RESTORING THE BALANCE OF POWERS

FreedomWorks Foundation

"The Founders intentionally placed the power of the government in the hands of the people via their representation in Congress. Yet for many years, Congress has slowly ceded its authority to the executive branch. Rather than taking the time to properly legislate, Congress has passed bills that lack detail and provide gross regulatory authority to unelected federal bureaucrats. Congress seems keen to participate in opaque rulemaking processes, begging bureaucrats to implement policies that align with congressional intent. We've seen the effects of this trend in every policy area, from immigration to environmental policies, and health care to foreign aid. It's time for change.

"One of the core tenants of my office mission is to restore the balance of power between the executive and legislative branches to more closely resemble what the Founders intended. I am grateful to FreedomWorks for raising awareness of this need and for the work they do reduce the size of government and promote individual liberty."

Congressman Andy Biggs (AZ-05)

"The idea that the federal government is composed of three coequal branches is false. While it is essential that the three branches hold each other accountable, Congress was always intended to be the most powerful for a simple reason: it is the branch that is closest to the people, and is the only branch organized to encourage debate and compromise on the most pressing issues facing America. The founders of this great nation never imagined that Members of Congress would so willingly give away their power and responsibility, but that is exactly what we have done for a century. This paper offers a roadmap for Congress to reassert itself as the predominant player in the federal government."

Congressman Mike Gallagher (WI-08)

"The authors of the Constitution intended Congress to be first among the federal government's three co-equal branches. Unfortunately, over the past hundred years Congress has handed many of its legislative duties to the Executive Branch. Both parties are to blame. There are, however, steps Congress can take to restore its Article I powers. This essential paper explains how Congress can reclaim its role in regulation, trade, and war powers, thus reclaiming its proper role as the first branch of the federal government."

Senator Mike Lee (UT-SEN)

BY JASON PYE AND JOSH WITHROW
FREEDOMWORKS FOUNDATION

RESTORING THE BALANCE OF POWERS:

THE CONSTITUTIONAL ROLE OF THE LEGISLATIVE BRANCH

Executive Summary

Over the past century, the Legislative Branch has ceded many of its constitutionally delegated powers to the Executive Branch and concentrated most of the rest in the hands of congressional leadership. These concerns are not new. They did not arise in only the past few years. Rather, the erosion of Article I has progressed steadily over time, and every president has played a role. This shift that has gone on for more than a century undercuts the Founders' vision of checks and balances to protect our freedom from power wielded by too few hands.

The Founders specifically outlined the powers of the legislature in the first Article because they believed that the most power should reside with the people. It was only after they explicated all of the responsibilities of the legislature did they invest power in the executive in Article II. The reversal of this balance deprives the American people of the value of policies informed and shaped by the expertise and local interests of all of our elected representatives.

Many in Congress realize the problem, but too few are willing to take steps to address it systematically. For the most part, when Congress does assert itself, it does so only when it is politically convenient, usually when the Executive and Legislative Branches are controlled by opposing parties. But overall, members of Congress often find it politically safer to not have to address and vote on tough issues, and outside interest groups often find it easier to lobby (privately) a few key people in the Executive Branch than 535 unruly elected officials in Congress. This result favors those with connections and resources at the expense of the rest of us.

The Constitution gives the Legislative Branch the power to make laws and decide when America is at war. The Executive Branch is to "take care that the laws be faithfully executed." This is what every student is taught in civics class in grade school. Unfortunately, the federal government today does not operate that way. In fact, Congress is quite dysfunctional. At times, it seems, the hardest thing that Congress can do is take a vote to exercise even some of the powers that Article I of the Constitution delegates to it.

In reality, Congress does make laws, but representatives and senators often prefer to simply provide a framework through legislation and then let administrative agencies in the Executive Branch fill in the details via rulemakings. This allows members to create distance between themselves and actual regulations that may be unpopular in their districts or states. When it comes to war powers and trade, Congress -- regardless of which party is in control -- has given up much of its authority to the Executive Branch. Taken together, this abandonment of the Legislative Branch's constitutional role has given the presidency powers far beyond what the Framers of the Constitution intended.

A shift back to the proper role of the Legislative Branch will take time and political will, but Congress can, and must, begin to address these issues. Rank-and-file members will have to step forward and, at times, take positions that are unpopular with their own party's leadership. For this to happen, "we the people" need to understand why it matters and make clear to those who represent us that we demand action.

"...despite what partisans would have us believe, this problem did not begin under President Donald Trump."

A strong legislature may be unappealing to some, especially to powerful interests that have a stake in maintaining the power dynamic as-is. Among those interests is current congressional leadership. Changing course will not be easy. Regardless, the shift away from a constitutionally limited government to an unchecked government in which one branch has consolidated so much power is neither sustainable nor consistent with our collective liberty. The paradigm must shift back, and it must shift soon.

Many have raised concerns about the erosion of Article I over the past few years. But the blurring of the constitutional lines has been a progression over the past century. In short, despite what partisans would have us believe, this problem did not begin under President Donald Trump. Likewise, it did not begin under President Barack Obama. Every modern president, Democrat and Republican alike, has played a role in the erosion of Article I.

Restoring the Balance of Powers: The Constitutional Role of the Legislative Branch presents the case for the restoration of Article I and empowering the Legislative Branch. This issue brief explains that Congress must reclaim its power from the administrative state by either restoring the nondelegation doctrine or creating an approval process for regulations. When it comes to war powers, Congress must narrow the scope of the war powers resolution. Also, with so much economic uncertainty created by unilateral tariffs imposed by the Executive Branch, Congress should reinforce its authority over trade.

These are the policy steps Congress must take:

- Decentralize the legislative process
- Allow committees to work as intended
- Allow members to properly represent their constituents through the amendment process
- Reform the broken budget and appropriations process by enacting long-needed changes to end the cycle of governing by manufactured crisis

Americans deserve better.

Introduction

By Jason Pye

One of the core tenets of the Constitution is the separation of powers. Each of the three branches of the federal government -- Legislative, Executive, and Judicial -- has unique powers and serves as a check on the others. But over the past century, due to lethargy in the Legislative Branch and deference to the White House, the Executive Branch has increasingly and alarmingly concentrated power, with few real checks.

The Constitution is an imperfect document, but the Framers did carefully delineate the powers of each branch, seeking to make sure that no one branch became dominant over the others. This was particularly a concern with the Executive Branch. After all, the United States had just fought for its independence from a tyrannical monarch, King George III, who, as the Declaration of Independence noted, had "a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States."

Article I, Section 8 of the Constitution defines the specific enumerated powers of Congress. Among the 18 powers listed in Article I, Section 8 are the powers to tax, regulate commerce with foreign nations, regulate copyrights and patents, and declare war. The states were meant to handle the powers not enumerated in this section, as James Madison explained:[1]

> "[T]he general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other subjects which can be separately provided for, will retain their due authority and activity."

Similarly, Article II, Section 2 defines the powers of the Executive Branch. The powers are few and limited. Not only does the president serve as commander-in-chief of the military but he also has the power to grant clemency and pardons within the jurisdiction of the federal government; make treaties with the advice and consent of the Senate; nominate ambassadors, officers to the federal government, and judges to federal courts with the advice and consent of the Senate; and he can make temporary appointments to federal posts when the Senate is in recess.

The American Revolution ended only four years before the Constitution was approved by the Constitutional Convention in Philadelphia. The framers were wary of giving the Executive Branch too much power. In Federalist No. 51,[2] the author, either Madison or Alexander Hamilton, wrote:

> "To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may,

1 Federalist No. 14 https://avalon.law.yale.edu/18th_century/fed14.asp
2 Federalist No. 51 https://avalon.law.yale.edu/18th_century/fed51.asp

by their mutual relations, be the means of keeping each other in their proper places."

Each president has left his own mark on the Executive Branch, but a dangerous evolution of the office has taken place over the past century. It began, by and large, with the Progressive Era and two presidents, Theodore Roosevelt and Woodrow Wilson. Their activist approaches to the presidency established a framework for their successors. None of this is to say that Roosevelt and Wilson's predecessors did not act outside of the constitutional limitations of the office. They certainly did, often to very vocal critics. President Andrew Jackson, for example, is credited with "la[ying] the foundations for what we can begin to recognize as the modern presidency."[3]

"...a dangerous evolution of the office has taken place over the past century. It began, by and large, with the Progressive Era and two presidents, Theodore Roosevelt and Woodrow Wilson."

Wilson viewed the limitations on the presidency as a mere inconvenience. He once lamented that "the presidency is too silent and inactive, too little like a premiership and too much like a superintendency."[4] Wilson was influenced heavily by the actions of President Theodore Roosevelt as well, who expanded the role of the presidency through executive action, such as executive orders and regulation, with his two primary focuses being regulation of businesses and conservation. Roosevelt issued nearly 1,100 executive orders. His 24 predecessors had issued 1,262, combined.[5] After he left office, Roosevelt would defend the approach he took to the presidency:[6]

> "My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power."

Wilson took the theory and practice of a strong executive left by Roosevelt and expanded it. As presidential scholar Gene Healy explained, "The winner of the 1912 race, Woodrow Wilson, would in his first term continue to expand presidential power along the lines

3 John Yoo, "Andrew Jackson and Presidential Power," University of California-Berkeley School of Law, July 16, 2008 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1158001

4 Woodrow Wilson, "Congressional Government: A Study in American Politics," The Riverside Press, 1885 https://www.gutenberg.org/files/35861/35861-h/35861-h.htm

5 The American Presidency Project, "Executive Orders," University of California-Santa Barbara, Accessed September 26, 2019 https://www.presidency.ucsb.edu/statistics/data/executive-orders

6 Theodore Roosevelt, "Theodore Roosevelt: An Autobiography," New York-MacMillan, 1913 https://www.bartleby.com/55/

suggested by Roosevelt's Stewardship Doctrine. In his second term, with American entry into the Great War, Wilson would go on to wield powers of which even TR hardly dared dream."[7]

If Jackson "la[id] the foundations" for the modern presidency, Roosevelt and Wilson erected the walls and laid the carpet. This house, though, is still expanding. As former Rep. Bob Barr (R-Ga.) told the House Judiciary Committee in 2008, "Every administration that comes in takes the powers that it inherits from its predecessor as a floor, not a ceiling."[8] Each president adds another floor, leaving ample opportunity for the next person who takes the office to further expand executive power. Some, like President Franklin Roosevelt and President Richard Nixon, are, of course, more notable in doing this than others.

What of the constitutional separation of powers and checks-and-balances, then? Members of Congress have routinely deferred to presidential administrations, particularly in times of unified government. Congress has abdicated and surrendered its rightful constitutional authority to the Executive Branch in many ways. This does not end at executive orders. It extends to virtually every major policy matter, from regulation to trade to war powers.

Today, lawmakers talk about restoring the powers of the Legislative Branch defined by Article I, but few back it up. Sen. Mike Lee (R-Utah) has been one of the handful of individuals in Congress who have made the restoration of Article I a priority. He recognizes that many of his colleagues are to blame for the deterioration of the separation of powers. "We hear members of Congress complain about it almost as if we're victims," Lee said in a 2016 interview. "We are not. We are the perpetrators."[9]

Similarly, the House Select Committee on Modernization of Congress is exploring various ways to strengthen Congress. This important select committee, which has broad bipartisan support, was created in January 2019 at the beginning of the 116th Congress. The select committee is charged with making a number of recommendations to improve Congress, including changes to procedure, staff hiring and retention, and technology.

The Select Committee on Modernization of Congress is a good start toward accomplishing the goal of strengthening the Legislative Branch. But much more work is needed to address the larger issues that have weakened Congress and for members of both chambers to rediscover their proper roles.

Indeed, the Executive Branch, which includes an alphabet soup of agencies, is more often than not responsible for writing rules and regulations for legislation that Congress passes. This faceless bureaucracy has become an unconstitutional "fourth branch" of government to which Congress has handed its responsibilities. While Congress does have oversight and investigatory powers to restrain and manage this bureaucracy, these powers are ordinarily used forcefully only during times of divided government.

Members of Congress have not only ceded power to the Executive Branch, they have also surrendered what little power they have left to party leadership inside of Congress, especially in the House of Representatives. The House has largely centralized the process of writing legislation in the Speaker's office, taking it away from committees and members in floor debate through adjustments to the rules. This centralization of power extends to the

7 Gene Healy, "The Cult of the Presidency," Cato Institute, 2008 https://www.cato.org/sites/cato.org/files/documents/cult-of-the-presidency-pb.pdf

8 Wil S. Hylton, "Give Him Liberty or...," ABC News, June 30, 2008 https://abcnews.go.com/Politics/Vote2008/story?id=5275971&page=1

9 Michelle Cottle, "Mike Lee's New Crusade," The Atlantic, February 12, 2016 https://www.theatlantic.com/politics/archive/2016/02/mike-lee-article-one-project/462564/

annual budget and appropriations legislation, in which few members have any substantive input. The Senate has likewise manipulated its rules and precedents to find ways for party leaders, particularly the majority leader, to control the legislative process.

One of the phrases heard frequently in politics today is "democratic norms." These are our country's political traditions that are meant to be followed.

However, the only real arbiter of such norms is the Constitution. The Constitution establishes a republican government and places express limitations on each branch of the federal government, including the Executive Branch. It is incumbent on those who care about these norms, for the preservation of the Constitution, to emphasize their importance. It remains today just as Benjamin Franklin so famously said in 1787 when asked what the Constitutional Convention in Philadelphia had created: "A republic, if you can keep it."

"It is up to Congress to take back both the power that has been willingly given to the Executive Branch, and those powers that have been usurped."

Law professor Elizabeth Price Foley has written and spoken on American law and the unique emphasis the founding fathers placed on individual liberty and sovereignty. From her perspective, extra-constitutional actions, such as handing the federal government more power, are dangerous to individual liberty:[10]

> "The morality of American law has been abandoned by all branches when certain exigencies and pragmatic considerations have arisen rather than taking the harder route of supermajoritarian Article V processes: a desire to avoid civil war, followed closely by a desire to avoid another civil war, a desire to protect the United States from dangers of socialist and, later, communist thought; a desire to pull this country out of a severe economic depression and, today, a desire to protect America from terrorism."

The Framers of the Constitution were similarly concerned about one branch or one individual having more power than the other branches of the government. Clearly, that constitutional system of checks-and-balances has withered. It is up to Congress to take back both the power that has been willingly given to the Executive Branch, and those powers that have been usurped.

10 Cato Institute, "Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality," October 31, 2006 https://www.cato.org/multimedia/events/liberty-all-reclaiming-individual-privacy-new-era-public-morality

The Administrative State: The Unconstitutional Fourth Branch of the Federal Government

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Section I of the Constitution

Although Article I, Section I of the Constitution gives "all legislative powers" to Congress, the Legislative Branch has surrendered power to the Executive Branch to essentially fill in the blanks of laws that they pass. The founding generation and the framers of the Constitution were heavily influenced by John Locke, who wrote:[11]

> "The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands."

