



THE C. BOYDEN GRAY

Center for the Study  
of the Administrative State

ANTONIN SCALIA LAW SCHOOL • GEORGE MASON UNIVERSITY

---

# The Revolution That Wasn't: Conservatives Against Congress, 1981-2018

Philip A. Wallach

CSAS Working Paper 20-22

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

# The Revolution That Wasn't: Conservatives Against Congress, 1981-2018

Philip A. Wallach  
Resident Scholar, American Enterprise Institute

Working Paper prepared for the Research Roundtable, “First Branch, Second Thoughts” convened by the C. Boyden Gray Center for the Study of the Administrative State, Antonin Scalia Law School, September 2020. Thanks to participants in the March roundtable for excellent comments.

*Why didn't conservatives have more success overhauling the administrative state or cutting back the scope of the federal government after the Republican Revolution of 1994? In part, they simply lacked the votes. Less obviously, forty years in the minority in the House of Representatives left Republicans with a deeply hostile view of Congress as an institution, making it difficult for them to envision the legislature as an effective counterweight to the president or administrative state. Even as Congress became conservatives' power center, they mostly remained presidentialists. This paper provides a detailed account of the reforms conservatives sought, especially in the 104<sup>th</sup> Congress of 1995-1996, in order to show how conservative antipathy toward Congress helped ensure the durability of the administrative state.*

\*\*\*

## I. Introduction

In November 2019, Attorney General William Barr delivered a keynote speech to the Federalist Society's National Lawyers Convention, the message of which was that “over the past several decades, we have seen steady encroachment on Presidential authority by the other branches of government.”<sup>1</sup> In Barr's telling, Congress had “largely abdicated its core function of legislating” and turned instead to “constant harassment” of the executive branch, “plainly designed to incapacitate” it. Such impositions began as far back as the 1960s, and “substantially weakened the functioning of the Executive Branch, to the detriment of the Nation.”

---

<sup>1</sup> William P. Barr, *Attorney General William P. Barr Delivers the 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention* (2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture> (last visited Nov 22, 2019).

In a typical critical reaction, *Washington Post* columnist Max Boot wrote that Barr's speech attempted to provide "a pseudo-intellectual gloss on Trump's authoritarian instincts" while putting forward a version of history utterly disconnected from the reality of expanded and unchecked executive power in recent years.<sup>2</sup> One veteran of the George W. Bush administration denounced Barr for making a "lunatic authoritarian speech," and likewise asserted that, under President Trump, the executive branch was the one expanding its powers.<sup>3</sup>

To read some of these critics, it might seem as though Barr's 2019 views had emerged suddenly and unexpectedly, perhaps as a function of Barr's zealous advocacy for President Trump. But nothing could be further from the truth. Barr has been making similar arguments on the national stage for more than three decades. As Assistant Attorney General in 1989, he penned a memorandum outlining ten ways that Congress "encroaches" on the executive branch's rightful authority, including interfering with the president's appointment power, "micromanaging" administrative functions, and intrusively insisting on disclosure of information that the executive branch should keep confidential.<sup>4</sup> Barr's strong advocacy for executive power was a major focus of his confirmation hearings when George H.W. Bush nominated him to be Attorney General in 1991.<sup>5</sup>

---

<sup>2</sup> Max Boot, *William Barr's chilling defense of virtually unlimited presidential power*, WASHINGTON POST, November 17, 2019, <https://www.washingtonpost.com/opinions/2019/11/17/william-barrs-chilling-defense-virtually-unlimited-presidential-power/> (last visited Jun 5, 2020). For similar reactions, see Jed Shugerman, *The Barr Presidency*, Slate, November 18, 2019, <https://slate.com/news-and-politics/2019/11/barr-speech-federalist-society-impeachment.html> (last visited Jun 5, 2020); Allan J. Lichtman, *Bill Barr's dangerous celebration of unchecked presidential power*, NEW YORK DAILY NEWS, November 25, 2019, <https://www.nydailynews.com/opinion/ny-oped-bill-barrs-dangerous-celebration-of-unchecked-presidential-pow-20191125-ioglxelmrbrfkhmqow4nwiui3fa-story.html> (last visited Jun 5, 2020).

<sup>3</sup> Remarks of Richard Painter, quoted in Merritt Kennedy, *Barr Accuses Democrats Of Trying To 'Cripple' The Trump Administration's Power*, NPR, November 16, 2019, <https://www.npr.org/2019/11/16/780092237/barr-accuses-democrats-of-trying-to-cripple-the-trump-administration-s-power> (last visited Jun 22, 2020).

<sup>4</sup> William P. Barr, *Common Legislative Encroachments on Executive Branch Authority* (1989), <https://www.justice.gov/file/24286/download> (last visited July 8, 2020).

<sup>5</sup> Sharon LaFraniere, *For Nominee Barr, An Unusual Path to Attorney General's Office*, WASHINGTON POST, November 12, 1991, <https://www.washingtonpost.com/archive/politics/1991/11/12/for-nominee-barr-an-unusual-path-to-attorney-generals-office/deed0c0f-1078-41d8-94e5-35f9619e0528/> (last visited Jul 8, 2020). See also Confirmation Hearing on the Nomination of William P. Barr to be Attorney General of the United States, Senate Judiciary Committee, November 12, 1991, S. Hrg. 102-505, Pt. 2, 3, <http://civilrightsdocs.info/pdf/ag-vacancy/1991-AG-Nomination-Hearing-Transcript.pdf> (where Committee Chairman Joseph Biden expressed concern that "Mr. Barr may be sympathetic to efforts of the current administration to enlarge and consolidate the power of the Executive, with an accompanying disdain for the legitimate role of Congress as a coequal branch of the Government.").

