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The Case for Congressional Regulatory Review

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EXECUTIVE SUMMARY

The executive and legislative branches of government oversee the modern administrative state. Presidents have a duty to "take Care that the Laws be faithfully executed." But Congress is entitled to regulate the regulators no less than the president; after all, Congress exercises its enumerated powers to create and fund domestic regulatory agencies. Thus, equipped with overlapping authorities, the elected branches of government historically have competed for the reins of administrative policymaking. Such competition represents a constitutionally healthy manifestation of dueling institutional "ambitions."

At present, however, the contest between the political branches is dangerously out of balance. Since Richard Nixon, presidents have increased control over the administrative state through a process known as "White House regulatory review." Presidents developed this powerful management tool unilaterally, and today, these functions are performed out of the Office of Information and Regulatory Affairs. Congress, however, hasn't kept pace. Not only has the legislature failed to create an equivalent of White House regulatory review, but the overall quality of oversight in Congress has declined as power has centralized in leadership and away from committees in both the House and Senate. The result is that the president calls the shots on the administrative state while Congress sits on the bench. Through its ever-tightening grip over the administrative state, the presidency has accumulated a constitutionally worrisome concentration of power.

To remedy this alarming imbalance, this paper proposes the creation of a congressional capacity to evaluate administrative action. Because regulatory review is values driven, the only feasible institutional design is to give each party caucus in Congress its own ability to vet administrative action.

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INTRODUCTION

Government entities that go by acronyms such as EPA, FDA, and OSHA did not spring from the earth or magically appear.[1] Rather, an alphabet soup's worth of federal bureaucracies flows from legislation passed by Congress. Lawmakers create and sustain domestic regulatory agencies with enabling statutes and appropriations. In the words of renowned political scientist W. F. Willoughby, the legislative branch is "the source of all administrative authority."[2]

Yet the administrative state cannot be solely a function of congressional intent. The president must, after all, "take Care that the Laws be faithfully executed." To this end, the Constitution establishes a hierarchical management system meant to promote accountability, whereby "officers" and "inferior officers" are responsive to the president to ensure the "faithful" execution of the law.

The executive and legislative branches, therefore, can stake a rightful constitutional claim as the proper superintendent of the administrative apparatus. If the president is the CEO of the regulatory corporation, then Congress represents an active board of directors. Both answer to voters, who play the role of shareholders in this metaphor.

These vying claims operate as a constitutional check on overbearing government. The Founding Fathers designed a system of separate and competing powers to prevent the concentration of power in any one branch, which they thought to be "the very definition of tyranny."[3] Although "the Framers could hardly have envisioned today's vast and varied federal bureaucracy,"[4] they could take solace in the protections afforded by the constitutional framework they put in place. To the extent that Congress and the president compete for management primacy over the administrative state, these institutions check one another and thereby better protect liberty.

For decades after the New Deal era, Congresses and presidents struggled to control the reins of regulatory policy. During the past 40 years, however, a once-close race has become a rout in the executive branch's favor. When it comes to "setting the direction and influencing the outcome of administrative process"—which, again, is the dominant source of contemporary federal policymaking—we live in "an era of presidential administration," as then professor Elena Kagan argued in a celebrated article.[5]

To be sure, undisputed presidential supervision of the administrative state engenders efficiencies for governing. All else being equal, domestic regulatory agencies have an easier time churning out rules when the chain of command is simpler. Yet this managerial virtue is a constitutional sin. As a general matter, more efficient government more readily infringes on individual rights, which is precisely the threat that the Framers sought to mitigate with the system of separated powers.[6] By dividing government but giving each component the means to check one another, the Framers expected human nature to take over, such that "ambition [could] counteract ambition."[7]

In the competition among institutions for control of the administrative state, presidents unerringly have demonstrated all the "ambition" the Founders' envisioned. Congress, alas, has not. This paper explains the current (and constitutionally worrisome) imbalance of power between the elected branches of government and proposes a remedy in the form of a new congressional capacity to evaluate administrative action.

The first section of this policy analysis describes how the post–World War II Congress designed itself to oversee regulatory agencies and how, since the 1980s, Congress has strayed from this blueprint. The second section traces the rise of White House regulatory review through the Office of Information and Regulatory Affairs (OIRA), which has become the president's primary tool for managing administrative policy and which serves as the foundation of "presidential administration." The paper's third section points to the obvious need for an OIRA-like capability in Congress. Finally, the fourth section proposes a politically palatable version of legislative regulatory review. Because cost-benefit analyses are values driven, the only feasible institutional design is to give each party caucus in Congress its own capacity to vet administrative action.

THE RISE AND FALL OF CONGRESS'S CAPACITY TO COMPETE

For much of the 20th century, congressional committees ably competed with the president to manage domestic regulatory agencies. Over the past four decades, however, power in Congress shifted from committees to party leadership, and the results have been disastrous for legislative oversight. Post–New Deal Congresses organized themselves to supervise regulatory policy, but the centralization of power within Congress since the 1980s has undermined congressional capacity to supervise administrative action.

Congress Designs Itself to Manage the Administrative State

At the close of the 19th century, a rapidly growing American economy precipitated social disruption, and the public called on Congress to respond. These Progressive Era pressures intensified with the onset of the Great Depression. Citizens sought relief; businesses wanted protection. In the face of surging constituent sentiment, Congress established administrative agencies and empowered them to regulate markets and distribute benefits.[8]

Yet the onset of administrative governance triggered another societal reaction. Popular objections centered on the combination of the legislative, executive, and judicial functions in regulatory agencies.[9] For progressive theorists and administrators, the separation-of-powers principle was a quaint restraint on efficiency.[10] For others, but especially the legal community of that time, the Constitution's tripartite structure retained its vitality, and the young administrative state appeared alien to the Framers' design.

Political elites of the day echoed concerns about the potential for unaccountable and arbitrary administration. In a 1937 government study commissioned by President Franklin D. Roosevelt and described by him as "a document of permanent importance,"[11] a blue-ribbon panel proclaimed that "safeguarding of the citizen from narrow-minded and dictatorial bureaucratic interference and control is one of the primary obligations of democratic government." In terms of a remedy, the report recommended "centralization" of administrative control—under the president—as the appropriate response to the danger posed by the "isolated and arrogant bureaucrat."[12]

The panel's call to enhance executive power is unsurprising given that the president himself commissioned the report. For their part, members of Congress held different ideas about which institutions should "safeguard" the public from the vagaries of the administrative state. After debating reform proposals for more than a decade, Congress in 1946 passed three complementary statutes whose collective purpose was to tame bureaucratic governance.

