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Legislative Control of Administrative Rulemaking: Lessons from the British Experience

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LEGISLATIVE CONTROL OF ADMINISTRATIVE RULEMAKING: LESSONS FROM THE BRITISH EXPERIENCE?

Jack Beatson†

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INTRODUCTION

Acts of the British Parliament that delegate rulemaking power commonly provide for some sort of parliamentary control over the exercise of that power. For a number of years Americans have taken an interest in this system of legislative control of administrative rulemaking, or "delegated legislation" as it is termed in Britain. In 1941 the British system was unenthusiastically mentioned in the report of the U.S. Attorney General's Committee on Administrative Procedure,¹ and in 1955 two companion law review articles discussed the British approach, one by Sir Cecil Carr describing it² and the other by Professor Bernard Schwartz commending it as a model for the United States.³

At a time when the United States is beginning to make increased use of control of rules by legislative veto,⁴ another glance across the Atlantic seems appropriate. There are several reasons for reexamining the British system. First, Britain now has much more experience with the legislative veto than it had in 1955, and since 1970 several parliamentary reports containing detailed studies of the system have been published.⁵ Second, the

1. ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. (1941).

2. Carr, *Legislative Control of Administrative Rules and Regulations: Parliamentary Supervision in Britain*, 30 N.Y.U. L. REV. 1045 (1955).

3. Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U. L. REV. 1031 (1955); see text accompanying note 155 *infra*.

4. See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1370-71 (1977); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977). Many bills and amendments to bills concerning the delegation of legislative power have been considered by Congress. Representative Elliott Levitas has introduced many of them. See, e.g., H.R. 12048, 94th Cong., 2d Sess., 122 CONG. REC. H10666-90, H10718-19 (1976). See also H.R. REP. NO. 94-1014, 94th Cong., 2d Sess. (1976); *Congressional Review of Administrative Rulemaking: Hearings Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary on H.R. 3658 and H.R. 8231*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *House Hearings*]; *Improving Congressional Oversight of Federal Regulatory Agencies: Hearings Before the Senate Comm. on Government Operations on S. 2258, S. 2716, S. 2812, S. 2878, S. 2903, S. 2923, S. 3318 and S. 3428*, 94th Cong., 2d Sess. (1976) [hereinafter cited as *Senate Hearings*]. Many states have provisions for legislative review of administrative rules: Professor Schwartz lists 28 states that have some sort of legislative review. Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351, 362 n.90 (1978).

5. See, e.g., JOINT COMM. ON DELEGATED LEGISLATION, REPORT, H.L. 184, H.C. 475 (1971-72) [hereinafter cited as H.C. 475]; JOINT COMM. ON STATUTORY INSTRUMENTS, FIRST SPECIAL REPORT, H.L. 76, H.C. 184 (1972-73) [hereinafter cited as H.C. 184]; JOINT COMM. ON DELEGATED LEGISLATION, FIRST REPORT, H.L. 188, H.C. 407 (1972-73) [hereinafter cited as H.C. 407]; JOINT COMM. ON DELEGATED LEGISLATION, SECOND REPORT, H.L. 204, H.C. 468

procedures for control have been modified several times since 1955. The most significant change has been the establishment of a joint committee of both Houses of Parliament to scrutinize British rules. The need to scrutinize rules made by the various institutions of the European Economic Community (EEC) is also important, although this Article will not specifically consider this new form of scrutiny.⁶ Finally, it is now possible, as a result of studies such as the one by Professors Harold Bruff and Ernest Gellhorn,⁷ to make direct comparisons with existing U.S. legislative vetoes and to examine whether the British experience has any general implications for the United States.

This Article will describe and evaluate the British system of legislative control of administrative rulemaking and will consider its utility as a model for the United States. I have taken to heart Professor L.L. Jaffe's warning that "one must tread warily in a foreign land when he has brought his finding instruments from home,"⁸ and opinions on the position of the United States are expressed with caution. The Article consists of four sections: a summary of the differences in the constitutional and administrative positions of the two countries, a description of the British system of legislative control of rulemaking, an evaluation of that system, and finally, consideration of the relevance of the British model to the United States.

I

DIFFERENCES BETWEEN U.S. AND BRITISH LEGAL SYSTEMS

A. CONSTITUTIONAL RESTRICTIONS

In Britain, there is no written constitution and no separation of powers doctrine.⁹ Parliament is in theory sovereign, but in fact the executive

(1972-73) [hereinafter cited as H.C. 468]; SELECT COMM. ON PROCEDURE, FIRST REPORT, H.C. 588 (1977-78) [hereinafter cited as H.C. 588].

6. See generally Bates, *The Scrutiny of European Secondary Legislation at Westminster*, 1 EUR. L. REV. 22 (1976). On the difficulties involved, particularly in the case of British rules implementing EEC obligations, see JOINT COMM. ON STATUTORY INSTRUMENTS, FIRST SPECIAL REPORT, H.L. 51, H.C. 169 (1977-78) [hereinafter cited as H.C. 169]. In a letter to *The Times* (London), May 9, 1978, at 19, col. 4, Lord Greenwood of Rossendale pointed out that the British House of Lords is usually more efficient in considering EEC rules than the European Parliament at Strasbourg.

7. Bruff & Gellhorn, *supra* note 4.

8. Jaffe, *English Administrative Law—A Reply to Professor Davis*, 1962 PUB. L. 407, 416.

9. S. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW ch. 2 (3d ed. 1977). See generally Griffith, *The Constitutional Significance of Delegated Legislation in England*, 48 MICH. L. REV. 1079, 1083-92, 1116-20 (1949); G. MARSHALL, CONSTITUTIONAL THEORY 97-124 (1971); B. SCHWARTZ & H.W.R. WADE, LEGAL CONTROL OF GOVERNMENT 11-18 (1972); E.C.S. WADE & G. PHILLIPS, CONSTITUTIONAL LAW chs. 2-4 (9th ed. A. Bradley 1977).

dominates the legislature through a strong party system. Nevertheless, the doctrine of parliamentary sovereignty means that there is no legal impediment to the extent to which the legislature may control the executive and administrative agencies. Control can never be said to be unconstitutional, leaving only practical and conventional limits upon Parliament's control.¹⁰

In the United States, by contrast, the constitutionality of legislative control is less clear. Although the legislative veto "was neither specifically discussed by the Framers nor clearly banned by the Constitution,"¹¹ the doctrine of separation of powers¹² implicitly limits the power of Congress to interfere with the exercise of presidential power.¹³ The doctrine also restricts the power of Congress to delegate legislative power, although this limitation has been undermined by judicial acceptance of very broad statutory standards.¹⁴ Many critics of congressional control of administrative rulemaking have argued that such control is unconstitutional.¹⁵ President Carter, for instance, has asserted that

[s]uch intrusive devices infringe on the Executive's constitutional duty to faithfully execute the laws. They also authorize Congressional action that has the effect of legislation while denying the President the opportunity to exercise his veto. Legislative vetoes thereby circumvent the President's role in the legislative process established by Article I, Section 7 of the Constitution.¹⁶

As British practice can throw no light on the constitutionality in the United States of the various forms of legislative veto,¹⁷ the following discussion will deal only with the practical efficacy of legislative control.

10. See E.C.S. WADE & G. PHILLIPS, *supra* note 9, at 16-26, 48-50; S. DE SMITH, *supra* note 9, at 44-62, 90-93 (general discussion of conventions). See also notes 70-72 *infra* and accompanying text (suggesting that there are serious practical limits to the effectiveness of legislative control).

11. Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1087 (1975).

12. See *Monaco v. Mississippi*, 292 U.S. 313 (1934); *Kilbourn v. Thompson*, 103 U.S. 168, 190-91 (1880); C. ANTIEAU, 2 MODERN CONSTITUTIONAL LAW §§ 11:13-22 (1969).

13. 2 C. ANTIEAU, *supra* note 12, § 11:17.

14. *Id.* § 11:21; see, e.g., *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930) ("just and reasonable" a sufficient standard); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12 (1932) (public convenience, interest, or necessity a sufficient standard).

15. See *Senate Hearings*, *supra* note 4, at 76, 124-31 (testimony of Antonin Scalia, Asst. Attorney General, U.S. Dep't of Justice); note 17 *infra*.

16. President's Message to the Congress on Legislative Vetoes, 14 WEEKLY COMP. OF PRES. DOC. 1146, 1147 (June 21, 1978).

17. Much has been written on the constitutional questions. See Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323 (1977); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Javits & Klein, *supra* note 4; Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Schwartz, *supra* note 4; Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEGIS. 593 (1976); Watson, *supra* note 11.

B. JUDICIAL REVIEW

The role and scope of judicial review of executive or department action differ sharply in the two countries. In the United States a reviewing court decides all questions of law¹⁸ and determines questions of fact under the substantial evidence rule, which permits administrative action to be set aside where it is unsupported by "such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion."¹⁹ In Britain, on the other hand, the scope of review is narrower than in the United States in that, with one exception, it is limited to cases of excess or abuse of jurisdiction.²⁰ In practice, however, the scope of review has been broadened by a greater willingness to characterize questions as ones of law²¹ and by the improvement of techniques for controlling abuse of discretion.²²

The contrast between the broad scope of judicial review in the United States and the narrower scope in Britain is particularly significant because in Britain, in the absence of express statutory provisions, there is no requirement similar to that in the United States²³ mandating compliance with

18. Administrative Procedure Act, § 10(e), 5 U.S.C. § 706 (1976).

19. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). See also Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 608-21 (1966); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 29.01-11 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 595-623 (1965).