Nor is Barr an isolated outlier. The most influential conservatives of his generation have been famously committed presidentialists. The much-less-remarked-upon flip-side of this affinity is that they have also been bitter skeptics of Congress. Given that their views were formed during the latter part of a forty-year stretch of unbroken Democratic control of the House of Representatives, this orientation is not particularly surprising.

What is more confounding is the continued dominance of this view among conservatives even after 1994, when Republicans mounted their most energetic campaign in a generation and retook both the House and Senate. On January 3, 1995, there was a GOP Speaker of the House for the first time in four decades—something that not a single member of the Republican caucus had ever experienced firsthand. And, thanks to the efforts of their new Speaker, Newt Gingrich, Republicans came in armed with a well-articulated program that they believed would sweep through Washington, changing the basic rules of the game for the hidebound bureaucracy and its enablers in Congress.

This article argues that conservative antipathy for Congress seriously constrained Republicans' ability to reform the legislature and administrative state in the 1990s. Republicans, led by Gingrich, took an almost punitive attitude toward the First Branch that they now found themselves controlling. They were determined to root out petty corruption, but more fundamentally their legislative reform agenda was about cutting Congress down to size. Their years of adversarial opposition to the institution left them little able to appreciate the unique capacities of a legislature or envision it working as a real counterweight to the bureaucracy. Republicans often acted as if Gingrich had been elected as shadow president, and this led them to mishandle their best opportunity for major reform of America's expanded state.

Republicans succeeded in diminishing Congress, but they mostly failed in dictating conservative policies and set themselves up for political defeat in 1996. Thereafter, their revolutionary zeal was dissipated, and by the time of the George W. Bush administration their desire to reform the system had almost entirely passed. Instead, they sought to dominate the policymaking process as it existed and execute modest managerial reforms in the executive branch. The previous commitment to presidentialism was reaffirmed. By the time Republicans were swept out of the majority in 2006, the size and shape of government were little changed.

Eight years of Barack Obama's presidency, the last six of which featured Republicans in control of at least the House, inspired conservatives to cultivate a sense of the legislature's constitutional importance, and it is possible that this would have flowered into a coherent philosophy had there been a Hillary Clinton administration beginning in 2017. Instead, Donald Trump's unexpected victory meant a sharp turn back toward presidentialism and skepticism of Congress—even as Republicans controlled both chambers in the 115<sup>th</sup> Congress of 2017-2018. Republicans' unified control of Congress and the presidency did not lead to passage of any of the conservative plans to strengthen Congress that had been touted during the Obama years. The administrative state, which Trump's advisor Steve Bannon once promised would be “deconstructed,” was subjected to somewhat increased presidential control through a number of executive actions, but was left almost entirely unaltered in its basic form.

Conservatives' skepticism—or contempt—for Congress was hardly the only reason that the Revolution of 1994 proved less than revolutionary in retrospect. Perhaps most importantly, the Republican majority was far from uniformly conservative. A sizable faction shared Speaker Gingrich's anti-government zeal, but just as many members were committed to keeping federal dollars flowing to their districts most of all. Even where House Republicans mustered something close to unity for reform, they tended to coordinate poorly with their Senate counterparts.

Still, antipathy to Congress as an institution represented a surprisingly consistent orientation for conservatives. This attitude profoundly shaped their behavior once they found themselves holding the reins of power in 1995, and so it is a theme that deserves to be probed much more clearly than it has been in existing literature. This paper proceeds to do so as follows.

Part II explores conservatives' views of Congress and its relationship to the executive branch during the two decades stretching from Watergate through the Republican Revolution. Conservatives were suspicious of reforms of Congress pushed through by liberal Democratic members in the wake of Nixon's resignation but remained fairly quiet through the 1970s. Once Ronald Reagan became president, however, conservatives became pointed critics of the “resurgent” Congress, accusing the institution of aspiring to usurp the executive branch's proper administrative functions. Through the presidency of George H.W. Bush, they systematically championed flexibility for the presidency, including supporting the doctrine of *Chevron* deference to agency interpretations. At the same time, they developed a sharp critique of Congress as an

almost hopelessly corrupted institution, accusing House Democratic leaders of scandalous behavior and petty tyranny, but also of helping insulate the bureaucracy from presidentially driven accountability.

Part III carefully examines the Republican Revolution and the actions of the 104<sup>th</sup> Congress. Because conservatives continued to see Congress as a source of mischief, they mostly undertook reforms designed to limit the legislature's degrees of freedom. Gingrich's top priority was centralizing power within the House such that he could better stand toe to toe with President Bill Clinton. These centralization efforts succeeded, but the Speaker's attempt to force a diminishment of the welfare state on Clinton ended in political disaster. The Revolution was chastened and henceforth charted a more modest course, including on deregulation and structural reform. In part because Republicans believed they were likely to win the presidency in 1996, they continued to believe that the best course of action was to enhance the president's powers, and the most ambitious reform they passed was the presidency-enhancing line-item veto.