The first was the Administrative Procedure Act,[13] known as the "constitution of the administrative state,"[14] through which lawmakers sought to regulate the regulators. The act established judicial review for administrative action,[15] required public input in the formation of regulations,[16] and ensured that governmental functions (such as prosecution and adjudication) are sufficiently distinct within agencies.[17] The second law, the Federal Tort Claims Act, waived sovereign immunity for torts committed by agents of the government.[18] Citizens thus became empowered to vindicate their rights against the regulatory apparatus.[19] Third, the Legislative Reorganization Act provided lawmakers with a sorely needed framework to superintend the administrative state.[20] In the course of creating domestic regulatory agencies during the previous half-century, Congress never had bothered to update itself, and by 1946, a consensus emerged that the legislature was far behind the times.

Rep. A. S. "Mike" Monroney (D-OK), a sponsor of the Legislative Reorganization Act, warned that the failure to refresh

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Congress's "archaic organization" could "be tragic for our representative form of Government." Monroney's cosponsor, Sen. Robert La Follette Jr. (R-WI), spoke of a "grave constitutional crisis."[21] The media, too, took note of Congress's inability to keep pace with the rise of the administrative state. A 1942 *Reader's Digest* article bemoaned that legislators were "corner store wiseacres in an age of calculating-machine-trained researchers."[22] Three years later, *Life* magazine ran a cover story titled "U.S. Congress: It Faces Great New Tasks with Outworn Tools."[23]

To mitigate Congress's dire inadequacies, the Legislative Reorganization Act empowered congressional committees to serve as members' primary agents for managing domestic regulatory agencies. According to George Galloway, a professor and one of the statute's architects, "modernization of the standing committee system was the first objective of the act and the keystone in the arch of congressional reform."[24] The act streamlined the number of committees to end redundancies, clarified committee jurisdictions, and regularized their procedures.[25] Membership on committees was capped for each lawmaker in the House and Senate to prevent members from diluting their attention.[26] In addition, the act authorized committees to develop a professional staff virtually from scratch.[27] Finally, the act tasked committees with exercising "continuous watchfulness" over the administration of laws.[28] Although "continuous watchfulness" is plainly a nebulous mandate, La Follette offered the following explanation:

> If the standing committee is given this responsibility and mandate, and is given a staff of experts, it will be in touch with the various activities of the departments of agencies of the government over which it has jurisdiction, and it will endeavor by cooperation by meetings and exchange of views and gathering of information, to make certain, insofar as possible, that the agency or department, in exercising the broad delegation of legislative power which is contained in almost every act, is exercising it as was intended by Congress. . . . [The committees] will become familiar, as the process goes along from month to month and year to year, with the manner in which the department or agency is administering the power bestowed upon it. It will then be very likely, I believe, if the committee finds that the agency or department is going beyond the intent of Congress, to introduce legislation to correct the situation.[29]

Committee staff wasn't the only investment that Congress made in improving its capacity. The Legislative Reorganization Act also reorganized and strengthened lawmakers' primary analytical support agency, the Legislative Reference Service (now known as the Congressional Research Service).[30]

Thus began an era, lasting roughly from 1946 to the late 1970s, that scholars define as the period of "committee government," meaning that committee structures were a formidable force, if not the paramount power, in domestic policy.[31]

During committee government, Congress refined certain norms to complement the effectiveness of committees as agency managers. Under the "property right" custom, for example, lawmakers held their committee assignments from one Congress to the next, rather than cycling through different committees.[32] As a result, members dealt with the same subject matter for continuous and extended periods, which led to familiarity with policymaking details. To further cultivate expertise within their ranks, committees institutionalized the "apprenticeship" norm, whereby incoming members were expected to choose a narrow issue area within their committee's jurisdiction and then gain specialization in that area through years of mundane legislative work.[33] Taken together, these norms encouraged members to master the agencies they oversaw.

At the same time, Congress cultivated procedural mechanisms to facilitate legislative supervision of administrative action. For example, Congress expanded use of "reauthorization," whereby legislators put a time limit on laws that create regulatory agencies, and when the deadline approaches, lawmakers decide whether to continue, or "reauthorize," the program.[34] Standing committees perform the process and are expected to bring their agency expertise to bear. Through reauthorization, Congress can modify regulatory programs that aren't working or, alternatively, boost successful programs. After World War II, Congress expanded its use of reauthorization to manage agencies.[35]

In the post-war period, Congress also expanded use of the legislative veto, which allows lawmakers to directly check administrative action by unicameral, bicameral, or even committee vote. From 1932 to 1950, Congress enacted 25 legislative veto provisions; over the following quarter-century, Congress enacted 267 such provisions.[36] As with reauthorization, standing committees played a crucial analytical role in the process. Sometimes committees exercised the veto. More often, in advance of action by one or two Houses on legislative vetoes, committees convened hearings and wrote committee reports to inform their peers. Due to the committees' work, members were not reliant on executive branch agencies or lobbyists when they voted whether to strike down administrative action.[37] Perhaps even more important than the legislative veto *per se*, agencies respected its potential use. Because they feared the legislative veto, agencies would maintain direct lines of communication with committees and honor requests and objections that members registered as a rulemaking progressed.[38] In this fashion, the legislative veto became "a central means by which Congress secures the accountability of executive and independent agencies," according to Supreme Court Justice Byron White.[39]

In the early 1970s, as anxiety grew over growing executive power during the excesses of the Nixon administration, Congress doubled down on the committee structure. The Legislative Reorganization Act of 1970 revised and rephrased in more explicit language the oversight function of House and Senate standing committees.[40] The act further expanded committee staff, and it also strengthened the policy analysis role of the Congressional Research Service. Four years later, the Congressional Budget and Impoundment Control Act rationalized Congress's role in the budget by creating budget committees in both chambers and establishing an annual procedure.[41] In addition, the act created a new Article I agency, the Congressional Budget Office, to provide analytical support.[42] The act also strengthened the Government Accountability Office by enhancing its authority to acquire information from regulatory agencies.[43] In the face of Nixon's excesses, Congress practiced self-help.