20. B. SCHWARTZ & H.W.R. WADE, *supra* note 9, at 209-16; S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 111-12, 353-61 (3d ed. 1973). This is largely a result of the doctrine of parliamentary sovereignty, see notes 9-10 *supra* and accompanying text, for once it is established that administrative action is authorized by Parliament the courts may not intervene. It is, however, a cardinal axiom that every statutory power has its limits, regardless of the breadth of the language of the statute, and any administrative action that goes beyond those limits is subject to control by the courts. According to H.W.R. Wade, "The technique by which the courts have constructed their system for the judicial control of powers has been by stretching the doctrine of ultra vires. . . . [T]hey can make the doctrine mean almost anything they wish by finding implied limitations in Acts of Parliament" H.W.R. WADE, ADMINISTRATIVE LAW 42 (4th ed. 1977). The exception is error of law on the face of the record.

21. Compare *Edwards v. Bairstow*, [1956] A.C. 14 (the issue whether a transaction amounted to "trade" was a question of law where the facts were undisputed), and *Coleen Properties Ltd. v. Minister of Hous. and Local Gov't*, [1971] 1 W.L.R. 433 (C.A.) (minister's decision that was not based on any evidence supporting it was error of law), and *Regina v. Medical Appeal Tribunal*, [1957] 1 Q.B. 574 (C.A.) with *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177 (1938) (facts were undisputed but the determination was nevertheless one of fact), and *NLRB v. Marcus Trucking Co.*, 286 F.2d 583 (2d Cir. 1961). British courts also have a tendency, where errors of law are made, to interpret jurisdiction very narrowly, e.g., *Anisminic Ltd. v. Foreign Compensation Comm'n*, [1969] 2 A.C. 147, 171.

22. E.g., *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997, 1006 (ministers are not at liberty to act arbitrarily or capriciously); *Laker Airways Ltd. v. Department of Trade*, [1977] 1 Q.B. 643 (C.A.); *Congreve v. Home Office*, [1976] 1 Q.B. 629 (C.A.).

23. The Administrative Procedure Act, § 4, 5 U.S.C. § 553 (1976), requires that rule-making be undertaken only after notice and an opportunity for the public to comment on a proposed rule.

procedural safeguards *before* promulgating a rule.²⁴ In practice, many British statutes provide for consultation, and where they do not, administrators tend to consult interested organizations voluntarily.²⁵ But the nature and extent of this consultation vary widely, and individual members of the public are rarely consulted. Moreover, in the absence of an express rulemaking power, administrators may be inhibited from establishing their policies by rules because they are barred from "fettering" their discretion—although this prohibition has recently come under attack from both judges and commentators.²⁶ The consequence of this unstructured approach to the rulemaking process at the promulgation stage is a greater need for other avenues of control, whether or not they are in fact the most effective.

C. ADMINISTRATIVE SYSTEMS

In the United States administration is conducted both by executive agencies, such as the Department of Health, Education and Welfare, and by independent regulatory agencies, such as the Federal Trade Commission. In Britain most administration is conducted by the executive, *i.e.*, by government departments that are ultimately controlled by ministers.²⁷ The contrast is important because party discipline and the fact that ministers are members of Parliament give the executive effective control of the legislature.

24. See *Bates v. Lord Hailsham*, [1972] 1 W.L.R. 1373 (Ch.); H.W.R. WADE, *supra* note 20, at 716-17, 723-28. Britain formerly had such a requirement in the Rules Publication Act, 1893, 56 & 57 Vict., c. 66, which provided for a limited form of consultation. This Act was repealed by the Statutory Instruments Act, 1946, 9 & 10 Geo. 6, c. 36. J. KERSELL, *PARLIAMENTARY SUPERVISION OF DELEGATED LEGISLATION 6-8* (1960); 415 *PARL. DEB., H.C.* (5th ser.) 1096, 1111-13 (1945); notes 43-45 *infra* and accompanying text.

25. See *Agricultural, Horticultural and Forestry Indus. Training Bd. v. Aylesbury Mushrooms Ltd.*, [1972] 1 W.L.R. 190 (Q.B.); H.C. 475, *supra* note 5, at 204-05 app. 9; Garner, *Consultation In Subordinate Legislation*, 1964 *PUB. L.* 105; Jergesen, *The Legal Requirements of Consultation*, 1978 *PUB. L.* 290; H.W.R. WADE, *supra* note 20, at 718, 728-31. See also H.C. 475, *supra* note 5, at 196-202 app. 8.

26. See *British Oxygen Co. v. Minister of Technology*, [1971] A.C. 610; *H.T.V. Ltd. v. Price Comm'n*, [1976] I.C.R. 170; Galligan, *The Nature and Function of Policies Within Discretionary Power*, 1976 *PUB. L.* 332. Courts and commentators in the United States generally encourage administrative agencies to formulate policy through rulemaking procedure, but recognize that an agency has discretion to choose case-by-case adjudication over rulemaking. See, e.g., *Fook Hong Mak v. Immigration and Naturalization Serv.*, 435 F.2d 728 (2d Cir. 1970); K. DAVIS, *ADMINISTRATIVE LAW TEXT* 143-46 (3d ed. 1972). Bruff & Gellhorn, *supra* note 4, at 1375; Williams, *Securing Fairness and Regularity in Administrative Proceedings*, 29 *AD. L. REV.* 1, 12-13 (1977). Some courts have gone further and held that rulemaking rather than adjudication should have been employed in a particular case. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

27. There are exceptions. See, e.g., W. ROBSON, *NATIONALIZED INDUSTRY AND PUBLIC OWNERSHIP* 25 (2d ed. 1962); Baldwin, *A British Independent Regulatory Agency and the "Skystrain" Decision*, 1978 *PUB. L.* 57, 70-71.

Although this difference has been overlooked by some commentators,²⁸ it may be significant. For instance, there is little danger in Britain of a veto leading to undue dominance by the legislature or to reluctance on the part of administrators to take controversial but necessary steps in rulemaking, as some commentators have suggested happens in the United States.²⁹ Indeed, the most recent Report from the Select Committee on Procedure suggests that the legislature is in a very weak position as compared to the executive. It stated that "the balance of advantage between Parliament and the Government in the day to day working of the Constitution is now weighted in favour of the Government to a degree which causes widespread anxiety and is inimical to the proper working of our parliamentary democracy."³⁰

II

A DESCRIPTION OF THE BRITISH SYSTEM

A. HISTORICAL DEVELOPMENT

The existence of rulemaking powers and requirements that rules be presented to—or "laid before"—Parliament can be traced to the eighteenth century.³¹ But it was not until the late nineteenth century that widespread delegation of legislative power necessitated some form of control.³² In 1893 the Rules Publication Act³³ was enacted to systematize the publication and review of rules that were subject to a laying requirement. The Act provided for advance publicity to facilitate the submission of comments on proposed rules. It also provided for the subsequent publication of statutory rules by requiring that they be numbered, printed, and sold by the Queen's printer.³⁴ The Act was not, however, comprehensive: it did not apply to all rules and its requirements could be evaded merely by calling a rule a "provisional order."³⁵ Moreover, even where the Act did apply, antecedent publication was not a condition precedent to the enforceability of a rule and thus did not ensure examination by the legislature.

The amount of delegated legislation has greatly increased over the last

28. *E.g.*, Schwartz, *supra* note 3.

29. *See* Watson, *supra* note 11, at 1081; Bruff & Gellhorn, *supra* note 4, at 1422.

30. H.C. 588, *supra* note 5, at viii.

31. C. Payshan, *The American Legislative Veto and its British and Constitutional Background* ch. 3 (1977) (unpublished thesis in Bodleian Law Library, Oxford University).

32. H.W.R. WADE, *supra* note 20, at 697-98.

33. 1893, 56 & 57 Vict., c. 66.

34. *Id.* § 3(1); H.W.R. WADE, *supra* note 20, at 723.

35. COMM. ON MINISTERS' POWERS (DONOUGHMORE COMMITTEE), REPORT, CMD. NO. 4060 at 44-48, 66 (1931-32) [hereinafter cited as CMD. No. 4060]; H.W.R. WADE, *supra* note 20, at 723.

eighty years. The reasons for this are generally said to be the development of the "welfare state" and the need for very broad emergency powers during the two World Wars.³⁶ The first move toward legislative control came in 1924 when a House of Lords select committee (the Special Orders Committee) was established to consider rules requiring an affirmative vote of approval in Parliament before becoming effective.³⁷ The continued growth in the amount of delegated legislation and the fear that government by executive *dictat* was becoming a real threat led to the establishment of the Committee on Ministers' Powers (the Donoughmore Committee) to conduct an inquiry. The committee's report,³⁸ published in 1932, recommended that each House of Parliament have a small standing committee to report on all proposed legislation conferring rulemaking powers on a minister, and further to report on all rules laid before that House.³⁹ Eventually this recommendation led to the establishment of the House of Commons Statutory Instruments Committee (the Scrutiny Committee) in 1944.⁴⁰ The House of Lords simply retained its Special Orders Committee.

The Scrutiny Committee's terms of reference extended to consideration of the drafting and scope of a rule, but not to its merits.⁴¹ Thus, the distinction between technical scrutiny and scrutiny of the merits came into existence, a distinction that still dominates the British system of legislative control today. The distinction is made on the assumption that the most effective scrutiny of technical adequacy will occur in a nonpartisan, judicial atmosphere and that this is only possible by avoiding the controversy inherent in any consideration of the merits and policy behind individual rules.⁴²

The Donoughmore Committee's recommendations were also instrumental in bringing about the repeal and replacement of the Rules Publication Act with the Statutory Instruments Act, 1946.⁴³ The Statutory

36. H.W.R. WADE, *supra* note 20, at 698.

37. See House of Lords Standing Order No. 216(1), *reprinted in* H.C. 475, *supra* note 5, at xii, para. 10. See also H.C. 475, *supra* note 5, at xviii-xx, paras. 32-45.

