

# Reasserting Congress in Regulatory Policy

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CONGRESS IS ‘THE FIRST BRANCH,’ and the Constitution assigns to it alone the power to legislate. In the eyes of the founders, the legislative branch was to predominate—all policy, all taxes, and all agencies would be its creatures. Fearing the legislature would, as James Madison put it, draw “all power into its impetuous vortex,” the founders enumerated the permissible subjects for legislation, and split the branch into two chambers.<sup>33</sup> Frequent elections were required in order to keep elected officials in tune with the demands of a diverse public.

Meanwhile, Article II posits the executive as a modest figure whose responsibilities mostly focus upon foreign affairs. The chief executive could veto unwise legislation, but had no authority to introduce legislation or require Congress to consider it. In a system of limited government, the president was to “take care that the laws be faithfully executed.” The founders designed the U.S. president to be very unlike the kings of the old world.

It is a remarkable and troubling development, then, to find modern presidents effectively “legislating” as a matter of course, and more frequently than Congress.<sup>34</sup> In recent years, Congress has enacted approximately 50 statutes annually on significant subject matter; the executive branch proposes 2,700 new regulations and finalizes another 4,000 rules each year.<sup>35</sup> Congress, then, has ceded much of its essential power to the executive branch, which exerts itself on nearly every aspect of life imaginable.

Restoring legislative power to Congress necessitates curbing the executive branch’s nearly untrammelled power to make law via

regulations. It also means strengthening Congress's capacity and the incentives to reassert its constitutional role in lawmaking.

#### THE ABSENTEE CONGRESS

Today, Congress currently plays at best a peripheral and reactive role in regulatory policy. The reasons for this are many, but three are especially pertinent to this report's consideration: inherent executive advantages, the immensity of the federal government, and Congress's limited incentives.

The executive branch by its nature can act with greater dispatch than the legislature. Alexander Hamilton characterized this quality as energy: "The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers."<sup>36</sup>

These terms concisely describe the administrative state, which is a machine that runs of its own accord. Agencies can propose, revise, and finalize regulations at their own initiative. Congress has no formal role in the rulemaking process.

And, as Hamilton recognized elsewhere, the president and agencies have what today we would call a "first mover" advantage over Congress: "The Legislature is free to perform its own duties according to its own sense of them—though the Executive in the exercise of its constitutional powers, may establish an *antecedent state of things* which ought to weigh in the legislative decisions."<sup>37</sup> Thus, while Congress is still deliberating, an agency can simply act—and thus change the status quo against which Congress legislates (or chooses not to legislate).

Agencies can act much more quickly than Congress because they are unitary actors. They take public comment, but agencies need not navigate vast and complex pluralistic politics as legislators do. The case of net neutrality is instructive on this count. In 2015, the FCC enacted its "net-neutrality" regulations, which span 300 pages. Three FCC commissioners voted for them, two voted against them; the bare three-commissioner majority sufficed to impose these rules on the nation. Congress, on the other hand, has 535 members, and effectively a supermajority vote threshold in its high chamber.<sup>38</sup> And the president may veto any legislation passed by both chambers. It struggled to reach agreement on its own net-neutrality legislation, which remains stymied.

The effects of the sheer immensity of the federal government today, which has an annual budget of \$3.9 trillion, should not be understated.

In 1900, before the rise of the administrative state, the federal government had eight departments, with 230,000 employees, 135,000 of whom worked for the Post Office Department. Congressional policymaking and oversight concentrated on appropriations, private relief bills, and infrastructure and lands-related issues.

Now there are 4.1 million civilian and active military employees toiling in approximately 120 executive agencies and another 60 “independent” agencies, each of which may propose regulations and issue policy guidance and other “regulatory dark matter” that has the effect of law.<sup>39</sup>

James Madison warned of the perils of big government. The “extension of the federal powers to every subject falling within the idea of the ‘general welfare’” would have ill effects, and, inevitably, “[o]ne consequence must be, to enlarge the sphere of discretion allotted to the magistrate.” Basic mathematics and finite congressional capacity were the reasons: “In proportion as the objects of legislative care might be multiplied...the time allotted for each would be diminished.”<sup>40</sup> The nature of writing legislation that could attend to the differing circumstances of the nation’s varying and far-flung communities also had a consequence:

The difficulty of providing uniform and particular regulations for all [would] be increased. From these sources would necessarily ensue a greater latitude to the agency of that department which is always in existence, and which could best mould regulations of a general nature so as to suit them to the diversity of particular situations.<sup>41</sup>

The titanic size of government makes oversight of the executive branch and the regulations it issues immensely challenging, even if legislators have the time, resources, and desire to do so.