Scholars identify the mid-1970s as the high-water mark of committee authority in Congress. Equipped with subject-matter expertise, supporting resources, and procedural tools, lawmakers of this time played a major role in managing agency policymaking.

Congress Takes to the Sidelines Under Party Leadership

Today, apathy (or worse) is the defining characteristic of legislative oversight. Early in the 116th Congress, for example, the *minority* party on the House Committee on Natural Resources adjourned a hearing on climate change before it could begin because so few members of the majority bothered to attend.[44] In a majoritarian institution like the House of Representatives, this sort of procedural happenstance is absurd. And when the rare high-profile hearing attracts member participation, lawmaker performances typically fail to inspire confidence in congressional competence.[45]

There are other conspicuous signs of a sidelined Congress. Committee reauthorizations, once a powerful oversight tool, have fallen into disuse.[46] Agencies routinely submit nonsensical budget justifications meant to obfuscate administrative policymaking priorities, and lawmakers don't bat an eye.[47] Where once agencies rushed to meet informational

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requests by committee leaders, agencies today dissemble in the face of questions from Congress, and lawmakers do nothing.[48]

What happened? Multiple factors conspired to diminish Congress. While some reasons for Congress's decline, such as the Supreme Court's invalidation of the legislative veto in 1983,[49] occurred independently of the legislature, the chief cause came from within. Specifically, the centralization of power in Congress undermined the committee-centric structure that had served as the body's intended mechanism for managing the administrative state. Over the past 40 years, a Congress "once dominated by fairly autonomous committees and relatively weak parties became a system of increasingly dependent committees and relatively strong parties."[50]

Changing demographics played a big part in the concentration of power in Congress. Starting in the 1970s, a gradual extinction of Southern Democrats and Rockefeller Republicans led to greater uniformity within and, consequently, polarization between the two political parties.[51]

Increasing partisanship, in turn, set the stage for opportunistic leadership.[52] Two successive House speakers, Tip O'Neill and Jim Wright, instituted rule changes that took power away from committees and consolidated it in the hands of party leaders.[53] But it was Speaker Newt Gingrich whose tenure marked the inflection point away from committee government. With his so-called Contract with America, Gingrich pioneered the modern strategic focus on national politics and dependence on party support.[54] As speaker, he instituted sweeping rule changes that further entrenched leadership's authority.[55] No matter which party has held the gavel, subsequent speakers have maintained these powers, for obvious reasons of self-interest.[56]

By its constitutional nature, the Senate always will be less susceptible to the concentration of authority. Nevertheless, the "world's greatest deliberative body" has trended in the same direction as the House. In the early 1990s, Senate Majority Leader George Mitchell Jr. began to structure committee bills and floor debate in a manner meant to emphasize the policy differences between the two parties.[57] By the end of the decade, both party conferences in the Senate practiced "message politics," or an effort by "each party [to] tr[y] to frame every policy and major vote as a partisan campaign issue."[58] Today, the Senate routinely abandons individual- and minority-based privileges—something that can be achieved only in an environment where party unity trumps institutional pride.[59]

Another significant contribution to the centralization of power in Congress is the "fiscalization" of politics. By "fiscalization," scholars mean that "questions of paying for services and programs have become the focusing lens of much legislative action."[60] Simply put, Congress's business is dominated by periodic high-profile and high-stakes negotiations over crises pertaining to budget deficits, debt ceilings, and government shutdowns. Fiscalization goes hand in hand with consolidated party control, because congressional leaders are best positioned to negotiate these interparty and interbranch disputes in periodic summits with the president.[61]

Although committee government evolved with the administrative state as a management tool for lawmakers, the shift toward a party-centric Congress didn't have to harm the legislature's oversight capacity. In a perfect world, a centralized Congress would compete more efficiently with the president. In this imperfect world, however, lawmakers give priority to party affiliation over Congress as an institution.

As a result, the legislative branch is less inclined to compete with the executive. In the current Congress, for example, Republicans overwhelmingly sided with President Trump when he exercised emergency powers to secure funding otherwise blocked by Congress's power of the purse.[62] On the other hand, Democratic members applauded during the 2013 State of the Union when President Obama declared he would bypass Congress on climate change.[63]

In addition to deflating institutional pride, centralization disrupted an incentive structure that had encouraged a capable Congress. When lawmakers could leverage their participation in the committee process to influence regulatory policy, they had an impetus to learn administrative law and policy.[64] For today's lawmakers, by contrast, time spent learning how government works is better spent building a following on social media. What's the point of mastering the details of administrative policymaking when a core group of leadership calls all the shots? Members today enter as generalists, and they're content to remain generalists.

During committee government, Congress grew committee staffs comprised of "top policy specialists in their fields" to help lawmakers "compete with the expertise of the executive branch and scrutinize the claims of special interests."[65] But strong committees are a threat to centralization, which is why Speaker Gingrich and Republican leadership slashed committee staff by one-third on the first day of the 104th Congress in 1994; the Senate soon followed suit.[66] Staffing levels never recovered: there were 2,115 professional personnel in House and Senate standing committees in 2015, or less than two-thirds the total in 1991 (3,528).[67] In fact, the current level of committee staffing is commensurate with levels from the early 1970s, even though government has grown much larger and more complex in the ensuing five decades.

Nor have legislative support agencies been spared. In addition to cutting committee staff, one of Speaker Gingrich's first-day actions in 1995 was to kick Article I agencies out of congressional office space, slash their budgets, and in the case of the Office of Technology Assessment, shutter it altogether.[68] Subsequent leadership in both chambers of Congress, regardless of party affiliation, has continued to starve these agencies. In 1991, Article I agencies employed 6,354 professionals; in 2015, the number stood at 3,833. The Government Accountability Office and Congressional Research Service today operate with about 75 percent and 60 percent of their 1975 professional personnel capacity, respectively, despite the increasing size and complexity of the federal government.[69] To be fair, congressional leadership has invested in some parts of Congress. From 1995 to 2011, for example, House and Senate leadership staff increased 35 percent and 38 percent, respectively.[70]

Though perhaps counterintuitive, investment in congressional oversight capacity is essential to any strategy for reining in the administrative state. Without such investment, Congress simply doesn't have the means to compete with the presidency for managerial primacy over the administrative state. And without this competition, we lose a structural check on government overreach.