38. CMD. No. 4060, *supra* note 35.

39. *Id.* at 62-64.

40. The workings of this committee have been described by Sir Cecil Carr. See Carr, *supra* note 2.

41. The Select Committee was to consider questions such as clarity, effect, ultra vires, and retroactivity—to ensure that rulemakers did not go beyond the authority conferred on them by the parent act, and that they adhered to any conditions or specifications therein. The committee's jurisdiction is discussed in H.C. 475, *supra* note 5.

42. CMD. No. 4060, *supra* note 35, at 69; 400 PARL. DEB., H.C. (5th ser.) 258-63 (1944). See also H.C. 475, *supra* note 5, Minutes of Evidence, at 49-50, 108, 124; J. KERSELL, *supra* note 24, at 49-50. Arguably the committee's original jurisdiction did not even permit it to consider the merits of a rule as an exercise of the power delegated. See note 130 *infra* and accompanying text.

43. 9 & 10 Geo. 6, ch. 36; see 415 PARL. DEB., H.C. (5th ser.) 1096 (1945); C. ALLEN, LAW AND ORDERS (3d ed. 1965).

Instruments Act applies to a much broader range of rules than did the Rules Publication Act; in fact, the more recent Act introduced the term "statutory instrument" to cover the many different types of delegated legislation to which it applied.⁴⁴ Unfortunately, however, the Statutory Instruments Act did not retain the earlier law's requirements of advance publication and consideration of written comments.⁴⁵

Shortly after these Donoughmore Committee recommendations were implemented a serious controversy arose over the difficulty in securing time on the floor of the House of Commons both to debate the merits of delegated legislation and to consider the reports of the Scrutiny Committee. The adoption of the "11:30 rule" in 1953⁴⁶ prohibiting debate on rules after 11:30 p.m. further limited the time for debate and merely worsened the situation, although some restriction was necessary to curb obstructionist tactics by the opposition in bringing prayers to annul rules.⁴⁷

B. RECENT REFORMS

By 1971, the time problem that had originally surfaced several years earlier had become so serious that the House of Commons Select Committee on Procedure stated that the lack of time for the House to consider reports of the Scrutiny Committee materially reduced the practical usefulness of technical scrutiny.⁴⁸ The Select Committee went on to make several recommendations, the following of which have been implemented: (1) the merits of some rules should be considered in committee rather than on the floor of the House, (2) the terms of reference of the Scrutiny Committee should be extended, and (3) a committee of both Houses should inquire into

44. Section 1(i) of the Act defines "statutory instrument" to include three categories of "delegated legislation" or "administrative rules" made or approved under statute: (1) Orders in Council; (2) ministerial powers stated in a statute to be exercisable by statutory instrument; and (3) rules made under a statute to which the Rules Publication Act applied. See H.C. 588, *supra* note 5, ch. 3, para. 1. The terms "rule," "instrument," and "delegated legislation" are used interchangeably in this Article. It should be noted, however, that many administrative rules are not statutory. British examples of such rules are extrastatutory tax concessions, see 60 LAW Q. REV. 125, 218 (1944), and the Criminal Injuries Compensation Board, see, e.g., Regina v. Criminal Injuries Compensation Bd., [1967] 2 Q.B. 864.

45. J. KERSELL, *supra* note 24, at 8.

46. See SELECT COMM. ON DELEGATED LEGISLATION, REPORT, H.C. 310-I, at xxxii, para. 107 (1952-53) [hereinafter cited as H.C. 310-I]. The committee recommended that rules not be considered after 11:30 p.m. and that the period of time in which a negative resolution could be brought be extended by 10 days from the report of the Scrutiny Committee, if necessary. Only the first proposal was adopted.

47. Carr, *supra* note 2, at 1051-53; see H.C. 475, *supra* note 5, at xv, xxxiii-xxxvi, paras. 21, 97-109.

48. SELECT COMM. ON PROCEDURE, SECOND REPORT, H.C. 538, at xxii, para. 42 (1970-71) [hereinafter cited as H.C. 538].

the whole question of legislative control and report on how to improve procedures.⁴⁹

Pursuant to this last recommendation of the Select Committee, the Joint Committee on Delegated Legislation was set up to report on legislative control. In 1972 this Joint Committee recommended the formation of a joint scrutiny committee with jurisdiction over all but a very small number of rules. The old system of conducting technical scrutiny separately in each House had led to extensive duplication of effort and to anomalous differences in jurisdiction.⁵⁰ This system was therefore abandoned in 1973 with the establishment of the Joint Committee on Statutory Instruments (Joint Scrutiny Committee), which now examines all general rules whether or not laid.⁵¹ It can draw the attention of Parliament to a rule on several specified grounds, including "any ground which does not impinge on its merits or on the policy behind it."⁵² The most common of the specific grounds for referral are "unusual or unexpected use of powers," including *ultra vires*,⁵³ defective drafting, and the need for elucidation.⁵⁴

The Joint Committee on Delegated Legislation also recommended in 1972 that a new standing committee be established to review and report to Parliament on the merits of rules.⁵⁵ The Joint Committee hoped that such

49. The committee also recommended that once the Scrutiny Committee draws the attention of the House to any rule subject to the negative procedure, the rule should, unless debated within the 40-day period, become subject to the affirmative procedure. *Id.* at xxii, para. 43. This proposal has not been adopted.

50. H.C. 475, *supra* note 5, at xviii-xxiii, xxvi-xxvii, paras. 32-54, 67. The House of Lords committee did not scrutinize negative or general instruments at all. The House of Commons committee confined itself to statutory instruments. It neither considered rules subject to the affirmative procedure that were Special Orders, *id.* at xii, paras. 10-11, nor gave the right to petition against Special Orders in the nature of private or hybrid bills, *id.* at xix-xx, xxvii, paras. 40-42, 67; H.C. 407, *supra* note 5, at xx-xxxix, paras. 35-105 (hybrid instruments).

51. See 850 PARL. DEB., H.C. (5th ser.) 1217 (1973). The House of Commons Select Committee is still in existence and meets weekly to consider instruments laid only before that House—mainly financial matters which constitutionally and conventionally are subject to the exclusive control of the Commons. Since the establishment of the Joint Scrutiny Committee, the Select Committee has considered 556 instruments, or an average of 111 per session. H.C. 169, *supra* note 6, para. 2. Its jurisdiction is the same as that of the Joint Committee, see note 52 *infra* and accompanying text.

52. These grounds are set out in H.C. 475, *supra* note 5, at xxi-xxii, para. 50. See also notes 106-21 *infra* and accompanying text.

53. H.W.R. WADE, *supra* note 20, at 736. The committee pays particular attention to sub-delegation where it is not expressly authorized, and to the question of whether onerous requirements imposed under a power expressed in general terms are reasonable and within the scope of the act. H.C. 475, *supra* note 5, at xxii-xxiii, para. 53. The Joint Committee has recently sharply criticized the omission of detail in instruments and wide discretionary powers in enabling acts. H.C. 169, *supra* note 6, paras. 9-12.

54. H.C. 475, *supra* note 5, at xxii-xxiii, paras. 53-54. See also C. ALLEN, *supra* note 43, at 139; J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 90-92 (5th ed. 1973).

55. H.C. 475, *supra* note 5, at xxxvi-xl, paras. 110-128. See also H.C. 538, *supra* note 48; 853 PARL. DEB., H.C. (5th ser.) 680 (1973).

a standing committee would alleviate the problems of securing time for debate on the floor of the House. This proposal has also been implemented, with the establishment of a standing committee (the Merits Committee) in 1973.⁵⁶ Consideration of the merits of rules is thus no longer restricted solely to the floor of the House, although the separation of technical scrutiny from scrutiny of merits still exists. In fact, the Joint Committee on Delegated Legislation recommended that the separation should be "rigidly maintained."⁵⁷

These successive reforms in parliamentary control of administrative rulemaking were necessitated by the continued ineffectiveness of the system. In many respects the establishment of the House of Commons Scrutiny Committee in 1946 was the major innovation, although its narrow terms of reference and the difficulty in securing time on the floor of the House of Commons to consider its reports or to debate the merits of rules led to the more recent reforms.

C. CONTROL PROCEDURE

1. *Methods of Control*

Although there is no constitutional requirement for legislative control of administrative rulemaking,⁵⁸ acts delegating legislative powers usually contain a provision directing that rules be laid before one or both Houses of Parliament. There are many different methods of control procedure that Parliament can choose from in exercising its power to review rules laid before it. The majority of rules are laid once they are in force, but some are laid in draft.⁵⁹ Some rules are subject to no precondition to effectiveness

56. The Merits Committee may consider statutory instruments requiring affirmative resolutions, and those subject to negative resolutions where there is a motion of a minister for annulment before the House—provided that 20 members do not object. Proposals to change this rule have been made by the Select Committee on Procedure. See H.C. 588, *supra* note 5, paras. 10-18. See also notes 101-05 *infra* and accompanying text.

57. H.C. 475, *supra* note 5, at xviii, para. 30. See also H.C. 588, *supra* note 5, ch. 3, paras. 12-13.

58. In fact, numerically the class of rules not subject to any control is large. J. KERSELL, *supra* note 24, at 14-20; H.C. 475, *supra* note 5, Minutes of Evidence, at 52 (testimony of R.D. Barlas, Second Clerk Assistant of the House of Commons); H.C. 468, *supra* note 5, at x, paras. 30-31.

