

Why Two Congressional OIRAs are Better Than One

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The political branches of government possess competing constitutional claims for leadership primacy over the administrative state. On one hand, Congress exercises its enumerated powers to create and fund domestic regulatory agencies; on the other, presidents have a duty to “take Care that the Laws be faithfully executed.” Thus equipped with overlapping authorities, these institutions historically have competed for the reins of administrative policymaking. Such competition, moreover, represents a constitutionally healthy manifestation of dueling “ambitions.” At present, however, the contest between the political branches is dangerously out of balance. In the post-WWII era, during a period known by scholars as “Committee Government,” Congresses and presidents were evenly matched as they vied for control of the administrative state. Yet over the last 40 years, Congress has sidelined itself, while presidents innovated a powerful new tool, known as White House regulatory review, with which to superintend the administrative state. Rather than “Committee Government,” American politics is now characterized by “Presidential Administration,” due largely to the president’s ever-tightening grip over regulatory policy. To remedy the constitutionally worrisome imbalance between the political branches, this paper proposes the creation of a new 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.

INTRODUCTION 2

I. THE RISE AND FALL OF CONGRESS’S CAPACITY TO COMPETE 3

 A. Congress Designs Itself to Manage the Administrative State 4

 B. Congress Takes to the Sidelines Under Party Leadership 8

II. THE UNINTERRUPTED RISE OF THE PRESIDENT’S CAPACITY TO COMPETE 12

 A. From Quality of Life Review to White House Regulatory Review 12

 B. Institutional Profile of OIRA 14

III. CONGRESS NEEDS ARTICLE I REGULATORY REVIEW TO CLOSE THE COMPETITION GAP WITH THE PRESIDENT 16

IV. WHY ARTICLE I OIRAS CAN EXIST ONLY IN PAIRS 17

CONCLUSION 21

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Introduction

Government entities that go by acronyms like EPA, FDA, and OSHA did not spring from the earth, or magically appear out of thin air.¹ Rather, an alphabet soup's worth of federal bureaucracies flows from enumerated powers granted to Congress by Article I of the Constitution.² Thus endowed, 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."³

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."⁴ To this end, the Constitution establishes a hierarchical management system meant to promote accountability, whereby "officers" and "inferior officers" are responsive to the president in order to ensure the "faithful" execution of the law.⁵

Each of the political 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 extended metaphor.

There is substantial constitutional wisdom inherent in these competing claims of management primacy over the administrative enterprise. Famously, the Founding Fathers designed a system of separated powers animated by power-hungry officeholders. In this manner, the Constitution's drafters sought to prevent the concentration of power, which they thought to be "the very definition of tyranny."⁶ Although "[t]he Framers could hardly have envisioned today's vast and varied federal bureaucracy,"⁷ they could take solace in the protections afforded by the constitutional framework they put in place. Due to the wisdom of the Founders' design, Congress and the president safeguard liberty when they compete for management primacy over the administrative state.

For decades after the New Deal era, Congresses and presidents vied for administrative control over domestic regulatory agencies, just as the Framers would have intended. During the last forty years, however, a once-close race has become a rout in the executive'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

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

² U.S. Const. art. I, § 8.

³ W. F. Willoughby, *Principles of Public Administration* 11 (1927).

⁴ U.S. Const. art. II, § 3.

⁵ U.S. Const. art. II, § 2.

⁶ *Federalist No. 47* (James Madison).

⁷ *City of Arlington*, 133 S. Ct. 1878 (Roberts, C.J., dissenting).

in “an era of presidential administration,” as then-professor Elena Kagan argued in a celebrated article.⁸

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. More efficient government more readily infringes on individual rights, which is precisely the threat the Framers sought to mitigate with the system of separated powers.⁹ By dividing government, yet giving each component part the means to check one another, the Framers expected human nature to take over, such that “ambition [could] counteract ambition.”¹⁰

In the competition among institutions for control of the administrative state, presidents unerringly have played up to the Founders’ expectations about human nature. Congress, alas, has not. This paper explains the current (and constitutionally worrisome) imbalance of power between the political branches and, furthermore, proposes a remedy in the form of a new congressional capacity to evaluate administrative action.

Part I describes how the post-WWII Congress designed itself to oversee regulatory agencies, and how, since the 1980s, Congress has strayed from this blueprint. Part II 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.” Part III of this paper points to the obvious need for an OIRA-like capability in Congress. Finally, Part IV proposes a politically palatable version of legislative regulatory review. Because cost-benefits analyses are values-driven, the only feasible institutional design is to give each party caucus in Congress its own capacity to vet administrative action.

I. The Rise and Fall of Congress’s Capacity to Compete

For much of the twentieth century, congressional committees ably competed with the president to manage domestic regulatory agencies. Over the last four decades, however, power in Congress shifted from committees to party leadership, and the results have been disastrous for legislative oversight. This part first describes how post-New Deal Congresses organized themselves to supervise regulatory policy. Then, this part chronicles the centralization of authority in Congress since the 1980s and explains how this trend undermined congressional capacity to supervise administrative action.

⁸ Elena Kagan, *Presidential Administration*, 114 *Harvard L. Rev.* 2245, 2246 (2000).

⁹ *Bowsher v. Synar*, 478 US 714, 722 (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.”)

¹⁰ *Federalist No. 51* (James Madison).