It's a false narrative claim that investment in congressional staff reflects an "expansion of government." Gingrich advanced the same argument when he dropped the ax on committee staff in 1995, and his real motivation was to consolidate power. President Reagan was the epitome of small-government conservatism, but do you imagine he was concerned about the budget implications of Executive Order 12,291, which created the executive regulatory-review mandate? He ordered White House review into existence with neither congressional authorization nor appropriation.

If Congress must lead by example on fiscal prudence, then lawmakers can "offset" investments in oversight by reallocating the near-billion dollars Congress spends every year on press offices within regulatory agencies, whose underlying value is doubtful.[71]

THE UNINTERRUPTED RISE OF THE PRESIDENT'S CAPACITY TO COMPETE

During the period of committee government, the legislative and executive branches for the most part were evenly matched. On the one hand, Congress exercised "continuous watchfulness" through standing committees; on the other, presidents employed their constitutional and statutory authorities over officers and the budget, respectively, to influence the domestic regulatory agenda.[72] Yet since

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the peak of committee government, the executive has assumed supremacy over administrative policy. According to congressional scholar Curtis Copeland, "the reality [today] is that on a day-to-day basis the president exerts a great deal more influence on rulemaking than either the courts or Congress."[73] The president has become the undisputed policymaker in chief.

From Quality of Life Review to White House Regulatory Review

As the legislature waned, the executive waxed. Since the peak of committee government, the president has cultivated a potent new management tool, one that is "foundational" to this present era of "presidential administration."[74] This means of supervision is known as "White House regulatory review."

Its roots extend to 1971, when President Nixon's Office of Management and Budget instituted a process, known as "Quality of Life Review," to vet public health rules.[75] President Ford modified regulatory review by focusing on regulations' inflationary impact.[76] Next, President Carter required regulatory agencies to assess the "economic consequences" of all rules that cost more than $100 million, which were then sent to a "Regulatory Analysis Review Group."[77]

Presidents Nixon, Ford, and Carter set the stage for Ronald Reagan, who ushered in White House regulatory review as we know it today. Whereas previous efforts at centralized review had been largely informal, President Reagan entrenched a systematic process.

In 1981, with the issuance of famed Executive Order 12,291, the Reagan administration required executive—but not independent—agencies to perform a cost-benefit analysis, known as a "Regulatory Impact Analysis," for each proposed or final rule that had an annual effect on the economy of more than $100 million. These agencies then had to submit their rules and associated analyses to the White House for review.[78] In 1985, Reagan issued Executive Order 12,498, which added a mandate that each executive agency (but not independent agencies) submit for review an annual regulatory plan listing proposed actions for the year.[79]

President Reagan located a home for regulatory review by unilaterally expanding the responsibilities of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget.[80] Notably, the president lacked a statutory basis to do so. Congress had created OIRA in 1980 to manage government paperwork, and lawmakers never intended to empower the president to establish White House regulatory review.[81] Although Congress later authorized OIRA and made its administrator's appointment subject to Senate confirmation,[82] President Reagan created the agency on his own.[83] OIRA, therefore, is a function of the executive's "ambition."

While subsequent administrations have modified this benchmark for weighing costs and benefits,[84] they only added to Reagan's basic framework. President Clinton, for example, created a process by which the president could referee disputes between OIRA and agencies.[85] Clinton further expanded the scope of the required annual regulatory plan to include independent agencies.[86] President George W. Bush's administration empowered OIRA to send "prompt letters" to agencies to start the rulemaking process,[87] in addition to expanding "informal" review of draft rules before their submission.[88] During the Obama administration, OIRA requested, but did not require, independent agencies to submit to White House regulatory review.[89] For its part, the Trump administration has signaled that it might require such participation by independent agencies, though it hasn't yet done so.[90]

With the establishment of White House regulatory review, presidents seized a powerful tool for managing administrative policy. Through OIRA, the White House can both prompt administrative action and, when action is delivered, compel agency reexamination and even revisions. After President Reagan established OIRA's review function, administrative law professor Kenneth Culp Davis commented that "the President has thus assumed full power to control the content of rules issued by executive departments and agencies."[91] In the years since, the president's grip over administrative policy has only tightened as OIRA's powers have been expanded and refined.

Institutional Profile of OIRA

OIRA is among the most misunderstood agencies in the federal government.[92] In part, this confusion is due to OIRA's keeping a low profile, sometimes to the point of opacity.[93]

OIRA has a staff of about 45, led by a Senate-confirmed administrator. Its annual budget is about $50 million.[94] In terms of organizational structure, OIRA is divided into "branches" that correspond to different policy areas. Within these branches, "desk officers" focus on a small number of agencies. Desk officers are supervised by seasoned policy experts known as "branch chiefs," who in turn answer to the administrator. When disagreements occur between "desk officers" and the agencies that are subject to White House regulatory review, issues are "elevated" up the respective political chains (at the regulatory agency and the Office of Management and Budget), all the way to the president.[95]

White House regulatory review doesn't cover all rules but instead is limited to "significant regulatory action" by executive branch agencies. A rule is "significant" if its "annual effect on the economy" exceeds $100 million or if the rule "raise[s} novel legal or policy issues."[96] Within the executive branch, OIRA has the final say on which administrative policies are "significant regulatory actions."

With respect to regulatory review, former OIRA administrator Cass Sunstein has described OIRA's primary role as being an "information aggregator" of interagency comments and input from outside experts.[97] Another key OIRA function is the vetting of an agency's regulatory impact analysis, a cost-benefit analysis required by executive order for all significant rules.[98] Importantly, OIRA doesn't conduct independent cost-benefit analyses; rather, the office shapes how the agency conducts its analysis in accordance with the president's policy priorities.

Relative to other agencies, OIRA is modest in size, but it punches far above its weight. Sunstein quantified OIRA's aggregate effect on regulatory policymaking as follows:

> OIRA reviewed 2,304 regulatory actions between January 11, 2009 and August 10, 2012. In that period, 320 actions, or about 14%, were approved without change; 161 actions, or about 7% were withdrawn; and 1,758 actions, or about 76%, were approved "consistent with change." In assessing the importance of review, it is important to note that the words "consistent with change" reveal that the published rule is different from the submitted rule, but do not specify the magnitude of the change. In some cases, the changes are minor . . . in others, they are substantial.[99]

In sum, presidents have adopted White House regulatory review to manage administrative policymaking. The process dates to the Nixon administration's "Quality of Life Review" vetting of public health rules, and it became institutionalized when President Reagan located this function in the newly created OIRA. Congress never authorized White House regulatory review; instead, presidents unilaterally took the initiative. Due to the executive branch's self-empowerment, scholars refer to the present era of American governance as being one of "presidential administration."

