

# The Decision of 1946: The Legislative Reorganization Act and the Administrative Procedure Act

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*First Branch, Second Thoughts – What Is Congress’s Proper Role in the  
Administrative State?*

The Decision of 1946:  
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In the summer of 1946, Congress enacted two laws that served as the foundation of the modern administrative state. One of them is well-known to scholars of administrative law; the other, to scholars of Congress. The first, the Administrative Procedure Act (APA), established procedural requirements for administrative rulemaking and adjudication and outlined the scope of judicial review of administrative decisions. The second, the Legislative Reorganization Act (LRA), restructured Congress's committee system and dedicated resources to enable Congress to engage in "continuous watchfulness" over the bureaucracy. Their enactment less than two years after the death of President Franklin Roosevelt and the conclusion of World War II marked the end of a period of contestation between Congress and the President over both the legitimacy and the control of the modern administrative state.

Given the centrality of the APA to the functioning of the modern administrative state, and the importance of the LRA to how the modern Congress functions, it is surprising that these two laws are rarely considered in conjunction. The timing of their enactment suggests that members of Congress were not considering them as isolated or separate reforms. There are two exceptions to this neglect. David H. Rosenbloom's *Building a Legislative-Centered Public Administration* argues that "The Question in 1946" that animated both the APA and LRA was: "Whose Bureaucracy Is This, Anyway?"<sup>2</sup> Congress answered that question, he concludes, by affirming that it was Congress's bureaucracy: "Congress's effort to redefine its constitutional position vis-à-vis federal administration in 1946 relied heavily on the idea that agencies should operate and be treated as extensions of the legislature."<sup>3</sup> Congress, in other words, declared itself to be the supervisor and controller of the administrative state. It accepted the delegation of many of its former responsibilities to administrative agencies, and focused on controlling agency power

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<sup>2</sup> Rosenbloom, *BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION* (2000), 14.

<sup>3</sup> Rosenbloom, *supra* note 1, at 23.

rather than limiting it.<sup>4</sup> In addition, Joanna Grisinger has explained that both the APA and LRA “reflected Congress’s fundamental uneasiness that bureaucrats had become the primary makers of law and policy in the modern state.”<sup>5</sup> The goal of the LRA, at least, Grisinger argues, was to “restor[e] Congress to its rightful place of primacy over the administrative state.”<sup>6</sup>

The promise of Congress’s work in the summer of 1946, however, was largely unfulfilled. Both the APA and the LRA have operated very differently in practice than they were intended to operate in theory. Subsequent developments in Congress have altered and weakened the control over bureaucracy that Congress anticipated in the LRA. In addition, the APA has functioned differently in practice than the members of Congress who enacted it intended. This article aims to describe the connection between these two important statutes as well as the subsequent developments that altered the “Decision of 1946” in practice.

The description and the argument of this article take place in five parts. Part I profiles the 79<sup>th</sup> Congress that enacted both the APA and the LRA and briefly describes the timeline of both laws’ enactment in the Summer of 1946. Part II summarizes the arguments and debates around the passage of the APA, emphasizing the assumption of many members that it was an initial first step towards limiting the administrative state that had emerged over the previous decades. Parts III and IV form the heart of the article. Part III thoroughly examines the hearings and debates that led to enactment of the LRA, focusing particularly on how members of Congress sought to position the institution in relation to the administrative state it had just sanctioned in the APA. Part IV describes the failure of the LRA to live up to its promise, and how subsequent developments in Congress thwarted the ultimate design of the law. It also describes in brief the story, well-known to most administrative law scholars, of the disjunction between the APA as originally enacted and its contemporary application. This Part explains how the decision Congress made in the summer of 1946 to accept but restrain the administrative state through congressional oversight failed to be achieved in the years following the decision.

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<sup>4</sup> Rosenbloom, *Whose Bureaucracy is This, Anyway? Congress’ 1946 Answer*, 34 PS: POL. SCI. AND POLITICS 773 (2001), 774: “by 1946, the members [of Congress] accepted delegation as an unavoidable necessity.” See also Rosenbloom, *1946: Framing a Lasting Congressional Response to the Administrative State*, 50 Admin. L. Rev. 173 (1998).

<sup>5</sup> Joanna Grisinger, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* (2012), 109.

<sup>6</sup> Grisinger, *supra* note X, at 111.

Finally, in Part V, the article explores the implications of the failure of the decision of 1946 to take hold. The conclusions in Part V are offered in light of the fact that the summer of 1946 marks a major settlement and reframing of the relationship between Congress and the New Deal administrative state. The summer of 1946 represents a time when members of Congress, across the ideological spectrum, came to a settlement over the legitimacy of the New Deal agencies, and sought to constrain those agencies through administrative procedure and (primarily) legislative control. As the goal of expanding legislative control through a reconstituted committee system governed by party leaders failed to materialize, the APA was steadily reinterpreted to impose judicial controls on the administrative state in place of the congressional controls that the LRA was supposed to create. One implication of the failure of the decision of 1946 to take hold, therefore, was the reinterpretation of the APA – a connection that has never been fully appreciated by legal scholars. This development has dramatically affected how administrative law is taught and understood.

### **Part I: The 79<sup>th</sup> Congress and the Summer of '46**

As with most mid-century congresses, the Democratic Party enjoyed majority control during the 79<sup>th</sup> Congress, which began its first session on January 3, 1945 and adjourned its second session on August 2, 1946, the day that President Truman signed the LRA. At the beginning of the 79<sup>th</sup> Congress Democrats held a 244-189-1-1 majority in the House and a 57-38-1 majority in the Senate (Robert LaFollette, Jr. of Wisconsin was a member of the Progressive Party and an integral figure in the debates over the LRA).<sup>7</sup> This majority was relatively stable leading up to the 1944 elections, but Democrats enjoyed a slightly larger majority than usual. Democrats picked up 20 seats in the House in 1944 and lost one seat in the Senate. Samuel Rayburn (D-TX), the longstanding Speaker of the House, was Speaker during the 79<sup>th</sup> Congress, and Alben Barkley (D-KY), a supporter of Roosevelt and the New Deal, was the Senate's Majority Leader (and eventually Vice President during President Truman's second term).

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<sup>7</sup> These numbers changed slightly during the 79<sup>th</sup> Congress due to vacancies in both the House and the Senate. Democratic majorities were diminished slightly in both chambers, but not significantly enough to alter the political dynamics. Two members of the House of Representatives came from third parties: Merlin Hull, Progressive from Wisconsin, and Vito Marcantonio, American Labor Party representative from New York.

Democrats were punished by voters in the 1946 congressional elections, however, and Republicans gained control of both houses, an unusual occurrence during this period. In the 1946 elections Republicans gained 55 seats for a 246-188 majority in the House and won twelve Senate seats, receiving a 51-45 majority. Senator LaFollette was defeated by Joseph McCarthy. Richard Nixon won his first term in the House of Representatives. There is considerable evidence that members of both parties knew the Democratic majority may change hands in 1946.<sup>8</sup>

The Republican majority was short-lived. The party, which had not controlled either chamber since 1932, and lost control of Congress two years later as a result of the 1948 elections. President Truman campaigned against the “Do Nothing Congress,” and Democrats retook both chambers.<sup>9</sup> The coalition that enacted the APA and the LRA in the summer of 1946, in sum, was replaced by voters with a Republican majority in the elections in the fall. That new majority was once again replaced in the 1948 elections, returning a Democratic majority to both chambers.

#### *The Enactment of the APA and LRA*

Both the APA and the LRA were considered by special committees throughout 1945, and debated and enacted in the summer of 1946. The APA, as discussed in the following section, was the product of several years of contestation between Congress and the president over the authority, discretion, and control of administrative agencies.<sup>10</sup> These battles produced several different reform proposals, one of which passed Congress but was successfully vetoed by Roosevelt, in the late 1930s: well before the APA emerged. The American Bar Association (ABA) sharply criticized the lack of legal process in administrative agencies, and laid the

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<sup>8</sup> Gary A. Donaldson writes, “as the 1946 congressional elections approached, the Republicans prepared for a significant gain in their congressional power. As early as June, the Democratic National Committee (DNC) was willing to admit privately that the Democrats might lose control of the House.” Donaldson, *TRUMAN DEFEATS DEWEY* (2014), at 5. One political cartoon from July 1946 depicted Barkley and Rayburn presenting the Legislative Reorganization Act to “John Q. Public,” but “Public” responds that “you ought to see the reorganization plan we’re working on for next November.”