A. *Congress Designs Itself to Manage the Administrative State*

At the close of the nineteenth 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.¹¹

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.¹² For progressive theorists and administrators, the separation of powers principle was a quaint restraint on efficiency.¹³ For others, but especially the legal community of that time, the Constitution's tripartite structure retained its vitality, and the nascent administrative state demonstrated a bureaucratic character 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 Roosevelt and described by him as "a document of permanent importance,"¹⁴ 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."¹⁵ 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."¹⁶

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 the juvenile leviathan of bureaucratic governance.

The first was the Administrative Procedure Act,¹⁷ known as the "constitution of the administrative state,"¹⁸ through which lawmakers sought to

¹¹ For dueling and engaging contemporary histories of the administrative state, compare Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994) with Gillian Metzger, *1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017).

¹² *Wong Yang Sung v. McGrath*, 339 US 33, 37-40 (1950) (describing historical criticisms of administrative policymaking).

¹³ James M. Landis, *The Administrative Process* 1 (1938) ("In terms of political theory, administrative process springs from the inadequacy of a simply tripartite form of government to deal with modern problems.")

¹⁴ 81 Cong. Rec. 187, 191 (1937).

¹⁵ The President's Committee on Administrative Management, *Administrative Management in the Government of the United States* 30 (GPO 1937).

¹⁶ *Id.*

¹⁷ Pub.L. 79-404, 60 Stat. 237, 5 U.S.C. ch. 5, subch. I § 500 et seq.

regulate the regulators. The Act establishes judicial review for administrative action,¹⁹ requires public input in the formation of regulations,²⁰ and ensures that governmental functions (like prosecution and adjudication) are sufficiently distinct within agencies.²¹ The second law, the Federal Tort Claims Act, waived sovereign immunity for torts committed by agents of the government.²² Citizens thus became empowered to vindicate their rights against the regulatory apparatus.²³

Third, the Legislative Reorganization Act provided lawmakers with a sorely needed framework to superintend the administrative state.²⁴ 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-Okla.), a sponsor of the Act, warned that the failure to refresh Congress's "archaic organization" could "be tragic for our representative form of Government."²⁵ Rep. Monroney's cosponsor, Sen. Robert La Follette Jr. (R-Wisc.), spoke of a "grave constitutional crisis."²⁶ 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 wisecracs in an age of calculating-machine-trained researchers."²⁷ Three years later, *Life* magazine ran a cover story titled, "U.S. Congress: It Faces Great New Tasks with Outworn Tools."²⁸

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, 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."²⁹ The Act streamlined the number of committees to end redundancies, clarified committee jurisdictions, and regularized their procedures.³⁰ Membership on committees was capped for each lawmaker in the

¹⁸ See, e.g., Christopher J. Walker, *The One Time I Agreed with Ian Millhiser (on Constitutional Law, No Less!)*, Notice & Comment (Mar. 6, 2018), <https://yalejreg.com/nc/that-one-time-i-agreed-with-ian-milhiser-on-constitutional-law-no-less/>.

¹⁹ 5 U.S.C. §§ 701-706.

²⁰ 5 U.S.C. § 553.

²¹ 5 U.S.C. §§ 554, 557.

²² Pub. L. No. 79-601, Title IV, 60 Stat. 812, 28 U.S.C. § 1346.

²³ See generally, Henry Cohen et al., *Federal Tort Claims Act*, Congressional Research Service (Dec. 11, 2007).

²⁴ Pub. L. No. 79-601, 60 Stat. 812, 5 U.S.C. §§ 551-559, 701-706, 1305, 3344, 4301, 5335, 5372, 7521.

²⁵ David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* 63 (2002).

²⁶ *Id.* at 64.

²⁷ George E. Outland, *We Must Modernize Congress*, *Reader's Digest*, 35-38 (Feb. 1945).

²⁸ *Life*, 71-85 (June 8, 1945).

²⁹ George B. Galloway, *The Operation of the Legislative Reorganization Act of 1946*, *The American Political Science Review*, Vol. 45, No 1., at 42 (Mar. 1951).

³⁰ Secs. 102, 121 of Pub. L. No. 79-601, 60 Stat. 812. See also Joel D. Aberbach, *Keeping a Watchful Eye* 22 (1990); Robert Byrd, *The Senate 1789-1989: Address on the History of the*

House and Senate, in order to prevent members from diluting their attention.³¹ In addition, the Act authorized committees to develop a professional staff virtually from scratch.³² Finally, the Act tasks committees with exercising “continuous watchfulness” over the administration of laws.³³ Although “continuous watchfulness” is plainly a nebulous mandate, Sen. La Follette lent 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.³⁴

Committee staff wasn’t the only investment that Congress made in improving its own 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).³⁵

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.³⁶

During Committee Government, Congress refined certain norms to complement the effectiveness of committees as agency managers. Under the “property right”³⁷ custom, for example, lawmakers held their committee assignments from one Congress to the next, rather than cycling through different committees. As a result, members dealt with the same subject matter

United States Senate, Volume 1 548-49 (1989); Lawrence C. Dodd & Richard L. Schott, *Congress and the Administrative State* 86-87 (1979).

³¹ Galloway, *supra* note 29 at 42.

³² Sec. 202 of Pub. L. No. 79-601, 60 Stat. 812. *See also* Dodd & Schott, *Congress and the Administrative State*, *supra* note 30 at 72; Byrd, *The Senate 1789-1989*, *supra* note 30 at 549; Galloway, *supra* note 29 at 53-54

³³ Sec. 136 of Pub. L. No. 79-601, 60 Stat. 812. *See also* David H. Rosenbloom, *1946: Framing A Lasting Congressional Response to the Administrative State*, 50 *Admin. L. Rev.* 173, 179 (1998).