CONGRESS NEEDS ARTICLE I REGULATORY REVIEW TO CLOSE THE OVERSIGHT GAP WITH THE PRESIDENT

After the Second World War, standing committees competed with the president to manage domestic regulatory agencies. Over the past 40 years, however, committees receded, crucial customs disappeared, and oversight capacity generally diminished. While Congress faded, presidents filled the

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power vacuum by establishing and refining White House regulatory review—all without a legislative mandate. In this context, the need for some sort of Article I response to OIRA practically jumps off the page.

Historically, Congress has parried the president's institutional thrusts in the fight for supremacy over the administrative state. In 1921, for example, when Congress ceded budget formulation duties to the president, lawmakers concomitantly created the General Accounting Office (now the Government Accountability Office) to "investigate all matters relating to the receipt, disbursement, and application of public funds."[100] Another example is the competition between the two political branches for management primacy over domestic regulatory agencies in the wake of the Progressive and New Deal eras. As previously noted, President Roosevelt recommended the concentration of power in the presidency to best protect liberty from the possibility of arbitrary bureaucratic governance. Congress, however, declined FDR's advice and instead invested in congressional committees and legislative support agencies.

Perhaps the most relevant historical touchstone is the creation of the Congressional Budget Office (CBO). In the 1960s and 1970s, Congress became increasingly concerned that the presidency possessed an unfair advantage in formulating the budget, by virtue of the office's exclusive access to macroeconomic data within the White House bureaucracy. To address this informational asymmetry, lawmakers in 1974 created a new Article I agency, the CBO, to provide economic analysis independent of the White House. The parallel to the present is obvious: just as Congress created the CBO to rectify its reliance on the president's budget data, so the legislature needs an Article I OIRA to end the president's advantage conferred by White House regulatory review.

In addition to the historical example, there is a pragmatic impetus for creating congressional regulatory review. In 1983, the Supreme Court invalidated the legislative veto, which for decades had been Congress's most powerful tool for supervising administrative action.[101] Thirteen years later, lawmakers adopted a constitutionally permissible legislative veto by passing the Congressional Review Act.[102] The act, however, deprives lawmakers of an informed choice. At present, members deliberating on a legislative veto are limited to information from biased sources—either the president behind the rule or special interests aligned on one side or the other of a given regulatory policy.

During the 115th Congress, for example, lawmakers enacted 15 disapproval resolutions, a major increase over historical practice.[103] While Congress's increased willingness to check administrative action is a welcome development, this flurry of legislative vetoes demonstrates the inadequacy of the current process. No committee held a hearing, much less a vote, on any of the measures, nor did any committee issue any reports. For each of the legislative vetoes, Congress failed to perform any investigation or analysis. An Article I version of OIRA would redress this analytical imperative.

Congress has recognized its oversight shortcomings in the past. Two decades ago, during the 106th Congress, a bipartisan coalition passed the Truth in Regulating Act of 2000, which authorized a pilot program for congressional regulatory review modeled on OIRA.[104] Speaking in support of the bill on the House floor, Rep. Paul Ryan (R-WI) explained, "The most basic reason for supporting this bill is constitutional, as Congress needs a Congressional Budget Office to check and balance the executive branch in the budget office, so too does it need an analytic capability to check and balance the executive branch in the regulatory process." The act, Ryan added, would render Congress "better equipped to review final agency rules under the [Congressional Review Act]."[105]

Regulatory review, alas, never got off the ground in Congress. The Truth in Regulating Act of 2000 authorized a three-year pilot program for a legislative response to OIRA, but lawmakers refused to fund the experiment, and the program expired in 2004 without ever vetting a rule.[106]

WHY ARTICLE I OIRAS CAN EXIST ONLY IN PAIRS

There's a glaring need for a legislative counter to White House regulatory review, but how do we get there? Any attempt to address this imbalance of power must survive a polarized Congress, where partisanship runs especially hot on regulatory policy.[107]

First, there's the problem of picking the leader of the new legislative support agency, a question that bedeviled prior reform efforts. In 1998, during the 105th Congress, committees in both the House and Senate passed bills that would create a new Article I agency called the Congressional Office of Regulatory Affairs, with responsibilities such as those advanced in this paper.[108] Support for the bill within the Republican-controlled Congress broke down largely along partisan lines, and a leading Democratic criticism was that the new agency would do the majority's bidding.[109] During the next Congress, lawmakers passed the Truth in Regulating Act of 2000, which, again, authorized Article I regulatory review. So why did the 106th Congress pass reform where the Congressional Office of Regulatory Affairs had failed in the 105th Congress? A major reason is that the later bill elided the difficult question of agency leadership by housing a pilot program in the existing Government Accountability Office,[110] whose director (the comptroller general) the president appoints and the Senate confirms.[111]

Similarly, any new proposal for a legislative regulatory review could place the process in the Government Accountability Office (GAO) and thereby duck the divisive question of how to choose the new agency's leadership. Much can be said against this approach, however. Program audits, the sine qua non of the GAO, are fundamentally different from regulatory review; that is, the two agencies reflect distinct missions. More importantly, the GAO has already demonstrated a reluctance, if not hostility, to taking on regulatory review. From the outset, the agency never sought to exercise its Truth in Regulating Act authorities, nor did it mourn these authorities' demise. And the Congressional Review Act required the office to "assess" rules under consideration, but the GAO interprets this mandate narrowly to avoid any analytical responsibilities.[112] The GAO's repeated rejection of opportunities to press for regulatory review speaks volumes.

In the current (116th) Congress, the House and Senate are each under a different party's control. Accordingly, there is no danger that one party could shut out the other from selecting someone to lead the new legislative version of OIRA. But could the parties ever compromise on regulatory review? That seems very unlikely.

At a fundamental level, there is no room for agreement because assumptions are essential to cost-benefit analyses, a crucial cog in the machinery of regulatory review. Assumptions, in turn, are values based, which means they're inextricably political. Due to their distinct values (read: politics), Democrats and Republicans in the modern Congress would almost certainly fail to achieve an understanding on the assessment of costs and benefits. Thus, they would be unable to agree on how to conduct regulatory review. Division is baked into the process and likely explains why the GAO wanted no part of OIRA's authorities.

