

**LEGISLATIVE OVERSIGHT OVER ADMINISTRATIVE RULEMAKING
(PUBLIC SECURITY):
AN ANALYSIS OF THE US AND THE UK AND ITS APPLICATION FOR
GEORGIA**

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LLM SHORT THESIS

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Abstract

When the legislative branch delegates lawmaking power to the executive the problem to legitimize such delegation arises. The present thesis chooses to talk about the importance of political control in the form of legislative oversight over administrative rulemaking. It tries to explore what the main tools are in the hands of the legislators in the UK and the US to effectively scrutinize rulemaking activity of the executive bureaucracy. Based on the analysis of the legislative oversight process of the above mentioned states the thesis will propose suggestions for Georgia to politically legitimize administrative rulemaking especially in the sphere of public security.

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INTRODUCTION

All countries that follow the traditional principle of separation of powers encounter problems¹ related to delegated legislation,² the need of which comes from the necessity of saving the working time of Parliament.³ It is true that the development of the whole detailed legislation is not convenient for any Parliament.⁴ Therefore, Parliament transfers legislative power to the executive authorities.

In the United States, as well as in the UK⁵ and Georgia, delegated legislation is considered a prerequisite requirement of the principle of separations of powers⁶ and the specific form of bureaucratic decision-making.⁷ In the United States, rulemaking is one of the most important functions, performed by governmental agencies⁸ by which they go from rough and non-existing rules, stipulated in statutes, to detailed and well-defined rules,⁹ legally binding requirements, which are used by society, agencies and the court.¹⁰

¹ Hermann Punder, "Democratic Legitimation of Delegated Legislation-A Comparative View on the American, British and German Law," *International Comparative Law Quarterly*, Vol. 58(2), 2009, p. 353

² Delegated lawmaking is the power, specifically granted for the adoption of administrative decisions, Aileen McHarg, "What is Delegated legislation?" *Journal Public Law*, issue AUTUM, 2006, p. 557. This power is directed towards the achievement of economy and efficiency, as well as improvement of public activities, Derek P. Langhauser, "Executive Regulations and Agency Interpretations: Binding Law or More Guidance? Development in Federal Judicial Review," *Journal of College and University Law*, Vol. 29, (part 1), 2002, p. 6.

³ Stephen H. Bailey, *Cases, Materials and Commentary on Administrative Law*, 4th ed., Sweet and Maxwell, London, 2005, p. 206.

⁴ Seerden J.G.H. Rene, *Administrative Law of the European Union, its Member States and the United States - A Comparative Analysis*, 2nd ed., Intersentia, Antwerpen-Oxford, 2007, p. 233.

⁵ As Barnett notes in 1972 Parliament's Joint Committee on Delegated legislation defined subordinate legislation "as covering every exercise of power to legislate conferred by or under an Act of Parliament," Hilaire Barnett, *Constitutional and Administrative Law*, 7th edition, Routledge-Cavendish, 2009, p. 374.

⁶ William Wade, and Christopher Forsyth, *Administrative Law*, 9th ed., Oxford: Oxford University Press, New York, 2004, p. 857.

⁷ Julia Black, *Rules and Regulations*, Oxford: Oxford University Press, New York, 1997, p. 213.

⁸ Kenneth F. Warren, *Administrative Law in the Political System*, 4th ed., Westview Press, 2004, p. 213.

⁹ Kenneth C. Devis, *Discretionary Justice: A Preliminary Inquiry*, Louisiana State University Press, Baton Rouge, 1969, p. 219.

¹⁰ Charles H. Koch. Jr., Jordan William S. Jordan III and Richard W. Murphy, *Administrative Law, Cases and Materials*, 5th ed., Mathew Bender and Company, San-Francisco, 2006, p. 183.

Thus, administrative rulemaking is the administrative equivalent of legislative process,¹¹ which ends in rules and completes the legislative process.¹² On the one hand, administrative rulemaking is invaluable, if we consider that executive authorities have the competence of making a better decision in regard to this or that sphere of public life; on the other hand, granting unlimited power to executives, who are not directly elected by people is a “problematic” issue.¹³ So the problem of legitimating of delegated power comes to the agenda, which can be solved in various ways.

Among different methods of legitimating delegated legislation such as public participation in administrative rulemaking or judicial scrutiny of bureaucracy, I will argue that one of the most effective means to control the executive is legislative oversight over government activities. As Elliot mentions: “While the risk of abuse of power means that the executive cannot be allowed to legislate without any sort of checks, judicial review in this sphere...while important, is not sufficient.”¹⁴ it is necessary for delegated legislation to be scrutinized not just in legal, but also in political and policy, terms – a function which Parliament is better placed than the courts to discharge.”¹⁵

Thus, I will suggest that executive rulemaking especially in the sphere of public security, one of the most developing aspects of the executive activity, requires the active interference from the legislative branch which is directly elected by the people and has more power to

¹¹ Daniel E. Hall, *Administrative Law Bureaucracy in a Democracy*, 2nd ed., Prentice Hall, Upper Saddle River, New Jersey, 2001, p. 110.

¹² As professor Kerwin states, “Rulemaking is the most important device,” which could be used by Federal agencies for promotion, definition and perfection of working product of Congress. For details, see Steven Croley, “Making Rules: An Introduction, How Government Agencies Write Law and Make Policy by Cornelius M. Kerwin,” *Michigan Law Review*, Vol. 93, 1995, p. 1512.

¹³ Steven J. Balla, “Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking,” *I/S: A Journal of Law and Policy for the Information Society*, Vol. 1, 2004/2005, p. 60. As Leyland mentions it :“It would appear that the trend towards delegation of powers by Parliament to the executive and other agencies, confirms that there has been a discernible shift of power away from parliamentary procedures providing for accountability and thus democratic control,” Peter Leyland, Gordon Anthony, *Administrative Law*, 6th edition, Oxford University Press, 2009, p. 122.

¹⁴ As Endicott puts it if parliament does not control delegated legislation then “judges do not have any techniques to fill a constitutional vacuum left by spineless backbenchers, excessive party discipline, or a weak opposition.” Timothy Endicott, *Administrative Law*, second edition, Oxford: Oxford University Press, 2011, p. 56.

¹⁵ Mark Elliot, *Administrative Law, Texts and Materials*, 3rd ed., Oxford: Oxford University Press, 2005, p. 648.

control the activities of appointed agency officials.¹⁶ As an example I will use the experience of the US and the UK where the legislative oversight of executive branch is legally regulated.

It is interesting to note that despite the fact that in Georgia there is the General Administrative Code and the law on Normative Acts which govern the procedure of issuance of government regulations, these legal acts have no provisions underlining the necessity of parliamentary scrutiny. Thus, there exists a real need to adopt a legal basis for legislative oversight of government activities in Georgia. Therefore it will be beneficial to study the merits and flaws of the abovementioned systems as the analysis conducted during the research will help to find the most appropriate solution in the form of legislative oversight of executive activities which will eventually aid to legitimize the process of delegation in Georgia.

In contrast with Georgia in the United States of America and the United Kingdom there are special normative acts, Congressional Review Act (CRA) 1996 in the US¹⁷ and the Statutory Instruments Act 1946 in the UK,¹⁸ that regulate the legislative control process of governmental rulemaking. In addition to the legislative framework, there are examples how the norms related to legislative control of executive rulemaking are implemented in practice.¹⁹ Therefore I will provide different arguments concerning the effectiveness of

¹⁶ For instance Oliver cites Norton who mentions it correctly that: "The place of parliament is not to substitute the judgment of parliamentarians for that of the regulators. Rather, the role of parliament is to determine whether regulatory bodies are working as intended and whether they are operating effectively and efficiently." Dawn Oliver, Tony Prosser, Richard Rawlings, *The Regulatory State: Constitutional Implications*, Oxford University Press, 2010, p. 252.

¹⁷ As Skrzycki mentions: "CRA was crafted to give Congress overarching authority to review final rules and eliminate them under very streamlined procedures," Cindy Skrzycki, *The Regulators, Anonymous Power Brokers in American Politics*, Rowman and Littlefield Publishers, 2003, p. 157.

¹⁸ The laying before parliament of delegated legislation is regulated by the Statutory Instrument Act of 1946, Peter Leyland, Gordon Anthony, *Administrative Law*, 6th edition, Oxford: Oxford University Press, 2009, p. 123.