59. Only about 10% are laid in draft. H.C. 475, *supra* note 5, at 193 app. 7. See also C. ALLEN, *supra* note 43, at 123; J. GRIFFITH & H. STREET, *supra* note 54, at 84-85. Drafts are more commonly laid where control is by affirmative resolution. H.C. 468, *supra* note 5, at vi, viii, paras. 9, 17; H.C. 169, *supra* note 6, paras. 19-20. In the United States it appears that review of rules already in force is constitutionally more questionable than review of drafts of rules because of the obstacle imposed by the presentation clause, U.S. CONST. art. I, § 7, cl. 3; see *Atkins v. United States*, 556 F.2d 1028, 1064-65 (Ct. Cl. 1977); Abourezk, *supra* note 17, at 336; Watson, *supra* note 11, at 1071-73. The majority in *Atkins* was of the opinion that a one-house legislative veto did not violate the principle of bicameralism because the veto's effect

beyond being laid before Parliament.⁶⁰ The laying requirement by itself, therefore, cannot really be considered a legislative veto.

Most rules are subject not only to a laying requirement but also to annulment. Annulment⁶¹ is effected by one of two basic procedures: (1) a negative procedure, under which a rule becomes automatically effective unless rejected by a resolution of either or both Houses of Parliament within forty sitting days, or (2) an affirmative procedure, under which a rule's effectiveness lapses unless specifically approved by resolution.⁶² The negative procedure is used in approximately 66% of general rules, while the affirmative procedure is used in approximately 12%.⁶³ About 22% are subject to no control beyond a laying requirement.⁶⁴

2. *Choosing Among Methods of Control*

Despite the availability of several types of control procedure, Parlia-

was not to make law but to preserve the status quo. Also, based on a comparison of the experience of the Office of Education and the Federal Energy Administration, it appears that legislative control may be more effective if rules are laid in draft. Bruff & Gellhorn, *supra* note 4, at 1386, 1395-97, 1411.

60. Professor Schwartz did not consider this type of rule. Schwartz, *supra* note 3, at 1038. Many of them—about half of the 2,000 statutory instruments registered each year—are local in their operation. H.C. 475, *supra* note 5, at xi-xii, paras. 6-7. The Joint Committee, however, has considered rules only subject to a laying requirement (an average of 64 per session) and those that are not required to be laid (an average of 279 per session) where they are general in their operation. H.C. 588, *supra* note 5, at xxxi.

61. Section 5 of the Statutory Instruments Act provides for annulment by Order in Council, so the appropriate motion that a regulation be annulled is a prayer to the Crown.

62. H.C. 475, *supra* note 5, at xiii, para. 12. The following are examples of rules that are (1) subject to a negative resolution, and (2) subject to an affirmative resolution. There are other types of negative and affirmative resolutions, *see* note 63 *infra*, but these two are the most common:

(1) Section 7 of the Poisons Act, 1972, c. 66, empowers the Secretary of State, after consultation with or on the recommendation of the Poisons Board, to make rules with respect *inter alia* to the sale, storage, transport, and labeling of poisons. Section 10(1) of the Act states: "Any power to make orders or rules under this Act shall be exercisable by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament."

(2) Section 273(7) of the Town and Country Planning (Scotland) Act, 1972, ch. 52, provides: "Any order under this Act which designates an area for the purposes of section 72(4) of this Act [requiring "office development permits"] shall cease to have effect at the end of the period of twenty-eight days beginning with the day on which the order is made . . . unless before the end of that period the order is approved by a resolution of each House of Parliament."

63. Including rules laid in draft, there are at least five standard methods by which rules are submitted to Parliament: (1) by being laid after making; (2) by being laid in draft subject to a negative resolution; (3) by being laid after making and subject to negative resolution; (4) by being laid in draft and approved before making; (5) by being laid after making and having a limited duration if not approved. H.C. 475, *supra* note 5, at 193-94 app. 7 (memorandum by First Parliamentary Counsel). *See also* H.C. 468, *supra* note 5, at vi-viii, paras. 8-15.

64. These figures have been compiled from the information in H.C. 468, *supra* note 5, at vi-vii, paras. 8-11, 14; *id.*, Minutes of Evidence, at 10 app. 1, 14-15, 41, 66 app. 2.

ment has failed to develop any rational criteria for determining which procedure is appropriate in making a particular delegation of rulemaking power.⁶⁵ This is particularly true in choosing between the negative procedure and the "laying only" procedure. The failure to develop criteria has been justified on the ground that "[r]ules for the settlement of questions such as this, which must arise in circumstances of infinite variety, are nothing but an embarrassment, tending to encumber the task of arriving at the right answer in any particular case."⁶⁶ On the other hand, the absence of criteria means that when granting rulemaking power, Parliament is hindered from making a considered choice of the means by which it is to exercise control over such power in any given situation.⁶⁷ Consequently, the political judgment of the minister whose rules are to be scrutinized tends to prevail.⁶⁸

The Joint Committee on Delegated Legislation has recently recommended that the affirmative procedure should normally be employed for rules that substantially affect the provisions of primary legislation, impose or increase taxation, or involve considerations of special importance—such as the creation of new varieties of criminal offenses. The committee recommended use of the negative procedure for other cases in which Parliament wishes to retain some control. It rejected the argument that "skeleton" powers, which are broad delegations of power by Parliament leaving broad discretion in formulating administrative rules, should always be controlled by the affirmative procedure.⁶⁹ It is too early, however, to evaluate the impact of these tentative criteria on legislative control.

3. *The Timing of Control*

Parliamentary control is *ex post facto* in that administrators have already drafted the rules and decided upon the policies embodied in them before Parliament scrutinizes them. This leads to control being relatively weak because, as a general rule, it is more difficult to persuade administra-

65. See H.C. 468, *supra* note 5, at xi-xvi, paras. 34-54; *id.*, Minutes of Evidence *passim*. See also H.C. 475, *supra* note 5, Minutes of Evidence, at 98-100, 102, 106-07, 109, 126, 133, 153-54; *id.* at 194-95 app. 8; C. ALLEN, *supra* note 43, at 129-32; J. KERSELL, *supra* note 24, at 16-20, 83-85.

66. H.C. 310-I, *supra* note 46, at 31-32 (memorandum by Sir Alan Ellis). This is still the official view. H.C. 468, *supra* note 5, at xi, para. 35; H.C. 475, *supra* note 5, at 194 app. 8, para. 2.

67. H.C. 468, *supra* note 5, at xii, paras. 38-39; C. ALLEN, *supra* note 43, at 129-32.

68. C. ALLEN, *supra* note 43, at 129; H.C. 310-I, *supra* note 46, Minutes of Evidence, at 61, 146.

69. H.C. 468, *supra* note 5, at xiv, para. 46.

tors to change views already formed than to influence initial policy choices.⁷⁰

The weakness of parliamentary control of rulemaking is not necessarily bad. After all, the purpose of delegating legislation is to relieve Parliament of some of the burdens of legislative government. If the only way for Parliament to control rulemaking is by legislative procedures, much of the point of delegation is lost.⁷¹ But parliamentary control is even more ineffectual than it might otherwise be because several factors impede Members of Parliament from getting information early enough for effective control. Since the repeal of the Rules Publication Act in 1946,⁷² rules are no longer published in advance of their being laid. At the formulative stage of rulemaking there is very little consultation between administrators and Members of Parliament *qua* Members.⁷³ In addition, until very recently no legislative committee existed to consider the merits of a rule; such consideration was left to the floor of the House to be brought up, if at all, by individual Members of Parliament.

4. *The House of Lords Rarely Exercises Control*

Although in theory both Houses of Parliament are equally involved in control, as far as non-EEC rules are concerned only the House of Commons

70. The same is true in the United States. Compare the legislative veto of rulemaking in the General Education Provisions Act, § 431, 20 U.S.C. § 1232(d) (1976), with the experience of Congress with the Federal Energy Administration. Bruff and Gellhorn, *supra* note 4, at 1396, state that

[f]or its part, the FEA did not engage in the detailed negotiation over the substance of proposed rules that typified HEW's practice, perhaps because of the diminished role of the committee process. Instead, the FEA ordinarily tried to diffuse political opposition in advance by the substance or timing of its proposals. It then lobbied Congress from a relatively fixed position.

Compare the U.K.'s attitude toward control of rulemaking by the EEC, where the emphasis is placed on early scrutiny procedures. See SELECT COMM. ON EUROPEAN COMMUNITY SECONDARY LEGISLATION, SECOND REPORT, H.C. 463-I, at xvi-xxii, paras. 53-80 (1972-73); SELECT COMM. ON EUROPEAN SECONDARY LEGISLATION, & C., TWENTY-EIGHTH REPORT, H.C. 45-XXVIII (1974-75); Bates, *supra* note 6, at 24-25, 36-37.

71. H.C. 588, *supra* note 5, ch. 3, paras. 2-4; W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 127 (6th ed. 1974); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CAL. L. REV. 565, 574-75 (1954).

72. This Act was found to be too inflexible, and a large proportion of enabling statutes specifically excluded its application to them. The Act did not cover all rulemaking anyway, and even when it did apply publication was not a condition precedent to the enforceability of the rule. J. KERSELL, *supra* note 24, at 8; notes 33-35 *supra* and accompanying text.

73. Parliament does play a consultative role during the consideration of primary legislation, but even at this stage control is hampered by lack of information, lack of adequate research and secretarial facilities, and by the party system. J. GRIFFITH, PARLIAMENTARY SCRUTINY OF GOVERNMENT BILLS 232-57 (1974). For studies of facilities available to Members of Parliament, see THE HOUSE OF COMMONS SERVICES AND FACILITIES (M. Rush & M. Shaw eds. 1974); J. MORGAN, REINFORCING PARLIAMENT (PEP Broadsheet vol. XLII, no. 562, 1976). See also H.C. 588, *supra* note 5, paras. 6.34-46.

regularly exercises any control. The House of Lords has never annulled an instrument subject to the negative procedure and only once has rejected an instrument under the affirmative procedure;⁷⁴ but the reasons for this lack of participation of the Lords are not clear. One possible factor is that originally the Lords only scrutinized rules made under statutes relating to the supply of utilities, which were in the nature of private legislation.⁷⁵ Other reasons may include the fact that the House of Lords is not an elected chamber, and that it is effectively excluded from considering financial legislation.

