

TOWARD A CONGRESSIONAL RESURGENCE

Congress should

- reclaim the power to make law by requiring an up-or-down vote on all "major rules" involving more than \$100 million in economic costs;
- establish a standing committee to review past legislation and identify broad statutory language that abets executive overreach in rulemaking;
- revise the Administrative Procedures Act to make clear that federal courts reviewing agency action are to decide questions of federal law de novo, without deference to agencies' interpretations of their own authority;
- establish an Article I agency to inform lawmakers about executive branch regulations—comparable to White House regulatory review—to allow for meaningful congressional oversight of the administrative state;
- rein in the president's statutory powers by subjecting them to reasonableness review in Article III courts;
- reclaim the power of the purse by enacting a law requiring that all profits, fees, fines, civil and criminal forfeitures, and other revenues be deposited in the Treasury and spent through the normal congressional appropriations process; and
- require regulatory agencies to submit comprehensible budgets.

“In absolute governments, the king is the law,” Thomas Paine proclaimed in *Common Sense*, but “in America, the law is king.” We’ve come a long way since 1776: increasingly, in 21st-century America, the *president* is the law. Over the past few decades, the “most powerful office in the world” has grown more powerful still, thanks to a succession of presidents who repeatedly pushed the limits of executive authority and multiple Congresses unwilling to push back.

President Bill Clinton pioneered our modern era of “presidential administration,” in which the White House has leveraged the executive order to become the

primary policymaker in the federal government. An aide to Clinton famously described this approach to the press, saying “Stroke of the pen, law of the land. Kind of cool.”

The George W. Bush administration became notorious for sweeping claims of executive authority in foreign affairs. Yet by the end of his second term, Bush had also radically expanded presidential power on the home front, into areas in which no plausible national security claim could be made, such as ordering a multibillion-dollar auto bailout just days after Congress failed to pass the bill.

On the campaign trail, Sen. Barack Obama (D-IL) railed against presidents “trying to bring more power into the executive branch and not go through Congress at all.” But after assuming the office, Obama famously reached for his pen and phone to grant sweeping dispensations to immigration law, impose billions of dollars in climate regulations, and unilaterally amend the Affordable Care Act.

His successor, President Donald Trump, continued this aggressive unilateralism and then some, imposing “national security” tariffs on our NATO allies, barring entire classes of immigrants on the basis of nationality, and declaring a transparently bogus “national emergency” at the southern border to perform an end run around Congress’s power of the purse.

Our system of separated powers was designed to force deliberation and consensus; for a bill to become law, it needs to meet with the approval of the representatives of three different constituencies: the House, the Senate, and the president. But when the executive branch makes law unilaterally, those procedural hurdles stand in the way of undoing what the president has ordered with the stroke of a pen.

As someone who spent most of his adult life in the Senate, President Biden surely appreciates the constitutional boundaries between the legislative and executive branches of government. He signaled as much before assuming office. “I am not going to violate the Constitution,” the then president-elect told civil rights leaders in December 2020: the sort of “executive authority that my progressive friends talk about is way beyond the bounds.”

Yet the allure of unilateral presidential lawmaking proved too tempting. In the first days of his administration, Biden unleashed such a flurry of unilateral edicts that even the *New York Times* editorial board felt compelled to cajole him: “Ease Up on the Executive Actions, Joe.” Throughout his first year, Biden issued executive orders at an unprecedented clip for modern presidents—almost double the combined annual average of his three immediate predecessors. To date, the Biden administration has imposed several sweeping measures that are indistinguishable from major legislation, including a halt on oil and gas

leasing on federal property, continuation of a nationwide moratorium on evictions initiated by his predecessor, and a vaccine mandate on businesses with more than 100 employees.

It's unlikely to stop there: Biden's progressive friends have an extensive wish list. Senate Majority Leader Chuck Schumer (D-NY) has urged Biden to "call a climate emergency," noting that "he could do many, many things" that wouldn't have to go through Congress. And Sen. Elizabeth Warren (D-MA) has been after him to declare an executive jubilee on student loans, forgiving up to \$50,000 per debtor, at a cost of around a trillion dollars. They're sure to ramp up the pressure as his ability to pass legislation the old-fashioned way dwindles.