Part IV recounts how conservative views about Congress evolved—or failed to—in the two decades following the 104<sup>th</sup> Congress. Although Republicans kept control of both houses of Congress for a dozen years, their desire to fundamentally alter the shape and size of government abated considerably after Clinton's reelection. While the Clinton impeachment encouraged a brief moment of conservative skepticism about the presidency and its powers, the election of George W. Bush quickly brought conservatives back to their robust defense of the presidency. During the Bush years, conservatives sought to bolster the president's managerial control of federal agencies and paid almost no attention to questions of Congress's distinctive role in the policy process. Barack Obama's frequent recourse to his "pen and phone" did, finally, make conservatives appreciate the perils of having a strong president and weak Congress. But before their new sensibility had a chance to take root or deliver any successful reforms, the unexpected victory of Donald Trump turned conservatives sharply back toward strong presidentialism of the sort advocated by the once-and-future Attorney General, William Barr.

Finally, Part V sketches the road not taken: what conservatives' "revolution" might have entailed had they been more appreciative of the distinctive advantages of the legislature. A well-developed, "anti-Cesarist" theory of Congress's importance had represented the leading conservative view in the wake of the New Deal. This view receded because of its failure to reckon with the exigencies

of the Cold War and because presidentialism presented conservatives with the greatest opportunities for policy victories after Reagan's election. If the earlier view, which emphasized the value of a multi-vocal legislature, had persisted, Republicans might have transformed Congress into a venue suitable to develop and implement a workable conservative governance strategy in the 1990s and beyond. Opposition to the welfare state as it had been realized by the Great Society might have been channeled into a true reconstruction of American governance in ways that honored federalism and self-government. Conservative energy might have been focused more on redesigning program architecture and renegotiating bad policy settlements instead of waging wholesale challenges against the existence of the administrative state. That path remains open, still.

## II. Embracing the Presidency and Denouncing Congress, 1970s-1994

Republicans went into the minority in both the House and Senate after the election of 1954. In both chambers, they would remain there for the next 26 years, and in the House they be outnumbered for an even 40. But during those four decades out of power in the House, the GOP managed to hold the presidency for 26 years. It is hardly surprising, then, that conservatives became presidentialists during this time.

It is nevertheless striking to see how fully they converted to this position by the end of the Reagan administration—and how their suspicions of the Democratic congresses congealed into a well-theorized condemnation of an “imperial Congress” that routinely abrogated the functions constitutionally assigned to the executive branch.

### A. Early Conservative Suspicion of Congressional Reform

The beginnings of the era of liberal-driven congressional reform predated Richard Nixon's presidency. Urban liberals were gaining power across the nation, but their ambitions for new federal programs met with fierce resistance from the southern conservative Democrats who, by virtue of seniority, held the majority of Congress's most important chairmanships. Scholars and politicians alike expressed deep frustration with what they saw as reactionary resistance to progress and demanded an internal restructuring that would allow more scope for policy entrepreneurship,

and give less of an ironclad veto to senior members.<sup>6</sup> During this period, liberals were focused on getting legislation moving and empowering the government to act—a position they maintained even after the election of Richard Nixon.<sup>7</sup>

But the focus of reform shifted markedly once Nixon's transgressions from the 1972 campaign rose to prominence. Congress came to see itself as Nixon's adversary, and more generally sought to fashion restraints for what had become an "Imperial Presidency."<sup>8</sup> As James L. Sundquist chronicled, in the remainder of the 1970s, Congress engineered a wide-ranging institutional "resurgence" meant to enable it to go toe to toe with the president. It overhauled the budget process, massively increased its own staff and built out an extensive subcommittee system, ramped up oversight, changed the process for engaging in foreign hostilities, and sprinkled legislative vetoes throughout the new legislation it passed.<sup>9</sup>

Democrats, who by that time had controlled both the House and Senate for more than two decades, clearly drove this reform agenda. Republicans mostly remained aloof, but sometimes expressed concerns that Congress was attempting to do too much and thereby dissipating its energies. Senator Pete Domenici (R-NM), for example, stated on the Senate floor in 1979: "Every member of this body, and every person who works here, knows the frustrations imposed by too many meetings, competing with too many markups, producing too many bills, attracting too many extraneous amendments, requiring too many recorded votes...."<sup>10</sup> Republicans also wondered if some of Democrats' reforms had swung the pendulum too far away from the presidency. Immediately after Ronald Reagan's triumph over President Carter, Gerald Ford told *Time* magazine, "We have not an imperial presidency, but an imperiled presidency. Under today's rules...the presidency does not operate effectively... That is harmful to our overall national interests."<sup>11</sup> And Republicans were critical of the extent of the staff build-up; a prominent conservative scholar wrote a book

---

<sup>6</sup> For an influential scholarly critique, see JAMES MACGREGOR BURNS, *THE DEADLOCK OF DEMOCRACY* (1963); for a critique advanced by a liberal Senator from Pennsylvania, see JOSEPH S. CLARK, *THE SAPLESS BRANCH* (1964).

<sup>7</sup> E.g., Congress empowered Nixon to impose wage and price controls in the Economic Stabilization Act of 1970 and gave his appointee budgetary discretion to wage a "war on cancer" with the National Cancer Act of 1971.

<sup>8</sup> ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

<sup>9</sup> For a comprehensive accounting of the late 1970s resurgence, see Part II of JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* (1981).

<sup>10</sup> Quoted in *Ibid.*, at 409.

