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LEGISLATIVE SCRUTINY OF REGULATIONS IN THE ANGLOSPHERE

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INTRODUCTION

President Donald Trump's inauguration could have significant implications for the U.S. regulatory state for two principal reasons. The first is that he is committed to reducing the regulatory burden and has proposed the adoption of regulatory budgeting to meet this goal.¹ The second is that the president's complicated relationship with members of the Republican-controlled Congress could lead to renewed interest in strengthening congressional oversight and scrutiny of regulations and other executive rulemaking.

Both developments would be positive for the U.S. economy and its democracy. The regulatory burden imposed on businesses and individuals by the federal government has been growing for several decades, with important economic and political consequences.

The economic part of the story is well-known. A 2014 report

1. Sean Speer, "Regulatory Budgeting: Lessons from Canada," R Street Institute, March 18, 2016. <http://www.rstreet.org/policy-study/regulatory-budgeting-lessons-from-canada/>.

CONTENTS

Introduction	1
Regulations and rulemaking by the executive and legislative branches	2
Legislative scrutiny of regulations and executive rulemaking	3
Australia	4
Canada	5
New Zealand	6
United Kingdom	7
Regulatory reform and congressional oversight in the United States	8
Lessons from the Anglosphere	10
Conclusion	11
About the author	12

TABLE 1:

Australia's tests to review a regulation	4
--	---

TABLE 2:

Canada's criteria to evaluate a statutory instrument	5
--	---

TABLE 3:

New Zealand's criteria to review a regulation	6
---	---

TABLE 4:

United Kingdom's tests to review delegated authorities	8
--	---

TABLE 5: United Kingdom's criteria to review regulations	8
--	---

Table 6:

U.S. federal legislation versus regulations, 2003-2016	9
--	---

by the National Association of Manufacturers estimated the total cost of federal regulations exceeded \$2 trillion and represented a financial burden of \$233,182 for the average U.S. firm.² This financial cost imposes a significant burden on the U.S. economy with respect to capital investment and job creation.

But the massive expansion of federal regulations also carries a political cost, to the extent that it diminishes the legislative branch relative to the executive. A proliferation of regulations, rules and other executive directives has led to regulatory sprawl and what Georgetown University legal scholar Jonathan Turley has called "a constitutional crisis with sweeping implications for our system of government."³

For example, federal bureaucrats have used the Clean Air Act alone to enact, on average, roughly 350 pages of regulations for every year the law has been in effect.⁴ Surely, legislators did not intend such executive exuberance when they passed the act nearly 50 years ago. But it is hardly the only example of broad or vague legislation becoming a seemingly limitless basis for executive rulemaking and overreach.

2. W. Mark Crain and Nicole V. Crain, "The Cost of Federal Regulations to the U.S. Economy, Manufacturing and Small Business, National Association of Manufacturers," Sept. 10, 2014. [http://www.nam.org/Newsroom/Press-Releases/2014/09/Pay-Up--Federal-Regulations-Cost-U-S--Economy-More-Than-\\$2-Trillion-Annually/](http://www.nam.org/Newsroom/Press-Releases/2014/09/Pay-Up--Federal-Regulations-Cost-U-S--Economy-More-Than-$2-Trillion-Annually/).

3. As quoted in Clyde Wayne Crews Jr., "One Nation, Ungovernable? Confronting the Modern Regulatory State," in Donald Boudreaux and Robert A. Lawson (eds.), *What America's Decline in Economic Freedom Means for Entrepreneurship and Prosperity*, Fraser Institute, April 16, 2015. <https://www.fraserinstitute.org/sites/default/files/One-Nation-Ungovernable-Confronting-Modern-Regulatory-State-by-Crews.pdf>.

4. Kevin Kosar and Sean Speer, "Will Congress claw back power from the regulatory state?" *National Review Online*, July 14, 2016. <http://www.nationalreview.com/article/437859/cut-regulations-restore-congressional-power-senator-lee-leads-way>.

Several ideas have been considered to reverse this trend of a growing regulatory burden and greater scope for executive action. Proposals have been advanced to require Congress to vote on major regulations and to form a commission to remove anachronistic or ineffective regulations.⁵

Another institutional reform that should be considered is to create a legislative committee that would scrutinize “delegated legislation” and ensure that any new rules and regulations promulgated by the executive comply with the law. Such committees exist in Australia, Canada, New Zealand and the United Kingdom, and generally serve to diminish executive overreach with regards to its legal authority in regulation and rulemaking.

This study outlines the Anglosphere experience with such legislative committees and considers what lessons can be derived for the U.S. context. U.S. legislators can learn from the strengths and weaknesses of these Anglosphere experiences to establish a new congressional committee to scrutinize regulations and executive rulemaking as part of a broader strategy to reverse the growth of the regulatory state and the erosion of congressional supremacy.

The key lessons are: the review process should be depoliticized to the extent possible; such a legislative committee must be properly resourced and staffed; correspondence between the committee and government departments and agencies must be transparent and tied to clear and reasonable timelines; enabling or primary legislation should only delegate lawmaking authorities where appropriate; and the threat of disallowance must be practical and real.

The paper’s first section will describe the relationship between the executive and legislative branches and the role of delegated authorities in regulations and executive rulemaking. The second will review the mandate, role and structure of these committees in Australia, Canada, New Zealand and the United Kingdom. The third will examine the growing regulatory state in the United States, how the absence of congressional oversight has contributed to the problem and the set of reforms presently under consideration. The final section will assess the strengths and weaknesses of the Anglosphere models to establish key lessons for U.S. lawmakers.

REGULATIONS AND RULEMAKING BY THE EXECUTIVE AND LEGISLATIVE BRANCHES

Discussing the relationship between the executive and legislative branches in regulation and rulemaking can sound like a

boring university seminar. It may seem esoteric and disconnected from real-world concerns, such as economic opportunity or the cost of living. But these are essential subjects at the root of the functioning of our democracies. An executive branch unmoored from legislative limits or obligations risks becoming intrusive, undemocratic and costly. The extent to which it is subject to legislative restraints is a measure of the health of our democracy and its fidelity to the country’s founding principles.