¹⁹ For example in *Associated Provincial Picture House Ltd v Wednesbury Corporation* Lord Greene underlined that decision-makers violate law if they not follow "relevant considerations" given in parent acts. In addition in *Padfield v minister of Agriculture Fisheries and Food*, the Houses of Lords announced that: "the statutory discretion must not be used to frustrate the purpose of the statute which confers it." Ian McLeod, *Principles of Legislative and Regulatory drafting*, Oxford and Portland, Oregon, 2009, pp. 168-169.

legislative oversight procedure over executive rulemaking based on the examples of the United States and the United Kingdom and try to find effective solution

While conducting the research different sources will be examined. For the aims of the study I will explore both the theoretical background and practices established with regard to the legislative oversight procedure of executive rulemaking as empirical analysis conducted in relation with this issue will be essential to properly address the thesis question.

Thesis will have three chapters and final recommendations. In the first chapter I will explain the meaning of legislative oversight and enumerate different forms of legislative control over administrative rulemaking making a comparison between them and underlining which of them plays important role in the control of administrative bureaucracy. In chapter two I will discuss the function of legislative veto in the oversight process of government activities and emphasize the flaws and merits of the usage of legislative veto²⁰ for the control of executive agencies. In chapter three I will finalize the legislative oversight procedure by underlining the role of legislative committees and offices in overseeing administrative activities. Finally recommendations made in the conclusion will provide the legislators with analysis of what forms of legislative control will be useful to effectively control delegated legislation and will encourage researchers to promote the importance of legislative oversight.

²⁰ Which according to James R. Bowers: “is institutional tool designed to promote the institutional integrity of Congress...by securing the accountability of administrative agencies to the rule of law.” James R. Bowers, *Regulating the Regulators, an Introduction to the Legislative Oversight of Administrative Rulemaking*, New-York Westport, Connecticut, London, 1990, p. 26.

1. THE IDEA AND FORMS OF LEGISLATIVE OVERSIGHT

When legislators delegate their power to legislate to executives the issue of controlling such delegation arises²¹ and the legislative branch is destined to ensure that those who perform legislative tasks stay accountable to legislators for the “decisions they make and also for the manner in which they make them.”²² It is interesting that the problem of delegation²³ interests not only lawyers, but also economists who propose different suggestions on how to control legislative behavior of unelected officials.²⁴ One such suggestion underlines that while delegating powers to the executive parliament has to provide for “some parliamentary control or oversight to be built into the use of specific powers.”²⁵

Thus, in this chapter I will discuss the role of legislative oversight, its main idea and analyze different forms of legislative oversight underlining which of them are more appropriate to use with regard to particular administrative rulemaking.

1.1 The Idea of Legislative Oversight

Different authors provide various interpretations of legislative oversight. For some scholars “Legislative oversight process can be described as a chain, and the oversight potential should

²¹ As Endicott notes: “accountability is a fundamental requirement for responsible government, because public officials cannot be trusted to act responsibly if they don’t have to face up to anyone.” Timothy Endicott, *Administrative Law*, second edition, Oxford: Oxford University Press, 2011, p. 25, Accountability issue is underlined also by Hall and Miler who emphasize that: “responsiveness of public agencies to elected officials is a basic issue in the study of democratic institutions,” Richard L. Hall, Kristina C. Miler, “What Happens After the Alarm? Interest Group Subsidies to Legislative Overseers,” *The Journal of Politics*, Volume 70, No 4, October 2008, p. 1002.

²² Cornelius M. Kerwin, *Rulemaking How Government Agencies Write Law and Make Policy*, 3rd edition, CQPress, Washington, D.C., 2003, p. 212.

²³ It is discussed in legal literature how to cure delegated legislation and “how to best ensure that this unavoidable fact of political life departed as little as possible from orthodox constitutional understandings of legislative/executive relationship,” Ian Loveland, *Constitutional Law, Administrative Law and Human Rights, A critical introduction*, 5th edition, Oxford: Oxford University Press, 2009. p. 139.

²⁴ Mathew D. McCubbins, Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” in *Economics of Administrative Law*, edited by Susan Rose Ackerman, An Elgar Reference Collection, Cheltenham, UK-Northampton, MA, USA, 2007, p. 86.

²⁵ A.W. Bradley, K.D. Ewing, *Constitutional and Administrative Law*, 14th edition, Pearson Longman, 2007, p. 682.

be considered as one of its important links.”²⁶ Others try to explain what legislative oversight is by citing various scientists. For instance Chen Friedberg cites the nineteenth century English philosopher John Stuart Mill, according to which one of the primary functions of the legislator is to control executive branch, provide public with the content of government’s activities, ensure accountability of government, sanction it and in exceptional cases refuse to provide the executive branch with necessary aid. Chen Friedberg also mentions that for Ogul²⁷ legislative oversight is the activity performed by the legislative branch either collectively or through individual members in order to affect the executive’s behavior. Chen Friedberg goes further and cites Gregory²⁸ for whom legislative oversight is a broader concept which consists of four elements. The first refers to scrutinizing executive; the second relates to sanctioning it, the third and the fourth unite types of sanctions used which means that in case of third element legislator utilizes disciplinary sanctions, while the fourth aspect of legislative oversight covers “punitive” sanctions. When summarizing the proposed aspects of legislative scrutiny it becomes obvious that Gregory talks about two types of parliamentary oversight: the first is “political parliamentary” and the second “administrative parliamentary” oversight. The former is widespread in parliamentary systems such as the UK, where the functioning of the government greatly depends on the will of the legislature.²⁹ As Endicott mentions in England Parliament scrutinizes executive “in the national interest” as a representative branch of government³⁰ and despite the fact that the Committee on Ministers to Powers announced that “skeleton legislation” that includes only general provisions and leaves the regulation of details to the executives should not become the rule the position was

²⁶ Chen Friedberg, From a Top-Down to a Bottom-Up Approach to Legislative Oversight, *The Journal of legislative Studies*, 17:4, 2011, p. 527.

²⁷ Ogul, M.S., (Congress Oversees the Bureaucracy. Pittsburgh, PA: Pittsburgh University Press, 1976. p. 11) in Chen Friedberg, “From a Top-Down to a Bottom-Up Approach to Legislative Oversight,” *The Journal of legislative Studies*, 17:4, 2011, p. 525-526.

²⁸ Gregory, R., (Parliamentary Control and the Use of English. *Parliamentary Affairs*, 43 (1), 1990, 59–77) in Chen Friedberg, “From a Top-Down to a Bottom-Up Approach to Legislative Oversight,” *The Journal of legislative Studies*, 17:4, 2011, p. 525-526.

²⁹ *Ibid.*, p. 525-526.

³⁰ Timothy Endicott, *Administrative Law*, second edition, Oxford: Oxford University Press, 2011, p. 56.

changed with the rise of delegated legislation and creation of the House of Lords special committee for the scrutiny of delegated powers.³¹ Thus, in the UK, parliamentary control of delegated legislation is the usually used form of control of public bureaucracy.

Legislative oversight of the executive branch is known in Presidential systems such as the US. The interesting issue is “to what extent³² and in what way Congress attempts to detect and remedy executive-branch violation of legislative goals.”³³ To define legislative oversight Smith cites the Congressional Research Service according to which legislative oversight is: “the review, monitoring and supervision of federal agencies, programs, activities, and policy implementation.”³⁴ Thus, Congress has a “watchdog” role³⁵ and represents the most efficient external supervisor of government, who is obliged to find out violations in executive activities and remedy them.³⁶ But what are the mechanisms and tools that Congress utilizes to control government bureaucracy and how effective these are discussed below.

³¹ Owen H. Phillips, Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law*, 8th edition, Sweet and Maxwell, 2001, p. 669.

³² For example: As American scholars note despite the fact that Congress is delegating great amount of its legislative power to the executive, the Supreme Court limits Congress’s delegation and requires it to follow the enabling statutes “intelligible principle to guide the agency,” Harvard Law Review, “Oversight and insight: Legislative Review of Agencies and Lessons from the State,” (note), *Harvard Law Review*, Volume 121, Issue No 2, December 2007, p. 615

³³ Mathew D. McCubbins, Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” in *Economics of Administrative Law*, edited by Susan Rose Ackerman, An Elgar Reference Collection, Cheltenham, UK-Northampton, MA, USA, 2007, p. 85.

³⁴ Keith W. Smith, “Congressional Use of Authorization and Oversight,” *Congress and the Presidency*, 37, 2010, p. 60.

³⁵ As Bejesky notes: “Congressional oversight is ‘one of the most important responsibilities of the United States Congress’ particularly when oversight can enhance the likelihood that executive policies will reflect the public interest, augment the efficiency and efficacy of government operations, and deter “capricious behavior, waste, dishonesty, and fraud,” Robert Bejesky, “Congressional Oversight of the “Marketplace of Ideas:” Defectors as Sources of War Rhetoric,” *Syracuse Law Review*, No 63, 2012, p. 1.