<sup>9</sup> Truman’s slogan was a misnomer. The 80<sup>th</sup> Congress passed many important bills, such as the Taft-Hartley Act limiting the authority of the National Labor Relations Board, the National Security Act of 1947 which restructured the nation’s security and intelligence agencies, the Federal Water Pollution Control Act, and the Foreign Assistance Act, known colloquially as the Marshall Plan. In addition, the 80<sup>th</sup> Congress passed the 22<sup>nd</sup> Amendment, sending it to the states for ratification, and created the first Hoover Commission.

<sup>10</sup> See George B. Shepherd, *Fierce Compromise: the Administrative Procedure Act Emerges from New Deal Politics*, 90 *NORTHWESTERN L. REV.* 1557 (1996).

groundwork for fundamental reform. In Congress itself, hearings were held on the APA in the summer of 1945, and the bill was brought before the Senate on March 12, 1946 for debate. The Senate passed the APA on that date by unanimous consent with no dissent. From there, the APA went to the House, where it was approved on May 24, again with no dissent. Some technical amendments were adopted by the House and enacted by the Senate on May 27, and the APA became law with President Truman's signature on June 11, 1946.

The LRA came a few months later, but it was being considered at the same time. Its legislative history, though shorter than the APA's, followed a parallel path. A professional organization, the American Political Science Association, formed a committee in 1941 to study the modernization of Congress. That committee issued a report several years later, right before Congress formed the Joint Committee on the Organization of Congress (JCOC) in February of 1945. That committee, also known as the Monroney-LaFollette committee, held extensive hearings from March-June 1945 (just before the hearings were held on the APA). The JCOC's report was issued on March 1946, and the Senate debated the LRA on June 5-10 of 1946. The Senate passed the measure on June 10, by a 49-16 vote, but the bill was delayed in the House, as Speaker Rayburn stalled to avoid conflicts with powerful House committee chairs. On July 25, 1946, the House debated the bill and approved various amendments, passing the LRA by a 229-61 vote. The Senate approved the new bill on July 26 by voice vote, and Truman signed the LRA into law on August 2, 1946.

The full details of the legislative history and debates for both measures are the subject of the following sections, but this cursory view indicates that the two measures were under study and consideration at the same time, and ultimately were signed into law within two months of each other. They were not passed hastily, and each was the product of months (even years) of careful study. Both were informed by professional organizations that issued reports on administrative procedure and congressional modernization in the years leading up to their enactment. Both were controversial and highly-visible laws. Although each was passed by a wide majority – and in the case of the APA, by voice vote – leading members believed that they had overcome significant opposition in order to obtain passage. This was especially true of the LRA. Then-Representative Estes Kefauver (D-TN) and Jack Levin wrote a year after its passage that its enactment “upset all predictions” and that it faced “a bitter uphill fight in both the Senate

and House to shake Congress loose from two decades of inertia.”<sup>11</sup> Given the conflict surrounding both laws, and their visibility, it is reasonable to assume that members understood how the two measures would interact and would have one in mind when considering the other, and *vice versa*. The fuller history of the two measures generally supports these assumptions.

## **Part II: The Administrative Procedure Act: A Pioneer Effort**

As George Shepherd has explained, the APA was the product of a “fierce compromise” over the legitimacy of the administrative state that had emerged during the New Deal.<sup>12</sup> In particular, lawyers and judges understood that they stood to lose much of their authority in the transfer of political power from courts to administrative agencies. As Franklin Roosevelt put it in his veto message on the Walter-Logan Act, a measure predating but in some ways anticipating the APA, “a large part of the legal profession has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of the courts, in which lawyers play all the speaking parts, to the simple procedure of administrative hearings which a client can understand and even participate in.”<sup>13</sup> Roosevelt believed that the bar was the source of measures to restrain the power of administrative agencies, and if the statements of the American Bar Association (ABA) at the end of the 1930s were any indication, he was correct in this assessment.

The ABA’s concerns over the rise of the administrative state emerged along with the New Deal itself. In 1933 the ABA formed a special committee on administrative law, which proposed placing the power of adjudication back into the independent judiciary rather than administrative agencies. Five years later, the ABA issued its infamous report denouncing the “administrative absolutism” of the New Deal.<sup>14</sup> Eventually the ABA shifted from pressing for wholesale transfer of adjudication into independent courts, to advocating review boards in each administrative agency to review all decisions made by their personnel. Congress responded to these calls by passing the Walter-Logan Act in 1939. Walter-Logan would have subjected agencies to stronger judicial controls as well as more significant internal review procedures to

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<sup>11</sup> Estes Kefauver and Jack Levin, *A TWENTIETH-CENTURY CONGRESS* (1947), 220.

<sup>12</sup> Shepherd, *supra* note X.

<sup>13</sup> Roosevelt, “Veto of a Bill Regulating Administrative Agencies,” December 8, 1940, *available online via “The American Presidency Project,” at <http://www.presidency.ucsb.edu/ws/index.php?pid=15914>.*

<sup>14</sup> *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331 (1938), 346.

protect individuals aggrieved by agency decisions. It also would have required trial-type hearings for rulemaking and adjudication. Franklin Roosevelt’s veto ensured that Walter-Logan would not become law, but Congress continued to work towards passage of a compromise bill that could survive the president’s veto.

### *The APA’s Original Vision*

The debates on the APA shed light on its intended purpose. Generally speaking, in the words of Sen. Patrick McCarran (R-NV), who led the floor debates on the bill, the goal of the law was to “cut down on the ‘cult of discretion’” that had emerged “in the last decade or so.”<sup>15</sup> This was particularly true of the scope of review section, which provided that reviewing courts “shall decide all relevant questions of law.”<sup>16</sup> As Francis Walter (D-PA) (after whom Walter-Logan was partially named) explained on the floor of the House, the APA “requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions.”<sup>17</sup> Walter added the word “independently” in his summary of this statutory provision, in line with several members’ comments on the floor of Congress relating to this section. Generally, members agreed that the APA would establish judicial review of agencies’ statutory interpretations.<sup>18</sup>

Other provisions similarly limited the discretion and authority of administrative agencies. While the APA did not go so far as to create a complete separation of functions between agency prosecutors and adjudicators, it created an internal separation of functions that served as a middle ground between the current law and recommendations for a stricter separation. Rep. Howard W. Smith (D-VA) expressed hope for “a more complete separation of the judicial and executive functions” in the APA, but Francis Walter noted that the “‘internal’ separation of functions” would still mark an improvement over the current law.<sup>19</sup>

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<sup>15</sup> Patrick McCarran, *Improving ‘Administrative Justice’: Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A. Journal 827 (1946), 893.

<sup>16</sup> 5 U.S.C. §706(2)(A).

<sup>17</sup> ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79<sup>TH</sup> CONGRESS, 1944-1946 (1946), 370.

<sup>18</sup> See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 *Yale Law Journal* 908 (2017), at 988-990; Joseph Postell, *Bureaucracy in America: The Administrative State’s Challenge to Constitutional Government* (2017), at 240-242.

<sup>19</sup> APA LEGISLATIVE HISTORY, *supra* note X, at 348, 362.

The consensus that prevailed during the legislative debates over the APA, in sum, suggested that members of Congress intended it to serve as a constraint on the administrative state. It was generally acknowledged to be the product of careful study and compromise, and its provisions for administrative procedure, agency structure, and scope of judicial review were designed to place limits on how agencies could function in the future. Some viewed it as a final settlement of the New Deal controversy over the administrative state, but others announced, as the debates came to a conclusion, that the law marked the first step in a long process of limiting and constraining administrative authority. Rep. Earl Michener (R-MI) captured the sentiment of these reformers when he called the law “a pioneer effort” that “can be amplified as circumstances warrant.”<sup>20</sup> Rep. John Gwynne (R-IA) said, more forcefully, that the APA was “a start at least along the road that we must travel to regulate the many bureaus and tribunals that are now operating in the executive branch of the Government.”<sup>21</sup> Sen. McCarran wrote an article after the APA’s passage arguing that Congress still needed “to probe deeper into the general problem of regulatory government. We must do that, lest we become deluded into thinking that what we have done, or are now doing, marks the end of the road to which there is, in truth, no end.”<sup>22</sup> Perhaps the most colorful statement was from John Jennings Jr. (R-TN), who said that the APA was “a step in the right direction, but many more of the same tenor and effect need to be taken by Congress....The chief indoor sport of the Federal bureaucrat is to evolve out of his own consciousness, like a spider spins his web, countless confusing rules and regulations which may deprive a man of his property, his liberty, and bedevil the very life out of him.”<sup>23</sup> Most of the members who suggested further reforms would be forthcoming were Republicans. Since Republicans had some reason to think they may be the majority party in the subsequent Congress, they were perhaps laying the groundwork for a second bill that would augment the constraints the APA placed on administrative agencies.