The U.S. founders did not intend for a large and muscular executive branch. Quite the contrary, their purpose was to establish the legislative branch as the principal protector of republican government. As James Madison declared in the *Federalist Papers*, “in republican government, the legislative authority necessarily predominates.”⁶

Article I of the Constitution establishes the national legislature and grants it *all* lawmaking power. Only Congress, not the government generally, may “coin Money” and regulate its value; “lay and collect Taxes”; or establish a “uniform Rule of Naturalization.” Congress, and especially the House of Representatives, is to be the place where the will of the people—the ultimate source of power—is represented.

Article II of the Constitution sets out the president’s enumerated powers. A review of those powers provides a powerful reminder of their limitations. The president’s own powers mostly relate to international affairs. Even though the president is commander in chief, Congress retains the power to “raise and support armies,” “provide and maintain a navy” and to “declare war.” The president’s most fundamental duty is to “take Care that the Laws be faithfully executed.”⁷

This is a critical point. The legislative branch is to promulgate and pass laws and the president and his or her appointees are to implement and enforce them. But this is not how the system of governance has evolved. The combination of executive exuberance and congressional passivity is largely to blame.

Many of the laws passed by Congress delegate authorities to departments and agencies. That is to say, an act gives authority to the executive to promulgate rules and regulations to effectuate or administer the law. These secondary or accompanying policies are sometimes called “delegated or subordinate legislation” because they find their authority

5. Kevin R. Kosar, “Reasserting Congress in Regulatory Policy,” in *Unleashing Opportunity: Policy Reforms for an Accountable Administrative State*, National Affairs, 2017. <http://www.nationalaffairs.com/publications/page/regulation-policy-book>.

6. Jeffrey H. Anderson, “In Republican government, the legislative authority necessary predominates,” *Weekly Standard*, Sept. 7, 2011. <http://www.weeklystandard.com/republican-government-legislative-authority-necessary-predominates/article/592771>.

7. Kevin Kosar, “How to strengthen Congress,” *National Affairs*, Number 25, Fall 2015. <http://www.nationalaffairs.com/publications/detail/how-to-strengthen-congress>.

in “enabling or primary legislation” and have the full force of law.⁸

Consider the Dodd–Frank Wall Street Reform and Consumer Protection Act, commonly known as “Dodd-Frank.” The 2,300-page statute was passed following the U.S. financial crisis to better regulate the financial sector. The framework legislation covered a far-reaching set of issues, including financial instruments, executive compensation, mortgage lending and government oversight. It also established three new agencies, including the Consumer Financial Protection Bureau.⁹

While the act was comprehensive in scope, it frequently was light on details. Federal agencies were granted considerable discretion to promulgate delegated authorities to accompany the statute, with no congressional role. Vague drafting that agencies “may” or “shall” issue rules as they “determine are necessary and appropriate” provide the executive branch tremendous power to define, broaden and interpret the law. As Christopher DeMuth has put it: “in these case, the agencies make the hard policy choices. They are the lawmakers.”¹⁰

The growing trend of this type of executive lawmaking—which is how it is described in administrative law, hence the term “delegated legislation”—has indeed provided an opening for presidents and their cabinets to act as *de facto* lawmakers. Unsurprisingly, successive administrations have taken advantage of it. As R Street scholar Kevin Kosar writes:

The data here tell the tale. Congress enacts perhaps 50 significant laws each year. Agencies issue 4,000 new rules per year, and 80 to 100 have economic effects of \$100 million or more. And these numbers do not include ‘guidance’ documents issued by executive agencies, which can have the same effect as regulations. *The Code of Federal Regulations*, the corpus of current agency rules, holds more than 170,000 pages. All this indicates that the executive branch has displaced Congress as the primary locus of lawmaking in the country.¹¹

The upshot is that most of the legislation enacted each year is not made by Congress directly. It is made by other per-

sons or bodies under powers granted or delegated to them by Congress. To the extent that there are benefits of delegated legislation—including technicality, flexibility and contingencies—they surely must be weighed against the costs of a diminished legislature and an inflated executive. It is not hyperbole to say that doing so is a matter of protecting and abiding by the U.S. Constitution.

LEGISLATIVE SCRUTINY OF REGULATIONS AND EXECUTIVE RULEMAKING

The United States is hardly the only jurisdiction to grapple with the challenges of delegated legislation and executive overreach. Parliamentary governments in Australia, Canada, New Zealand and the United Kingdom have struggled with similar problems. In fact, the fusion of the executive and legislative branches in the parliamentary model tends to lead to a less-adversarial relationship between the two branches and greater deference to executive branch. If the executive and the legislature are essentially one and the same, what incentives are there for legislators to call out cases of executive overreach?¹²

Yet these Anglosphere countries have nonetheless taken steps to strengthen the legislative branch’s means to scrutinize regulations and executive rulemaking. The general goal is to ensure that governments are acting according to the law and not using delegated authorities to promulgate rules and regulations beyond what has been granted by the legislative branch.

Australia, Canada, New Zealand and the United Kingdom are considerably more advanced than the United States in this regard. Congress’ control over delegated legislation is highly limited, in large part, because there are no designated congressional committees to scrutinize it.¹³ This has been attributed to the constitutional structural, which rests responsibility to review the legality of administrative rulemaking with the courts.¹⁴ We will address this question in a subsequent section about the applicability of the Anglosphere model to the U.S. context.

Australia, Canada, New Zealand and the United Kingdom have permanent legislative committees to oversee and

8. For more on “delegated legislation,” see Ruth Fox and Joel Blackwell, “The Devil is in the Details: Parliament and Delegated Legislation,” Hansard Society, 2014. https://assets.contentful.com/u1rlvvs33ri/7rCt1Vc2C4oAaGqUeiOKsw/fdeec732b95f7562860db4fb01aed9fi/Publication_The-Devil-is-in-the-Detail-Parliament-and-Delegated-Legislation-Executive-Summary.pdf.