For the most part, they do not, however, which brings us to the matter of incentives. Most members of Congress spend little time in Washington, D.C. They jet in on Tuesday and are gone by Friday. Some quality oversight does get done, but much of legislators’ time in town is spent introducing symbolic legislation, voting on bills pushed by chamber leaders, and participating in hearings designed to attract media attention. One survey found members of the House spend only a third of their time in Washington on policymaking.<sup>42</sup> More and more

legislators' congressional staff work in state and district offices — not on Capitol Hill — and are devoted to constituent service and public-relations activities — not policymaking and oversight.<sup>43</sup>

Not too many decades ago, close observers of Capitol Hill differentiated between congressmen who were workhorses and those who were show horses. Purebred workhorses are rare today; most legislators today are hybrids, who are unlikely to spend their valuable time reading the *Federal Register* and asking agencies difficult questions about regulations.<sup>44</sup>

We have, to quote Senator Mike Lee, an “absentee Congress.” This is not because today’s legislators are bad people; rather, the incentives encourage them to neglect their constitutional and institutional duties.<sup>45</sup> Congressmen individually can benefit by delegating away policy responsibility. If an agency does the job well, the legislator can claim credit; if it performs badly, the elected official can earn praise and votes by publicly denouncing the bureaucrats, threatening to clean house, and acting to help any aggrieved constituents.<sup>46</sup>

Additionally, party control of the two chambers has vacillated during the past three decades at a rate unseen since the 19<sup>th</sup> century,<sup>47</sup> and congressmen fear primary challenges, like the one that toppled House Majority Leader Eric Cantor in 2014. The 24-hour-a-day news cycle and the Internet together pose a relentless public-relations challenge for legislators. In short, if an elected official does not devote considerable time to defining himself in the media and Internet, someone else will — in far less glowing terms. This is why congressmen return to their home districts and states so often. They need to raise money, press the flesh, and do all they can to reduce the odds that they or their party will lose the next election. This new context also explains why legislators devote staff and effort to managing their Twitter, YouTube, and other social-media channels, taking time and attention away from governing.

Unintentionally and increasingly, then, America has morphed into the expert-led, executive state imagined by John Stuart Mill in his 1861 treatise *Considerations on Representative Government*. Civil servants devise policy, and the legislature serves mostly as a pressure valve for *vox populi*.

Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch

and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable; to [censure] them if found condemnable, and, if the men who compose the government abuse their trust, or fulfill it in a manner which conflicts with the deliberate sense of the nation, to expel them from office, and either expressly or virtually appoint their successors. This is surely ample power, and security enough for the liberty of the nation.

This is not the way it is supposed to be, nor does it need to be so. Congress can reassert itself as a force in regulatory policy, given the right incentives and institutional reforms, and it can bolster its own power.

#### REASSERTING CONGRESS IN REGULATORY POLICY

To be clear, Congress is mostly responsible for the current state of affairs. As the Supreme Court once observed, “an agency literally has no power to act...unless and until Congress confers power upon it.”<sup>48</sup> Thus, Congress enacts the statutes that create agencies and assign to them broad realms of regulatory authority. Congress typically funds these agencies with dollars from the Treasury or authorizes agencies to fund themselves via fees and taxes.

What Congress has done, however, Congress can undo. The Constitution still vests Congress with the legislative power. Reining in the regulatory state can be achieved through the reassertion of the First Branch’s powers to authorize, appropriate, and oversee the executive branch. But this will not happen unless the majority leader, the speaker of the house, and other top legislators make legislative ascendancy a priority. And individual legislators must see the advantage in performing the duties the Constitution assigns. As Madison explained:

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.<sup>49</sup>

Therefore, the first thing that needs to happen in order to reassert Congress in regulatory policy, is a reawakening of congressional interest in regulation. Congressional leaders should encourage their members to see the advantages of paying attention to regulations. The public's regard for the federal government is very low — fewer than 40% of Americans are confident it can handle domestic problems.<sup>50</sup> John Q. Public also trusts state government more. When Gallup asked, “Which theory of government do you favor: concentration of power in the state government or concentration of power in the federal government?” some 55% of respondents chose the former, and 37% picked the latter. More than three-quarters of Republicans favored more state power.<sup>51</sup> Clearly, there is room to improve the public's view of the competence of the federal government.