³⁴ Rosenbloom, *Building a Legislative-Centered Public Administration*, *supra* note 25.

³⁵ Sec. 203 of Pub. L. No. 79-601, 60 Stat. 812.

³⁶ Christopher J. Deering & Steven S. Smith, *Committees in Congress* 30-33 (1997); Dodd & Schott, *Congress and the Administrative State* 65-71, *supra* note 30.

³⁷ Deering & Smith, *Committees in Congress* 27, *supra* note 36.

for continuous and extended periods, which led to familiarity with policymaking details. In order to further cultivate expertise within their ranks, committees institutionalized the “apprenticeship” norm,³⁸ 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.³⁹ 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.⁴⁰ The process is performed by standing committees, who 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.⁴¹ At the end of World War II, as much as 95 percent of the federal budget was under permanent authorization.⁴² During the next 25 years, however, Congress trended towards much greater use of fixed authorization periods and subsequent reauthorizations.⁴³

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.⁴⁴ 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 a legislative veto, committees convened hearings and wrote committee reports in order 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.⁴⁵ 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 committees⁴⁶ and honor requests and objections registered by members as

³⁸ *Id.* at 31-32.

³⁹ *Id.*

⁴⁰ Dodd & Schott, *Congress and the Administrative State* 235-240, *supra* note 30.

⁴¹ *Id.* at 236.

⁴² Allen Schick, Congress and the “Details” of Administration, 36(5) *Public Administration Review* 516, 525 (Sep. – Oct. 1976).

⁴³ See generally Jonathan H. Adler & Christopher J., Delegation and Time, C. Borden Gray Center for the Study of the Administrative State Working Paper (2019) (Part III of the paper explains reauthorization and how it has fallen into disuse).

⁴⁴ Schick, *supra* note 42 at 522-23.

⁴⁵ Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 *Harv. L. Rev.* 1369, 1380 (1977). (“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.”)

⁴⁶ *Id.* at 1386.

a rulemaking progressed.⁴⁷ 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.⁴⁸

In the early 1970s, as President Nixon bred legislative anxiety over growing executive power, Congress doubled-down on the committee structure. The 1970 Legislative Reorganization Act revised and rephrased in more explicit language the oversight function of House and Senate standing committees.⁴⁹ The Act further expanded committee staff, and it also strengthened the policy analysis role of the Congressional Research Service.⁵⁰ Four years later, the Congressional Budget and Impoundment Act rationalized the Congress’s role in the budget by creating Budget Committees in both chambers and establishing an annual procedure.⁵¹ In addition, the Act created a new Article I agency, the Congressional Budget Office, to provide analytical support.⁵² The Act also strengthened the Government Accountability Office by enhancing its authority to acquire information from regulatory agencies.⁵³ In the face of Nixon’s excesses, Congress practiced self-help.

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

B. 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 Natural Resources Committee adjourned a hearing on climate change before it could begin, because so few members of the majority bothered to attend.⁵⁴ 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.⁵⁵

⁴⁷ Arthur S. Miller & George M. Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 *Indiana L. J.* 367, 373 (1976).

⁴⁸ *INS v Chadha*, 462 U.S. 919, 967-68 (1983) (dissenting).

⁴⁹ 84 Stat. 1156 (1970) (“ . . . each standing committee shall *review and study, on a continuing basis, the application, administration, and execution* of those laws or parts of laws, the subject matter of which is within the jurisdiction of that committee.”) (emphasis added).

⁵⁰ *Id.* (expanding permanent committee staff by two)

⁵¹ Pub. L. 93–344, 88 Stat. 297, 2 U.S.C. §§ 601–688

⁵² Title II of Pub. L. 93–344, 88 Stat. 297. *See also* Deering & Smith, *Committees in Congress* 39-40, *supra* note 36.

⁵³ Title VI of Pub. L. 93–344, 88 Stat. 297.

⁵⁴ John Siciliano, *House Republicans Vote to End Climate Change Hearing after Only Two Democrats Show Up*, *Washington Examiner* (Feb. 26, 2019), <https://www.washingtonexaminer.com/policy/energy/house-republicans-vote-to-end-climate-change-hearing-after-only-two-democrats-show-up>.

⁵⁵ *See, e.g.,* Olivia Messer, *Trey Gowdy, Who Led 11-Hour Benghazi Hearing, Declares Public Congressional Hearings “Utterly Useless,”* *The Daily Beast* (Mar. 4, 2019), <https://www.thedailybeast.com/trey-gowdy-who-led-11-hour-benghazi-hearing-declares-public-congressional-hearings-utterly-useless>.