The Legislative Branch has surrendered much of its lawmaking authority to the Executive Branch by allowing various departments, agencies, and commissions the ability to regulate. Of course, the Executive Branch has housed various departments and agencies dating back to President George Washington, although then, the number of these departments was limited. In 1789, the 1st Congress created only three departments: State, Treasury, and War. The position of Attorney General was also created by the 1st Congress.[12]

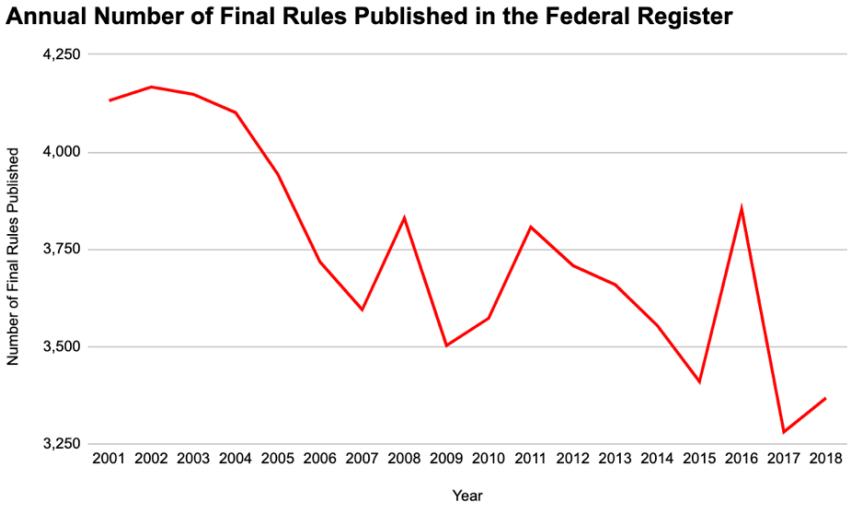
Although departments, agencies, and commissions existed during the nineteenth century and were delegated certain authorities, regulation was still primarily handled at the state level. The twentieth century saw Congress hand presidents more authority to essentially make law through departments, agencies, and commissions housed inside the Executive Branch. Handing the Executive Branch what is essentially lawmaking power allows the Legislative Branch, regardless of which party is in power, to avoid direct responsibility for unpopular implementation of laws it passes.

For conservatives, these concerns about the administrative state became amplified under President Barack Obama. Although the Obama administration did aggressively regulate, the groundwork was laid by his predecessors. In fact, as economist Veronique de Rugy noted,

11 John Locke, "Second Treatise of Government," Awnsham Churchill, 1689 https://www.gutenberg.org/files/7370/7370-h/7370-h.htm

12 The Department of Justice, which is headed by the attorney general, was not established until 1870.

President George W. Bush oversaw a massive expansion of the administrative state.[13] But even the Bush administration had precedent for this. Additionally, for at least half of his presidency,[14] he had a Congress that was willing to hand him more power.



Today, the exact number of agencies in the Executive Branch is unknown.[15] Congress has taken some limited steps to exert influence over the administrative state, but departments, agencies, and commissions inside the Executive Branch continue to wield enormous influence. This is largely because Congress continues to delegate rulemaking authority to them in most legislative initiatives.

In recent years, the concern over the administrative state has led to a rebirth of interest in Article I, particularly in conservative and libertarian circles.However, most members of Congress, Democratic and Republican alike, are not nearly as eager to change the status quo. This is particularly true because it would make them more responsible for specific government actions, many of which will inevitably be unpopular with some constituents in their districts or states and may put their re-election in jeopardy.

The administrative state comes with a tremendous cost and impacts most areas of Americans' lives. According to the Competitive Enterprise Institute, "The estimated $1.9 trillion 'hidden tax' of regulation is greater than the corporate and personal income taxes combined. If the cost of federal regulations were a country, it would be the 9th largest, behind India and just ahead of Canada."[16] Put another way, this burden averages "at least $14,615 annually" per household in America.

"...departments, agencies, and commissions inside the Executive Branch continue to wield enormous influence."

13 Veronique de Rugy, "Bush's Regulatory Kiss-Off," Reason, January 2009 https://reason.com/2008/12/10/bushs-regulatory-kiss-off/

14 President Bush saw full Republican control of Congress between January 20, 2001 until May 24, 2001 when Sen. Jim Jeffords left the Senate Republican Conference, became an independent, and caucused with Democrats. Republicans would regain control of the Senate in January 2003 and enjoyed the full control of Congress until January 3, 2007. .

15 Clyde Wayne Crews, Jr., "How Many Federal Agencies Exist? We Can't Drain The Swamp Until We Know," Forbes, July 5, 2017 https://www.forbes.com/sites/waynecrews/2017/07/05/how-many-federal-agencies-exist-we-cant-drain-the-swamp-until-we-know/

16 Clyde Wayne Crews, Jr. "Ten Thousand Commandments 2019," Competitive Enterprise Institute, May 7, 2019 https://cei.org/10kc2019

How did we get here? The history of the administrative state is a great topic for future in-depth analysis, but the concise story is simply that Congress has, for more than one hundred years, given its power to the Executive Branch. Pinpointing exactly when the problem began is difficult, but a few examples that show how it has evolved can help elucidate this issue.

President Theodore Roosevelt used powers handed to him by Congress to go after businesses through regulation[17] and place millions of acres of land directly under federal control.[18] One law that Congress passed, and for which Roosevelt lobbied, was the Hepburn Act of 1906, which "laid the foundation for the modern administrative state."[19]

The Hepburn Act gave the Interstate Commerce Commission (ICC) substantial power to further regulate railroads, as well as bridges and ferries, in response to fare increases by the railroads.[20] The fare increases were the result of higher demand and costs. The ICC was allowed to set a maximum fare and, with limited exceptions, it also prohibited free passes. The commission was allowed to require annual reports from railroads, as well as establish fares. The Hepburn Act also gave ICC rulings the force of law, although a ruling could still be challenged in circuit court.

The Hepburn Act had a devastating impact on railroads and directly contributed to the decline and near collapse of the industry in the 1960s and 1970. In 1935, the ICC was given the power to regulate the trucking industry. Ironically, the railroads urged for this regulatory authority because they were losing business to the trucking industry. Although trucking was inefficient due to heavy regulation, railroads continued to suffer despite the seeming regulatory parity.[21]

> "During the first three-quarters of the twentieth century, the ICC kept a stranglehold on railroads, preventing them from abandoning unprofitable lines and business. Regulations restricted rates and encouraged price collusion. As a result, by the end of this period many railroads faced bankruptcy, and Congress faced the prospect of having to take over the railroads to keep them operating."

This problem with regulation was amplified under President Franklin Delano Roosevelt (FDR) during the Great Depression, beginning with his New Deal. Extraordinary power was handed to new agencies such as the Agricultural Adjustment Administration and the National Recovery Administration, both of which were eventually struck down by the Supreme Court.[22] These two agencies were among those that had unprecedented power to regulate and control various aspects of the economy, such as controlling prices for commodities and wages.

Elements of these laws, however, did come back later in other aspects of FDR's economic agenda, which, as economic professors Harold L. Cole and Lee E. Ohanian have explained, actually

17 Constitutional Rights Foundation, "Progressives and the Era of Trustbusting," Spring 2007 https://www.crf-usa.org/bill-of-rights-in-action/bria-23-1-b-progressives-and-the-era-of-trustbusting.html

18 National Parks Service, "Theodore Roosevelt and Conservation," Accessed September 30, 2019 https://www.nps.gov/thro/learn/historyculture/theodore-roosevelt-and-conservation.htm

19 Jean M. Yarbrough, "Theodore Roosevelt: Progressive Crusader," The Heritage Foundation, September 24, 2012 https://www.heritage.org/political-process/report/theodore-roosevelt-progressive-crusader

20 P.L. 59-337 https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/34/STATUTE-34-Pg584.pdf

21 Thomas Gale Moore, "Surface Freight Transportation Deregulation," The Library of Economics and Liberty, Accessed October 21, 2019 https://www.econlib.org/library/Enc/SurfaceFreightTransportationDeregulation.html

22 The laws creating both of these agencies, the Agriculture Adjustment Act (AAA) and the National Industrial Recovery Act (NIRA), were part of the New Deal. The Supreme Court struck down the AAA in United States v. Butler (1935). The NIRA was struck down in Schechter Poultry Corp. v. United States (1935). The Court changed its approach to economic regulation in West Coast Hotel Co. v. Parrish (1937).

prolonged the Great Depression by seven years.[23] The power that the presidency absorbed during FDR's twelve years in office is perhaps summed up best by law professor John Yoo: "FDR drew deeply upon the reservoir of executive power unlike any president before or since—reflected in his unique status as the only chief executive to break the two-term tradition."[24]

Although FDR was one of the first presidents to significantly expand the administrative state, he certainly wasn't the last. Traditionally presented as the diametric opposite of the progressive FDR, conservative President Richard Nixon, who regularly raged against big government, also found himself expanding the role of executive agencies. Nixon did not necessarily seek to make environmentalism a cornerstone of his presidency, but he was influenced by the politics of the time. In July 1970, Nixon created the Environmental Protection Agency (EPA) by executive order.[25] After its creation, Congress would, at various times, hand the EPA massive regulatory authority. Nixon's use of executive power did not end at the creation of the EPA. In August 1971 and again in June 1973, he used emergency powers given by Congress to force temporary wage and price controls.[26]

A small step forward in addressing some of the burgeoning administrative state came in March 1996, when the Republican-controlled Congress passed and President Bill Clinton signed the Contract with America Advancement Act into law.[27] Specifically, Section 8 of the Contract with America Advancement Act set forward procedures by which Congress can review and disapprove of rules finalized by federal agencies. Known as the Congressional Review Act,[28] or CRA, the law requires federal agencies to submit rules to both chambers of Congress and the Comptroller General of the United States, who runs the Government Accountability Office (GAO), for review.

Every federal agency promulgating a rule is required to provide several items with its report to each chamber of Congress and the GAO. These items include a cost-benefit analysis, a regulatory flexibility analysis, and the procedure for gathering comments. The promulgating federal agency must also show compliance with certain sections of the Unfunded Mandates Reform Act of 1995.[29]

"Although FDR was one of the first presidents to significantly expand the administrative state, he certainly wasn't the last."

The chairman and ranking member in each chamber of the committee(s) of jurisdiction receive copies of the report from the federal agency. The comptroller general is required to send a report on each major rule -- those with an annual economic impact of $100 million or more -- to each committee of jurisdiction within 15 days of the submission of the major rule to Congress or publication date of the major rule in the *Federal Register*.[30]

Congress has 60 legislative days, which can last more than one calendar day, to disapprove of the rule through a joint resolution, which is not subject to a filibuster in the Senate. Such a joint resolution is also known as a "CRA." The clock for the sixty legislative days begins running on the later of two days, either the date of the submission of the rule to Congress

23 Harold L. Cole and Lee E. Ohanian, "How Government Prolonged the Depression," The Wall Street Journal, February 2, 2009 https://www.wsj.com/articles/SB123353276749137485
24 John Yoo, "Franklin Roosevelt and Presidential Power," University of California-Berkeley School of Law, February 28, 2018 https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3988&context=facpubs
25 H.-Dec. 91-366 https://archive.epa.gov/ocir/leglibrary/pdf/created.pdf
26 Gene Healy, "Remembering Nixon's Wage and Price Controls," Cato Institute, August 16, 2011 https://www.cato.org/publications/commentary/remembering-nixons-wage-price-controls
27 H.R. 3136, 104th Congress (1996) https://www.congress.gov/bill/104th-congress/house-bill/3136
28 5 U.S. Code §§ 801-808 https://www.law.cornell.edu/uscode/text/5/part-I/chapter-8
29 2 U.S. Code § 25 https://www.law.cornell.edu/uscode/text/2/chapter-25
30 5 U.S. Code § 804 https://www.law.cornell.edu/uscode/text/5/804

or its publication in the *Federal Register*. If a rule is canceled through a joint resolution of disapproval, the promulgating federal agency is prohibited from promulgating a rule that is substantially similar.

At the time of its passage, lawmakers hailed the Congressional Review Act, which was the product of the work of Sens. Don Nickles (R-Okla.) and Harry Reid (D-Nevada), as a substantive means to target major rules and restore congressional power. Then-House Judiciary Committee Chairman Henry Hyde (R-Ill.) declared, "[I]t is important to emphasize that this approach means that Congress must be prepared to take on greater responsibility in the rulemaking process. If during the review period, Congress identifies problems in a proposed major rule prior to its promulgation, we must be prepared to take action. Each standing committee will have to carefully monitor the regulatory activities of those agencies falling within their jurisdiction."[31]

However, until 2017, the Congressional Review Act had been used successfully only once. In March 2001, President George W. Bush signed a joint disapproval resolution into law.[32] The resolution canceled the Department of Labor's ergonomics rule, which would have cost employers $4.5 billion annually.[33] Between July 2003 and April 2016, eight CRAs received votes in the House and eighteen received votes in the Senate. Only five CRA received votes in both chambers, occurring between February 2015 and April 2016, and were presented to President Obama for his signature, each of which was vetoed.

New life was breathed into the Congressional Review Act during the 115th Congress, when the Republican-controlled Congress targeted "midnight regulations" published in the final months of Obama's presidency. Between February 2017 and May 2018, Congress passed sixteen CRAs. President Donald Trump signed all sixteen into law. In the 116th Congress, Democrats have attempted to use the CRA on multiple occasions to undo regulations promulgated by the Trump Administration, but none of these efforts have succeeded.

Even though the law was used successfully in the 115th Congress, the Congressional Review Act has flaws and, because it had been used so seldom, was viewed as arcane until 2017.[34] It's success illustrates the problem: it required the Presidency and both houses of Congress to be of the same party. If Congress wanted to rein in a President of the opposite party, the CRA effectively requires the very high bar of a veto-proof majority in both chambers.

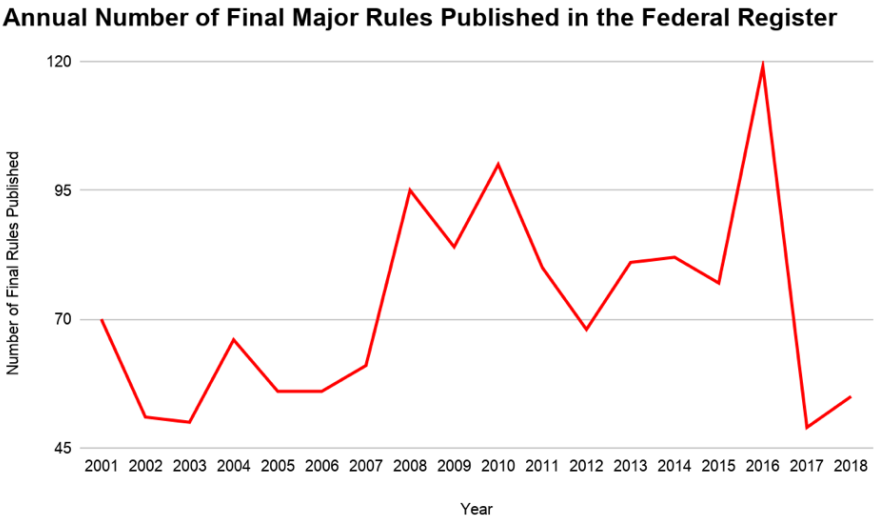
One measure of the scope of the problem is how many major rules are finalized in a given period. In his 1996 State of the Union address, President Clinton said, "We know big Government does not have all the answers. We know there's not a program for every problem. We know, and we have worked to give the American people a smaller, less bureaucratic Government in Washington. And we have to give the American people one that lives within its means. The era of big Government is over."

Those words certainly sounded good at the time, but the number of major rules in 1997, the first year for which data are available, came in at 61. In 1998, 76 major rules were published in the *Federal Register*. In the final year of Clinton's presidency, 77 major rules were published. Obama, who openly circumvented Congress with his "pen and phone," oversaw

31 142 Cong. Rec. 45 (1996)
32 Ben Liberman, "Clinton's Last-Minute Environmental Regs: More Targets for the Congressional Review Act," Competitive Enterprise Institute, March 26, 2001 https://cei.org/studies-point/clinton%E2%80%99s-last-minute-environmental-regs-more-targets-congressional-review-act
33 Vol. 147 Cong. Rec. 28 (2001)
34 Laura Barrón-López and Arthur Delaney, "Republicans Are Using An Arcane Tool To Handcuff Federal Agencies," Huffington Post, February 19, 2017 https://www.huffpost.com/entry/republicans-cra-federal-agencies_n_58a7776ae4b045cd34c1a44c

the two years with the most major rules, publishing 119 in 2016 and 110 in 2010.[35]

The sad reality of the situation regarding the regulatory state is that each branch of the federal government has failed to adhere to its constitutional limitations. This issue brief focuses virtually all of its attention on the relationship between the Legislative Branch and the Executive Branch, but the role of the Judicial Branch, particularly the Supreme Court, cannot be ignored.