In this political environment, the traditional model for Article I agencies—a single organization headed by a nonpartisan director—won't work. It's not simply a matter of agreeing on leadership. One office cannot serve two masters with mutually exclusive conceptions of regulatory review. The only way to cut the Gordian knot of partisan disagreement is to arm each side with its own sword. Instead of adopting the historical model of a single "nonpartisan" organization, Congress should create two versions of OIRA—one for the majority and the other for the minority. Under this proposal, each side would gain its own mechanism to compete with the president for management primacy over the administrative state, in accordance with each side's values.

The new agencies would combine political direction with a nonpartisan staff whose primary loyalty is to Congress as an institution. In terms of contemporary analogs, the idea is

"In this political environment, the traditional model for Article I agencies — a single organization headed by a nonpartisan director — won't work."

> "In the legislative branch, a regulatory office would provide the two parties with regulatory analysis that is independent of the president."

to pair the bifurcated (majority/minority) leadership structure of a generic standing committee with the highly capable and nonpartisan staff of the Joint Committee on Taxation.[113]

In sum, past congressional efforts to create an OIRA-like office foundered because lawmakers designed a traditional Article I agency with a single director. To work, any such office must reflect the political realities of a polarized Congress by serving both parties independently.

HOW WOULD CONGRESSIONAL REGULATION REVIEW WORK?

A bifurcated congressional office of regulatory affairs would perform a role that is similar to White House regulatory review.

In the executive branch, OIRA provides the president's team with regulatory analysis that is independent of the agencies that wrote the regulations. In the legislative branch, a regulatory office would provide the two parties with regulatory analysis that is independent of the president. In both cases, the purpose is to allow the principals—the president and Congress—to better manage the administrative state.

Just as OIRA solicits input from regulatory agencies and outside parties, so too could each party's respective legislative equivalent in Congress. And just as OIRA requires agencies to re-run their cost-benefits analysis, so too could the congressional counterparts to White House regulatory review.

In one important manner, legislative review would have a far greater scope. To date, the president has respected the "independence" of agencies whose leadership enjoys employment protections from at-will removal by the president.[114] As the creator of all agencies—executive or independent—Congress's reach would extend to the administrative state's entire domain.

Although its scope would be wider than OIRA's, legislative regulatory review would entail far fewer regulations than its White House counterpart. OIRA reviews about 500 "significant" administrative actions every year; the Article I OIRAs could focus their energies on the most important policies—regulatory or deregulatory.

To facilitate the flow of information, Congress must overhaul its current approach to "legislative affairs" offices within domestic regulatory agencies. First, lawmakers should take these liaisons out of the executive branch and relocate them in the legislative branch. Legislative affairs offices were created to inform Congress, but they've been co-opted by the executive branch and now function primarily to stall congressional inquiries. By assuming direct leadership, Congress would ensure the integrity of these functions. Second, Congress should increase spending on these reconstituted Article I adjuncts within regulatory agencies so that they can shepherd the information requests that would drive legislative regulatory review.

The new-and-improved agency liaisons would work hand in hand with the congressional office of regulatory affairs. With time, legislative regulatory review could develop a distinct operational culture as it evolves in response to the respective needs of the party caucuses in Congress.

To what ends would Congress use this information? Ideally, this knowledge would complement broader reforms that give lawmakers a bigger hand in regulating the regulators. Under the Regulations from the Executive in Need of Scrutiny (REINS) Act, for example, Congress would have to affirm major rules before they took effect.[115] If the REINS Act passed, then some sort of independent regulatory office would become glaring—without it, lawmakers would be woefully underinformed for the duties they reserved for themselves.

But even absent such sweeping (and necessary) reforms, there remains an acute need for independent analysis during the window of time that lawmakers are afforded to veto a regulation under the Congressional Review Act. When deliberating over the fate of a major regulation, Congress currently relies on information from special interests or the administration (the biggest special interest). It's an analytical problem that lawmakers recognized soon after passing the Congressional Review Act. As previously explained, later Congresses sought to fix the legislative veto by establishing a regulatory office akin to the proposal in this paper.

More broadly, legislative regulatory review would strengthen Congress's atrophied capacity for oversight. Appropriators would be afforded better understanding of agencies within their jurisdiction. Standing committees would have an independent baseline against which to audit agency performance.

At present, there is a gross asymmetry between the two political branches when it comes to information about the administrative state. This imbalance undermines lawmakers' express statutory responsibility—and implicit constitutional duty—to oversee agencies that are, after all, created and funded by Congress. Regarding the competition among political branches, self-help is a feature, not a bug of the constitutional system. By investing in an OIRA-like function for Congress, legislators similarly would demonstrate fidelity to the Framers' design.

CONCLUSION

As the saying goes, "you can bring a horse to water, but you can't make it drink." In proposing a legislative response to OIRA, this paper assumes that the contemporary Congress—as an institution (instead of as constituent political parties)—cares to compete with the president in managing domestic regulatory agencies. But is this assumption correct? On this question, there is reason for doubt.

Driving such skepticism is the relative ease of administrative action compared with passing laws. President Obama, for example, resorted to "pen and phone" to implement a suite of policies that had failed to survive the legislative process.[116] Notwithstanding President Trump's deregulatory agenda,[117] for every law Congress passed in 2018, regulatory agencies promulgated 12 rules that are effectively indistinguishable from legislation.[118] Presidents can simply order subordinates to conduct rulemaking with the force of law; it's much more difficult for Congress to pass a bill in two chambers and then get the president's signature.

The comparative efficiency of "presidential administration" undercuts institutional ambition within a polarized Congress. When the president serves as the modern fount of law-like action by the federal government, and party leaders run a centralized Congress, there is a corresponding danger that the legislature becomes a means to executive ends. In more concrete terms, the risk is that one side would mindlessly cover for the president and that the other side—equally mindlessly—would seek to undermine the president so that "their guy" can assume the Oval Office and start getting things done. In this zero-sum game, no one would be pressing the interests of Congress as an institution.

It's an alarming possibility, one that offends the Constitution twice over. To begin with, the administrative state is composed of regulatory agencies that exercise lawmaking, law-prosecuting, and law-judging functions in considerable tension with separation-of-powers principles. Congress's abandonment of competition with the president would reflect a distinct constitutional breach—namely, a failure of the "ambition" on which the Framers' relied.

