department of Defense in the construction field have been subject to control by the armed services committees of Congress on an informal basis. Such an informal arrangement, for example, was established to control the use of emergency funds by the military departments that were authorized by a 1951 construction authorization statute.[2] This statute authorized a lump-sum grant of funds for the military departments to be used "for restoration or replacement of facilities damaged or destroyed . . . ,"[3] or for other urgent construction needs not covered in the regular appropriation items. Although the statute did not specifically require the military departments to obtain the approval of the armed services committees before any of the funds were used, they followed such a clearance

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staffs of congressional committees and officers in several of the executive departments in Washington, D.C.

[2] U.S., Statutes at Large, LXV, 336. This is Public Law 155, the Military Public Works Act, that was passed in the first session of the Eighty-second Congress. It is the same statute that established the general statutory requirement of committee approval of real-estate transactions of the military departments and the Federal Civil Defense Administration involving $25,000 or more. See supra, Chapter VI, p. 201.

[3] U.S., Statutes at Large, LXV, 342.

procedure. The use of emergency funds by the military departments authorized by subsequent statutes have also been subject to this informal arrangement. The practice has thus developed that the military departments must submit each proposed decision to use such emergency funds to both armed services committees for review and approval.

The Department of the Air Force, for example, submitted a proposed decision to the committees in 1953 to use 2.9 million dollars of the emergency fund established by the 1951 statute to restore and replace facilities, at Warner Robins (Georgia) Air Force Base, that had been destroyed by a tornado earlier in the year.[4] The Army Department similarly proposed to spend $199,000 of an authorized emergency fund in 1955 to replace an officers' mess hall that had burned the previous year, and the proposal was

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[4] U.S., Congress, House, Committee on Armed Services, 83d Cong., 1st Sess., 1953, Armed Services Paper No. 20, p. 840. These armed services papers are published miscellaneous hearings on bills, resolutions, and other legislative matters conducted by the House Committee on Armed Services and its subcommittees. They are paged continuously for binding at the end of each session of Congress under the title "Hearings before Committee on Armed Services of the House of Representatives on Sundry Legislation Affecting the Naval and Military Establishments." Further citation of this source will be by initial, "A.S.P." None of the activities of the Senate Committee on Armed Services relating to review of these decisions--or, for that matter, any other decisions that are submitted to the committees under either a formal or an informal procedure--are available in published form.

also submitted to the armed services committees for clearance.[5] A more recent example of this informal clearance procedure involves a proposal of the Department of the Navy that was submitted to the committees in February, 1957. This proposal concerned a contemplated decision to spend $26,000 of an emergency fund to replace a water-treatment plant laboratory on Guam that had been destroyed by an explosion in November, 1956.[6]

Public Law 968, a military construction bill enacted in the second session of the Eighty-fourth Congress, provided the basis for informal committee review of proposed decisions of the Defense Department. This statute served as a substitute for a military construction bill that had been passed by Congress earlier in the session and vetoed by President Eisenhower. The vetoed bill, H.R. 9893, included an authorization for the Secretary of Defense to enter into contracts with private contractors for the construction or acquisition of so-called Capehart housing to provide living quarters for

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[5] U.S., Congress, House, Committee on Armed Services, 84th Cong., 1st Sess., 1955, A.S.P. 31, p. 4416.

[6] U.S., Congress, House, Committee on Armed Services, 85th Cong., 1st Sess., 1957, A.S.P. No. 12, p. 393. Other examples can be found in: U.S., Congress, House, Committee on Armed Services, 83d Cong., 2d Sess., 1954, A.S.P. No. 70, p. 3819; U.S., Congress, House, Committee on Armed Services, 84th Cong., 1st Sess., 1955, A.S.P. No. 8, p. 884; and U.S., Congress, House, Committee on Armed Services, 85th Cong., 1st Sess., 1957, No. 20, p. 547.

the military and civilian personnel of the armed service departments stationed at various locations. Under this bill, however, no such contract could become effective until the Secretary of Defense had come "into agreement with the Armed Services Committees of the Senate and House of Representatives."[7]

President Eisenhower vetoed this bill when it was submitted to him for the necessary presidential approval. The veto was based upon the requirement of committee clearance of the exercise of the authority delegated to the Secretary of Defense in the statute. The President, in his veto message, described such a requirement as a "serious departure from the separation of powers as provided by the Constitution."[8]

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[7]Quoted in U.S., Congress, Senate, Committee on Armed Services, 84th Cong., 2d Sess., Senate Report 2775 to accompany H.R. 12270, p. 5. Section 301 of H.R. 9893, the vetoed bill, also required the Secretary of Defense to "come into agreement" with the committees concerning the utilization of an appropriation authorization totaling approximately $16,000,000 for the construction of Talos (guided missile) site facilities. U.S., Congress, Conference Committee, 84th Cong., 2d Sess., 1956, House Report 2641 to accompany H.R. 9893, p. 15. This requirement of committee approval was included because of the "concern which had previously been expressed over the very large expenditures involved, the relative merits of the Nike and Talos systems, and the proper assignment of roles and missions in both the Nike and Talos programs." Ibid., p. 3.

[8]U.S., Congressional Record, 84th Cong., 2d Sess., July 16, 1956, CII, No. 120, 11788.

The House Committee on Armed Services met on the day after the veto message to draw up a new bill. The committee simply removed the requirement of committee approval in the vetoed bill that was objected to by the President and reintroduced the bill as H.R. 12270. It passed the House of Representatives and was sent to the Senate for the necessary concurrence.[9] When the bill was before the Senate Committee on Armed Services, however, the committee added a new requirement that became Section 419 of the 1956 statute. Although this proviso did not empower the armed services committees to nullify any contract that was entered into by the Secretary of Defense to provide the needed housing, it did declare that no such contract could become effective until 180 days after it had been submitted to the committees on armed services or until both committees stated in writing that they had no further questions concerning the proposed contract.[10]

The report of the Senate Committee on Armed Services that accompanied the bill to the floor of the Senate declared that "the committee has again inserted language in the bill to insure that the Armed Services Committees retain adequate supervision over the

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[9]U.S., Congressional Record, 84th Cong., 2d Sess., 1956, CII, No. 121, 11933.

[10]Section 419(2) of Public Law 968 (1956).

construction or acquisition of military housing units."[11] It also stated that, although the new language did not involve a "coming into agreement" requirement, "it does provide for the submission of timely reports by the Secretary of Defense which, if properly submitted, will provide Congress with a basis for proper legislative review as well as any further legislative action that may be found to be necessary."[12]

The practical effect of this prior reporting requirement, however, when coupled with the extended laying period of six months, has actually eliminated the necessity of any legislative action on the part of Congress to control the use of the authority delegated to the Secretary of Defense. Regardless of the statutory language, the actual result of such a requirement has been to place the power of approval and disapproval of the proposed construction contracts in the armed services committees of Congress. This occurs because the Defense Department generally desires to begin construction on the necessary housing units as quickly as possible and does not want to postpone such construction for six months while the proposed contract remains before the committees. This laying period, according

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[11] Senate Report 2775, supra, n. 7, p. 5.

[12] Ibid.

to the statute, can be waived only by the armed services committees. If these committees have any objections to particular items in the contract, therefore, the Defense Department must accept such objections and modify the contract in order to meet the approval of the committees in return for a waiver of the remainder of the laying period. A refusal by the Defense Department to follow such committee suggestions would generally mean a six-month delay in the beginning of construction. These factors thus establish a situation in which the use of the discretionary authority delegated to the Secretary of Defense by Congress is subject to review and clearance by congressional committees in a manner identical, for all practical purposes, to the formal instances of committee control.[13]

Another instance of informal committee control is found in the case of negotiated disposals of surplus government property by the General Services Administration. In this case the proposed disposals are submitted to the committees on government operations

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[13]Personal interviews with: Mr. Harry L. Wingate, Jr., chief clerk, Senate Armed Services Committee, January 7, 1957; Mr. John A. Johnson, general counsel, Department of the Air Force, January 8, 1957; Major Watts, Office of Legislative Liaison, Department of the Army, January 8, 1957; Mr. Mansfield D. Sprague, general counsel, Department of Defense, January 8, 1957. All of these interviewees agreed that the decisions of the Defense Department concerning proposed construction contracts under this statute were actually subject to review and clearance by the armed services committees.

for review and clearance. The basis for this particular example of informal committee review is a statute approved in 1952.[14] This statute amended the Federal Property and Administrative Services Act of 1949 by extending until June 30, 1953, the authority of the administrator of the General Services Administration to dispose of surplus property by negotiation rather than by advertised bidding. In addition, however, the 1952 statute also added a new proviso to this extension of statutory delegation of authority. The new requirement stated that "an explanatory statement shall be prepared and submitted to the appropriate committees of Congress and a copy preserved in the file of all cases where negotiated disposals occur."[15] This requirement, according to the Senate Committee on Government Operations, actually meant that such statements had to be submitted to the appropriate committees--the committees on government operations--prior to the actual disposal "in order that these committees may have up-to-date information on the extent of this program."[16]

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[14] U.S., Statutes at Large, LXVI, 593.

[15] Ibid., 40 U.S.C. 484(E). This requirement has been carried over in further extensions of such disposal authority. See U.S., Statutes at Large, LXVII, 521; U.S., Statutes at Large, LXVIII, Part 1, 474; and Public Law 971 (1956), which extended the authority to July 31, 1958.

[16] U.S., Congress, Senate, Committee on Government Operations, 82d Cong., 2d Sess., 1952, Senate Report 2075 to accompany H.R. 5350, p. 5.

This "prior reporting" requirement actually serves as the basis for a clearance procedure in which the proposed negotiated disposals by the General Services Administration[17] are reviewed and either approved or rejected by the government operations committees.[18] This procedure has resulted from an unwritten understanding between the executive agency and the government operations committees that disposals unacceptable to either committee will not

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[17]Section 203(c) of the 1952 statute also authorized the administrator of the General Services Administration to redelegate his authority concerning negotiated disposal to any executive agency that has property surplus to its needs. This redelegation power also has been included in the successive extensions of such disposal authority. In such cases of redelegation, the designated agency is also required to submit the proposed negotiated disposal to the government operations committees for review and approval. Such a statutory grant to the Administrator to redelegate the disposal authority to other executive agencies, coupled with the requirement of committee review and clearance, establishes a situation in which the government operations committees can extend their supervision and control over the disposal programs of a virtually indeterminate number of agencies in the executive branch. Indeed, the extension of such committee control is as broad as the range of redelegations of authority by the administrator of the General Services Administration. A concomitant result of such a situation, furthermore, is that the actual function of controlling the use of such subdelegated power is shifted from the delegating agency in the executive branch (i.e., the General Services Administration) to committees of the legislative body.

[18]Interview with Mr. Walter L. Reynolds, chief clerk and staff director, Senate Committee on Government Operations, January 11, 1957. Neither committee specifically approves any proposed decision. Approval is given by allowing the proposal to remain before the committee during the laying period, which has been set at thirty days, without raising objections to it.

be carried out by the General Services Administration. Both committees have taken advantage of this arrangement to exercise a close control over the uses of the delegated discretionary authority of the General Services Administration regarding the negotiated disposal of surplus property. During the Eighty-fourth Congress, for example, the House Committee on Government Operations reviewed a total of thirty-four proposed disposals. The committee did not raise any objections to twenty-four of this number. Ten proposed disposals, however, were unacceptable to the House committee. In these ten cases "the proposed negotiated sale was either cancelled, modified or made pursuant to competitive bidding."[19] Although the Senate Committee on Government Operations reviewed a total of eighty-seven proposals (a far larger number than did the House) during this same period, it disapproved of only three. The remainder of the eighty-seven disposals submitted to the Senate committee were acceptable to the committee, and no objections were raised.[20]

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[19]Letter from Mr. Orville S. Poland, general counsel, House Committee on Government Operations, February 15, 1957.

[20]"Activities of the Senate Committee on Government Operations" for the Eighty-fourth Congress, Senate Report No. 1, 85th Cong., 1st Sess., 1957, p. 46. Two of the disapproved disposals were later revised and accepted by the Senate committee. They involved the sale of the government-owned alumina plant at Laramie, Wyoming, and the sale of parcels of land in the Voice of America

Some of the activities of the Department of the Interior are also subject to an informal clearance procedure. Such a procedure was established on two separate occasions during the Eighty-fourth Congress to control the discretionary powers of this executive department. In both instances, interestingly enough, committee review and approval was set up simply by an informal agreement entered into by the department and a committee of the House of Representatives. No Senate committee was involved in either informal agreement, nor was any committee of the Senate included in the clearance procedure established by the agreements. Both of these cases serve, therefore, as unique and interesting examples of review of administrative decisions by a single committee of one chamber rather than the more usual method of review by related committees of the House and the Senate.

Secretary of the Interior Douglas McKay entered into an informal agreement with Chairman Bonner of the House Committee on Merchant Marines and Fisheries early in the second session of the

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(Baker West) site in Clallan County, Washington. Ibid. The remaining disposal was withdrawn and thus never carried out. The proposed sale of the alumina plant was the subject of a published hearing by the House Committee on Government Operations. See "Negotiated Sale of a Government-owned Defense Plant Near Laramie, Wyoming," Hearings before a Subcommittee of the House Committee on Government Operations, 84th Cong., 1st Sess., April 14, 15, 19, and May 3, 1955.

Eighty-fourth Congress which established the first example of such review of administrative decisions by a single House committee. This arrangement related to the national wildlife refuges that were under the jurisdiction of the Fish and Wildlife Service of the Department of the Interior. The events leading up to this agreement began when Representative Metcalf introduced a bill on March 29, 1955, during the first session of the Eighty-fourth Congress, that declared that it was the policy of the United States Congress to preserve and maintain the areas of the national wildlife refuges. The bill then stated that the "Secretary of the Interior shall not dispose of, or relinquish any of the national wildlife refuges, or parts thereof, without the prior approval of Congress."[21] Metcalf introduced this bill because information had been brought to his attention that the Interior Department planned to begin allowing entry into the wildlife refuges for various purposes that would destroy the value of the refuges as sanctuaries for the nation's

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[21] Private copy of bill, H.R. 5306, obtained from Mr. John M. Drewry, chief counsel, House Committee on Merchant Marine and Fisheries. Representative Metcalf had no particular method of approval in mind. He stated that he would accept approval by a committee, a joint committee, or Congress as a whole. See "Wildlife Refuge Disposal Policy," Hearings before the Committee on Merchant Marines and Fisheries, House of Representatives, 84th Cong., 2d Sess., on H.R. 5306, January 19, 20, and February 20, 21, 1956, p. 8.

wildlife. He was especially concerned about the proposed leasing of portions of such areas to private companies for the purpose of petroleum exploration.

The House Committee on Merchant Marines and Fisheries was not able to hold hearings on the bill until early in the second session of the Eighty-fourth Congress. After the hearings, however, the bill was never reported from the committee. The House committee recognized that special legislation to approve each decision of the Interior Department was impractical, but the members were unable to agree upon a satisfactory alternative method of congressional control.[22] In order to circumvent this stalemate and establish some sort of check upon the actions of the Department of the Interior, Chairman Bonner wrote to Secretary McKay on March 21, 1956, requesting that the Interior Department consent to an experimental procedure whereby any proposed decision to allow entry into the national wildlife refuges that would result in the relinquishment of the operating jurisdiction of the Fish and Wildlife Service would be submitted to the House Committee on Merchant Marines and Fisheries sixty days in advance for review and clearance. The proposed decisions would then be

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[22]U.S., Congress, House, Committee on Merchant Marines and Fisheries, 84th Cong., 2d Sess., 1956, House Report 1941 pursuant to H.R. 118, p. 11.

carried out by the executive agency only if they were not disapproved by the House committee. Secretary McKay agreed to such an arrangement, and the informal clearance procedure was thus established.[23]

Since the establishment of such committee oversight, which is still operative at the present time, the Interior Department has submitted forty-six proposed entries to the House committee for clearance. The committee and the Department of the Interior have been in agreement in almost every case. The committee approved forty-five of the proposals, and in only one case was the decision of the Interior Department nullified by the House committee.[24]

The Department of the Interior also entered into an informal agreement in 1956 with the House Committee on Interior and Insular Affairs. This agreement concerned the Interior Department's withdrawal or reservation of public lands owned by the national government from entrance, settlement, or sale, for the use of the military departments. It was brought about primarily because of the growing concern in the Western states about the large

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[23]Chairman Bonner's letter can be found in ibid., p. 12. Secretary McKay's reply is printed in ibid, p. 13.

