The Participation of the Second Chamber of Parliament in the Implementation of the Control Function on the Example of the Senate of the United States of America

Keywords: parliament, control function, senate, second chamber of parliament, United States of America

Abstract
This article is devoted to one of the classic functions of the legislature, which is the control function. In the first part of the elaboration the author focuses on the characterization of such concepts as control, parliamentary control and the control function regarding doctrinal level. The rest of the article deals with the specific competences by which the Congress of the Senate of the United States of America participates in the performance of the parliamentary control function.

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1 ORCID ID: 0000-0002-6432-5651, M.A., Department of Constitutional Law and Human Rights, Institute of Law Science, College of Social Sciences, University of Rzeszów. E-mail: hadala.anna@interia.pl.
Streszczenie

Udział drugiej izby parlamentu w realizacji funkcji kontrolnej na przykładzie Senatu Stanów Zjednoczonych Ameryki

Niniejszy artykuł poświęcony jest jednej z klasycznych funkcji legislatywy jaką jest funkcja kontrolna. W pierwszej części opracowania autor skupia się na scharakteryzowaniu takich pojęć jak kontrola, kontrola parlamentarna oraz funkcja kontrolna na płaszczyźnie doktrynalnej. Natomiast dalsza część artykułu dotyczy konkretnych kompetencji, za pomocą których wchodzący w skład Kongresu Senat Stanów Zjednoczonych Ameryki bierze udział w realizacji funkcji kontrolnej parlamentu.

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The parliament is an institution, whose sources date back to the beginning of the creation of parliamentary institutions. The mentioned situation especially took place in disputes between states and the ruled. Most often, contentious issues were related to financial expenses. Parliamentary control is one of the basic elements, by means of which one can characterize a democratic state ruled by law. As H. Kelsen indicates: “The fate of modern democracy depends to a large extent on the systematic development of all control institutions. Democracy without control is impossible for a longer period of time, abandoning this self-limitation, which is the principle of legality, it is tantamount to suicide of democracy”. In modern science of constitutional law, parliamentary scrutiny is thought to be one of the most fundamental principles characteristic for the democratic system.

In the 19th century, there was a significant strengthening of the importance of the parliamentary scrutiny function. This phenomenon was related to the parliament’s lack of confidence in the executive branch as well as to concepts regarding parliamentary democracy, which appeared at the turn of the 18th and

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3 H. Kelsen, O istocie i wartości demokracji, Warsaw 1993, pp. 98–99.
19th centuries. The enormous impact of the idea of national sovereignty and separation of powers was of great importance in the process of shaping political principles, which indicated the areas of relations between the legislative authority and the executive branch. At the stage of searching for the principles of functioning of the new parliamentary system, there was a development of the awareness considering the need of the existence of control, which would guarantee respect for the extremely important principles of a democratic state. The idea of parliamentary control carried out in relation to the activities of the executive branch was contained in the norms of mutual inhibition of the authorities. There are just the general principles of the parliamentary system that the sources of scrutiny activities (specific for modern parliaments) come from.

The very term of “control” is a complex concept and has many meanings. In the semantic sense it should be understood as considering something, comparison of current and desired state (required state), insight, investigation, infiltration, exercising supervision over something or supervising someone. Z. Czeszejko-Sochacki indicates that a broad understanding of the concept of “control” requires some sort of search for the characteristics of parliamentary scrutiny. It should be noted that the concept of parliamentary scrutiny can be considered not only in a broad, but also in a narrow way. As an example, L. Garlicki indicates that the narrow sense “parliamentary scrutiny” concerns actions taken by a parliament to gather information on the activities of entities subject to scrutiny, as well as providing parliamentary opinions, views and suggestions to these entities. The author emphasizes that beyond the concept of the narrow sense “parliamentary scrutiny”, outside its scope, there are powers of parliament which remain to make some individual decisions. These concern the coverage of an executive and also competencies related to the enforcement of liability from entities subject to control, especially government, but also individual participants who are its members.