The "declared purpose" behind the Framers' constitutional structure is "to diffus[e] power the better to secure liberty."[119] Within this design, presidents have acted precisely as the Framers intended; Congress, however, has struggled to keep pace. If lawmakers still have the will to compete, then here is a proposed institutional design for legislative regulatory review. Because this function is inherently political, lawmakers would have to bifurcate legislative regulatory review for it to survive in a polarized Congress. In this manner, each side would gain the capacity to compete with the president over management of the administrative state.

"If lawmakers still have the will to compete, then here is a proposed institutional design for legislative regulatory review."

NOTES

1. Respectively, the Environmental Protection Agency, the Food and Drug Administration, and the Occupational Safety and Health Administration.

2. W. F. Willoughby, *Principles of Public Administration 11* (Washington: Institute for Government Research, 1927).

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4. *City of Arlington v. Federal Communications Commission*, 569 U.S. 290 (2013).

5. Elena Kagan, "Presidential Administration," *Harvard Law Review* 114, no. 8 (June 2001): 2245, 2246.

6. *Bowsher v. Synar*, 478 U.S. 714 (1986). "That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured . . . to provide avenues for the operation of checks on the exercise of governmental power."

7. *Federalist*, no. 51 (James Madison).

8. For dueling and engaging contemporary histories of the administrative state, compare Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107, no. 6 (April 1994): 1231 with Gillian Metzger, "1930s Redux: The Administrative State Under Siege," *Harvard Law Review* 131, no. 1 (November 2017): 1.

9. *Wong Yang Sung v. McGrath*, 339 U.S. 33, (1950). Describing historical criticisms of administrative policymaking.

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13. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, 5 U.S.C. §§ 500–504 (1946).

14. Christopher J. Walker, "The One Time I Agreed with Ian Millhiser (on Constitutional Law, No Less!)," *Notice & Comment* (blog), *Yale Journal on Regulation*, March 6, 2018.

15. 5 U.S.C. §§ 701–6.

16. 5 U.S.C. § 553.

17. 5 U.S.C. §§ 554, 557.

18. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, Title IV, 60 Stat. 812 (1946); and 28 U.S.C. § 1346 (1946).

19. See generally, Henry Cohen and Vanessa K. Burrows, *Federal Tort Claims Act* (Washington: Congressional Research Service, 2007).

20. Legislative Reorganization Act of 1946; and 5 U.S.C. §§ 551–9, 701–6, 1305, 3344, 4301, 5335, 5372, 7521.

21. David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946–1999* (Tuscaloosa: University of Alabama Press, 2002), p. 63.

22. George E. Outland, "We Must Modernize Congress," *Reader's Digest*, February 1945, pp. 35–38.

23. "U.S. Congress: It Faces Great New Tasks with Outworn Tools," *Life*, June 18, 1945, pp. 71–85.

24. George B. Galloway, "The Operation of the Legislative Reorganization Act of 1946," *American Political Science Review* 45, no. 1 (March 1951): 42.

25. Legislative Reorganization Act of 1946 §§ 102, 121. See also Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* (Washington: Brookings Institution, 1990); Robert Byrd, *The Senate 1789–1989: Addresses on the History of the United States Senate*, ed. Mary Sharon Hall, vol. 1 (Washington: Government Printing Office, 1989), pp. 548–9; and Lawrence C. Dodd and Richard L. Schott, *Congress and the Administrative State* (Upper Saddle River, NJ: Prentice Hall, 1979), pp. 86–87.

26. Galloway, "The Operation of the Legislative Reorganization Act," p. 42.

27. Legislative Reorganization Act of 1946 § 202. See also Dodd and Schott, *Congress and the Administrative State*, p. 72; Byrd, *The Senate 1789–1989*, p. 549; and Galloway, pp. 53–54.

28. Legislative Reorganization Act of 1946 § 136. See also David H. Rosenbloom, "1946: Framing A Lasting Congressional Response to the Administrative State," *Administrative Law Review* 50, no. 1 (Winter 1998): pp. 173, 179.

29. Rosenbloom, *Building a Legislative-Centered Public Administration*.

30. Legislative Reorganization Act of 1946 § 203.

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32. Deering and Smith, *Committees in Congress*, p. 27.

33. Deering and Smith, pp. 31–32.

34. Dodd and Schott, *Congress and the Administrative State*, pp. 235–40.

35. See generally Jonathan H. Adler and Christopher J. Walker, "Delegation and Time," C. Boyden Gray Center for the Study of the Administrative State Working Paper no. 19-14, May 2, 2019. Part III of the paper explains reauthorization and how it has fallen into disuse.

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37. Harold H. Bruff and Ernest Gellhorn, "Congressional Control of Administrative Regulation: A Study of Legislative Vetoes," *Harvard Law Review* 90, no. 7 (May 1977): 1369, 1380. "The usual process is for one or more committees or subcommittees to hold hearings and to report to the full house, which debates the matter before a final vote."

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57. Loomis and Schiller, *The Contemporary Congress*, p. 100.

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60. Loomis and Schiller, *The Contemporary Congress*, p. 174.

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63. Barack Obama, *Remarks by the President in the State of the Union Address*, February 12, 2013. "But if Congress won't act soon to protect future generations, I will. (Applause.)"

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72. See generally Eloise Pasachoff, "The President's Budget as a Source of Agency Policy Control," *Yale Law Journal* 125, no. 8 (June 2016): 2182. Describing how president's exercise control over the administrative state through the budget process.

73. Curtis W. Copeland, "The Presidential-Congressional Power Imbalance in Rulemaking," in *When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry*, ed. Mort Rosenberg (Washington: The Constitution Project, 2017), p. 236.

74. Kagan, "Presidential Administration," p. 2285.

75. Jim Tozzi, "OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding," *Administrative Law Review* 63, Special Edition: OIRA Thirtieth Anniversary Conference (2011): 44–50; and Curtis W. Copeland, "The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking," *Fordham Urban Law Journal* 33, no 4 (2006): 1257, 1264.