Current congressional leaders have demonstrated some understanding of the political appeal of engaging regulatory policy. They held votes to pass through both chambers five Congressional Review Act (CRA) joint disapproval resolutions to block regulations.<sup>52</sup> President Barack Obama vetoed them all, but the effort highlighted the glaring policy differences between the regulators and the critical members of Congress.<sup>53</sup>

But leadership should do more to help legislators see that their interest in pleasing constituents can be served by engaging regulatory policy. This is true whether a member is a Democrat or a Republican, a liberal or a conservative. Active oversight of regulatory policy is a means for a congressman to represent the interests of his constituents. A new regulation on hunting and fishing in Alaska, for example, will be of interest to Alaska's congressional delegation.<sup>54</sup> Similarly, a proposed rule that affects civil fines against mining companies will be of interest to legislators from states where mines operate and mineworkers live.<sup>55</sup> Any member with a policy interest of a national scope — say, housing policy — might want to understand why a new fee is charged on a Section 108 loan guarantee.<sup>56</sup>

Leadership in both chambers could foment interest among members by making regulation a regular subject of communication. Leadership staff might be tasked to spend a modest amount of time each week reviewing the *Federal Register* for new and finalized rules and sending out “regulation alerts” to all members and committees, regardless of party. This process would not require much effort. The *Federal Register*'s website posts final and proposed rules daily.<sup>57</sup> Its interface tags

regulations by issuing agencies and policy areas, and allows anyone easily to extract and share the most recent proposed and final regulations.

Crowd-sourcing of regulatory oversight by individual members, however, is not enough to tip the balance between the branches. Congress needs to adopt policies that directly curb the executive branch's ability to regulate wantonly. Three policies hold great promise for establishing institutional controls on regulation.

First, Congress should adopt legislation to lessen the regulatory aggregation that has expanded the *Code of Federal Regulations* to more than 175,000 pages, a 30-mile long paper path. Including rulemaking sunsets in new legislation would be one way to slow the growth. Sunset requirements would force agencies to re-promulgate and re-justify rules after a period of time (say 10 years).

Agencies are supposed to conduct regulatory look-backs; to date, these reviews have been woefully ineffective at culling the current corpus of regulation. Stronger measures are needed. Congress should create a bipartisan commission akin to the Base Realignment and Closure (BRAC) commission. It would identify unworthy regulations based upon transparent criteria, and submit the list of regulations to Congress in one piece of legislation for a single up-or-down vote. The House of Representatives approved legislation to do just this in early 2016 by passing the Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2016, or the SCRUB Act.<sup>58</sup> The legislation would establish a nine-member commission of individuals appointed by the president and approved by the Senate. The commission would have five-years to identify regulations that have been in effect 15 years or more and which are ineffective or duplicative or excessively costly. The president, congressmen, federal employees, and the public all would be permitted to submit regulations to the commission for review. The commission would vote to decide which regulations would be repealed, then compile the regulations for repeal into a final report. Congress would be obliged to consider the report under expedited procedures, similar to those used for the Congressional Review Act and BRAC. If the joint resolution passes and is signed by the president, agencies would have 60 days to abolish the rules.

Second, Congress should establish a policy that would require congressional approval of the most significant regulations before they take effect. Such a policy should be limited to regulations that have substantial,

tangible costs to the public or the private sector. Congress has considered regulatory-approval legislation intermittently over the past 20 years. The Regulations from the Executive In Need of Scrutiny Act (REINS) was first introduced in 2009, and versions of the bill were passed by the House in 2011, 2013, and 2015. REINS bills have varied in their particulars, but their essence has been to flip the regulatory toggle to disallow proposed rules. Before an agency could implement a major rule, defined as one whose effects on the economy would be greater than \$100 million, Congress must approve the rule. Both chambers would have expedited procedures to pass a congressional resolution of approval within a set deadline, defined as 70 days in the most recent iteration of the bill. If Congress fails to act, the regulation does not take effect. If the rule deals with the enforcement of criminal laws, national security or an international trade agreement, the president would be allowed to authorize implementation of the rule for 90 days. Absent subsequent congressional approval, the regulation would cease to have effect.