There are other conspicuous signs of a sidelined Congress. Committee reauthorizations, once a powerful oversight tool, have fallen into disuse.⁵⁶ Agencies routinely submit nonsensical budget justifications meant to obfuscate administrative policymaking priorities, and lawmakers don't bat an eye.⁵⁷ Where once agencies rushed to meet informational requests by committee leaders, agencies today dissemble in the face of questions from Congress, and lawmakers do nothing.⁵⁸

What happened? Indeed, 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 1983,⁵⁹ 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 last forty years, a Congress "once dominated by fairly autonomous committees and relatively weak parties became a system of increasingly dependent committees and relatively strong parties."⁶⁰

The advent of electoral homogeneity provided much of the centripetal force behind 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.⁶¹

Increasing partisanship, in turn, set the stage for opportunistic leadership.⁶² Two successive House Speakers, Tip O'Neil⁶³ and Jim Wright,⁶⁴ instituted rule changes that took power away from committees and consolidated it in the hands of party leaders.⁶⁵ But it was Speaker Newt Gingrich whose tenure marked the inflection point away from Committee Government. With his so-called

⁵⁶ Congressional Budget Office, *Unauthorized Appropriations and Expiring Authorizations*, January 15, 2016, (calculating that \$300 billion worth of administrative programs are run on virtual autopilot), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51131-uaea-house2.pdf>.

⁵⁷ William Yeatman, *Confusing EPA Budget Process Calculated to Resist Meaningful Oversight*, Open Market (Mar. 22, 2017), <https://cei.org/blog/confusing-epa-budget-process-calculated-resist-meaningful-oversight>.

⁵⁸ William Yeatman, *EPA's Clean Power Plan Lies Undermine Congressional Oversight*, Open Market (Dec. 27, 2016), <https://cei.org/blog/epas-clean-power-plan-lies-undermine-congressional-oversight>.

⁵⁹ *INS v Chadha*, 462 U.S. 919 (1983).

⁶⁰ Deering & Smith, *Committees in Congress* 21, *supra* note 36.

⁶¹ Burdett A. Loomis & Wendy J. Schiller, *The Contemporary Congress* 86-87, 93 at Table 5-3 (4th ed. 2004), (observing that the proportion of partisan role calls—i.e., how often a majority of Democrats voted against a majority of Republicans—was 48 percent in both the House and Senate in 1975. In 1985, it was 61 percent in the House and 50 percent in the Senate. And in 1995, it was 73 percent and 69 percent, respectively.)

⁶² John H. Aldrich & David W. Rhode, *Congressional Committees in a Continuing Partisan Era*, in Lawrence C. Dodd & Bruce I. Oppenheimer, *Congress Reconsidered* 143 (2009).

⁶³ Deering & Smith, *Committees in Congress* 36-37, *supra* note 36 (summarizing House & Senate reforms of the 1970); Dodd & Schott, *Congress and the Administrative State* 143-44, *supra* note 30.

⁶⁴ Loomis & Schiller, *The Contemporary Congress* 27, *supra* note 61.

⁶⁵ The key change was the reconstitution of the Rules Committee's authority to control legislative action. The Rules Committee operates as an agent of House leadership.

Contract with America, Gingrich pioneered the modern strategic focus on national politics and dependence on party support.⁶⁶ As Speaker, he instituted sweeping rule changes that further entrenched leadership's authority.⁶⁷ No matter which party has held the gavel, subsequent Speakers have maintained these powers, for obvious reasons of self-interest.⁶⁸

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 began to structure committee bills and floor debate in a manner meant to emphasize the policy differences between the two parties.⁶⁹ 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."⁷⁰ Today, the incontrovertible evidence of unprecedented Senate polarization rests in the routine abandonment of individual- and minority-based privileges, which can be achieved only in an environment where party unity trumps institutional pride.⁷¹

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."⁷² 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 inter-party and inter-branch disputes in periodic summits with the president.⁷³

Although Committee Government evolved with the administrative state as a management tool for lawmakers, the shift away from a committee-centric Congress and towards 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 organized under the banner of party rather than Congress, so members are apt to give priority to party affiliation over the House and Senate as institutions.

⁶⁶ Republican Party, *Contract with America* (1994), <https://web.archive.org/web/19990427174200/http://www.house.gov/house/Contract/CONTRACT.html>.

⁶⁷ Deering & Smith, *Committees in Congress* 49, Table 2-2 (listing the changes ushered in by majority party in House in 104th Congress), *supra* note 36.

⁶⁸ John H. Aldrich & David W. Rhode, *Congressional Committees in a Continuing Partisan Era* in Lawrence C. Dodd & Bruce I. Oppenheimer (Eds.), *Congress Reconsidered* 217 (2009).

⁶⁹ Loomis & Schiller, *The Contemporary Congress* 100, *supra* note 61.

⁷⁰ *Id.* at 101.

⁷¹ Examples include the abandonment of the filibuster and "Blue Slip" procedures for Supreme Court Justices and federal district court judges, respectively.

⁷² Burdett A. Loomis & Wendy J. Schiller, *The Contemporary Congress* 174 (7th ed. 2015).

⁷³ Kenneth A. Shepsle, *The Changing Textbook Congress* in John E. Chubb & Paul E. Peterson (Eds.), *Can the Government Govern?* 238 (1989).

As a result, the legislative branch is less inclined to compete with the executive. In the current Congress, for example, Republicans sided with President Trump when he exercised emergency powers to secure funding otherwise blocked by Congress's power of the purse.⁷⁴ On the other hand, Democratic members applauded when President Obama declared he would bypass Congress on immigration reform during the 2014 State of the Union.⁷⁵

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. When committees are sidelined, this incentive lessens.⁷⁶ For today's lawmakers, 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.