The most vocal supporters and contributors to the legislative debates surrounding the APA, as indicated by these statements, were the critics of the administrative state. Supporters and moderates agreed with the provisions of the bill but were less emphatic about the need for

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<sup>20</sup> APA LEGISLATIVE HISTORY, *supra* note X, at 347.

<sup>21</sup> APA LEGISLATIVE HISTORY, *supra* note X, at 373.

<sup>22</sup> Patrick McCarran, *The Unwritten and Irrational Constitution of Regulatory Government in the United States*, 24 Notre Dame L. Rev. 62 (1948), 62.

<sup>23</sup> APA LEGISLATIVE HISTORY, *supra* note X, at 392.

future reforms. Sen. McCarran, for instance, spoke in grandiose terms about the significance of the APA and the nature of the problem it addressed. He famously called the APA “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government.”<sup>24</sup> Yet he admitted that in many cases, such as regarding the admissibility of evidence, “we sought an intermediate ground which we thought would be protective of the rights of individuals, and at the same time would not handicap the agencies.”<sup>25</sup>

In short, the APA was most strenuously supported by critics of the administrative state, who were the most vocal in the legislative debates, and who clearly indicated their desire to follow the APA with further and stricter reforms. But others supported the APA because its effects were modest and would not disrupt the administrative state that had been established during the New Deal. As one contemporary wrote colorfully in the *Yale Law Journal*, “[t]he basic purpose of the APA was obviously the wish to bring about, somehow, a curb of the administrative branch of our government....Its passage in part at least was due to the deep yearning of the traditional lawyer ‘for the comparatively simple life of yesteryear’ and his desire to put brakes on any new development in the law that disturbed his accustomed way of doing business. The main protagonist of this yearning was the American Bar Association.”<sup>26</sup> Nevertheless, he insisted, while the APA “naturally curbs administrative agencies to a certain degree,” those changes “do not come close to an effective curb of the administrative branch of the Government as such.”<sup>27</sup> The APA received broad, unanimous support in Congress because critics of the administrative state saw it as a first step to be followed by more significant reforms and the supporters of the administrative state understood that it would not significantly change the way it functioned.

### **Part III: The Legislative Reorganization Act: Congress Asserts Itself**

While the APA was, in part, the product of experts from the bar, the LRA was spurred by reform proposals that emerged from political scientists. As mentioned above, their professional organization, the American Political Science Association (APSA), formed a “Committee on

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<sup>24</sup> APA LEGISLATIVE HISTORY, *supra* note X, at 298.

<sup>25</sup> APA LEGISLATIVE HISTORY, *supra* note X, at 320.

<sup>26</sup> Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 *Yale L. J.* 581 (1951), 583.

<sup>27</sup> Parker, *supra* note X, at 587.

Congress” in 1941 to produce articles and reports recommending a restructuring of Congress. Many of the APSA’s proposals would work their way into the LRA.

*The Political Scientists Weigh In*

Political scientists during the mid-20<sup>th</sup> Century regarded Congress as a hopelessly outdated institution. It was easy to come to this conclusion in light of two factors: the growing complexity and rapidity of governmental action, and the arcane rules and procedures that had built up in Congress over time. As Roger Davidson writes, “[w]ithin the political science profession there was...a generation of intellectuals trained in ‘scientific management’ who looked with horror on what they regarded, no doubt rightly, as a messy, tradition-bound organization.”<sup>28</sup> APSA’s five-member “Committee on Congress” was formed in 1941 and was chaired by George Galloway, who had previously worked for the National Recovery Administration.<sup>29</sup> Under Galloway’s leadership the APSA committee produced a report in 1945 whose recommendations, unsurprisingly, “presaged those eventually made by the Joint Committee on the Organization of Congress” where Galloway would eventually serve as staff director.<sup>30</sup>

The political scientists’ committee was more aggressive in its proposals than the congressional committee that succeeded it, presumably because the members of the committee were less concerned about the political ramifications of their proposals. For instance, the APSA committee addressed the problems associated with using seniority to determine committee chairs. This seniority principle, combined with the significant powers held by the committee chairs appointed under that principle, led to a system where the most senior (and more conservative) members of the House controlled veto points that enabled them to obstruct legislation preferred by their junior colleagues. The APSA committee understood the political challenge of unseating these chairs, but recommended alternatives such as imposing term limits or age limits on chairs.<sup>31</sup> While these solutions had little chance of making their way into the

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<sup>28</sup> Roger H. Davidson, *The Advent of the Modern Congress: The Legislative Reorganization Act of 1946*, 15 LEG. STUD. QUARTERLY 357 (1990), 362.

<sup>29</sup> Daniel Stid, *Two Pathways for Congressional Reform*, in IS CONGRESS BROKEN? THE VIRTUES AND DEFECTS OF PARTISANSHIP AND GRIDLOCK (William F. Connelly, Jr., John Pitney Jr., and Gary Schmitt, ed., 2017), 12.

<sup>30</sup> Davidson, *supra* note X, at 362-3.

<sup>31</sup> THE REORGANIZATION OF CONGRESS: A REPORT OF THE COMMITTEE ON CONGRESS OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION (1945), 33-7, 80, quoted in Stid, *supra* note X, at 14.

legislation, given the power that committee chairs had in both chambers, other proposals essentially formed the basis of the congressional committee's suggestions and the final legislation itself. The APSA's Committee on Congress was followed by the creation of a congressional committee that would share the same views and aims as the political scientists.

### *The LaFollette-Monroney Committee*

The Joint Committee on the Organization of Congress (JCOC) was chaired by Representative A.S. Mike Monroney (D-OK) and Senator Robert M. LaFollette, Jr. (Progressive-WI). Monroney and LaFollette would go on to coauthor the LRA, and LaFollette led the floor debates over its passage in the Senate. The JCOC was a bipartisan group of twelve legislators (six Democrats, five Republicans, and LaFollette) and the reorganization proposal it devised was reported unanimously.<sup>32</sup> The Committee began its deliberations in spring of 1945, holding 39 days of hearings and receiving testimony from over a hundred witnesses before issuing its report.<sup>33</sup> Proposals to weaken the seniority principle were quickly dropped, and the Committee focused instead on weakening the discretion of the committee chairs and increasing committee transparency.

The JCOC discussed whether and how to address the seniority system, but failed to agree on any proposals. One problem, as already indicated, was political: the bill could not pass if resisted by powerful committee barons. This was likely the critical factor. The problem was also substantive, however. All of the alternatives to the seniority principle – giving party leaders the power to choose chairs, setting term limits, or allowing the majority party caucus to name chairs – posed their own difficulties.<sup>34</sup> As Sen. LaFollette testified at the committee hearings, there was no “solution better than the disease.”<sup>35</sup> In addition to avoiding the problem of changing the seniority principle, the JCOC was explicitly forbidden from making any recommendations that would alter the rules and procedures of either chamber of Congress.<sup>36</sup>

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<sup>32</sup> Eric Shickler, *DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS* (2001), 141. Though it was reported unanimously, Shickler notes that three Democrats dissented from specific measures in the proposal. *Id.*

<sup>33</sup> Davidson, *supra* note X, at 363.

<sup>34</sup> James L. Sundquist, *THE DECLINE AND RESURGENCE OF CONGRESS* (1981), 181.

<sup>35</sup> Cited in Sundquist, *supra* note X, at 181.

<sup>36</sup> Congressional Institute, “Joint Committees on the Organization of Congress: A Short History (2015), 4. (Available online at [https://conginst.org/wp-content/uploads/2015/10/brief\\_history\\_reform\\_committees.pdf](https://conginst.org/wp-content/uploads/2015/10/brief_history_reform_committees.pdf)).

Aside from these critical omissions, however, most of the core features of the LRA were anticipated in the JCOC report. First, the report advocated streamlining and reorganizing Congress's committee system to match the structure of the federal bureaucracy that had emerged over the past decades. Second, it supported increased staff resources and expertise within Congress so that it could compete with the vast staff and information capacities of the agencies. Third, it insisted upon the need for congressional committees to supervise and control the administration of the law in the executive branch. In sum, the report sought to put Congress in control of the bureaucracy. To advance this goal, the report also endorsed eliminating many items from the congressional agenda, such as private bills and bridge bills, that distracted members from their primary responsibilities as legislators and policymakers.