³⁶ Kenneth F. Warren, *Administrative Law in the Political System*, 4th edition, Westview Press, 2004, p. 118.

1.2 Forms of Legislative Oversight: Ex Post and Ex Ante Legislative Oversight

The legislative branch has lot of mechanisms³⁷ in its arsenal to limit executive discretion. In the UK, Parliament has many tools to control government activities;³⁸ however, it depends on several factors to determine how parliament scrutinizes subordinate legislation and therefore various aspects have to be taken into consideration such as “the nature of the power conferred; procedures for making statutory instruments...technical scrutiny of statutory instruments and considering the merits of statutory instruments” in order to apply a particular tool of examination.³⁹

In the US, Congress tries to use various tools to handle “the principal-agent problem between itself and bureaucracy” and therefore decrease the negative impact of delegation.⁴⁰

Therefore in the United States, Congress utilizes a lot of methods to control government’s

³⁷ One mechanism of control of bureaucracy in the US is deadlines and hammers. Hammers are legislative provisions that expedite agency rulemaking by noting that they will start functioning if the agency did not “issue an alternative regulation. Deadlines together with hammers are effective tool to strictly scrutinize executive’s performance of rulemaking. However lot of people criticizes Congressional deadlines and says that they are “unrealistic” as Congress uses them intentionally to limit agencies performance of rulemaking. In case of deadlines agencies do not have enough time to fully deal with the concrete rulemaking and the outcome is “flawed product.” Consequently established regulation is put before the Court by the interested party or the group who are usually supported by Congress and they may easily get the satisfactory judicial ruling from the Court. Therefore : “the looming presence of the judiciary, combined with the unmistakable legislative intent of a fixed deadline, make this device the most powerful, and arguably the most predictable, indirect mechanisms of accountability at the disposal of Congress.” Cornelius M. Kerwin, *Rulemaking How Government Agencies Write Law and Make Policy*, 3rd edition, CQPress, Washington, D.C., 2003, p. 215-216, the important tool of control is also periodic reports of agencies which contain information about their activities. However Congress may also insist on special report or agencies themselves may do it by their initiative in cases where agency requires “additional legislative authority to deal with a particular problem,” Ernest Gellhorn and Ronald M. Levin, *Administrative Law and Process in a nutshell*, West Publishing Company, 1991, p. 46., One other approved method is also checking administrative discretion through congressional “casework” which gives the legislators the function of “ombudsman” as the legislator helps citizens in overcoming problems with the administration. According to the procedure the legislator finds out the spheres that require “statutory correction” and “oversight hearings” and try to remedy them, *Ibid.*, pp. 47-48., “Finally If legislators find that problems exist through their casework probing, authorization committee members can compel agencies to respond to the problems,” Kenneth F. Warren, *Administrative Law in the Political System*, 4th edition, Westview Press, 2004, p. 124.

³⁸ Control mechanisms used by Parliament may be: “motions of censure on the Minister responsible for the instrument... questions to ministers, In either House questions may be asked about instruments lying on the table, but no debate is allowed on a question,” Owen H. Phillips, Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law*, 8th edition, Sweet and Maxwell, 2001, p. 674.

³⁹ A.W. Bradley, K.D. Ewing, *Constitutional and Administrative Law*, 14th edition, Pearson Longman, 2007, p. 684

⁴⁰ Kathleen Bawn, “Political Control Versus Expertise: Congressional Choices about Administrative Procedures” in *Economics of Administrative Law*, edited by Susan Rose Ackerman, An Elgar Reference Collection, Cheltenham, UK-Northampton, MA, USA, 2007, p. 227.

policymaking power.⁴¹ The most popular form for Congress to scrutinize bureaucracy is writing ‘enabling statutes’ in detail and directing further actions of the agency.⁴² However, it is not the only possibility for Congress to evaluate executive’s activity. After the adoption of the ‘enabling statute’ Congress can exercise oversight powers on government by using different techniques.⁴³

In general the most approved and widespread forms of legislative control of administrative rulemaking are ex post and ex ante legislative oversight known also as “police patrol” and “fire alarm” control of administrative rulemaking.⁴⁴ As their importance is enormous in exercising scrutiny of administrative rulemaking I will discuss them in detail in the next section.

1.2.1 Ex Post (Police Patrol) Legislative Oversight

Ex post control entails permanent oversight of agency behavior and looking at how it implements in practice the conferred powers. Therefore any deviation from the authority granted by the legislature may end in sanctioning of the agency.⁴⁵

Ex post oversight as an important tool of control is known also as “police patrol” oversight and various scientists give different explanations about this mechanism of legislative scrutiny. According to McCubbins and Schwartz police patrol oversight resembles real police patrols, it is: “centralized, active and direct.” In the case of police patrol oversight, the

⁴¹ Conventionally Congress makes government accountable by obliging agencies to be responsible in different fields. For instance Congress tries to ensure agencies fiscal, procedural, program and system responsibility. Therefore it explores different tools to assess programs of administrative authorities and find out if the policy outcomes achieve statutory goals. Kenneth F. Warren, *Administrative Law in the Political System*, 4th edition, Westview Press, 2004, p. 119.

⁴² William F. Fox, Jr. *Understanding Administrative Law*, Lexis-Nexis, 2000, p. 43.

⁴³ Cornelius M. Kerwin, *Rulemaking How Government Agencies Write Law and Make Policy*, 3rd edition, CQPress, Washington, D.C., 2003, p. 213.

⁴⁴ *Ibid.*, p. 218.

⁴⁵ Keith W. Smith, “Congressional Use of Authorization and Oversight,” *Congress and the Presidency*, 37, 2010, p. 47.

legislator looks over one sphere of the executive activities and tries to find deviation from the statutory provisions. Where it detects an infringement the legislative branch uses tools to remedy the violation and obliges agency to fall within the statutory framework.⁴⁶ Thus, “police patrol” oversight takes place when legislature by its initiative starts the process of examining particular activities of the agency in order to eradicate any deviation from the initial legislation.⁴⁷

For several years ex post oversight was considered to be one of the most important sources of control of the executive branch; however scholars and practitioners who closely looked at its performance noted that this technique of oversight incurred high costs. Therefore they tried to find another solution for the improvement of ex post oversight.⁴⁸ However, skepticism with regard to “police patrol” oversight was changed in the end of the twentieth century. As Balla notes in his article, it is empirically evidenced that in recent years legislature tends to use “police patrol” oversight to control executive activities. In addition, Balla underlines that the increased use of such an oversight mechanism is conditioned by the widespread exploration of public hearings. Balla provides an example by citing the data obtained from CIS, which shows that the percentage of use of public hearings and reports has dramatically increased.⁴⁹

Another important proof that “police patrol” oversight is actively used is the regulations issued in the sphere of public security. The extensive utilization of police-patrol oversight concerning issues of public security is conditioned by different events, such for example,

⁴⁶ Mathew D. McCubbins, Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” in *Economics of Administrative Law*, edited by Susan Rose Ackerman, An Elgar Reference Collection, Cheltenham, UK-Northampton, MA, USA, 2007, p. 86.

⁴⁷ Steven J. Balla, Christopher J. Deering, “Police Patrols and Fire Alarms: An Empirical Examination of the Legislative Preference for Oversight,” *Congress and Presidency*, 40:27, 2013, p. 29.

⁴⁸ Brian J. Gerber, Cherie Maestas, Nelson C. Dometrius, “State Legislative Influence over Agency Rulemaking: The Utility of Ex ante Review,” *State Politics and Policy Quarterly*, Volume 5, No 1, Spring 2005, p. 39.

⁴⁹ The evidence of it is the reference volumes produced by CIS which mostly include descriptions of such hearings and reports Steven J. Balla, Christopher and J. Deering, “Police Patrols and Fire Alarms: An Empirical Examination of the Legislative Preference for Oversight,” *Congress and Presidency*, 40:27, 2013, p. 31-32.

establishing special procedures for controlling war-related affairs and therefore they are considered to be the “event-driven” activities of public administration⁵⁰ that require more detailed scrutiny. However, except for ex post legislative oversight administrative agencies utilize other essential forms of control known as ex ante legislative oversight which will be discussed below.

