

### **3. Toward a Congressional Resurgence**

#### ***Congress should***

- reclaim the power to make law by requiring an up-or-down vote on all “major rules” involving more than \$100 million in economic costs;
- establish a standing committee to review past legislation and identify broad statutory language that abets executive overreach in rulemaking;
- revise the Administrative Procedures Act to make clear that federal courts reviewing agency action are to decide questions of federal law *de novo*, without deference to agencies’ interpretations of their own authority; and
- reclaim the power of the purse by enacting a law requiring that all profits, fees, fines, civil and criminal forfeitures, and other revenues be deposited in the Treasury and spent through the normal congressional appropriations process.

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

President George W. Bush earned his reputation as the imperious “decider” thanks to his sweeping claims of inherent executive power in foreign affairs. Yet by the end of his second term, Bush had also radically expanded presidential power on the home front, into areas where no plausible national security claim could be made. In December 2008,

Bush unilaterally ordered a multibillion-dollar auto bailout just days after Congress voted the program down. A White House spokesman [explained that](#) “Congress lost its opportunity to be a partner because they couldn’t get their job done.”

“The biggest problems we’re facing right now,” Sen. Barack Obama intoned on the campaign trail in 2008, involve the “president trying to bring more power into the executive branch and not go through Congress at all.” By 2011, President Obama had decided that “we can’t wait” for Congress to pass laws before the president acts. “We’re not just going to be waiting for legislation in order to make sure that we’re providing Americans the kind of help they need,” he warned. “I’ve got a pen, and I’ve got a phone.” And he proceeded to use them to

- unilaterally grant lawful status and eligibility for federal benefits for nearly half of the 11 million unauthorized immigrants in the country;
- force schools throughout the country [to adopt national curriculum requirements](#) or suffer federal penalties;
- issue regulatory “guidance” documents purporting to make the rules for nearly every [school](#) and [workplace](#) bathroom in the United States;
- promulgate new rules that [nearly quadruple](#) the number of workers eligible for overtime pay;
- force American power plants and, ultimately, electricity consumers to bear billions of dollars of costs to reduce greenhouse gas emissions, though Congress has never voted to treat CO<sub>2</sub> as a pollutant; and
- unilaterally amend the Affordable Care Act (ACA) by ignoring clear statutory deadlines and mandates passed by Congress.

During his efforts to revise the ACA unilaterally, President Obama even usurped the “power of the purse,” ordering the disbursement of some \$7 billion in “cost-sharing” subsidies that Congress never appropriated. At a congressional hearing in July 2016, Obama administration officials could not identify any legal authority for those expenditures. Still, Treasury official Mark J. Mazur [volunteered](#), “If Congress doesn’t want the money appropriated, they could pass a law that specifically says don’t appropriate the money from that account.”

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

he has ordered with the stroke of a pen. As Justice Anthony Kennedy remarked during oral argument in *U.S. v. Texas*, the challenge to the president's sweeping immigration directives, "that's just upside down."

Even as he forged new frontiers in unilateral power, President Obama reportedly worried about "leaving a loaded weapon lying around" for future presidents to wield. That weapon now belongs to Donald J. Trump, our 45th president, who has promised to "do a lot of right things" with executive orders, and whose governing philosophy, as expressed in his acceptance speech at the Republican National Convention, is "I alone can fix it."

That's the political environment facing the 115th Congress, and, like the prospect of a hanging, it ought to concentrate the mind wonderfully. As we'll see, Congress bears much of the blame for the rise of one-person rule, having abdicated its core constitutional responsibility for making the law. But the crisis of executive governance creates an opportunity for a congressional resurgence. This chapter offers a number of reforms that, if implemented, would go some distance toward revitalizing Congress.

### ***Congress and the Presidency in the Constitutional Order***

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

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

"All legislative Powers herein granted shall be vested in a Congress of the United States," the document proclaims in Article I, Section 1, the first sentence following the Preamble. Congress wields the power of the

purse; it establishes the structure of the executive branch, and the rules under which it operates. It can create or abolish agencies, remove department heads and even, through the impeachment power, remove the president. The president has no reciprocal powers allowing executive control over Congress.