9. U.S. Congress, H.R. 4173 – Dodd-Frank Wall Street Reform and Consumer Protection Act, 111th Congress (2009-2010). <https://www.congress.gov/bill/111th-congress/house-bill/04173#major%20actions>.

10. Christopher DeMuth, “The Regulatory State,” *National Affairs*, Number 12, Summer 2012. <http://www.nationalaffairs.com/publications/detail/the-regulatory-state>.

11. Kosar, *National Affairs*, 2015.

12. Gabrielle Appleby and Joanna Howeb, “Scrutinising Parliament’s scrutiny of delegated legislative power,” *Oxford University Commonwealth Law Journal*, Vol. 15, No. 1, 2015: 3-40.

13. In Congress, scrutiny of a regulation may be done by the committee with jurisdiction over the subject matter. For example, the Senate Committee on Energy and Natural Resources could examine a proposed regulation on fishing in streams, but it cannot authorize or prohibit the regulation through a vote. Executive agencies may issue regulations and Congress may only stop them if both chambers enact legislation that the president signs. See Kevin R. Kosar, “Three steps for reasserting Congress in regulatory policy,” R Street Institute, Policy Study No. 34, March 2015. <https://www.rstreet.org/wp-content/uploads/2015/03/RSTREET34.pdf>.

14. I.P. Massey, *Administrative Law*, Eastern Book Company, 6th edition, 2005, p. 102.

review “delegated legislation.”¹⁵ It is worth examining the basic features of each model to understand their commonalities and differences. The examination is limited to reviewing the experiences at the national or central level.¹⁶

Australia

Australia became the first of the four countries to establish a parliamentary committee to scrutinize delegated legislation when its national Parliament established such a committee in 1932. But the legislature’s role in overseeing executive regulations and other rulemaking dates back even further.

Australia’s lower and upper houses have had powers to disallow regulations since the early 1900s.¹⁷ A 1904 statute that granted these powers also required the government to submit any new regulations in each house within 15 sitting days, in order to facilitate parliamentary review. House and Senate members were then able to determine whether to move a disallowance motion based on a regulation’s nonconformity to the enabling or primary legislation or other factors.

This regime seemed to provide considerable discretion to Parliament, in general, and individual parliamentarians, in particular, to monitor and oversee regulations and executive rulemaking. But it eventually became clear there needed to be a dedicated committee to carry out such responsibility effectively, particularly as the number of regulations grew.

The Senate Committee on Regulations and Ordinances (SCRO) was thus established in 1932 to serve a dedicated role for parliamentary oversight of delegated legislation.¹⁸ Under the committee’s mandate:

All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.¹⁹

15. Elizabeth Weir, “Delegated legislation: The weak link of parliamentary accountability,” *Canadian Parliamentary Review*, Vol. 20, No. 3, 1997. <http://www.revparl.ca/english/issue.asp?param=64&art=65>.

16. Australia and Canada also have similar parliamentary committees at several of their state or provincial levels that are outside the scope of this review.

17. Dennis Pearce, “Rules, regulations and red tape: Parliamentary scrutiny of delegated legislation,” *Papers on Parliament*, No. 42 (Parliament of Australia), December 2004. http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/-/-/link.aspx?id=A82D5061FA5C4BFABD5701538EF7E86B&z=z.

18. D.J. Whalen, “Scrutiny of delegated legislation by the Australian Senate,” *Statute Law Review*, Vol. 12, Issue 2, January 1991: 87-108.

19. Harry Evans (ed.), *Odgers’ Australian Senate Practice*, 12th edition, 2008. <http://www.aph.gov.au/binaries/senate/pubs/odgers/pdf/odgers.pdf>.

The committee’s work is guided by four basic tests of each regulation or rule, described in Table 1. The principal focus is whether delegated legislation conforms to the authorities set out in the enabling or primary statute. The committee’s role is not to evaluate the utility or substance of a set of regulations, per se.

TABLE 1: AUSTRALIA’S TESTS TO REVIEW A REGULATION

1.	It is in accordance with the statute.
2.	It does not trespass unduly on personal rights and liberties.
3.	It does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.
4.	It does not contain matter more appropriate for parliamentary enactment.

SOURCE: Committee on Regulations and Ordinances²⁰

The committee works in tandem with a separate Senate Scrutiny of Bills Committee that is responsible for, among other things, ensuring that any new legislation does not “inappropriately delegate legislative powers or ... insufficiently subject the exercise of legislative power to parliamentary scrutiny.”²¹ One way to think of the difference is that the Scrutiny of Bills Committee plays its role by scrutinizing primary legislation, while the Committee on Regulations and Ordinances has ongoing responsibility to review delegated or subordinate legislation.

Each year, the SCRO reviews approximately 2,000 pieces of delegated legislation against its terms of reference. It produces a weekly report of the rules and regulations it has reviewed during the parliamentary schedule and whether it has identified any issues.²²

Historically, the committee raises issues of concerns with about 10 percent of the items. These concerns are conveyed to the relevant Cabinet minister in the form of a letter from the committee’s chairman. The majority of these concerns are resolved by an explanation from the sponsoring minister or a commitment to amend the enabling or primary legislation to address issues identified by the committee.²³

If a resolution is not reached, the chairman will then move a disallowance motion in the Senate. The threat of a disallowance motion tends to prompt action on the part of an executive. As Australian legal scholar Dennis Pearce writes:

20. *Ibid.*

21. Whalen, 1991, p. 91.

22. Standing Committee on Regulations and Ordinances, Delegated legislation monitor. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2016/index.