That's the political environment facing the 118th Congress, and, like the prospect of a hanging, it ought to concentrate the mind wonderfully. As we'll see, Congress bears much of the blame for the rise of one-person rule, having abdicated its core constitutional responsibility for making the law. But the crisis of executive governance creates an opportunity for a congressional resurgence. This chapter offers a number of reforms that, if implemented, would go some distance toward revitalizing Congress.

Congress and the Presidency in the Constitutional Order

The current regime of executive branch dominance is at odds with our Constitution's structure and history. Presidential hegemony wasn't part of the original plan: the Framers never conceived of the president as America's "national leader" and the prime mover in the federal system. Neither did they subscribe to the Jacksonian notion that the president, as the only nationally elected figure, was the "direct representative of the American people" or, as Theodore Roosevelt saw it, uniquely the "steward of the whole people," with special powers to act on their behalf.

If anything, Congress had the superior democratic pedigree. Compared with the chief executive or the federal judiciary, the members of the legislative branch, who "dwell among the people at large," James Madison wrote in *Federalist* no. 49, were "more immediately the confidential guardians of the rights and liberties of the people." And it is Congress that, on parchment at least, has the superior powers. Just as the Capitol dome looms over the president's house in the architecture of the federal city, Congress overshadows the president in the structure of the federal Constitution.

"All legislative Powers herein granted shall be vested in a Congress of the United States," the document proclaims in Article I, Section 1, the first sentence following the Preamble. Congress wields the power of the purse; it establishes the structure of the executive branch and the rules under which it operates.

It can create or abolish agencies, remove department heads and even, through the impeachment power, remove the president. The president has no reciprocal powers allowing executive control over Congress.

The first sentence of Article II vests “The executive Power” in the president. At its core, that power consists of the authority to carry into execution the laws that Congress makes. The point is underscored in Article II, Section 3, which imposes a number of duties on the president, among them that “he shall take Care that the Laws be faithfully executed.”

The Constitution was not a blueprint for a government of coequal branches. To the contrary, as Madison explained, “in a republican government, the legislative authority necessarily predominates.” In fact, given the relative balance of the branches’ formal powers, the Framers worried about Congress overwhelming the president. Experience in the states, where “the legislative department is everywhere extending the sphere of its activity, and drawing all power into its *impetuous vortex*,” served as a cautionary tale. To guard against that danger, the Constitution’s architects divided the legislature into separate branches and fortified the president with the veto as a defensive weapon.

The Presidency Transformed

From a modern vantage point, the Framers’ concerns about legislative dominance seem almost quaint. By the mid-20th century, the *executive’s* “impetuous vortex” threatened to swallow up the powers of the first branch.

In the first century of the Republic, when Congress still served as the country’s principal lawmaker, presidents issued fewer than 800 executive orders in total. Yet as the chief executive’s responsibilities expanded, so too did his power to govern by decree. From Truman through Nixon, presidents issued over 2,200 executive orders, which became increasingly indistinguishable from legislative acts. For its part, Congress facilitated the growth of presidential rule by drafting increasingly broad and vague laws that accorded the executive discretion in interpretation and implementation. Legal scholar Gary Lawson has likened the legal regime that emerged from unrestrained delegation to one governed by “a statute creating the Goodness and Niceness Commission and giving it power ‘to promulgate rules for the promotion of goodness and niceness in all areas within the power of Congress under the Constitution.’” The myriad “goodness and niceness” commissions of the modern administrative state go by different names and have narrower purviews individually, but collectively, they’re hard to distinguish from Lawson’s *reductio ad absurdum*.

In the latter part of the 20th century—not coincidentally a period characterized by the “emerging Republican majority” in the Electoral College—conservatives perceived advantages to presidential dominance. Using the enhanced powers

of the presidency, conservative chief executives could gain control over the administrative state and rein in the regulators, they reasoned. But as Elena Kagan—formerly a policy adviser in the Clinton administration and now a Supreme Court justice—pointed out in a 2001 *Harvard Law Review* article, there’s little reason to think that “presidential supervision of administration inherently cuts in a deregulatory direction.” A progressive president could use his control over the administrative state to pursue “a distinctly activist and pro-regulatory agenda”—as Clinton had done and as Obama and Biden would later do.

Reclaiming the Power to Make Law

Thankfully, the powers the Constitution gives to the first branch are more than adequate for the Congress to reestablish its rightful role. As law professor Charles Black noted four decades ago in the wake of Watergate: “My classes think I am trying to be funny when I say that . . . Congress could reduce the president’s staff to one secretary . . . [and] put the White House up at auction. . . . [But] these things are literally true.”