Worst of all, party leadership in a centralized Congress has an incentive to weaken the body. During the period of 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."⁷⁷ Abundant committee resources, however, work at cross-purposes with the consolidation and maintenance of authority. Therefore, on the first day of the 104th Congress in 1994, Speaker Gingrich and Republican leadership slashed committee staff by one-third, and the Senate soon followed suit.⁷⁸ Because strong committees are a threat to centralization, House and Senate leadership, regardless of party orientation, have not restored staff levels. For example, 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).⁷⁹ In fact, the current level of committee staffing is commensurate with levels from the early 1970s,⁸⁰ even though government has grown much larger and more complex in the five decades since.

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,

⁷⁴ The House passed a resolution of disapproval of President Trump's emergency declaration to secure funding to build a wall between the United States and Mexico. The vote was 245-182, with thirteen Republicans voted with Democrats to pass the measure. The resolution passed the Senate by a 59-41 vote, with twelve Republicans joining the Democrat caucus. Because the majority of Republican lawmakers sided with the President, there were insufficient votes in either chamber to overcome the president's veto.

⁷⁵ Jonathan Turley, *Why Trump Will Win the Wall Fight*, Re ipsa loquitur (Feb. 18, 2019), <https://jonathanturley.org/2019/02/18/why-trump-will-win-the-wall-fight/>.

⁷⁶ Shepsle, *The Changing Textbook Congress* 250-51, *supra* note 73.

⁷⁷ Deering & Smith, *Committees in Congress* 162, *supra* note 36.

⁷⁸ *Id.* at 48-51.

⁷⁹ Brookings Institution, *Vital Statistics*, Chapter 5: Congressional Staff and Operating Expenses, Table 5-5 (2018) <https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-5.pdf>.

⁸⁰ Compare Brookings, *Id.*, with Dodd & Schott, *Congress and the Administrative State* 202 Table 5-3, *supra* note 30.

and, in the case of the Office of Technology Assessment, shutter it altogether.⁸¹ Subsequent leadership in both chambers of Congress, regardless of party affiliation, have continued to starve these agencies. In 1991, Article I agencies employed 6,354 professionals; in 2015, the number stood at 3,833.⁸² The Government Accountability Office and Congressional Research Service today operate with about 75 percent and 60 percent of their 1975 professional personnel capacity, respectively.⁸³

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).⁸⁴

II. The Uninterrupted Rise of the President's Capacity to Compete

During the period of Committee Government, the political 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.⁸⁵ Yet since the peak of Committee Government, the executive has assumed an unprecedented supremacy over administrative policy. According to congressional scholar Curtis Copeland, “[t]he 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.”⁸⁶ Below, I explain how an uninterrupted line of presidents since Nixon, on their own initiative, empowered themselves to grip the administrative state with increasing strength.

A. 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 cultivated a potent new management tool, one that is “foundational” to this present era of “presidential administration.”⁸⁷ 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.⁸⁸ President Ford modified regulatory review by focusing on

⁸¹ Deering & Smith, *Committees in Congress* 50, *supra* note 36.

⁸² Brookings Institute, *Vital Statistics* at Table 5-8 Staffs of Congressional Support Agencies, FY1946 – FY2015, *supra* note 79.

⁸³ *Id.*

⁸⁴ *Id.* at Table 5-5.

⁸⁵ See generally Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 Yale L.J. 2182 (2016) (describing how president's exercise control over the administrative state through the budget process).

⁸⁶ Curtis W. Copeland, *The Presidential-Congressional Power Imbalance in Rulemaking in Mort Rosenberg, When Congress Comes Calling*, 236 (2017).

⁸⁷ Kagan, *Presidential Administration* at 2285, *supra* note 8.

⁸⁸ Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 Admin. L. Rev. 37, 44-50 (2011); see also, Curtis W.

regulations' inflationary impact.⁸⁹ Next, President Carter required regulatory agencies to assess the "economic consequences" of all rules that cost more than \$100 million,⁹⁰ which were then sent to "Regulatory Analysis Review Group."⁹¹

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,⁹² 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.⁹³ 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.⁹⁴

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.⁹⁵ Notably, the president lacked a statutory basis to do so. Congress had created OIRA in 1980 to manage government paperwork, and, by passing that statute, lawmakers never intended to empower the president to establish White House regulatory review.⁹⁶ Although Congress later authorized OIRA and made its administrator's appointment subject to Senate confirmation,⁹⁷ President Reagan created the agency on his own initiative. OIRA, therefore, is a function of the executive's "ambition."

While subsequent administrations have modified this benchmark for weighing costs and benefits,⁹⁸ they only added to Reagan's basic framework. President Clinton, for example, created a process by which the president

Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 *Fordham Urb. L.J.* 1257, 1264 (2006).

⁸⁹ Exec. Order No. 11,821 (Nov. 29, 1974).

⁹⁰ Exec. Order No. 12,044 (Mar. 24, 1978).

⁹¹ *Id.*

⁹² Tozzi, *OIRA's Formative Years* at 48-50, *supra* note 88.

⁹³ Exec. Order No. 12,291 (Feb. 17, 1981).

⁹⁴ Exec. Order No. 12,498 (Jan. 4, 1985).

⁹⁵ Although OIRA's statutory mandate is to manage federal paperwork by reviewing information collection requests, 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 directory of OIRA.

⁹⁶ Congress created OIRA with passage of the Paperwork Reduction Act in 1980.

⁹⁷ Copeland, *The Presidential-Congressional Power Imbalance in Rulemaking* 240, *supra* note 86.