[24]Letter from Mr. John M. Drewry, chief counsel, House Committee on Merchant Marines and Fisheries, February 12, 1957.

withdrawals of public lands in those states for bombing and gunnery ranges, rocket and missile testing areas, and areas to be used for teaching survival training. The Department of Defense, in recent years, had asked the Interior Department to withdraw large parts of the public lands from entrance and settlement for the exclusive use of the military departments for such purposes. One application, for example, involved 2.8 million acres in the Black Rock Desert-Sahwave Mountain area in northwestern Nevada. Another application by the Defense Department requested that 1.2 million acres be withdrawn in the Saline-Panamint Valley area of southeastern central California.[25] The Department of Defense, as of June 30, 1955, already owned or controlled fourteen million acres of land that had been withdrawn from the public domain area. Applications for further withdrawals pending on that date totaled an additional eight million acres in the continental United States.[26] Since most of the public land area was located in the western part of the country, such large holdings and proposed future withdrawals became a subject of apprehension and alarm to the western states.

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[25] "Accomplishments of the House Committee on Interior and Insular Affairs" for the Eighty-fourth Congress, 84th Cong., 2d Sess., Sept. 1, 1956, Committee Print No. 18, p. 41.

[26] U.S., Congress, House, Committee on Interior and Insular Affairs, 84th Cong., 2d Sess., 1956, House Report 2856 to accompany H.R. 12185, p. 11.

These increasingly large withdrawals of public lands by the Department of the Interior for military uses of the Defense Department finally prompted Representative Engle of California, chairman of the House Committee on Interior and Insular Affairs, to write to Mr. Wesley A. D'Ewart, Assistant Secretary of the Interior for Land Management, during the recess between the first and second sessions of the Eighty-fourth Congress, to ask that D'Ewart withhold his approval of any more applications for the withdrawal of public lands from entry and settlement until the House committee could investigate the subject in the second session of the Eighty-fourth Congress. D'Ewart accepted this arrangement and thus agreed to establish what became popularly known in the Pentagon as the "Engle Freeze."[27]

The House Committee on Interior and Insular Affairs held hearings during the early months of the second session of the Eighty-fourth Congress that extended from January to May, 1956.[28] The

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[27]The letters written by Engle and D'Ewart consummating this agreement are printed in "Withdrawal and Utilization of the Public Lands of the United States," Hearings before the Committee on Interior and Insular Affairs, House of Representatives, 84th Cong., 2d Sess. (Serial 29-Defense Agencies), 1956, pp. 2-3. The popular descriptive title for this arrangement was obtained in a personal interview with Mr. George W. Abbott, committee counsel, House Committee on Interior and Insular Affairs, January 10, 1957.

[28]See "Withdrawals and Utilization of the Public Lands of the United States," supra, n. 27.

facts brought out in the hearings pointed to the conclusion that the Department of Defense had not created any effective system for supervising and reviewing the requests of the military departments for withdrawal of public lands. According to the committee, the evidence reflected the absence of a centralized reporting system whereby the possibility of using lands already withdrawn by the different departments of the military establishment could be determined. Furthermore, the House committee was informed by Assistant Secretary D'Ewart that he found it virtually impossible to measure the requests for military uses of the public lands against the possible maximum utilization of the lands for other purposes. D'Ewart told the committee that "we are not in a position to weigh the economic impact of the withdrawal of substantial acreages against military neecessity [sic.]."[29]

Several bills were introduced in Congress after these hearings to provide a congressional check upon public land withdrawals by the Interior Department. They required all withdrawals for defense purposes involving more than 5,000 acres to be approved by an act of Congress.[30] The bills were introduced late in the second

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[29] Ibid., p. 302.

[30] See H.R. 10371, H.R. 10380, H.R. 10377, and H.R. 10367 of the 84th Cong., 2d Sess. The authority to withdraw public lands

session, however, and none were passed by the legislative body. In the meantime, an informal agreement was consummated between the Department of the Interior and the House Committee on Interior and Insular Affairs in which the department agreed to submit all proposed withdrawals of public lands for the use of the military departments to the House committee for review and approval. This arrangement is presently in operation and provides another example of a clearance procedure in which a single committee of the lower

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for public purposes (military reservations, natural-resource conservation, and Indian reservations) has been historically considered as a part of the President's "executive power." This view has been sanctioned by long practice. The Supreme Court of the United States, in United States v. Midwest Oil Company, 236 U.S. 459 (1915), upheld such nonstatutory presidential action on the theory that repeated instances of such action without congressional prohibition reflected the acquiescence of Congress. See Glendon A. Schubert, Jr., The Presidency in the Courts (Minneapolis: University of Minnesota Press, 1957), Ch. 3. The President has delegated this function to the Secretary of the Interior, and the withdrawal is now carried out by public land orders. A recent delegation of this authority can be found in Executive Order No. 10355 issued by President Truman on May 26, 1952. See Federal Register, XVII, No. 105, May 28, 1952, pp. 4831, 4833. The proposed legislation to prohibit such withdrawals except with the approval of Congress was based upon the objective of restoring "to the Congress its constitutional powers over the public lands of the United States." "Withdrawal and Utilization of the Public Lands of the United States," Hearings before the Committee on Interior and Insular Affairs, House of Representatives, 84th Cong., 2d Sess., 1956, on H.R. 10371, H.R. 10380, H.R. 10377, H.R. 10367, and similar bills, p. 8.

house controls the discretionary authority of the Department of the Interior.[31]

Apparently the only example of informal committee review and approval carried out by a joint committee of Congress is the clearance procedure presently in operation to control the tax refunds of the Internal Revenue Service of the Department of the Treasury. At the present time such tax refunds in excess of $100,000 are submitted to the Joint Committee on Internal Revenue Taxation[32] for review and approval before they are paid.

This arrangement developed out of an early statutory requirement which stipulated that particular tax refunds had to be reported to the joint committee before they were made. This requirement first appeared as a proviso accompanying the appropriation of funds to the Bureau of Internal Revenue in the Urgent Deficiency Act for 1927. It required that all refunds of taxes involving more than $75,000 had to be reported to the Joint Committee on

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[31] Interview with Mr. George W. Abbott, supra, n. 27.

[32] The Joint Committee on Internal Revenue Taxation is presently composed of five members of the Committee on Finance of the Senate and five members from the House Ways and Means Committee. The five members of each committee are composed of three members of the majority party and two minority party members. Subtitle G, Chapter 91, Section 8002, Internal Revenue Code Act of 1954, U.S., Statutes at Large, LXVIII(A), 925.

Internal Revenue Taxation sixty days before they were paid.[33] The period during which the refunds had to lay before the committee was shortened to thirty days by the Revenue Act of 1928.[34] The minimum amount of such refund for reporting purposes was raised to $200,000 in 1949,[35] only to be reduced to $100,000 a few years later by the Internal Revenue Code Act of 1954. The statutory basis for the informal review of tax refunds by the joint committee, as found in this 1954 statute, now reads:

> No refund or credit of any income, war profits, excess profits, estate, or gift tax in excess of $100,000 shall be made until after the expiration of 30 days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Secretary or his delegate, is submitted to the Joint Committee on Internal Revenue.[36]

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[33] U.S., Statutes at Large, XLIV, Part 2, 1250. This requirement was established at this time, according to Mr. Colin Stam, chief of staff of the joint committee, as a result of objections in Congress to the continual large tax refunds that had first begun shortly after World War I. Interview with Mr. Colin Stam, chief of staff, Joint Committee on Internal Revenue Taxation, January 10, 1957.

[34] U.S., Statutes at Large, XLV, Part 1, 791.

[35] U.S., Statutes at Large, LXIII, Part 1, 666.

[36] Subtitle F, Chapter 65, Subchapter A, Section 6405(a) of U.S., Statutes at Large, LXVIII(A), 792. This statutory requirement refers to the Secretary of the Treasury rather than the Commissioner of Internal Revenue, because a reorganization plan of 1950

Although the statutory language upon which the clearance of tax refunds is based does not require the approval of the Joint Committee on Internal Revenue Taxation, the actual operation of this statutory procedure involves clearance by the committee. Each tax refund involving more than $100,000 is reviewed by the joint committee. If it meets with the approval of the committee it is validated and can then be paid. If, on the other hand, the joint committee objects to a particular refund, it is not made at all or it is revised in order to satisfy the objections of the joint committee before payment.[37] As Kofmehl reports, "a refund or credit to which the Joint Tax Committee objected was not likely to be made unless the taxpayer concerned sued and won."[38]

During the fiscal year ending June 30, 1955, for example, the joint committee scrutinized a total of 177 cases that involved the

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transferred all the functions of all officials of the Treasury Department and all agencies and employees of that department, except those functions assigned to the Comptroller General by law and the functions of hearing examiners under the Administrative Procedures Act of 1946, to the Secretary of the Treasury. See Reorganization Plan No. 26 of 1950, effective July 31, 1950, Federal Register, XV No. 148, August 2, 1950, 4935.

[37] Personal interview with Mr. Colin Stam, supra, n. 33.

[38] Kofmehl, op. cit., supra, Chapter VI, n. 1, p. 206. This was a reported statement of Dr. Roy Blough, formerly director of tax research and assistant to the Secretary of the Treasury.

impressive sum of approximately 523.5 million dollars in proposed tax refunds. The vast majority of these proposed refunds were acceptable to the committee. Objections were raised to only eleven proposals, while the joint committee allowed 166 refunds to become effective without objection.[39] The comparable figures for the preceding fiscal year included a total of 191 cases involving a lesser sum of only about 245.2 million dollars. The joint committee approved 179 of these proposed refunds and raised objections in only twelve cases.[40]

Conclusions

The survey of both the formal and informal instances of committee control provide a picture of the development and use of this second device of congressional oversight. This picture reveals that the device has been used as a mechanism of control of bureaucratic discretion in twenty instances. This includes fourteen cases in which the requirement of committee clearance has been established by

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[39] "Refunds and Credits of Internal Revenue Taxes for the Fiscal Year Ended June 30, 1955," Joint Committee on Internal Revenue Taxation, House Document 460, 84th Cong., 2d Sess., 1956, p. 3.

[40] "Refunds and Credits of Internal Revenue Taxes for the Fiscal Year Ended June 30, 1954," Joint Committee on Internal Revenue Taxation, House Document 178, 84th Cong., 1st Sess., 1955, p. 3.

statute dating from the naval construction statute enacted in 1944. Six of these statutory requirements are still in effect.[41] The remaining six instances are based upon informally established committee review. They are presently operative. There are, therefore, twelve instances in which this device is presently being used to control administrative discretion. They make up the contemporary program of committee clearance, which is, in turn, a significant aspect of congressional oversight.

These figures suggest the conclusion that this device, like its companion device of review by resolution, has not apparently been viewed as a mechanism of control that should be expanded into a general program of legislative oversight. It has rather followed a pattern of use similar to the latter device. It has been established in those particular instances in which Congress has wanted an opportunity to exert a close control over the specific execution of certain governmental programs.

This congressional concern for such control has generally been based upon any or a combination of three basic reasons. The concern and consequent imposition of committee clearance has sometimes stemmed from particular dissatisfactions with the administration

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[41] See Appendix III and Appendix IV, infra.

of existing programs. This is evident, for example, in the case of the refunding of internal revenue levies. It also is reflected in the recent controversy surrounding the withdrawal of public lands for the military services by the United States Department of the Interior.

Another reason for Congress having turned to this device is found in those special cases where the demands of particular programs have seemed to foreclose the possibilities of effective congressional control by any of the older and more traditional means. Such instances are exemplified by the problem created as a result of the demand for fast and flexible decisions and actions in the naval construction field during time of war. This demand could not be met by the normal method of detailed and specific authorizations of funds for fairly long periods extending into the future. In order to meet such a demand and at the same time provide an opportunity for congressional supervision of the use of general, lump-sum grants of funds, Congress established the device of committee control. A similar situation underlies the more recent uses of this device in the fields of the construction of facilities and real estate acquisitions and disposals by the military services. In these cases committee clearance has served as a device that would allow a flexible basis for these activities and still provide an effective means of congressional control.

The third principal reason for recourse to committee review has been associated with particular situations of congressional concern regarding new and untried governmental programs. Committee review has provided a means whereby Congress could establish such programs and maintain a close scrutiny over their initial execution. An example of this is the use of committee clearance in connection with the new programs of lease-purchase contracts for acquiring needed building space, or government assistance in the construction of water retardation structures for irrigation and soil conservation.

There is, however, a significant difference between the pattern of use that has accompanied each of the devices of congressional oversight. Committee clearance has been used more widely than has review by resolution. It has been established in a greater number of different fields of governmental activity, while review by resolution has been confined principally to three major fields.

This can be illustrated by looking at the instances of committee control presently in effect. Four instances, it is true, do concern the construction activities and real estate transactions of the military services. In the remaining eight cases, however, this device is found in many different areas of governmental activity. They include areas as diverse as the protection of wildlife refuges and the establishment of criteria to be used in determining rents to be

charged by government agencies for employees' quarters. They range from the acquisition of property through lease-purchase contracts to the disposal of property by negotiated agreements.

Although it is difficult to assess the future use of this device, past experience may offer some useful hints. Experience to date suggests that committee clearance has been introduced into many different areas, and has accompanied the inauguration of new governmental programs in recent years. This seems to reflect a favorable orientation on the part of Congress toward this device. It may be, therefore, that committee review will become an increasingly important part of congressional oversight.

One final point about committee control should be discussed. It concerns the structure connected with this device. The various instances making up the present system of committee clearance do not reveal a single type of structure. Rather, as a result of the growth and development of this device on the basis of discrete instances of formal and informal review, the present system includes a distinct variation in structure.

The many instances point out this structural variability. They range from clearance by a joint committee of Congress to approval by a member of a single committee of the lower house. The Joint Committee on Internal Revenue Taxation, for instance, is charged

with the function of clearing tax refunds made by the executive branch. In eight other instances, which comprise the majority of the cases in the present system, the responsibility for the clearance of administrative decisions is assigned to related committees in each chamber of Congress. In the case of public land withdrawals and the operation of the national wildlife refuges, on the other hand, the review of the exercise of discretionary authority by the executive agencies is the function of a committee of the House of Representatives only and no committee of the other chamber is involved. Finally, the approval of changes or modifications in Bureau of the Budget Circular A-45 is delegated specifically to the chairman of the House Appropriations Committee.

A mere description of gross variability in the structure of committee review, however, does not provide a basis for adequate insight into the actual functioning of this device. A careful look at the operation of committee clearance reveals that the actual review and decision-making functions are concentrated at various points in the committee hierarchy and legislative body. The administration of committee control must, therefore, be presented and analyzed. This will provide a basis for evaluation of the device in terms of the norm of political responsibility found in the doctrine of legislative control.

CHAPTER VIII

PROCEDURE IN COMMITTEE REVIEW

Introduction

The instances of committee clearance that are presently operative, almost without exception, place the function of review and clearance in the full committees. In most instances, however, the committees play only a minor role in the actual scrutiny and approval or disapproval of the decisions submitted by the executive agencies. A survey of the reviewing practices of those committees currently engaged in the clearance of administrative decisions reveals that the clearance function has actually been delegated to subordinate levels of the administrative hierarchy of the committee structure and even, in some cases, to individual members of the legislative body.

Only in one instance of committee oversight that has been in operation for any length of time is the clearance of administrative decisions carried out at the level of the full committee; i.e., the apex of the organizational hierarchy of the committee. This

particular practice occurs in the review and clearance of changes made by the director of the Bureau of the Budget in Budget Circular A-45. Each of the proposed changes is personally reviewed and cleared by the chairman of the House Appropriations Committee, in accordance with the requirement contained in the statute establishing this particular method of control.[1]

In most cases, however, the reviewing practices have resulted in de facto delegations of the function of review and clearance. Such delegations fall into three basic patterns. In the first pattern, represented by the practices of both committees on armed services, the clearance of administrative decisions is actually carried out by a subcommittee and a member of the professional staff. The second pattern of delegation results from the reviewing practices of the Joint Committee on Internal Revenue Taxation. In this pattern the clearance function has been delegated to the professional staff alone. The third pattern, perhaps best represented by the practices of the government operations committees, is characterized by the de facto delegation of this function to individual members of Congress,

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[1] The chairman often confers with other members of the committee before making a decision, according to Mr. Sprankle, a member of the professional staff of the House Appropriations Committee (interview, January 7, 1957), but the final decision to approve or reject the proposed change always rests with the chairman.

completely outside the organizational hierarchy of the reviewing committees.