If Congress has the legal power to sell the White House, it certainly has the power to constrain and discipline the president in less dramatic fashion: to punish unauthorized spending, police violations of the take care clause, and reclaim responsibility for making the laws Americans are required to follow. What’s needed now is for Congress to recognize the powers it has and begin flexing muscles that have grown slack with disuse.

To begin with, if members of Congress are concerned with presidential power grabs, they should stop *enabling* them. Too often, legislators have given the president a colorable claim to legal authority by passing broad and vaguely worded statutes that leave the details to be worked out by the executive branch. Congress should establish a standing committee to review past legislation and identify broad statutory language that abets executive overreach in rulemaking. The new committee would propose new, narrower language for existing statutes to restore congressional control over agencies. Such a retrospective review would provide a legislative complement to the Supreme Court’s recent decision in *West Virginia v. EPA*, which requires Congress to be clear when it assigns significant regulatory authority to administrative agencies.

Congress should also consider framework legislation that promotes legislative accountability for new regulatory rules going forward. In the Congressional Review Act of 1996 (CRA), Congress defined a “major rule” as a regulation that involves more than \$100 million in costs or otherwise significantly affects the economy. The CRA provided expedited procedures for members to challenge proposed regulations, via a disapproval resolution, which, if passed by

both houses and signed by the president, prevents the rule from going into effect. In the first two decades after it passed, the act was employed to stop a final rule only once; in recent years, Congress has seen more success with the CRA, overturning 16 rules since 2017. Still, to truly reclaim responsibility for lawmaking, it needs a more reliable weapon than the CRA's post hoc veto.

The proposed Regulations from the Executive in Need of Scrutiny (REINS) Act is that weapon. It would require Congress to vote major rules into law before they take effect. Under its provisions, agency rules that meet the criteria are automatically introduced into each house and fast-tracked toward an up-or-down vote within 70 days. If enacted, the REINS Act—versions of which have passed the House four times since 2013—would increase Congress's workload, forcing members to consider 50–100 major rules per year. But as the Hudson Institute's Christopher DeMuth has put it, "Should not members of Congress stand and be counted on regulatory policies costing \$100 million or more, even if that means spending less time naming post offices after one another and proclaiming National Orange Juice Week?" As with the retrospective review of existing legislation, discussed above, the REINS Act would complement the Supreme Court's decision in *West Virginia v. EPA*, which, again, calls for Congress to be clear when it grants major policymaking authority to regulatory agencies. Under REINS, Congress would signal its unambiguous intent with every significant administrative action to come out of the executive branch.

Further, Congress must equip itself with the analytical capacity to compete with the presidency for managerial control over the administrative state. As the saying goes, information is power; at present, Congress suffers from a gross informational asymmetry vis-à-vis the executive branch. Since the Reagan administration, the White House has superintended regulatory policymaking through a 40-person staff at the Office of Information and Regulatory Affairs (OIRA), whose role is to appraise the president of regulatory consequences. Yet Congress has developed no comparable function for assessing regulatory products. As a result, lawmakers are reliant on the executive branch for information about the costs, benefits, and other societal effects of administrative policymaking. To level the playing field, Congress should remedy this analytical gap by creating an Article I agency that performs an OIRA-like function. Only then will lawmakers have sufficient information to effectively oversee the administrative state. A historical parallel is the Congressional Budget Office that Congress created to redress the president's informational advantage when it comes to budgeting.

Further, Congress should consider revising the Administrative Procedure Act (APA) to empower judicial review of executive agency actions. Such review has become utterly anemic over the past several decades, under the judicially

created *Chevron* doctrine, by which the courts accord executive branch agencies extraordinary deference to their interpretations of their own statutory authority. Bills introduced in the House and Senate in 2019 would overturn *Chevron* deference, amending the APA to empower courts to decide “de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules.”