III

SCRUTINY OF MERITS AND TECHNICAL SCRUTINY

The distinction between technical scrutiny and scrutiny of the merits, mentioned above,⁷⁶ is an essential part of the British system. As it plays no part in American legislative vetoes, it is important to examine it and the consequences of its use.

A. SCRUTINY OF MERITS

1. *Shortage of Time for Debate*

The effectiveness of scrutiny of rules continues to be hampered by the shortage of time for debate on the floor of the House. The Joint Committee on Delegated Legislation reported that in the 1970-71 session there were forty-eight notices of prayer to annul statutory instruments that were subject to the negative procedure. Of these, thirty-one were not debated and five were debated after the expiration of the period of annulment.⁷⁷ De-

74. H.C. 475, *supra* note 5, at xiii, para. 13. There is no difficulty finding time in the House of Lords to debate these matters. From 1960 to 1972 only 14 negative resolutions were moved—an average of just over one per session. *Id.* at xxx, xxxii, paras. 85, 91; *id.*, Minutes of Evidence, at 132.

75. This type of legislation relates to a particular locality or a particular person or agency—*e.g.*, British Rail, an individual, a local authority, or a corporation. The legislative process has some of the attributes of a judicial proceeding; evidence is presented and the promoters of the bill are represented by counsel. See E. MAY, *THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT* 840-1000 (18th ed. Sir B. Cocks 1971); E.C.S. WADE & G. PHILLIPS, *supra* note 9, at 180-81, 358-60.

76. See notes 41-42 & 51-57 *supra* and accompanying text.

77. H.C. 475, *supra* note 5, at xxxii, para. 95; *id.*, Minutes of Evidence, at 51; see *id.* at 62, 63, 134. An average of 500 negative instruments are laid each session, but 1970-71 was a busy year: 765 were laid. The Scrutiny Committee considered 314 and 16 were debated (5% of those considered, 2% of those laid), 11 within the annulment period (3.5% of those considered, 1% of those laid). *Id.* at 52, 134. The evidence taken by the committee established the following points: (1) debate rarely occurs on technical issues because of the classification by the Whips of instruments into "major" and "minor" categories, according to political importance, *id.* at 43, 53, 55-56, 137-39, and because of the necessity in the case of technical scrutiny for the Scrutiny

bates that take place outside the period in which an instrument can be annulled appear to be only of cosmetic value, although they may be useful in compelling administrators to explain their actions and to disclose information.⁷⁸ The lack of time for debate also affects consideration of instruments subject to the affirmative procedure. Affirmative instruments are often approved without discussion and sometimes wholesale. Where debate does occur it is rare to have more than two speakers,⁷⁹ which suggests that legislative control does not facilitate the resolution of issues of policy left open by primary legislation.⁸⁰ It was thought that enabling some debates on merits to be conducted in committee⁸¹ would improve the situation, but the Merits Committee has no power to make recommendations⁸² and has not been very effective.⁸³ Debate on the floor of the House is most likely to occur when the opposition party objects to a rule. It is least likely to occur when the objection comes from government backbench M.P.'s.⁸⁴ This is because government Whips—or party managers—generally refuse to set aside government time for such debates. Furthermore, the strength of the party system makes it difficult to be disloyal, particularly on an issue that is relatively unimportant.⁸⁵

The time problem does not in fact stem from an increase in the number of rules coming before Parliament, as this figure has remained fairly constant since 1954.⁸⁶ The problem is instead attributable to the fact that the legislature has made less time available for debate⁸⁷ and to the increased size and complexity of individual rules.⁸⁸ It also stems from inefficient use

Committee to consult the department before making an adverse report while time for annulment is running out, *see id.* at 148; (2) only serious technical defects are reported, *id.* at 35, and although normally the department gives a satisfactory explanation, often an assurance that the point will be dealt with in the future suffices to prevent an adverse report because everyone knows of the time problem, *id.* at 37, 145; and (3) sometimes it is more difficult to get a debate on a sensitive political issue due to government resistance, *id.* at 53-54, 134.

78. H.C. 475, *supra* note 5, Minutes of Evidence, at 60; H.C. 169, *supra* note 6, paras. 21-22; H.C. 588, *supra* note 5, ch. 3, para. 8; *id.*, app. 22, paras. 26-31.

79. *See* H.C. 475, *supra* note 5, Minutes of Evidence, at 167-72 app. 3.

80. Exceptions to this are where politically controversial issues are embodied in administrative rules. For instance, a dock labor scheme promulgated pursuant to the Dock Work Regulation Act, 1976, ch. 79, failed to get an affirmative resolution after debate of 90 minutes with 12 M.P.'s speaking. *See* 954 PARL. DEB., H.C. (5th ser.) 1289-382 (1978).

81. *See* note 56 *supra*.

82. *See* H.C. 475, *supra* note 5, Minutes of Evidence, at 113-14; H.C. 588, *supra* note 5, paras. 10, 16; note 102 *infra*.

83. *See* notes 101-05 *infra* and accompanying text.

84. H.C. 475, *supra* note 5, Minutes of Evidence, at 43, 53, 72, 138-39.

85. *Id.*, Minutes of Evidence, at 43.

86. *Id.* at 44, 52.

87. *See, e.g.*, notes 46-47 *supra* and accompanying text.

88. In 1955 there were 3,240 pages for 2,007 rules while in 1974 there were 8,667 pages for 2,213 rules. H.C. 588, *supra* note 5, at x-xi; *id.*, app. 1, paras. 19-36.

of the time available. For instance, debates on the merits frequently take place before an instrument has been subjected to technical scrutiny by the Joint Committee. The fact that in the 1976-77 session twenty-four such debates took place led the Joint Committee to describe the situation as making "a farce of the appointment of a Scrutiny Committee," and demonstrating the

lack of consideration shown to [the committee] and, more important, to the House by those responsible for arranging the business of the House in failing, in as many as 24 instances in a Session, to enquire about the progress of an instrument through the Committee before bringing it on for debate.⁸⁹

The Select Committee on Procedure has also been very critical of this practice, and both it and the Joint Scrutiny Committee have recommended the adoption of a requirement that no rule be considered by the House of Commons until the Scrutiny Committee has reported on its technical adequacy.⁹⁰ In the case of rules subject to the negative procedure, the Select Committee has further recommended that, if necessary, the brief period in which annulment is possible should be extended to ensure that technical scrutiny precedes debate on the floor of the House.⁹¹ These proposals have not been acted upon. The nonimplementation of earlier proposals—the first was in 1953—for extending the time for annulment under the negative procedure, or for changing the method of control to the affirmative procedure once the Scrutiny Committee issues an adverse report on a rule, suggest that reform is unlikely.⁹² There is still force in the view expressed in 1941 by the U.S. Attorney General's Committee on Administrative Procedure that the ineffectiveness of legislative control of rulemaking is attributable to "lack of desire rather than lack of opportunity,"⁹³ although other factors, such as the tight control over the business of the House of Commons exercised by the executive, are also important.⁹⁴

The difficulties caused by the shortness of time for annulment under the negative procedure⁹⁵ are increased by the absence of a requirement of

89. H.C. 169, *supra* note 6, paras. 21-22. At least two of these were later reported by the Scrutiny Committee on the ground that they were ultra vires and were withdrawn.

90. This already exists in the House of Lords for rules subject to affirmative resolutions: House of Lords Standing Order No. 68.

91. H.C. 169, *supra* note 6, paras. 21, 22; H.C. 588, *supra* note 5, paras. 10-18. *See also* H.C. 475, *supra* note 5, at xxxiv, para. 102.

92. *See, e.g.*, H.C. 310-I, *supra* note 46, at xxvi, para. 98; H.C. 538, *supra* note 48, at xxii-xxiii, para. 43 (recommendation 19). Even the Select Committee on Procedure, which was very critical of existing procedures, felt unable to make a firm recommendation on this. H.C. 588, *supra* note 5, para. 14.

93. ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, *supra* note 1, at 120; H.C. 588, *supra* note 5, paras. 10-18.

94. *See* notes 27-30 & 84-85 *supra* and accompanying text.

95. The 40 "sitting days" within which negative instruments must be annulled may in

prepromulgation consultation with M.P.'s.⁹⁶ It is noteworthy that a major concern of the House of Commons committee responsible for scrutinizing EEC secondary legislation has been to ensure that it has adequate notice of rules before their promulgation.⁹⁷ In the case of non-EEC rules, the fact that no such notice is given must weaken the effectiveness of legislative control.

Critics have pressed for more time for debate on the floor of the House, but in view of the increased amount of primary legislation being considered this would be difficult. In an effort to provide more time for technical scrutiny, the government has agreed to try to defer the operation of some negative instruments for twenty-one days after laying.⁹⁸ Twenty-one day deferral would also give more time for consideration of the merits, but unfortunately it is not uniformly adhered to.⁹⁹ This noncompliance, together with the sharp resistance to proposals relating to instruments subject to the negative procedure that sought either to extend the period for annulment or—once the Joint Committee had drawn the attention of Parliament to a rule—to change the method of control to the affirmative procedure,¹⁰⁰ suggests that no real improvement is likely.

practice be as few as 28 working days of the parliamentary session. Attempts to extend the period have failed. The Joint Committee on Delegated Legislation has stated that the question of extending the 40-day period should be considered again after the effects of its other proposals and the 21-day rule have been assessed. H.C. 475, *supra* note 5, at xxv-xxvi, xxxiv, paras. 63, 102; H.C. 407, *supra* note 5, at xliii, paras. 121-22; H.C. 468, *supra* note 5, at ix, para. 25. The committee did, however, suggest an amendment to the Statutory Instruments Act that would enable Parliament to extend the period by resolution of both Houses. H.C. 407, *supra* note 5, at xlv, para. 127. *Cf. id.* at xliii-xliv, paras. 123-26 (arguments for and against extending the time period). As yet, this proposal has not been implemented.