This resulting de facto delegation of the clearance function in the American practice of committee oversight closely parallels the pattern of decision-making that generally develops in hierarchical organizations associated with the administrative process. It is generally recognized by students of public administration that a realistic conceptual model of administrative decision-making must take into account the fact that decisions are often actually made at various hierarchical levels in the administrative organization below that at which the formal authority is officially placed. Such a delegation of decision-making generally follows upon the routinization of the administrative program and the decisions required by such a program. That is, as a program administered by an agency becomes established as a normal part of the agency's activities, the decisions that have to be made raise fewer questions and problems that demand attention and independent scrutiny at the organizational level at which such a function is officially centered. The usual result of such routinization is delegation of the determination and formulation of the decisions to subordinate levels of the administrative hierarchy with the official point of decision-making serving merely as a source of ratification of such decisions. Only the few cases involving new

problems or controversies generally find their way to the official point of decision-making for independent consideration and resolution.

The de facto delegation of decision-making connected with most of the instances of committee clearance represents a result that closely follows that posited for decision-making by administrative theory. By applying the model of decision-making in administrative theory it is perhaps possible to point to one of the major factors producing such a result in the committee clearance process. It is probable that many of the instances of de facto delegation in this process have resulted from a similar stabilization and routinization of the required decisions relating to the clearance of administrative proposals.[2]

Reviewing Practices

The first pattern of delegation is best represented by the reviewing practices followed by both armed services committees in the various instances of committee clearance, both formal and informal, in which they are involved. The decisions of the executive agencies

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[2]This, of course, may not represent an explanation that can be applied equally to all three patterns of delegation described in the text. It would be especially interesting, for example, to determine whether the factor of routinization was of equal influence in the delegation to subordinate levels of the committee hierarchy and to individual members of Congress.

--i.e., in most cases the military departments and the Department of Defense and in a lesser number of instances the Federal Civil Defense Administration--are submitted to both committees about once a week. The initial review of such decisions is performed by a regular member of the professional staff assigned to this duty. He prepares a short summary of the relevant data concerning each proposal. This summary is then submitted to a designated subcommittee along with the proposal. In the House of Representatives the proposals are submitted to a seven-member subcommittee on real estate and construction. In the case of the upper chamber they are submitted to a much smaller subcommittee on military construction composed of three members. If the review by the staff member discloses no questions concerning the legality or reasonableness of the proposals they are generally approved by the subcommittees at periodic meetings with little detailed scrutiny. If such a question should be raised, however, by the staff member or a member of the subcommittee, a hearing is usually held by the subcommittee.[3]

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[3]Air Force Acquisition Project No. 99 of 1953, for instance, was the subject of a hearing by the predecessor of the present House subcommittee, the Subcommittee on Real Estate Acquisitions and Disposals. The Air Force previously had been authorized to purchase 760 acres of land at Carswell Air Force Base, Texas, for

Representatives of the executive agency involved appear at such a hearing to explain and justify the particular proposed action. Private parties that might be involved in the proposal--which is often the case in the acquisition or disposal of land or other real property--and interested members of Congress also usually present their views concerning the proposed action and urge the subcommittee to accept or reject the proposal or to modify it by inserting particular requirements.[4] After accumulating the relevant facts and weighing the various issues that have been brought out by the

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approximately 1.5 million dollars. An earlier acquisition project to purchase 365 acres of this land, at a price of about 1.4 million dollars, had been approved by the House Committee on Armed Services in 1952. The Air Force proposed to obtain an additional 338 acres of the original authorization in Project No. 99 of 1953, but the price for this land had risen in the meantime to nearly 2.5 million dollars. This was an additional million dollars for a slightly lesser amount of land, and the subcommittee demanded an explanation. The hearing brought out the fact that governmental facilities raised the cost of land adjoining them and when the facilities had to be expanded the necessary adjoining land cost a great deal more to purchase. The Air Force explained to the subcommittee that the funds that were needed for the purchase price were not available from the remaining original allotment. The Air Force planned to readjust other programs and transfer the necessary funds. The subcommittee deferred a decision until executive session. See U.S., Congress, House, Subcommittee on Real Estate Acquisitions and Disposals, 83d Cong., 1st Sess., 1953, A.S.P. No. 16.

[4]See, for example, U.S., Congress, House, Subcommittee on Real Estate and Construction, 83d Cong., 1st Sess., 1953, A.S.P. No. 47 and A.S.P. No. 48.

hearing the subcommittee makes a decision concerning the disposition of the proposal of the executive agency.

The procedures of the two committees diverge after the subcommittee review is completed. In the case of the Senate, the Subcommittee on Military Construction has been authorized by the full Committee on Armed Services to make the final decision on each proposal that is submitted. The House Armed Services Committee has not delegated this power to its subcommittee. The final disposition of each administrative decision is technically determined, therefore, by the full committee on the basis of recommendations of the subcommittee. This is merely a matter of form, however, for the subcommittee recommendations are almost invariably accepted by the full committee with little debate or consideration during a meeting of the full committee to consider proposed bills or other legislative matters. The full House committee thus simply serves as the official organ for ratification of the decisions made at the subordinate levels of the committee structure to approve or disapprove the proposals of the executive agencies.[5]

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[5]The information concerning the procedures of the armed services committees was obtained from personal interviews with Mr. Robert Smart, chief counsel, House Armed Services Committee, January 2, 1957, and Mr. Harry L. Wingate, Jr., chief clerk, Senate Committee on Armed Services, January 7, 1957. See also, however, Kofmehl, op. cit., supra, Chapter VI, n. 1, pp. 209-211.

Although the function of review and clearance is officially placed in the full committees, therefore, neither committee takes an active role in this function. The reviewing practices that have been established and followed by both the House and Senate committees on armed services have resulted in the delegation of the review and clearance of administrative proposals to subordinate levels of the administrative hierarchy of the committee structure. A subcommittee and a member of the professional staff, rather than the full committee, determine the disposition of the proposals of the executive agencies in the clearance practice of each armed services committee.[6]

The particular pattern of delegation associated with the armed services committees has also emerged in the clearance of lease-purchase contracts by the Senate Committee on Public Works under the terms of the program established by the 1954 statute.[7]

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[6] In the routine cases the actual decisions may be made by the staff members with the subcommittees serving merely to ratify such decisions without independent scrutiny. The point here is, however, that almost every case of committee clearance, whether routine or controversial, is actually carried out by the subcommittees and professional staff members rather than by the full committees.

[7] The clearance practice of the House Public Works Committee establishes a different pattern of delegation. It is discussed below. See infra, p. 273.

The reviewing practices of this committee have also resulted in a delegation of the clearance function to a subcommittee and a member of the professional staff.

The proposed lease-purchase contracts submitted to the Senate Committee on Public Works by the administrator of the General Services Administration and the Postmaster General are first reviewed by a member of the professional staff. This staff member analyzes the proposals and prepares a memorandum on each one, summarizing the relevant data. These summaries are submitted, in turn, to a subcommittee on public buildings and grounds, composed of seven members, for review. After such subcommittee review, which is based primarily upon the summary prepared by the staff member, the subcommittee arrives at recommendations of approval or disapproval of each project and submits such recommended decisions to the full committee. The full committee almost invariably simply incorporates the subcommittee recommendations as its official decisions and, in this manner, serves merely to ratify the choices arrived at by the staff member and the subcommittee.[8]

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[8] Interview with Mr. T. W. Sneed, staff member, Senate Committee on Public Works, January 7, 1957. At the time of the interview there had been no proposals submitted to the committee under the 1956 amendment to the earlier Watershed Protection Act, but any such proposal presumably would be handled in a similar manner, according to Mr. Sneed.

The reviewing practices associated with the review of proposed tax refunds by the Joint Committee on Internal Revenue Taxation result in another pattern of delegation. The clearance of the refunds is performed almost exclusively by the professional staff of the joint committee in this particular pattern. Neither the full committee nor a subcommittee is actively involved in the clearance practice.

The proposed refunds of the Internal Revenue Service are initially submitted to a staff office of the joint committee, which is located in the same building that houses the office of the Commissioner of Internal Revenue. The staff office is composed of a director and three attorneys whose sole duty is to review such refunds. A report of the initial review carried out by this office is submitted to the chief of staff of the joint committee. If the initial reviewing staff and the chief of staff agree with the Internal Revenue Service concerning the proposals, final clearance for such refunds is given by the chief of staff. If they oppose the proposed refund, however, the chief of staff arranges a conference between representatives of the Internal Revenue Service and the staff of the joint committee. At this time the facts and the issues of the case are discussed in detail. Generally, agreement is reached at this level. Some refunds are allowed to become effective by the staff, and others are

not carried out by the Internal Revenue Service, in accordance with the wishes of the joint committee staff. Only the limited number of cases in which agreement can not be reached are submitted to the Joint Committee on Internal Revenue Taxation.

Such cases are submitted to an executive session of the joint committee. Representatives of the Internal Revenue Service appear at the meeting to present their views and justifications for the proposed refund. The arguments opposing such a refund are outlined by the joint committee staff. After weighing the various issues and arguments presented by both sides, the joint committee approves or disapproves each refund according to a majority vote of the members of the joint committee.

This formal committee vote, in the majority of cases, upholds the position of the joint committee staff. Even in the small number of cases in which the joint committee takes an active role, therefore, the influence of the professional staff generally predominates in the committee disposition of the proposed refund. The Joint Committee on Internal Revenue Taxation, sitting in an appellate capacity, almost always serves primarily to put the stamp of finality upon the initial decision of the professional staff.[9]

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[9]Interview with Mr. Colin Stam, chief of staff, Joint Committee on Internal Revenue Taxation, January 10, 1957. See also Kofmehl, op. cit., supra, Chapter VI, n. 1, pp. 206-208.

The reviewing practices that have been established to carry out the review and clearance of proposed tax refunds, as in the case of the practices associated with most of the other instances of committee clearance, have thus actually resulted in a de facto delegation of the clearance function. This function is actually performed by the professional staff. Review and clearance by the joint committee itself has been largely reduced to an occasional review of such staff clearance.

The reviewing practices followed by both committees on government operations in clearing the proposed negotiated disposals of surplus property by the General Services Administration or its designated agent represents still another basic pattern of delegation. The reviewing practices, in the case of both of these committees, have led to the de facto delegation of the power of nullification of administrative decisions to individual members of Congress.

When the committees receive a proposed disposal from the executive branch it is initially reviewed by a member of the professional staff of each committee to ascertain whether the disposal meets certain technical requirements. In the case of the House committee, the proposal is then referred to the congressman in whose district the surplus property is located, for his consideration. The Senate Government Operations Committee similarly notifies the senators representing the state in which such property

is located.[10] If the representative or senators have any objection to the disposal, they notify their respective committees within the established thirty-day laying period. If such objections are received by either committee, the proposal is almost always disapproved automatically by the committee, in accordance with the wishes of the congressional member or members.[11] Both committees have thus established an interesting system of "congressional courtesy" in connection with the clearance of the administrative decisions in which the actual power of nullification rests with individual members of the legislative body.[12]

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[10] In some cases, of course, the property may be of such a nature as not to be located in a particular geographical area, as, for example, the proposed disposal by the Air Force of sixty C-46F aircraft during the Eighty-third Congress. See "Activities of the Senate Committee on Government Operations" for the Eighty-third Congress, 84th Cong., 1st Sess., 1955, Senate Report No. 4, p. 28. In such a case the committees generally would make a decision based upon staff study and recommendation.

[11] In the Eighty-fourth Congress, for example, the Interior Department proposed to exchange 3,861.01 acres of federal property appraised at $272,000, and adjacent to Olympic National Park in western Clallam and Jefferson counties, Washington, for 400 acres of privately owned land, appraised at $269,350, in Lassen Volcanic National Park, Plumas County, California (plus $2,670 cash). "This proposal was objected to by the Senators from the state of Washington, and was not consummated by the Department of the Interior." "Activities of the Senate Committee on Government Operations" for the Eighty-fourth Congress, 85th Cong., 1st Sess., 1957, Senate Report No. 1, p. 46.

[12] Interview with Mr. Walter L. Reynolds, chief clerk and staff director, Senate Committee on Government Operations, January 11, 1957.

The reviewing practices that have been established by the House Committee on Public Works for the clearance of proposed lease-purchase contracts have resulted in a similar pattern of delegation of the power of disapproval to individual members of the lower house. In this case, as in the case of both government operations committees, the clearance of administrative decisions rest primarily, not with a subcommittee or the professional staff, but with individual members of Congress who generally can not even claim membership on the reviewing committee.

When proposed lease-purchase contracts are submitted to the House committee they are given an initial cursory review by a member of the professional staff. This is not a detailed review, however, for the committee is not equipped with a staff adequate to devote a great deal of time and attention to a thorough analysis and investigation of all the projects. After such staff review the congressman from the area involved is notified about the proposed construction. The House Public Works Committee relies primarily upon the recommendation of the congressman in arriving at its decision. If the House member should object to the proposed building, the committee would disapprove the proposed contract. On the other hand, committee approval usually follows as a matter of

course if the congressman in the area involved raises no objections to the proposed building.[13]

The House Committee on Agriculture has also followed this practice for the clearance of the Agriculture Department's proposals concerning plans of assistance to local organizations constructing watershed projects. The reviewing practices that have been established by this committee, as in the case of the House Public Works Committee and both committees on government operations, have resulted in a de facto delegation of the clearance of administrative decisions to individual members of Congress.

Whenever the committee receives a proposed plan of assistance, it is given a brief review by a member of the professional staff. The staff member then notifies the representative from the district in which the proposed project is to be built. The committee passes the necessary resolution of approval only if the proposed plan is acceptable to this member of the House.[14]

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[13]Interview with Mr. Robert F. McConnell, committee counsel, House Committee on Public Works, January 11, 1957. No detailed information was available concerning the procedure associated with the clearance of proposed decisions of the Interior Department relating to the national wildlife refuges. This is carried out by the House Committee on Merchant Marines and Fisheries. It was discovered, however, that the House committee relies primarily upon the objections or approval of members of Congress. This is similar to the practice of the House Committee on Public Works. Interview with Mr. John M. Drewry, committee counsel, House Committee on Merchant Marines and Fisheries, January 5, 1957.

[14]Interview with Mr. John Heimburger, committee counsel, House Committee on Agriculture, January 15, 1957.

In this pattern of delegation, then, the clearance function has been delegated to points outside the committee structure itself. The actual power of nullification rests with individual members of Congress. The official decisions by the full committees to accept or reject an administrative decision, in any given case, represent little more than a ratification of the decision made by the congressional member or members. As in the two patterns of delegation discussed previously, therefore, the full committees play only a minor role in the clearance process.[15]

The Senate Agriculture Committee, unlike its counterpart in the lower house, has not established any definite reviewing practice

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[15]The practices of the House Committee on Interior and Insular affairs that have been followed for the review of the Interior Department's proposed withdrawal of public lands for the use of the military departments present an interesting variation of this de facto delegation of the power of nullification to individual congressmen. The House committee notifies the governor of the state, as well as the congressman from the area in which the public lands are located, of the pending proposals. If neither of these persons raises any objections to the proposed withdrawal, the committee generally approves the proposal. But if either the governor or the congressman raises any objection to the withdrawal, the House committee holds a hearing. After such a hearing the committee arrives at a decision to approve or reject the particular withdrawal. The practices of the House committee thus create a situation in which the consent of the governor and the congressman to the withdrawals invariably leads to committee approval, whereas objections on the part of such elected political officials merely serve to initiate review by the committee. In the latter case the locus of actual decision-making in the clearance procedure is transferred to the full committee, which arrives at an independent decision after a committee hearing. Interview with Mr. George Abbott, committee counsel, House Committee on Interior and Insular Affairs, January 10, 1957.

for the clearance of the proposed projects submitted by the Department of Agriculture. No particular reviewing pattern has thus crystallized. The few projects that have been submitted to the Senate committee have been handled by the full committee up to this time. The proposed contracts were first studied by a member of the professional staff. This staff member then prepared a summary of the information concerning each project for the benefit of the members of the full committee. Because of the newness of the program of federal assistance to local organizations for watershed projects, and because this was its first experience with committee review of administrative decisions, the Senate committee also held a hearing to consider most of the projects.[16] Representatives of the Agriculture Department appeared at the hearing to explain and justify each project. Other executive agencies that administered programs closely related to the watershed construction program, such as the Bureau of Reclamation and the Army Corps of Engineers, also appeared to present their views about the projects. The decisions to approve or reject the proposed projects were then made by the full committee on the basis of the information obtained at this hearing.[17]

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[16] See "Watershed Projects," Hearings before the Committee on Agriculture and Forestry, United States Senate, 84th Cong., 2d Sess., 1956.

[17] Interview with Mr. Harker T. Stanton, counsel, Senate Committee on Agriculture and Forestry, January 7, 1957.