Congress should also provide for a judicial check to prevent obvious abuses of discretion when a president exercises statutory powers. Most of the time, Congress delegates regulatory authority to an alphabet soup’s worth of administrative agencies collectively known as the administrative state. Sometimes, however, Congress delegates regulatory authority directly to the president, especially in areas of international trade, immigration, or public land regulation. Although courts review agency regulations for reasonableness and abuse of discretion, the Supreme Court exempted the president from such review in the early 1990s. And because courts don’t check for reasonableness, presidents are allowed to be unreasonable. This is why Trump was able to impose “national security” tariffs on NATO allies (see “International Trade and Investment Policy”), or why Obama could regulate fishing in an oceanic “monument” the size of Connecticut. To stop these obvious abuses of discretion, Congress should amend the Administrative Procedure Act to subject the president’s regulatory decisions to reasonableness review. Such a requirement would in no way threaten to disrupt the president’s ability to conduct foreign affairs or respond to crises: courts would retain the discretion to refrain from reviewing a president’s actions in cases that implicate genuine constitutional powers. Instead, lawmakers would merely ensure that the president can no longer commit flagrant abuses of discretion when exercising delegations from Congress.

Congress should also address agencies’ use of “coercive guidance” to expand their authority, meaning guidance issued outside the normal notice-and-comment procedures dictated by the APA. One way to do that is by amending the APA to establish qualified immunity for regulated parties, private or public, who violate abstract or contested rules issued as informal policy statements that outline proscribed behavior. In practice, such regulatory targets would not be held liable retrospectively. Law professor William Baude has described how qualified immunity would change coercive guidance:

If presented with executive guidance that takes an aggressive or questionable interpretation of the underlying statute, the regulated entity would now be able to more confidently go on about its business, ignoring the agency’s position. It is still equally possible for the agency to impose sanctions and take the regulated entity to court, but the entity has been insured to some degree against

the risk of losing a novel question of law. This makes it far more likely that debatable executive interpretations will end up subject to judicial review, and hence far more likely that they will ultimately be subject to congressional constraints.

Reclaiming the Power of the Purse

Congressional shortcomings go beyond promiscuous delegation of legislative power. Article I, Section 9, of the Constitution states, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Nonetheless, a number of regulatory agencies rely on funding extracted outside the normal appropriations process and the congressional oversight it enables.

For example, the Consumer Financial Protection Bureau is funded outside the congressional appropriations process. Instead of going to Congress, the agency is authorized to draw funds from the Federal Reserve System. Every year, the bureau receives the amount that the director deems “to be reasonably necessary to carry out the authorities” of the agency.

The Federal Communications Commission sets and collects about \$8 billion in taxes on landline and wireless telecommunications companies, cable companies that provide voice service, and paging service companies. The commission then has broad discretion in spending that money to achieve universal service. In this case, the power of the purse seems to be migrating to the executive branch. “All of this is easily fixed,” notes legal scholar Michael McConnell. Congress can “pass a statute providing that all profits, fees, fines, civil and criminal forfeitures . . . and other revenues must be deposited in the Treasury and spent only in accordance with congressional appropriations.”

Moreover, when it comes to presidential inaction and failure to faithfully execute the laws, the power of the purse is likely to be among the most effective weapons available to Congress. As Justice Antonin Scalia put it in a 2012 case, “Nothing says ‘enforce the Act’ quite like ‘. . . or you will have money for little else.’”

Finally, Congress should require agencies to submit comprehensible budget documents. Here, the Environmental Protection Agency’s fiscal year 2022 budget justification is emblematic of most agencies’ approach. Instead of organizing its budget justification by office or statute, the EPA employed an indecipherable matrix of conceptual goals and organizational labels. Over the course of almost 1,000 pages, the document described more than 150 of these matrix combinations, using airy prose that fails to impart even the most basic information (such as which office is spending the money). When agencies submit incomprehensible budgets, they make lawmaker oversight impossible. Congress

should demand that agencies simplify these documents to make it easy to follow the money.

Crisis and Opportunity

Reining in the president’s de facto lawmaking powers won’t be easy. Members of Congress may be tempted to delegate their power to avoid responsibility for policy outcomes. But business as usual will only encourage the growing public perception that the game is rigged. The long decline in respect for Congress occurred during a period when it increasingly abdicated responsibility and power to the executive branch and stems in large part from the popular perception that, as an institution, it has become useless.

Unfortunately, Congress has done much to foster that perception. As Sen. Mike Lee (R-UT) has noted, “At the end of the day, the real change can’t come to federal law until it comes to federal lawmakers. Congress has to re-assert its Article 1 powers—and get back in the habit of doing its job.”

The current crisis in executive governance is an opportunity for congressional “institutionalists.” And all the powers the Framers gave Congress are there for institutionalists’ taking.

Suggested Readings

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