Source: Congressional Research Service[36]

In *J. W. Hampton, Jr. & Co. v. United States* (1928),[37] the Supreme Court held that Congress could hand some legislative power to the Executive Branch as long as there is "an intelligible principle" to guide the body to which the power is being delegated. The Court would later reiterate the "intelligible principle" needed to delegate legislative authority in *Schechter Poultry Corp. v. United States* (1935).[38] Robert Levy and William Mellor have argued that the Court "for all practical purposes…removed the non delegation doctrine from the Constitution" in *Whitman v. American Trucking Associations, Inc.* (2001).[39]

> *"The result of the Supreme Court's decision [in* Chevron*] has played a part in the alarming erosion of the constitutional separation of powers…"*

Another example came in 1984, when the Supreme Court, in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*,[40] held that federal courts could defer to federal regulatory agencies' interpretations of purportedly "silent or ambiguous" statutes or laws written by

35 Jennifer Epstein, "Obama's pen-and-phone strategy," Politico, January 14, 2014 https://www.politico.com/story/2014/01/obama-state-of-the-union-2014-strategy-102151
36 Congressional Research Service, "Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register," September 3, 2019 https://fas.org/sgp/crs/misc/R43056.pdf
37 276 U.S. 394 (1928) https://supreme.justia.com/cases/federal/us/276/394/
38 295 U.S. 495 (1935) https://supreme.justia.com/cases/federal/us/295/495/
39 Robert Levy and William Mellor, "The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom," Sentinel HC, 2008
40 467 U.S. 837 (1984) https://supreme.justia.com/cases/federal/us/467/837/

Congress, without judicial review:[41]

> "Underlying *Chevron* is the idea that when Congress enacts broad regulatory statutes that require and empower administrative agencies to erect and implement vast regulatory programs, it is inevitable that there will be questions or issues that Congress overlooked, and Congress expects that the implementing agency will fill in the details, clarifying ambiguities and resolving unanswered questions. Whether the question is what constitutes a 'telecommunications service' or how to identify the boundaries of 'waters of the United States,' Congress often speaks in generalities and expects agencies to provide the specifics."

The result of the Supreme Court's decision has played a part in the alarming erosion of the constitutional separation of powers, allowing federal agencies to determine vaguely written statutes -- perhaps, at times, purposefully written to be vague -- without judicial review. It is possible, however, that the Supreme Court may undo the *Chevron* deference.[42] Justices Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh are sharp critics of *Chevron*.

Similarly, the *Auer* deference, which stems from *Auer v. Robbins* (1997),[43] is a lesser known issue similar to Chevron. The key difference is that *Chevron* prevents federal courts from reviewing agency interpretations of statutes, while *Auer* prohibits federal courts from reviewing agency interpretations of regulations. The Supreme Court recently narrowed the scope of the *Auer* in *Kisor v. Wilkie* (2019)[44] but kept the deference in place.[45]

An administrative state with such extraordinary power is also a problem in the area of criminal justice. There are an estimated 5,000 criminal statutes and more than 300,000 rules promulgated by regulatory agencies that carry criminal penalties.[46] In 2013, the House Over-Criminalization Task Force requested the Congressional Research Service to provide a complete accounting of all federal offenses. The agency could not produce the report.[47]

The scope of the problem is more severe than most realize. As law professor John Baker said, "There is no one in the United States over the age of 18 who cannot be indicted for some federal crime. That is not an exaggeration."[48] The recent proclivity of Congress to avoid any *mens rea*, or criminal intent requirement, in criminal statutes in favor of strict

41 Jonathan H. Adler, "What's Wrong with Chevron Deference Is Congress," National Review, June 6, 2019 https://www.nationalreview.com/magazine/2019/06/24/whats-wrong-with-chevron-deference-is-congress/

42 In 2017, the House of Representatives passed the Regulatory Accountability Act, H.R. 5, which, in Section 205, included language to essentially eliminate the Chevron deference to allow for judicial review of statutory and regulatory interpretations. The legislation was not considered by the Senate. https://www.congress.gov/bill/115th-congress/house-bill/5

43 519 U.S. 452 (1997) https://supreme.justia.com/cases/federal/us/519/452/

44 588 U.S. ___ (2019) https://supreme.justia.com/cases/federal/us/588/18-15/

45 William Yeatman, "The Auer Doctrine Suffers Pyrrhic Victory in Kisor v. Wilkie," Cato Institute, June 27, 2019 https://www.cato.org/blog/auer-doctrine-suffers-pyrrhic-victory-kisor-v-wilkie

46 John Malcolm, "Criminal Law and the Administrative State: The Problem with Criminal Regulations," The Heritage Foundation, August 6, 2014 https://www.heritage.org/crime-and-justice/report/criminal-law-and-the-administrative-state-the-problem-criminal-regulations

47 Over-Criminalization Task Force of 2013, Transcript of June 14, 2013 Hearing, "Defining the Problem and Scope of Over-Criminalization and Over-Federalization" https://www.govinfo.gov/content/pkg/CHRG-113hhrg81464/html/CHRG-113hhrg81464.htm

48 Gary Fields and John R. Emshwiller, "Many Failed Efforts to Count Nation's Federal Criminal Laws," The Wall Street Journal, July 23, 2011 https://www.wsj.com/articles/SB10001424052702304319804576389601079728920

liability has only exacerbated the problem.[49]

Even in areas where Congress has sought to exercise robust oversight of the Executive Branch, there are signs it is failing. The House Permanent Select Committee on Intelligence and its Senate counterpart were created "in 1977 to exert meaningful oversight over the intelligence community in the wake of revelations of abuse and violations of law." But numerous concerns have arisen, in light of more recent revelations, about their ability to fulfill their charge, including by some involved in their establishment.[50]

There are avenues to tilt the scales back toward balance. The most obvious is for Congress to cease its delegation of power by writing the regulations for inclusion in a proposed bill during the legislative process. Additionally, Congress could take rulemaking authority away from a host of federal agencies, essentially restoring the nondelegation doctrine. Obviously, this would make the text of legislation longer, substantially so in some cases, but the separation of powers would be restored. It would also require a considerable increase in congressional expertise on complex and technical issues. This might be a good thing, but perhaps difficult to achieve given the current context of how candidates are identified and elected combined with the extensive issue portfolio Congress handles that far surpasses what the Founders imagined for the federal government.

"Congress should seek to end the doctrine of Chevron deference, as well as Auer deference, by allowing federal courts de novo and full review of agency interpretations of statutes and regulations."

Short of Congress having to directly author all regulations, another potential fix is to amend the Congressional Review Act to require a vote from the House and the Senate affirming the regulation through a joint resolution, which would be transmitted to the White House to be signed into law or vetoed by the president. Legislation has been introduced to this effect: the Regulations from the Executive in Need of Scrutiny (REINS) Act.[51] However, the REINS Act applies to only major rules, which could lead to at least some major rules being broken apart to come in officially below the $100 million threshold that defines a major regulation.

Some have questioned the constitutionality of a legislative affirmation process for regulations based on the case law holding "legislative veto" power unconstitutional,[52] and have even questioned the constitutionality of the Congressional Review Act itself.[53] The constitutional questions come from a 1983 case in which the Supreme Court struck down Section 244(c)(2) of the Immigration and Nationality Act. This section of the law provided for a one-house legislative veto for an administrative action. One chamber could veto an action, with no remaining action to be taken by another chamber or the White House.

The Supreme Court, in *Immigration and Naturalization Service v. Chadha*,[54] determined that the legislative veto provision of the Immigration and Nationality Act ran afoul of

49 Jason Pye, "The Over-criminalization Epidemic: The Need for a Guilty Mind Requirement in Federal Criminal Law," FreedomWorks, September 1, 2015 https://www.freedomworks.org/content/over-criminalization-epidemic-need-guilty-mind-requirement-federal-criminal-law

50 R Street, FreedomWorks, Demand Progress, and the Electronic Frontier Foundation, "Strengthening Congressional Oversight of the Intelligence Community," September 13, 2016 http://www.rstreet.org/wp-content/uploads/2016/09/intelligence-oversight.pdf

51 S. 92, 116th Congress (2019) https://www.congress.gov/bill/116th-congress/senate-bill/92

52 Bill Funk, "Why the REINS Act Is Unconstitutional," Center for Progressive Reform, February 14, 2017 http://www.progressivereform.org/CPRBlog.cfm?idBlog=3C5ACFC6-C222-F08F-A106B521ABA655E3

53 Alex Guillen and Marianne Levine, "Swift repeal of Obama rules leaves former staffers steaming," Politico, February 11, 2017 http://www.politico.com/story/2017/02/congress-rules-purge-trump-234922

54 462 U.S. 919 (1983)

bicameralism and the Presentment Clause of Article I.

The Congressional Review Act, however, is different from Section 244(c)(2) of the Immigration and Nationality Act because joint resolutions require approval from both chambers of Congress and presentment to the Executive Branch. Legislative affirmation of a regulation would need to be carefully crafted to avoid the bicameral and Presentment Clause conflicts to which Section 244(c)(2) of the Immigration and Nationality Act succumbed in *Chadha*. One way to achieve this would be to redefine the authority of agencies so that it is not to promulgate regulations, but only to draft and recommend them to Congress for Congress to enact (or not).

Finally, Congress should seek to end the doctrine of *Chevron* deference, as well as *Auer* deference, by allowing federal courts *de novo* and full review of agency interpretations of statutes and regulations.

Restoring Congressional Authority Over War

"The Congress shall have power…[t]o declare war…"

Article I, Section 8, Clause 11 of the Constitution

Several years ago, as the United States was considering intervention in the bloody Syrian Civil War, some conservatives and progressives in Congress pushed back on the notion that President Barack Obama could sanction air strikes against the regime of Syrian President Bashar al-Assad without congressional authorization.

Others argued that Obama needed no congressional authorization at all. Sen. John McCain (R-Ariz.), for example, said, "I think it would be a very serious situation where we are now 535 commanders in chief. Look, the president of the United States is the only commander."[55] McCain was referencing the Executive Branch's authority under Article II and the War Powers Resolution,[56] both of which, ironically, were meant to restrain presidents, rather than empower them to use force without authorization from Congress.

Certainly, this was not what the framers of the Constitution had envisioned. James Madison, the "Father of the Constitution," once wrote:[57]

> "In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department. Beside the objection to such a mixture of heterogeneous powers: the trust and the temptation would be too great for any one man: not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy. War is in fact the true nurse of executive aggrandizement. In war a physical force is to be created, and it is the executive will which is to direct it. In war the public treasures are to be unlocked, and it is the executive hand which is to dispense them. In war the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace….Hence it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war[.]"

The framers were careful about vesting too much power in the hands of one branch of the federal government, or in one individual. Among the specifically defined powers of Congress

55 Tal Kopan, "McCain fears '535 commanders in chief,'" Politico, September 3, 2013 https://www.politico.com/story/2013/09/john-mccain-syria-plan-096187

56 50 U.S. Code 33 https://www.law.cornell.edu/uscode/text/50/chapter-33

57 James Madison, "'Helvidius' Number 4," National Archives, September 14, 1793 https://founders.archives.gov/documents/Madison/01-15-02-0070

in Article I, Section 8 is the power "to declare war."[58] There is nothing in Article II that gives this authority to the Executive Branch. The conduct of the war is a separate matter and one in which the Constitution, in Article II, Section 2, makes the president the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States[.]"

Now, this is not to insinuate that a president cannot respond with force when the United States needs to defend itself. Moreover, not every military action necessarily rises to the level of necessitating a formal declaration of war, in which case Congress must still act through an authorization. Even in the early days of the Republic, Congress authorized military action against France in the Quasi-War[59] and against the corsairs of Algiers, Tripoli, and Tunis in the Barbary Wars. Congress may also respond to a misuse of this form of executive power through a restriction of appropriations, as well as other tools at its disposal.

"...not every military action necessarily rises to the level of necessitating a formal declaration of war, in which case Congress must still act through an authorization."

Some may argue that military action may be authorized only when Congress formally declares war. This is a rather simplistic, not to mention problematic, view given the domestic impact of a declaration of war:[60]

> "A declaration, for instance, activates statutes that empower the President to interdict all trade with the enemy, order manufacturing plants to produce armaments and seize them if they refuse, control transportation systems in order to give the military priority use, and command communications systems to give priority to the military. A declaration triggers the Alien Enemy Act, which gives the President substantial discretionary authority over nationals of an enemy state who are in the United States. It activates special authorities to use electronic surveillance for purposes of gathering foreign intelligence information without a court order under the Foreign Intelligence Surveillance Act. It automatically extends enlistments in the armed forces until the end of the war, can make the Coast Guard part of the Navy, gives the President substantial discretion over the appointment and reappointment of commanders, and allows the military priority use of the natural resources on the public lands and the continental shelf."

58 Congress has not passed a resolution declaring war since June 1942, the last of which was against Rumania (Romania). In recent history, Congress has passed joint resolutions for the "authorization of the use of military force," or AUMF, to authorize military actions against a nation or, in the case of the 2001 AUMF that was passed after the September 11, 2001 terrorist attacks "against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." (See the Congressional Research Service, "Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications," April 18, 2014 https://fas.org/sgp/crs/natsec/RL31133.pdf and S.J.Res. 23, 107th Congress (2001) https://www.congress.gov/bill/107th-congress/senate-joint-resolution/23)

59 Yale Law School, "An Act Further to Protect the Commerce of the United States," Accessed October 7, 2019 https://avalon.law.yale.edu/18th_century/qw04.asp

60 Jennifer K. Elsea and Matthew C. Weed, "Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications, Congressional Research Service, April 18, 2014 https://fas.org/sgp/crs/natsec/RL31133.pdf

Not mentioned in the above excerpt is the Defense Production Act, which allows a president to effectively nationalize entire sectors of the economy during war time.[61] An authorization for the use of military force may not necessarily come with such extremes. Regardless, in the current "war on terrorism" — which is actually merely authorized force, not officially declared as war — the Executive Branch still has attempted to justify domestic mass surveillance programs that infringe on constitutionally protected liberties.

Although the Constitution clearly delegates the question of war to the Legislative Branch, Congress has, over time, surrendered its power to the Executive Branch and, to a lesser extent, the United Nations (UN) Security Council and the North Atlantic Treaty Organization (NATO). The latter two have, at times, been used to justify the United States' involvement in certain conflicts in which there is a humanitarian crisis of some kind.

In 1973, Congress passed the War Powers Resolution in response to a secret military campaign that President Nixon had ordered in Cambodia during the course of the Vietnam War.[62] The bombing campaigns, which lasted for more than three years, resulted in the deaths of tens of thousands of Cambodians.[63] Although the Gulf of Tonkin Resolution authorized military engagement in Vietnam,[64] Congress had not explicitly authorized the bombing of Cambodia.