The thus-far limited experience of the Senate Agriculture Committee has resulted in the retention in the full committee of the function of review and approval or disapproval of the proposed projects of the Agriculture Department. It is likely, however, based on the experience of the other committees that have been engaged in the clearance function for a longer period of time, that, as the watershed program becomes established, the Senate committee gains additional experience with the particular problems involved, and the process of review and clearance becomes routinized, the actual review and clearance of the executive proposals will be delegated to subordinate levels of the administrative hierarchy of the committee or even to individual senators representing the particular state in which the proposed project is located. It is also probable that as this routinization and delegation develops the full committee will assume a decreasingly active role in the clearance practice.

Conclusions

It is now possible to evaluate committee clearance in terms of the norm of political responsibility found in the legislative control doctrine. One of the major claims of this doctrine is that legislative control of administrative discretion will insure that administrative decisions represent the majoritarian political consensus of American society; i.e., the consent of the governed. Committee review represents a particular way for putting a scheme of legislative control into

effect. The basic question is thus whether such a device fulfills the claim that is implied for it by the doctrine of legislative control.

Committee clearance does not offer a control device that satisfies this claim. This results from the fact that the operation of the device concentrates the function of review and clearance at different points in the governmental structure which generally deny effective access and representation to all organized interests. The final disposition of administrative decisions normally takes place at different points that magnify the access and influence of particular interests while, at the same time, denying effective representation to others. The clearance of particular decisions, in such a situation, can hardly be viewed as a reflection of the political consensus emerging out of the conflict and compromise among such competing interests and public policy views. It is more likely to represent a specialized and segmented consensus.

This is made quite clear by looking at the various patterns of clearance that have evolved in the present system. Review and clearance by the full committees is found in a few instances. It is difficult to accept the claim that such a pattern insures final clearance that represents an accurate translation of the consent of the governed. The point of control involved in such a pattern generally distorts the influence and representation of particular interests and views. The committees do not represent an accurate cross section of the organized interests and the various views on public policy

found in American society. The final clearance thus can not generally be viewed as a reflection of any sort of agreement evolving out of the give-and-take among such organized interests.

A similar indictment applies against the pattern which concentrates the final clearance in subcommittees. Such subcommittees, even more than their parent bodies, fail to provide equal representation and effective access to all the many organized interests making up the political basis of our society. Similarly, then, the clearance of administrative proposals will generally be representative of the consent of only a small part of the governed. This does not coincide with the claim of the doctrine of legislative control.

The same criticism applies with even greater force to those cases in which the final disposition of administrative decisions has been delegated to individual congressmen. In such cases the final clearance is left with congressmen representing particular geographical areas. Such areas are seldom miniature replicas of the patterns of interests and public policy views of the whole body politic. Rather, they more often include a specialized segment of such interests and views. Since congressmen must necessarily be oriented toward, and responsive to, the segmented patterns of interests in their constituencies, it is unlikely that the clearance of administrative proposals in such a situation will be a close approximation to a consensus of all the organized interests included in American society.

Finally, the delegation of the clearance function to members of the professional staff of committees involves a defect similar to that found in

the above patterns. The staff members are not responsible to the electorate through periodic general elections. Rather, their lines of responsibility lead to the source of their appointments. The members are formally appointed by the committees they serve. In practice, however, they are often actually appointed by the committee chairman or, in the case of staff members who serve the minority members, by the ranking minority member. It is probable, in such a situation, that the decisions of the staff members will follow the general patterns of expectations and views of the ranking individual members of the committee. The clearance of administrative proposals by the staff members is thus likely to be a close reflection of the views and stands of the organized interests having access to particular committee members. Such clearance can seldom serve as an accurate translation of the consent of the governed.

The committee clearance device does not operate in such a way as to fulfill one of the major claims of the doctrine of legislative control. This occurs because the various patterns of review and clearance connected with this device establish situations in which the final disposition of administrative decisions generally will reflect the consent of specialized publics. This is not the consent of the governed implied in the legislative control doctrine. It does not satisfy, therefore, the claim of the promotion of politically responsible administrative decision-making.

CHAPTER IX

THE CONSTITUTIONALITY OF CONGRESSIONAL REVIEW

A basic question that is raised by both methods of legislative control of administrative decision-making--i.e., review by resolutions and congressional committee clearance--concerns the validity of such devices in the American constitutional system. The constitutional propriety of such forms of control has never been passed upon by the federal courts. The absence of a formal court decision, however, does not mean that there have been no interpretations of the United States Constitution to support or deny the validity of such devices.

Several arguments concerning the question of the constitutionality of both methods of control of administration have been presented. These arguments, however, are scattered throughout congressional committee reports and debates in both houses of Congress, opinions of the Attorneys General of the United States, and presidential messages. It is the aim of this chapter to present the various arguments found in these several sources. Such a

presentation offers an insight into the constitutional issues that have been raised by both devices and provides an important part of any thorough discussion of the fairly new American practice of legislative oversight by resolutions and congressional committees.

Review by Resolution

The various arguments supporting or rejecting the constitutionality of the use of resolutions to approve or nullify administrative decisions have all centered around presidential reorganization of the executive branch.[1] The instances in which this device has

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[1] The federal courts have never passed upon the constitutionality of the use of simple or concurrent resolutions to nullify proposed presidential reorganization of the executive branch. The United States Supreme Court was presented with the question of the validity of the procedure established by Section 407 of the act of March 3, 1933, in two cases arising in 1937. The procedure, however, did not subject proposed executive reorganization to possible congressional rejection by either type of resolution. This statute simply required that executive orders embodying reorganization proposals could not become effective until they had laid before Congress for sixty days of legislative session "unless Congress shall by law provide for an earlier effective date of such Executive order or orders." See supra, Chapter V, p. 156. The court refused to determine the constitutionality of this procedure on the basis that the actual executive reorganization subsequently had been validated by legislative ratification in appropriation acts and the Merchant Marine Act of 1936. See Isbrandtsen-Moller Co., Inc. v. United States, 300 U.S. 139 (1937), and Swayne and Hoyt, Ltd., et al. v. United States, 300 U.S. 297 (1937).

been established to control administrative decisions in other fields of governmental activities have been completely devoid, by and large, of any useful consideration or systematic discussion of the constitutionality of such a method of congressional control.

The establishment of the first instance of the use of resolutions in 1932 to furnish a means of legislative control of executive reorganization, surprisingly enough, was not accompanied by any debate or controversy regarding the validity of such a device in the American constitutional system. The 1932 Economy Act that first established the procedure of congressional nullification of reorganization proposals by a simple resolution of either house was passed by Congress and approved by President Hoover with no mention of this problem.

It was not until one year later that the issue of the constitutionality of such a device was raised. This occurred in an opinion dated January 24, 1933, written by United States Attorney General William D. Mitchell to President Herbert Hoover. In this opinion, Mitchell referred briefly to the procedure established by the Economy Act passed in 1932 and declared:

> It must be assumed that the functions of the President under this act were executive in their nature or they could not have been constitutionally conferred upon him, and so there was set up a method by which one house of Congress might disapprove Executive action. No one would question the power

> of Congress to provide for delay in the execution of such an administrative order, or its power to withdraw the authority to make the order, provided the withdrawal takes the form of legislation. The attempt to give to either House of Congress, by action which is not legislation, power to disapprove administrative acts, raises a grave question as to the validity of the entire provision in the Act of June 30, 1932, for Executive reorganization of governmental functions.[2]

When Congress renewed authority for executive reorganization in the 1939 reorganization statute it changed the procedure for congressional review and control. This statute subjected reorganization plans authorized by the statute to disapproval by concurrent resolutions of Congress rather than a simple resolution of either chamber of the legislative body. The inclusion of this requirement in the statute provoked a full-scale debate concerning the constitutionality of the use of concurrent resolutions to control executive reorganization.

One of the major arguments, supporting the constitutionality of this requirement, that appeared during the debate on the reorganization bill was first presented in the report of the House Select Committee on Government Operations, which accompanied the reorganization bill to the floor of the House of Representatives. The committee report denied the basic assumption of Attorney General

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[2] Opinions of the Attorneys General of the United States, Vol. 37 (1932-1934), pp. 63-64.

Mitchell that the functions of the President in the process of executive reorganization were of an executive nature. On the contrary, according to the report, the power delegated to the President was of a legislative character, and its use could validly be made dependent upon certain conditions or contingencies. The failure of Congress to pass a concurrent resolution, for example, was just such a contingency upon which the effectiveness of the legislative power delegated to the President rested.

> The failure of Congress to pass such a concurrent resolution is the contingency upon which the reorganizations take effect. Their taking effect is not because the President orders them. That the taking effect of action legislative in character may be made dependent upon conditions or contingencies is well recognized. The latest pronouncement of the Supreme Court on the subject is Currin et al. v. Wallace et al., No. 275, October term 1938, decided January 30, 1939. That case upheld the validity of a referendum of farmers which determined whether the Secretary of Agriculture could exercise the authority given him by the statute to designate a market as one at which tobacco was required to be inspected and certified by Department representatives prior to its sale. It seems difficult to believe that the effectiveness of action legislative in character may be conditioned upon a vote of farmers but may not be conditioned on a vote of the two legislative bodies of the Congress.[3]

This argument was used by several members of Congress to support the contemplated procedure for review of proposed

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[3] U.S., Congress, House, Select Committee on Government Operations, 76th Cong., 1st Sess., 1939, House Report No. 120 to accompany H.R. 4425, p. 6.

presidential reorganization of the executive branch. Representative Cox[4] of the lower house and Senators Barkley[5] and Brown[6] of the Senate relied upon this interpretation to reach the conclusion that review by concurrent resolution was a constitutional procedure. All three declared that such a device was valid on the ground that the failure of the passage of a concurrent resolution was the event or condition--i.e., the contingency--upon which the exercise of the power delegated to the President (embodied in reorganization plans) could become effective.

The attack on the constitutionality of such a procedure to control executive reorganization had first appeared in some remarks made by President Roosevelt concerning an unsuccessful reorganization bill of the preceding year. This bill proposed to subject proposed presidential reorganization plans to nullification only by a regular bill or a joint resolution. President Roosevelt supported this procedure and, at the same time, pointed to the invalidity of the use of concurrent resolutions to disapprove proposed executive reorganization by the President. Concurrent resolutions, which were

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[4] U.S., Congressional Record, 76th Cong., 1st Sess., 1939, LXXXIV, Part 3, 2375-2379.

[5] Ibid., p. 3036.

[6] Ibid., p. 3044.

not submitted to the chief executive for approval or disapproval, were, in the opinion of the President, merely expressions of congressional sentiment. Such resolutions, according to President Roosevelt, could not "repeal Executive action taken in pursuance of a law."[7] Nullification of presidential action based upon a statutory grant of power could be accomplished only by the successful passage of a bill or joint resolution, both of which demanded the concurrence, not only of both chambers of the legislative body, but also the approval of the chief executive or, in the case of a presidential veto, a two-thirds majority in each chamber.

A similar argument was used by the opponents of the 1939 reorganization bill during consideration of that bill in the House of Representatives. When the bill was before the House, for example, Representative Taber arose to challenge the constitutionality of subjecting presidential reorganization plans to disapproval by concurrent resolutions that were not submitted to the President for approval or veto. He declared that the nullification of executive reorganization plans involved matters of a basically legislative character. According to the established practice,[8] therefore, concurrent

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[7]See U.S., Congressional Record, 75th Cong., 3d Sess., 1938, LXXXIII, Part 4, 4487.

[8]See supra, Chapter V, pp. 150-151.

resolutions disapproving such reorganization had to be submitted to the President for his signature. Taber concluded that, when concurrent resolutions that were not submitted to the President were used to nullify executive reorganization, it circumvented the President's constitutional veto power guaranteed by Article I, section 7, of the United States Constitution.[9] Senator King reiterated this argument, when the 1939 bill came up for debate and discussion in the upper chamber, to support his charge that review by concurrent resolution was unconstitutional.[10]

Another anticonstitutionality argument was presented by Representative Lanham during debate on the bill, introduced in 1949, to re-establish the reorganization program after the earlier authority,

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[9] U.S., Congressional Record, 76th Cong., 1st Sess., 1939, LXXXIV, Part 3, 2477. Representative Taber was joined in this view by Representative Wolcott. See ibid., p. 2478. Ginnane, in his discussion of the use of concurrent resolutions to disapprove presidential reorganization plans, also concludes that such a device circumvents the President's veto power and is thus an unconstitutional procedure. See Ginnance, op. cit., supra, Chapter VI, n. 1, p. 595.

[10] U.S., Congressional Record, 76th Cong., 1st Sess., 1939, LXXXIV, Part 3, 3090. Cf. Frank C. Newman and Harry J. Keaton, "Congress and the Faithful Execution of Laws--Should Legislators Supervise Administrators," California Law Review, XLI, No. 4 (Winter, 1953-1954). The authors deny that congressional review by concurrent resolution is an invalid circumvention of the presidential veto power. They argue that the President has ample opportunity to use this power when the parent statute is sent to him for the necessary presidential approval.

contained in the 1945 statute, had expired. Although Lanham was generally in favor of the bill, he argued that the Constitution of the United States placed the legislative power in a Congress composed of two separate and equal chambers. According to Lanham, therefore, each house of Congress must concur on each legislative matter before it can become the law of the land. The use of concurrent resolutions to nullify presidential reorganization plans violated this constitutional requirement. Lanham pointed out that under such a procedure a reorganization proposal could become law even though one chamber disapproved if the other chamber approved of the reorganization plan and refused to agree to a concurrent resolution rejecting the proposed reorganization. In such a case the reorganization plan would be enacted into law despite the lack of concurrence of one chamber of the legislative body. Such a procedure, according to Lanham, would thus violate the rules of the legislative process established by the United States Constitution.[11]

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[11] U.S., Congressional Record, 81st Cong., 1st Sess., 1949, XCV, Part 1, 898-899. This is the same argument that was used by a majority of the Supreme Court of New Hampshire one year later as the basis for the conclusion that a state reorganization statute, subjecting reorganization proposals of the Governor to nullification by concurrent resolution of the New Hampshire General Court (i.e., state legislature) was a violation of the state constitution. See Opinion of the Justices, 83 A. 2d (N.H.) 738 (1950). The same argument, of course, could be raised against statutory nullification of reorganization plans. Such statutory nullification, however, obviously would be constitutional.

Senator McClellan used this same argument to oppose the use of concurrent resolutions to nullify reorganization plans. In this case, however, McClellan was urging the Senate to pass a reorganization bill, drawn up by the Senate Committee on Expenditures in the Executive Departments in 1949, which subjected reorganization proposals to nullification by a simple resolution of either house of Congress. In regard to rejection by concurrent resolutions, McClellan declared:

> At the same time, I say I have had trouble going along with the requirement that two Houses must disapprove to keep a reorganization plan from becoming law, because if we retain that provision, if we retain that procedure for disapproval, we are in effect abdicating the legislative power and duty of at least one House of the legislative branch of the Government, because the action of the President, with the approval, or no action at all, negative approval, of either House of the Congress, could put into effect a reorganization plan which the other House unanimously opposed, and that plan, once in effect, would be tantamount to the enactment of a law.[12]

Implicit in McClellan's remarks was the view that the reservation of power to each house of Congress to reject a proposed reorganization plan, by simple resolution, satisfied his constitutional objection. This view of the constitutional propriety of annulment by simple resolution was clearly stated in an earlier report of the

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[12] U.S., Congressional Record, 81st Cong., 1st Sess., 1949, XCV, Part 5, 6227. See also Senator McClellan's written statement. Ibid., p. 6229.

Senate Committee on the Judiciary in regard to a proposed reorganization bill subjecting reorganization proposals to a one-house veto:

> Such a delegation of legislative power [of executive reorganization] does not operate to deprive either House of the Congress of its constitutional right to have no change made in the law relating to organization of the Government without the assent of at least a majority of its Members present and voting.
>
> Under this bill either House of the Congress, upon seeing precisely how the President proposes to exercise the general power delegated to him by this bill, will have, in effect, its own independent right to veto the Presidential action; and thus to retain the essential authority vested in it by the Constitution.[13]

These arguments supporting and denying the constitutionality of the control of presidential reorganization of the executive branch by concurrent resolutions of Congress were completely ignored, interestingly enough, by a memorandum of the Department of Justice, written in 1949 and commenting on the question of the validity of such a procedure. This memorandum was written in response to a request by the chairman of the Senate Committee on Expenditures in the Executive Departments for a legal opinion concerning the constitutionality of the nullification of reorganization plans by both simple and concurrent resolutions. The request was made when the committee began consideration of the 1949 bill that later became the reorganization statute of 1949. The reply was sent to the Senate

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[13] U.S., Congress, Senate, Committee on the Judiciary, 79th Cong., 1st Sess., 1945, Senate Report No. 638 to accompany S. 1120, p. 3.

committee by Mr. Peyton Ford, assistant to the Attorney General. Although Mr. Ford refused to give an official opinion to members of Congress or congressional committees, he did submit a written memorandum setting forth the views of the Justice Department which would, he said, be the basis of testimony of any representative of that department requested to appear before the Senate committee.