76. Exec. Order No. 11,821, 39 Fed. Reg. 41501 (November 29, 1974).

77. Exec. Order No. 12,044, 43 Fed. Reg. 12661 (March 24, 1978).

78. Exec. Order No. 12,291, 46 Fed. Reg. 13193 (February 19, 1981).

79. Exec. Order No. 12,498, 50 Fed. Reg. 1036 (January 8, 1985).

80. Although the Office of Information and Regulatory Affairs (OIRA) statutory mandate is to manage federal paperwork by reviewing information collection requests, President Reagan

broadened the newly created body's duties to include regulatory review. Future presidents followed suit, and Congress has acquiesced by funding OIRA and confirming the director of OIRA.

81. Congress created OIRA with passage of the Paperwork Reduction Act in 1980.

82. Copeland, "The Presidential-Congressional Power Imbalance in Rulemaking," p. 240.

83. See generally, William G. Howell and David E. Lewis, "Agencies by Presidential Design," *The Journal of Politics* 64, no. 4 (November 2002): 1095–1114.

84. Originally, Exec. Order No. 12,291 required that "potential benefits to society for the regulation outweigh the potential costs to society." President Clinton's Exec. Order No 12,866 § 1, 58 Fed. Reg. 51735 (October 4, 1993) called for regulations that "maximize net benefits." And Obama's Exec. Order 13,563 § 1, 3 C.F.R. 13563 (January 18, 2011), which called for regulatory benefits that "justify" costs.

85. Exec. Order 12,866 § 7.

86. Exec. Order 12,866 § 4.

87. John D. Graham, "Saving Lives through Administrative Law and Economics," *University of Pennsylvania Law Review* 157, no. 2 (2008): 268n460.

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89. Exec. Order 13,579, 3 C.F.R. 13579 (July 11, 2011).

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91. Kenneth Culp Davis, "Presidential Control of Rulemaking," *Tulane Law Review* 56, no. 3 (April 1982): 849.

92. Cass Sunstein, "The Office of Information and Regulatory Affairs: Myths and Realities," *Harvard Law Review* 126, no. 7 (May 2013): 1838, 1839. "Even among close observers—in the media, in the business and public interest communities, and among academics, including professors of law—the role of OIRA and the nature of the OIRA process remain poorly understood."

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94. Executive Office of the President, *Fiscal Year 2018 Congressional Budget Submission* (Washington: Executive Office of the President, 2017), p. 13.

95. This description of OIRA's operational workings is gleaned from Sunstein, "Myths and Realities," p. 1845.

96. Exec. Order 12,866 § 3(f). Although there are other factors to consider, these are the primary considerations.

97. Sunstein, "Myths and Realities," p. 1840.

98. Exec. Order 12,991 § 3, 3 C.F.R. 12991 (March 6, 1996).

99. Sunstein, "Myths and Realities," p. 1847.

100. Budget and Accounting Act of 1921, Pub. L. 67–13, 42 Stat. 20, Sec. 312(a).

101. *Chadha*, 462 U.S. 919.

102. 5 U.S.C. §§ 801–808 creates a fast-track mechanism for Congress to check agency rules, including a bypass of the Senate filibuster.

103. Prior to the 115th Congress, only one Congressional Review Act disapproval resolution survived the president's veto. See "Congressional Review Act Resolutions in the 115th Congress," Coalition for Sensible Safeguards."

104. Truth in Regulating Act of 2000, Pub. L. 106-312, 114 Stat. 1248-50 (October 17, 2000).

105. 166 Cong. Rec. H8706 (2000).

106. Rosenberg, ed., *When Congress Comes Calling*, p. 176.

107. For an incisive analysis of contemporary congressional politics over domestic regulation, see Philip A. Wallach, Losing Hold of the REINS: How Republicans' Attempt to Cut Back on Regulations Has Impeded Congress's Ability to Assert Itself," Brookings Institution, May 2, 2019.

108. The Congressional Office of Regulatory Analysis Creation Act (H.R. 1704) passed the House Committee on Government Reform and Oversight and the House Judiciary Committee. The Congressional Accountability for Regulatory Information Act of 1999 (S. 1198) passed the Senate Committee on Governmental Affairs.

109. Committee on Government Reform and Oversight, Rept. 105-441 Part 2, Minority Views on H.R. 1714, June 3, 1998, p. 23 ("the appointment process [for the new office] is partisan"); and Committee on the Judiciary, Rept. 105-441 Part 1, Dissenting Views to H.R. 1714, March 13, 1998, p. 18 (objecting to the "supposedly nonpartisan" composition of the new office's leadership).

110. Truth in Regulating Act of 2000, Sec. 4.

111. Money and Finance, Pub. L. 97-258, 96 Stat. 877, 31 U.S.C. § 703(a)(1) (September 13, 1982).

112. 5 U.S.C. § 801(a) requires the Government Accountability Office (GAO) to perform an "assessment" of the rule under consideration. See Rosenberg, ed., *When Congress Comes Calling*, p. 168, describing GAO's narrow interpretation.

113. Created in 1926, the nonpartisan Joint Committee on Taxation has an experienced professional staff of PhD economists, attorneys, and accountants "who assist Members of the majority and minority parties in both houses of Congress on tax legislation." See "Overview," About Us, Joint Committee on Taxation.

114. See Exec. Order No. 12,291 and accompanying text. The extent to which the Constitution permits congressional regulation of the removal of Article II officers (inferior and principal) is currently in flux. In 2010, for example, the Supreme Court held that Congress may not afford removal protections to inferior officers at independent agencies. See *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). In the present term, the court will hear arguments in *Seila Law LLC v. Consumer Financial Protection Bureau*, which involves a challenge to Congress's constitutional authority to regulate the removal of the principal officer who heads the Consumer Financial Protection Bureau. See Scott A. Keller, Noah R. Mink, and Ilya Shapiro, "Seila Law LLC v. Consumer Financial Protection Bureau," Legal Briefs, Cato Institute, July 29, 2019.

115. For more on the Regulations from the Executive in Need of Scrutiny (REINS) Act, see Eric Boehm, "Rand Paul's REINS Act Finally Makes It to Senate Floor," *Reason*, May 17, 2017.

116. Tamara Keith, "Wielding a Pen and a Phone, Obama Goes It Alone," *NPR*, January 20, 2014.

117. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (January 30, 2017).

118. See Clyde Wayne Crews, "The 2019 Unconstitutionality Index," *OpenMarket* (blog), Competitive Enterprise Institute, December 31, 2018.

119. *Bowsher v. Synar*, 478 U.S. 714.

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