<sup>11</sup> Cited in ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* (2005), 30.

worrying about the unaccountable power staff exercised as “unelected representatives.”<sup>12</sup> Upon retaking the Senate majority in January 1981, Republicans immediately cut staff by about ten percent.<sup>13</sup>

Conservative legislators’ voting behavior on presidential power also changed during this early period. Through the presidency of Lyndon Johnson, conservatives had been more likely to vote to restrict presidential power than others in Congress, but after Nixon they were more likely to embrace choices that empowered the presidency.<sup>14</sup>

## B. Branding Reagan’s Congressional Critics as Usurpers

Conservatives had some successes in frustrating the ambitions of Jimmy Carter in the last years of the 1970s. But they won their first decisive victory in a generation in 1980, when Ronald Reagan trounced Carter and Republicans unexpectedly won control of the Senate for the first time since 1954.<sup>15</sup> Still, the House of Representatives remained in Democratic hands. And while a coalition of conservative Democrats and Republicans brought Reagan a number of historic victories in his first years in office, Democrats became increasingly recalcitrant and effective opponents of Reagan’s conservative maneuvers as his term went on. As long as Democrats held the House, there was little chance that Congress would seriously pursue conservative visions of cutting the institutions of the Great Society down to size.

As a result, conservatives during this time became even more skeptical of Congress as an institution. This evolution can be seen in the rise of Newt Gingrich, the development of an intellectual vocabulary describing congressional overreach, and in the fights over the nation’s foreign policy for war-torn Nicaragua.

### 1. Newt Gingrich’s Villainization of the Democratic House

Conservative members of the House developed their own distinctive critique of their institution in the 1980s. They believed the GOP minority had too long accommodated itself to the idea of an

---

<sup>12</sup> MICHAEL MALBIN, *UNELECTED REPRESENTATIVES* (1980).

<sup>13</sup> Sundquist 1981, *supra* n. 9, at 411.

<sup>14</sup> J. Richard Piper, *Presidential-Congressional Power Prescriptions in Conservative Political Thought since 1933*, 21 *PRESIDENTIAL STUDIES QUARTERLY* 35–54 (1991), 40-45.

<sup>15</sup> For a detailed account of how conservatives secured dominance within the Republican Party machinery, see GEOFFREY KABASERVICE, *RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY, FROM EISENHOWER TO THE TEA PARTY* (2012).

everlasting Democratic majority, scrounging for breadcrumbs rather than mounting a serious attempt to unsettle their opponents' control and eventually retake the chamber. In their view, corrupt Democratic leaders presided over a thoroughly corrupt institution, and their role was first of all to hammer on this corruption. Far and away the most important developer of this critique was Newt Gingrich.

Gingrich, first elected in 1978, rose to prominence within the Republican caucus by pioneering a strategy of intransigent criticism, which sharply contrasted with the accommodative style of House Minority Leader Bob Michel. Michel's genial cooperation with Democratic leaders, and especially Speaker Tip O'Neill, had, for many years, ensured that Republicans could exert some influence on legislation. Gingrich and some of his fellow firebrands, on the other hand, pioneered the use of 1-minute C-SPAN speeches meant to enrage the Speaker. They explicitly hoped to provoke an intemperate response, which they could then denounce as an abuse of power.<sup>16</sup> They succeeded in doing so, with O'Neill in 1984 taking to the floor to denounce their antics as "the lowest thing I've ever seen in my 32 years in Congress," words which were then stricken from the record for violating the chamber's rules against name-calling.<sup>17</sup>

Michel's style remained more popular among Republicans during O'Neill's speakership. But under O'Neill's successor, Jim Wright, Democrats adopted a style of steamrolling the opposition. Wright's leadership undermined "the credibility of go-along, get-along Republicans among their Republican colleagues. By drawing partisan lines, Wright gave Republican moderates—moderates in style, not necessarily in policy preferences—no place to go but into the camp of Republican militants."<sup>18</sup> Gingrich was the main beneficiary. And he made it clear that not only Wright, but the whole Democratic majority—indeed, the whole institution of Congress—bore responsibility. In 1988, Gingrich wrote: "It is an imperial Congress reigned over by an imperial Speaker enacting special-interest legislation.... [It] has become the most unrepresentative and corrupt of the modern era. It is a Congress that lusts for power but evades responsibility for its actions."<sup>19</sup>

---

<sup>16</sup> JULIAN E. ZELIZER, *BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY* (2020), at 66-68.

<sup>17</sup> *Ibid.*, at 72; see also STEVE KORNACKI, *THE RED AND THE BLUE: THE 1990S AND THE BIRTH OF POLITICAL TRIBALISM* (2018), at 42-48.

<sup>18</sup> NELSON POLSBY, *HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE* (2004), 133. See also J. BROOKS FLIPPEN, *SPEAKER JIM WRIGHT: POWER, SCANDAL, AND THE BIRTH OF MODERN POLITICS* (2018).

<sup>19</sup> *THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS*, (Gordon S. Jones & John A. Marini eds., 1988), at ix, x.