Concerned that the Executive Branch was consolidating war powers that legitimately belong to the Legislative Branch, Congress took action. The War Powers Resolution was meant to limit a president's war powers by reinforcing those of Congress. The resolution provides only three ways a president may introduce the military into hostilities: "a declaration of war," "specific statutory authorization," "or a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[65]

Additionally, the War Powers Resolution requires the president to consult with Congress before the introduction of the military during hostilities or if hostilities could occur, as well as during the course of such an engagement.[66] The resolution also requires regular written reports that include very specific details about the engagement.[67]

Finally, the War Powers Resolution requires that a president end a military engagement within 60 to 90 days after the submission of a report, unless Congress has declared war or statutorily authorized the engagement, extended the engagement by statute, or is unable to meet because of an attack on the United States.[68] Congress may also pass a concurrent resolution to terminate the military engagement.

In practice, the War Powers Resolution has not been viewed by the Executive Branch as a means to limit the war powers of the president. Instead, it has been used to grab even more power, such as claiming that "hostilities" in which the military may be engaged are not in fact hostilities for purposes of the War Powers Resolution. Additionally, presidents have relied on joint military operations with the United Nations and NATO to skirt the War

61 Congressional Research Service, "The Defense Production Act of 1950: History, Authorities, and Considerations for Congress," November 20, 2018 https://crsreports.congress.gov/product/pdf/R/R43767/7

62 The bombing campaign in Cambodia destabilized the country and boosted the Khmer Rouge and the Communist Party of Kampuchea, which came to power after a bloody civil war. As many as 2 million people were killed under the country's totalitarian leader, Pol Pot. (See "The Black Book of Communism: Crimes, Terror, Repression," President and Fellows of Harvard College, 2000)

63 Estimates are wide-ranging given that the Cambodia Civil War began in 1968.

64 Public Law 88-408 https://www.govinfo.gov/content/pkg/STATUTE-78/pdf/STATUTE-78-Pg384.pdf#page=1

65 50 U.S. Code § 1541(c) https://www.law.cornell.edu/uscode/text/50/1541

66 50 U.S. Code § 1542 https://www.law.cornell.edu/uscode/text/50/1542

67 50 U.S. Code § 1543 https://www.law.cornell.edu/uscode/text/50/1543

68 50 U.S. Code § 1544 https://www.law.cornell.edu/uscode/text/50/1544

Powers Resolution and statutory authorization, because such operations are excluded from its reach.[69]

In fact, it was not until last year that the War Powers Resolution was truly employed for its original purpose. For the first time ever, in December 2018, Congress advanced a joint resolution that invoked the War Powers Resolution to direct the President to remove United States Armed Forces from hostilities. The joint resolution was the product of an unusual pairing, Sens. Bernie Sanders (I-Vt.) and Mike Lee (R-Utah). In this instance the relevant hostilities were those "in or affecting the Republic of Yemen, except United States Armed Forces engaged in operations directed at al Qaeda or associated forces."[70]

This joint resolution in the 115th Congress passed the Senate by a bipartisan vote of 56 to 41, but a similar concurrent resolution[71] in the House was blocked numerous times by Republican leadership, sparking backlash from a lead cosponsor, Rep. Thomas Massie (R-Ky.), after consideration was blocked in the rule governing consideration of the Farm Bill.[72] However, in the 116th Congress, a renewed push resulted in a joint resolution[73] passing both chambers on a bipartisan basis: 54 to 46 in the Senate[74] and 247 to 175 in the House.[75] Unfortunately, President Trump vetoed the legislation and the veto override failed.[76]

"Further use of Congress' options to rein in such executive [warmaking] power should be pursued to right the improperly interpreted powers delegated under it."

Still, this bipartisan effort was historic for the marker it represented -- Congress is able, and willing in some instances, to challenge the often entirely unilateral actions of the Executive Branch in warmaking. Further use of Congress' options to rein in such executive power should be pursued to right the improperly interpreted powers delegated under it.

The problem lies not only with the War Powers Resolution and the Executive Branch's interpretation of its power under the resolution, but also with the latitude Congress has given presidents to engage in military operations. A prime example of this is the 2001 Authorization for the Use of Military Force (AUMF).[77]

Few doubted the need to respond to the September 11, 2001 terrorist attacks in New York, at the Pentagon, and in Shanksville, Pennsylvania with overwhelming military force. Nearly 3,000 civilians were killed by al-Qaeda operatives on American soil in a matter of a couple of hours. Congress responded with an AUMF that was quite broad in the power that it gave to the Executive Branch. The relevant section of the AUMF states:

> "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that

69 50 U.S. Code § 1547 https://www.law.cornell.edu/uscode/text/50/1547
70 S.J.Res. 54, 115th Congress (2018) https://www.congress.gov/bill/115th-congress/senate-joint-resolution/54
71 H.Con.Res. 81, 115th Congress (2018) https://www.congress.gov/bill/115th-congress/house-concurrent-resolution/81
72 Elizabeth Nolan Brown, "Republican Leaders Sneak Support for Yemen War Into Farm Bill Vote," Reason, December 12, 2018 https://reason.com/2018/12/12/yemen-war-vote-snuck-in-farm-bill/
73 S.J.Res. 7, 116th Congress (2019) https://www.congress.gov/bill/116th-congress/senate-joint-resolution/7
74 Roll Call Vote 48, 116th Congress (2019) https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=1&vote=00048
75 Roll Call Vote 153, 116th Congress (2019) http://clerk.house.gov/evs/2019/roll153.xml
76 Roll Call Vote 94, 116th Congress (2019) https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=1&vote=00094
77 Public Law 107-40 https://www.govinfo.gov/content/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf

> occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

Rep. Barbara Lee (D-Calif.) was the only member of the House to vote against[78] the House's version of the 2001 AUMF.[79] Writing days after passage, Lee explained why she voted against the authorization:[80]

> "It was a blank check to the president to attack anyone involved in the Sept. 11 events -- anywhere, in any country, without regard to our nation's long-term foreign policy, economic and national security interests, and without time limit. In granting these overly broad powers, the Congress failed its responsibility to understand the dimensions of its declaration. I could not support such a grant of war-making authority to the president; I believe it would put more innocent lives at risk."

Of course, Lee was right; the 2001 AUMF was far too broad and lacked any timeframe for an end to the justified retribution sought by the United States. As of May 2016, the 2001 AUMF had been used to justify at least 37 military operations in 14 countries, including Djibouti, Georgia, Libya, Philippines, and Yemen.[81] Some have estimated that the number of countries in which the United States has conducted military operations under the 2001 AUMF is closer to 20, if not higher.[82] Even Sen. Lindsey Graham (R-S.C.) acknowledged that "[w]e don't know exactly where we're at in the world militarily and what we're doing."[83]

In 2013, President Barack Obama asked Congress for an authorization to use military force against Syria. The request came after Syrian President Bashar al-Assad had allegedly used chemical weapons against his own people. This was a "red line" that Obama had warned Assad not to cross. "I will not put American boots on the ground in Syria. I will not pursue an open-ended action like Iraq or Afghanistan. I will not pursue a prolonged air campaign like Libya or Kosovo," Obama said. "This would be a targeted strike to achieve a clear objective: deterring the use of chemical weapons, and degrading Assad's capabilities."[84]

There was skepticism in Congress of another military excursion. The whip list from the time was overwhelmingly lopsided in opposition to military action against Assad's regime.[85] A diplomatic solution was reached and Obama no longer sought an authorization for the use of military force. Still, Obama used the Central Intelligence Agency to help arm Syrian rebels and, eventually, Congress appropriated money to arm Syrian groups against the Islamic

78 Roll Call Vote 342, 107th Congress (2001) http://clerk.house.gov/evs/2001/roll342.xml
79 The vote, in this instance, was on H.J.Res. 64. The Senate version of the 2001 AUMF was S.J.Res. 23, which was ultimately the version that became law. S.J.Res. 23 passed the House on September 14, 2001 without objection or a roll call vote.
80 Barbara Lee, "Why I opposed the resolution to authorize force," San Francisco Chronicle, September 23, 2001 https://www.sfgate.com/opinion/article/Why-I-opposed-the-resolution-to-authorize-force-2876893.php
81 Matthew Weed, "Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress," Congressional Research Service, May 11, 2016 https://fas.org/sgp/crs/natsec/pres-aumf.pdf
82 Andrew Rudalevige, "When did Congress authorize fighting in Niger? That's an excellent question," Washington Post, November 11, 2017 https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/11/when-did-congress-authorize-fighting-in-niger-thats-an-excellent-question/
83 Daniella Diaz, "Key senators say they didn't know the US had troops in Niger," CNN, October 23, 2017 https://www.cnn.com/2017/10/23/politics/niger-troops-lawmakers/index.html
84 The White House, "Remarks by the President in Address to the Nation on Syria," September 10, 2013 https://obamawhitehouse.archives.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria
85 Wilson Andrews, Aaron Blake, Darla Cameron, and Kennedy Elliott, "Where Congress stands on Syria," The Washington Post, September 2, 2013 https://www.washingtonpost.com/wp-srv/special/politics/where-lawmakers-stand-on-syria/

State of Iraq and the Levant (ISIL).[86]

In 2014 and 2015, Obama used the 2001 AUMF to conduct air strikes against ISIL in Syria and, eventually, to place special operations forces on the ground. More recently, in March 2017, President Donald Trump introduced a small number of Marines into Syria to assist the special operations and local forces in Syria.[87] All activities came under the umbrella of the 2001 AUMF.

The War Powers Resolution and the 2001 AUMF are only two pieces to the puzzle. Another way the Executive Branch gets around Congress is through joint military actions. Perhaps the best recent example of this was the United States' intervention in Libya in 2011 that led to the toppling of the country's dictator, Muammar al-Gaddafi.

In March 2011, the United Nations Security Council passed a resolution that tacitly authorized the enforcement of a no-fly zone to prevent violence by the Libyan government against civilians.[88] The resolution was used by Obama to justify the United States' participation in the air strikes to enforce the no-fly zone, which was sanctioned by the United Nations and commanded by NATO. The Office of Legal Counsel (OLC) at the Department of Justice advised Obama that the military action in Libya was within his power: [89]

> "We conclude, therefore, that the use of military force in Libya was supported by sufficiently important national interests to fall within the President's constitutional power. At the same time, turning to the second element of the analysis, we do not believe that anticipated United States operations in Libya amounted to a 'war' in the constitutional sense necessitating congressional approval under the Declaration of War Clause."

Congress was not persuaded by OLC's argument. Rep. Alcee Hastings (D-Fla.) introduced a joint resolution to provide for a limited authorization for the use of military force,[90] which was rejected by a large margin.[91] The House sent mixed signals, days before it voted down a limited authorization, when it rejected another joint resolution,[92] introduced by Rep. Dennis Kucinich (D-Ohio),[93] to end the United States involvement in Libya. One can understand this as another example of Congress wanting to avoid responsibility for *any* controversial decision.

Federal courts have been a barrier to addressing this clearly unconstitutional behavior from the Executive Branch. In June 2011, for instance, Kucinich and a handful of other lawmakers, including Reps. Ron Paul (R-Texas) and John Conyers (D-Mich.), filed a lawsuit in federal court over the bombing campaign in Libya.[94]

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86 Deborah Amos, "After A Long Wait, Syrian Rebels Hope The Weapons Will Now Flow," NPR, September 17, 2014 https://www.npr.org/sections/parallels/2014/09/17/349075789/after-a-long-wait-syrian-rebels-hope-the-weapons-will-now-flow

87 Dan Lamothe and Thomas Gibbons-Neff, "Marines have arrived in Syria to fire artillery in the fight for Raqqa," The Washington Post, March 8, 2017 https://www.washingtonpost.com/news/checkpoint/wp/2017/03/08/marines-have-arrived-in-syria-to-fire-artillery-in-the-fight-for-raqqa/

88 Dan Bilefsky and Mark Landler, "As U.N. Backs Military Action in Libya, U.S. Role Is Unclear," The New York Times, March 17, 2011 https://www.nytimes.com/2011/03/18/world/africa/18nations.html

89 Office of Legal Counsel, "Authority to Use Military Force in Libya," April 1, 2011 https://www.justice.gov/file/18376/download

90 H.J.Res. 68, 112th Congress (2011) https://www.congress.gov/bill/112th-congress/house-joint-resolution/68

91 Roll Call Vote 493, 112th Congress (2011) http://clerk.house.gov/evs/2011/roll493.xml

92 Roll Call Vote 412, 112th Congress (2011) http://clerk.house.gov/evs/2011/roll412.xml

93 H.Con.Res.51, 112th Congress (2011) https://www.congress.gov/bill/112th-congress/house-concurrent-resolution/51

94 Felicia Sonmez, "Kucinich, other House members file lawsuit against Obama on Libya military mission," The Washington Post, June 15, 2011 https://www.washingtonpost.com/blogs/2chambers/post/kucinich-other-house-members-file-lawsuit-against-obama-on-libya-military-mission/2011/06/15/AGrzd6VH_blog.html

The lawsuit alleged that President Obama had violated the War Powers Resolution and sought "injunctive and declaratory relief to protect the plaintiffs and the country from the (1) policy that a president may unilaterally go to war in Libya and other countries without a declaration of war from Congress, as required by Article I, Section 8, Clause 11 of the United States Constitution; (2) the policy that a president may commit the United States to a war under the authority of the North Atlantic Treaty Organization (NATO) in violation of the express conditions of the North Atlantic Treaty ratified by Congress; (3) the policy that a president may commit the United States to a war under the authority of the United Nations without authorization from Congress; (4) from the use of previously appropriated funds by Congress for an unconstitutional and unauthorized war in Libya or other countries; and (5) from the violation of the War Powers Resolution as a result of the Obama Administration's established policy that the President does not require congressional authorization for the use of military force in wars like the one in Libya."

The lawsuit was dismissed in October 2011 by Judge Reggie Walton. In his opinion, Walton ruled that the lawmakers lacked standing and "ha[d] not demonstrated that they are without a legislative remedy."[95]

What can be done to address the Executive Branch's proclivity for military intervention? This a deeper question than most realize. Certainly, there is a growing skepticism toward unquestioned military intervention in the conservative movement, but that has yielded limited results thus far. Before any significant legislative change can happen, the notion that perpetual war is fundamentally inconsistent with limited government and fiscal responsibility must be realized, and that unchecked executive power on the issue enables such perpetual war.[96]

It is worth noting the unpleasant truth about the incentives that drive Congress in delegating this authority, namely the desire to avoid having to make a public choice that might be unpopular with some constituents. Members of Congress fear that they stand to get all of the blame and none of the credit for any authority they proactively take with respect to war. When they passively fund what the executive wants, members can claim that any outcome was not their fault.

It is up to "we the people" to start making the choice to go to war a meaningful political issue, as was done towards the end of the Vietnam War, when Congress, compelled by popular unrest, actually moved to pull funding for expanding the war. Otherwise, the current incentives will continue leading Congress to authorize other limitless, permanent AUMFs.

The repeal of the 2001 AUMF would address at least some of the issues that have arisen in recent years. This is an avenue that many in Congress, Democratic and Republican alike, would like to pursue. Some wish, however, to replace the 2001 AUMF with another. That would be a mistake.

The deficiencies of the War Powers Resolution must also be addressed. In September 2013, Rep. Scott Garrett (R-N.J.) introduced legislation to repeal the War Powers Resolution.[97] Garrett believed that the law "ha[d] been stripped of its original purpose and has instead

95 Josh Gerstein, "Judge zings lawmakers, dismisses lawsuit over Libya mission," Politico, October 20, 2011 https://www.politico.com/blogs/under-the-radar/2011/10/judge-zings-lawmakers-dismisses-lawsuit-over-libya-mission-040162

96 Although this issue brief touches on the separation of powers issues created by interpretations of the War Powers Resolution and the seemingly open-ended 2001 AUMF, it does not explore the costs of post-September 11, 2001 foreign policy and military activities, including Iraq, which is not covered by 2001 AUMF. The cost is estimated at $5.9 trillion. (See https://watson.brown.edu/research/2018/59-trillion-spent-and-obligated-post-911-wars) This paper also does not address the civil liberties concerns related to post-September 11, 2001 foreign policy and military activities. (See Section215.org)

97 H.Res. 3065, 113th Congress (2013) https://www.congress.gov/bill/113th-congress/house-bill/3065

served as a temporary, de facto authorization for the executive branch to use military force whenever it deems it necessary."[98] He was not wrong, but a simple repeal of the War Powers Resolution may not solve the issue.