*Centralization and Party Leadership: The Forgotten Recommendations*

In addition to these major changes that were ultimately implemented in the final legislation, the JCOC's report also recommended the creation of structures and committees that would centralize power in Congress. Centralization would increase Congress's capacity to coordinate its activities, enabling it to work efficiently in spite of the checks and balances that the Constitution placed in the legislative process. The committee recommended the creation of a legislative budget process that would reduce the President's initiative in setting revenue and spending targets, as well as party policy committees that would set the agendas for their respective party caucuses. In other words, the committee connected the restoration of Congress's role with centralizing mechanisms that would increase party leadership control over the legislative agenda. As the committee report read: "[t]here is no unity of command in Congress today....As a result, policy making is splintered and uncoordinated. The proposed policy committees would formulate overall legislative policy of the respective parties and strengthen party leadership. They would also help to promote party responsibility and accountability for the performance of platform promises."<sup>37</sup>

This proposal for central party policy committees in each chamber foreshadowed the other major, and more famous, APSA report of the mid-1940s, "Towards a More Responsible Two-Party System." That report opened by identifying a core problem in the American political

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<sup>37</sup> Quoted in Donald A. Ritchie, *A HISTORY OF THE UNITED STATES SENATE REPUBLICAN POLICY COMMITTEE, 1947-1997* (1997), 1.

system, that “either major party, when in power, is ill-equipped to organize its members in the legislative and executive branches into a government held together and guided by the party system. Party responsibility at the polls thus tends to vanish.”<sup>38</sup> Without leadership that can proclaim a party program and incentivize individual members to enact it, the report argued, the will of the people could not be translated into a coherent policy agenda.

The desire for greater party leadership and centralized control of Congress reflected second thoughts about party leadership in Congress in the aftermath of the insurgent uprising against Speaker Joseph Cannon in 1909-1910.<sup>39</sup> Prior to 1910, party leaders, and especially the Speaker of the House, enjoyed enormous power that they used to influence party members to vote for party priorities. The three pillars of the Speaker’s authority were the power to recognize members, to appoint members to committees and committee chairs, and control of the Rules Committee, which served as the primary mechanism for legislation to reach the floor of the House for a vote.<sup>40</sup> Such a system enabled Congress to function efficiently on behalf of the party majority but it also dramatically reduced individual members’ independence and autonomy. Furthermore, it suppressed other majority coalitions, such as the inter-party coalition of Progressive Republicans and Democrats that conspired to reduce party leaders’ authority in 1909-1910.

Reducing the power of the Speaker liberated individual members from the influence of central leaders, but that freedom came with a cost. First, it inevitably led to a system of dispersed and decentralized power in the House’s committee system. Committee chairs, now chosen by seniority, were independent not only of party leaders but also of the entire party, on whose behalf the party leaders acted. This decentralization of power to autonomous committee chairs was less accountable to the membership as a whole. If members objected to the decisions of a Speaker, they could vote to replace the Speaker. There was no vote to assign the committee

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<sup>38</sup> American Political Science Association, *Toward a More Responsible Two-Party System*, 44 AM. POL. SCI. REV. (1950), v.

<sup>39</sup> There is an extensive scholarly discussion of the 1910 revolt, which was preceded by similar rules changes stripping the Speaker of authority in 1909. For a sample, see Schickler, *supra* note X, at 71-84; Charles O. Jones, *Joseph G. Cannon and Howard W. Smith: An Essay on the Limits of Leadership in the House of Representatives*, 30 J. Pol. 617 (1968); John D. Baker, *The Character of the Congressional Revolution of 1900*, 60 J. Am. Hist. 679 (1973).

<sup>40</sup> See Randall Strahan, *Leading Representatives: The Agency of Leaders in the Politics of the U.S. House* (2007), 79-126; Sundquist, *supra* note X, at 162-8.

chairs. Second, it made Congress less efficient and responsive to a national constituency represented by the majority party. The President, who could claim the support of a national constituency, eventually supplanted the Speaker and the Congress as the representative of the nation as a whole.<sup>41</sup> As Nelson Polsby explains, the New Deal-era Congress was “in the grip of a conservative, anti-New Deal alliance of southern Democrats and Republicans who constituted the real majority of the House, notwithstanding the nominal Democratic majorities” that were routinely produced by congressional elections.<sup>42</sup> This conservative coalition “was mostly obstructionist in character,” blocking measures that the majority of more progressive Democrats wished to bring to the floor for passage.<sup>43</sup> Although Sam Rayburn is well-known as one of the great Speakers in the history of the House, this conservative coalition thwarted him more often than not. His inability to lead the independent chairs chosen by the seniority principle meant the obstruction of progressive legislation.<sup>44</sup>

Members generally understood these costs associated with the turn away from centralized party leadership. Both liberal and conservative members testified before the JCOC that Congress was not organized, in the words of one liberal member, to advance “any alternative constructive program of its own” to compete with the President’s. Eugene Cox, a conservative Democrat from Georgia, responded to that statement by noting that “you have been classified as an ultra-progressive and I as a mossback reactionary, and still there is not the slightest difference between my views and the statement you make.”<sup>45</sup> The committee system was less responsible for this decline in congressional capacity than the weakening of party leaders’ tools for building and sustaining a functioning majority coalition.

The leading figures of the JCOC, and other members, in short, understood that restructuring the committee system and focusing on congressional oversight were not the only or even the primary goals of congressional reform. Congress could only compete with the administrative state, they understood, if it organized itself to advance a legislative agenda of its own. This would require rebuilding mechanisms that would integrate the activities of the committees and put them in the service of a party majority. This was an explicit aim of the

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<sup>41</sup> Sundquist, *supra* note X, at 155-187.

<sup>42</sup> Nelson Polsby, *How Congress Evolves: Social Bases of Institutional Change* (2004), 7.

<sup>43</sup> Polsby, *supra* note X, at 14.

<sup>44</sup> See Sundquist, *supra* note X, at 186.

<sup>45</sup> Quoted in Schickler, *supra* note X, at 142.

reformers on the committee. As Joseph Cooper explains, “the Reformers developed their ideas concerning the strengthening and contribution of Congressional policy committees within a broader frame of reference which included approval for party government.”<sup>46</sup> Scholars tend to overemphasize the committee restructuring portions of the LRA because they were eventually enacted into law, neglecting the necessary integrating reforms that the LRA’s supporters wanted to include alongside the committee reforms. The latter set of reforms trampled on too many entrenched interests to make it into the final legislation, which undermined the LRA’s effectiveness.

### *The Introduction of the LRA: LaFollette’s Vision*

Senator LaFollette led the floor debates over the LRA in the Senate, where it was introduced on May 13, two months after the JCOC issued its report. Debate began on June 5 and lasted several days. In his introductory remarks, LaFollette opened by highlighting the grave crisis that, in his view, threatened representative government in America. In his words, there was a “widespread congressional and public belief that a grave constitutional crisis exists in which the fate of representative government is at stake. Public affairs are now handled by a host of administrative agencies headed by nonelected officials with only casual oversight by Congress.”<sup>47</sup> As he had written a few years earlier, LaFollette believed that “representative government in the United States is on trial for its life.”<sup>48</sup> “If the control of governmental policy is to remain with the people’s elected representatives,” he continued, rather than “drift into the hands of a relatively irresponsible bureaucracy, Congress will have to streamline its operations.”<sup>49</sup> The main proposals of the LRA, LaFollette implied, were the product of a central concern: the growth of the administrative state and Congress’s inability to supervise and control the exercise of its powers. Rather than reducing the size or scope of that administrative state, the LRA was designed to place Congress in charge of it.

After identifying the problem, LaFollette summarized the LRA’s reforms. First and foremost in his view was “the strengthening of the policy-making functions of the Congress.”<sup>50</sup>

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<sup>46</sup> Joseph Cooper, *Congress and its Committees* (1988), at 240.

<sup>47</sup> Speech of Robert M. LaFollette, Jr., June 5, 1946, in *Congressional Record*, vol. 92, p. 6344.

<sup>48</sup> Robert M. LaFollette, Jr., *A Senator Looks at Congress*, *Atlantic Monthly*, July 1943.

<sup>49</sup> *Id.*

<sup>50</sup> *Congressional Record*, vol. 92, p. 6344.

In particular, reorganizing the standing committees “to meet modern conditions” was imperative.<sup>51</sup> To that end, “the pending measure proposes to simplify the committee structure and...to correlate it with the departments and agencies of the Federal Government.”<sup>52</sup> Reducing the number of committees, matching them to the administrative state, and defining their jurisdiction in law, were the central reforms of the LRA. In addition to restructuring the committees, the LRA sought to “regulariz[e] committee procedure as regards hearings, meetings, and records.”<sup>53</sup> As discussed earlier, LaFollette and others likely realized that the seniority principle for committee chairs was not negotiable, and sought to diminish their authority by constraining their discretion rather than controlling their appointment.