23. Pearce, 2004.

The Senate has not had to disallow a regulation on the initiative of the committee since 1988. This is simply because, over the many years of its existence, the Senate has always supported a disallowance motion when moved by the committee. The executive knows that it must reach an accommodation with the committee or lose its legislation.²⁴

The Australian experience has thus generally been positive. The two-pronged model between the Scrutiny of Bills Committee and Regulations and Ordinances Committee, and a focus on public reporting, has been seen as an effective means to limit executive overreach.²⁵

Canada

Canada’s experience with parliamentary scrutiny is associated with the outgrowth of the regulatory state in the mid-20th century. A post-World War II proliferation of executive rulemaking known as Orders in Council generated significant criticism and led to calls for greater parliamentary oversight and scrutiny of delegated legislation.²⁶ A series of parliamentary studies into the question, including a review of best practices in the Commonwealth parliaments, led to establishment of a joint committee comprising members of the lower and upper houses of the Canadian Parliament.²⁷

In response to these calls, the Standing Joint Committee for the Scrutiny of Regulations (known hereafter as the Scrutiny of Regulations Committee) was established in 1971. The committee is one of only two permanent parliamentary committees comprised of House and Senate members. It also has joint and vice-chairs from each of the major political parties, in order to minimize partisanship.

The Scrutiny of Regulations Committee is responsible for scrutinizing “statutory instruments,” which are defined as:

[A]ny rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established ... in the execution of a power conferred by or under an Act of Parliament.²⁸

Its mandate is to review matters of legality and the procedural aspects of regulations. That is to say, the committee is concerned with fidelity to delegated authorities set out

24. Ibid.

25. Evans, 2008.

26. Robert Marleau and Camille Montpetit (eds.), *House of Commons Procedure and Practice*, 2000 edition. <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?Lang=E&Sec=Ch17&Seq=3>.

27. Ibid.

28. Marleau and Montpetit, 2000.

in enabling or primary legislation statutes, rather than the merits of specific rules or regulations. It uses 13 criteria to guide its work, as described in Table 2. These criteria are designed to make determinations about the conformity of delegated legislation.

TABLE 2: CANADA’S CRITERIA TO EVALUATE A STATUTORY INSTRUMENT

1	It is not authorized by the terms of the enabling legislation or has not complied with any condition set forth in the legislation.
2	It is not in conformity with the <i>Canadian Charter of Rights and Freedoms</i> or the <i>Canadian Bill of Rights</i> .
3	It purports to have retroactive effect without express authority having been provided for in the enabling legislation.
4	It imposes a charge on the public revenues or requires payment to be made to the Crown or to any other authority, or prescribes the amount of any such charge or payment, without express authority having been provided for in the enabling legislation.
5	It imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation.
6	It tends directly or indirectly to exclude the jurisdiction of the courts without express authority having been provided for in the enabling legislation.
7	It has not complied with the <i>Statutory Instruments Act</i> with respect to transmission, registration or publication.
8	It appears for any reason to infringe the rule of law.
9	It trespasses unduly on rights and liberties.
10	It makes the rights and liberties of the person unduly dependent on administrative discretion or is not consistent with the rules of natural justice.
11	It makes some unusual or unexpected use of the powers conferred by the enabling legislation.
12	It amounts to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment.
13	It is defective in its drafting or for any other reason requires elucidation as to its form or purport.

SOURCE: Scrutiny of Regulations Committee²⁹

Each year the Scrutiny of Regulations Committee uses these criteria to review hundreds of rules and regulations. Legal advisers to the committee conduct an initial review. Most cases are compliant and thus closed. Nonconforming cases are brought to the attention of the committee. A letter is then sent to the department responsible for the regulation, identifying the issue, requesting its position and requesting an amendment to rectify the problem.

The committee attempts to resolve problems through this exchange of private correspondence with the department or agency. If the committee decides there is an impasse, it will then write to the responsible Cabinet Minister to resolve the issue. Only when this process does not yield a satisfactory solution will the committee consider reporting to both

29. Ibid.

houses of Parliament, and possibly recommending that it exercise its powers of disallowance.³⁰

The committee has recommended disallowance fewer than 20 times during the 30-year period between 1986 and 2015.³¹ This limited use of the disallowance powers speaks to the committee’s predisposition to compromise rather than for conflict. As one former senator and a member of the Scrutiny of Regulations Committee writes:

Before exercising these [disallowance] powers...it [the committee] makes use of exceptional diplomacy: no amount of correspondence, calls, assistance, arm-twisting, patience, persuasion, or pressure is too much trouble before the ultimate weapon is used.³²

This lack of transparency and self-imposed limits on the use of disallowance powers proffers lessons for U.S. lawmakers. Such a committee’s utility in achieving a better balance between the executive and legislature requires greater transparency, clearer timelines and disallowance powers with real and practical meaning.

New Zealand

New Zealand’s regime is the newest among the four countries. Until the 1980s, the oversight of delegated legislation by the unicameral New Zealand Parliament was limited. There were no requirements that regulations be submitted in Parliament until 1962 and disallowance powers were not established until 1989.³³ The role for parliamentary oversight was criticized as “lax” and “bureaucratic” and the perception was that the legislative branch was undermined by the proliferation of regulations and executive rulemaking.³⁴

A new Regulations Review Committee was thus established in 1985 to strengthen the role of Parliament in the oversight of regulations and executive rulemaking. The committee is chaired by an opposition member of Parliament and has con-

siderable scope to both review primary legislation to determine if it provides for an inappropriate delegation of power and delegated legislation to see if it conforms with its delegated authorities.³⁵ The committee effectively has five main functions concerning regulations:

1. The examination of all regulations;
2. Consideration of draft regulations referred to the committee by a Cabinet minister;
3. Consideration of provisions in bills that concern regulations, such as regulation-making powers;
4. Inquiring into any matters relating to regulations; and
5. Investigating complaints about the operation of regulations.

Its work is guided by a set of tests, described in Table 3, that are similar to those provided in Australia’s regime. The committee’s focus also is not on whether the policy has merits, but rather on the regulatory and rulemaking process.³⁶

TABLE 3: NEW ZEALAND’S CRITERIA TO REVIEW A REGULATION

1	It is not in accordance with the general objects and intentions of the statute under which it was made.
2	It trespasses unduly on personal rights and liberties.
3	It appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made.
4	It unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal.
5	It excludes the jurisdictions of the courts without explicit authorisation in the enabling statute.
6	It contains matters more appropriate for parliamentary enactment.
7	It is retrospective where this is not expressly authorized by the empowering statute.
8	It was not made in compliance with particular notice and consultation procedures prescribed by statute.
9	It is objectionable for any other reason concerning its form or purport, or calls for elucidation.