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8 Z. Czeszejko-Sochacki, op.cit., p. 168.
L. Garlicki emphasizes that the parliamentary scrutiny should always be considered under these two aspects i.e. the legal and political levels. Considering activities in the field of parliamentary scrutiny in the legal sphere, it should be emphasized that on the side of the addressees, there will be obligations, primarily procedural, such as the obligation to take a position or the obligation to provide information. However, considering parliament’s political activity connects with more significant imperative effects, especially a situation in which the parliamentary majority undertakes specific actions and the further functioning of the government or a given minister depends on it. Therefore, it is necessary to distinguish between control activities that can only be undertaken by a majority of the chamber or a majority of committees and activities that can be undertaken independently by the opposition (minority) or even by a single parliamentarian.

Z. Czeszejko-Sochacki indicates that at the doctrinal level, the term “parliamentary scrutiny” means “parliamentary oversight and decision-making process (relative influence) considering behavior of other state authorities, and in particular the government and administration, with direct option (the parliamentary majority) or/and indirect option (the opposition) the application of specific measures and sanctions in relation to this behavior during four phases: obtaining information, information processing, evaluation of information (approval or criticism) and finally – expressing a political position or making a legally binding decision.” In turn W. Stefani indicates that under the term “parliamentary scrutiny” one should understand parliamentary oversight in relation to the government as well as in relation to administration with the direct or indirect possibility of using specific measures, as well as acceptance of the activities undertaken by these entities.

B. Banaszak emphasizes that the scrutiny function of the parliament is connected with the Montesquieu concept of the separation of powers. The author indicates that a significant number of representatives of the science of constitutional law claims that the actions taken as a part of the control func-

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11 Z. Czeszejko-Sochacki, op.cit., p. 168.
tion are consistent with the tasks of the parliament, which is the representative body, and also allow it to become an authority which, in democratic practice, is a counterweight to the executive power\(^\text{13}\). The mentioned actions are a supplement to and a consequence of the basic function of parliament, which is the legislative function. They also increase the importance of parliamentary opposition in a commonwealth\(^\text{14}\).

The parliamentary scrutiny function is considered one of the classic functions of the legislature\(^\text{15}\). Representatives of the doctrine of constitutional law distinguish exercising control over the government in two perspectives, i.e. control in a narrower sense and control in a broader sense. The first of them – the control in a narrower sense involves analyzing the facts and then creating an assessment of the activities of the controlled body. The control in a broader sense means creating opinions that are forms of influence on the government, interpretations, conclusions, postulates. In this case, the basis is a critical assessment of the government’s activities\(^\text{16}\). According to one of the definitions, a control function means the right to state a specific factual situation, considering the scope of activities of broadly understood public institutions and bodies, especially the government and its administration, as well as the right to compare it with the expected state. However, the doctrine of the constitutional law extended this definition to include the right of the legislative authority to influence on the direction of executive policy, personal squad of the government, as well as the manner of performing state tasks. One of the consequences of the negative assessment of the authority under scrutiny is, for example, resignation of its foster-father\(^\text{17}\).

A scrutiny, being the result of a desire to cooperate, and sometimes also rivalry between the legislature and the executive power, manifests itself in the ability of one department to influence on the competences of the other.


\(^{14}\) B. Banaszak, op.cit., pp. 513–514.


\(^{17}\) M. Bożek, op.cit., p. 425.
Very often, the mentioned process is done by approving actions during one of the stages that make up the entire process of decision making by the audit department\textsuperscript{18}. The controlling function of the Senate, among others, is in the process of appointing federal judges and high-ranking executive officials. The Senate always is obliged to approve presidential nominations. This is done by implementing appropriate procedures related to “advice and consent” to assume the function of a specific person. This is tantamount to undertaking specific scrutiny activities\textsuperscript{19}.

Secondly, the Senate performs a control function over the executive during the process of concluding international agreements with foreign countries, or other entities in the field of international law. An essential condition for the entry into force of a given treaty is the cooperation of the President and Senate. Namely, formally it is the president who, as the head of the executive, represents the state in international relations. Moreover, his competence also includes signing an international agreement. The President’s signature is a prerequisite for binding such an agreement under US law. Nevertheless, it is the Senate that must ratify such an agreement (by a two-thirds majority of its members)\textsuperscript{20}.