To facilitate this new committee structure and ensure it worked to oversee the administrative state, LaFollette explained the second category of reforms: “to improve the staff facilities of the committees in order to enable them better to discharge their responsibility in the field of their jurisdiction.”<sup>54</sup> Specifically, the LRA as introduced sought to provide “a high-caliber administrative assistant to perform non-legislative duties and departmental work” to each member of Congress, and to “provide for the appointment to each committee of four experts in its subject-matter field.”<sup>55</sup> These expert committee staffers would be appointed by committee chairs, but only after the approval of a new director of congressional personnel. The law as introduced therefore anticipated a kind of merit system for committee staff.

After summarizing the streamlining of committees and augmentation of committee staff, LaFollette discussed the third aspect of the LRA: strengthening political parties. LaFollette connected this goal with the need to reduce special interest influence on Congress. “[T]o strengthen party government as an offset to organized pressure groups,” he explained, “we provide in this measure for the establishment of majority and minority policy committees in each House of Congress.”<sup>56</sup> To further increase the efficiency and coordination of Congress, the original LRA also proposed “the creation of a Joint Legislative-Executive Council” that would “mitigate the periodic deadlocks which occur between the Executive and the Congress, and

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<sup>51</sup> *Congressional Record*, vol. 92, p. 6344.

<sup>52</sup> *Congressional Record*, vol. 92, p. 6344.

<sup>53</sup> *Congressional Record*, vol. 92, p. 6345.

<sup>54</sup> *Congressional Record*, vol. 92, p. 6345.

<sup>55</sup> *Congressional Record*, vol. 92, p. 6345.

<sup>56</sup> *Congressional Record*, vol. 92, p. 6345.

which have caused dangerous crises in the conduct of the Federal Government. I believe that such a council would tend to strengthen coordination and cooperation between the two branches.”<sup>57</sup> In short, LaFollette argued that Congress could only be in a position to offset the influence of the executive if two things were present: coordination authority inside Congress, and coordination mechanisms between Congress and the President. Without these, Congress’s fragmentation into committees and individuals with different constituencies would weaken its ability to set the policy agenda.

Only after emphasizing both the streamlining of committees and the strengthening of parties in Congress did LaFollette proceed to the fourth major reform of the LRA: “the provisions designed to strengthen congressional oversight of the execution of the laws by the executive branch.”<sup>58</sup> Most notably, section 136 as enacted read, “each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee.”<sup>59</sup> The original provision was for “continuous surveillance” rather than “watchfulness,” a term to which Senator Forrest Donnell (R-MO) objected. After a lengthy discussion between Donnell and LaFollette, Donnell’s proposed amendment to change “surveillance” to “watchfulness” passed.<sup>60</sup> In explaining the oversight provisions of the law, LaFollette emphasized the inevitability of delegation. In his words, “because of the complexity of our modern society it has become necessary for the Congress to delegate to the various departments and agencies of the Government powers for making rules and regulations in order that they may carry out in detail the intent of Congress.”<sup>61</sup> Each committee, the law provided, would have the power of subpoena. Special committees would be banned (an aspect of the law that generated significant discussion), so that the standing committees and their staff could

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<sup>57</sup> *Congressional Record*, vol. 92, p. 6345.

<sup>58</sup> Speech of Sen. LaFollette, June 6, 1946, *Congressional Record*, vol. 92, p. 6365.

<sup>59</sup> Public Law 79-601; 60 Stat. 812, section 136 (August 2, 1946).

<sup>60</sup> See Rosenbloom, *supra* note 1, at 69-71. This was not the only occasion on which Senator Donnell caused a lengthy digression on a relatively trivial matter during the debates over the LRA. At another point he prompted an extended debate over whether the LRA was unconstitutional because it made rules for both chambers of Congress, whereas the Constitution says that “each House” shall make its own rules. Each chamber was therefore, in his view, delegating control over its rules to the other chamber (and the President who signed the law). Many members chimed in to note, first, that each chamber could amend its rules at any time after the law was passed, and second, that historically this was not the first time Congress had enacted a law setting up procedures or rules for both chambers. See *Congressional Record*, vol. 92, pp. 6391-4.

<sup>61</sup> *Congressional Record*, vol. 92, p. 6365.

become intimately familiar with the details of the execution of the laws within their jurisdiction. As Everett Dirksen (R-IL) explained colorfully, the expert staff, armed with the subpoena power, “must go and live in the structure of Government and find the weaknesses and then...sit at the elbows of the Members of Congress as they are assembled in committees as say: ‘Ask him this question; as him how he justifies this expense or that procedure.’”<sup>62</sup> The combination of committee jurisdiction, expertise, and subpoena power would enable congressional committees to use hearings as weapons to subject administrative agencies to their control. This would ensure coordination between the legislative and administrative parts of the government. As LaFollette would later state,

“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 or 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 that is contained in almost every act, is exercising it as it was intended by Congress.”<sup>63</sup>

In other words, standing committees with their expert staff would partner with agencies in carrying out the law, rather than delegating unfettered discretion to them. LaFollette envisioned extensive meetings and discussions, and clear lines of communication, between the committees and the agencies, rather than *ad hoc* oversight. This would be an ongoing, collaborative relationship between Congress and the administrative state, rather than a narrow oversight responsibility.

In addition to these central features of the LRA – committee restructuring, increase in staff expertise, party policy committees and a joint legislative-executive council, and oversight mechanisms – LaFollette explained the other reforms of the law (which are only briefly summarized here for the sake of brevity). The law required the registration of lobbyists (again, in LaFollette’s words, to ensure that “the true attitude of public opinion” is not “distorted and obscured by pressures of special-interest groups”<sup>64</sup>), the creation of a legislative budget process that foreshadowed the 1974 Budget Control Act, and the Federal Tort Claims Act (Title IV of the

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<sup>62</sup> *Congressional Record*, vol. 92, p. 10051.

<sup>63</sup> *Congressional Record*, vol. 92, p. 6445.

<sup>64</sup> *Congressional Record*, vol. 92, p. 6367.

LRA) and General Bridge Act (Title V of the LRA), which transferred onerous constituent service functions to administrative agencies.

LaFollette concluded his summary remarks on the LRA by reminding members of the crisis that the Act was intended to avert: “a tidal wave of complex, difficult, and intricate problems is threatening to engulf the legislative arm of the Government....under our present archaic organization it is impossible for Congress to transact the business which it has become imperative that it handle and dispose of at each session.” LaFollette argued that “The fate of democracy will depend upon whether we make the legislative arm of the government efficient and responsive to the will of the people.”<sup>65</sup> Like the floor leaders for the passage of the APA, LaFollette connected the LRA’s reforms to the need to preserve representative government in the face of executive and bureaucratic encroachment. At stake was democracy itself. While the LRA and APA advanced different aspects of the solution – increasing congressional capacity and efficiency versus applying legal constraints on agencies – they were designed to address the same problem, namely the inevitable arrival of the modern administrative state. The LRA’s approach to reasserting congressional control, in LaFollette’s view, required merging committee consolidation, increased committee staff expertise, and centralized party control.

#### *Amendment and Passage of the LRA*

Several aspects of the LRA were controversial in the Senate, and central features of the law were altered during the amendment process. The creation of a version of merit system for committee staff provoked significant resistance. As mentioned earlier, the Act as introduced created a director of congressional personnel who would provide committee chairs with a list of suitable candidates for appointment as committee staff. In addition to this, LaFollette expected that committee staff would not move with committee chairs from one assignment to another. As he explained, “with the exception of one or two committees in the Senate, the staff of the committee moves around with the chairman. We want to get away from that.”<sup>66</sup> The committee

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<sup>65</sup> *Congressional Record*, vol. 92, p. 6370.