The reply ignored the question of the use of simple resolutions and concentrated upon rejection of reorganization plans by concurrent resolutions of Congress. The constitutionality of such a procedure was upheld by a very brief argument based upon a simple analogy. Mr. Ford wrote:

> 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.[14]

The memorandum concluded by stating that such a procedure actually raised no problem of the legislative body encroaching upon executive

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[14] U.S., Congress, Senate, 81st Cong., 1st Sess., 1949, Committee on Expenditures in the Executive Departments, Senate Report No. 232 to accompany S. 526, p. 20.

powers or the President abdicating his functions and powers to 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. . . ."[15]

The enactment of the 1949 reorganization statute, which provided for congressional nullification of presidential reorganization plans by a simple resolution of either house of Congress, marked the beginning of the present system of legislative review of executive reorganization and the end, for all practical purposes, of any debate or controversy concerning the constitutionality of legislative control of executive reorganization by either simple or concurrent resolutions. The procedure included in the 1949 statute has been included in successive renewals of presidential reorganization powers without debate or controversy about the constitutionality of the legislative veto of presidential reorganization plans by either type of resolution.

The various other uses of simple and concurrent resolutions, to provide a method of congressional control of the exercise of discretionary authority delegated to the executive branch in other fields of governmental activity, have been established without any serious

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[15] Ibid.

consideration of the constitutionality of such requirements. The first use of resolutions in other fields was established by the 1932 statute setting up the program for the adjustment and elimination of the debts of Indians and Indian tribes. The requirement was inserted in the bill without any debate or controversy concerning the question of the constitutionality of such a device. This first statute was followed by several other statutes, beginning with the 1940 amendment to the Immigration and Naturalization Act of 1917, which allowed suspension of deportation only after review and clearance by Congress. None of these instances have stimulated or provoked consideration of the constitutional issues.

It is likely that this dearth of debate or controversy, in these other instances, has resulted from the early use of the device of review by resolution in the executive reorganization program. The different types of resolutions--i.e., affirmative concurrent resolutions and negative concurrent and simple resolutions--had all been used in the reorganization program before most of the other instances were established. The statutory incorporation of such a device in the reorganization program could thus serve as a model for the more recent instances. The validity of the more recent uses of this device in other fields of governmental activity was

probably assumed simply by pointing to such an established usage of review by resolution.[16]

Congressional Committee Clearance

As in the case of the first method of legislative control of administrative decision-making--i.e., review by resolutions--the constitutionality of congressional committee review and clearance of administrative decisions has never been passed upon by the federal courts. There are two cases, however--one decided by the United States Supreme Court and one decided by the New York Court of Appeals--based upon somewhat similar devices,[17] that raise

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[16] See, for example, the House Armed Services Committee hearing on H.R. 5728 during the first session of the Eighty-third Congress in 1953. This was the bill establishing the governmental program of disposal of government-owned rubber-producing facilities. It proposed a system of congressional review of the proposed contracts of the established disposal agency whereby either house of Congress could nullify any contract by a simple resolution. The question of the constitutionality of such a device was raised during this committee hearing. This question provoked practically no debate, however, for it was pointed out that such a device was the same as that used in the executive reorganization program. This settled the issue. U.S., Congress, House, Committee on Armed Services, "Full Committee Hearing on H.R. 5728 to Authorize the Disposal of the Government-owned Synthetic Rubber Facilities, and for Other Purposes," A.S.P. No. 27, 1953, pp. 1281-1282.

[17] Both cases concerned an arrangement in which legislators personally participated in the actual administration of a statute. In the congressional committee clearance practice, senators and congressmen participate only to the extent of giving final approval to

relevant arguments concerning the question of the constitutionality of congressional committee clearance. They thus merit discussion and analysis in any complete consideration of this problem.

The first case is Springer v. Government of the Philippine Islands.[18] This case was decided by the United States Supreme Court in 1928. It concerned the validity of two economic nationalization acts passed by the legislature of the Philippine Islands setting up the National Coal Company and the National Bank. Both statutes had been amended so that the voting power of all stock owned by the government was vested in a committee, in the first case, and in a board of control, in the latter instance. In the case of the National Bank, the statute also gave the board of control the power of final approval over the appointment of a general manager chosen by the bank's board of directors. Both the committee and the board of control were composed of the president of the Senate and the speaker of the House of Representatives of

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the initial decisions of an executive agency. This actually is a distinction without a difference, however, for in both instances the legislative members are playing a substantial role in the administration of a statute. These two court decisions are more relevant, therefore, than might appear at first glance.

[18] 277 U.S. 189 (1928).

the Philippine government, and the Governor General, who was the chief executive officer of the island government.[19]

Justice Sutherland, who wrote the majority decision in the case, concluded that this arrangement violated the "fundamental law" of the Philippine Islands established by the Organic Act of 1916. He stated that this act,

> . . . following the rule established by the American constitutions, both state and federal, divides the government into three separate departments--the legislative, executive, and judicial. . . . And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital. . . .[20]

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[19]This plan, it may be noted, was followed in four other cases including the National Development Company, the National Cement Company, the National Petroleum Company, and the National Iron Company. Justice Sutherland, in the majority opinion, declared that "the suggestions of the Solicitor General that this indicates a systematic plan on the part of the legislature to take over, through its presiding officers, the direct control generally of nationally organized or controlled stock corporations would seem to be warranted." Ibid., p. 199. The recognition of this so-called plan by the Solicitor General and the court majority hints at what was perhaps the broader issue in this case. The case actually manifests an underlying struggle for the control of the administration of the government of an American dependency between the inhabitants of the Philippine Islands, represented by the Philippine legislature, and the United States, as represented by the Governor-General, who was appointed by the President of the United States and approved by the American Senate. It is, of course, impossible to determine how much influence this may have had upon the court majority, but it is a factor that certainly must be kept in mind in attempting to assess the applicability of this case to the American domestic scene.

[20]Ibid., p. 201.

He then continued by declaring that "legislative power, as distinguished from executive power, is the authority to make the laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."[21]

The two nationalization statutes, according to Justice Sutherland, violated this constitutional separation-of-powers by indirectly vesting the legislative body with the appointing power. This was accomplished by vesting purely executive functions in members of the legislature. Justice Sutherland, by a process of deduction, had little trouble in characterizing the powers delegated to the legislative members by the statutes as executive powers. He declared:

> It is clear that they are not legislative in character, and still more clear that they are not judicial. The fact that they do not fall within the authority of either of these two constitutes logical ground for concluding that they do fall within that of the remaining one of the three among which the powers of government are divided.[22]

Vesting such executive functions in legislative members, in the eyes of the majority of the court, was tantamount to the legislative appointment of officers to enforce the statutes. The legislature, in passing the two nationalization statutes, had thus usurped an executive

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[21] Ibid., p. 202.

[22] Ibid., pp. 202-203.

function--the power of appointment--which by the Organic Act of 1916 was vested exclusively in the Governor General.[23]

Justice Holmes, who was joined by Justice Brandeis, was unable to accept the majority's major assumption that governmental powers could be precisely differentiated and assigned to different departments of government. The realities of the American constitutional system, according to Justice Holmes, did not fall into such a conceptual mold. He declared that "the great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other."[24]

After citing many examples to substantiate this point, Holmes concluded by pointing to a venerable institution of the national government, the Smithsonian Institution. He said:

> Parallel to the case before us, Congress long ago established the Smithsonian Institution, to question which would be to lay hands on the Ark of the Covenant; not to speak of later similar exercises of power hitherto unquestioned, so far as I know.[25]

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[23]Section 22 of the Organic Act of 1916 stated "that all executive functions of the Government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General."

[24]Ibid., p. 209.

[25]Ibid., pp. 210-211.

On the basis of this general view, therefore, Justice Holmes had little trouble in reaching a conclusion that sanctioned the procedure established by the two economic nationalization statutes of the Philippine legislature. He concluded his dissenting opinion with these remarks:

> It is said that the functions of the Board of Control are not legislative or judicial and therefore they must be executive. I should say rather that they plainly fall into the indiscriminate residue of matters within legislative control. I think it would be lamentable even to hint a doubt as to the legitimacy of the action of Congress in establishing the Smithsonian as it did, and I see no sufficient reason for denying the Philippine legislature a similar power.[26]

A case decided by the highest court of the state of New York the following year also highlights an argument that is relevant to the consideration of the constitutionality of congressional committee clearance of administrative decisions. This case, People v. Tremaine,[27] involved a legislative provision, inserted into the Governor's original budget bill by the New York legislature, which stated that the Governor, the chairman of the Senate Finance Committee, and the chairman of the Assembly Ways and Means Committee were required to decide upon and approve any segregation of lump-sum appropriations for personal services. The segregation of such

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[26] Ibid., pp. 211-212.

[27] 252 N.Y. 27 (New York Court of Appeals, 1929).

general appropriations involved a detailed compilation of the positions and attendant salaries to be covered by the grant.

The majority of the New York Court of Appeals, in a decision written by Justice Pound, concluded that this requirement violated an article of the state constitution which prohibited the legislative body from granting any "civil appointment" to a member of the legislature.[28] The majority interpreted the phrase "civil appointment" to "include any placing in civil office or public trust, pertaining to the exercise of the powers and authority of the civil government of the State, not reasonably incidental to the performance of duties of a member of the Legislature. . . ."[29]

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[28] Ibid., p. 42. Cf. Opinions of the Justices, 19 N.E. 2d. 807 (1939). This case concerned a Massachusetts statute which amended the state budgeting act to allow the legislature to appropriate a stated amount of funds for transfers to items of appropriations, excluding personal services, from the general fund for the second fiscal year of a two-year fiscal period for unforeseen circumstances or contingencies. The amendment authorized the governor to make the specific transfers from this fund with the approval of a "special recess commission" consisting of several members of the state senate and house of representatives. The Massachusetts court was of the opinion that such approval by the commission was an unconstitutional appointment of legislative members to a "civil office" by the general court.

[29] 252 N.Y. 40. This decision brings up the interesting question as to whether a somewhat similar article in the United States Constitution would be applicable as a prohibition upon the practice of congressional committee clearance in the national government. Article I, section 6, of the national Constitution states: "No Senator

The statutory designation of legislative members to approve the segregation of lump-sum appropriations, in the eyes of the majority of the court, was clearly a case of the New York legislature granting a "civil appointment" to its own members. The statutory requirement was thus a direct violation of this constitutional prohibition.

Justice Crane, in a concurring opinion, was not convinced that the concept of "civil appointment" could be stretched to cover the particular procedure involved in the case before the court. Although he agreed with the decision of the majority, therefore, he preferred to base his conclusion upon a different argument.

Justice Crane reached his conclusion denying the validity of such a procedure by a simple and direct deduction from his views concerning the requirements of the separation-of-powers concept as it applied to the New York State governmental system. He argued "that when a member of the Legislature is clothed with the duty of segregating lump sum appropriations he ceases to act as a legislator

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or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office." None of the arguments denying the constitutionality of the practice of committee clearance have relied upon this particular constitutional rule.

and is performing executive duties, administrative functions which under our form of government is illegal."[30] Such a legislative provision, according to Justice Crane, was thus a clear and obvious violation of the constitutional principle that the three major powers of the government--legislative, executive, and judicial--must be kept separate and involate.[31]

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[30]252 N.Y. 56. Although the majority decision was not based upon this specific point, it agreed that such activities fell into the category of executive functions. The majority decision described the legislative provision as "a clear and conspicuous instance of an attempt by the Legislature to confer administrative powers upon two of its own members." 252 N.Y. 43.

[31]Cf. Stockman v. Leddy, 55 Colorado Reports 24 (1912), and Bramlette v. Stringer et al., 186 South Carolina Reports 134 (1937). In the former case the state court was asked to pass upon the constitutionality of a legislative provision accompanying appropriations made by the state legislature to a committee composed of three members from each chamber of the legislature and the state attorney general as an ex officio member. The legislative provision directed the committee to determine all the different ways by which the state's right to control the waters of the state might be adversely affected, and to decide what actions should be taken to protect the state's rights concerning such waters. The state court found this particular arrangement to be a violation of the Colorado constitution, because it attempted to impose executive duties upon members of the state legislature. The South Carolina case concerned the Greenville County Act of 1937, which authorized the county to sell bonds and borrow money from the national government for the construction and maintenance of roads and bridges within the county. This act reserved to the legislative delegation from Greenville County the power to determine what amount of bonds should be issued, how they should be issued, and what roads should be built or improved. The state court found such actions to be executive functions of the county government, which, according to Article I, section 14, of the South Carolina constitution, could not be performed by members of the state legislature.

Former Attorney General William D. Mitchell, in an advisory opinion to President Hoover in 1933, drew upon arguments similar to those presented by Justice Crane in the Tremaine case and the majority in the Springer case in his analysis of a proviso in an urgent deficiency bill that had been passed by Congress and sent to the chief executive for his signature. The proviso accompanied a lump-sum grant of funds to the Treasury Department to carry out the previously authorized function of refunding taxes illegally or erroneously collected. It required the prior approval of the Joint Committee on Internal Revenue Taxation for all such refunds in excess of $20,000.

Mitchell initially based his decision upon his conception of the requirement of the separation-of-powers established by the United States Constitution. He declared that the refund of taxes, pursuant to a previous grant of authority by Congress, was an executive function that was required, by the Constitution, to be performed by the executive branch and could not legally be carried out by members of the legislative branch. The delegation of the power of final approval over such refunds of taxes to a committee of the legislative body violated this constitutional principle. Mitchell declared, in reference to the legislative proviso, that

> It attempts to entrust to members of the legislative branch, acting ex officio, executive functions in the execution of the law, and it attempts to give to a committee of the legislative branch power to approve or disapprove executive acts.[32]

In order to further bolster the conclusion that such a proviso was an unconstitutional requirement, Mitchell cited another argument which recalls the reasoning of the majority decision in the Springer case. Mitchell continued his argument by saying:

> If the functions to be performed by the joint committee are administrative or executive in character, the bill is subject to the further objection that the selection of the personnel by the Congress is an infringement of the constitutional function of the Executive to make appointments and is an attempt by the legislative branch to make appointments of officials performing administrative or executive functions.[33]

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[32] Opinions of the Attorneys General of the United States, Vol. 37 (1932-1934), p. 58.

[33] Ibid. See also Opinions of the Attorneys General of the United States, Vol. 39 (1937-1940), pp. 61-67. This opinion related to a joint resolution passed by Congress establishing the New York World's Fair Commission. It was to be composed of three members of the executive branch and six members of Congress. The commission was directed to administer the joint resolution generally and, specifically, to appoint certain officers and to expend the money appropriated by Congress for the activities of the commission. This arrangement, according to Attorney General Cummings, amounted to "an unconstitutional invasion of the province of the Executive." Ibid., p. 62. Cummings further stated that, following the rule of the Springer case, the arrangement also represented an invalid indirect infringement of the President's appointing power, because it vested executive functions in members of the legislature and thus amounted to a legislative appointment of agents to administer the resolution. Ibid.

Mitchell's opinion to President Hoover thus concluded that the requirement of prior committee clearance of tax refunds by an executive department was an unconstitutional violation of the separation-of-powers principle inherent in the American constitutional system. This conclusion was based upon two arguments. In the first place, the requirement gave members of the legislative body functions in carrying out the law that were exclusively executive in nature. The second argument, a bit less direct than the first, reasoned that the delegation of executive functions to members of the legislature was an indirect violation of the constitutional rule that the appointing power is the function of the chief executive and cannot be performed by the legislature.

The arguments concerning the constitutionality of committee clearance that have been provoked by recent uses of this device have repeated some of these earlier arguments and also introduced some new interpretations to support the validity of such a device. The several presidential messages, the single opinion of the Attorneys General, and a memorandum of the Justice Department, denying the propriety of such a device, for example, have been based primarily upon a simple and direct argument from the separation-of-powers concept similar to that presented by the concurring opinion of Justice Crane in the Tremaine case. Congressional supporters of

committee clearance, on the other hand, have mustered other interpretations not previously presented to support the constitutionality of this device.