Contrary to the contention of some critics, legislative pre-review of regulations is not a radical notion. Many states require some level of legislative review of regulations before they may take effect. Connecticut, for example, has a Legislative Regulation Review Committee that approves regulations before they take effect. A REINS-type congressional review of proposed major rules, additionally, would not constitute a unicameral legislative veto of the sort struck down in *Immigration and Naturalization Service v. Chadha*.<sup>59</sup> More profoundly, legislative pre-review does not offend the separation of powers. Law professor Jonathan Adler writes:

The Constitution's separation of powers among the three coordinate branches was designed as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." The Court has consistently sought to block Congress from interfering "with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." But...Congress is not prevented from limiting or constraining the exercise of power it delegates to the executive branch....Unconstitutional aggrandizement occurs when the legislature seeks to seize executive powers for itself, not when it places limits on rulemaking authority created by prior legislative



grants. Federal agencies have no authority to promulgate regulations beyond that which has been given by Congress — and what Congress has given, it may take back. That Congress may restrain the exercise of such authority, whether by adopting rules for the exercise of regulatory authority (as under the Administrative Procedure Act or the Congressional Review Act) or limiting the scope of such authority, is perfectly acceptable, so long as other constitutional requirements (such as bicameralism and presentment) are satisfied. As the REINS Act does in fact satisfy such requirements, there is no constitutional problem. The REINS Act does not curtail inherent executive power so much as it places limits on the legislative-like power delegated by Congress.<sup>60</sup>

Enacting such a policy would shift some legislative authority back to Congress. It would allow the executive branch to continue to propose rules, but it would force the legislature to shoulder the responsibility for them. Regulations would be enacted as laws. REINS-type legislation would have the additional benefit of forcing regulatory oversight back onto Congress's legislative calendar. And agencies, as economist James Gattuso observed, would have to think more closely about the major rules they propose to be sure “they are exercising their delegated powers in a way consistent with the intent of Congress.”<sup>61</sup> Some democratic responsibility for law-making would be restored. Article I, notably, does declare Congress has the power “to make rules for the government and regulation of the land and naval forces.”<sup>62</sup>

Third, absent executive action, Congress should direct the executive branch to adopt a regulatory budget. Regulatory budgeting has been discussed on Capitol Hill for decades,<sup>63</sup> and is used in Canada both at the national and provincial level, and in some European nations.<sup>64</sup> During the 114<sup>th</sup> Congress, bills were introduced in both chambers to establish a federal regulatory budget.<sup>65</sup>

Regulatory budgeting employs traditional budget concepts to manage regulatory costs. It requires government agencies to price their regulatory expenditures. As such, it treats regulatory costs the same as fiscal spending or tax expenditures and therefore subject to congressional expansion or reduction.

Under a regulatory budget, the executive branch would not be free to regulate as much as it likes. Instead, Congress would establish a total

annual regulatory expenditure amount, and then apportion that sum across the government to various departments and agencies, who must regulate within their respective regulatory budgets. Regulatory budgeting creates scarcity and pricing where they previously did not exist, and thus forces tradeoffs and efficiency. When agencies fear a proposed regulation may bust its regulatory expenditure cap, it must find a way to make the rule less costly or trim another rule's burden. Regulatory budgeting brings an additional benefit—it requires the adoption of a government-wide methodology for pricing the costs and benefits of regulations. No longer could agencies devise their own methodologies that tend to produce results they favor. The methodology could be set by law, or its basic components could be enumerated in statute and then finalized by an agency, perhaps the Government Accountability Office or the Congressional Budget Office, or a new Congressional Regulatory Office (discussed below).<sup>66</sup>

#### STRENGTHENING OVERSIGHT

For Congress to have a fighting chance against the regulatory state, it must reclaim its spending authority and invest in itself.