<sup>66</sup> *Congressional Record*, vol. 92, p. 6395.

staff would serve on good behavior and have merit protection similar to that possessed by civil servants.<sup>67</sup>

Among others, senator Walter George (D-GA), a powerful southern conservative committee chair, strenuously objected to the process envisioned by the Act as introduced. Somewhat hyperbolically, he claimed that the director would be a “strong man” and “he will reach the point where he will overshadow both Houses of Congress.”<sup>68</sup> At other points in the debate the director of personnel was called a “superlord,” “generalissimo,” “czar,” and “dictator.”<sup>69</sup> Multiple senators objected to taking away their “patronage” appointments over congressional staff. Elmer Thomas (D-OK), for instance, asserted that “to provide a man with authority to dictate the patronage on the Senate and the House side both is to me unthinkable.”<sup>70</sup> LaFollette responded that “the objective of this provision” is precisely “to do away with the patronage system which exists in congressional employment.”<sup>71</sup> Thomas defended the senators’ control over staff appointments: “I would not say that I am for the spoils system. But when the Democratic Party is in power I am of the opinion that the Democratic Party is entitled to have its affairs administered by the men, and women, for that matter, who are in sympathy with Democratic principles and Democratic policies.”<sup>72</sup> Thomas’s objections were echoed by Senator McKellar (D-TN), and ultimately LaFollette agreed to the elimination of this proposal, leaving the selection and control of committee staff in the hands of committee chairs.<sup>73</sup>

Aside from the elimination of the merit system for committee staff, the major amendments to the LRA were made by the House. The House subjected the LRA to a lengthy delay upon its arrival from the Senate before weakening many of its provisions by amendment. Roger Davidson notes that the House’s delay ensured that “there was no time to negotiate further before Congress adjourned....Seeing no alternative but to accept the emasculated bill presented

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<sup>67</sup> Clarifying this middle position between merit protections and at will employment, LaFollette explained later in the debate: “we have declared the principle that he should have tenure. But of course tenure does not mean the permanent freezing of a man into a job....[W]e do not propose to give him any statutory rights such as those employed by civil-service employees. A civil service employee who is discharged may appeal to the Commission for a review of his case....That right is not given in this bill to any person who holds one of these [staff] positions.” *Congressional Record*, vol. 92, p. 6441.

<sup>68</sup> *Congressional Record*, vol. 92, p. 6372.

<sup>69</sup> *Congressional Record*, vol. 92, 6454, 6460, 6529, cited in Rosenbloom, *supra* note 1, at 72.

<sup>70</sup> *Congressional Record*, vol. 92, p. 6459.

<sup>71</sup> *Congressional Record*, vol. 92, p. 6459.

<sup>72</sup> *Congressional Record*, vol. 92, p. 6459.

<sup>73</sup> *Congressional Record*, vol. 92, p. 6561.

to them by the House, LaFollette moved that the Senate agree to the House amendments” rather than go to conference committee.<sup>74</sup> Speaker of the House Sam Rayburn and his allies in the House, therefore, may have imposed this delay for strategic purposes.

The question of party leadership through central party committees was especially significant. Rayburn understood the threat it posed to powerful committee chairs, as well as the threat that centralized party leadership posed to the tenuous relationship between progressive and conservative Democrats. More specifically, he believed that it represented a threat to his personal power. Although (or perhaps because) he led a fractured caucus, his personal relationships were vital for securing harmony within the party and moving legislation forward. Party committees imposing a common policy agenda on such a disparate coalition would threaten the peaceful coexistence of its members and provide a mechanism for undermining Rayburn’s personal influence.

In a series of speeches on the history of Congress, Sen. Robert Byrd later explicitly accused Rayburn of delaying the LRA in order to eliminate this part of the plan: “The bill moved to the House. There it rested for six weeks on the Speaker’s desk....Speaker Rayburn, despite earlier support for reform, recognized in the bill extensive challenges to his autonomy. Policy committees would rationalize the murky decision-making processes and fix accountability.”<sup>75</sup> Ultimately, the House stripped the party policy committees from the LRA and LaFollette was forced to accept this alteration. As Sundquist explains, “Rayburn exercised one of his office’s remaining arbitrary powers to block creation of the proposed majority policy committee in the House and, with it, the joint legislative-executive council. Deletion of these provisions was among the concessions he demanded before he would refer the Senate-passed bill for committee consideration.”<sup>76</sup> By hesitating to refer the bill to the appropriate committee, Rayburn could stall the legislation in order to obtain this concession. George Galloway boldly called Rayburn’s elimination of the committees “an astonishing piece of political piracy.”<sup>77</sup> However, given the relative weakness of the Speaker of the House during the 1940s, compared to the committee chairs and the chair of the House Rules Committee, it is also possible that Rayburn was

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<sup>74</sup> Davidson, *supra* note X, at 364.

<sup>75</sup> Robert C. Byrd, *THE SENATE, 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* (1988), Vol. 1, p. 547.

<sup>76</sup> Sundquist, *supra* note X, at 188-9.

<sup>77</sup> Galloway, *supra* note X, at 345-6; Quoted in Byrd, *supra* note X, at 547.

protecting the prerogatives of these members rather than his own. Or, more specifically, Rayburn knew that his best opportunity for influencing committee chairs was to do so personally, rather than through formal mechanisms that would threaten their autonomy. As Schickler explains, the party policy committee and joint legislative-executive council proposals were both “dropped from the bill at the insistence of House Speaker Sam Rayburn” because “party committees would reduce his ability to manage the House through informal contacts.”<sup>78</sup> He may have known that the LRA stood little chance of passing if it threatened the most powerful members of the House.<sup>79</sup>

Although the party policy committees did not survive the House’s amendment process, they were still created by the Senate, which passed a supplemental appropriation in 1947 to create majority and minority policy committees in its chamber. Michael Crespin, Joel Sievert, Anthony Madonna, and Nathaniel Ament-Stone have argued that the creation of a majority party committee in the Senate measurably increased party unity in the Senate, enabling the majority party to overcome the collective action problems inherent in the individualistic nature of the Senate by structuring procedural votes.<sup>80</sup>

In addition to the elimination of party policy committees, the House also diluted the committees’ subpoena power that the Senate version would have granted. This power was limited to only a handful of House committees: Appropriations, Expenditures in the Executive Department, and Un-American Activities. An amendment to extend that power to all House committees failed on the floor of the House.<sup>81</sup> It was opposed by Monroney, who explained on the floor that the power was granted to Senate committees to “get away from that outbreak of special committees” with which “the Senate is plagued.”<sup>82</sup>

#### **Part IV: The Failed Promise of 1946**

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<sup>78</sup> Schickler, *supra* note X, at 145-6.

<sup>79</sup> As the foregoing analysis suggests, Rayburn’s view that the party policy committees threatened his power, rather than potentially enhanced it, may have been short-sighted. Sean Theriault and Mickey Edwards write, for instance, that under the LRA “the Speaker marginally lost power to refer bills to favored committees....No longer could Speakers skirt difficult committee chairs by naming a new and more complaint committee. Rather, the party leadership was forced to work through the nineteen existing channels to pass legislation.” Theriault and Edwards, *CONGRESS: THE FIRST BRANCH* (2020), at 214.

<sup>80</sup> Crespin, Madonna, Sievert, and Ament-Stone, *supra* note X.

<sup>81</sup> Schickler, *supra* note X, at 162.

<sup>82</sup> *Congressional Record*, vol. 92, p. 10073.

The amendments imposed by conservative Southern Democrats in the Senate, and by the House as a whole, disappointed many of the LRA's core architects and supporters. They openly lamented the weakening of the law. Estes Kefauver and Jack Levin wrote a book in 1947, *Twentieth-Century Congress*, that advocated further reforms to strengthen central party and leadership mechanisms to make Congress more efficient. They envisioned a more parliamentary institution, proposing a regular "question period" in which administrators would be subjected to questioning on the floor of the Senate and House.<sup>83</sup> They also sought a close, even physical relationship between the legislative committees and administrative agencies. Agencies, in their vision, would establish offices in the Capitol next door to the committee rooms, and the physical interaction between senior agency officials and legislative committees would draw the agencies into the committees' orbit.<sup>84</sup>

Of course, the major problem that progressive Democrats identified with the LRA was the failure to address the seniority rule for selecting committee chairs. (One of the sections of Kefauver and Levin's book was titled "Seniority, Sectionalism, and Senility.") The independence that Democratic committee chairs had from their party made the failure of the House to create party policy committees especially frustrating to progressives.

This failure to establish the policy committees was universally lamented by the LRA's main proponents. Five years after the law was enacted, George Galloway, the scholar who influenced both the APSA report and the JCOC's work, noted the ineffectiveness of many of the LRA's provisions, especially the Senate's policy committees, which he claimed "have thus far failed to achieve their full potential. As instruments for promoting more effective liaison and cooperation with the President, they have also been a disappointment, partly because of the lack of similar party policy committees in the House of Representatives. Their limited achievements to date can be attributed...to their composition, to the fragmentation of power in Congress and to the deep internal divisions within both of our major political parties."<sup>85</sup> Galloway's assessment, in short, was that the fragmentation of power in Congress and the inability of congressional

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<sup>83</sup> Kefauver and Levin, *supra* note X, at 70-1.

<sup>84</sup> Kefauver and Levin, *supra* note X, at 149. This also seems to be LaFollette's vision, in his comment about "meetings and exchange of views and gathering of information" between committees and agencies. See *supra* note X and accompanying text (the quote on p. 6445 of the Record).