The first presidential message attacking the constitutionality of such a device was issued by President Truman in 1951.[34] This was a message to Congress explaining his disapproval of a bill recently passed by Congress subjecting particular real estate

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[34]See also, however, President Woodrow Wilson's veto message accompanying his disapproval of H.R. 12610. U.S., Congressional Record, 66th Cong., 2d Sess., 1920, LIX, Part 7, 7026-7027. The veto centered around a requirement in Section 8 of the bill which established a procedure somewhat similar to that represented by the present practice of committee clearance of administrative decisions. Section 8 declared that the Joint Committee on Printing was authorized to prescribe regulations governing the printing, issuance, or discontinuance of any journal, magazine, periodical, or other government publication, by any branch of the national government. Wilson viewed this function, in regard to the activities of the executive agencies, as an executive function that could not be performed by the legislative branch. He declared: "The Congress and the Executive should function within their respective spheres. Otherwise efficient and responsible management will be impossible and progress impeded by wasteful forces of disorganization and obstruction. The Congress has the power and the right to grant or deny an appropriation, or to enact or refuse to enact a law; but once an appropriation is made or a law is passed, the appropriation should be administered or the law executed by the executive branch of the Government. In no other way can the Government be efficiently managed and responsibility definitely fixed. The Congress has the right to confer upon its committees full authority for purposes of investigation and the accumulation of information for its guidance, but I do not concede the right, and certainly not the wisdom, of the Congress endowing a committee of either House or a joint committee of both Houses with power to prescribe 'regulations' under which executive departments may operate." Ibid., p. 7026.

transactions of the military departments and the Federal Civil Defense Administration to the prior approval of the armed services committees.[35] Although his veto was based primarily upon what he considered to be the resulting inefficiencies of such a requirement, President Truman briefly touched upon the question of the constitutionality of such a proviso. He denied its constitutionality on the basis that it represented an unconstitutional legislative participation in the execution of the laws. The President declared that such congressional committee clearance would lead to congressional participation in "the actual execution and administration of the laws. Under our system of government it is contemplated that the Congress will enact the laws and will leave their administration and execution to the executive branch."[36]

The President's veto of the 1951 bill provoked one of the few instances in which the question of the constitutionality of committee clearance has been considered on the floor of either chamber of

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[35] See H.R. 3096, 82d Congress, 1st Session.

[36] U.S., Congressional Record, 82d Cong., 1st Sess., 1951, XCVII, Part 4, 5375. President Truman also issued a short message explaining his "pocket veto" of a bill passed by Congress the following year that gave committees the power to nullify administrative decisions. His veto was based on the view that such a procedure violated the constitutionally required separation of powers. See U.S., Congressional Record, 82d Cong., 2d Sess., 1952, XCVIII, Part 7, 9756.

Congress. During consideration of the President's veto in the lower house, Representative Vinson took the floor to urge the House of Representatives to override the veto. Vinson outlined his views supporting the constitutionality of the requirement of prior committee approval during the course of his discussion.

He began by disputing the President's assertion that the requirement infringed upon the functions of the executive department in violation of the constitutional rule of the separation of executive and legislative powers. Vinson answered this point by simply stating that "you do not trespass. You delegate to a bureau to do certain things. Now we are saying by law that instead of delegating it to the bureau, delegate it to yourself, delegate it to a committee here in Congress. That is all we are doing."[37] After dismissing the President's argument in this rather brief fashion Vinson turned to a consideration of the constitutional basis for such a requirement.

He declared that the Constitution gave Congress plenary power over property belonging to the United States. In delegating such legislative power, therefore, Congress could include limitations upon the exercise of this power by the executive branch. The requirement

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[37] U.S., Congressional Record, 82d Cong., 1st Sess., 1951, XCVII, Part 4, 5436.

of committee review and clearance, according to Vinson, was just such a valid limitation. He stated:

> Congress has by the Constitution, the power to dispose of and make all needful rules and regulations respecting property belonging to the United States. That is the Constitution itself, and instead of saying it should be administered by the Department of Defense, Congress has the right to put in limitations on any piece of property or any method by which a piece of property may be acquired, and we say we put this responsibility on ourselves by saying to the Armed Services Committees, "You must have knowledge of it before it can be acquired."[38]

Similar arguments were set forth in the Senate in connection with consideration of H.R. 6342, the bill that later became the statute establishing the lease-purchase contract program, during the second session of the Eighty-third Congress. The views of the executive branch concerning the constitutionality of prior committee

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[38] Ibid., p. 5437. Representative Tackett, however, agreed with the President's position that the requirement of prior committee approval was invalid. The practical effect of the requirement, according to Tackett, was to allow the committees to administer the law in violation of the constitutional rule that executive functions were to be performed by the executive branch of the government. Ibid., p. 5438. Representative Patman agreed with this position, but he also offered another argument based upon a logical dilemma flowing from the separation-of-powers concept. He announced to the House: "The function of a congressional committee in a matter of this kind cannot be construed as a legislative function, because if it is it must be performed by the whole Congress, including both the House and the Senate. Such a function cannot be considered an executive function, because the congressional committee is no part of the executive branch of the Government, and is not included within the constitutional provision that permits it to exercise executive power." Ibid., p. 5443.

approval of administrative decisions, in this particular case, were set forth in a memorandum of the Justice Department signed by Mr. J. L. Rankin. This memorandum was read in the Senate by Senator Knowland. It concerned an amendment inserted in the bill by the Senate Committee on Public Works requiring the administrator of the General Services Administration and the Postmaster General to "come into agreement" with the public works committees before executing any lease-purchase contracts.

Rankin was of the opinion that such an amendment violated the constitutional separation of legislative and executive powers established by the first and second articles of the United States Constitution. He then set forth the arguments leading to this conclusion. Since this memorandum sets forth the views of the executive branch concerning this problem in a fairly complete and detailed manner, it merits lengthy quotation:

> The obvious purpose of this provision of H.R. 6342 is to subject such proposed real-estate transactions to the prior approval or disapproval of committees of the Congress. The practical effect is to vest the power to make such purchase contract agreements jointly in the Administrator of General Services and the members of the Committees on Public Works. It is well established in American constitutional law that such powers cannot be placed in a member, officer, or committee of the legislature. Indeed, probably no one would contend that under the Constitution the sole power to make such agreements could be vested in legislative committees. The same principles preclude a committee of Congress from exercising such powers jointly with an executive officer.

> It is clear that Congress could reserve to itself the power to determine in the form of regular legislation whether a particular purchase contract agreement should be made. Historically, Congress has enacted many laws authorizing specific real-estate transactions on behalf of the United States. On the other hand, Congress may by legislation empower executive officers to execute such transactions subject to whatever general legislative standards Congress chooses to prescribe. But while Congress may thus elect whether such decisions shall be made by legislative or executive action, it cannot place the power to make such decisions in its committees. Viewing the power to determine whether such a purchase contract agreement should be made as a legislative power, it cannot be delegated to individual members or to committees of the Congress; viewing it as an executive function, the constitutional separation of powers prohibits vesting it in Members or committees of the Congress.
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> This provision of H.R. 6342 involves, not a mere technicality, but a departure from our constitutional practice which, if systematically pursued, could result in a radical change in the distribution of the powers of the Federal Government. Its principle could be applied to subject a huge variety of governmental actions to the prior approval or disapproval of committees of the Congress, including committees consisting of a single Member or the Members from a particular state.[39]

Senator Case did not agree with this interpretation. He viewed the requirement of committee clearance as a constitutional procedure. In order to support this conclusion, Senator Case followed an argument reminiscent of that presented by Representative Vinson in 1951.

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[39] U.S., Congressional Record, 83d Cong., 2d Sess., 1954, C, Part 4, 4879. Representative Dirksen argued long and forcefully for this interpretation of the requirement of prior committee approval. He declared that such an arrangement was a basic violation of the constitutionally required separation of powers, because it was "an absolute and unqualified sharing of an administrative function by the legislative branch." Ibid., p. 4953. See also his remarks in ibid., pp. 4953-4957.

Senator Case found the basis of the validity of such a device in the substantive powers assigned to Congress by the Constitution.

The primary basis for his conclusion was the congressional power of appropriation. The proposed bill, according to Senator Case, would allow the executive agencies to obligate the United States government to pay money to fulfill the lease-purchase contracts. No such money, however, could be drawn from the Treasury without the approval of Congress through appropriations. Senator Case believed that since the final power and responsibility for such appropriations rested with Congress it was quite proper and valid for the legislative body to attach the requirement of prior committee assent as a condition accompanying the delegation of power to the executive branch to enter into agreements that would require such appropriations. He concluded that "under the general clause relating to drawing money from the Treasury, Congress certainly has the authority to prescribe a condition precedent to the finality of any appropriations of public money."[40]

Senator Case also pointed to the fact that the Constitution assigned to Congress the responsibility for paying the national debt. The requirement of prior committee approval was thus further

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[40] Ibid., p. 4948.

substantiated as a valid condition accompanying the congressional delegation of power to executive agencies to incur debts against the national government which, in the final analysis, were the constitutional responsibility of the legislative body to pay. The fact that these two powers were vested in the legislative body, according to Senator Case, "clearly demonstrates that the Constitution contemplates the exercise of a power such as is here suggested, namely, that these debts should not be incurred except by agreement with the action of the Congress."[41]

Attorney General Herbert Brownell has issued the only official Attorney General opinion in recent years regarding the prior committee approval requirement. This opinion concerned the requirement contained in the 1956 Defense Department appropriation bill passed by Congress in 1955 that subjected all proposed

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[41] Ibid. Senator Carlson queried Senator Case about the propriety of delegating the function of congressional approval to committees of the legislative body. Senator Case answered simply that Congress could appoint its committees as agents of Congress to make findings just as it had authorized the President to make certain findings as the congressional agent in executive reorganization. Ibid., p. 4949. The analogy was fallacious. The non sequitur, which no one bothered to dispute, was that in the former case the committees took final action and Congress did not pass upon the committees' "findings," while in the latter case the legislative body reserved to itself the power to accept or reject its agent's (President's) "findings." The latter case, therefore, certainly did not prove the propriety of the first.

discontinuances of commercial and industrial enterprises of the Defense Department to the approval of the committees on appropriations. Brownell concluded that such an arrangement violated the constitutional requirement of the separation of the powers of the national government into three major categories that were entrusted to separate departments of the government. In reaching this conclusion he drew upon arguments appearing in the Springer case and past views of the executive branch expressed primarily in opinions of Attorneys General Mitchell and Cummings, in 1933 and 1937, respectively. Brownell declared, in regard to the specific requirement in the 1956 bill, that:

> The practical effect of these provisions is to vest the power to administer the particular program jointly in the Secretary of Defense and the members of the Appropriations Committees with the overriding right to forbid action reserved to the two Committees. This, I believe, engrafts executive functions upon legislative members and thus overreaches the permitted sweep of legislative authority. At the same time, it serves to usurp power confided to the executive branch. The result, therefore, is violative of the fundamental constitutional principle of separation of powers prescribed in Articles I and II of the Constituion which places the legislative power in the Congress and the executive power in the executive branch.[42]

These views regarding the requirement of committee clearance were re-echoed in much briefer form by President Eisenhower

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[42]Advance (Slip) Opinions, Opinions of the Attorneys General of the United States, July 13, 1955, p. 2.

in his veto message accompanying his disapproval of the bill passed by Congress during the second session of the Eighty-fourth Congress that required all contracts, entered into by the Secretary of Defense to acquire housing on military bases, to be reviewed and approved by the armed services committees.[43] The President stated, in reference to such a requirement, that, "while the Congress may enact legislation governing the making of Government contracts, it may not constitutionally delegate to its Members or committees the power to make such contracts, either directly or by giving them the authority to approve or disapprove a contract which an executive officer proposes to make."[44] President Eisenhower labeled such a requirement a "serious departure from the separation of powers provided by the Constitution."[45]

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[43]See H.R. 9893, 84th Cong., 2d Sess., Section 419.

[44]U.S., Congressional Record, 84th Cong., 2d Sess., 1956, CII, No. 120, 11788. President Eisenhower has also issued two other messages denying the constitutionality of two other statutory requirements of prior committee approval of administrative decisions. Both messages argued that the requirement violated the separation of powers established by the Constitution. See U.S., Congressional Record, 84th Cong., 1st Sess., 1955, CI, No. 118, 8997, and "Accomplishments of the House Committee on Interior and Insular Affairs" during the Eighty-fourth Congress, Committee Print No. 18, 1956, p. 9.

[45]Robert Ginnane, a former official of the United States Department of Justice, has given some consideration to the problem of

Conclusions

The supporters and opponents of both devices of legislative control have presented several different arguments, of varying degress of sophistication and persuasiveness, concerning the question of the constitutionality of both methods. It is interesting to note, however, that the earlier arguments connected with review by resolution have not been the same as those appearing in the controversy surrounding the more recent device of committee clearance. Each device has provoked different and unrelated arguments.

The use of concurrent resolutions to nullify executive reorganization, for example, has been attacked as an unconstitutional circumvention of the veto power of the President. The major argument supporting this use of concurrent resolutions has been cast in terms of the contingency doctrine associated with the exercise of

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the constitutionality of congressional committee clearance in a fairly recent article appearing in the Harvard Law Review. He concludes by agreeing with the position of the executive branch in the controversy surrounding this practice. After citing and discussing the Springer case, the Tremaine case, and other state cases, and the published opinions of Attorneys General Mitchell and Cummings, Ginnane concludes that such a practice is an unconstitutional procedure. Relying upon the arguments presented in these sources, he views such a procedure as an invalid attempt to delegate executive functions associated with the administration of the laws to members of the legislative body. See Ginnane, op. cit., supra, Chapter VI, n. 1, pp. 606-609.

delegated legislative powers. Another argument that has been raised by the use of both concurrent and simple resolutions has concerned the bicameral organization of Congress and the relative role and power of each legislative chamber.

The arguments relating to the more recent device of congressional committee clearance, on the other hand, have all focused upon the issue of the constitutionally required separation of executive and legislative powers. The opponents of this device have maintained that it invests legislative committees with executive functions that are assigned exclusively to the executive branch by the Constitution. This argument is further bolstered by the contention that such a device also represents an invalid legislative appointment of personnel to carry out executive functions in violation of the President's power of appointment. The few published arguments supporting committee clearance have denied these points by arguing that it can be upheld as a valid condition accompanying the delegation of congressional powers to the executive branch.

Despite the disparity in the issues and arguments that have been raised by the two devices of legislative oversight, a single common constitutional issue actually underlies both methods. Whether the review and clearance of decisions of executive agencies is reserved to both chambers of Congress, either chamber, or

congressional committees, the central issue remains, in all three cases, whether or not such legislative-executive relationships satisfy the general constitutional principle of the separation of executive and legislative powers. Interestingly enough, however, an appeal to this general constitutional requirement does not furnish a definitive and unambiguous solution to this problem. It actually serves as a source of two contradictory arguments, one supporting both devices and one denying their validity. Each argument depends upon a different conceptualization of the basic functions of the executive branch associated with both devices of the American practice.

On the one hand, the activities of the President and the executive agencies may be viewed as the exercise of delegated legislative powers of Congress. The executive organs, in such a case, are simply instrumentalities for carrying out congressional legislation. When the activities of the executive organs are conceptualized in this manner, the relevant constitutional issue becomes whether or not both devices, associated with such delegation of legislative powers, fit into the theory of the delegation of legislative powers to the executive branch--an aspect of the separation of executive and legislative powers.

It can be argued, in the context of this particular issue, that these devices are valid applications of the contingency doctrine. This

doctrine states that the effectiveness or application of legislative regulations can be made dependent upon particular contingencies or conditions. The federal courts have upheld this doctrine since an early date. It was validated by the United States Supreme Court in the Brig Aurora case,[46] decided in 1813. In this case the court upheld a scheme in which the operation of a particular piece of legislation depended upon a presidential proclamation. It has been upheld more recently in the case of Currin v. Wallace.[47] In this case the effectiveness of legislative regulations, embodied in a decision of the Secretary of Agriculture, was conditioned upon a favorable vote of a referendum of farmers associated with a particular tobacco auction market.

In terms of the logic of this doctrine, therefore, congressional disapproval--by resolutions or committee action--could be conceptualized as the contingency or event upon which congressional legislative power, embodied in particular decisions of the President and subordinate executive agencies, becomes effective. Both devices could thus be supported in terms of the contingency doctrine

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[46] The Cargo of the Brig Aurora, Burnside, Claimant v. United States, 7 Cranch 382 (1813).

[47] Currin et al. v. Wallace, Secretary of Agriculture, et al., 306 U.S. 1 (1938).

associated with the theory of the delegation of legislative powers to the executive branch.