A solution has been used in Congress since 1932, primarily aimed at reducing the risk of depriving the chambers of the possibility of effective influence on the implementation of laws. This procedure consists in creating authorization in the act to be made (at a specific moment) binding the executive power of acceptance or refusal of acceptance in relation to activities based on the competences delegated to the executive by Congress in the mentioned Act. Such a solution, as R. Piotrowski indicates, significantly goes beyond control limits, which allows far-reaching interference with the functioning of the administration. The essence of this procedure is that both chambers, and sometimes their committees, are entitled to veto decisions, initiatives and executive regulations, as long as this right is provided by law\textsuperscript{21}.

\begin{itemize}
\item \textsuperscript{19} Ibidem, p. 236.
\item \textsuperscript{20} Ibidem.
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The effect of the need to reconcile the Senate’s controlling powers not included in the US Constitution with the principle of separation of powers is the concept in literature called permanent vigilance over the application of the Act\textsuperscript{22}. Its essence is that Congress is obliged to actively participate in the process of implementing the act, because, as D.B. Truman indicates, it is a continuation, extension of the legislative process\textsuperscript{23}. An important argument that supports treating the control function as a supplement to the legislative function is the view expressed by the Supreme Court, which stated that the investigative function of Congress “includes examining the implementation of applicable laws, as well as proposed laws and needs in this respect” and also “is inextricably linked to the legislative process”\textsuperscript{24}.

The concept of permanent vigilance over the application of the law is reflected in the institution of legislative control. It was introduced in 1970 in the Act on the reorganization of the legislature\textsuperscript{25}. This solution, according to R. Piotrowski, by increasing the effectiveness of control simultaneously causes contrary to the assumption of separation of powers, too many possibilities of influence of each House of Congress on the executive\textsuperscript{26}. The Supreme Court has commented the mentioned doubts, stating that the institution “legislative veto” does not comply with the Constitution, because it violates not only the principle of bicameralism and the principle of separation of powers, but also a rule according to which, before the bill is turned into law, it will be presented to the head of executive – the President\textsuperscript{27}. Despite the disadvantages of the control techniques, such as “legislative veto” and “committee veto”, they have not been abandoned. However, some modifications were introduced to harmonize with the decision of the Supreme Court. Their essence was to repeal the challenged decisions issued by the executive through a joint resolution adopted by both houses of Congress, which in turn could become the subject of a president’s veto\textsuperscript{28}. Another effect of the mentioned Supreme Court de-

\textsuperscript{22} Ibidem, p. 291.
\textsuperscript{24} The verdict of the Supreme Court in Case \textit{Watkins v. U.S.} (1957).
\textsuperscript{26} R. Piotrowski, op.cit., p. 292.
\textsuperscript{27} The verdict of the Supreme Court in Case \textit{Immigration and Naturalization Service v. Chadha}.
\textsuperscript{28} R. Piotrowski, op.cit., p. 292.
cision is granting in 1996, on the basis of the Congressional Control Act, the right to perform preventive control of provisions, which government agencies have issued, as well as participation in undertaking activities aimed at preventing the introduction of such provisions into the legal system by means of a joint resolution of both Houses of Congress, the subject of which is the rejection of the challenged provisions. Pursuant to the Act, before the entry into force of regulations that arose in government agencies, they are subject to control exercised by both Houses of Congress. The House of Representatives and the Senate must take a position on this matter within 60 days. A manifestation of the positions taken by the chambers may be a joint resolution which blocks the provisions subject to control. Where such a decision has been taken, and the lack of a president’s veto on it, or the veto will be rejected, at that time, such regulations shall not enter into force. Such control has positive effects on the law created by government agencies. The necessity to submit provisions to Congress provides the Senate with controlling powers. This function is of fundamental importance, among others due to the fact that it materializes already at the start of the 60-day period provided for taking the appropriate, joint resolution of both houses of Congress. Notwithstanding the Senate’s decision, it is not disputed that it exercises control over the act submitted to it by a government agency and it should be noted that without its control, this Act cannot become applicable law.