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

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

### ***The Presidency Transformed***

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

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

names and have narrower purviews individually, but collectively, they're hard to distinguish from Lawson's *reductio ad absurdum*.

In the latter part of the 20th century—not coincidentally a period characterized by the “emerging Republican majority” in the Electoral College—conservatives perceived advantages to presidential dominance. Using the enhanced powers of the presidency, conservative chief executives could gain control over the administrative state and rein in the regulators, they reasoned. But as Elena Kagan—formerly a policy adviser in the Clinton administration and now a Supreme Court Justice—pointed out in a 2001 *Harvard Law Review* article, there's little reason to think that “presidential supervision of administration inherently cuts in a deregulatory direction.” A liberal president could use his control over the administrative state to pursue “a distinctly activist and pro-regulatory agenda”—as President Bill Clinton had done and President Obama later would do.

### ***Federal Courts to the Rescue?***

President Obama's aggressive use of executive power spurred a legislative response in the House. Yet congressional efforts thus far have fallen far short of what's needed to restore the first branch's constitutional powers. Too often, those efforts have been half-hearted measures aimed at getting the federal judiciary to save the legislative branch from its own fecklessness. Indeed, when asked in a June interview how he'd handle a President Trump's attempts to govern without Congress, House Speaker Paul Ryan (R-WI) replied, “I would sue any president that exceeds his or her powers.”

That's the strategy behind the ENFORCE the Law Act (“Executive Needs to Faithfully Observe and Respect Congressional Enactments”), which passed the House in 2014. The bill is designed to make it easier for Congress to take the president to court when legislative majorities determine that he has violated the Take Care clause—instead of punishing the violation themselves.

To be sure, the judiciary has an important role to play, as made clear by two recent court victories in challenges to Obama administration unilateralism. In *U.S. v. Texas*, the Fifth Circuit upheld (and the Supreme Court later affirmed) a preliminary injunction against President Obama's sweeping immigration directives, noting that federal law “flatly does not permit the reclassification of millions of illegal aliens as lawfully present.” And in *House of Representatives v. Burwell*, former House Speaker John Boehner's lawsuit challenging the president's post hoc revisions of the ACA met with partial, provisional success when a D.C. federal judge held

the cost-sharing expenditures unlawful: “Congress is the only source for such an appropriation, and no public money can be spent without one.”

Yet the federal courts are unlikely to serve as a *deus ex machina* that repeatedly rescues Congress from a problem largely of its own making. They’ve been notably skeptical about past attempts by Congress to bootstrap itself into legislative standing. In *Burwell*, Judge Rosemary Collyer found that the House had standing on the unlawful appropriations claim, but did not with regard to the president’s refusal to implement the employer mandate by the ACA deadline. And she stayed her ruling on the first claim, allowing the unauthorized expenditures to stand, pending appeal.

Nor has the judiciary historically shown much appetite for policing the boundaries between executive and legislative power: between 1943 and 1997—a period that saw some 4,000 executive orders—presidents lost only 14 times in federal court challenges to those orders. Congress’s predilection for broad, vaguely worded delegations of legislative authority has concentrated enormous discretionary power in the president’s hands, and the courts rarely find that he’s taken too much of what Congress has freely given. Since 1937, as Justice Stephen Breyer has noted, “the Court has only twice in its history found that a congressional delegation of power violated the ‘nondelegation’ doctrine.” In 2001, the Court found that Congress did not violate the Constitution by enacting the Clean Air Act that gave the Environmental Protection Agency legislative power to set air quality standards using criteria that “protected the public health” with “an adequate margin for safety.” As federal Judge Douglas Ginsburg remarked, “the statute effectively delegated to an unelected and unaccountable agency the decision how far our society should go and how many billions of dollars should be spent to reduce the adverse health effects of industrial pollution, a decision that seems quintessentially legislative, but undoubtedly one for which legislators would prefer to avoid responsibility.”