The same activities, on the other hand, can also be conceptualized as basically a matter of the execution and administration of governmental programs established by statute. The President's structural rearrangement or reshuffling of the organizations and agencies in the executive branch, for example, can be described as a process of administering or executing the national government's program of economy and efficiency as established by the general policies of the reorganization statutes. The activities of the subordinate executive agencies, in the many other instances of legislative oversight, also can be conceptualized as essentially a process of carrying out the general statutory policies of different governmental programs.

If this description of the activities of the executive organs as primarily administrative in nature is accepted, the major issue becomes, not whether the legislative devices fit into the scheme of the delegation of powers, but whether or not the legislative branch, in reserving to itself (both chambers, either chamber, or congressional committees) the final approval or disapproval of specific administrative decisions, has invaded or usurped the executive power --the presidential authority and responsibility "faithfully to execute

the Laws." When the issue is stated in this manner a persuasive argument can be built that both devices do indeed represent an unconstitutional invasion or infringement of this executive power.

It can be argued, for instance, that the final approval or disapproval of administrative decisions and proposed actions is tantamount to the actual execution of the laws. Thus, in the final analysis, the execution of the laws rests with members of the legislature. These members, of course, are not subject to the presidential power of appointment or removal.

The character of these functions carried out by legislative members, to carry the argument a step further, are basically of an executive nature, rather than quasi-legislative or quasi-judicial. In terms of the basic distinction outlined by the Myers[48] and Humphrey[49] cases, therefore, they fall under the general rule of the former case. The principle enunciated by the majority in the Myers case was that, in those cases of an essentially executive nature, the President's authority and responsibility to "faithfully execute the Laws" (his power of administrative direction) and his power of appointment and removal were two sides of the same coin; i.e., the former power

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[48] Myers v. United States, 272 U.S. 52 (1926).

[49] Rathbun (Humphrey's Executor) v. United States, 295 U.S. 602 (1935).

necessarily depended upon the latter.[50] By denying to the President the power of appointment and removal over the personnel finally responsible for these executive functions, therefore, these two devices infringe upon this presidential power of administrative direction. The legislative body, in such a case, has actually denied the essential sanctions upon which the presidential authority and responsibility to "faithfully execute the laws" rests, and, in this manner, has usurped this constitutional grant to the President.

Another constitutional issue raised by the practice of legislative oversight is that of the bicameral organization of Congress. This particular issue is not applicable, however, to all the different ways in which this oversight is carried out, but is limited to a few specific types. It is relevant in those instances in which the power of disapproval is reserved to both legislative chambers acting in

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[50] "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible." 272 U.S. 117 (1926).

concert through concurrent resolutions, as, for example, in the case of congressional review of the adjustment of Indian debts by the Secretary of the Interior. It is also a pertinent issue in the single case that places the power of approval in the chairman of the House Appropriations Committee, acting as an agent of the lower house. It is, moreover, an inherent issue in those informal instances of committee clearance in which the approval power is vested only in a single committee of the lower house. If such instances were ever formalized by statute or copied in future statutes, it would also raise the problem of the constitutionally required bicameralism of Congress.

The central issue raised by these clearance arrangements is whether or not they fit into the relationships between the two chambers of the legislative body prescribed by the Constitution. An appeal to this general constitutional requirement of bicameralism, however, as in the case of the separation of powers, does not furnish a clear-cut solution to the problem of the propriety of such instances of legislative oversight. It is possible to draw two contradictory arguments from the constitutional language concerning the required relationships. One argument denies the validity of such arrangements and the other supports their validity, but, like the previous arguments stemming from the separation-of-powers scheme,

each depends upon a different conceptualization of the activities of the executive organs.

In the first place, the activities of the executive organs may be viewed as basically a process of the exercise of sublegislative powers flowing from the delegated legislative powers of Congress. Disapproval by the legislative chambers or approval by a single chamber (acting through its agents, the chairman of a committee or a committee itself), in such a case, is related to the process of legislation and thus represents action of an essentially legislative nature.

If this conceptualization serves as the major assumption, it can be argued that such clearance arrangements violate the required bicameral organization of the legislative body. The legislative power, according to Article I of the Constituion, is assigned to a Congress composed of two equal and independent chambers. The concurrence of both houses, therefore, is required in all matters essentially legislative in character. In other words, each chamber retains a veto over the action of the other.

The use of concurrent resolutions of disapproval violates this constitutional requirement. The executive sublegislation, which is embodied in particular decisions, becomes effective, in such cases, in spite of the disapproval of one chamber, if the other chamber

acquiesces in such a decision. The veto power of one chamber over the actions of the other is thus completely ineffective, and the requirement of the concurrence of each legislative chamber is abrogated. Such a procedure, therefore, is not compatible with the constitutionally required bicameral organization of Congress, according to this theory.

The same indictment applies to those cases in which the power of approval is reserved either to the chairman of a committee or to a committee itself, acting as agents of the lower house. Such clearance arrangements establish a situation whereby the exercise of delegated legislative powers by the executive branch may become effective with the approval of a single chamber. The required concurrence of the upper chamber is thus effectively circumvented. Such arrangements, therefore, also represent an unconstitutional nullification of the veto power granted to each house.

On the other hand, the activities of the executive organs may be viewed as primarily of an administrative or executive nature. They could be labeled, in this fashion, as essentially a process of the administration or carrying out of governmental programs, rather than the formulation and promulgation of sublegislation. The approval or disapproval of the legislative chambers, in such a case, would not

relate to the process of legislation and the previous rule of the Constitution would not be applicable.

Moreover, it could be argued that the Constitution even presupposes that in cases of nonlegislative action the concurrence of each chamber is not always necessary. The last paragraph of Article I, Section 7, which is concerned with the veto power of the chief executive, evidently refers to such cases of nonlegislative action, for it is attached as an addendum to the preceding paragraph. The preceding paragraph concerns the President's veto power in regard to the process of legislation represented by the passage of bills. There would seem to be little logical reason for repeating the constitutional rule about the President's veto power in the latter paragraph unless the rule was to be applied to congressional action different than that involved in the preceding paragraph; i.e., action of an essentially legislative nature.

The latter paragraph states that "every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States . . ." (italics added). The obvious implication of such language is that, in certain cases of a nonlegislative nature, the concurrence of the two chambers is not necessary. It could be argued, therefore, that the

approval or disapproval of particular administrative decisions, representing congressional action that is nonlegislative in character, fell into this exempt category. In this manner, the Constitution serves as the source of an argument upholding the validity of those cases of legislative oversight raising the issue of the correct relationship between the two chambers of Congress.

The two devices thus raise two basic constitutional issues. In the first place, a central question connected with both devices in their various forms involves their propriety in the scheme of the separation of executive and legislative powers. Secondly, and in a more limited number of cases, these two devices also raise the issue of the validity of such arrangements in terms of the required bicameral organization of Congress. Both of these general constitutional principles, however, serve as the source of contradictory arguments. Depending on the conceptualization of the activities of the President and the executive agencies, an argument upholding both devices or one opposing their validity can be drawn from each one.

A choice between the two arguments associated with each constitutional rule will probably never become the subject of a definitive ruling by the federal courts, however, since it is unlikely that any person would have the requisite standing to bring such a question before the courts for adjudication. The general taxpayer and citizen

certainly would not have the necessary standing to bring a suit in court to challenge the validity of either device.[51] Even private parties directly engaged in transactions with the national government which involved either of these devices--such as the purchase of a government-owned rubber plant or bidding for a lease-purchase contract for the construction of a public building--could not claim the required standing. The party who purchased the plant or the successful bidder on a lease-purchase contract would lack the necessary standing under the doctrine of estoppel whereby a person who has benefited under a statute may not attack the constitutionality of any of the statutory requirements.[52] The unsuccessful buyer or purchaser who entered into such transactions would also have no legal standing, in the absence of legislation granting such a right, to challenge the validity of the procedures involved.[53]

"The constitutionality of both devices will probably not depend, therefore, upon a formal court ruling by the federal judiciary. This

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[51] Massachusetts v. Mellon, 262 U.S. 447 (1923).

[52] Fahey v. Mallonee, 332 U.S. 255 (1947).

[53] Perkins, Secretary of Labor, et al. v. Lukens Steel Company et al., 310 U.S. 113 (1940); Harry Friend v. Frederick B. Lee, Administrator, Civil Aeronautics Administration, et al., 221 F. 2d. 96 (1955).

question will have to be answered by the political organs of the presidency and the legislature. If the President continues to be forced into accepting these devices in order to preserve a governmental program or to obtain the necessary authorization for the appropriation of funds for executive agencies, it is more than likely that both devices will become established practices in the American governmental system. If this occurs, the necessary interpretation of the Constitution will have been achieved by "custom and usage" and both devices will take their place beside legislative control of executive reorganization through the use of resolutions as instances of constitutional interpretation by the political organs of the national government.

CHAPTER X

SUMMARY AND CONCLUSION

The American practice of legislative oversight of administrative decision-making, composed of the two devices of review by resolution and congressional committee clearance, represents a unique system for controlling the discretionary powers of the American national bureaucracy. In place of the normal channels of control operating through the hierarchy of the executive branch and through the judiciary this recent American practice places the review and control of the exercise of discretionary powers in the legislative body. In the case of review by resolution this control rests either with both legislative chambers jointly, as exemplified by the use of concurrent resolutions to approve or disapprove particular administrative decisions, or with either chamber separately, as in the case of simple nullifying resolutions. The second device, congressional committee clearance, places the function of review and control in congressional committees. In most cases this function officially rests with a legislative committee in each chamber of Congress. In a few cases, however, the clearance of

administrative decisions is assigned to a single committee, and in one particular instance this function has been specifically placed in the chairman of a single committee of the lower house.

This American practice is more, however, than simply a new system for the control of administration in the national government. It also represents an institutionalization of the doctrine of legislative control of administrative discretion. This doctrine is one of the three current doctrines offering competing solutions to the problem of the control of the vast discretionary powers of the national bureaucracy that have become so necessary to successful administration in modern American society. The other two doctrines have been labeled the doctrine of the judicial formula and the doctrine of presidential control. The doctrine of the judicial formula is primarily concerned with controlling the exercise of discretionary administrative powers to prevent infringements upon individual rights. The doctrine of presidential control, on the other hand, like the doctrine of legislative control, centers around the problem of securing responsible administrative decision-making--i.e., the exercise of discretionary authority--on the part of the executive agencies, which is responsive to the expectations and demands of the electorate. The major concern of these two doctrines, in other words, is that of insuring that particular administrative

decisions will represent that consensus of agreement that emerges out of the conflict and compromise among the myriad political interest groups of American society.

The problem of achieving such responsible administrative decision-making is solved in different ways by the two current doctrines. The doctrine of presidential control concludes that this problem is best resolved by vesting in the President the power of final review and approval or disapproval of the exercise of discretionary authority by the executive agencies. This is the proper solution, according to this doctrine, for two important reasons. In the first place, the Constitution assigns the function of supervision and control of administration to the chief executive. Secondly, and more important at this particular point, the President serves as the focus for the various political pressures and interests of the body politic. His approval or disapproval of the administrative decisions will thus represent the best translation of the consensus of these interests. In this manner the administrative decisions will most closely approximate the consent of the governed.

The doctrine of legislative control offers an alternative solution to this problem. It maintains that the broad grants of Article II of the Constitution do not give the President exclusive control over governmental administration. On the contrary, according to this

doctrine, the administrative agencies are primarily organizational extensions of Congress and are thus subject to the supervision of the legislative body. The doctrine of legislative control also dissents from the former doctrine on the second important point. It maintains that Congress, not the President, is the best source of the determination of the political consensus of American society. This consensus is most accurately represented by the area of agreement that emerges out of the conflict and compromise among the elected representatives of separate geographical areas of the country. In order to insure that any particular administrative decision will be based upon the consent of the governed, therefore, it is necessary to place the approval and disapproval of such decisions in the legislative body.

Both devices are products of this latter doctrine in as much as they point to the legislature, rather than the President, as the organ for the final control of administrative decision-making. Each device, however, represents a different way of carrying out this control by the legislature. Whether or not they both fulfill the claim of their doctrinal progenitor--i.e., to establish systems of control that promote responsible administrative decisions--is the basic issue connected with the American practice. American

experience with these two devices offers an opportunity to measure the performance against the promise.

Before turning to such an analysis, however, it is interesting, and useful as a point of comparison, to see whether or not the British practice of parliamentary supervision of delegated legislation establishes a system of control that promotes responsible administrative decision-making. The British practice was established and developed to furnish a means of parliamentary control of the use of the delegated legislative powers of the government departments and the cabinet. It is made up of those many statutes that require such subordinate legislation to lay before Parliament, either in draft or final form, for a certain period and subject it to the disapproval of either chamber or the approval of both chambers during this laying period. In a very few cases the approval of only the lower house is required.

British experience with this device has revealed that it has been used to nullify subordinate legislation on only a very few occasions. The passage of a nullifying resolution or the defeat of a necessary affirmative resolution has been the rare exception rather than the rule. This parliamentary ineffectiveness in exercising its power of control has stemmed from a variety of reasons. The primary cause, however, is the development of the cabinet into the

organ of legislative leadership and control. The cabinet, in command of a rather highly disciplined majority party, has generally been able to prevent any such parliamentary rejection of subordinate legislation.

This development has actually resulted, therefore, in placing the final responsibility for subordinate legislation in the cabinet, rather than in the legislative body. Interestingly enough, this resulting arrangement is probably the best guarantee that the formulation and promulgation of subordinate legislation will reflect the majoritarian political consensus of British society. The British cabinet is based upon a majority in the House of Commons which, in turn, reflects an area of agreement among a broad cross section of the major interests and groups in the electorate. It is more than likely that the important decisions taken by the ruling cabinet regarding subordinate legislation will be formulated to maintain this basis of political consensus and support. Such decisions, in other words, generally will not reflect a particular group interest or combination of such interests that add up to less than the necessary majoritarian political consensus.

The concentration in the cabinet of the power and responsibility for subordinate legislation, which seemingly destroys the effectiveness of parliamentary review, thus actually promotes a

system in which the consent of the governed--in terms of a majoritarian political consensus--is built into the formulation and promulgation of such legislation. The actual operation of the British practice, therefore, results in a situation in which particular administrative decisions closely approximate the ideal pattern of responsible administrative decision-making.

A further interesting point in regard to this British practice is its relationship to the American doctrines of legislative and presidential control. The British practice formally represents a product of the former doctrine. In reality, however, the concentration of the final control of administrative discretion in the central executive organ offers an interesting example of the institutionalization of what is analogous, for the English governmental system, to the doctrine of presidential control.

The American counterpart to this British practice is represented by the device of review by resolution. This device has been included in several statutes delegating discretionary authority to agencies in the executive branch to be used in the administration of governmental programs. It is represented by two different types of requirements, both of which stipulate that the particular exercises of this discretionary authority--i.e., particular administrative decisions--have to lay before the legislature for specified periods of

time. In one type, the administrative decisions can not become effective unless they are specifically approved by concurrent resolutions during the laying period. In the other, the exercises of the discretionary authority are validated only if, during the laying period, they are not disapproved by the legislature. In some cases the disapproval is carried out by concurrent resolutions, while in others the nullification is effected by simple resolutions of either chamber of Congress.

Although this device places the control of the administrative decisions in either chamber or in both chambers acting in concert, the disposition of the routine and noncontroversial decisions is generally determined by the legislative committees that initially review them. In such cases the recommended decisions of the reviewing committees, to approve or disapprove the administrative proposals, are generally simply ratified by the legislative chambers with little consideration or debate. For all practical purposes, these reviewing committees serve as the organ of effective decision-making in the routine cases subject to review by resolution.

If a particular decision should become the center of controversy and conflict, however, this American device also provides a mechanism of appeal to the full chamber, in the case of simple resolutions, or both chambers, in the case of concurrent resolutions.

In such cases the determination of the disposition of the administrative proposal will be focused at the point through which the various interest groups in the American electorate have access and representation. The approval or disapproval of such controversial proposals, which is based upon the composite decision of the individual elected representatives, will thus generally represent a translation of the political consensus of the American political system.

This device provides an interesting system whereby those administrative decisions which become the center of controversy and a focus of opposing views can be disposed of in terms of the consensus and compromise among the competing organized interests making up the American electorate. It thus establishes a system of control that provides a channel for relating the disposition of particular administrative decisions to the consent of the governed.

The second American device of legislative surveillance is congressional committee review and clearance of administrative decisions. The survey of the actual operation of this device revealed that the full committees, in most cases, play a minor and relatively inactive role in the clearance process. Almost without exception, there has been a de facto delegation of this function. Such delegation generally follows one of three patterns of delegation. The function of committee review and clearance has been actually delegated

either to an established subcommittee and a member of the professional staff, to individual members of Congress, or to the professional staff of a committee.