When the ethics investigation initiated and spurred on by Gingrich led to Wright's resignation, the conservative's commitment to running against institutional corruption in the House was cemented. Ambitious young members, such as the "Gang of Seven" in the 102<sup>nd</sup> Congress, would school themselves in Gingrich's techniques. Denouncing corrupt Democratic leadership would become conservatives' favorite strategy in the years to come, helping to magnify the importance of the House Bank Scandal and House Post Office scandal, among others.<sup>20</sup> The Republican platform for the 1992 elections included a denunciation of the "Imperial Congress."<sup>21</sup>

## 2. A Common Language for Denouncing Congress

While there were many differences between the rhetoric of Gingrich and his allies and the arguments made by Reagan administration lawyers like William Barr, there was a common tendency of countering charges that Reagan was abusing his power with an insistence that Democratic congressional leaders were the real tyrants.

A close examination of the evolution of Reagan-era conservative and Republican views on Congress and the presidency is beyond the scope of this essay. But a brief examination of three books gives an idea of the positions that conservative intellectuals staked out in the late 1980s and early 1990s and the distinctive vocabulary they developed to accuse Congress of outsized pretensions. Two edited volumes, *The Imperial Congress* (published by the Heritage Foundation) and *The Fettered Presidency* (published by the American Enterprise Institute), from the end of the Reagan's presidency, sought to compile conservative views from a variety of prominent commentators and former administration officials.<sup>22</sup> A third book, Terry Eastland's *Energy in the Executive*, offered an influential defense of a strong presidency at the end of George H.W. Bush's term.<sup>23</sup> Several themes emerge in each of these works.

*Congressional micromanagement:* Conservatives argued that Congress was forsaking its responsibility to decide major policy questions while simultaneously demanding for itself the ability to dictate how executive branch agencies were run. As (post-Borking) Robert Bork put it

---

<sup>20</sup> C. LAWRENCE EVANS and WALTER OLESZEK, CONGRESS UNDER FIRE (1996), at 35-37.

<sup>21</sup> Craig Green, *Deconstructing the Administrative State: Constitutional Debates over Chevron and Political Transformation in American Law*, SSRN JOURNAL (2018), <https://www.ssrn.com/abstract=3264482> (last visited Jan 31, 2020), at 144.

<sup>22</sup> *The Imperial Congress*, supra n. 19; *THE FETTERED PRESIDENCY* (Gordon Crovitz & Jeremy Rabkin eds., 1989).

<sup>23</sup> TERRY EASTLAND, *ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY* (1992).

in his foreword for the AEI volume, Congress was intruding on the rightful administrative province of the executive branch, sometimes through overly detailed statutes and sometimes through inappropriately aggressive oversight.<sup>24</sup> In the past, they had also done so through profligate use of legislative vetoes, which conservatives were glad to see struck down.

*Criminalization of politics:* Especially in the wake of the Iran-Contra scandal, conservatives were dead-set against the independent counsel statute, which they said ensured lengthy and unnecessary investigations of executive branch officials who had done nothing wrong other than advance policies that Congress disliked.<sup>25</sup>

*Abusive Omnibus Legislation:* The conservative commentators were united in denouncing the House's use of omnibus spending legislation, which they saw as an illegitimate way to force the president's hand. By doing so, they argued, Congress was depriving the president of his constitutional share of the legislative power by effectively making it impossible to use his veto. Their favored solution was to give the president a line-item veto power that would allow him to effectuate some parts of an omnibus enactment while vetoing others.

### 3. The Anti-Congressional Defense against Iran-Contra

One defining moment in the development of conservatives' antipathy toward Congress was the Iran-Contra scandal, the essence of which was actors within the executive branch straining to circumvent congressional restraints they believed were against the nation's interests. To critics, the Reagan administration's imperiousness recalled nothing so much as the Nixon administration's attitude around Watergate. But as administration sympathizers saw it, the workarounds used had been consistent with the letter of the law. The real scandal was that Congress had so heavily-handedly constrained the nation's intelligence services.

The main congressionally-imposed limitations at issue were known as the Boland Amendments, after their sponsor, Representative Edward Boland. These appropriation riders prohibited U.S. government assistance to the Nicaraguan Contras, and there was a contentious question of statutory

---

<sup>24</sup> THE FETTERED PRESIDENCY, xi. Conservatives were especially concerned about the way that Congress was attempting to dictate U.S. foreign policy and the policies of the U.S. intelligence agencies; the Boland Amendments were frequently pointed to as the height of congressional folly.

<sup>25</sup> Eastland 1992, supra n. 23, at 79.

interpretation as to whether they covered activities of the National Security Council.<sup>26</sup> But defenders of the administration did not confine themselves to arguing that the activities at issue were technically permitted. Instead, they argued that the Boland Amendments could not serve as the strong prohibition that Congressional Democrats made them out to be; if they were interpreted that way, they would “become an unconstitutional congressional effort to control the exercise of core functions of the coordinate political branch—an action which runs afoul of the separation of powers principle. ... Congress cannot regulate indirectly through appropriations that which, because of specific constitutional restrictions, it could not control directly.”<sup>27</sup>

In this view, the problem wasn’t that members of the Reagan administration had attempted to circumvent legitimate congressional controls. It was that Congress had “confused the legislative role with the administrative or even operational role that is properly the domain of the executive branch,” and thereby created an impossible situation for those charged with promoting the nation’s best interests.<sup>28</sup>