⁹⁸ 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. 12,886 §1 called for regulations that "maximize net benefits." And Obama's Exec. Order 13,563 §1, which called for regulatory benefits that "justify" costs.

directly could referee disputes between OIRA and agencies.⁹⁹ Clinton further expanded the scope of the required annual regulatory plan to include independent agencies.¹⁰⁰ President George W. Bush's administration empowered OIRA to send "prompt letters" to agencies to start the rulemaking process,¹⁰¹ in addition to expanding "informal" review of draft rules before their submission.¹⁰² During the Obama administration, OIRA requested, but did not require, independent agencies to submit to White House regulatory review.¹⁰³ For its part, the Trump administration has signaled that it might require such participation by independent agencies, though it hasn't yet done so.¹⁰⁴

With the establishment of White House regulatory review, presidents seized a powerful tool to manage administrative policy. Through OIRA, the executive can both prompt administrative action and, when action is delivered, the White House can compel reexamination and even revisions by the agency. After President Reagan established OIRA's review function, prominent administrative law professor Kenneth Culp Davis commented that, "[t]he President has thus assumed full power to control the content of rules issued by executive departments and agencies."¹⁰⁵ In the years since, the president's grip over administrative policy only tightened as OIRA's powers have been expanded and refined.

B. Institutional Profile of OIRA

The Office of Information and Regulatory Affairs is among the most misunderstood agencies in the federal government.¹⁰⁶ In part, this confusion is due to OIRA's keeping a low-profile, sometimes to the point of opacity.¹⁰⁷

OIRA has a staff of about forty-five,¹⁰⁸ led by a Senate-confirmed administrator.¹⁰⁹ Its annual budget is about \$50 million.¹¹⁰ In terms of organizational structure, OIRA is divided into "branches" that correspond to

⁹⁹ Exec. Order 12,866 §7 (Oct. 4, 1993).

¹⁰⁰ Exec. Order 12,866 §4.

¹⁰¹ John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. Pa. L. Rev. 395, 460 at FN 268 (2008).

¹⁰² Copeland, *The Presidential-Congressional Power Imbalance in Rulemaking* 242, *supra* note 86.

¹⁰³ Exec. Order 13,579 (July 11, 2011).

¹⁰⁴ Bridget C.E. Dooling, *OIRA Sends a Smoke Signal on Independent Agencies*, Notice & Comment (Aug. 23, 2018), <https://yalejreg.com/nc/oira-sends-a-smoke-signal-on-independent-agencies/>.

¹⁰⁵ Kenneth Culp Davis, *Presidential Control of Rulemaking*, 56 Tulane L. Rev. 849 (1982).

¹⁰⁶ Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838, 1839 (2014) ("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.")

¹⁰⁷ For thoughtful criticisms of OIRA, including the agency's alleged lack of transparency, see Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship between the Obama EPA and the Obama White House*, 31 Pace Env't'l L. Rev. 325 (2014).

¹⁰⁸ Office of Management and Budget, *About OIRA* <https://obamawhitehouse.archives.gov/omb/oira/about>.

¹⁰⁹ 44 U.S. Code § 3503(b).

¹¹⁰ Executive Office of the President, *Fiscal Year 2018 Congressional Budget Submission*, at 13 (Distribution of Program Activity), <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/EOP-FY18-Budget.pdf>.

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 up to the president.¹¹¹

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.”¹¹² 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.¹¹³ 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.¹¹⁴ Importantly, OIRA doesn’t conduct independent cost-benefits analyses; rather, the office will shape 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. Ex-administrator Cass 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.¹¹⁵

In sum, presidents have adopted White House regulatory review to manage administrative policymaking. The process dates to the Nixon administration’s “quality of life” vetting of public health rules, and it became institutionalized when President Reagan located this function in the newly created Office of

¹¹¹ This description of OIRA’s operational workings is gleaned from Sunstein, *Myths and Realities* at Part II.a. “The Basics,” *supra* note 106.

¹¹² Exec. Order 12,866 §3(f). Although there are other factors to consider, these are the primary two considerations.

¹¹³ Sunstein, *Myths and Realities* at 1840, *supra* note 106.

¹¹⁴ Exec. Order 12,991 §3.

¹¹⁵ Sunstein, *Myths and Realities* at 1847, *supra* note 106.

Information and Regulatory Affairs. Congress never authorized White House regulatory review; instead, presidents unilaterally took the initiative. Due to the executive's self-empowerment, scholars refer to the present era of American governance as being one of "presidential administration."¹¹⁶

III. Congress Needs Article I Regulatory Review to Close the Competition Gap with the President

After the Second World War, standing committees competed with the president to manage domestic regulatory agencies. Over the last 40 years, however, power centralized in both chambers of Congress, causing crucial customs to disappear, committees to recede, and support agencies to diminish. While Congress faded, presidents empowered themselves 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 always has parried the president's institutional thrusts in the joust 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."¹¹⁷ Another example is the competition between the political branches for management primacy over domestic regulatory agencies in the wake of the Progressive and New Deal eras. As noted above, President Roosevelt recommended the concentration of power in the presidency to best protect liberty from the possibility of arbitrary bureaucratic governance. Congress, however, took a flyer on 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. In the 1960s and 1970s, Congress became increasingly concerned that presidents possessed an unfair advantage in formulating the budget, by virtue of his exclusive access to macroeconomic data within the Executive Office of the President. To address this informational asymmetry, lawmakers in 1974 created a new Article I agency, the Congressional Budget Office, to provide economic analysis independent of the White House.¹¹⁸ 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 counter White House regulatory review.