1.2.2 Ex Ante (Fire-Alarm) Legislative Oversight

Scholars note that while delegating lawmaking power, legislators have the ability to use special procedures in order to limit government discretion and to make it responsible to the legislative branch. Spence underlines that “Congress cannot foresee many of the important policy decisions it delegates to the agency” therefore “it can use enabling legislation to shape the agency policy-making process in ways that influence subsequent agency policy decisions.”⁵¹ Such type of control is known as ex ante oversight where legislators scrutinize government activities effectively and affect the outcome of the agency’s policy. The main idea of such oversight is to constrain choices of government and enable legislator to “hardwire agencies to make certain types of decisions or stack the deck in favor of particular interests.”⁵² Thus, ex ante oversight⁵³ is used to restrain the behavior of bureaucracy through statutes that describe administrative procedure for the agency’s actions to reach the desired

⁵⁰ For instance The House Armed Service Committee of the 112th Congress gives the explanation of “event-driven” hearing. According to the Committee: “the oversight of defense activities by the committee has historically involved in-depth assessments of military operations and other major events that are generally difficult to predict in advance, such as the war in the Islamic Republic of Afghanistan and response to catastrophic events.” *Ibid.*, 32

⁵¹ David B. Spence, “Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies” in *Economics of Administrative Law*, edited by Susan Rose Ackerman, An Elgar Reference Collection, Cheltenham, UK-Northampton, MA, USA, 2007, p. 173.

⁵² Brian J. Gerber, Cherie Maestas, Nelson C. Dometrius, “State Legislative Influence over Agency Rulemaking: The Utility of Ex ante Review,” *State Politics and Policy Quarterly*, Volume 5, No 1, Spring 2005, pp. 24-25.

⁵³ Sometimes legislators use even the broader context of ex ante control by introducing “notice and comment” rulemaking provisions in Administrative Procedure Act (APA) in order to constrain bureaucracy’s discretion and give interested parties the say in administrative rulemaking, *Ibid.*, p. 26.

outcome or by adopting legislation that does not give the agency enough space for manipulation.⁵⁴

McCubbins and Thomas Schwartz use the term “fire-alarm” oversight in order to explain the idea of ex ante legislative oversight. According to them, while “police patrol oversight is proactive, with Congress setting its own agenda for programs to review...fire alarm oversight is a congressional response to a complaint filed by a constituent or other politically significant actor.”⁵⁵ In addition, McCubbins and Schwartz emphasize that “fire-alarm” oversight is similar to the use of real fire alarms; it is “less centralized and involves less active and direct intervention.”⁵⁶ In the case of Fire-alarm oversight, the legislature does not overlook the activities of particular administrative decisions, but provides system of rules and establishes procedures that are necessary to be followed by administrative agencies. This procedure allows citizens to be more active in detecting violations of statutory provisions by the agencies in implementing delegated legislation.⁵⁷ Thus, in “fire-alarm” oversight the role of outsiders is important as the initiation of legislative oversight depends on their complaint to eradicate violations that have an adverse impact on them.⁵⁸

Thus, from the analysis provided above it is clear that the ex ante legislative oversight is quite different from the ex post legislative oversight, but the question which is the most appropriate form of control is still in doubt. Therefore below I will try to identify the merits and flaws of each mechanism in order to discover which form of oversight is more convenient to use in practice.

⁵⁴ Keith W. Smith, “Congressional Use of Authorization and Oversight,” *Congress and the Presidency*, 37, 2010, p. 47.

⁵⁵ Cornelius M. Kerwin, *Rulemaking How Government Agencies Write Law and Make Policy*, 3rd edition, CQPress, Washington, D.C., 2003, p. 218.

⁵⁶ Mathew D. McCubbins, Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” in *Economics of Administrative Law*, edited by Susan Rose Ackerman, An Elgar Reference Collection, Cheltenham, UK-Northampton, MA, USA, 2007, p. 86.

⁵⁷ *Ibid.*, p. 86.

⁵⁸ Steven J. Balla and Christopher J. Deering, “Police Patrols and Fire Alarms: An Empirical Examination of the Legislative Preference for Oversight,” *Congress and Presidency*, 40:27, 2013, p. 29.

1.2.3 Ex Ante or Ex Post Legislative Oversight?

Comparing which of the tools the ex ante or the ex post legislative oversight, is the appropriate mechanism for the control of government bureaucracy one cannot provide a concrete answer to the question. Each of them has its cons and pros.

The opponents of the ex post (police patrol) oversight mention that this type of oversight is time consuming and costly, while ex ante (fire alarm) legislative oversight does not incur costs. They underline that the costs related to fire-alarm oversight are covered by citizens and interest groups and not by Congress itself, while in ex post (police patrol) legislative oversight the costs are borne by Congress. In addition, under ex post (police patrol) legislative oversight Congress controls only specific activities of the executive branch, in the case of ex ante (fire alarm) legislative oversight any violation that affects the right of an individual can be brought before Congress. Moreover ex ante (fire alarm) legislative oversight is activated in cases where interested persons claim particular infringements, while the activation of the ex post (police patrol) legislative oversight depends on Congress' initiative itself.⁵⁹ Finally the opponents of then ex post (police patrol) legislative oversight conclude that the ex ante (fire alarm) legislative oversight dominates the oversight system and that this system serves legislators well by addressing agency discretion in areas of significance to influential constituencies.”⁶⁰

On the other hand, the supporters of the ex post (police patrol) legislative oversight base their analysis on empirical data and conclude that despite the dominance of ex ante (fire alarm) legislative oversight it cannot overstep the prominence of the ex post (police patrol)

⁵⁹ Mathew D. McCubbins, Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” in *Economics of Administrative Law*, edited by Susan Rose Ackerman, An Elgar Reference Collection, Cheltenham, UK-Northampton, MA, USA, 2007, p. 88.

⁶⁰ Steven J. Balla and Christopher J. Deering, “Police Patrols and Fire Alarms: An Empirical Examination of the Legislative Preference for Oversight,” *Congress and Presidency*, 40:27, 2013, p. 29.

legislative oversight .⁶¹ Therefore as Smith notes correctly: “there are reasons to expect that oversight and authorization are complements,” they did not alter each other and both of them could be used by the legislator. However: “the higher level of each form of legislative control will lead to lower levels of the other.”⁶²

As the legislative veto, one of the most important tools of legislative oversight used both in the US and in the UK represents the combination of the police patrol and fire alarm forms of legislative oversight⁶³ we will consider it in the next chapter.

⁶¹*Ibid.*, p. 31.

⁶² Keith W. Smith, “Congressional Use of Authorization and Oversight,” *Congress and the Presidency*, 37, 2010, p. 51.

⁶³ Cornelius M. Kerwin, *Rulemaking How Government Agencies Write Law and Make Policy*, 3rd edition, CQPress, Washington, D.C., 2003, p. 222.

2. LEGISLATIVE VETO AS A TOOL FOR LEGISLATIVE OVERSIGHT

In the United States and in the UK the usage of legislative veto as a tool for legislative oversight⁶⁴ has different histories.⁶⁵ In the US, the unicameral legislative veto was utilized for a long time, despite the fact that the presidents did not like it at all and its use was a controversial issue.⁶⁶ In the US, the unicameral legislative veto was utilized actively from 1930s as almost every statute required from the government to submit rules to Congress in order to receive its approval.⁶⁷ In the UK there was no such distinction between unicameral and bicameral vetoes⁶⁸ and, according to the Statutory Instrument Act of 1946, when the rule was considered to be laid in Parliament it was to be laid before it took effect.⁶⁹

From the above passages it is clear that both states utilized legislative veto as a tool for legislative oversight for years and it is actively used also nowadays. However in order to fully explore the importance of legislative veto and underline its necessity as a mechanism that is employed to control government activities we have to look at the definition of legislative veto.

Thus, in the chapter I will try to underline the importance of legislative veto by providing its definition, giving data on how the unicameral legislative veto was abolished in the US and what are the legal provisions in current legislation in the US and UK that regulate utilization

⁶⁴ From its enactment legislative veto was a tool that entailed aspects of both “police patrol” and “fire-alarm” oversight. On the one hand legislative veto was covering the “the whole programs of rulemaking” and therefore exercising police patrol oversight, on the other hand as the instrument of control of administrative rulemaking it was stipulated in statutes and a signal of alarm was needed from interested groups to activate provisions of legislative veto through Congress, *Ibid.*, p. 222.

⁶⁵ For example in the US as Bowers mentions: “The legislative veto emerged first in Congress as an effort to reconcile two conflicting demands: administrative clamor for broader discretionary authority and congressional insistence on a way to control this broader discretionary authority that did not depend upon passing any additional laws.” James R. Bowers, *Regulating the Regulators, An Introduction to the Legislative Oversight of Administrative Rulemaking*, Praeger, New York, Westport, Connecticut, London, 1990, p. 20.