One of the administration’s staunchest and most effective defenders in Congress throughout Iran-Contra was Representative Richard Cheney of Wyoming. Cheney was first elected to Congress in 1978 after playing an important role in Gerald Ford’s presidency, first as right-hand man to Chief of Staff Donald Rumsfeld, and then as Chief of Staff himself once Rumsfeld became Secretary of Defense. Given his previous experience, Cheney quickly established himself as a leader in the GOP minority, becoming Republican Policy Chair after just two years. His conception of his role as a member of Congress was unusual, in that he made very few speeches and sought out committee assignments with non-public meetings, including the Intelligence Committee. Like Rumsfeld and other Ford administration alumni, he believed that Congress had gotten in the habit of making a nuisance of itself instead of attending to its core functions.<sup>29</sup>

Cheney’s Intelligence Committee experience set him up to act as House Republicans’ ranking member on the Select Committee investigating Iran-Contra. He supervised the eventual writing of

---

<sup>26</sup> Bretton G. Sciaroni, *Boland in the Wind: The Iran-Contra Affair and the Invitation to Struggle*, 17 PEPPERDINE LAW REVIEW 379–427 (1990), at 382. Sciaroni provides a complete listing of all the Boland Amendments, which were passed between 1982 and 1986, although the most consequential for the Iran-Contra scandal was the one passed in 1984.

<sup>27</sup> *Ibid.*, at 408, 412.

<sup>28</sup> *Ibid.*, at 417.

<sup>29</sup> For an account of Cheney’s early career, set in the context of other national security conservatives’ experiences, see JAMES MANN, *RISE OF THE VULCANS: THE HISTORY OF BUSH’S WAR CABINET* (2004), Kindle loc. 2125.

a Minority Report representing the views of six House members and two Senators. The Minority Report admitted that the Reagan administration had made numerous errors of judgment, but insisted that there were no laws or important norms broken. Indeed, it turned the tables on Congress, arguing that the administration had acted in part out of “[a] legitimate frustration with abuses of power and irresolution by the legislative branch,” and that it was the investigating committees’ “aggrandizing theory of Congress’ foreign policy powers” that had unnecessarily escalated the incident into a scandal.<sup>30</sup> The minority report conceded that it was unwise to try to keep Congress ignorant of important decisions but was equally insistent that Congress recognize “that the power of the purse does not make it supreme. Limits must be recognized by both branches to protect the balance that was intended by the Framers.”<sup>31</sup>

Cheney’s work defending the administration during Iran-Contra further raised his stock with the GOP, and after the 1988 elections he was elected Minority Whip. That made him the heir apparent to Minority Leader Michel, but his legislative career soon came to an end when President Bush’s nomination of John Tower to become Defense Secretary failed. An easily-confirmable replacement was needed, and Cheney fit the bill. His decade serving Congress had done little to convince him of the body’s seriousness, and his doubts would come to have enormous importance in shaping the George W. Bush administration’s orientation toward Congress. His place in the House GOP leadership was taken by none other than Newt Gingrich.

Nicaraguan policy—and Congress’s place in determining it—remained contentious in the immediate wake of Iran-Contra. Speaker Wright (who had a career-long interest in Latin America) felt the administration’s efforts on behalf of peace were lacking and he decided to intervene himself, including by meeting with Sandinista leader Daniel Ortega at a time when the Reagan administration had cut off communication with him. Republicans were furious at Wright’s willingness to conduct his own foreign policy, not to mention cozy up to communists. President Reagan went so far as to criticize Wright for trying to devise a “Wright-Ortega plan” and thereby jeopardizing the government’s official efforts to secure peace.<sup>32</sup> Even after Reagan and Wright were reconciled, Gingrich pressed the attack, saying that Wright was “systematically undermining

---

<sup>30</sup> H.Rept. No. 100-433, S. Rept. No. 100-216, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR: WITH SUPPLEMENTAL, MINORITY, AND ADDITIONAL VIEWS (1987), at 437.

<sup>31</sup> *Ibid.*, at 438.

<sup>32</sup> JULIAN E. ZELIZER, BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY (2020), at 120.

the foreign policy of the United States,” and that he was “so consumed by his own power that he is like Mussolini, believing he can redefine the game to suit his own needs.”<sup>33</sup>

In short, while Democrats believed the lesson of Iran-Contra was that attempting to circumvent Congress would lead to bad things, conservatives mostly came away confirmed in their belief that Congress had a talent for making a mess of things by sticking its nose where it did not belong.

### C. Envisioning a Stronger Managerial Presidency

As Republicans in Congress developed their strategy of attacking Congress as corrupt, other conservatives simultaneously worked to enhance the president’s authority to control the bureaucracy. They reasoned that accountability to the people properly flowed through the president, who is, after all, the only official elected by the whole nation. If the administrative state was going to work for the American people, it would be the result of Republican presidential leadership.

The first step was simply to confirm Reagan appointees who were substantively committed to changing agencies’ conceptions of their own missions to give a much greater weight to economic growth.<sup>34</sup> Sometimes these attempts went quite badly, as with Environmental Protection Agency Administrator Anne Gorsuch, whose run-ins with EPA career staff and Congress ultimately led to her ouster.<sup>35</sup>

At a deeper structural level, conservatives working within Reagan’s White House created a central clearing process for agency regulations that required the Office of Information and Regulatory Affairs (OIRA) with the Office of Management and Budget (OMB) to sign off on significant new rules.<sup>36</sup> Vice President George Bush was charged with leading a special task force on deregulation, further adding to the top-down effort to control regulatory agencies.<sup>37</sup>

---

<sup>33</sup> *Ibid.*, at 121.

<sup>34</sup> Thomas O McGarity, *Regulatory Reform in the Reagan Era*, 45 MARYLAND LAW REVIEW 253 (1986), at 260.