The control function of the Senate may also be carried out in connection with the adoption of laws that set out rules for the functioning of institutions, agencies and government programs, their internal organization, methods of operation and the basis for financing their activities – authorization bill. The Senate Committee on Budget Loans taking part through its committees in the process of adopting laws, which provide financing for executive agencies, has also the ability to control their activities. The Act on the reorganization of the legislature in 1946 authorized Senate committees to carry out legislative control. The subject of the mentioned scrutiny considered the activities of the government and its agencies. In turn, the purpose of this control is primarily to propose legal solutions as well as other types of options to re-

30 J. P. Harris, Congressional control of administration, Washington D.C. 1964, p. 284.
move the found deficiencies. On the basis of the mentioned Act, the commission, which competence includes matters relating to budget expenditure, was entitled to perform fiscal control over expenditure of government agencies. In contrast, the commission that deals with government issues and home affairs has been given the obligation to investigate. The aim of this was to track down inefficiency, corruption and wastage in the federal government. Already in 1977, the audit powers of this commission have been strengthened 31.

Among the controlling powers of the Senate there is also the right to set up a commission. The main task of the commission is to conduct investigations. There are situations when they become joint committees i.e. for Senate and for the House of Representatives. The committees deal with matters concerning the activities of the administration. In addition, Senate committees are entitled to take control actions consisting in summoning and later interrogating witnesses according to the rules specified in the committee’s regulations and in the Article XXVI of Senate regulations 32. In the literature, representatives of the doctrine recognize conducting of hearings as a basic technique that falls within the competence of the commission, as scrutiny activities 33. One of the types of hearings held in the Senate are “Legislative Hearings”. Their purpose is to gather opinions on a strictly defined legislative intention. In addition, legislative hearings are the part of the entire legislative process. Another type of the hearings conducted in the Senate are the so-called “Oversight Hearings”, in other words, interviews conducted in the field of control competences. The main purpose of this type of interrogation is to look for optimal solutions to the problems faced by the administration, in need of legislative intervention. In addition, hearings in the field of control activities are focused around the analysis, the subject of which is the way of the government functions, its agencies, and officials, in particular in terms of the implementation of the mentioned laws by these entities. Another type of audits is “Investigative Hearing”. The main task of this type of commission is to get information on the situation, in which public and private individuals violated the law due to their behavior and their action indicates the need for

a legislative remedy. Also, a different type of hearings is “Confirmation Hearing” – i.e. hearings, which relate to the expression of the Senate “Counsel and Consent”. Those hearings shall, in particular, provide information about particular candidates. There is also a possibility to find out what are its intentions in terms of performing the function that is being sought. Sometimes these hearings also concern the Senate’s acceptance of international treaties, moreover, they also enable control over selected aspects of foreign policy. The other type of hearings is the so-called “Field Hearing”, that is, those that take place outside the seat of the Senate. The mentioned solution allows to intensify the implementation of the control function. According to the Article XXVI of the Senate regulations, committee or subcommittee which conducts the interrogation, has the right, under the penalties of perjury, to summon to appear or to hand over items. The Senate has also the right to “extort” compliance with such a request, then, on a proposal from the committee it adopts a resolution. This resolution is the basis for submitting an offense to Congress to the prosecutor’s office. Nevertheless, at the request of the committee, the Senate has the option of adopting a resolution authorizing its legal advisor in order to apply to the court to decide whether the requested person is required to appear before the committee34.

Audit powers of the United States Congress have become one of the most significant and maybe even the most important functions, which implementation is carried out independently of the other authorities. One must agree with the opinion of A. Pułło, who indicates that it is thanks to the mentioned independence that can be stated that the activities carried out by the Congress serve the principle of separation of powers35. However, it is not easy to answer the question about the effectiveness of the Senate’s actions under the control instruments used by that institution. This is due to many factors, which may include not only the complexity of the Senate’s control activities, but also following parliamentary practice. It can be noted that in most modern countries the position of the second chamber of parliament is definitely weaker compared to the position of the first chamber. A similar situation applies to the implementation of the control function by the United States’

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34 R. Piotrowski, op.cit., p. 295.
Senate. However, it does not mean that the scrutiny carried out by the second parliamentary chamber will be less effective. Very often it turns out that despite the fact that the second chamber has less competences, all activities within the group of control activities are implemented not only in a substantive, but also in a professional manner\textsuperscript{36}.

\textbf{Literature}