SOURCE: Regulations Review Committee³⁷

The committee and its staff review all new regulations as soon as possible after they have been introduced or released. Any regulations flagged for further inquiry will be subject to an exchange between committee staff and officials from the

30. The disallowance powers are set out in the *Statutory Instruments Act*, which states: “Only the Standing Joint Committee can initiate disallowance. In any case where the Committee is of the view that a regulation, or part of a regulation, should be revoked, it can make a report to the two Houses containing a resolution to this effect. Before doing so, however, the Committee must notify the regulation-making authority of its intent to propose the disallowance of a regulation at least 30 days prior to adopting the disallowance report. The Committee only recommends disallowance. That recommendation must then be accepted by Houses.” See Cynthia Kirby, “The Standing Joint Committee for the Scrutiny of Regulations,” Library of Parliament, April 2, 2014. <http://www.lop.parl.gc.ca/Content/LOP/ResearchPublications/2014-18-e.htm?cat=government>.

31. Lorne Neudorf, “Rule by regulation: Revitalizing Parliament’s supervisory role in the making of subordinate legislation,” *Canadian Parliamentary Review*, Spring 2016. http://www.revparl.ca/39/1/39n1e_16_Neudorf.pdf.

32. Normand Grimard, “The Standing Joint Committee for the Scrutiny of Regulations,” *Canadian Parliamentary Review*, Vol. 21, No. 3, 1998. <http://www.revparl.ca/english/issue.asp?art=106¶m=68>.

33. Evans, 2008.

34. Caroline Morris and Ryan Malone, “Regulation reviews in the New Zealand Parliament,” *Macquarie Law Journal*, Vol. 4, 2004. <http://www.austlii.edu.au/au/journals/MqLJ/2004/2.html#fn33>.

35. Ibid.

36. Regulations Review Committee, “Inquiry into instruments deemed to be regulations—An examination of delegated legislation,” New Zealand Parliament, July 1999. <http://www.pco.parliament.govt.nz/regulationsreview/>.

37. Anthony H. Angelo, *Constitutional Law in New Zealand, The Netherlands: Kluwer Law International*, 2011, pp. 78-9.

relevant government departments or agencies. The committee is then updated and a decision is taken on whether the regulation conforms to its enabling or primary legislation.

The committee has adopted the practices of making reports to the House of Commons on its activities on an annual basis. The report informs the House of its consideration of all regulations, even if any problems ultimately are resolved with the relevant department. A separate report drawing the House's specific attention to a regulation is reserved for those few regulations which raise issues of particular significance.³⁸

The New Zealand House of Representatives has three unique powers with regards to disallowance. The first is it can disallow regulations at any time, even years after they have been enacted. The second it can disallow a part of a regulation, rather than having to repeal the entire item. The third is that motions for disallowance made by committee members take effect if not disposed of within 21 days.³⁹ These are positive characteristics that ought to be considered in other jurisdictions.

But there are also unique weaknesses in the New Zealand model. The combination of a unicameral legislature and tight party discipline effectively means that regulations will only be repealed if the government wants them to be repealed. As one former prime minister has put it: "tenderness toward executive power in New Zealand dies hard."⁴⁰ The result is that the committee's work tends to be focused on narrow questions such as regulations "confusing naming practices" and "not being available on the agency's website," rather than bigger questions that reverse the trend of executive overreach.⁴¹

United Kingdom

The United Kingdom has a long history of parliamentary scrutiny of delegated legislation. The arcane subject has generated considerable attention in recent years following a high-profile dispute between the government and the upper house in 2015 over the use of delegated legislation to

enact contentious changes to a number of tax credits.⁴² The incident led to an inquiry about the role of Parliament—particularly the House of Lords—in reviewing and blocking delegated legislation.⁴³

The upshot of this controversy is unresolved.⁴⁴ There remain outstanding questions about the respective roles of the lower and upper houses, particularly in light of the recent Brexit vote, but the basic structure for parliamentary scrutiny remains in place.

There are three separate parliamentary committees with responsibilities to scrutinize delegated powers, rules and regulations, and other statutory instruments. There are some similarities to Australia's two-pronged model, though the tensions between the two houses of Parliament, in general, and questions about the legitimacy of the unelected upper house, in particular, have led to differences in influence and effectiveness. It is worth noting, for instance, that the House of Lords voluntarily blunts its sway by generally refraining from exercising its powers to disallow delegated legislation.⁴⁵

The House of Lords Delegated Powers and Regulatory Reform Committee was established in 1992 to review the extent of legislative powers delegated by primary legislation to the executive.⁴⁶ The committee applies four tests to the lawmaking authority in a bill and then reports to the House of Lords on whether to enact changes to circumscribe the delegated authorities. This process is described in Table 4.

38. David McGee, *Parliamentary Practice in New Zealand*, 3rd edition, Dunmore Publishing Ltd., Wellington, 2005. https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/document/00H000CPPNZ_291/chapter-29-delegated-legislation#RelatedAnchor.

39. This particular power has only been used once since the 1980s. See: Regulations Review Committee, "Parliamentary law milestone: first automatic disallowance of regulations," (New Zealand Parliament), March 1, 2013. <https://www.parliament.nz/en/get-involved/features-pre-2016/document/50NZPHomeNews201303011/parliamentary-law-milestone-first-automatic-disallowance>.

40. Geoffrey Palmer, "Subordinate legislation in New Zealand," *New Zealand Law Society*, Oct. 11, 2013. <https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-829/subordinate-legislation-in-new-zealand>.

41. Regulations Review Committee, Activities of the Regulations Review Committee in 2015, (New Zealand Parliament), November 2016. https://www.parliament.nz/resource/en-NZ/51DBSCH_SCR71862_1/1f15621f51243499e55a80d8c606e8652443e88a.

42. George Eaton, "House of Lords defeats the government over tax credit cuts," *New Statesman*, Oct. 26, 2015. <http://www.newstatesman.com/politics/uk/2015/10/house-lords-defeats-government-over-tax-credit-cuts>.