<sup>35</sup> Ronald L. Claveloux, *The Conflict between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE LAW JOURNAL 1333 (1983).

<sup>36</sup> See Andrew Rudalevige, *Central Clearance as Presidential Management*, Gray Center for the Study of the Administrative State Working Paper 20-05, available at <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2020/02/Rudalevige-Central-Clearance-as-Presidential-Management.pdf>.

<sup>37</sup> See Barry D. Friedman, *REGULATION IN THE REAGAN-BUSH ERA: THE ERUPTION OF PRESIDENTIAL INFLUENCE* (1995).

In keeping with their preference for presidential control, conservatives became enthusiastic proponents of two legal doctrines developed during Reagan's presidency. The first was the unitary executive, which reasons from the Constitution's vesting of the whole executive power in the president to consequences about who may permissibly challenge presidential decisions.<sup>38</sup> If one accepts strong versions of the unitary executive, then many of Congress's oversight practices come to seem like pernicious attempts to wrest legitimate constitutional prerogatives away from the president.<sup>39</sup>

The second doctrine was *Chevron* deference. Before it became emblematic of an unchecked administrative state, *Chevron v. NRDC* was an important victory for the Reagan administration. By upholding a more flexible interpretation of the Clean Air Act, the Supreme Court protected a number of Reagan's key environmental policies from environmental groups' legal challenges.

The logic of *Chevron* is not clearly antithetical to Congress's interests; it is first and foremost a doctrine of judicial modesty. But by affirming the executive branch's ability to follow its own reasonable interpretations, it implicitly cuts down on the legislature's ability to control legal outputs through vague restrictions. Congress needs to be clear if it expects to restrict the executive's freedom of action. Justice Antonin Scalia was a consistent defender of *Chevron*, and systematic conservative opposition to the doctrine was unknown until well into the Obama administration.<sup>40</sup> Coupled with Scalia's well-known opposition to consulting legislative intent, *Chevron* fit neatly into a skeptical view of Congress, in which Committee Chairs or even staffers might try to have their way by means of low-visibility manipulation of the documentary record, rather than through clear instructions arrived at after forthright legislative debate.

#### D. The Puzzling Response to the Demise of the Legislative Veto

Finally, it is important to note one area in which conservative antipathy for Congress seems not to have played an important role during the Reagan years: determining an appropriate response to presidential challenges to the legislative veto. Republicans and Democrats put their institutional

---

<sup>38</sup> For an influential statement, see Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARVARD LAW REVIEW 1153 (1992).

<sup>39</sup> For a critical review of such implications, see Heidi Kitrosser, *The Accountable Executive*, 93 MINNESOTA LAW REVIEW 1741 (2009).

<sup>40</sup> Not until 2016 did the Republican Party include an attack on *Chevron* in its national platform. For a comprehensive account of conservatives' relationship to *Chevron*, see Green 2018, *supra* n. 21.

interest ahead of their partisan interest as they organized a legal defense of the legislative veto in the late 1970s and early 1980s. Presidents of both parties were opposed to the use Congress made of the legislative veto beginning in the 1970s, with Jimmy Carter being especially vehement in his opposition. Legislators of both parties were generally united, if not on all particular uses of vetoes, then at least on the question of whether Congress ought to have the ability to impose them as a condition of delegation. Indeed, the House General Counsel's office was institutionalized with bipartisan support specifically in order to defend the legislative counsel in court.<sup>41</sup>

Notwithstanding those efforts, the Supreme Court invalidated all legislative vetoes with its sweeping decision in *INS v. Chadha*.<sup>42</sup> If legislators wanted to regain the control over presidential or agency decisions that the legislative veto had previously given them, they would either have to change the Constitution—only perfunctorily considered<sup>43</sup>—or devise alternate means that would comply with the constitutional requirements of bicameralism and presentment.

Mostly, Congress adapted by putting “report and wait” requirements where they used to put vetoes.<sup>44</sup> Committees developed informal reciprocal relations with the agencies within their jurisdiction. Only if agencies kept committees apprised of their activities, and were responsive to committee concerns, would they be reauthorized promptly. In normal circumstances, this meant things were much as they were before legislative vetoes were invalidated, which has led a number of commentators to assert that *Chadha* changed little.<sup>45</sup>

For two of the most high-profile legislative vetoes, Congress took a notably different course. The War Powers Resolution and the National Emergencies Act both originally gave Congress the ability to stop presidential actions (foreign hostilities and declarations of national emergencies)

---

<sup>41</sup> See Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROB'S 47 (1998).

<sup>42</sup> 462 U.S. 919 (1983).

<sup>43</sup> Senator Dennis DeConcini proposed a brief amendment designed to reverse *Chadha*, but it never gained traction. See Dennis DeConcini, “Should Congress Act Now to Preserve the Legislative Veto?” 62 CONG. DIGEST 296 (1983); “The Legislative Veto: A Constitutional Amendment,” 21 HARV. J. LEGIS. 29 (1984). For a detailed account of congressional actions in the immediate wake of *Chadha*, see Michael J. Horan, *Of Train Wrecks, Time Bombs, and Skinned Cats: The Congressional Response to the Fall of the Legislative Veto*, 13 J. LEGIS. 22 (1986).