<sup>85</sup> Galloway, "The Operation of the Legislative Reorganization Act of 1946," *American Political Science Review* 45 (1951), 52

leaders to discipline members would frustrate the goals of the reformers. More bluntly, he elsewhere claimed that “if reorganization stops here, some of the changes may do more harm than good.”<sup>86</sup>

Galloway may have been thinking of the weakening of the party-centered integrating reforms when he made this statement. LaFollette, writing in 1947, having just lost his Senate seat to Joseph McCarthy, emphasized the need for more coordination and centralization of authority in Congress.<sup>87</sup> LaFollette emphasized the centrality of the party policy committees to congressional reorganization. “To meet the need for policy integration in terms of a legislative program,” he explained, “the Joint Committee [on the Organization of Congress] proposed to set up policy committees of the majority and principal minority parties.” This reform, had it survived the legislative process, would ensure that “By looking at the whole picture, greater emphasis would be placed on national welfare as against sectional or special interests.”<sup>88</sup> Instead of committees that were unrepresentative of the whole Congress, party policy committees would reflect the wishes of a broader, national coalition. LaFollette envisioned that “the policy committees would be an advisory superstructure on the simplified committee system.”<sup>89</sup> LaFollette’s arguments echoed the report of the JCOC, which he chaired and which also viewed Congress through a similar, parliamentary-style lens: “in a democracy national problems must be handled on a national basis. Only through the expression of the will of the people by their support of political parties on the basis of their platform pledges can the majority will be determined.”<sup>90</sup> Congress could be reformed into a national legislature with the responsibility for advancing a national program only if party responsibility could be integrated into the existing decentralized committee structure.

LaFollette regretted that this part of the LRA was not enacted. “The importance of providing machinery for a unified legislative program and over-all planning cannot be over-emphasized,” he argued. “Lack of such planning and of unity of objectives is at the root of certain congressional weaknesses that are frequently attributed to other causes.”<sup>91</sup> Without this

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<sup>86</sup> Quoted in Estes and Kefauver, *supra* note X, at 221.

<sup>87</sup> Robert LaFollette, *Systematizing Congressional Control*, 41 Am. Pol. Sci. Rev. 58 (1947).

<sup>88</sup> LaFollette, *supra* note X, at 63.

<sup>89</sup> LaFollette, *supra* note X, at 63.

<sup>90</sup> Quoted in Cooper, *supra* note X, at 241.

<sup>91</sup> LaFollette, *supra* note X, at 64.

mechanism for disciplining the committees, the final result of the LRA was distorted. As Eric Schickler writes, without the “integrative mechanisms to coordinate committee activities,” the consolidating of the committees actually “reinforc[ed] the already-strong system of powerful standing committees and committee chairmen” that were not representative of the Congress as a whole.<sup>92</sup> This “tension between broad institutional goals and narrower individual and committee-based objectives compromised the success of the Reorganization Act” and “made the position of party leaders even more difficult,” he concludes.<sup>93</sup>

### *The Post-1946 Evolution of Congress*

Therefore, the LRA’s supporters knew that its value was limited by the political dynamics they confronted. Any attempt to diminish the power of committee chairs, particularly by weakening the seniority principle that protected their autonomy, would have scuttled the other reforms they could achieve. The House’s amendments had struck other approaches to discipline committees. Thus there were limits to what the LRA could accomplish, but many of its supporters thought they had still made positive steps in enacting the law, particularly in consolidating the committee structure and rendering it more accountable.

The immediate implementation of the LRA, however, thwarted many of these tempered expectations. In addition, Congress’s long-term trajectory, especially at the end of the 20<sup>th</sup> Century and into the 21<sup>st</sup>, altered the dynamics between committees and party leaders in ways that Congress could not have foreseen in 1946. In the short term, as James Sundquist has written, the provisions of the LRA “turned out...to be less than self-executing.”<sup>94</sup> The provisions of the Act that sought to constrain the discretion of committee chairs by requiring regularly scheduled meetings, agendas defined by committee members rather than the chair, and open records of committee proceedings were simply ignored.<sup>95</sup> Committee chair power and autonomy, therefore, were largely untouched by the LRA.<sup>96</sup>

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<sup>92</sup> Schickler, *supra* note X, at 145.

<sup>93</sup> Schickler, *supra* note X, at 146.

<sup>94</sup> Sundquist, *supra* note X, at 182.

<sup>95</sup> Sundquist, *supra* note X, at 182.

<sup>96</sup> As Sundquist writes, even if a committee could organize to force chairs to comply with the requirement to hold regularly-scheduled meetings, “he still had many ways of stalling action....And the Reorganization Act did not deal with some key elements of the chairman’s power, notably his control over the constitution of subcommittees, referral of bills to them, and assignment of staff to facilitate their work.” Sundquist, *supra* note X, at 183.

The authority of committee chairs, in fact, was augmented by the LRA's core reform, namely the reduction of the number of committees and the defining of their jurisdictions to give them clearer authority over policy. As Walter Kravitz of the Library of Congress wrote, the LRA "vastly expanded the range of policy areas controlled by many committees. These larger jurisdictions, in turn, magnified the influence of the chairs and made their abuses of power more intolerable. Moreover, the fewer the chair positions, the longer a member could expect to wait before succeeding to one under the seniority system."<sup>97</sup> The LRA made the chairs more powerful and made their seniority even more valuable.

Accounts of Congress in the years after 1946 illustrate the authority still wielded by the committee barons. Graham Barden (D-NC), for example, ran the House Committee on Education and Labor, an important committee for the enactment of progressive legislation, with an iron fist. As one junior member of the committee remarked, "Once he became chairman in 1951, Barden could effectively choke any legislation that had a liberal smell to it. He called committee hearings...arbitrarily and without warning. He adjourned them when he wished – often suddenly if they took a turn he didn't like."<sup>98</sup> He could filibuster hearings, call witnesses to filibuster on his behalf, and generally dominate the committee's proceedings. Harold Cooley (D-NC) on the Agriculture Committee once told a junior member that "You can attend the meetings, but I'm not going to recognize you to speak. And you won't be able to amend any bills in the committee....And nothing you want to do for your district will come out of this committee. Soon as I find out it's you who wants it, it will be stopped. Let me give you some advice. Get off the committee. You're a zombie on this committee. You're a walking, living, dead man."<sup>99</sup> Similar stories of all-powerful committee chairs running roughshod over their colleagues abound.<sup>100</sup>

At the same time, the restructuring of the committees, according to Galloway, was the "keystone in the arch of congressional reform," but it was undermined by the growth of subcommittees which occurred in the decades following the law's passage.<sup>101</sup> As Roger Davidson explains, "members' desires for leadership posts soon frustrated the reformers' neat

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<sup>97</sup> Walter Kravitz, *The Legislative Reorganization Act of 1970*, 15 Leg. Stud. Quart. 375 (1970), at 376.

<sup>98</sup> Quoted in Polsby, *supra* note X, at 17.

<sup>99</sup> Quoted in Polsby, *supra* note X, at 20.

<sup>100</sup> See Polsby, *supra* note X, at 16-20, and Sundquist, *supra* note X, at 176-186.

<sup>101</sup> Galloway, *supra* note X, at 41.

design,” and “proliferation of subcommittees after 1947 further distorted the Reorganization Act’s tidy scheme....[M]any of the old jurisdictional lines surfaced as subcommittees within the newly consolidated committees.”<sup>102</sup>

The increase in resources for committee staff, as a means of securing more vigilant oversight, was also coopted by committee chairs who wanted to preserve their patronage over such appointments. They were successful in eliminating the scheme for a merit system for committee staff and the creation of a director of congressional personnel. Still, the strengthening of committee oversight was, as Davidson puts it, “the most notable legacy of the 1946 act.”<sup>103</sup> The LRA gave “governmentwide investigating authority” to the Government Operations Committee, and subsequent legislation gave that committee further authority to coordinate the oversight activities of all congressional committees.<sup>104</sup>

In short, “relatively few of the major objectives of the Legislative Reorganization Act were achieved.”<sup>105</sup> The reason is that reformers ran into political opposition that required the weakening of the law’s provisions regarding committee expertise and committee accountability to the chamber as a whole. While the LRA certainly increased committee oversight of the administrative state, it failed to accomplish that objective in a way that would make the administrative state accountable to Congress (and thus to the will of the people) as a whole. Instead, political scientists identified interest group capture through “iron triangles” as a key problem of the autonomous committee structure abetted by the LRA.