96. See text accompanying note 70 *supra*.

97. SELECT COMM. ON EUROPEAN COMMUNITY SECONDARY LEGISLATION, FIRST REPORT, H.C. 143 (1972-73) [hereinafter cited as H.C. 143]; H.C. 463-I, *supra* note 70; SELECT COMM. ON EUROPEAN SECONDARY LEGISLATION & C., FIRST SPECIAL REPORT, H.C. 46 (1974-75); Bates, *supra* note 6, at 30-35; H.C. 169, *supra* note 6, paras. 23-26, 28-36.

98. See H.C. 538, *supra* note 48, at xxiv, para. 48 (recommendation 22); 825 PARL. DEB., H.C. (5th ser.) 649-58 (1972); 325 PARL. DEB., H.L. (5th ser.) 238 (1971); H.C. 475, *supra* note 5, at xxv, para. 62; *id.*, Minutes of Evidence, at 197; H.C. 184, *supra* note 5.

99. The Joint Scrutiny Committee has reported that a high percentage of breaches are attributable to the process of decisionmaking in the EEC, and are sometimes outside the immediate control of the relevant British ministry. H.C. 169, *supra* note 6, paras. 13-16, 27.

100. See note 92 *supra* and accompanying text. These proposals were rejected in 1972, apparently on the grounds that technical issues are not necessarily most appropriate for discussion on the floor of the House, and that administrative problems would result if the date of operation of an instrument were affected after its laying. H.C. 475, *supra* note 5, at xxvi, xxx, paras. 65, 85; *id.*, Minutes of Evidence, at 111. The Joint Committee on Delegated Legislation did recommend a system for ensuring some priority for instruments drawn to the attention of the House by the Scrutiny Committee, H.C. 475, *supra* note 5, at xxxix, para. 125. See also H.C. 407, *supra* note 5, at xliii, para. 123; H.C. 588, *supra* note 5, ch. 3 (reiteration of the rejection of earlier proposals).

2. Operation of the Merits Committee

It is still early to assess the impact of the Merits Committee, but the Select Committee on Procedure has reported that it has several serious defects. First, although the committee has alleviated pressure on the floor of the House and has enabled more rules to be considered, it has increased the difficulty for ordinary Members of Parliament to move motions of annulment on the floor of the House. This is because ministers seek to refer rules to the committee once a motion of annulment has been made. Once a rule has been considered by the committee it can be brought to a vote on the floor of the House without notice or debate. One consequence of this is that rules subject to the negative procedure are now rarely considered on the floor of the House.¹⁰¹ Second, membership on the committee is not popular because Government Whips indiscriminately unload the routine business of the House onto the committee. Since this business would take little time on the floor of the House and is of little interest to Members, service on the committee is seen as a waste of time. This feeling is reinforced by the inability of the committee to take action on or even make recommendations on¹⁰² the instruments it reviews. There is little desire to serve on a committee that merely reports that it "has considered" a rule.

The Select Committee concluded that the Merits Committee is an "unsatisfactory procedural device which has failed to meet the real needs of the House."¹⁰³ It has suggested that the committee should have the power to make substantial recommendations and to recommend amendments to rules subject to the affirmative procedure.¹⁰⁴ It also suggested changes that,

101. H.C. 588, *supra* note 5, ch. 3, para. 10; *id.*, app. 22, para. 23. This is despite the fact that 20 M.P.'s have the power to block a reference to the committee, H.C. 475, *supra* note 5, at xxxvi-xxxviii, paras. 110-23; H.C. 588, *supra* note 5, ch. 3, paras. 10-19; *see* note 56 *supra*. The object, however, was to supplement, not to supplant, opportunities for debate on the floor of the House. H.C. 475, *supra* note 5, at xl, paras. 127-28.

102. The committee only has the power to "take note" of a rule. H.C. 475, *supra* note 5, at xxxvii, para. 116. This neutral report has failed to be passed on only six occasions since the 1974-75 session when the committee was established. Some 322 rules were referred to it in its first three years of operation. H.C. 588, *supra* note 5, ch. 3, paras. 10, 15-16, 18; *id.*, app. 22, para. 22.

103. H.C. 588, *supra* note 5, ch. 3, para. 10; *id.*, app. 22, para. 20.

104. In Britain there has never been power to amend rules. This is in contrast to some U.S. state veto provisions. *E.g.*, CONN. GEN. STAT. § 4-170 (1979); NEB. REV. STAT. § 84-904 (Cum. Supp. 1978). An earlier but more limited proposal—to give power to amend technical defects—was rejected. The proposal was made to get around the difficulty in finding time to debate negative instruments, *see* notes 77-78 *supra* and accompanying text. The general arguments against powers of amendment are that they (1) defeat the purpose of delegation by increasing the workload of the legislature, and (2) could compromise the value of consulting affected interests at the promulgation stage of rulemaking. H.C. 310-I, *supra* note 46, Minutes of Evidence, at 10-167; H.C. 475, *supra* note 5, at xxxi, para. 88; H.C. 588, *supra* note 5, ch. 3, paras. 19-21; *id.*, app. 22, paras. 26-28.

if implemented, would enhance the influence of individual Members of Parliament and facilitate debates on the merits.¹⁰⁵ Only time will tell whether these recommendations will be implemented, and if they are, whether they will improve matters significantly.

B. TECHNICAL SCRUTINY

Technical scrutiny is essentially a limited tool for control.¹⁰⁶ The Joint Scrutiny Committee clearly does have an important deterrent effect on administrative malpractice because of the publicity it can generate. The committee has improved standards of drafting considerably and has persuaded departments to avoid delay in laying rules before Parliament.¹⁰⁷ Its most powerful weapon against a rule, however, is to refer the rule to the full House. It can do no more. The inability of the committee to ensure that a prayer for annulment will be brought or a debate will occur once it reports adversely on a rule has already been discussed.¹⁰⁸ It is submitted that the committee's weakness is partly due to the distinction between merits and technical issues. Although not rigidly adhered to,¹⁰⁹ the distinction means that M.P.'s, who generally wish to debate merits and politically important issues,¹¹⁰ do not have a report on the very issues that interest them.¹¹¹ This

105. These proposals include a longer maximum time for debating rules subject to the affirmative procedure (2½ hours instead of 1½ hours), consideration of such rules that are approved at the commencement of public business, and provision for a debate where a rule is not approved or where approval is qualified. In the case of rules subject to the negative procedure the Select Committee recommended that, where the Merits Committee recommends that a rule be annulled, government time be allotted for a debate. If after seven days a debate has not been held, any Member could claim precedence over all public business for one hour of debate. H.C. 588, *supra* note 5, ch. 3, paras. 15-16.

106. See notes 41-42 *supra* and accompanying text; J. GRIFFITH & H. STREET, *supra* note 54, at 92. The limited nature of technical scrutiny is illustrated by the fact that the Joint Scrutiny Committee has expressed reservations on whether it is the appropriate body to review delegated legislation made during the continued period of direct rule in Northern Ireland. The committee reasoned that since such legislation fulfills the function of primary legislation, often adopting previously enacted British primary legislation, "the normal questions about vires, purport and drafting are therefore inapplicable." H.C. 184, *supra* note 5, at 10, para. 12; see H.C. 169, *supra* note 6, paras. 6-8. This function has now been taken away from the committee.

107. J. GRIFFITH & H. STREET, *supra* note 54, at 93-94; H.C. 588, *supra* note 5, para. 8.

108. See notes 77-100 *supra* and accompanying text.

109. See notes 123-31 *infra* and accompanying text.

110. J. KERSELL, *supra* note 24, at 49-50; Hanson, *The Select Committee on Statutory Instruments 1944-1949*, 1949 PUB. AD. 278, 281; Hanson, *The Select Committee on Statutory Instruments: A Further Note*, 1951 PUB. AD. 281, 282.

111. The fact that there is no requirement of prepromulgation consultation with Members of Parliament makes this a particularly serious problem. See text accompanying note 96 *supra*. It is arguable that the issues that the Scrutiny Committee presently considers could best be dealt with by rulemaking procedures such as those in the Administrative Procedure Act, 5

can only reduce the influence of the Scrutiny Committee and explains why debate on the floor of the House on technical issues is fairly uncommon.

Another weakness of technical scrutiny is that, although departments normally cooperate fully in responding to technical criticism by the Scrutiny Committee, they often do no more than assure the committee that the point criticized will be dealt with in the future. The particular instrument that attracted the criticism is thus left unaffected. The committee has contented itself with such assurances because of its limited terms of reference and the difficulty in getting its reports debated on the House floor.¹¹² Some departments have simply not followed the committee's recommendations to avoid certain drafting techniques,¹¹³ although this is rare. Professor H.W.R. Wade has stated that the importance of the committee's work is that "it gives government departments a lively consciousness that critical eyes are kept upon them. The fact that 2 per cent or less of the instruments scrutinized are reported to the House is in part a measure of the Committee's success in establishing a standard."¹¹⁴ In view of the difficulty in ensuring any further control once an adverse report has been made, the low percentage of reports made to the House may in fact reflect the committee's desire to maximize the likelihood of a debate on rules that have really serious defects. Mr. Albert Booth, M.P., a former chairman of the House of Commons Scrutiny Committee, certainly adhered to this view.¹¹⁵ The situation could improve, however, if the Joint Committee on Delegated Legislation's recommendation that priority in debate be given to instruments reported to the House is adopted.¹¹⁶

These weaknesses do not, however, mean that technical scrutiny can never be used as a broad tool for control. The Joint Scrutiny Committee has criticized the "recurring tendency of Departments to seek to by-pass Parliament" by omitting necessary details from instruments, thus conferring upon themselves wide discretion to vary or add to the provisions of an instrument instead of making a new instrument that would itself be subject to

U.S.C. §§ 551-706 (1976); see *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973); text accompanying notes 150-54 *infra*.