The power of the purse is a great oversight tool. As James Madison wrote in *Federalist 58*, “[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.” Through authorization statutes, appropriations laws and reports, and oversight, Congress can direct how agencies spend funds. Or, it can simply prohibit agencies from spending funds on particular activities. The Department of the Interior FY2017 funding bill, for example, forbids the expenditure of funds to implement the controversial Waters of the U.S. rule.<sup>67</sup> Appropriations limitations on agencies’ authority to spend on administrative overhead expenses are an age-old tool for curbing agency workforce size.

Unfortunately, bit by bit, Congress has ceded much control of government funding. It has delegated to agencies the authority to collect revenues through the imposition of fees and taxes: the Universal Service Administrative Company taxes telephony providers and spends the income to widen telephony and Internet access; the Consumer Financial Protection Bureau lives off funds transferred from the Federal Reserve to regulate the financial-service industry. Some federal agencies impose fines, which they sometimes have paid to private organizations.

Possibly worse, Congress has lost control of the budget *process*. Since the enactment of the Congressional Budget and Impoundment Control Act in 1974, Congress has adopted a budget resolution on time only six times. It misses the annual April 15 deadline by an average of nearly 40 days. Congress virtually never passes all 12 appropriations bills before the end of the fiscal year. Instead, chamber leaders rush through omnibus spending bills and continuing resolutions whose contents are unknown to many if not most legislators.<sup>68</sup>

Empowering agencies to fund themselves and funding the government via omnibus legislation diminishes Congress's opportunities to conduct oversight. Both these recent practices need to be rolled back. Agencies, with rare exceptions,<sup>69</sup> should come to Congress for annual appropriations. And Congress should revise the budget process to enable it to pass spending bills as separate pieces of legislation. Yuval Levin writes:

Congress should...break up the appropriations process from its 12 large pieces (which have lately been consolidated into one) into many smaller appropriations measures taken up year-round. This would give the legislature more real say over funding choices, rather than just a kind of reverse veto power. Congress should also prohibit any fee-funding of federal agencies, let alone the preposterous practice of having such agencies funded by the Federal Reserve. The consolidated structure and decision-making of the executive branch should not be countered by consolidating Congress' own work (which has often been the instinct of reformers in the past) but rather mitigated by breaking up the budget process into a form that plays better to Congress' innate strengths.<sup>70</sup>

Presently, Congress has very little incentive to appropriate, to say nothing of budget, in an orderly, timely fashion, especially given how difficult it is to do under the present baroque congressional budget process. To encourage legislators to spend more time on appropriations, the budget process should be simplified and made more expeditious.

The process should be revised to require the enactment of a multi-year budget resolution negotiated upfront by a bicameral budget committee. This resolution would cap total annual federal spending and apportion it amongst policy areas. The new budget process also would

carry the stick of mandatory automatic continuing resolutions — with a 1% across-the-board cut — in the event an appropriation expires or the budget resolution expires. Together, these policies would free up time and provide a spur to pass spending bills in a timely fashion. In order to more firmly connect the interest of the legislators to oversight, the appropriations subcommittees should be made committees, and doubled in number and assigned narrower jurisdictions. These new mini-appropriations committees would be empowered to report their spending bills directly to their chambers' floors for prompt votes without amendment.<sup>71</sup> (Presently, subcommittees hand off their recommendations to the full appropriations committees, where their work may be revised or sit for months.)

Under this revised budget process, there would be time and an incentive for oversight. No longer would two chambers try to enact a one-year spending resolution and move 12 big spending bills between January and September each year. Congress instead would have small groups of legislators with greater ownership of the spending in their jurisdictions. Individual members who wanted to affect policy (spending, of course, is policy) would have to do so through subcommittee participation.

Congress's great strength is its connection to the diverse public and its various local wants and needs. All regulations are local, and the people's representatives are most likely to be both mindful and interested in the effects of regulation. But with the breakdown of regular order, legislators have few chances to exert the power of the purse or any other legislative oversight.

A growing executive branch and a shrinking legislative branch is a recipe for unaccountable, uncontrolled government. Certainly, reducing the size of government would make overseeing it easier, but even if Congress cut the executive branch by half it would still be too big to oversee.