Reforming the War Powers Resolution may be the best option that Congress has. Reinforcing the provisions of the War Powers Resolution that limit when a president may use military force and better defining legislative terms, leaving less to interpretation by OLC or other divisions of the Executive Branch, is imperative. Mere consultation and reports to Congress are not enough. Put simply, Congress must narrow the scope of the War Powers Resolution and the ability of the president to involve the United States in foreign conflicts. It might help, for example, to limit the length of any authorization for the use of force and to explicitly require its periodic reauthorization.

One element that would further underscore the seriousness of subverting a reformed War Powers Resolution would be to make doing so explicitly an impeachable offense. In January 2013, Rep. Walter Jones (R-N.C.) introduced such a concurrent resolution.[99] Rep. Tulsi Gabbard (D-Hawaii) introduced a similar resolution in May 2019.[100] Still, if such a resolution was adopted, further action by the House would be required to enforce it.

98 New Jersey Herald, "Garrett bill would repeal War Powers Resolution," September 9, 2013 https://www.njherald.com/article/20130909/NEWS/909025437

99 H.Con.Res. 3, 113th Congress (2013) https://www.congress.gov/bill/113th-congress/house-concurrent-resolution/3

100 H.Res. 411, 116th Congress (2019) https://www.congress.gov/bill/116th-congress/house-resolution/411

The Regulation of Trade Belongs Exclusively in the Hands of Congress

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States…[and t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"

Article I, Section 8, Clauses 1 and 3 of the Constitution

In recent years, trade has come to the forefront of national politics as the world economy has become more competitive. Article I, Section 8 of the Constitution makes it abundantly clear that only the Legislative Branch has the authority to lay and collect taxes, duties, imposts, and excises, as well as the power to regulate commerce with foreign nations. Once again, this is an area where Congress has, since 1934, increasingly and improperly delegated its power to the Executive Branch.

Congress has not necessarily always made good choices when it comes to its trade and tariff authority. One can easily point back to the Tariff Act of 1930, generally known as "Smoot-Hawley,"[101] to note the disastrous consequences of protectionism.[102] But concentrating this power in the hands of a singular individual, regardless of his or her party affiliation, is clearly a problem that has to be addressed as much as any other Article I issue discussed in this brief.

Recently, there has been increased scrutiny of the two particular provisions in existing statutes that provide the president with the authority to unilaterally impose tariffs: Section 232 of the Trade Expansion Act of 1962[103] and Section 301 of the Trade Act of 1974.[104] These unilateral trade authorities not only come at the expense of the economy but also of the separation of powers.

Section 232 of the Trade Expansion Act allows the Secretary of Commerce to conduct investigations on the national security effects of certain imports. The term "national security" is not defined in the statute, although it does list factors that must be taken into consideration.[105] But Section 232 has been interpreted broadly at times, especially recently, and has led to more than two dozen investigations to determine whether certain imports were, in fact, a threat to national security and thus able to be acted on using Section 232.

Excluding current investigations, recommendations for action were made after the completion of almost a dozen of those investigations.[106] Recent investigations under Section 232 led to the 25 percent tariff on imported steel[107] and the 10 percent tariff on aluminum.[108]

101 Sen. Reed Smoot (R-Utah) and Rep. Willis Hawley (R-Ore.) were the primary authors of the Tariff Act of 1930. President Herbert Hoover signed the bill into law.

102 Theodore Phalan, Deema Yazigi, Thomas Rustici, "The Smoot-Hawley Tariff and the Great Depression," Foundation for Economic Education, February 29, 2012 https://fee.org/articles/the-smoot-hawley-tariff-and-the-great-depression/

103 19 U.S. Code § 1862 https://www.law.cornell.edu/uscode/text/19/1862

104 19 U.S. Code § 2411 https://www.law.cornell.edu/uscode/text/19/2411

105 19 U.S. Code § 1862(d)

106 Congressional Research Service, "Section 232 Investigations: Overview and Issues for Congress, April 2, 2019 https://fas.org/sgp/crs/misc/R45249.pdf

107 U.S. Department of Commerce, "The Effect of Imports of Steel on the National Security," January 11, 2018 https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf

108 U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security," January 17, 2018 https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_aluminum_on_the_national_security_-_with_redactions_-_20180117.pdf

There are three current investigations.

Section 232 was a tool intended to address the threat of communism, specifically the Union of Soviet Socialist Republics (USSR) in the 1960s. "A vital expanding economy in the free world is a strong counter to the threat of the world communist movement. This act is, therefore, an important new weapon to advance the cause of freedom," said President John F. Kennedy in October 1962.[109]

As concerning as the growth of communism was, and as well-intentioned as the Trade Expansion Act may have been, it delegated a responsibility that is clearly reserved for the Legislative Branch to the Executive Branch. Today, the Trade Expansion Act is used far outside of the parameters for which it was written. Writing before President Trump took office, trade attorney Scott Lincicome explained:[110]

> "[N]either Section 232 nor the relevant regulations define the term 'national security.' Past agency practice would argue against using Section 232 in ways envisioned by Candidate Trump, but this is hardly reassuring when *President* Trump appoints the head of the agency. Trump might therefore try to block imports under Section 232 in ways never envisioned by Congress *or* past Presidents."

Section 301 of the Trade Act directly relates to enforcement of trade agreements by allowing the United States Trade Representative (USTR) to investigate trade barriers that are perceived as being an impediment to exports from the United States and, if necessary, recommend the imposition of tariffs on imports. Thus far, the USTR has recommended four rounds of tariffs of 10 percent or 25 percent on $550 billion worth of imports from China[111] based on its investigation.[112]

Of course, the result of these tariffs has been a trade war, as China has retaliated in kind with $250 billion worth of tariffs on goods from the United States. We should note that Section 232 and Section 301 are not the only provisions of law that give the Executive Branch power to unilaterally impose tariffs. Section 201 of the Trade Act, through which the Trump administration has imposed tariffs on imported washing machines and solar cells, also gives such power.[113]

"The imposition of tariffs leads to counterproductive trade wars that not only hurt the global economy, but also hurt consumers."

The imposition of tariffs leads to counterproductive trade wars that not only hurt the global economy, but also hurt consumers. The Tax Foundation has noted that the imposed tariffs, as well as the threatened tariffs, under Section 232 and Section 301 would diminish "almost 40

109 Doug Palmer, "The Cold War origins of Trump's favorite trade weapon," Politico, July 5, 2018 https://www.politico.eu/article/cold-war-origins-of-donald-trump-favorite-trade-weapon/

110 Scott Lincicome, "Ambiguities in U.S. Trade Laws Imperil Our Economy and Constitutional Order," Cato Institute, November 29, 2016 https://www.cato.org/blog/ambiguities-us-trade-laws-imperil-our-economy-constitutional-order

111 The most recently recommended 25 percent tariff of $300 billion on Chinese imports is currently pending.

112 United States Trade Representative, "Findings of the Investigation Into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Security Act," March 22, 2018 https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Draft%20Exec%20Summary%203.22.ustrfinal.pdf

113 Congressional Research Service, "Safeguards: Section 201 of the Trade Act of 1974," December 31, 2018 https://crsreports.congress.gov/product/pdf/IF/IF10786

percent of the long-run impact of the Tax Cuts and Jobs Act,"[114] the December 2017 tax reform law. The National Taxpayers Union Foundation has estimated that the tariffs imposed under Section 232 and Section 301 represent the largest tax hike since World War II.[115] This, despite the fact that the Constitution puts the regulation of trade entirely in the Legislative Branch.

Another concern is the power given to the Executive Branch through the International Emergency Economic Powers Act (IEEPA). IEEPA was passed by the 95th Congress and signed into law in December 1977 by President Jimmy Carter. IEEPA, along with the National Emergencies Act (NEA), was meant to be an upgrade to the emergency powers under the Trading with the Enemy Act (TWEA) because TWEA gave a president too much power and provided little legislative oversight. IEEPA has been amended nine times since it became law, most recently in October 2007 to increase the civil and criminal penalties associated with violating the law.[116]

The law has been used primarily for foreign policy actions, like sanctions against a foreign country such as Iran or Iraq, or sanctioning foreign nationals, including terrorists. In many of these instances, the United States has been engaged in some measure of hostilities or used the law to penalize countries accused of human rights abuses, atrocities, or supporting terrorism. This has even included sanctioning specific foreign nationals engaged in criminal or terrorist acts.

The law has been cited in 54 declarations of emergency, 29 of which remain in effect.[117] These declarations have been used in executive orders which prescribe the sanctions, prohibition, or limitations which are intended to address the subject(s) of the emergency declaration. In total, 167 such executive orders have been issued since November 1979.

IEEPA came into the broader public policy discussion in May when the White House threatened tariffs on Mexico in response to the "illegal migration crisis" at the United States-Mexico border. The administration planned to impose a 5 percent tariff on Mexican goods, incrementally increasing to 25 percent by October 1, 2019 if Mexico did not take measures to address the issue.[118] The threat of tariffs had the outcome that the White House desired.

President Trump again brought IEEPA into the public policy discussion when he tweeted: "Our great American companies are hereby ordered to immediately start looking for an alternative to China."[119] The President said that he has "the absolute right to [order that American companies end investment in China],"[120] citing the IEEPA. Via Twitter, he again repeated that he had the power to issue such an order through the IEEPA.[121]

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114 Erica York, Kyle Pomerleau, and Scott Eastman, "Tracking the Economic Impact of U.S. Tariffs and Retaliatory Actions," Tax Foundation, May 31, 2019 https://taxfoundation.org/tariffs-trump-trade-war/

115 Bryan Riley and Damian Brady, "The Escalating Toll of Trump's Taxes on Trade," National Taxpayers Union Foundation, May 31, 2019 https://www.ntu.org/foundation/detail/the-escalating-toll-of-trumps-taxes-on-trade

116 Christopher A. Casey, Dianne E. Rennack, Ian F. Fergusson, and Jennifer K. Elsea, "The International Emergency Economic Powers Act: Origins, Evolution, and Use," Congressional Research Service, March 20, 2019 https://fas.org/sgp/crs/natsec/R45618.pdf

117 Ibid. Casey-Rennack-Ferguson-Elsea (2019)

118 The White House, "Statement from the President Regarding Emergency Measures to Address the Border Crisis," May 30, 2019 https://www.whitehouse.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis/

119 Donald J. Trump (@realDonaldTrump), "....better off without them. The vast amounts of money made and stolen by China from the United States, year after year, for decades, will and must STOP. Our great American companies are hereby ordered to immediately start looking for an alternative to China, including bringing..," August 23, 2019, 10:59 am https://twitter.com/realDonaldTrump/status/1164914960046133249

120 The White House, "Remarks by President Trump Before Marine One Departure," August 24, 2019 https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-61/

121 Donald J. Trump (@realDonaldTrump), "For all of the Fake News Reporters that don't have a clue as to what the law is relative to Presidential powers, China, etc., try looking at the Emergency Economic Powers Act of 1977. Case closed!," August 23, 2019, 11:58 pm https://twitter.com/realDonaldTrump/status/1165111122510237696

IEEPA does grant a president authority related to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." The authority is granted only for the threat and may not be used outside the scope of the law.[122]

The powers granted to the president under IEEPA are rather broad, though, with few exceptions. A president may regulate or prohibit "any transaction in foreign exchange," "transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof," and "the importing or exporting of currency or securities."[123] Among other powers, the president may also investigate or block any transactions with a foreign country or national.

IEEPA does not allow the president to make an emergency declaration retroactive, meaning previous investment would not be affected should President Trump issue an emergency declaration aimed an American investment in China. He could, theoretically, prohibit future transactions.

Still, a president must consult with Congress, including the circumstances for the use of the authority provided by IEEPA, as to why the circumstances are an "unusual and extraordinary threat," why he or she believes the actions are necessary, and against which country or whom the actions are being taken.[124] Regulatory authority is also given for the president to carry out the action.[125]

Congress does have the statutory authority to terminate an emergency through a privileged joint resolution.[126] The process governing the joint resolution of disapproval is through Section 202 of the National Emergencies Act.[127] As we note elsewhere in this issue brief, Congress has already attempted to use this statute to terminate an emergency declaration, although the declaration in this instance was itself issued under the National Emergencies Act.[128] A joint resolution to terminate the national emergency declared at the United States' southern border[129] was vetoed by President Trump.[130] The override attempt in the House, where the joint resolution originated, failed.[131]

There is another element of trade that has not received much attention. In December 2018, President Trump gave Congress an early spring 2019 deadline to approve the United States-Canada-Mexico Agreement (USMCA), the replacement trade agreement for the North American Free Trade Agreement (NAFTA). If Congress did not approve USMCA before the

122 50 U.S.C. 1701
123 50 U.S.C. 1702
124 50 U.S.C. 1703
125 50 U.S.C. 1704
126 50 U.S.C. 1706(b)
127 50 U.S.C. 1622
128 Sen. Mike Lee (R-Utah) has introduced legislation to amend the National Emergencies Act. The Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies (ARTICLE ONE) Act, S. 764, would preserve the president's ability to declare a national emergency. However, the declaration of a national emergency will terminate after thirty days, absent the House and Senate passing a joint resolution of approval. The only exception is if Congress is physically unable to convene. In such a case, the thirty-day clock would begin running when Congress does reconvene. For true emergencies, thirty days is ample time for Congress to act. In the case of the approval of a joint resolution, the national emergency may last for one year after the transmission of the joint resolution to the president. The national emergency may be extended if the president publishes it in the Federal Register and sends Congress an executive order that renews the declaration. Congress would treat renewal of the declaration by the same process as the initial approval.
129 H.J.Res. 46, 116th Congress (2019)
130 The White House, "Veto Message to the House of Representatives for H.J. Res. 46," March 15, 2019 https://www.whitehouse.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/
131 Roll Call Vote 127, 116th Congress (2019) http://clerk.house.gov/evs/2019/roll127.xml

deadline, he threatened to unilaterally withdraw the United States from NAFTA.[132]

Now, the deadline has come and gone and USMCA still lingers in Congress, but the question remains: Can a president unilaterally withdraw the United States from a trade agreement approved by Congress through a binding agreement with the Executive Branch? Sen. Pat Toomey (R-Pa.) believes that such an action would be unconstitutional.

> "Unilateral executive withdrawal would amount to the president creating new law by himself. NAFTA became operative when Congress passed implementing legislation in 1993. Nowhere in the 1993 law, or in any other relevant statute, has Congress delegated to the President authority to terminate a free-trade agreement. A president can no more repeal NAFTA than he can repeal ObamaCare or create a new NAFTA without Congress's approval."[133]

Section 109 of the North American Free Trade Agreement Implementation Act refers to the termination of the agreement but does not give the president any authority to initiate withdrawal.[134] Ultimately, this question would have to be answered by the courts.

Obviously, Congress should not have delegated so much of its authority to the Executive Branch. However, this issue is non-binary, as one could make a case for granting trade promotion authority to the executive in an effort give the administration the ability to negotiate trade agreements. After all, a trade agreement, such as NAFTA or USMCA, still must be approved by Congress before it can take effect.