⁶⁶ Philip J. Cooper, *Cases on Public Law and Public Administration*, Thomson Wadsworth 2005, pp. 37-38.

⁶⁷ Cornelius M. Kerwin, *Rulemaking How Government Agencies Write Law and Make Policy*, 3rd edition, CQPress, Washington, D.C., 2003, p. 222.

⁶⁸ However, the House of Lords have power to veto all regulations except for financial instruments that is to be vetoed by the House of Commons, A.W. Bradley, K.D. Ewing, *Constitutional and Administrative Law*, 14th edition Pearson Longman, 2007, p. 685.

⁶⁹ *Ibid.*, p. 684.

of legislative veto procedure. In addition, I will provide analysis about the effectiveness of legislative veto.

2.1 The Idea of Legislative Veto

Bowers provides a broad definition of legislative veto which means the general activity of the legislator directed to control the executive branch. According to his definition, such legislative veto entails “negative, “affirmative” or “deliberative” legislative procedures and in all three cases the legislator provides the chief of the agency or the agency itself with the specific power of making rules in order to handle particular public problem, and at the same time oblige them to put the rule before the legislator for its approval.⁷⁰ This definition is not incorrect; however other scholars prefer to define legislative veto more precisely underlining that it relates to the annulment of administrative decision.⁷¹

In the US scientists provide various interpretations of legislative veto. As Harrington and Lief explain legislative veto is “a statutory provision that allows Congress to nullify decisions made by administrators.”⁷² Warren adds to this definition further explanation that using legislative veto provisions Congress vetoes “planned activity” of agencies as legislative veto provisions stipulated in the statutes oblige agencies to put rules in front of Congress in order to get approval before they take effect.⁷³ The reason for annulling administrative decisions is that the legislature voids regulation when agencies do not follow authorizing legislation. As Warren mentions correctly the legislator limits the agency or the president if it feels that they

⁷⁰ James R. Bowers, *Regulating the Regulators, An Introduction to the Legislative Oversight of Administrative Rulemaking*, Praeger, New York, Westport, Connecticut, London, 1990, p. 19.

⁷¹ Christian B. Harrington, Lief H. Harter, *Administrative Law and Politics, Cases and Comments*, 14th edition, CQ Press, Washington D.C., 2009, p. 96.

⁷² *Ibid.*, 96.

⁷³ Kenneth F. Warren, *Administrative Law in the Political System*, 4th edition, Westview Press, 2004, pp. 124-125.

surmount their statutory authority.⁷⁴ Thus, it is clear that legislative veto is an instrument in the hands of the legislature that allows blocking such executive activities that are not in accordance with authorizing statutes.⁷⁵ However, what kind of legislative veto is to be utilized and if it is constitutional to use legislative veto at all in order to constrain government activities will be discussed below.

2.2 Constitutionality of the Unicameral Legislative Veto and Implications Of *Chadha*

In the US in comparison with the UK, the issue of constitutionality of legislative veto was central. The reason for this was the usage of the unicameral veto instead of the bicameral one. According to the US legislation, each house of Congress had the power to veto agency rules. The unicameral legislative veto was used in the following way: Congress delegated legislative power to the executives however at the same time it obliged agencies to submit rules for review before they took effect; if the rule was found to be issued not in accordance with authorizing legislation then it was vetoed by the resolution of disapproval adopted by either House of Congress by simple majority vote. The outcome then was non-implementation of rules.⁷⁶

This procedure of vetoing administrative decisions was considered to be unconstitutional by the Supreme Court of the US in *Chadha*. In *Chadha* the court ruled that single-house veto provision in Immigration and Nationality Act of 1952 was not constitutional as it infringed the idea of separation of powers and undermined “the constitutional principles of

⁷⁴ *Ibid.*, 124-125.

⁷⁵ James R. Bowers, *Regulating the Regulators, An Introduction to the Legislative Oversight of Administrative Rulemaking*, Praeger, New York, Westport, Connecticut, London, 1990, p. 19.

⁷⁶ William F. Fox, Jr. *Understanding Administrative Law*, Lexis-Nexis, 2000, p. 48.

bicameralism and presentment.”⁷⁷ The unicameral legislative veto was considered an unconstitutional mechanism to control bureaucracy discretion and thus annulled.

After *Chadha* many Congressman and also outsiders tried to discover a new tool for controlling agency decisions that will adequately alter the unicameral legislative veto. They wanted to devise instrument which would allow Congress to scrutinize agency activities without violating Article 1 of the Constitution.⁷⁸

Therefore the implications of *Chadha* were that in 1996 Congress passed the Congressional Review Act (CRA), which introduced bicameral legislative veto in the form of a joint resolution of disapproval of agency rules.⁷⁹

According to a CRA special procedure is used for activation of legislative veto provisions of the act. What those provisions are and how they work in practice will be considered in the following section.

2.3 Legislative Veto Provisions in Legal Instruments

Legislative veto as the instrument of legislative oversight is used both in the United States⁸⁰ and in the UK. In the US provisions related to utilization of legislative veto are put in the CRA.⁸¹ According to CRA, all new rules have to be submitted to both Houses of

⁷⁷ Kenneth F. Warren, *Administrative Law in the Political System*, 4th edition, Westview Press, 2004, p. 126.

⁷⁸ Lot of suggestions were provided among which some proposed to “postpone implementation of regulations” until Congress reviews them, others offered exploration of joint resolution of disapproval by Congress and the final signature of the president or adoption of sunset legislation that “triggers the end of a program or an entire agency merely by the passage of time so long as Congress does nothing to reauthorize the program or agency.” William F. Fox, Jr. *Understanding Administrative Law*, Lexis-Nexis, 2000, p. 49.

⁷⁹ Cornelius M. Kerwin, *Rulemaking How Government Agencies Write Law and Make Policy*, 3rd edition, CQPress, Washington, D.C., 2003, p. 223.

⁸⁰ As Koch notes: “Having enacted the statute authorizing an agency’s rule, Congress is free at any time to use the full legislative process-bicameralism and presentment to the President-to change the statute and alter or eliminate a rule.” Charles H. Koch, Jr., William S. Jordan III, Richard W. Murphy, *Administrative Law: Cases and Materials*, 5th edition, LexisNexis, 2006, p. 90.

⁸¹ As Skrzycki notes: “CRA was crafted to give Congress overarching authority to review final rules and eliminate them under very streamlined procedures that limit debate and negotiations between the House and Senate and require only a simple majority vote,” Cindy Skrzycki, *The Regulators, Anonymous Power Brokers in American Politics*, Rowman and Littlefield Publishers, 2003, p. 157.

Congress and to the General Accounting Office (GAO).⁸² The CRA underlines the importance of major rules⁸³ and defines them as rules that “have significant impacts on the economy.”⁸⁴ Because of the essentiality of major rules, CRA requires from the Office of Information and Regulatory Affairs to figure out if the rule is major. If the Office of Information and Regulatory Affairs determine that the rule is major “it cannot take effect for at least sixty days” which “gives Congress time to take expedited action, not unlike the Corrections Day procedure,⁸⁵ to disapprove the rule.”⁸⁶ After the GAO which is given 15 days to make a report on major rules submits its report to both houses of Congress, Congress is given the power to issue a joint resolution in order to veto the proposed rule.⁸⁷ The President may veto the joint resolution of disapproval; however “Congress may overturn the veto of the joint resolution of disapproval by the normal veto override procedure.”⁸⁸ The CRA then stipulates that if the resolution is passed “the rule is immediately deprived of any effect”⁸⁹ and in case it has already taken effect “It shall be treated as though such rule had never taken effect.”⁹⁰

In comparison with the US, in the UK there is no Act which obliges government to lay regulation before Parliament. Not all statutory instruments are required to be laid before

⁸² Cornelius M. Kerwin, *Rulemaking How Government Agencies Write Law and Make Policy*, 3rd edition, CQPress, Washington, D.C., 2003, p. 223.

⁸³ As Fox notes: CRA distinguishes between major and non-major rules and defines major rules “with some precision.” William F. Fox, Jr. *Understanding Administrative Law*, Lexis-Nexis, 2000, p. 43., In addition, pursuant to CRA major rules: “are subject to delayed effective date requirement and other rules...are not.” Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 4th edition, American Bar Association, 2006., p. 188.

⁸⁴ Charles H. Koch, Jr., William S. Jordan III, Richard W. Murphy, *Administrative Law: Cases and Materials*, 5th edition, LexisNexis, 2006, p. 90.