112. Recently the committee's terms of reference were extended, however, to include "any . . . ground which does not impinge on [a rule's] merits or on the policy behind it." H.C. 475, *supra* note 5, at xxiv, para. 59. For a discussion of the committee's jurisdiction, see notes 52-54 *supra* and accompanying text.

113. For instance, in 1974 the committee recommended that in drafting an order subject to a financial limitation the instrument should indicate on its face that it does not exceed the limitation. SELECT COMM. ON STATUTORY INSTRUMENTS, THIRD REPORT, H.C. 22-iii (1974-75). But this was overlooked in drafting the Compensation for Limitation of Prices Order (Northern Ireland) 1976, 1976 STAT. R. & O. N.I. No. 1. H.C. 54-x (1975-76).

114. H.W.R. WADE, *supra* note 20, at 735.

115. H.C. 475, *supra* note 5, Minutes of Evidence, at 35, 37, 145.

116. See note 100 *supra* and accompanying text.

parliamentary control.¹¹⁷ While recognizing that the need for executive flexibility is one of the justifications for granting delegated powers in the first place, the committee stated that the corollary of this "must be that the delegated legislation itself should be detailed, specific and self-explanatory and should not depend on the exercise of ministerial or departmental discretion unless provision to that effect is expressly contained in the enabling Statute."¹¹⁸ The committee felt that rules should not be made by departmental circular when Parliament had enacted a statute providing that they were to be made by statutory instrument subject to further parliamentary scrutiny.

Although in the past successive Joint Committees have accepted "administrative inconvenience" as a reason for rejecting proposals for reform,¹¹⁹ the most recent Special Report from the Joint Scrutiny Committee contains some of the sharpest criticism of the executive yet seen. The committee was disturbed "by what appears to be an astonishingly casual attitude on the part of the Executive" toward the practice of laying rules before Parliament in manuscript form without a printed version appearing until well after the rule has become law.¹²⁰ This, the committee said, amounts "on the face of it to a cynical disregard of the rights of the subject" to know the law,¹²¹ and the strength of this language may foreshadow more vigorous control by the legislature. The evidence of the past, however, does not encourage optimism.

C. UTILITY OF THE DISTINCTION

The Joint Scrutiny Committee does not always adhere to the distinction between scrutiny of merits and technical scrutiny. Sir Cecil Carr admitted that the House of Commons Scrutiny Committee sometimes "peep[ed] at the merits,"¹²² and this is still the case. For instance, in the evidence taken by the committee in relation to the Welfare Food Order

117. H.C. 169, *supra* note 6, paras. 9-12. The committee gave as an example the retention of power to specify the amounts of certain educational grants. The amounts were specified by regulation, but the regulation went on to give to the minister the power to set aside the amounts specified and to substitute other grants. Although it is possible to delegate power to amend acts of Parliament, H.W.R. WADE, *supra* note 20, at 700-01, such delegation requires express authority.

118. H.C. 169, *supra* note 6, para. 12. For judicial disapproval of a similar practice, see *Laker Airways Ltd. v. Department of Trade*, [1977] 1 Q.B. 643 (C.A.).

119. See notes 92 & 100 *supra*.

120. See H.W.R. WADE, *supra* note 20, at 725-28 (discussion of the effect of nonpublication on validity). The better view is that nonpublication does not normally affect the validity of an instrument. *But see* Lanham, *Delegated Legislation and Publication*, 37 MOD. L. REV. 510 (1974).

121. H.C. 169, *supra* note 6, paras. 17-18.

122. Carr, *supra* note 2, at 1055.

1975¹²³ and the Counter-Inflation (Price Code) (Amendment) Order 1976,¹²⁴ some of the questions indicated the committee's concern with the method chosen to protect consumers,¹²⁵ which is surely an issue of policy. This was particularly true in the case of the latter order, which was concerned only with making lists of protected goods. The tendency to blur the distinction is increased by the committee's custom of taking evidence from outside bodies and its practice of giving reasons for reporting an instrument.

The distinction is also breaking down in the context of control of European Community rules. The House of Lords Select Committee on the European Communities considers the policy of a rule and whether its strategy can be improved.¹²⁶ The House of Commons Committee on European Secondary Legislation is only supposed to identify matters of legal or political importance and not to consider merits.¹²⁷ But the criteria of "importance" have been flexible enough to include indirect consideration of merits.¹²⁸ The experience of this House of Commons committee and the report of the Joint Committee on Delegated Legislation both suggest that "merits" means political content,¹²⁹ but this is rather vague. In 1946 the clerk of the House of Commons suggested that the Scrutiny Committee should consider "the merits of an instrument *as an exercise of the power delegated,*"¹³⁰ but at the time this was rejected. Although this test might draw the committee into controversy, such power is vital, and indeed it arguably falls within the heading "unusual or unexpected use of power" in the committee's present terms of reference.¹³¹

As mentioned above,¹³² the distinction between scrutiny of technical defects and merits has reduced the influence of the Scrutiny Committee. Because of the distinction, the committee tends to focus on those issues that could best be dealt with by rulemaking procedures of the type provided for

123. 1975 STAT. INST. NO. 1686.

124. 1976 STAT. INST. NO. 71.

125. See JOINT COMM. ON STATUTORY INSTRUMENTS, THIRD REPORT, H.C. 54-iii (1975-76); JOINT COMM. ON STATUTORY INSTRUMENTS, EIGHTH REPORT, H.C. 54-viii (1975-76); JOINT COMM. ON STATUTORY INSTRUMENTS, NINTH REPORT, H.C. 54-ix (1975-76).

126. Bates, *supra* note 6, at 26 & n.26.

127. *Id.*, at 26-27; H.C. 463-I, *supra* note 70; SELECT COMM. ON PROCEDURE, FIRST REPORT, H.C. 294 (1974-75) [hereinafter cited as H.C. 294], Minutes of Evidence, at 44, para. 135.

128. Bates, *supra* note 6, at 27-28, 35-36.

129. H.C. 475, *supra* note 5, at xvii, para. 29.

130. SELECT COMM. ON PROCEDURE, THIRD REPORT, 189-I, Minutes of Evidence, at 353, para. 39 (1945-46) (emphasis in original) [hereinafter cited as 189-I]; see J. KERSELL, *supra* note 24, at 49-50.

131. See 189-I, *supra* note 130, at 250, para. 4669.

132. See notes 109-11 *supra* and accompanying text.

in the United States by the Administrative Procedure Act. Technical issues are of little concern to the politicians who, under the British system, ultimately decide whether they are significant enough to warrant debate. The fact that the distinction is not adhered to rigidly suggests that, apart from insulating the Scrutiny Committee from some political pressure, it has no real advantage.¹³³

IV

LESSONS FROM THE BRITISH EXPERIENCE

The British system of legislative veto has proved less than satisfactory in rendering administrators accountable to their political superiors and protecting those affected by administrative rules. This limited success stems from many factors. These include de facto executive control of the legislature, the unavailability of information about the substance of a rule in the time available for control, the limited time available for debate, and the apparent unwillingness of Members of Parliament to take an interest in scrutiny, especially of technical infirmities.

It could be argued that a general veto in the United States would be free from these defects. Many of the administrative agencies are independent, the executive by no means controls Congress, members of Congress—unlike Members of Parliament—have staffs available to research issues, and Americans pay little attention to the distinction between “merits” and “technical issues.”¹³⁴ Furthermore, in the United States rule-making procedures under the Administrative Procedure Act are completed before the veto stage is reached, bringing controversial issues into the open by then.¹³⁵

These factors, coupled with the different constitutional position of the United States, may persuade some that the British experience is not instructive in assessing the utility of the legislative veto in the United States. Consideration should be given, however, to the fact that Congress would have to deal with a far greater number of rules than the average of about 1,000

133. The Joint Committee on Delegated Legislation recommended that the distinction be “rigidly maintained,” see note 57 *supra* and accompanying text, but somewhat inconsistently rejected a power to amend technical defects on the ground that distinguishing these from issues of policy would be too difficult. H.C. 475, *supra* note 5, at xxxi, paras. 86-90.

134. See Schubert, *Legislative Adjudication of Administrative Legislation*, 7 J. PUB. L. 135, 160-61 (1958); Newman & Keaton, *supra* note 71, at 572-73. The legislative veto over the Department of Health, Education and Welfare’s Office of Education is, however, limited to inconsistency with the statutory authority. General Education Provisions Acts, § 431, 20 U.S.C. § 1232(d)(1) (1976).

135. See Bruff & Gellhorn, *supra* note 4, at 1389, 1412-14.

per year considered by the British Scrutiny Committee.¹³⁶ This, together with the fact that records produced under U.S. rulemaking procedures are often extremely lengthy,¹³⁷ suggests that a general veto could only provide haphazard control in the United States.¹³⁸ If this is the case, the British experience is of some value because it demonstrates what can happen when an overburdened legislature takes on a task of this kind. Together with the experience of U.S. state legislatures that have attempted to operate a general veto provision,¹³⁹ Britain's experience suggests that the overall impact of a general legislative veto is unlikely to be beneficial.