43. Select Committee on the Constitution, Delegated Legislation and Parliament: A response to the Strathclyde Review, (UK Parliament), 9th report of the session, 2015-2016. <https://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/news-parliament-2015/strathclyde-report/>.

44. Joel Blackwell, "A constitutional storm in a teacup? Delegated legislation, the House of Lords and the inadequacies of the Strathclyde Review," *The Political Quarterly*, Vol. 87, No. 3, July 2016: 443-449.

45. Fox and Blackwell, 2014.

46. Select Committee on Delegated Powers and Deregulation (United Kingdom Parliament, House of Lords). <http://www.publications.parliament.uk/pa/ld199798/ldselect/lddelder.htm>.

TABLE 4: UNITED KINGDOM'S TESTS TO REVIEW DELEGATED AUTHORITIES

1	Whether the grant of secondary power is appropriate. This includes expressing a view on whether the power is so important that it should only be granted by primary legislation.
2	Whether it carries Henry VIII powers – a provision in a bill enabling primary legislation to be amended or repealed by delegated or subordinate legislation with or without further parliamentary scrutiny.
3	What form of parliamentary control is appropriate and, in particular, whether the proposed power calls for the affirmative, rather than the negative, resolution procedure.
4	Whether the legislation should provide for consultation in draft form before the regulation is laid before Parliament, and whether its operation should be governed by a Code of Conduct.

SOURCE: Delegated Powers Scrutiny Committee⁴⁷

The House of Lords Secondary Legislation Scrutiny Committee reviews all regulations (approximately 1,200 per year) that are required to be laid before Parliament to determine whether any special attention is required of the House of Lords. The larger body then has the ability to disallow such regulations – though, as mentioned above, it generally does not use it. The committee uses a set of tests, described in Table 5, to make its recommendations and ultimately determine whether to exercise the power of disallowance.⁴⁸

TABLE 5: UNITED KINGDOM'S CRITERIA TO REVIEW REGULATIONS

1	It is politically or legally important or gives rise to issues of public policy likely to be of interest to the House.
2	It may be inappropriate in view of the changed circumstances since the passage of the parent act.
3	It may inappropriately implement European Union legislation.
4	It may imperfectly achieve its policy objectives.
5	The explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation.
6	There appear to be inadequacies in the consultation process which relates to the instrument.

SOURCE: Secondary Legislation Scrutiny Committee⁴⁹

There is also a Joint Committee on Statutory Instruments that can examine in detail the “technical qualities” of any regulation. This committee differs from the Secondary Legislation Scrutiny Committee in that the latter has greater scope for rendering judgments about policy merits (in fact, it was previously called the Merits of Statutory Instruments

Committee) whereas the former is solely focused on matters of process and technicalities.⁵⁰

Notwithstanding the multipronged structure, the regime has not led to a significant number of disallowances. Just 16 pieces of delegated legislation out of more than 169,000—or 0.01 percent—in nearly 65 years have been rejected. Since 1950, the House of Commons has rejected 11 and the House of Lords has rejected five.⁵¹ A debate remains ongoing about what reforms should be undertaken to strengthen the role of legislative review and oversight.

The clear takeaway from these four Anglosphere experiences is that there are models for the legislative branch to scrutinize regulations and executive rulemaking. None is perfect. But each offers strengths and weaknesses that can inform U.S. lawmakers on how best to strengthen the role for congressional oversight of executive action.

REGULATORY REFORM AND CONGRESSIONAL OVERSIGHT IN THE UNITED STATES

The U.S. Congress does not presently conduct this type of oversight role for delegated legislation. The massive growth in regulatory and executive action over the past eight years is one of the consequences.

The need for reforms to curb regulatory sprawl and executive overreach in the United States is thus well-established. Just consider that, in 2016, while Congress passed 211 laws,⁵² the federal government issued 3,853 rules and regulations.⁵³ As research by regulatory policy expert Clyde Wayne Crews shows, this major discrepancy between primary legislation and delegated legislation is hardly unique that one year. Table 6 summarizes Crews’ findings on the balance of new laws and new regulations over the past 14 years.

50. A. Tucker, “Tax Credits, Delegated Legislation, and Executive Power,” UK Constitutional Law Association Blog, Nov. 5, 2015, (available at <https://ukconstitutionalaw.org/>).

51. Fox and Blackwell, 2014.

52. This figure includes many non-policy statutes, such as post-office-naming legislation and commemorative acts (e.g., the Boys Town Centennial Commemorative Coin Act).

53. Clyde Wayne Crews Jr., “The 2017 Unconstitutionality Index: 18 federal rules for every law Congress passes,” Competitive Enterprise Institute, Dec. 30, 2016. <https://cei.org/blog/2017-unconstitutionality-index-18-federal-rules-every-law-congress-passes>.

47. Neudorf, 2016.

48. United Kingdom Parliament, “Delegated Legislation.” <http://www.parliament.uk/about/how/laws/delegated/>.

49. House of Lords, “Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, Great Britain, Parliament,” 2010, p. 221.

TABLE 6: U.S. FEDERAL LEGISLATION VERSUS REGULATIONS, 2003-2016

Year	Pieces of primary legislation	Number of executive rules or regulations
2003	198	4,148
2004	299	4,101
2005	161	3,975
2006	321	3,718
2007	188	3,595
2008	285	3,830
2009	125	3,503
2010	217	3,563
2011	81	3,807
2012	127	3,708
2013	72	3,659
2014	224	3,554
2015	115	3,410
2016	211	3,853

SOURCE: Competitive Enterprise Institute⁵⁴

Recent congressional attempts to control regulations have had “mixed results.”⁵⁵ The focus has been to reduce the paperwork burden on small businesses and improve regulatory transparency. Congress has been “less active” in exerting concerted oversight over the regulatory process.⁵⁶

It was not always this way. Congress previously attempted to retain some control over regulations and executive rule-making through the use of legislative veto provisions. The legislative veto usually took the form of a clause in a statute that stipulated any new rules or regulations promulgated by the power delegated in the law would take effect only if Congress did not veto it by resolution within a given timeframe.⁵⁷ There were more than 200 statutes with such provisions that enabled one or both houses or their relevant committees to disapprove, without the president’s signature, an agency’s exercise of delegated authority.⁵⁸

But this legislative tool was declared unconstitutional by the Supreme Court in the 1983 *Chadha* case. Examining a legislative veto that allowed one house of Congress to block a decision by the attorney general not to deport an illegal

54. *Ibid.*

55. Susan E. Dudley, “Improving regulatory accountability: Lessons from the past and prospects for the future.” *Case Western Reserve Law Review*, Vol. 65, Issue 4, 2015: 1027-1057. <http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1006&context=caselrev>.