⁸⁵ In 1995 Congress instituted “Corrections Day.” Using expedited procedures, Congress could enact legislation to correct a clear error in existing law or regulation with a statute that must be signed into law by the President., Cornelius M. Kerwin, *Rulemaking How Government Agencies Write Law and Make Policy*, 3rd edition, CQPress, Washington, D.C., 2003, p. 223.

⁸⁶ *Ibid.*, p. 223.

⁸⁷ Christian B. Harrington, Lief H. Harter, *Administrative Law and Politics, Cases and Comments*, 4th edition, CQ Press, Washington D.C., 2009, p. 101.

⁸⁸ William F. Fox, Jr., *Understanding Administrative Law*, Lexis-Nexis, 2000, p. 43.

⁸⁹ Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 4th edition, American Bar Association, 2006., p. 190.

⁹⁰ *Ibid.*, p. 190.

Parliament by the Statutory Instrument Act 1946⁹¹; however the ‘enabling act’ has to be reviewed in any situation. After it is decided that statutory instrument has to be laid before parliament it goes under the review of the both Houses of Parliament, where the delegated legislation is considered under affirmative or negative procedure. It depends on the Minister to define what method of laying is to be used in the case of particular statutory instrument.⁹²

Thus in comparison with US, in the UK there are different procedures⁹³ of laying the regulation before Parliament. These procedures are known as affirmative and negative parliamentary resolutions.⁹⁴ Barnett describes affirmative parliamentary procedure and notes that during this procedure the instrument that is laid before parliament receives immediate effect “subject to subsequent approval by parliament” or the instrument is laid as draft and takes effect after it is approved by parliament.”⁹⁵ Apart from this procedure, Parliament may use the negative parliamentary procedure during which the statutory instrument is laid before parliament with immediate effect “subject to annulment following a resolution of either House.”⁹⁶ The “negative resolution procedure” originates from the opposition, who calls the House to vote against “the instruments’ passage into law.”⁹⁷

⁹¹ But those instruments that are laid, pursuant to the Statutory Instrument Act go the procedure outcome of which is stated as follows: “Where both Houses have adopted or are deemed to have adopted a resolution that all or any portion of a regulation be revoked, the authority authorized to make the regulation shall revoke the regulation or portion of the regulation no later than 30 days, or any longer period that may be specified in the resolution, after the later of the dates on which the Houses have adopted or are deemed to have adopted the resolution,” Statutory Instrument Act 1946, section 19.1 (9).

⁹² Owen H. Phillips, Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law*, 8th edition, Sweet and Maxwell, 2001, p. 674.

⁹³ As Yardley notes: “It is sometimes provided that the regulation shall not come into force or continue in force unless an affirmative resolution of one or both of the Houses shall have been passed, or else that the regulation or order shall become or remain law unless one or other House annuls it by a negative vote within a specific time,” David Yardley, *Constitutional and administrative Law*, 8th edition, Butterworths, 1995, p. 146.

⁹⁴ As Bradley describes: “under the affirmative procedure the minister concerned must secure the affirmative resolution and if necessary, the government must allot time for the resolution to be discussed...under the negative procedure it is for any member who so wishes to pray that the instrument should be annulled,” A.W. Bradley, K.D. Ewing, *Constitutional and Administrative Law*, 14th edition, Pearson Longman, 2007, p. 683.

⁹⁵ Hilaire Barnett, *Constitutional and Administrative Law*, 7th edition, Routledge-Cavendish, 2009, p. 377.

⁹⁶ Owen H. Phillips, Paul Jackson, Patricia Leopold, *Constitutional and Administrative Law*, 8th edition, Sweet and Maxwell, 2001, p. 674.

⁹⁷ Ian Loveland, *Constitutional Law, Administrative Law and Human Rights, A critical introduction*, 5th edition, Oxford: Oxford University Press, 2009. p. 139.

These two types of resolutions are the main control mechanisms utilized by parliament in the UK; however regulations that are made under the Emergency Powers Acts may be passed by using a different procedure. Particularly the instrument related to emergency issues is laid before parliament with immediate effect, but loses this effect if not approved by resolution of Parliament in a defined time. So this type of legislative oversight combines “prompt operation with parliamentary control.”⁹⁸ As we can see, issues related to public security in the context of usage of emergency powers go under low scrutiny in the UK. It is also important to note that in the US like the UK the level of control government regulations in the sphere of the public security is not high. As Zegart mentions the 9/11 Commission’s Vice Chairman Lee Hamilton in 2007 made an announcement, where she castigated Congress’s policy of inactivity with regard to issues related to American national security.⁹⁹ Therefore the question arise is this passive oversight approach of legislator to public security issues justified and why legislative branch is not playing an active role in the development of rules related to public emergency?¹⁰⁰ To answer the question I will try to discuss the efficiency and the effectiveness of usage of legislative veto in the US and the UK.

2.4. Effectiveness of Legislative Veto

Is legislative veto an effective tool to control government bureaucracy in the US and UK?

There is no common answer to the question. Some scholars think that in the USA the

⁹⁸ Owen H. Phillips, Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law*, 8th edition, Sweet and Maxwell, 2001, p. 675.

⁹⁹ Particularly she stated: “To me, the strong point simply is that the Senate of the United States and the House of the United States is not doing its job and because you are not doing the job, the country is not as safe as it ought to be...You’re dealing here with the national security of the United States, and the House ought to have the deep down feeling that we’ve got to get this thing right.” Amy B. Zegart, “The Domestic Politics of Irrational Intelligence Oversight,” *Political Science Quarterly*, Volume 126, No 1, 2011, p. 1.

¹⁰⁰ One answer to the question is suggestion of Owens and Pelizzo who underline that: “war, civil unrest, economic and political crisis, terrorist attacks, strengthen the power of the executive, disrupt and threaten constitutional politics.... Crisis requires swift action and executives are thought to be more capable than parliaments and legislatures of taking such actions.” John E. Owens and Ricardo Pelizzo, “Introduction: The Impact of the “War on Terror” on Executive-Legislative Relations: A Global Perspective,” *The Journal of legislative Studies*, Volume 15, No 2-3, June-September 2009, p. 119.

historical unicameral veto was a “last-ditch” invention introduced by Congress to control agency activities before they take effect.¹⁰¹ Therefore the proponents of unicameral legislative veto were arguing that the correction made by CRA in favor of bicameral legislative veto diminished the importance of the legislative veto because as Warren mentions: “it is quite inconvenient and politically unfeasible to obtain passage of legislative veto in both houses of Congress.”¹⁰²

Despite the opposition to the bicameral legislative veto, the effective usage of it was evidenced in 2001 concerning regulation which has great impact on public health and security. The regulation was adopted by the Occupational Safety and Health Administration (OSHA) demanding “employers seek to prevent repetitive stress injuries to workers through the requirements of ergonomically safe equipment and processes.”¹⁰³ In this case Congress effectively used the legislative veto provision of CRA.

In the UK, similar to the US, the idea of utilization of joint resolutions of parliament in order to veto government activity is usually debated. Part of the scholars note the main characteristic of negative and affirmative resolution procedures is that “neither House may amend a statutory instrument, except for very rare instances where the amendment is expressly authorized by the parent Act” and the only outcome of such resolution procedure is that if the Houses dislike the rule, the minister has to “withdraw it and start again.”¹⁰⁴ In addition, during the negative and affirmative parliamentary procedures the statutory instrument usually is not annulled if the minister has the majority in Parliament.¹⁰⁵ However, despite the fact that resolutions have no real power to annul the statutory instrument, just

¹⁰¹ William F. Fox, Jr. *Understanding Administrative Law*, Lexis-Nexis, 2000, p. 49.

¹⁰² Kenneth F. Warren, *Administrative Law in the Political System*, 4th edition, Westview Press, 2004, p. 129.

¹⁰³ Philip J. Cooper, *Cases on Public Law and Public Administration*, Thomson Wadsworth, 2005, p. 45.

¹⁰⁴ A.W. Bradley, K.D. Ewing, *Constitutional and Administrative Law*, 14th edition, Pearson Longman, 2007, p. 684.