In addition to the example provided by history, there is a pragmatic impetus for the creation of 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.¹¹⁹ Thirteen years later, lawmakers adopted a constitutionally permissible legislative veto by passing

¹¹⁶ Kagan, *Presidential Administration*, *supra* note 8.

¹¹⁷ Sec. 312(a) of the Budget and Accounting Act of 1921, Pub. L. 67-13, 42 Stat. 20.

¹¹⁸ *Supra* notes 51-52 and accompanying text.

¹¹⁹ *INS v Chadha*, 462 U.S. 919.

the Congressional Review Act.¹²⁰ The Act, however, is deeply flawed, because it 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 fifteen disapproval resolutions, a major increase over historical practice.¹²¹ While I welcome Congress's increased willingness to check administrative action, 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.¹²² For each of the legislative vetoes, Congress failed to perform any investigation or analysis of its own. Ignorance, obviously, is a suboptimal state of lawmaking. An Article I version of OIRA would redress this analytical imperative.

Almost two decades ago, lawmakers recognized this pressing need. In 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.¹²³ Speaking in support of the bill on the House floor, Rep. Paul Ryan (R-Wisc.) explained, “[t]he 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.”¹²⁴ The Act, Rep. Ryan added, would render Congress “better equipped to review final agency rules under the [Congressional Review Act].”¹²⁵

Regulatory review, alas, never got off the ground in Congress. Although the Truth in Regulating Act of 2000 authorized a three-year pilot program for a legislative response to OIRA, lawmakers never funded the pilot program, so it died on the vine in 2004 when its authorization expired.¹²⁶

IV. 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 the partisanship runs especially hot on regulatory policy.¹²⁷

¹²⁰ 5 U.S.C. § 801, et seq. (creates a fast-track mechanism for Congress to check agency rules, including a bypass of the Senate filibuster).

¹²¹ Prior to the 115th Congress, only one Congressional Review Act disapproval resolution ever survived the President's veto. See Rules at Risk (continuously updated chart of disapproval resolutions) (accessed Aug. 23, 2019) <http://rulesatrisk.org/resolutions/>

¹²² Author review of House and Senate resolutions of disapproval on www.Thomas.gov.

¹²³ P.L. 106-312, 114 Stat. 1248-50; 5 U.S.C. § 801.

¹²⁴ Cong. Record, H8706 (Oct. 3, 2000).

¹²⁵ *Id.*

¹²⁶ Mort Rosenberg, *When Congress Comes Calling* 176, *supra* note 86.

¹²⁷ For an incisive analysis of contemporary congressional politics over domestic regulation, see Philip Wallach, *Losing Hold of the REINS*, Brookings Series on Regulatory Process and Perspective (May 2, 2019), <https://www.brookings.edu/research/losing-hold-of-the-reins/>.

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 like those I'm advancing in this paper.¹²⁸ 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.¹²⁹ 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,¹³⁰ whose director (the Comptroller General) is President-appointed and Senate-confirmed.¹³¹

Similarly, any new proposal for a legislative regulatory review could place the process in the Government Accountability Office, 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 Government Accountability Office, are fundamentally different from regulatory review, and significant transaction costs would attend any hammering the OIRA square peg into the round hole that is the GAO. More importantly, the Government Accountability Office already has 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 narrowly interprets this mandate to avoid any analytical responsibilities.¹³² By repeatedly rejecting opportunities to press for regulatory review, the Government Accountability Office speaks volumes.

In the current (116th) Congress, of course, 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

¹²⁸ 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.

¹²⁹ According to Democrats on the House Government Reform and Oversight Committee, "the appointment process [for the new office] is partisan." See Committee on Government Reform and Oversight, Rept. 105-441 Part 2, Minority Views on H.R. 1714 at 23 (June 3, 1998). In the House Judiciary Committee, the minority party objected to the "supposedly nonpartisan" composition of the new office's leadership. See Committee on the Judiciary, Rept. 105-441 Part 1, Dissenting Views to H.R. 1714 at 18 (Mar. 13, 1998).

¹³⁰ Sec. 4 of P.L. 106-312, 114 Stat. 1248-50.

¹³¹ 31 U.S.C. § 703(a)(1).

¹³² 5 U.S.C. § 801(a) requires GAO to perform an "assessment" of the rule under consideration. See Mort Rosenberg, *When Congress Comes Calling* 168, *supra* note 86 (describing GAO's narrow interpretation).

version of OIRA. But could the parties ever compromise on regulatory review? In this author's opinion, the definitive answer is "no."

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 is the same thing as saying they're based on politics. Due to their distinct values (read: politics) Democrats and Republicans in the modern Congress never could achieve an understanding on the assessment of costs and benefits. As a result, they could never agree on how to conduct regulatory review. Division is baked into the process, and likely explains why the Government Accountability Office 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. Rather than 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 my 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 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.¹³³ Although it should incorporate the best elements of the present committee system, legislative regulatory review must not be grafted onto the status quo. Congress should establish new institutions, so that different and more effective operational cultures can evolve.

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.¹³⁴ 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

¹³³ Created in 1926, the nonpartisan Joint Committee on Taxation has an experienced professional staff of Ph.D economists, attorneys, and accountants "who assist Members of the majority and minority parties in both houses of Congress on tax legislation." See Joint Committee on Taxation, About Us (accessed Aug. 28, 2019), <https://www.jct.gov/about-us/mandate.html>.

¹³⁴ See *supra* note 93 and accompanying text.