56. *Ibid.*

57. Jerry Taylor, “The role of Congress in monitoring administrative rulemaking,” Testimony to the Subcommittee on Commercial and Administrative Law – Committee on the Judiciary (United States Congress), Sept. 12, 1996. <https://www.cato.org/publications/congressional-testimony/role-congress-monitoring-administrative-rulemaking>.

58. Dudley, 2015.

immigrant, the Supreme Court held that such legislative vetoes were unconstitutional for violating the separation of powers embodied in the Constitution.⁵⁹

The Congressional Review Act of 1996 provides a mechanism for Congress to block significant regulations from taking effect. But to ensure compliance with the court’s decision, each house must pass a resolution of disapproval and the president must sign it (thereby blocking his or her own administration’s regulation) or Congress must override his veto.⁶⁰ The CRA’s unwieldy process has rendered it rarely used. Until recently, only one regulation had been revoked, although the 115th Congress currently is in the process of exploring ways to use the act to repeal rules promulgated late in the Obama administration.⁶¹

The question then is not whether reform is needed, but rather what type of reform ought to be undertaken to expand congressional oversight over regulations and executive rule-making, while still complying with the Constitution. There are a number of proposals presently under consideration. The 115th Congress has already taken steps to pass the REINS Act (Regulations from the Executive In Need of Scrutiny) to require congressional approval of a “major rule,” defined as those that would impose \$100 million or more in economic costs, before they take effect.⁶² It effectively would shift the model from a congressional resolution of disapproval under the CRA to requiring a congressional resolution of approval before a major rule could take effect.

There have also been calls for a Congressional Regulation Office, modeled on the Congressional Budget Office, to conduct cost-benefit analyses of major rules and regulations and provide retrospective estimates of regulatory costs.⁶³ The office could help keep members of Congress better apprised of regulatory developments, strengthen Congress’ capacity to play a meaningful role in regulatory policy and force regulatory oversight onto the congressional agenda.

President Trump has also proposed adopting a regulatory-budgeting model to require that any new regulatory

59. Alec D. Rogers, “REINING in the agencies: Oversight of executive branch rulemaking in the 21st century,” *Engage* (Federalist Society), Vol. 16, Issue 3, December 2015. <http://www.fed-soc.org/publications/detail/reining-in-the-agencies-oversight-of-executive-branch-rulemaking-in-the-21st-century>.

60. *Ibid.*

61. Kellie Mejdich, “GOP Leaps on Congressional Review Act to Kill Obama Rules,” *Roll Call*, Feb. 23, 2017. <http://www.rollcall.com/news/policy/gop-leaps-congressional-review-act-kill-obama-rules>.

62. The House of Representatives passed the REINS Act Jan. 3, 2017. This was the fourth time it has passed such a bill. <https://www.congress.gov/bill/115th-congress/house-bill/26>.

63. Phillip Wallach and Kevin Kosar, “The case for a Congressional Regulation Office,” *National Affairs*, No. 29, Fall 2016. <http://www.nationalaffairs.com/publications/detail/the-case-for-a-congressional-regulation-office>.

requirements are offset on a two-to-one basis.⁶⁴ There are several bills in Congress that could help him deliver on this commitment.⁶⁵ A Congressional Regulation Office could play a key role in helping to launch, implement and oversee a model of regulatory budgeting.

Irrespective of which model or combination of models the Congress ultimately chooses, it is right to focus on regulatory oversight and reform as a key part of its policy agenda. The economic and political costs of executive rulemaking and overreach are too significant to neglect.

As for the potential of a permanent congressional committee, it is worth noting that several U.S. states have experimented with special committees to review rules and regulations by government departments and executive agencies. Forty-one states have some type of authority to review delegated legislation or administrative rules and nearly 30 have some capacity for legislative veto. Of those states with some veto authority, the action may be required through the enactment of statute in 13 states or passage of a resolution in 15 states. State courts have heard challenges to the legislative veto in at least 11 states, with all but two ruling either that the power or the process used was unconstitutional.⁶⁶

LESSONS FROM THE ANGLOSPHERE

While any new congressional committee with the mandate to review and oversee regulations and executive rulemaking would need to comply with this jurisprudence, there remains scope for such a committee as part of a broader strategy to reverse the growth of the regulatory state and the erosion of congressional supremacy. The inherent differences between the “separation of powers” in the United States and the “fusion of powers” in these parliamentary countries invariably would require a “made in America” solution. But there is still value to understand the lessons from the Anglosphere experiences.

The lesson from Australia, Canada, New Zealand and the United Kingdom is that there are principal ingredients for an effective role for oversight and scrutiny of delegated legislation by the legislative branch. These essential ingredients can be organized into five categories concerning the role of politics and partisanship; resources and staffing, public transparency and clear timelines; placing a key focus on ensuring primary legislation does not delegate authorities

too permissively; and real power to exercise disallowance.

1. *The review process should be depoliticized.*

An effective model requires that members act as legislators, rather than partisans. The goal is to protect the institution from executive overreach, rather than one’s party interests. A committee that falls victim to tight party discipline and party-line votes will thus not be effective.

This means that congressional opponents of the administration should not use the committee process to advance partisan objectives to embarrass or undermine the president. It also means that the administration’s congressional allies should not block efforts to raise legitimate concerns simply to protect or sustain the president. The experiences in Canada and New Zealand show how partisan dynamics can come to undermine the effectiveness of such a legislative committee.