¹⁰⁵ Owen H. Phillips, Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law*, 8th edition, Sweet and Maxwell, eighth edition, 2001, p. 674.

obliging the minister to change the proposed rule, they are actively used for the “vast majority of delegated legislation” as prescribed by the Statutory Instrument Act.¹⁰⁶

In sum, on the one hand there are arguments from the opponents of legislative veto alleging that legislative veto has only a negative implication on the rulemaking and does not give feedback on how to improve administrative rulemaking procedure; therefore it “fails to encourage rule-makers.”¹⁰⁷ On the other hand, those who praise legislative veto argue that if one looks at the legislative veto from a functional analysis of separation of powers the use of such veto is justified because “legislative-like quality of rulemaking” may be accepted in the case of exercising delegated legislation, while it will not be used when “adjudicative aspects of administration” have to be scrutinized.”¹⁰⁸ However, laying rules before the legislature in order to pass legislative veto requirement takes place only after all the discussions and procedures are employed by parliamentary committees and special offices in the US and the UK.

Therefore, the forthcoming chapter will provide the detail explanation the procedure of reviewing delegated legislation by the different institutions of the legislative branch and also by the General Accounting Office in the US which is Congress’s “watchdog” in performing the function of overseeing agency activities.

¹⁰⁶ Hilaire Barnett, *Constitutional and Administrative Law*, 7th edition, Routledge-Cavendish, 2009, p. 376.

¹⁰⁷ Moreover opponents note that the final effect of legislative veto “can discourage agency administrators from proposing new and needed rules.” Kenneth F. Warren, *Administrative Law in the Political System*, Westview Press, Fourth edition, 2004, p. 126. Opponents in addition underline that the fact of existence of legislative veto makes it essential and not its use. They argue that: “like many other forms of oversight, the threat of sanctions is more efficient and likely as effective as the sanction itself,” Cornelius M. Kerwin, *Rulemaking How Government Agencies Write Law and Make Policy*, 3rd edition, CQPress, Washington, D.C., 2003, p. 223.

¹⁰⁸ James R. Bowers, *Regulating the Regulators, an Introduction to the Legislative Oversight of Administrative Rulemaking*, New-York Westport, Connecticut, London, 1990, p. 23. Furthermore proponents of legislative veto mention that it ensures executive accountability and responsiveness “by making them answerable to Congress,” Kenneth F. Warren, *Administrative Law in the Political System*, Westview Press, Fourth edition, 2004, p. 125.

3. CONGRESSIONAL AND PARLIAMENTSRY COMMITTEES EXERCISING LEGISLATIVE OVERSIGHT

In the UK¹⁰⁹ as well as in the US, the committees within legislature play an important role in the oversight process of the delegated legislation. The legislative branch depends on the work of the committees¹¹⁰ who are the main helpers of the legislator.

In this chapter firstly I will address how committees review the correctness of delegation and then talk about the role of the committees with regard to how they control the implementation of the statutory provisions. Thus, I will distinguish between committees exercising control on delegation of the power and those who review implementation of already delegated legislative power. In addition, I will underline the importance of the General Accounting Office (GAO) in the US as it plays an essential role together with the committees in overseeing the delegated legislation.

3.1 Committees Exercising Control on the Delegation of the Legislative Powers

In the UK it was a common practice to review the clause that ensured delegation of powers to the executive branch. Therefore in 1992 the House of Lords designated a special committee for the examination of bills that suggest delegation of legislative powers and to obtain for each bill a government memorandum justifying the suggestion. This committee was renamed and from 2001 is known as the Committee on Delegated Powers and Regulatory Reform which aims “to discourage the granting of excessive powers and ensures

¹⁰⁹ In the UK a lot of parliamentary committees exercise control of government. The procedure of oversight includes control of government as well as the regulations issued by the executive branch. The reports of the committees are published and the executives have to make a response on them in a due time, Dawn Oliver, Tony Prosser, Richard Rawlings, *The Regulatory State: Constitutional Implications*, Oxford: Oxford University Press, 2010, p. 253.

¹¹⁰ A.W. Bradley, K.D. Ewing, *Constitutional and Administrative Law*, 14th edition, Pearson Longman, 2007, p. 685.

that appropriate safeguards are included in parent legislation.”¹¹¹ The Committee does not consider issues that are related to the “merits” of a bill, it only controls delegated powers and provides the House with recommendations and advice.¹¹²

Similar to the UK, in the USA there are committees which exercise the important function of scrutinizing how legislation is delegated. Such committees are authorization committees of Congress. Their main function is to provide the agency with the power to implement statutory provisions by adopting regulation. In some circumstances they give a detailed authorization identifying “specific course of actions for administrators to follow” and where the agency deviates from the prescribed course the authorization committees may use their legislative oversight function.¹¹³

Thus, congressional and parliamentary committees put great effort in legitimating delegated legislation and the first action they take in this context is to examine the clause in the ‘enabling act’ that delegates legislative power to government; however, this is not the only job of congressional and parliamentary committees. They actively participate in reviewing the implementation of the delegated legislation and propose questions for parliamentary and congressional consideration. Furthermore, in the US the task to oversee how agencies perform their duties is also performed by the General Accounting Office (GAO).

¹¹¹ A.W. Bradley, K.D. Ewing, *Constitutional and Administrative Law*, 14th edition Pearson Longman, 2007, p. 682.

¹¹² Owen H. Phillips, Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law*, 8th edition, Sweet and Maxwell, 2001, p. 672-673.

¹¹³ Warren cites Lawrence and Dodd who describe the process: “in situations where agency or program mandates are too broad, where agencies implement programs in ways that Congress did not intend or where evidence exists that initial statutory language is producing undesired consequences, the authorization committees can propose that Congress change statutory language by amendments to the original act.” Lawrence C. Dodd and Richard L. Scott, *Congress and the Administrative State* New York: Wiley, 1979, p. 163 in Kenneth F. Warren, *Administrative Law in the Political System*, 4th edition, Westview Press, 2004, p. 123.

3.2 Committees Exercising Scrutiny on the Delegated Legislation

In the UK the Joint Committee on Statutory Instruments¹¹⁴ has the important function to control the delegated legislation. It is chaired by a Member of Parliament from the opposition which makes it a more neutral body. Actually the Committee overlooks if the statutory provisions are applied with regard to a particular Statutory Instrument and if it finds any deviation then it puts the case before the House. The House and government do not have any obligation to follow the suggestions of the committee.¹¹⁵ It is interesting that the committee does not use its review power in every single case. There are different grounds on which the Joint Committee reports to parliament.¹¹⁶ The Joint Committee may oblige the government department to give an explanation concerning the instrument that is reviewed by the committee. The department has to provide interpretations for its action by memorandum or through witness. In any case the Committee is required to give the department the possibility to respond to questions.¹¹⁷ Apart from this Joint Committee on Statutory Instruments, an important function to control the delegated legislation is performed by the Standing Committees on delegated legislation which employ mechanisms of debate for scrutinizing government activities. The Standing Committee discusses the instrument on a motion¹¹⁸ and

¹¹⁴ Is a select committee which includes both Commons and Lords, seven member from each House and was established in 1972, Peter Leyland, and Gordon Anthony, *Administrative Law*, 6th edition, Oxford:Oxford University Press, 2009, p. 123.

¹¹⁵ Ian Loveland, *Constitutional Law, Administrative Law and Human Rights, A critical introduction*, 5th edition, Oxford: Oxford University Press, 2009, p. 139.

¹¹⁶ These are the cases where “the instrument imposes a tax charge; the parent Act excludes review by the courts; the instrument is to operate retrospectively... there has been unjustifiable delay in publication or laying... the instrument took effect in contradiction of the rules of notice to the House...there is doubt as to whether the instrument is *intra vires*... the instrument requires clarification...the instrument’s drafting is defective,” Hilaire Barnett, *Constitutional and Administrative Law*, 7th edition, Routledge-Cavendish, 2009, p. 377 .

¹¹⁷ Owen H. Phillips, Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law*, 8th edition, Sweet and Maxwell, 2001, p. 677.

¹¹⁸ This method of debating delegated legislation was considered not to be effective as it did not ensure essential themes to be discussed; there was a proposal to establish a “sifting committee” from the members of both Houses “to find out which instruments raise issues of policy that deserve the attention of Parliament, the aim being to enable each House to focus its attention on the most significant instruments,” A.W. Bradley, K.D. Ewing, *Constitutional and Administrative Law*, 14th edition, Pearson Longman, 2007, p. 686.

the Chairman makes a report before the House despite the fact motion is passed or not.¹¹⁹ Thus, in the UK the Committees play an active role in scrutinizing the delegated legislation.