Article I OIRAs could focus their energies on the most important policies, regulatory or deregulatory.

In addition to creating new support agencies, Congress would have to render other reforms to make regulatory review viable. Backed by White House political muscle, OIRA can expect agencies to honor its requests for data. Lacking such direct means, a proposed Article I OIRAs might find agencies to be less forthcoming, especially at the start. This sort of bureaucratic foot-dragging would injure legislative regulatory review, perhaps mortally.

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 they can shepherd the information requests that would drive legislative regulatory review.

To ensure rule-vetting proceeds as expeditiously as possible, Congress should require OIRA to share all its analysis that is not shielded by the Presidential Communications privilege, a constitutionally based protection for the free exchange of information to presidents from their closest advisors.¹³⁵ And for the subset of White House regulatory review that meets all the elements for disclosure protections, the privilege can be overcome if necessary and Congress’s need is sufficiently compelling.

Although uncertainty surrounds the law on executive privilege, OIRA fits some of the established criteria for eligibility. OIRA is within the Executive Office of the President, and the protections can be invoked even where the president never has seen or known of the documents in question, which would be the case for virtually all OIRA’s work.¹³⁶ Nevertheless, the Presidential Communications privilege is of doubtful applicability to OIRA because its reach extends only to “a quintessential and non-delegable presidential power,” such as the appointment or pardon powers.¹³⁷ By contrast, OIRA’s milieu is domestic regulatory policy, which is a “quintessential” Article I function that is “delegated” by Congress to administrative agencies, not to the president.

Because regulatory review is not a “quintessential and non-delegable presidential power,” the Presidential Communications privilege cannot provide a blanket cover for OIRA’s work. The president may wave at the duty to “take Care that the Law be faithfully executed,” but the fact remains that domestic regulatory agencies spring from congressional intent, and the political branches have *competing* claims for leadership of the administrative state. Lawmakers have no less valid a stake in overseeing its creations than does the president.

¹³⁵ Todd Garvey, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Development*, Congressional Research Service (Dec. 15, 2014).

¹³⁶ The president becomes involved only to referee disagreement between OIRA and the regulatory agency.

¹³⁷ *In re Sealed Case (Espy)*, 121 F.3d 729, 752 (D.C. Cir. 1997).

In all likelihood, executive privilege would extend legitimately to some of OIRA's analysis on a given rule, such as consultations with the Council of Economic Advisors within the Executive Office of the President. But proper withholdings would implicate only a small portion of White House regulatory review. The lion's share of OIRA's records reflects coordinated interagency collaboration, which is squarely in Congress's wheelhouse.

While leadership in the House and Senate have an incentive to starve legislative support services, as discussed above, some rank-and-file lawmakers might harbor sincere concerns about the cost of new bureaucracies. Such doubts, however, would be myopic. With the money it would take to bring legislative support staff above their presently anemic levels,¹³⁸ Congress could pay for legislative regulatory review with plenty to spare. Or members could unlock resources by streamlining redundant analytical capacity at Article I agencies.¹³⁹ Better yet, Congress could fund regulatory review many times over by reallocating the near-billion dollars it spends every year on press offices within regulatory agencies, whose underlying value is doubtful.¹⁴⁰

More broadly, nickel-and-diming congressional oversight is constitutionally counterproductive. President Reagan was the apotheosis of small-government conservatism, and do you imagine he was concerned about the budget implications of Executive Order 12,291? He ordered White House regulatory review into existence with neither a congressional authorization nor appropriation. Regarding the competition among political branches, the Reagan administration understood that 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 goes the saying, "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 to passing laws. President Obama, for example, resorted to "phone and pen" to implement a suite of policies that had failed to survive the legislative process.¹⁴¹ Notwithstanding President Trump's deregulatory

¹³⁸ See *supra* notes 81-83 and accompanying text.

¹³⁹ As the budget process has broken down, for example, the CBO increasingly allocates its resources into the production of policy reports that are redundant with the work produced by the GAO and the Congressional Research Service.

¹⁴⁰ Lauren Bowman & Romina Boccia, *A Billion Dollars for Propaganda and No Oversight*, Foundation for Economic Education (Nov. 4, 2016), <https://fee.org/articles/a-billion-dollars-for-propaganda-and-no-oversight/>.

¹⁴¹ Tamara Keith, *Wielding a Pen and a Phone, Obama Goes It Alone*, NPR (Jan. 20, 2014), <https://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone>.

agenda,¹⁴² for every law passed by Congress in 2018, regulatory agencies promulgated twelve rules that are effectively indistinguishable from legislation.¹⁴³ 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 always would cover for the president; and the other side 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 law-making, law-prosecuting, and law-judging functions, in considerable tension with separation-of-powers principles. Congress's abandonment of substantive competition with the president would reflect a distinct constitutional breach—namely, a failure of "ambition" on which the Framers' relied.

The "declared purpose" behind the Framers' constitutional structure is "to diffus[e] power the better to secure liberty."¹⁴⁴ 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 this paper proposes an 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.

¹⁴² Donald J. Trump, *Reducing Regulation and Controlling Regulatory Costs*, Executive Order 13,771 (Jan. 30, 2017).

¹⁴³ See Clyde Wayne Crews, *The 2019 Unconstitutionality Index*, Open Market (Dec. 31, 2018), <https://cei.org/blog/2019-unconstitutionality-index>.

¹⁴⁴ *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (citations and quotations omitted).