This leads to the question of congressional capacity generally. Plainly, the 535 members of Congress could not keep up with the great flow of regulations, even if leadership forced members to work more days (which it should).<sup>72</sup> Congress needs more staff who can help them conduct oversight. Federal spending today is 10 times larger than it was in 1975, yet the House and Senate employ fewer staff members than they did then. Of the 16,000 congressional employees, half work outside Washington and devote themselves mostly to constituents' personal

issues (for example, mail not being delivered). A significant percentage of the 8,000 Capitol Hill staffers have less than three years of experience, leaving them ill-equipped to comprehend let alone do anything about the regulations being proposed each week.<sup>73</sup>

Congress currently spends \$4.5 billion, just 0.1% of annual federal spending, on the legislative branch, which includes itself, the Congressional Budget Office, the Government Accountability Office, and the Congressional Research Service. Congress must invest in itself. Providing its committees with more oversight staff would help. So too would reversing the cuts to the manpower of the legislative-branch support agencies. The CRS, which aids Congress in all aspects of law-making and oversight, has seen its headcount shrink by a fifth since the late 1970s. GAO has 40% fewer staff than it had 40 years ago. The more full-time civil servants that Congress tasks to conduct oversight, the more oversight there will be.

To contend with the administrative state, Congress should establish a Congressional Regulation Office.<sup>74</sup> This new legislative support agency could be modeled on the CBO, which has a couple hundred employees and a generally admirable track record for performing nonpartisan budget analysis. The CBO issues 80 to 90 reports per year and scores the costs of 500 pieces of legislation. A Congressional Regulatory Office that had the same output would be immensely helpful to Congress.

Like the CBO, the CRO could serve as a go-to resource for legislators or staff who need help. Additionally, the CRO could perform cost-benefit analyses of agencies' significant rules, in order to provide a disinterested check on agencies' self-interested math. The CRO's assessment of a proposed regulation, like CBO's bill scores, could be posted online and delivered to the committee of jurisdiction. Doing these things would increase the political salience of agency rulemaking, thereby fostering congressional oversight and encouraging policy entrepreneurs in the legislature to take up the subject. A CRO cost-benefit analysis should also be automatically submitted as public comment to the rule, which would oblige an agency response and possibly a recalibration of the rule.

The CRO also could conduct periodic retrospective analyses informed by real data rather than forward-looking estimates. Agencies sometimes perform "look-back" assessments, but they are modest in number (certainly compared to the massive corpus of standing

regulation) and produce only nominal changes. This is unsurprising, since each agency is passing judgment on its own work. CRO reports would regularly goad Congress to examine how the rules produced by existing laws are performing, such that they could work to revise those statutes that have yielded problematic results.

The work of the CRO might be made even more potent were it wired into new oversight processes. CRO analyses could play a central role in the workings of a regulatory budget, for example, or its cost estimates could trigger review if a proposed rule qualifies under the REINS Act.

Congress could adopt new legislative procedures (which require no presidential signature) that permit any member of Congress to introduce a bill to either abolish or sunset an existing regulation if the regulation has an egregious CRO benefit-cost score. This type of bill might be considered under expedited procedures, which greatly enhances its chance of passage by both chambers.

In all, the CRO would provide Congress with a desperately needed Madisonian counterforce to the executive branch's regulators.

#### CONCLUSION

There are, as shown above, various means for reasserting Congress in regulatory policy. None of these reforms would cost the taxpayer much, and they would pay for themselves by stopping a single major rule per year.

Congress has the power to redress the immense imbalance between it and the executive branch. The Constitution grants it the power to make law, appropriate funds, and decide the rules for its own operation. Congress can reclaim the lawmaking authority that has ebbed away, and restore a great deal of democratic accountability and legitimacy to our federal regulatory system.