Ultimately, the “least dangerous branch” is unlikely to revive the nondelegation doctrine or serve as reliable bulwark against overbroad assertions of executive power. Congress will have to reclaim its powers itself.

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

If Congress has the legal power to sell the White House, it certainly has the power to constrain and discipline the president in less dramatic

fashion: to punish unauthorized spending, police violations of the Take Care clause, and reclaim responsibility for making the laws Americans are required to follow. What's needed now is for Congress to recognize the powers it has and begin flexing muscles grown slack with disuse.

### ***Reclaiming the Power to Make Law***

To begin with, if members of Congress are concerned with presidential power grabs, they should stop *enabling* them. Too often, legislators have given the president a colorable claim to legal authority by passing broad and vaguely worded statutes that leave the details to be worked out by the executive branch. Congress should establish a standing committee to review past legislation and identify broad statutory language that abets executive overreach in rulemaking. The new committee would propose new, narrower language for existing statutes to restore congressional control over agencies.

Congress should also consider “framework” legislation that promotes legislative accountability for new regulatory rules going forward. In the Congressional Review Act of 1996, Congress defined a “major rule” as a regulation that involves more than \$100 million in costs or otherwise significantly affects the economy. That act provided expedited procedures for members to challenge proposed regulations, via a disapproval resolution, which, if passed by both houses and signed by the president, prevents the rule from going into effect. In its 20 years of existence, the act has been successfully employed to stop a final rule only once.

The proposed Regulations from the Executive in Need of Scrutiny (REINS) Act represents a more promising approach to reclaiming congressional responsibility for lawmaking. It would require Congress to vote “major rules” into law before they take effect. Under its provisions, agency rules that meet the criteria are automatically introduced into each house and fast-tracked toward an up-or-down vote within 70 days. If enacted, the REINS Act, versions of which have passed the House three times since 2013, would increase Congress’s workload, forcing members to consider 50–100 major rules per year. But, as the Hudson Institute’s Christopher DeMuth has put it, “Should not members of Congress stand and be counted on regulatory policies costing \$100 million or more, even if that means spending less time naming post offices after one another and proclaiming National Orange Juice Week?”

Further, Congress should consider revising the Administrative Procedures Act (APA) to empower judicial review of executive agency actions.

Such review has become utterly anemic over the last several decades, under the judicially created *Chevron* doctrine, by which the courts accord executive-branch agencies extraordinary deference to their interpretations of their own statutory authority. A bill introduced in the House and the Senate in 2016 would overturn *Chevron* deference, amending the APA to empower courts to decide “de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules.”

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

If presented with executive guidance that takes an aggressive or questionable interpretation of the underlying statute, the regulated entity would now be able to more confidently go on about its business, ignoring the agency’s position. It is still equally possible for the agency to impose sanctions and take the regulated entity to court, but the entity has been insured to some degree against the risk of losing a novel question of law. This makes it far more likely that debatable executive interpretations will end up subject to judicial review, and hence far more likely that they will ultimately be subject to congressional constraints.

### ***Reclaiming the Power of the Purse***

Congressional shortcomings go beyond delegation of its legislative power. Article I of the Constitution states, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Nonetheless, a number of regulatory agencies rely on funding extracted outside the normal appropriations process and the congressional oversight it enables. For example, the Federal Communications Commission sets and collects about \$8 billion in taxes on landline and wireless telecommunications companies, cable companies that provide voice service, and paging service companies. The commission then has broad discretion in spending that money to achieve “universal service.” In this case, the “power of the purse” seems to be migrating to the executive branch. “All of this is easily fixed,” notes legal scholar Michael McConnell. Congress can “pass a statute

providing that all profits, fees, fines, civil and criminal forfeitures . . . and other revenues must be deposited in the Treasury and spent only in accordance with congressional appropriations.”

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

### ***Crisis and Opportunity***

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

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

The crisis in executive governance—heightened by the recent presidential contest between two of the most reviled public figures in modern memory—is an opportunity for congressional “institutionalists.” And all the powers the Framers gave Congress are there for institutionalists’ taking.

### ***Suggested Readings***

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—*Prepared by Gene Healy and John Samples*