"Addressing the issues over the misuse of trade statutes has, perhaps, opened the door to strong bipartisan agreement that the Executive Branch has too much power over trade. "

Addressing the issues over the misuse of trade statutes has, perhaps, opened the door to strong bipartisan agreement that the Executive Branch has too much power over trade.

With such strong views on this particular issue, there are competing pieces of legislation that have been introduced as possible answers. Sen. Mike Lee (R-Utah) and Rep. Warren Davidson (R-Ohio) have introduced the Global Trade Accountability Act in the Senate[135] and the House.[136]

The Global Trade Accountability Act would create an approval process for unilateral trade actions from the Executive Branch. If Congress does not approve a trade action within a certain time period, it cannot take effect. Covered statutes include Section 232 of the Trade Expansion Act and IEEPA. The bill would not cover Section 301 of the Trade Act.

Sens. Pat Toomey (R-PA) and Mark Warner (D-Va.), along with Reps. Mike Gallagher (R-Wis.) and Ron Kind (D-Wis.), have introduced the Bicameral Congressional Trade Authority Act

132 Katie Lobosco, "Trump says he'll force a 6-month deadline on Congress for NAFTA replacement," CNN, December 2, 2018 https://www.cnn.com/2018/12/02/politics/trump-terminate-nafta/index.html
133 Pat Toomey, "Don't Try to Blackmail Us on Nafta, Mr. President," The Wall Street Journal, May 10, 2018 https://www.wsj.com/articles/dont-try-to-blackmail-us-on-nafta-mr-president-1525992824
134 19 U.S. Code § 3311 note
135 S. 1284, 116th Congress (2019) https://www.congress.gov/bill/116th-congress/senate-bill/1284
136 H.R. 723, 116th Congress (2019) https://www.congress.gov/bill/116th-congress/house-bill/723

in the Senate[137] and the House.[138] Although the bill is limited to Section 232, the Bicameral Congressional Trade Authority Act is similar to the Global Trade Accountability Act, as it creates an approval process for unilateral trade actions under Section 232. It is also retroactive, covering the steel and aluminum tariffs imposed under Section 232.

Another approach is the Trade Security Act, introduced by Sen. Rob Portman (R-Ohio). The bill does not make changes to the determination process for tariffs related to Section 232. It simply takes the investigatory process from the Department of Commerce and transfers it to the Department of Defense. The Trade Security Act also merely states that Congress may consider a joint resolution of disapproval to nullify the imposition of tariffs. It does not give privileged, or filibuster-proof, status. Congress already has this authority.

Each approach brings challenges, but a congressional approval process for the imposition of unilateral tariffs by the Executive Branch is absolutely essential, particularly as reactionary populism continues to grow among both conservatives and progressives. "One need not be a prophet to be aware of impending dangers," the Nobel Laureate Friedrich Hayek wrote in *The Road to Serfdom*. In the case of trade, as well as other policy topics covered in this issue brief, it is not only a matter of the erosion of the Legislative Branch's Article I authority, but it is also concerning from an economic point of view; that one individual has unilateral power to profoundly disrupt the economy.

Particularly if, as Scott Lincicome puts it: "Tariffs not only impose immense economic costs but also fail to achieve their primary policy aims and foster political dysfunction along the way,"[139] we need to retain the higher bar of congressional approval for such measures.

137 S. 287, 116th Congress (2019) https://www.congress.gov/bill/116th-congress/senate-bill/287
138 H.R. 940, 116th Congress (2019) https://www.congress.gov/bill/116th-congress/house-bill/940
139 Scott Lincicome (@scottlincicome), June 2, 2018, 8:32 am https://twitter.com/scottlincicome/status/1002890671013982209

Addressing the Broken Budget and Appropriations Processes

"This 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, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[140]

James Madison

One of the most prominent displays of congressional dysfunction is the process for the annual federal budget and appropriations bills. Article I, Section 9, Clause 7 of the Constitution states, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

The Congressional Budget and Impoundment Act of 1974[141] governs the current budget and appropriations processes in Congress.[142] The law, signed by President Richard M. Nixon, provides certain dates and deadlines for the Executive Branch and respective houses in the Legislative Branch to begin and complete these processes for funding the federal government.

KEY DATES OUTLINED IN THE CONGRESSIONAL BUDGET ACT[143]

President submits a budget to Congress	First Monday in February
Congressional Budget Office scores President's Budget	Not later than six weeks after the president submits a budget
Senate Budget Committee reports a budget resolution	April 1
Congress completes work on a budget resolution	April 15
House may consider annual appropriations bills	May 15
House Appropriations Committee completes last appropriations bill	June 10
Congress completes any reconciliation legislation	June 30
Fiscal year begins	October 1

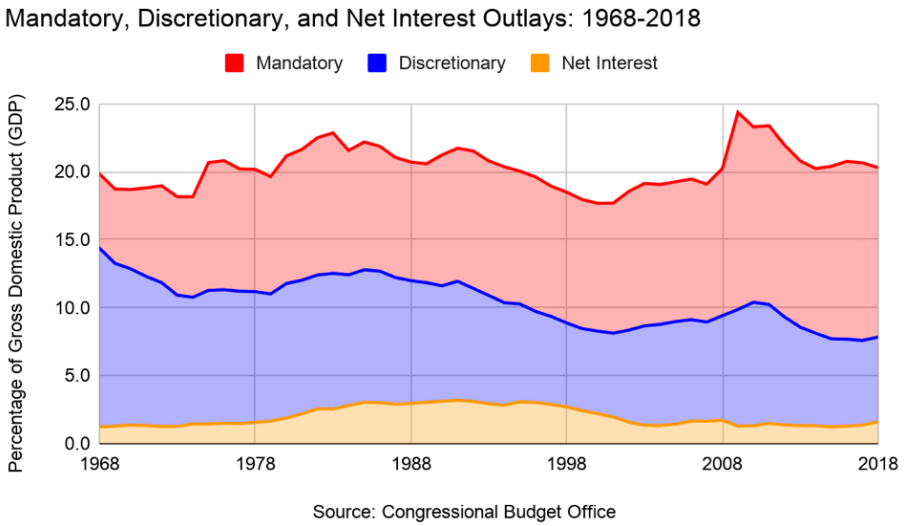
Of course, the deadlines in the Congressional Budget Act are rarely, if ever, met. For example, in the fourteen years between 2002 and 2016, Congress adopted budget resolutions only seven times.[144] Congress has an even worse track record when it comes to completing appropriations bills on time. Since the Congressional Budget Act was fully implemented, Congress has completed appropriations bills on time

140 Federalist No. 58 https://avalon.law.yale.edu/18th_century/fed58.asp
141 The Congressional Budget and Impoundment Act of 1974 is usually referred to as the Congressional Budget Act (CBA) or simply the Budget Act.
142 P.L. 93-344 https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg297.pdf
143 2 U.S. Code § 631 https://www.law.cornell.edu/uscode/text/2/631
144 Senate Budget Committee, "Fixing America's Broken Budget Process," Accessed October 25, 2019 https://www.budget.senate.gov/imo/media/doc/FINAL.SBC.BPR.Leg.SUMMARY.pdf

only four times -- 1977, 1989, and 1995, and 1997.[145]

When conservatives have called for a return to "regular order" in Congress, reverting to the established budget process is a large portion of what they mean. The regular budget process greatly empowers the permanent committees by delegating appropriations to them. This allows committee members from both parties to have input over topline budget figures, rather than merely having them dictated by party leadership.

In recent years, Congress has not passed a budget resolution. Instead, Congress has changed statutory discretionary budget caps. Take, for example, the Bipartisan Budget Act of 2018. The budget allotted $629 billion in base defense discretionary spending, $579 billion in base non-defense discretionary spending, and $78 billion in overseas contingency operations (OCO).[146] Federal outlays for FY 2018, however, exceeded $4.1 trillion.[147] This is because mandatory spending[148] and net-interest on the debt held by the public are on autopilot, or "baked into the cake."



Source: Congressional Budget Office

Mandatory spending includes outlays for programs like Medicare, Medicaid, Social Security, federal pension benefits, and veterans benefits. Outlays for these programs are formulaic and not based on static factors, as the number of beneficiaries changes from year to year. Although mandatory spending reform is not a topic of this issue brief, a byproduct of budget process reform could be that Congress is put on the record for the full scope of federal spending, rather than just the roughly 30 percent that the Bipartisan Budget Act covered for FY 2018.

Appropriations is an equal concern. Over the past ten years, Congress passed only seven regular appropriations bills before October 1.[149] Forty continuing resolutions (CRs) were passed over that same time frame. Regular appropriations bills are often combined into one large omnibus package, or a couple of smaller packages known as a "mini-bus." Amendments to these bills are rarely allowed in the House or Senate.

145 Drew Desilver, "Congress has long struggled to pass spending bills on time," Pew Research Center, January 16, 2018 https://www.pewresearch.org/fact-tank/2018/01/16/congress-has-long-struggled-to-pass-spending-bills-on-time/
146 P.L. 115-123 https://www.govinfo.gov/content/pkg/PLAW-115publ123/pdf/PLAW-115publ123.pdf
147 Congressional Budget Office, "An Update to the Budget and Economic Outlook: 2019 to 2029," August 2019 https://www.cbo.gov/system/files/2019-08/55551-CBO-outlook-update_0.pdf
148 Mandatory spending is also known as direct spending.
149 Congressional Research Service, "Continuing Resolutions: Overview of Components and Practices," April 19, 2019 https://fas.org/sgp/crs/misc/R42647.pdf

THE TWELVE REGULAR APPROPRIATIONS BILLS	
Agriculture, Rural Development, Food and Drug Administration, and Related Agencies	Interior, Environment, and Related Agencies
Commerce, Justice, Science, and Related Agencies	Labor, Health and Human Services, Education, and Related Agencies
Defense	Legislative Branch
Energy and Water Development	Military Construction, Veterans Affairs, and Related Agencies
Financial Services and General Government	State, Foreign Operations, and Related Programs
Homeland Security	Transportation, Housing and Urban Development, and Related Agencies

Each representative and senator must have the ability to represent his or her district or state through the legislative process, including appropriations. Not every member can serve on the appropriations committees, but they can offer amendments to appropriations bills. An open amendment process, rather than structured rules that allow only certain amendments to come to the floor, would give members that option to participate.

The Bipartisan Budget Act of 2018 did make an attempt to address the problems in the budget and appropriations process. Section 30442 of the legislation established the Joint Select Committee on Budget and Appropriations Process Reform. The committee, which had eight Republican members and eight Democratic members, held five hearings between April 2018 and July 2018 and marked up recommendations in legislative form during three meetings in November 2018, after the midterm election. The panel, however, ultimately failed to offer recommendations for consideration.

Although no recommendations were produced, Rep. Steve Womack (R-Ark.), who served as the chair of the panel, and Rep. John Yarmuth (D-Ky.)[150] introduced the Bipartisan Budget and Appropriations Process Reform Act.[151] The legislation, which was not considered before the conclusion of the 115th Congress, included provisions that had bipartisan support in the Joint Select Committee on Budget and Appropriations Process Reform. Those provisions included the biennial budget resolutions, a required completion date for a budget resolution, and biennial joint hearing of the budget committees on the fiscal state of the nation.

Created by the House of Representatives with a bipartisan vote of 418-12 in January 2019, the Select Committee on the Modernization of Congress is exploring various ways to improve the Legislative Branch, resulting so far in 29 unanimous recommendations. A recent hearing covered budget and appropriations process reform with testimony from Reps. Womack and Nita Lowey, Chair of the Appropriations Committee, although no recommendations on that topic have yet been released as of October 2019.[152]

150 Womack served as chairman of the House Budget Committee in the 115th Congress. Yarmuth was the ranking member. In the 116th Congress, their roles have reversed, with Yarmuth serving as the chairman in the Democratic majority and Womack as ranking member.

151 H.R. 7191, 115th Congress (2018) https://www.congress.gov/bill/115th-congress/house-bill/7191

152 Select Committee on the Modernization of Congress, "Select Committee Holds Hearing to Examine Budget and Appropriations Process Reform," September 19, 2019 https://modernizecongress.house.gov/news/press-releases/select-committee-holds-hearing-examine-budget-and-appropriations-process-reform

Addressing the problems in the budget and appropriations process is not an easy task, and there are a great many ideas that have been put forward, particularly in recent years. But Congress can promote transparency and accountability by taking several steps.

First, Congress should make all spending count towards discretionary spending caps. Over the past several years, Congress has boosted defense and homeland security discretionary spending through the overseas contingency operations (OCO),[153] which does not count toward the discretionary spending caps. OCO has not been subject to meaningful oversight from Congress and has served, to at least some extent, as a slush fund.[154]

Second, prohibit the use of "changes in mandatory programs" (CHIMPs) and other budget time gimmicks that theoretically offset spending increases but never come to fruition. CHIMPS were used as a partial offset in the Bipartisan Budget Act of 2019.[155] The Bipartisan Budget Act reduced mandatory outlays by $54.524 billion, but the CHIMPS do not enter the budgetary picture until fiscal years 2027 and 2028.[156] If the past is prologue, Congress will continue to extend the enacted CHIMPS into future years, continuously delaying the cuts from taking effect. This also occurs with purported discretionary spending savings and revenue changes on that are not realized.

Third, the House should provide a strong budgetary point of order to give members more time to read budget resolutions and appropriations bills. Congress has rushed budget and appropriations bills through both chambers in a short time period despite the "three-day" rule under recent Republican House majorities or the "72-hour" under the current Democratic House majority. This could be addressed by the creation of a nonwaivable (or waivable only by a supermajority vote) point of order prohibiting consideration of a budget resolution or appropriations bill that has not met the customary waiting periods for consideration on the floor.

Fourth, a requirement for a biennial budget resolution should be established. While there are conservative concerns about a biennial, or a two-year, budget,[157] they would be substantially eased by reforms proposed by Senate Budget Committee Chairman Mike Enzi (R-Wyo.) and Sen. Sheldon Whitehouse (D-R.I.) in the Bipartisan Congressional Budget Reform Act,[158] which includes the preservation of annual appropriations and a special process for a deficit reduction package.

Fifth, pass legislation to end government shutdowns. Several pieces of legislation have been introduced that provide for an automatic continuing resolution (CR) in the event that Congress fails to pass any of the twelve regular appropriations bills or only partially completes its work on these appropriations bills. Sen. Rand Paul (R-Ky.) has proposed the Government Shutdown Prevention Act,[159] which would provide for an immediate CR with a 1 percent spending cut. The legislation would continue with automatic CRs, mandating a 1 percent spending cut every 90 days. Sens. James Lankford (R-Okla.) and Maggie Hassan (D-N.H.) have proposed the Prevent Government Shutdowns Act.[160] This proposal would

153 Brendan A. McGarry and Emily Morgenstern, "Overseas Contingency Operations Funding: Background and Status," September 6, 2019 https://fas.org/sgp/crs/natsec/R44519.pdf
154 William D. Hartung, "It's Time to Phase Out the Pentagon's Slush Fund," Real Clear Defense, March 6, 2019 https://www.realcleardefense.com/articles/2019/03/06/its_time_to_phase_out_the_pentagons_slush_fund_114235.html
155 P.L. 116-37 https://www.congress.gov/116/plaws/publ37/PLAW-116publ37.pdf
156 Congressional Budget Office, "Bipartisan Budget Act of 2019," July 22, 2019 https://www.cbo.gov/system/files/2019-07/BipartisanBudgetActof2019.pdf
157 Romina Boccia, "Biennial Budgeting Is No Antidote to Budget Process Failure," The Heritage Foundation, September 11, 2018 https://www.heritage.org/budget-and-spending/report/biennial-budgeting-no-antidote-budget-process-failure
158 S. 2765, 116th Congress (2019) https://www.congress.gov/bill/116th-congress/senate-bill/2765
159 S. 147, 116th Congress (2019) https://www.congress.gov/bill/116th-congress/senate-bill/147
160 S. 589, 116th Congress (2019) https://www.congress.gov/bill/116th-congress/senate-bill/589

prohibit taxpayer-funded travel and reimbursements during a shutdown, and make any vote out of order unless it is directly related to appropriations. The Prevent Government Shutdowns Act would also provide for an automatic CR until Congress fulfills its obligation.