The Bruff and Gellhorn study shows that a significant constraint on the thoroughness of legislative control is the heavy workload of Congressmen and their staffs.¹⁴⁰ In Britain there is evidence that it is difficult to persuade Members of Parliament to sit on new committees because of their workload.¹⁴¹ The problems in the two countries would appear to be similar in this respect. Arguably the introduction of a general veto in the United States could divert attention from other legislative techniques of control available to Congress—for instance, control by oversight committees,¹⁴² watchdog committees, investigations, or limited expenditures.¹⁴³ It is also important to note that Parliament does not have as sophisticated a committee system as Congress has.¹⁴⁴ The need for direct legislative scrutiny of administrative rules may therefore be greater in Britain, even though such scrutiny has not proved to be an efficient technique for controlling rulemaking.

Those who argue for a general legislative veto in the United States

136. Senator Abourezk has stated that in 1974 there were 428 new rules and proposed rules, and 8,686 amendments and proposed amendments. In 1975 the figures were 486 and 9,861 respectively. Abourezk, *supra* note 17, at 323.

137. K. DAVIS, *ADMINISTRATIVE LAW* 245-47 (6th ed. 1977); Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929, 944 (1950); Note, *The Federal Register and the Code of Federal Regulations—A Reappraisal*, 80 HARV. L. REV. 439 (1966).

138. See Bruff & Gellhorn, *supra* note 4, at 1414-16, 1423-24, 1427-28; Watson, *supra* note 11, at 1073.

139. See, e.g., Schubert, *supra* note 134; F. HEADY, *ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES* 49-62 (1952).

140. Bruff & Gellhorn, *supra* note 4, at 1415-16.

141. H.C. 475, *supra* note 5, Minutes of Evidence, at 47-48, 64, 128-29. See also H.C. 588, *supra* note 5, at ix-xi; *id.*, ch. 3, para. 10; *id.*, app. 22, paras. 18, 22.

142. Jones, "Oversight" Function of Congressional Standing Committees, 34 A.B.A.J. 1018 (1948); Galloway, *The Operation of the Legislative Reorganization Act of 1946*, 46 AM. POL. SCI. REV. 41 (1951).

143. See W. GELLHORN & C. BYSE, *supra* note 71, at 109-22; Macmahon, *Congressional Oversight of Administration: The Power of the Purse-II*, 58 POL. SCI. Q. 380 (1943).

144. See E.C.S. WADE & G. PHILLIPS, *supra* note 9, at 195-97; H.C. 588, *supra* note 5 (radical reforms suggested by the Select Committee on Procedure).

recognize that Congress is unlikely to want to review the majority of non-controversial rules,¹⁴⁵ but they overlook the fact that "if in practice Congress does not exercise the veto power assiduously, the broader delegations of authority which it fosters may result, contrary to expectations, in a net decrease in control over agency discretion."¹⁴⁶ The very small number of debates in the House of Commons and the fact that they often occur before a rule has been considered by the Scrutiny Committee¹⁴⁷ illustrate this point.

It is also important to allow sufficient time for legislators to inform themselves of the issues involved. Without such a period there is a danger that they will not take any interest and leave themselves open to manipulation by administrators.¹⁴⁸ For this reason the suggestion¹⁴⁹ that legislative vetoes should be seen as analogous to the President's duty to approve or veto statutes within ten days must be rejected. The British experience directly contradicts the view that the problems of haphazard control will be resolved by strictly limiting the period available for control.

Finally, the notice and comment procedures imposed by the Administrative Procedure Act¹⁵⁰ and other statutes form one of the cornerstones of administrative law in the United States. Whether or not one agrees with Professor K.C. Davis that these procedures are "one of the greatest inventions of modern government,"¹⁵¹ it appears that they avoid many of the defects of legislative scrutiny of rulemaking. First, they provide a more efficient method of control in that they take place before rules are drafted and at a time when administrators are more likely to be sensitive to the opinions of others. Second, the procedures provide sufficient time for legislators to inform themselves of the issues involved and thus minimize the probability of inertia.

These factors suggest that, despite a tendency of courts to over-judicialize,¹⁵² rulemaking procedures are a more effective method of control than the legislative veto.¹⁵³ The veto may be useful where rulemaking

145. *House Hearings*, *supra* note 4, at 146 (only a few of the numerous rules promulgated by the bureaucracy "will require close scrutiny by Congress").

146. Bruff & Gellhorn, *supra* note 4, at 1424. *See also id.* at 1379-80, 1437-38.

147. *See* text accompanying notes 89-94 *supra*.

148. *See* notes 68, 71-72, 95 & 110-11 *supra* and accompanying text; Bruff & Gellhorn, *supra* note 4, at 1388, 1393-95, 1414.

149. Professor Arthur Miller and George Knapp have made this suggestion. Miller & Knapp, *supra* note 17, at 394.

150. 5 U.S.C. § 553 (1976).

151. K. DAVIS, *supra* note 137, at 241.

152. *E.g.*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); *International Harvester Inc. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

153. For the concern for prepromulgation notice when EEC rules are scrutinized, see note 97 *supra* and accompanying text. The very existence of legislative scrutiny might inhibit other,

procedures do not exist, but where they do the existence of a legislative veto as well may undermine their effectiveness and subject administrators to undesirable influences.¹⁵⁴

CONCLUSION

The experience of the British system of legislative control of rule-making does not support the suggestion made in 1955 by Professor Schwartz that "it would be most worthwhile to attempt the importation of the essentials of the English techniques of Parliamentary control . . . , particularly those of laying subject to legislative annulment and the aiding of the legislature itself by a select scrutinizing committee."¹⁵⁵ Professor Schwartz rejected the conclusion of the U.S. Attorney General's Committee on Administrative Procedure that general legislative review of administrative regulations "has not been effective where tried"¹⁵⁶ on the grounds that the committee's report was unsupported by evidence, that "most observers of the English system would strongly disagree" with it, and that the report predated the establishment of the Scrutiny Committee and therefore did not consider it.¹⁵⁷

It is submitted that the recent reports of the Joint Scrutiny Committee, the Joint Committee on Delegated Legislation, and the Select Committee on Procedure provide the missing evidence.¹⁵⁸ Events have shown that the confidence displayed by Professor Schwartz and Sir Cecil Carr¹⁵⁹ in the British system was misplaced. The restrictions on time for debate, in particular the "11:30 rule," and the shortness of the time period for scrutiny have always been major problems, but they appear to have been overlooked by both writers. The limited jurisdiction of the British Scrutiny Committee

potentially more effective methods of control, such as judicial review. The fact that British courts in some cases, contrary to principle, have hesitated to review any rule that has been approved by Parliament evidences this. See *F. Hoffman-La Roche & Co. v. Secretary of State of Trade and Indus.*, [1975] 1 A.C. 295, 316-17, 321-23 (C.A.) (Lord Denning M.R. and Buckley L.J.) (an order made by statutory instrument acquires the status of an act of Parliament if approved by resolution of both Houses). The House of Lords refused to adhere to this heterodox view, [1975] 1 A.C. at 349, 354, 365, 372. See Wallington, *Natural Justice and Delegated Legislation*, 33 CAMBRIDGE L.J. 26, 30-31 (1974); 90 LAW Q. REV. 436, 439 (1974). See also *McEldowney v. Forde*, [1971] A.C. 632, 648-49 (Lord Guest). For a critical discussion of this case, see McCormick, *Delegated Legislation and Civil Liberty*, 86 LAW Q. REV. 171 (1970). For the position in the United States, see Bruff & Gellhorn, *supra* note 4, at 1429-33.

154. Bruff & Gellhorn, *supra* note 4, at 1412-14.

155. Schwartz, *supra* note 3, at 1035.

156. ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, *supra* note 1, at 120.

157. Schwartz, *supra* note 3, at 1035.

158. See authorities cited in note 5 *supra*; H.C. 169, *supra* note 6.

159. See Carr, *supra* note 2.

was noted with apparent approval,¹⁶⁰ but in fact the artificial separation of merits from technical issues has substantially impeded the effectiveness of the British legislative veto. The continued pressure for reform of the system, which led to the establishment of the new Joint Scrutiny Committee and the Merits Committee, among other innovations, gives some indication of the problems with the system. Moreover, the latest reports from the Joint Scrutiny Committee and the Select Committee on Procedure¹⁶¹ suggest that despite the recent reforms the defects have not been cured.

The British experience clearly demonstrates that legislative control of rulemaking is rarely effective in resolving issues of policy¹⁶² and that there is little interest in legislative scrutiny, especially of technical defects.¹⁶³ If vetoes are to be used at all, they should be used only where they are likely to be effective. The evidence, both in the United States and in Britain, suggests that they may be effective where the resolution of politically sensitive issues has been left to rulemaking.¹⁶⁴ Where used as a general technique for controlling administrators, the defects of the legislative veto outweigh its perceived advantages.

160. *Id.* at 1051.

161. H.C. 169, *supra* note 6; H.C. 588, *supra* note 5; *see* text accompanying notes 89 & 120 *supra*.

162. *See, e.g.*, note 80 *supra* and accompanying text. The Bruff and Gellhorn study suggests that this is true even where legislators take an interest in the operation of the legislative veto. Because the veto is negative in its impact, any disagreement between the legislature and administrators will leave a policy vacuum. Bruff & Gellhorn, *supra* note 4, at 1428.

163. *See* notes 109-21 *supra* and accompanying text; Bruff & Gellhorn, *supra* note 4, at 1429-33.

164. *See* notes 77 & 126-29 *supra*; notes 126-29 *supra* and accompanying text.