Unlike review by resolutions, none of these de facto variations of committee clearance place the control of administrative decisions at a point which serves as a channel of access for the different interest groups of American society. Even in those few cases in which the disposition of the administrative decisions is determined by the full committee, the point of control distorts the influence and representation of particular interests. The legislative committees generally serve as a focus of particularized and special interests. By magnifying the access and influence of such specialized publics while denying effective representation to others, such committees reflect far less than a cross section of the political interests and public policy views in the American electorate. The approval or disapproval of particular administrative decisions, in such a situation, can not claim to be an accurate reflection of, or approximation to, a consensus carved out of the various competing and conflicting group interests in the American political society. Committee clearance, rather than reflecting the consent of the governed, thus reflects the consent of only part of the governed. It does not, therefore, necessarily insure responsible administrative decision-making.

A similar charge can be brought against the delegation of the clearance function to subcommittees. A subcommittee, like the full committees, provides an unrepresentative source of access for the organized interests making up the total matrix of the political basis of American society. The concentration of the clearance function in a subcommittee, then, also will generally establish a mechanism of control that fails to reflect a general approximation to the political consensus making up the consent of the governed.

The same problem is inherent in those cases in which the review and clearance of administrative decisions is in the hands of individual congressmen, whether it be the chairman of the House Committee on Appropriations or noncommittee members of either chamber. Such arrangements place the determination of the disposition of administrative decisions in a congressional member representing a particular geographical area. Such areas are not generally a microcosmic model of the complex of interests and public policy views of the body politic. Rather, in most cases, particular interests and views are dominant and others are perhaps entirely absent. The decisions of the elected member of such an area are necessarily oriented toward, and responsive to, this particular complex of interests. The approval or disapproval of administrative decisions, in such a situation, will thus be a reflection of particular political

interests or a consensus among a few such interests, rather than a manifestation of the consensus of the public policy views and political objectives of the total American political system.

It is equally difficult to defend the position that the delegation of the clearance function to members of the professional staff establishes a situation that provides a channel of access, to the decision-making point, for the myriad organized interests. In the first place, of course, such personnel are not elected members of the legislative body. They are not responsible to the body politic as a whole, or to any segment of it, through periodic elections, as in the case of the President and legislators. The normal channels of authority and responsibility for staff members lead to the committees that they serve, which, in theory at least, appoint them by a majority vote. In practice, however, the chairman of a committee, and, in the case of minority staff members, the ranking minority member, often actually choose the staff personnel. It is more than likely, in either case, that the decisions of the staff members will be made within a general context outlined by the expectations and views of either the committee or individual members of such committees. The clearance of administrative decisions by the professional staff thus will be ultimately related to that complex of particular interests operating through the committee or particular legislators. They can not claim

to be synonymous with the majoritarian political consensus of the body politic.

The committee clearance device does not fulfill the claim of the doctrine of legislative control. The operation of such a device, in all its many variations, defeats the promise of the legislative control doctrine, primarily because it concentrates the review and clearance of administrative decisions at different points in the governmental structure which, unlike review by resolution and its British counterpart, deny effective access and representation to all the different interests making up the warp and woof of the American political system. By placing the clearance function at such points, the approval or disapproval of the use of administrative discretion generally reflects particular interests or a consensus of a few such interests rather than representing an approximate translation of the political consensus constituting the consent of the governed, which serves as the standard of the doctrine of legislative control.

Despite the differences between the two devices in the relative attainment of the goal of the legislative control doctrine, they both have certain common advantages. In the first place, both subject particular decisions of executive agencies to a final review by sources unconnected with the specific execution of administrative programs. Whether such review is conducted by a reviewing

committee or members of Congress, in the case of review by resolution, or by any of the sources associated with committee clearance, there is an inherent virtue in such a procedure. It requires particular decisions to pass through a scrutiny based upon a complex of values, orientations, and perspectives, which generally will be different from that serving as the decisional premise of the executive organ.

The agency is necessarily concerned and identified with the administration of a governmental program and the successful accomplishment of the statutory mandate. This is, of course, its raison d'etre. Such a situation is liable to create a selectivity in decision-making, however, which magnifies particular perspectives and values while, at the same time, neglecting or overlooking other equally pertinent problems and probable consequences. Scrutiny and review by individuals less closely connected with the executive agency, and who constitute what is essentially a "lay" point of view, will more than likely point out and emphasize such problems and consequences of administrative decisions.

Both devices thus serve to subject particular decisions to a more searching analysis in terms of the different perspectives and values brought to bear upon the decisions. The accepted decisions, in such a case, will represent more thoroughly considered decisions

than those that would be formulated and promulgated in the absence of such reviewing devices. In this manner, then, both devices assure a better decision upon which to base administrative action.

A second major advantage associated with both devices is their practical utility both for the legislative body and the executive agencies. They equip the legislature, for example, with a method of prenatal control of administration which serves as a useful and practical substitute for the usual postnatal control. This becomes especially significant in terms of the present problem of controlling the necessarily broad grants of delegated discretion associated with modern-day administration.

It is becoming increasingly unrealistic to assume that the present methods of congressional supervision of administration, represented by periodic investigations, review, and censure, and the annual budgetary review, serve as effective tools of legislative control. They have only limited applicability. They can merely challenge past decisions or courses of administrative action and reorient the future administration of programs by the executive branch. They can not and do not furnish a channel of control and direction over the specific uses of the discretionary powers of the American bureaucracy.

As a result of the wide sphere of discretionary authority assigned to executive agencies, however, it is just such specific exercises of delegated powers that become highly important and consequential. If the legislative body is going to retain any real control over the powers it delegates to the executive agencies, therefore, it must have some way to control the particular uses of discretionary authority. The two devices of legislative oversight furnish such a solution. They allow the legislature to delegate rather broad discretionary powers to the executive agencies with the assurance that the use of such powers by the bureaucracy will be subject to a continual, day-to-day control that is increasingly necessary, but virtually impossible through the normal channels of legislative supervision.

They also serve a further useful function that is perhaps of benefit to both the legislature and the administrative agencies. Both devices reduce the necessity for the legislature to include a complex system of detailed legislative standards and statutory criteria in the delegation of discretionary authority in order to structure and direct the uses of administrative discretion. The legislative body can thus delegate broad grants of such authority and powers without working out in advance a detailed body of standards and criteria. The agencies, in turn, are granted a wider area of freedom within which to formulate decisions and courses of action that they consider most

effective in carrying out the statutory mandate. Particular guiding principles or policy standards can then be evolved through the process of interaction between the legislature and the administrative agencies on a basis of administrative experience and legislative approval.

Both devices offer a further primary advantage to the executive agencies charged with the exercise of delegated legislative powers in the administration of particular governmental programs. Such powers are granted and the programs sanctioned by the legislature, either with the approval of the President or over his objections. The favorable reaction of the legislative body or relevant influential committees to the uses of the delegated powers and the administration of governmental programs is thus necessarily an element of concern to the agencies. Unfavorable reaction can very well lead to legislative investigations, statutory revision--perhaps even elimination of the administrative program, or possible recrimination through the budget process. The security and stability of the executive agencies and their programs, then, depends, to a great extent, on the calculation and prediction of the reaction of the legislature and committees.

The two devices actually eliminate the necessity for the agencies to operate on this basis of calculation and prediction and, in

this manner, promote such security and stability. By requiring that each decision and action must be premised upon legislative or committee acceptance, they assure the agencies of a necessary degree of acquiescence and support. Such support, in turn, will more than likely reduce the possibility of later legislative recrimination. In terms of the security and stability of executive agencies and administrative programs, therefore, it is possible that such devices are not entirely unwelcome to agencies in the executive branch.

These are basic advantages of each device. In the case of committee clearance, however, they are outweighed by a single fundamental defect. This is the fact that the device of committee clearance fails to provide a system of political control that relates the consent of the governed to the final review and clearance of administrative decisions. Rather than placing the final clearance in either the presidency or the legislative body, generally considered to be the two representative and responsible governmental organs in the American democracy, this device actually establishes a virtually autonomous subsystem of decision-making in connection with governmental administration which cuts across both these major organs. The President and Congress are stripped of formal supervision and control over such a subsystem of administrative decision-making. The final determination of the use of the delegated

discretionary power rests, not with either of these organs, but within such an established subsystem.

This subsystem is made up of the institutionalized relationships between particular executive departments or agencies and congressional committees--in some cases operating through their instrumentalities, subcommittees and professional staff--or individual congressmen. This is not a representative subsystem. It establishes a source of access for particular and special interests that generally fail to add up to the total relevant interests which must form the basis of any political consensus claiming to approximate the consent of the governed.

The committee clearance device, then, even with the advantages mentioned above, is not a promising weapon in the arsenal of American democracy. It fails at precisely that point which is fundamental to any responsible mechanism of control of bureaucratic powers in a democracy. A proper controlling device must be, first and foremost, one that promotes and insures administrative decisions that are responsive and accountable to the expectations and demands of the electorate as expressed by a majoritarian political concurrence. The committee clearance device fails to achieve this basic criterion. In most cases the final clearance of administrative decisions under this device will reflect various specialized publics and

organized interests. The specific uses of administrative discretion, therefore, will represent, not the "public interest," but rather the "interests of particular publics."

The device of review by resolution, in comparison to committee clearance, offers a much more appropriate mechanism of legislative control of administration. It has the important virtue of combining the advantages associated with legislative oversight of administrative decision-making with an instrument that furnishes a channel of access to the point of final clearance for the different organized interests forming the political basis of the governmental process. It thus furnishes, on the one hand, a system that perhaps provides a partial answer to the modern problem of the legislative control of administrative powers. On the other hand, and even more importantly, it establishes a pattern of control in which the final disposition of administrative decisions, embodying the use of discretionary powers is more likely to represent the consent of the governed.

If the legislative body continues to rely upon legislative oversight to furnish a means of control over administrative decision-making, therefore, review by resolution is a more promising device than committee clearance to achieve democratic control and responsible decision-making. A system of control based on this device,

rather than that of committee clearance, would be a solution to the control of bureaucracy that would certainly be more compatible with the basic tenet of American democracy, which declares that the consent of the governed must be the fundamental regulator of public policy, whether it emerges from the President, Congress, or administrative agencies. It thus offers a better answer to the contemporary problem of "bureaucracy in a democracy."

APPENDIXES

APPENDIX I

STATUTES THAT HAVE SUBJECTED ADMINISTRATIVE DECISIONS TO REVIEW BY RESOLUTION

Statute	Date (Year)	Executive Agency	Type of Resolution
1. U.S., Statutes at Large, XLVII, Part 1, 382.	1932	President	Affirmative concurrent resolution or simple negative resolution
2. U.S., Statutes at Large, XLVII, Part 1, 564.*	1932	Secretary of the Interior	Affirmative concurrent resolution or negative concurrent resolution
3. U.S., Statutes at Large, LII, Part 2, 561.	1939	President	Negative concurrent resolution
4. U.S., Statutes at Large, LIV, Part 1,670.	1940	United States Attorney General	Negative concurrent resolution
5. U.S., Statutes at Large, LIX, Part 1,613.	1945	President	Negative concurrent resolution
6. U.S., Statutes at Large, LX, Part 1, 897.*	1946	Secretary of the Navy	Negative concurrent resolution
7. U.S., Statutes at Large, LXII, Part 1, 1,009.*	1948	United States Attorney General	Affirmative concurrent resolution
8. U.S., Statutes at Large, LXII, Part 1, 1,206.	1948	United States Attorney General	Affirmative concurrent resolution

APPENDIX I (Continued)

	Statute	Date (Year)	Executive Agency	Type of Resolution
9.	U.S., Statutes at Large, LXIII, Part 1,203 (renewed: U.S., Statutes at Large, LXVII, 4 [1953]; U.S., Statutes at Large, LXIX, 14 [1955])*	1949	President	Simple negative resolution
10.	U.S., Statutes at Large, LXVI, 163.*	1952	United States Attorney General	Affirmative concurrent resolution or simple negative resolution
11.	U.S., Statutes at Large, LXVII, 400.*	1953	United States Attorney General	Affirmative concurrent resolution or simple negative resolution
12.	U.S., Statutes at Large, LXVII 408 (renewed: Public Law 19 [1955]; Public Law 336 [1955); Public Law 433 [1956]).	1953	Rubber Producing Facilities Disposal Commission	Simple negative resolution
13.	Public Law 627.*	1956	Secretary of Commerce	Affirmative concurrent resolution

*Statutes presently in effect. For purposes of convenience these statutes are listed separately in Appendix II.

APPENDIX II

STATUTES PRESENTLY IN EFFECT SUBJECTING ADMINISTRATIVE DECISIONS TO REVIEW BY RESOLUTION

Number of Listing in Appendix I	Statute	Date (Year)
2	U.S., Statutes at Large, XLVII, Part 1, 564	1932
6	U.S., Statutes at Large, LX, Part 1, 897	1946
7	U.S., Statutes at Large, LXII, Part 1, 1,009	1948
10	U.S., Statutes at Large, LXVI, 163	1952
9	U.S., Statutes at Large, LXIX, 14	1955
11	U.S., Statutes at Large, LXVII, 400	1953
13	Public Law 627	1956

APPENDIX III

STATUTES THAT HAVE CONTAINED THE REQUIREMENT OF CONGRESSIONAL COMMITTEE REVIEW OF ADMINISTRATIVE DECISIONS

Statute	Date (Year)	Executive Agency	Congressional Committees
1. U.S., Statutes at Large, LVIII, Part 1, 189.	1944	Department of the Navy	Committees on Naval Affairs
2. U.S., Statutes at Large, LXIII, Part 1, 66.*	1949	Military Departments	Committees on Armed Services
3. U.S., Statutes at Large, LXV, 336.*	1951	Military Departments and Federal Civil Defense Administration	Committees on Armed Services
4. U.S., Statutes at Large, LXVI, 606.	1952	Military Departments	Committees on Armed Services
5. U.S., Statutes at Large, LXVI, 637.	1952	Bureau of the Budget	Chairman of the House Committee on Appropriations
6. U.S., Statutes at Large, LXVII, 418.	1953	Department of Defense and Bureau of the Budget	Committees on Appropriations and Chairman of the House Committee on Appropriations
7. U.S., Statutes at Large, LXVIII, Part 1, 518.*	1954	General Services Administration and Post Office Department	Committees on Public Works

APPENDIX III (Continued)

	Statute	Date (Year)	Executive Agency	Congressional Committees
8.	U.S., Statutes at Large, LXVIII, Part 1, 666.[1]	1954	Department of Agriculture	House Committee on Agriculture and Senate Committee on Agriculture and Forestry.
9.	U.S., Statutes at Large, LXVIII, Part 1, 829	1954	Bureau of the Budget	Chairman of the House Committee on Appropriations
10.	Public Law 110, Sec. 208.	1955	Bureau of the Budget	Chairman of the House Committee on Appropriations
11.	Public Law 155, Sec. 638.	1955	Department of Defense	Committees on Appropriations
12.	Public Law 578, Sec. 208.*	1956	Bureau of the Budget	Chairman of House Committee on Appropriations
13.	Public Law 984, Sec. 4(c).*	1956	Department of Interior	Committees on Interior and Insular Affairs
14.	Public Law 1018.*[2]	1956	Department of Agriculture	House Committee on Agriculture and Senate Committee on Agriculture and Forestry; Committees on Public Works

APPENDIX III (Continued)

*Statutes presently in effect. For purposes of convenience these statutes are listed separately in Appendix IV.

[1]This statute, of course, is still in effect, but the statutory requirement of prior committee approval contained in it was changed by Public Law 1018 (1956). As the statutory basis for an instance of formal committee review it is thus considered as no longer operative.

[2]This is actually merely an amendment to the 1954 statute. Since it established a new requirement of committee review, however, it is counted as a separate example in the chronological survey.

APPENDIX IV

STATUTES PRESENTLY IN EFFECT CONTAINING THE REQUIREMENT OF CONGRESSIONAL COMMITTEE REVIEW OF ADMINISTRATIVE DECISIONS

Number of Listing in Appendix III	Statute	Date (Year)
2	U.S., Statutes at Large, LXIII, Part 1, 66	1949
3	U.S., Statutes at Large, LXV, 336	1951
7	U.S., Statutes at Large, LXVIII, Part 1, 518	1954
12	Public Law 578	1956
13	Public Law 984	1956
14	Public Law 1018[1]	1956

[1] This particular statute serves as the statutory basis for two instances of committee review and clearance. The Agriculture Committees and the Public Works Committees are both authorized to review certain proposed decisions of the Department of Agriculture.

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