Finally, Congress should make it "out of order" to appropriate money for unauthorized programs. Congress routinely appropriates money for programs for which the authorization has expired. A way to address this is to make it much more difficult to waive the point of order against appropriating money for unauthorized programs. Since this recommendation would force Congress to address a host of issues they have studiously avoided in recent years, it would probably require a phase-in as part of new budget and appropriations procedures.

Another approach is the Unauthorized Spending Accountability (USA) Act,[161] championed by Rep. Cathy McMorris Rodgers (R-Wash.). This legislation would reduce funding for unauthorized programs over three fiscal years. Funding for a program would be eliminated if it has not been reauthorized after three years. The USA Act would also create a commission to review mandatory spending programs and set a schedule for the reauthorization of programs funded through discretionary spending.

This is not an exhaustive list of ideas. Rather, just examples of the steps Congress can take to begin to address the problem. Regardless of whether recommendations listed here or elsewhere are eventually adopted, each representative or senator should be vigilant that the process is being followed.

161 H.R. 2505, 116th Congress (2019) https://www.congress.gov/bill/116th-congress/house-bill/2505

Empowering Congress to Reclaim Its Role as the First Branch of Government

"[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."

—**James Madison**[162]

Most are familiar with the Schoolhouse Rock cartoon, "I'm Just a Bill," in which a bill sings about how he becomes a law: from introduction, to committee, to passage in the House or Senate, and through the process again in the other chamber before being sent to the president.[163] Of course, real processes being run by real people often fall short of the ideal, but the gulf between that familiar, friendly educational cartoon and reality has seemingly never been wider.

Case in point. On a snowy evening in the nation's capital in March 2018, party leaders in the House of Representatives unveiled a 2,232-page, $1.3 trillion omnibus spending bill to keep the government open for the remainder of FY 2018.[164] Prior to this, Congress had passed five separate continuing resolutions, or "CRs," to keep the government open for short periods of time.[165] Within a matter of hours, while facing a deadline to keep the federal government open, the omnibus was on the House floor, passed,[166] and sent to the Senate where it was also quickly approved.[167]

"the gulf between that familiar, friendly educational [Schoolhouse Rock] cartoon and reality has seemingly never been wider"

"How," one may ask, "could members of the House and Senate possibly process a more than 2,200-page bill and vote on it within a day?" Many members were asking the same question. Rep. Thomas Massie (R-Ky.) said, "There's no way humanly possible to read 2,232 pages [in such a short timeframe]."[168] Of course, unveiling the bill and voting on it within a matter of hours was not an accident.

The goal of rushing the omnibus was to force members to face a "choice," between approving "must-pass" legislation without time for public scrutiny, meaningful debate, or amendments, or being held responsible for a dreaded and unpopular "government shutdown." The contents of that legislation were known in advance only to the leadership of both parties in the House and Senate and the chairman and ranking members of the appropriations committees.

162 Federalist No. 51 https://avalon.law.yale.edu/18th_century/fed51.asp
163 Disney Educational Productions, "I'm Just a Bill Music Video," YouTube, December 8, 2011 https://www.youtube.com/watch?v=FFroMQlKiag
164 H.R. 1625, 115th Congress (2018) https://www.congress.gov/bill/115th-congress/house-bill/1625
165 Congressional Research Service, "Appropriations Status Table: FY2018," Accessed October 21, 2019 https://crsreports.congress.gov/AppropriationsStatusTable
166 Roll Call Vote 127, 115th Congress (2018) http://clerk.house.gov/evs/2018/roll127.xml
167 Roll Call Vote 63, 115th Congress (2018) https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00063
168 Erica Werner and Mike DeBonis, "In late-night drama, Senate passes $1.3 trillion spending bill, averting government shutdown," The Washington Post, March 23, 2018 https://www.washingtonpost.com/powerpost/house-prepares-for-rapid-vote-today-on-jam-packed-13-trillion-spending-deal/2018/03/22/2074fe7e-2dd6-11e8-8688-e053ba58f1e4_story.html

In the case of the House, this meant waiving the "three-day" rule on the omnibus.[169] The three-day rule was meant to give members time to read legislation before it was brought to the floor of the chamber for a vote. However, the three-day rule has frequently been ignored when convenient. More than two-dozen House Republicans revolted by voting against the rule governing the debate of the omnibus,[170] and members were still voting when Rep. Steve Womack (R-Ark.), who was serving as Speaker pro tempore, gaveled the vote closed.[171]

Unfortunately, this has become the way most major laws are made in Congress, and it's merely a symptom of systemic deficiencies that have developed in the legislative process like a cancer. One supposed justification is a need for "efficiency" and "getting things done." The explanation is that in the era of television and social media, externally-focused political "messaging" has become more important to your average member of Congress than serious discussion of policy, and as a result members have come to care less about getting things done. In response, leadership has taken more control to drive essential action.

Many members, while complaining about being disempowered, are actually ambivalent. Leadership's control gives them more time for fundraising and other activities, and omnibus bills are politically easier to vote for than having to take a public position on each controversial position within them. But the process creates the same problem as too much power in the Executive: less input risks producing policies that are less wise, to which members are less committed, and which they will be less concerned about or able to help constituents understand.

Fixing the legislative process is not just a matter of satisfying policy wonks; without serious reform, Congress will be fundamentally unable to reclaim its Article I powers as the government's dominant law-making body. To reclaim power from the Executive Branch, Congress will need the support of the public and the legitimacy of being able to show that it can function as intended.

169 Juliegrace Brufke, "Congress to waive three-day rule on omnibus," The Hill, March 21, 2018 https://thehill.com/blogs/floor-action/house/379518-congress-to-waive-three-day-rule-on-omnibus

170 Roll Call 124, 115th Congress (2018) http://clerk.house.gov/evs/2018/roll124.xml

171 Anna Giaritelli, "Democrats erupt in anger after GOP ends omnibus vote before everyone cast a ballot," Washington Examiner, March 22, 2018 https://www.washingtonexaminer.com/news/democrats-erupt-in-anger-after-gop-ends-omnibus-vote-before-all-have-cast-ballots-watch

(You Do Not Have to) Follow the Leader

One of the core problems that enables travesties like the omnibus example above is the incredible centralization of power into the hands of the leadership teams in each chamber.[172] This isn't an entirely new problem – there have been many Speakers of the House and Senate Majority Leaders over time who ran their chambers with an iron fist -- but the power of Congressional leadership is certainly at a high ebb.

Although increasingly bitter partisan acrimony has defined the modern Congress in the eyes of the public, the use of "must-pass" legislation deadlines as a means of control has been a generally bipartisan effort. This is partially enabled by the breakdown of regular order in the budget and appropriations process, which creates what has become a familiar pattern of "fiscal cliff" deadlines, as discussed previously.

Legislative sunset provisions, intended as a good governance measure to ensure that Congress has to periodically evaluate the proper functioning of laws they have passed, are also frequently used cynically by pairing an expiring provision that is important to rank-and-file members with some other policy prioritized by leadership and presenting the package as an all-or-nothing deal.

"...the use of 'must-pass' legislation deadlines as a means of control has been a generally bipartisan effort"

The reasons why the leaders of each chamber have accrued such control are somewhat different, because the House and Senate each set their own rules and procedures, and partly the same – driven by similar political considerations.

172 The term "leadership" in this context most refers to the Majority and Minority Leaders of both chambers, to their "whip" teams that attempt to corral rank-and-file members' votes, and to the Speaker of the House.

This Old House (Needs Some Fixing Up)

Although each party in the House sets its own caucus rules for how to organize, they both have come to strongly emphasize leadership control over committee assignments and chairmanships via a central steering committee. Much more than in the Senate, in the House, plum committee slots, such as seats on the powerful Ways and Means Committee, are awarded based on members' loyalty and ability to raise large quantities of money for their political party.[173]

In recent years, representatives from both parties have publicly expressed their dissatisfaction with what has become an increasingly blatant pay-to-play requirement for appointments to powerful committees.[174] Traditionally, important appointments have been directly tied to the amount a member fundraises for the party. As Rep. Thomas Massie told *USA Today,* "They told us right off the bat as soon as we get here, 'These committees all have prices and don't pick an expensive one if you can't make the payments.'"[175] Moreover, for many members, the major source for their fundraising efforts is the very industries they are supposed to oversee in their Committee. The result is a lot of time spent fundraising and the potential for significant conflicts of interest.

Not only does this subordination of Congressional committees to leadership undermine the integrity of the legislative process, it also has the obvious effect of solidifying the loyalty of ambitious representatives to the will of their parties over the interests of their constituents.

"Not only does this subordination of Congressional committees to leadership undermine the integrity of the legislative process, it also has the obvious effect of solidifying the loyalty of ambitious representatives to the will of their parties over the interests of their constituents."

What leadership giveth it can also taketh away via the Steering Committee. Notably, in 2012, Speaker John Boehner (R-Ohio) tried to quash dissent from "Tea Party" conservatives in the House by making an example out of Reps. David Schweikert (R-Ariz.), Justin Amash (R-Mich.), Walter Jones (R-N.C.), and Tim Huelskamp (R-Kan.) and kicking them off their respective committees for repeated votes against leadership priorities.[176]

Besides this system of pay-for-play, the Speaker of the House also has an outsized say in the majority's membership of the Rules Committee, which, consequently, is often referred to as the "Speaker's Committee." The Rules Committee in the House creates the guidelines for floor debate -- the length of time allowed for debate and whose amendments, if any, will receive a vote -- for every major piece of legislation that is brought to the floor. Rules committee amendments can also be used to change the text of a bill after it has been voted out of committee and without the consent of the wider House of Representatives, a practice that, when used, has generated outrage from the party in the minority.

The opportunity to offer amendments to a bill is at the core of a functioning legislative

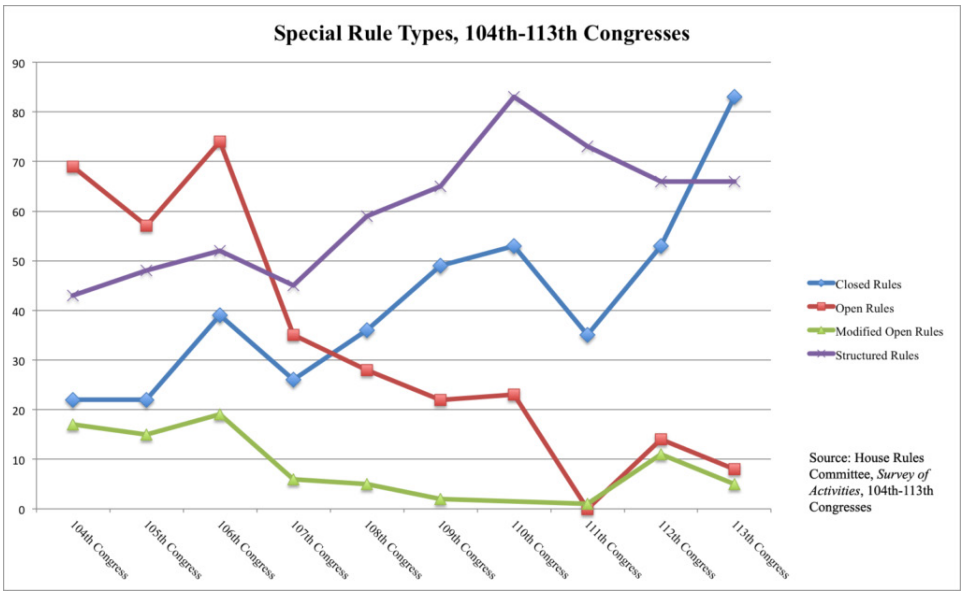
173 The Ways and Means Committee is responsible for tax-writing, trade, and tax-related provisions of major healthcare and retirement programs like Medicare, the Affordable Care Act, and Social Security.

174 Michael Beckel, "The Price of Power," IssueOne.org, https://bit.ly/2NfLId8

175 Deirdre Shesgreen and Christopher Schnaars, "Local Lawmaker: Congressional Committees 'All Have Prices'", USA Today, May 25, 2016. https://bit.ly/2qlEs21

176 John Bresnahan, "Schweikert Off Finance Panel," Politico, December 3, 2012 https://www.politico.com/story/2012/12/david-schweikert-financial-panel-084526

process, but recent years have seen a sharp decrease in the use of rules that allow for amendments, especially by the minority party. As this graphic from the Congressional Institute shows, Speaker Nancy Pelosi brought forth zero bills under open rules during the 111th Congress (2009-2010), while Speaker Paul Ryan managed to set a record for the most closed rules used in one Congress from 2017 through 2018.[177]



This is just one metric for the centralization of the legislative process, where bills are increasingly written behind closed doors by a select few legislators and presented to the rest as an up-or-down proposition.

The rule for a bill is sent out of the Rules Committee as a resolution that must pass a vote on the floor of the House, and, in theory, representatives who object to the guidelines within the rule could vote it down and force the bill back to the Rules Committee. In practice, the vote for a rule tends to split on purely party lines, and members of the majority party very seldom try to take down their leadership's rule. Given leadership's ability to retaliate, that's not surprising. However, as Rep. Matt Salmon urged in 2013, for conservatives to stop being railroaded by bipartisan big spenders, they may need to embrace voting against rules in order to make their voices heard the next time Republicans gain a majority in the House.[178]

One further noteworthy means for the House leadership to subvert the legislative process is attempting to slip potentially controversial bills through without a rule at all. The House rules provide that a bill can be brought to the floor "under suspension of the rules" and passed without any significant debate or any chance for amendments if the House can achieve a two-thirds majority of representatives who are present. This process is most typically used for minor procedures such as naming post offices, or for completely non-controversial minor legislation, but because suspension votes happen early in the week and are so routine, House leadership occasionally tries to sneak a more substantial bill through this process.

Ultimately, process issues were why Speaker Boehner faced intense criticism from House conservatives, the byproduct of which was the formation of the House Freedom Caucus.

177 Mark Strand and Timothy Lang, "Open House: How the House of Representatives Can Reinvigorate the Amendment Process," https://bit.ly/3a97cmO

178 Rep. Matt Salmon, "It's Time to Break Some Rules in Congress," Washington Times, March 11, 2013 https://bit.ly/2ofAzRb

In July 2015, Rep. Mark Meadows (R-N.C.) introduced a motion to vacate the Office of the Speaker that listed the serious grievances over process that conservatives had.[179]

A great deal of effort has been expended by both conservative and progressive members of Congress to force House leadership to obey certain guidelines that allow for a more fair and representative legislative process. These include:

» Allowing sufficient time for members and their staff to be able to read legislation before voting on it. This means actually enforcing the existing "72-hour rule" (which Democrats changed from "three days," because it had become 24 hours and 2 minutes[180]) even for key leadership bills and controversial votes.

» Allowing an open amendment process on all appropriations bills.

» Allowing the minority party at least one amendment vote on bills with closed rules.

» Reducing the use of the suspension calendar to pass substantive legislation.

» Making the motion to waive points of order subject to a supermajority vote instead of a simple majority.

Ultimately, the House of Representatives by its nature will always behave as more of a populist, majoritarian body, but that should not mean that the entire power of legislating rests in the hands of just a few of its 435 elected representatives. Restoring the ability of individual members to participate in the process and actually represent their constituents with their own local interests is of paramount importance for Congress to regain relevance. If instead we make all issues national and insist of monolithic party action, there is really no need for 435 local representatives.