In the US, like in the UK numerous congressional committees and subcommittees have the task to control administrative rulemaking; however in the US there is no such distribution of powers between committees as in the UK. Therefore there were suggestions from different scholars on how congressional committees should provide more effective scrutiny. It was proposed to create a joint congressional committee with qualified experts which will hold public hearings; permanently review regulations and have consultation with the agency representatives concerning the issues under consideration and in the case the committee was not satisfied by the outcome of the agency's work the matter would be directed to standing committees in both houses.¹²⁰ But other scientists think that the lack of the committee's detailed scrutiny in the US is balanced by the active input by the General Accounting Office (GAO) in the legislative oversight process. GAO is the agency which aids Congress in overseeing the delegated legislation. Its influence is significant.¹²¹ The agency is headed by the Comptroller General who evaluates a report submitted by the agency and provides the report "on each major rule to the committees of jurisdiction in each House of the Congress...The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps."¹²² In addition, federal agencies have to cooperate with the Comptroller General and submit any data that is relevant for his report.¹²³ Thus, because of its significant role in the legislative oversight process GAO "has been called "Congress's watchdog" and is widely considered one of the institution's most potent oversight tools,

¹¹⁹ Owen H. Phillips, Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law*, 8th edition, Sweet and Maxwell, 2001, p. 677.

¹²⁰ Harvard Law Review, "Oversight and insight: Legislative Review of Agencies and Lessons from the State," (note), *Harvard Law Review*, Volume 121, Issue No 2, December 2007, p. 634.

¹²¹ Initially GAO was established to conduct financial control on agencies, but then "it has taken on considerable responsibility for program review and evaluation," Ernest Gellhorn, Ronald M. Levin, *Administrative Law and Process in a nutshell*, West Publishing Company, 1991, pp. 46-47.

¹²² Congressional Review Act (CRA) 1946, § 801 (2) (A).

¹²³ Congressional Review Act (CRA) 1946, § 801 (B).

evaluating, investigating, and recommending management improvements to federal agencies.”¹²⁴

After considering the functions of the parliamentary and congressional committees it is interesting to evaluate what the real effects of the committee’s review of the delegated legislation are. Thus, the next section will provide analysis on what impact the committees have on the legislative oversight of the executive bureaucracy.

3.3 Effectiveness of the Committee’s Legislative Review

Some scholars think that the real control of the executive branch is conducted not by the legislator as an institution, but by the committees. They argue that the only tool in the hands of the legislator to control the government is the legislative veto; however, it is not effective because in some situations the executive has “dominance” over the legislative branch “which makes disapproval or non-approval highly unlikely; the crudeness of these mechanisms, under which approval cannot usually be subject to the amendment of the legislation; and the sheer volume of delegated legislation conspire to make these forms of control more theoretical than real. Genuine scrutiny is usually possible only through the work of committees.”¹²⁵ In addition, scholars give examples concerning the effectiveness of the committee scrutiny by underlining the role of the UK Parliament’s Joint Committee on Statutory Instruments, which according to them has “pervasive influence” on the government. Their argument is that the government tries not to fall under the control of the committee as this will decrease respect towards government and also “the administration is often willing to

¹²⁴ Amy B. Zegart, “The Domestic Politics of Irrational Intelligence Oversight,” *Political Science Quarterly*, Volume 126, No 1, 2011, p. 17.

¹²⁵ Matthews Beatson and Mark Elliott, *Administrative Law, Text and Materials*, 3rd edition, Oxford: Oxford University Press, 2005, p. 650.

amend legislation which the Committee is dissatisfied with.”¹²⁶ American scholars agree with their British colleagues and note that Congress establishes committees in order to effectively control government rulemaking as the committees are institutions who have expertise in the particular field in which they specialize. Thus, the creation of committees ensures benefits for everyone by “maximizing reelection prospects for individual legislators while providing specialized expertise for Congress as a whole.”¹²⁷

However, there are suggestions that committees only have a formal role and do not significantly affect the legislative oversight process of administrative rulemaking. As Oliver notes the fact that the committee tries to get information from agencies about administrative rulemaking does not make the agencies accountable to the legislator and does not make them more careful in approaching the decision-making procedure. Therefore, pursuant to Oliver, such a committee inquiring does not “add up to anything like a system for imposing democratic oversight and accountability on regulators. At most, sporadic parliamentary activity takes place.”¹²⁸ Moreover Kenneth Shepsle, Barry Weingast, William Marshall,¹²⁹ and others agree with Oliver saying that “committees are stacked with high demanders, not knowledge providers.”¹³⁰

It is clear that there is no one concrete answer to the question whether the legislative branch (as a whole) is a more effective controller of the government rulemaking or the

¹²⁶ *Ibid.*, p. 651.

¹²⁷ Amy B. Zegart, *The Domestic Politics of Irrational Intelligence Oversight*, *Political Science Quarterly*, Volume 126, No 1, 2011, p. 9.

¹²⁸ Dawn Oliver, Tony Prosser, Richard Rawlings, *The Regulatory State: Constitutional Implications*, Oxford: Oxford University Press, 2010, p. 254.

¹²⁹ Kenneth Shepsle, *The Giant Jigsaw Puzzle* (Chicago, IL: University of Chicago Press. 1978); Barry Weingast and William Marshall, “the Traditional Organization of Congress; or Why Legislatures, Like Firms, Are not Organized as Markets,” *Journal of Political Economy* 96 (February 1988) : 132-163; E. Scott Adler, *Why Congressional Reforms Fail* (Chicago, IL: University of Chicago Press, 2002) in Amy B. Zegart, “The Domestic Politics of Irrational Intelligence Oversight,” *Political Science Quarterly*, Volume 126, No 1, 2011, p. 9.

¹³⁰ *Ibid.*, p. 9.

committees. I think that each of them makes an effort to reach one and the same outcome and only the forms¹³¹ of approaching the problem are different.

¹³¹ As Barnett notes correctly: “the strength of the committee’s work lies not in its reports to parliament and any consequent action but rather in its scrutiny of instruments and drawing the relevant government department’s attention to defects in instruments,” Hilaire Barnett, *Constitutional and Administrative Law*, 7th edition, Routledge-Cavendish, 2009, p. 377. Thus, the committee studies the form of implementation of the delegated legislation, while “the policy is a matter of parliament” Owen H. Phillips, Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law*, 8th edition, Sweet and Maxwell, 2001, p. 677.

CONCLUSION: RECCOMENDATIONS FOR GEORGIA

The analysis of the legislative oversight process in the UK and the US showed that in both states the legislative veto, as well as an active participation of parliamentary and congressional committees in controlling government bureaucracy is considered to be one of the main tools in the hand of the legislator to scrutinize the executive branch. Both states, the US and the UK, have specific normative acts that in detail regulate the issue of putting statutory instruments before parliament. Although, the procedures of laying the regulations before the legislative branch in the US and the UK differ, the outcome of laying is the same. The erred regulation is annulled and a new one with improved provisions has to be originated and laid before the legislature.

Except for the usage of the legislative veto procedure it is also essential to underline that the legislative branch in both states actively utilizes the help provided by the committees or different offices with regard to scrutinizing a concrete regulation. Practically such committees and offices play an essential role in overseeing government policy as they possess special knowledge and expertise in concrete spheres of public life.

Thus, in the US and the UK the problem of legitimating the delegated legislation is solved not only by legal tools of control (judicial review) over government activities, but also by using active political oversight of the legislative branch.

Based on the above analysis to ensure the legitimation of the delegated legislation in Georgia the first effective step will be the adoption of a legal instrument –legislative act which will in detail regulate the oversight process of regulations issued by administrative authorities and individual government officials.

The second step pursuant to the legislative act will be the introduction of a legislative veto as well as the aid of different committees which specialize in the particular field of public activity. At the same time the legislative veto procedure should be used not in all

circumstances, but only in those cases where the regulation will have significant impact on the state. Among them may be regulations related to public health and security, also regulations that importantly affect the economy of the state. The significance of the regulation has to be decided by the special committees of parliament which will inquire from the relevant administrative authorities and public officials the real purpose of issuance of such regulations and only after debates on essential issues related to the regulations they have to be put before parliament for final consideration.

My proposition with regard to overseeing the regulations that have significant impact on the state resembles the system introduced in the US and UK. However in addition, I suggest providing some type of legislative review also for the regulations that are not considered to be significant regulation.

Thus the third step in legitimizing the delegated legislation will be that the regulations that are not importantly affecting public security, health, finance or any other significant field of the state's activity should still go through parliamentary scrutiny, not in the form of the legislative veto, but by passing the inquiry stage in the competent parliamentary committees.

In sum, the strict scrutiny followed by legislative veto for significant regulations and committee stage of control for non-significant regulations will ensure legislative oversight of administrative rulemaking and legitimation of the delegated legislation in Georgia.

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