## *Policy Reforms for an Accountable Administrative State*

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34. The president also effectively “legislates” through executive orders.
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36. “No. 70” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, (New York: Signet Classics, 2003), 422.
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53. The resolutions concerned the EPA's "Clean Power Plan," the EPA's and Army Corps of Engineers' "Waters of the United States" rule, a Department of Labor rule redefining the term "fiduciary," and National Labor Relations Board regulations making it easier for unions to organize in open shops. See the Congress.gov search at <https://goo.gl/ChF5cn>.
54. Department of Agriculture, Forest Service and Department of Interior, Fish and Wildlife Service, "Subsistence Management Regulations for Public Lands in Alaska; Rural Determination Process," 80 *Federal Register* 4521, Jan. 28, 2015.
55. Mine Safety and Health Administration, "Criteria and Procedures for Assessment of Civil Penalties," 79 *Federal Register* 78749, Dec. 31, 2014.
56. Department of Housing and Urban Development, "Section 108 Loan Guarantee Program: Announcement of Proposed Fee to Cover Credit Subsidy Costs and Solicitation of Comment," 80 *Federal Register* 6469, Feb. 5, 2015.
57. See <https://www.federalregister.gov/>.
58. HR 1155, 114<sup>th</sup> Cong., 1st sess. (February 27, 2015).
59. *INS v. Chadha*, 462 U.S. 919 (1983).
60. Jonathan H. Adler, "Placing REINS On Regulation: Assessing the Proposed REINS Act," *New York University Journal of Legislation and Public Policy* 16 (April 2013): 1, 27.
61. James Gattuso, "Taking the REINS on Regulation," Heritage Foundation WebMemo 3394 on Regulation, October 12, 2011, <http://www.heritage.org/research/reports/2011/10/taking-the-reins-on-regulation>.
62. U.S. Const. art. I, § 8.
63. Jeff Rosen, "Putting Regulators on a Budget," *National Affairs* (Spring 2016).
64. Sean Speer, "Regulatory Budgeting: Lessons from Canada," R Street Institute policy study no. 54, March 2016.
65. Senator Mike Lee, "Lee Unveils Article I Regulatory Budget Act," May 25, 2016. <http://www.lee.senate.gov/public/index.cfm/press-releases?ID=D24FACED-CC32-4C7D-8453-941276A90EEC>.
66. The 2006 Postal Accountability and Enhancement Act (P.L. 109-435) established a new postage rate-setting system by setting the basic criteria for ratemaking in statute and having the Postal Regulatory Commission complete the system. The law also required the PRC to re-evaluate its pricing system 10 years after it was adopted.
67. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2017, HR 5538, 114th Cong., 2d sess. (June 21, 2016).
68. Kevin R. Kosar, "So ... This Is Nixon's Fault?" *Politico*, October 21, 2015, <http://www.politico.com/agenda/story/2015/10/richard-nixon-congressional-budget-control-act-history-000282>.

69. Government corporations, meaning those federal agencies that are natural monopolies providing commercial products and services (the Postal Service and the St. Lawrence Seaway Corporation, for example), can safely continue as self-funded entities.
70. Yuval Levin, “Four Steps for Reviving the First Branch,” in *Restoring Congress as the First Branch*, ed. Kevin R. Kosar et al., R Street Institute policy study no. 50, January 2016.
71. The House and Senate full appropriations committees would be eliminated as the roles would be absorbed by the joint congressional budget committee and the small appropriation committees.
72. A modest reform would have Congress work five days a week for three weeks out of every five weeks.
73. Kosar, “How to Strengthen Congress.”
74. Philip Wallach and Kevin R. Kosar, “The Case for a Congressional Regulation Office,” *National Affairs* (Fall 2016).

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75. See, for example, Avinoam Nowogrodski, “The Bossless Workplace: A New Frontier,” *Entrepreneur*, October 20, 2015, <https://www.entrepreneur.com/article/250052>.
76. U.S. Const., art. II, § 3.
77. 1 *Annals of Cong.* 463 (1789).
78. See *PHH Corp. v. Consumer Financial Protection Bureau*, slip op. (D.C. Cir. 2016); see also *Free Enterprise Foundation v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).
79. Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (2001): 2245, 2248-49.
80. *Ibid.*, 2251-52.
81. See, e.g., Jennifer Epstein, “Obama’s Pen-and-Phone Strategy,” *Politico*, January 14, 2014, <http://www.politico.com/story/2014/01/obama-state-of-the-union-2014-strategy-102151>.
82. Jerry L. Mashaw, “Recovering American Administrative Law: Federalist Foundations, 1787-1801,” *Yale Law Journal* 115 (2006): 1256, 1304.
83. See Jim Tozzi, “OIRA’s Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding,” *Administrative Law Journal* 63 (2011): 37, 43.
84. George P. Shultz, “Agency Regulations, Standards, and Guidelines Pertaining to Environmental Quality, Consumer Protection, and Occupational and