Such options as establishing a joint committee, bipartisan co-chairs and high thresholds for committee votes can help address this concern. But the responsibility ultimately rests with members to put narrow partisanship aside and see their role as upholding the Constitution.

2. *Proper resources and staffing*

Such a committee must be properly resourced and staffed. It is basically responsible for tracking, reviewing and rendering judgments on all rules and regulations enacted by every government department and agency. The committee will simply not be able to keep up with regulations and executive rulemaking if it does not have adequate resources and a high-quality team of legal advisers.

The experience in each of the four countries is that the staff plays an essential role in conducting initial reviews of new rules and regulations. Thus, the efficiency and effectiveness of the process depends on the staff’s capacity. A former member of the Canadian Scrutiny of Regulations Committee cited understaffing as a serious problem in terms of the speed with which the committee could carry out its work.⁶⁷

It is hardly a surprising problem – indeed, this is consistent with the general problem of inadequate legislative-branch staffing, including at the Congressional Budget Office, Government Accountability Office, the Congressional Research Service and members’ offices.⁶⁸

If Congress is to consider establishing a committee dedicated to reviewing and overseeing regulations and executive rulemaking, it will therefore need to ensure it is properly resourced and staffed.

64. Susan E. Dudley, “President-Elect Trump’s two-for-one plan to reduce regulatory accumulation,” *Forbes*, Nov. 23, 2016. <http://www.forbes.com/sites/susandudley/2016/11/23/president-elect-trumps-two-for-one-plan-to-reduce-regulatory-accumulation/#540a06e17b81>.

65. Speer, 2016.

66. National Conference of State Legislatures, “Separation of powers – legislative oversight,” Background. <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-legislative-oversight.aspx>.

67. Grimard, 1998.

68. Kosar, National Affairs, 2015.

3. *Transparency and clear timelines*

It is important that such a committee's work is transparent and adheres to reasonable timelines. Its efforts will not be effective if it is limited to private correspondence with government departments and agencies, with no expectations for timely resolution.

One of the weaknesses of the Anglosphere model – particularly in Canada – is that much of the committee's work is conducted outside of the public domain. The tendency to limit communications with government departments and agencies about nonconforming rules or regulations fails to contribute to greater public transparency about executive rulemaking. Given that the ultimate responsibility to disallow nonconforming rules or regulations rests with Parliament, it would seem important that the committee provides more regular reports on problematic items.

The process of private correspondence also tends to be cumbersome and slow. Changes to problematic regulations often are subject to lengthy delays. As one former Canadian parliamentarian writes:

In some cases, reaching agreement about required amendments to regulations [between the committee and the relevant department] takes five, ten or fifteen years of written and oral negotiation. The Committee recently emerged victorious from one case of twenty-two years' standing.⁶⁹

It is essential that the committee's work be subject to public reporting, as it is in Australia and New Zealand, and that relevant departments and agencies are required to respond promptly to issues or concerns raised by the committee.

4. *Delegated authorities must be limited and focused.*

Any solution to the imbalance between the executive and the legislature cannot focus only on delegated or subordinate legislation. The real issue is the overdelegation of congressional responsibilities in enabling or primary legislation. It is critical that Congress exercise greater responsibility to ensure that any new laws only delegate authorities to the executive branch where appropriate and with careful definitions and scope.

Such a committee could play a role in reviewing legislation with this objective in mind. The New Zealand model empowers the committee to carry out such reviews. The United Kingdom model has a separate committee to focus on this matter. Irrespective of which model is selected, it would be a mistake to overlook this basic question.

69. Grimard, 1998.

As scholar James Q. Wilson once wrote, the laws that Congress passes are “architectural; the life of an agency is constrained by its need to live within a certain space, move along prescribed corridors, and operate specified appliances.”⁷⁰ It is up to Congress to ensure that the legislative architecture is sound and does not enable executive overreach.

5. *Real power to exercise disallowance*

The fifth lesson is the most difficult to translate to the U.S. context. The parliamentary notion of the “fusion of powers” greatly differs from the U.S. “separation of powers.” The result is that the scope for disallowance is quite different and needs to be thought of differently.

One key principle in common is that, for such a committee to be effective, the executive branch needs to have an incentive to respond to its issues and concerns. The experiences in Canada and the United Kingdom, where the committees are reluctant to exercise their disallowance powers, is that the government basically ignores them. It is intuitive. Why would the government change its rules or regulations if there are no negative consequences to maintaining them, irrespective of any problems?

The result is that the committee's work tends to be focused on mundane considerations—such as English/French translations in Canada, website availability in New Zealand and pagination in the United Kingdom—rather than more basic and fundamental questions about delegated authorities and executive overreach.

As an alternative to the power of disallowance, one option in the U.S. context could be the threat of freezing or withholding fiscal appropriations for departments or agencies that enact and refuse to amend rules or regulations that exceed their delegated authorities. This would provide some heft to a committee's work and increase the likelihood that departments and agencies are responsive to its requests and concerns.

CONCLUSION

The trend in recent decades has been a shift in U.S. politics from a presumption that Congress is the primary lawmaking body to a government of regulations and executive rulemaking. The cost of regulatory sprawl and executive overreach has not just been financial. It also comes at the expense of the U.S. Constitution and the founders' vision.

The election of Donald Trump to the presidency presents an opportunity to reverse this trend. Early signs are positive, including passage of the REINS Act and a plan to implement

70. Cited in Dudley, 2015.

regulatory budgeting. But there is, no doubt, more be work to be done.

This paper has examined the institutional role of legislative committees in Anglosphere countries to review and oversee regulations and executive rulemaking with the goal to inform such an effort in the U.S. Congress. Notwithstanding useful differences between the U.S. congressional system and parliamentary governance in Australia, Canada, New Zealand and the United Kingdom, there are some key lessons to be learned. A congressional committee dedicated to reviewing and overseeing executive lawmaking can be part of a broader strategy to reverse the growth of the regulatory state and the erosion of congressional supremacy.

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