179 H.Res. 385, 114th Congress (2015) https://www.congress.gov/bill/114th-congress/house-resolution/385

180 It is worth noting that House Democrats have waived this rule when politically convenient. In fact, the 116th Congress was in session for less than a month before it was waived for the first time. https://www.washingtontimes.com/news/2019/jan/27/house-democrats-pass-waiver-for-new-72-hour-readin/

Senate

Committee chairmanships in the Senate are generally decided more by tenure and seniority, which somewhat increases the independence of the chairmen. However, party leaders do have a large amount of say in actual committee assignments, which gives them some degree of leverage, although Senate leaders have been more hesitant to kick senators off a committee than their House counterparts.

Part of this has to do with the enormous power each individual senator wields within the legislative process. The Senate was intended to be the more deliberative of the two chambers, a moderating influence on the more populist impulses of the House. Its incredibly complex standing rules are based on precedents going back to the early Republic, and are heavily based on consensus - and the ability of any senator to withhold theirs.

This role as the chamber of deliberation has been sorely tested by the sheer volume of issues about which Senators are expected to deliberate. In addition to government funding and any legislation originating from the House, the Senate is also tasked under Article I with confirming executive and judicial branch appointments, which has practically become a full-time job in its own right. This already cramped schedule has been exacerbated for many years by the Senate convening for only three full legislative days most weeks. Thus, the momentum has fairly naturally swung towards investing the majority with more power to expedite the floor schedule.[181]

What has changed dramatically is the Majority Leader's hold over the amendment process. Because of precedent, the Majority Leader has priority of recognition on the Senate floor, allowing him to bring a bill to the floor and then "fill the amendment tree," which allows him to submit a first- and second-degree amendment and then block all other Senators from offering further amendments. To many senators' frustration, this tactic was employed more often by former Democratic Senate Majority Leader Harry Reid than anyone before him,[182] and its use has continued largely unabated under Republican Majority Leader Mitch McConnell.[183]

Fixing the Senate's amendment process would actually be fairly simple. Since all Senate rules are a matter of precedent and consent, a senator could offer a third-degree amendment and, if the Leader objects, senators could call for a vote to overturn the ruling by a simple majority vote.[184] Senators have simply been hesitant to make this change because of fears that it might open a Pandora's box of amendment votes that senators would rather not take. The fear of taking hard votes, however, is a very poor reason not to restore the free ability to offer and vote on amendments, which was once one of the defining features of the deliberative process of the Senate.

181 James Wallner, "The Death of Deliberation," Lexington Books, 2013. pp. 55-57
182 Walter J. Oleszek, Congressional Procedures and the Policy Process, 9th Edition, Sage CQPress, 2014. Pp. 292-293
183 James Wallner, "McConnell maintains firm grip despite pledging to restore the Senate," R Street Institute, Feburary 12, 2019. https://www.rstreet.org/2019/02/12/mcconnell-maintains-firm-grip-despite-pledging-to-restore-the-senate/
184 James Wallner, "In defense of third-degree amendments," R Street Institute, October 20, 2017 https://www.rstreet.org/2017/10/20/in-defense-of-third-degree-amendments/

Filibuster or Bust

Another trend in Senate procedure that has attracted a lot of attention is the increased use of the filibuster. Although the word commonly evokes images of endless speaking marathons, that necessity mostly went away when the Senate began to allow action on other matters when a filibuster was technically in progress. Now the filibuster is essentially a procedural obstacle that senators can use to extend the debate on a bill indefinitely. Once a point of principle rarely invoked, the use of filibuster threats has greatly increased in the modern Senate and has become an increasing cause of frustration. As Congressional scholar Walter Oleszek observes, "filibusters have enhanced potency in an institution that is workload packed and deadline driven."[185]

The key to the filibuster's effectiveness lies not only in the ability of a minority of senators to eat up valuable time, but also in that the procedure, called cloture, that is required to override these delay tactics needs 60 votes to pass, rather than the ordinary 51. Even assuming that members of the majority vote as a bloc, parties have rarely won a 60-vote Senate "supermajority" in recent history. As Congress has acted increasingly along partisan lines, the ability of the minority party to reject cloture has proven to be the main obstacle to passing any controversial bill.

"As Congress has acted increasingly along partisan lines, the ability of the minority party to reject cloture has proven to be the main obstacle to passing any controversial bill."

Frustrating though it may be for both parties at times, the filibuster and cloture are features of the Senate, not bugs. However, as with the amendment process above, changing the standing rules of the senate can be accomplished with only a simple majority, although doing so to eliminate the filibuster has been referred to as "the nuclear option" because of how profoundly it would alter the function and balance of power in the Senate. The Democrats under then-Majority Leader Harry Reid used the "nuclear option" in 2013 to eliminate the filibuster specifically for presidential nominations to executive agencies and judicial vacancies, in order to speed through several of President Obama's appointments that Republicans were blocking. The 2013 rules change specifically protected the 60-vote threshold for Supreme Court nominees, but Republicans under Majority Leader Mitch McConnell changed that in 2017 in order to confirm Supreme Court Justice Neil Gorsuch. Senate Republicans used the nuclear option once more in 2019 to reduce debate time on lower-level presidential nominations.

Thus far, however, the Senate has resisted eliminating the filibuster for actual legislation. Worryingly, the calls to do so have most recently come from Republicans in the House, upset that the Democratic minority in the Senate stood between them and tighter restrictions on immigration.[186] Proponents of limited government, in particular, should be categorically opposed to ending the Senate's filibuster, as they are in the minority no matter which party controls the Senate. History has shown that forcing the majority party in the Senate to accrue at least some votes from the opposing party in pursuit of 60 votes will not stop major legislation from passing. But slowing down the debate, forcing some degree of compromise, and giving individual senators more time to raise their state's local concerns at least maximizes the chance to prevent radical shifts in policy from occurring without some level of rational debate.

185 Oleszek, Congressional Procedures, pg. 308

186 Lindsey McPherson, "House GOP Has Message for Senate on Shutdown: Nuke the Filibuster", Roll Call, Jan. 20, 2018 rollcall.com/news/politics/house-republicans-message-senate-shutdown-deploy-nuclear-option

Congress Needs an Upgrade

One of the first things that incoming Speaker of the House Newt Gingrich (R-Ga.) accomplished in 1995 upon taking the gavel was to dramatically cut funding for congressional staff. This was a part of his "Contract with America" and was an excellent messaging point - Republicans were going to rein in spending and they were going to start leading by example. Unfortunately, in the context of its task as the first branch of government, reducing Congressional resources has proven more likely to enable the growth of government rather than limit it.

Thanks to the sprawling executive-branch bureaucracy that its laws have enabled over the past century, the most important task of Congress besides merely funding the government is attempting to keep up with how that money is being used and adjusting laws accordingly. The simplest logical solution would be to limit the number of programs and offices Congress has to oversee, but instead of addressing this issue, Congress keeps up the pretense of having effective oversight of the leviathan state whilst continually ceding authority to the unconstitutional "fourth Branch."

This problem is greatly exacerbated by the limitations of Congressional staff. House committees have 50 percent fewer employees than in 1985; Senate committees 20 percent less.[187] Overall, "roughly 40 percent of Capitol Hill staff are under 24 years of age, and staff turnover is high, which inhibits the development of expertise."[188] This is fed in part by a yawning gap between the earnings of young staffers and what a few years of inside experience in Congress can earn them in the private sector as lawyers and lobbyists.[189] Although the wages within Congress, financed by taxpayers, cannot (and should not) attempt to keep up with absurd lobbyist salaries, keeping experience and expertise in-house will require paying for it, especially given Washington D.C.'s incredibly high cost of living.[190] At a minimum, Congress should be able to attract talent of the same quality and expertise as the Executive Branch they are to oversee by being able to offer comparable salaries. Today, Congressional salaries are typically much lower.[191]

Currently, the entire legislative branch staff and operation accounts for only 0.4 percent ($4.7 billion) of federal discretionary spending.[192] And the proportion of this spending supporting staff has gone down significantly since 2001, when security concerns greatly increased spending for the Capitol Police and prompted the construction and operation of the Capitol Visitors Center. Ironically, it will probably be necessary to beef up spending on Congress in the Legislative Branch appropriations bill -- the so-called "302(b) allocations"[193] -- for Congress to have any chance of reining in the size of the Executive behemoth it helped create.

187 Kathy Goldschmidt, Congressional Management Foundation, "State of the Congress: Staff Perspectives on Institutional Capacity in the House and Senate, 2017 http://www.congressfoundation.org/storage/documents/CMF_Pubs/cmf-state-of-the-congress.pdf

188 Zach Graves and Kevin Kosar, "Bring in the Nerds: Reviving the Office of Technology Assessment," R Street Institute, January 24, 2018 https://www.rstreet.org/wp-content/uploads/2018/04/Final-128-1.pdf

189 According to 2019 CRS reports, the average salary of congressional staffers has actually decreased in inflation-adjusted dollars between FY 2009 and 2018 - for many positions by double digits. See Senate salary data at https://crsreports.congress.gov/product/pdf/R/R44324 and House data at https://crsreports.congress.gov/product/pdf/R/R44323

190 The Washington D.C. metro area ranked 9th highest in cost of living in the U.S., according to 2016 Bureau of Economic Analysis data. https://www.businessinsider.com/america-most-expensive-places-to-live-2018-5

191 R. Eric Petersen and Raymond T. Williams, "Staff Pay Levels for Selected Positions in House Member Offices, 2001-2018," Congressional Research Service, June 11, 2019 https://fas.org/sgp/crs/misc/R44323.pdf

192 Congressional Research Service, "Legislative Branch: FY 2019 Appropriations," November 13, 2018 https://crsreports.congress.gov/product/pdf/R/R45214

193 The term refers to Section 302(b) of the Congressional Budget and Impoundment Act of 1974, or 2 U.S. Code § 633(b). https://www.law.cornell.edu/uscode/text/2/633

An increase of $500 million per year, a tiny fraction of Executive Branch spending, could go a long way to restoring Congressional capacity, if targeted correctly. Funding would have to focus primarily on policy staff, especially for Committees, policy support from organizations like the General Accounting Office, Congressional Budget Office, Congressional Research Service, a restored Office of Technology Assessment, and perhaps restored funding to member-supporting legislative service organizations, and updated technology resources. It should not go to leadership, but some probably will need to be allocated to the Architect of the Capitol for needed building renovations. Congress can and should offset this cost with reductions in outlays elsewhere.

Arming Congress with Knowledge (Or Else the Lobbyists Will)

One of the difficulties Congress began to recognize as the size and complexity of the government increased during the middle of the twentieth century was that lawmakers needed a source of reasonably objective technical advice to help even out the information asymmetry that existed between them and the executive branch programs they were supposed to keep tabs on. It was for this reason that the legislative branch support agencies had been created -- the Congressional Research Service (CRS), the Government Accountability Office (GAO), and the Congressional Budget Office (CBO).

However, one major deficiency that has been repeatedly exposed in recent years is Congress' collective understanding of technology. Having a member of Congress ask Google's CEO why their iPhone doesn't work is good for a laugh,[194] but that sort of ignorance is less funny when Congress looks at totally banning the encryption that secures every internet user's data,[195] or nearly passes a bill that would destroy free speech and content sharing on the internet (as the Stop Online Piracy Act could have done).[196] As former Congressman (and actual rocket scientist) Rush Holt worried, "Most members of Congress don't know enough about science and technology to know what questions to ask, and so they don't know what answers they're missing."[197]

No one is expecting every individual lawmaker or his or her staff to be dedicated technologists, but it is clear that they need a resource to keep them at least somewhat better informed about how the laws they pass, and the regulations they oversee, affect the world around them. There are two parallel problems within Congress that each threaten technological development and innovation: that old laws often constrain new technologies in unexpected ways, and that entrenched interests are constantly lobbying for lawmakers and regulators to protect them from disruptive innovation.

Congress had an internal think tank of sorts whose job was to provide objective, Congress-focused technical expertise, called the Office of Technology Assessment (OTA), which was eliminated as part of Gingrich's cuts. There has been increasing bipartisan consensus that reviving something like the OTA is necessary for Congress to legislate responsibly in a world where technology is ubiquitous. Congress has taken steps in this direction by expanding an existing tech assessment program within the GAO.[198]

It is important, however, that the new congressional tech "think tank" be carefully structured to resist those, primarily on the political left, who would have it serve as a technocratic body prescribing "enlightened" regulations that Congress ought to pass, or advising what emerging technologies should be favored over others. Instead, like the old OTA, it should be focused like the Congressional Research Service on being available to provide timely, accessible, and reasonably objective expertise that Congressional staff can pull from to better understand how the law and technology interact.[199]

194 Owen Daugherty, "Google CEO responds to Steve King's iPhone concerns," TheHill.com, Dec. 11, 2018 https://thehill.com/policy/technology/420838-google-ceo-responds-to-steve-king-concerns-about-granddaughters-iphone

195 Mike Masnick, "Burr And Feinstein Release Their Anti-Encryption Bill... And It's More Ridiculous Than Expected," Techdirt, Apr. 8, 2016 https://www.techdirt.com/articles/20160408/08381934131/burr-feinstein-release-their-anti-encryption-bill-more-ridiculous-than-expected.shtml

196 Julie Borowski, "SOPA and PIPA Would Destroy Internet Freedom," Jan. 13, 2012. http://www.freedomworks.org/content/sopa-and-pipa-would-destroy-internet-freedom

197 Kim Zetter, "Of Course Congress is Clueless About Tech - It Killed Its Tutor," Wired.com, Apr. 21, 2016. https://www.wired.com/2016/04/office-technology-assessment-congress-clueless-tech-killed-tutor/

198 Our new Science, Technology, Assessment, and Analytics Team," GAO Watchblog, Jan. 29, 2019. https://blog.gao.gov/2019/01/29/our-new-science-technology-assessment-and-analytics-team/

199 Wayne Brough and Josh Withrow, "Making Congress Smart Again," Inside Sources, May 9, 2019. https://www.insidesources.com/making-congress-smart-again/

Conclusion

Over the last 100 years, Congress has ceded, and the Executive Branch has usurped massive amounts of power that the Constitution put in the hands of the legislative branch. This is a fundamental violation of the principles of separation of powers and checks and balances that the Framers of the Constitution saw as critical to maintain individual liberty and freedom over time in the face of populist passions, powerful interest groups, and would-be autocrats. This issue brief surveys many of the areas in which this has occurred and some of the enormous costs the American people have borne as a result.

Entirely independent of party, the long-term health of our nation depends on reversing this trend and restoring to Congress, the branch of government most closely in touch with and representative of the people, the powers it was intended to exercise, including the power of the purse, the power to declare war and authorize the use of force, the power to make the laws that govern us, and the power to exercise robust oversight of the other branches of government. This issue brief details numerous proposals for how that could be accomplished.

However, this paper also points out that much of the current dysfunction is a product of the systemic incentives facing members of Congress today. To a large extent, Congress is failing to exercise its power because many Members would prefer not to, fearing the consequences of votes that would make them responsible for the choices they have made. They find it easier to delegate choices to the bureaucrats of the administrative state, freeing them to criticize any results their constituents dislike. Delegation also frees up their time for the massive amounts of fundraising required to serve on important committees and simply get reelected.

With this reality in mind, people seeking reform should beware potential unintended consequences of partial measures. A Congress mandated to make choices that refuses to do so might leave the nation worse off in the short run than we are today. Effective reform has to ensure both that Congress is mandated to make or closely manage the choices that govern us and that members of Congress have the time, incentives, and ability to make those choices as wisely as possible on our collective behalf.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