Changes later in the 20<sup>th</sup> Century produced a Congress even further from the vision anticipated by the LRA’s supporters. A variety of changes to congressional rules and procedures have increased the Speaker of the House’s control over committee assignments and the Rules Committee, which controls the flow of legislation in the House. The seniority system was ended by the Democratic Party following the 1974 elections. Committee chairs are subjected to term limits in the House as a result of reforms that followed the Republican Party’s takeover of the House in the 1994 elections. The Senate Majority Leader increasingly uses procedural

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<sup>102</sup> Davidson, *supra* note X, at 366.

<sup>103</sup> Davidson, *supra* note X, at 367.

<sup>104</sup> Sundquist, *supra* note X, at 325. The 1970 LRA expanded the power of the Government Operations Committee; see Kravitz, *supra* note X, at 394 – but that authority was rescinded in the 1980s.

<sup>105</sup> Davidson, *supra* note X, at 370.

techniques to avoid amendments in the Senate and closed rules are increasingly the norm in the House, increasing majority party control over the congressional agenda.<sup>106</sup> If the challenge for the LRA's supporters in 1946 was a decentralized Congress with power located in autonomous committee chairs, weakening collective oversight of the administrative state, today's challenge comes from a different source but produces the same result. Party leadership has weakened the committee system to such an extent that committees no longer serve as effective overseers of the bureaucracy.

In short, the core ideas of the LRA were never fully accomplished by the terms of the law itself, by its implementation immediately following its passage, or by the way Congress functions today. Rather than placing Congress in charge of the administrative state, the LRA merely served to consolidate the committee system. The chairs remained autonomous, powerful barons that advanced their own interests rather than ensuring that administrative agencies followed the wishes of Congress as a whole. At the same time that the LRA was failing to live up to its promise, in the years following its enactment, the APA was also undergoing a significant transformation.

#### *The Evolution of the APA/Administrative Common Law*

As described earlier, many supporters of the APA believed that it was only a first step in the direction of needed, more fundamental reforms to the administrative state. Yet, just as basic aspects of the LRA were never fully implemented or followed, there was a significant gap between the APA as written and its operation in practice. As Evan Bernick has explained, “[t]oday, much administrative law related to the APA is administrative common law that has never been grounded in the APA’s text or history.”<sup>107</sup>

The gap between the APA and its implementation can be seen in a variety of legal issues.<sup>108</sup> The APA’s formal rulemaking procedures, for instance, fell into near obsolescence as

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<sup>106</sup> See James Wallner, *THE DEATH OF DELIBERATION: PARTISANSHIP AND POLARIZATION IN THE U.S. SENATE* (2013).

<sup>107</sup> Bernick, “Envisioning Administrative Procedure Act Originalism,” *Administrative Law Review* 70 (2018), 815. See also John Duffy, “Administrative Common Law in Judicial Review,” *Texas Law Review* 77 (1998).

<sup>108</sup> The various areas of administrative law where administrative common law has been developed is ably chronicled by Bernick, *supra* note X, at 817-21. This paragraph merely touches upon a few elements of this development.

a result of the Supreme Court’s decision in *Florida East Coast Railway*.<sup>109</sup> More significantly, the APA’s informal rulemaking procedures have been expanded dramatically by the courts. And the scope of review envisioned by the APA has been expanded in some contexts, diminished in others.<sup>110</sup> In short, the scope of judicial review over administrative process and substance expanded dramatically in the 1960s and 1970s, at the same time that the LRA was failing to achieve its intended result.

## **Part V: The Decline of the LRA and the Expansion of the APA**

These two developments – the expansion of judicial review under the APA and the failure of the LRA to place Congress in full control of the administrative state – are likely linked. The decision of 1946 said, in essence, that the administrative state was here to stay, but that instead of following the President’s will, it would be first held accountable by a reorganized and revitalized Congress, with judicial review as the backdrop. The LRA’s shortcomings disrupted that settlement. But the concern about a presidentially-directed administrative state had only become more acute, with President Richard Nixon in the Oval Office rather than a President Harry Truman. Without a Congress that is adequately in control of the bureaucracy, the APA’s provisions for judicial review had to be elaborated, in the minds of reformers, to place meaningful checks on administrative discretion.

Prevailing scholarly accounts of the transformation of the APA, while accurate, tend to overlook this factor in the change. For instance, Evan Bernick writes correctly that agencies’ shift to rulemaking over adjudication combined with “new concerns...raised about the bureaucracy” and the possibility of agency capture to produce “novel agency-constraining doctrines” in administrative law.<sup>111</sup> These two factors are surely critical in explaining the APA’s evolution in the 1960s and 1970s, but the failure of the LRA to place Congress in control of the administrative state surely exacerbated these concerns. In other words, had Congress been in a position to prevent agency capture and constrain and guide administrative rulemaking,

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<sup>109</sup> *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973). See Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 Geo. Wash. L. Rev. Arguendo 1 (2017).

<sup>110</sup> *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and its application in subsequent cases which, arguably, was very different from the holding of the case itself. See Gary Lawson and Stephen Kam, “Making Law Out of Nothing At All: The Origins of the *Chevron* Doctrine,” *Administrative Law Review* 65 (2013): 1-75.

<sup>111</sup> Bernick, *supra* note X, at 816.

progressives would have been able to use those mechanisms for constraining agencies rather than relying on courts.

This was a tragic outcome. As the congressionally-centered approach to control of the administrative state through the LRA was abandoned, the judicially-centered approach through the APA was expanded. Judicial control, however, was never the ideal or primary goal of the reformers in Congress in 1946 who made their peace with the administrative state. Ironically, it was the more conservative coalition that enacted the APA which sought to use the courts to constrain the bureaucracy. Yet their approach, embodied in precursors to the APA such as the Walter-Logan Act, hardly resembled the APA we have today.

This has affected dramatically the way administrative law is taught and understood in the United States. As judicial review was expanded to take the place of congressional authority over the administrative state, administrative law focused almost exclusively on judicial review of administrative action. The dynamics of the legislative process and committee oversight have traditionally played a limited role in the teaching of administrative law. There are signs in the legal scholarship that this may be changing.<sup>112</sup> One implication of this article is that the renewed focus on Congress's role in administrative law should be encouraged, in spite of the fact that Congress has not assumed the role in the administrative state envisioned for it by the LRA's enactors.

In sum, the failure of the LRA to establish Congress as the leader of the administrative state has likely played a significant role in the reinterpretation of the APA and the emergence of judicial review as a central feature of the administrative state. This development in the 1960s and 1970s ran contrary to the expectations of the progressives who first built the administrative state and the reformers who pressed for the enactment of the LRA.

More fundamentally, the LRA's failure sacrificed the original vision of many LRA proponents, which focused on building a close and ongoing relationship between congressional

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<sup>112</sup> This increased interest is visible across the ideological spectrum. For a small sample, see Christopher Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 Mich. L. Rev. 1101 (2018); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015); Abbe R. Gluck, Anne Joseph O'Connell, and Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 Columbia L. Rev. 1789 (2015); Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation From the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Parts I & II*, 65 Stan. L. Rev. 901 (2013); 66 Stan. L. Rev. 725 (2014).

committees and administrative agencies. While much of this envisioned relationship centered on oversight, reformers also wanted Congress to use its legislative powers to render the administrative state more accountable. As explained above, even the more progressive supporters of the LRA acknowledged the threat to democracy posed by the administrative state, especially if Congress were not placed at the head of it.<sup>113</sup> On the floor of Congress, Senator LaFollette and others emphasized the ongoing process of collaboration between Congress and the administrative state that the LRA would inaugurate.<sup>114</sup> After the LRA's passage, other reformers continued to press for Congress and the administrative state to be more deeply integrated, even to the point of physical integration.<sup>115</sup> However, the LRA's advocates were not entirely clear about the form in which oversight would be conducted. Given that most of the administrative state's work in the 1940s consisted of adjudication rather than rulemaking, it is unclear how LaFollette and others would want Congress to supervise agencies.

Therefore, what this article calls the "Decision of 1946" was never realized in practice. An administrative state that would be controlled by Congress, with judicial review as a backdrop, quickly morphed into an administrative state that was constrained by an extensive body of judicially-imposed administrative law doctrines, as Congress increasingly faded into the backdrop. Revisiting this original, post-New Deal settlement illustrates an important path not taken in the history of the administrative state – one which is still worth pursuing decades after these major statutes were enacted in the summer of 1946.

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<sup>113</sup> Cite previous discussions from the JCOC and LaFollette's opening speech with *supra* note X and accompanying text.

<sup>114</sup> LaFollette, *supra* note X and accompanying text.

<sup>115</sup> See Kefauver and Levin, *supra* note X and accompanying text.