<sup>44</sup> For the most complete account of Congress's response to *Chadha*, see MICHAEL J. BERRY, THE MODERN LEGISLATIVE VETO: MACROPOLITICAL CONFLICT AND THE LEGACY OF CHADHA (2016). Berry's empirical contribution is immense, but his analysis is marred by his insistence that report-and-wait provisions are just as much a kind of legislative veto as the unicameral vetoes that disappeared after *Chadha*.

<sup>45</sup>Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW AND CONTEMPORARY PROBLEMS 273 (1993); JESSICA KORN, THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO (1996); Berry 2016, supra n. 44.

with concurrent resolutions, which are actions taken by both chambers of Congress but not requiring the president's approval. In both cases, worried that the concurrent resolution procedures would be constitutionally ineffective after *Chadha*, Congress replaced them with joint resolution procedures, in which both chambers of Congress would need to act *and* secure the president's signature (or override his veto).<sup>46</sup> It did so with very little debate about the weakness of a procedure meant to check the executive that would henceforth be subject to a presidential veto.<sup>47</sup> In hindsight, these decisions look quite puzzling, especially given that other constitutionally permissible procedures were understood at the time.<sup>48</sup>

More generally, given that partisan politics seemed to play such a limited role in the response to *Chadha*, it is difficult to understand why Congress did not devise a more effective replacement for the legislative veto during the 1980s. As Part III.D will discuss, their puzzling inefficacy would continue into the era of Republican control.

### III. Missed Reform Opportunities in the 104<sup>th</sup> Congress

Conservatives' suspicions of Congress spread beyond their ranks in the years after Reagan's departure. Numerous scandals convinced many Americans that the institution's corrupt tendencies called out for serious reforms. Congress created a Joint Committee on the Organization of

---

<sup>46</sup> For the War Powers Act, see Senate amendment to Section 1013, State Department Authorization Act for FY1984, P.L. 98-164, approved November 22, 1983. Codified at 50 U.S.C., Section 1546a (1994). For a useful narrative explanation, see Scott R. Anderson & Margaret L. Taylor, *The Long Road Ahead for the Congressional Resolutions on Iran*, LAWFARE (2020), <https://www.lawfareblog.com/long-road-ahead-congressional-resolutions-iran> (last visited Feb 16, 2020). For the National Emergencies Act, see S.Amdt.299 to S.1003, agreed to by voice vote in Senate on June 7, 1985, and included in the conference bill for the Foreign Relations Authorization Act, 99 Stat. 448, P.L. 99-93.

<sup>47</sup> The only discussion of the change to the National Emergencies Act was provided by Senator Mac Matthias (R-MD), who sponsored the amendment. Matthias rather casually asserted: "If a majority of both Houses are for termination of a national emergency and the President disagrees, we are at the same point of impasse, whether the legislative means is a concurrent resolution or a joint resolution. If we come to such an impasse between the President and the Congress, either a two-thirds override is called for or the use of the appropriations power or other constitutionally sound remedies." 131 CONG. REC. 14948. No other Senator contested this logic, and the House apparently never addressed it at all.

<sup>48</sup> See Stephen Breyer, *The Legislative Veto after Chadha*, 72 GEORGETOWN L.J. 793 (1984) (outlining a plan for a constitutionally permissible "confirmatory law procedure"); Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPPERDINE L. REV. 57, at 83 (citing a number of statutes where Congress replaced legislative vetoes with a procedure by which a decision would be finalized only with passage of a joint resolution, including executive branch reorganization).

Congress in 1992 that issued a major report in December 1993, but its recommendations were not taken up during 1994. The legislature was clearly ripe for some changes, however.<sup>49</sup>

It was at that point that Republicans mounted their startlingly effective 1994 midterm campaign. Their 54-seat pickup in the House was the largest swing since 1948 and gave them 230 seats, their first majority since 1954. Their 8-seat pickup in the Senate returned control of the upper chamber after eight years of Democratic control, and gave them a slim majority of 52 seats. But these numbers significantly understate the momentum that Republicans and conservatives felt. Many people felt that Clinton's election was a fluke, given H. Ross Perot's huge impact on the 1992 election.<sup>50</sup> Republicans believed they had captured Perot's supporters in 1994 and were on their way to an easy win over the then-unpopular Clinton in 1996.

Just as important to House Republicans' understanding of their victory was the Contract With America, an unusually detailed campaign document that nearly all Republican candidates for the House had signed onto in October 1994. The Contract, which was masterminded by Gingrich and his associates with the hope that it would help deliver a majority, promised to reform Congress itself and listed various policy and constitutional changes that Republicans promised to vote on within their first hundred days in office. Although many members felt that the Contract was superfluous, preferring to focus on Bill Clinton's failed healthcare plan and tax increases, others insisted it was instrumental in convincing voters that Republicans had a real reform agenda.<sup>51</sup> If the GOP could deliver on all the promises of the Contract, it would mean a significant reduction of the Great Society welfare programs, a return to state control of many programs, a rollback of many regulatory programs Republicans felt had retarded economic growth, and a major overhaul of the Constitution. As he rose to the Speakership (with Michel having retired), Gingrich was totally committed to delivering on the Contract.

Because of the Contract, because Republicans were so energized by their unexpected return to the majority, and because Gingrich self-consciously viewed himself as a world-historical figure, the

---

<sup>49</sup> See Evans and Oleszek, *supra* n. 20.

<sup>50</sup> Perot won 18 percent of the popular vote. Many historians now believe that he drew voters away from Clinton and Bush in nearly equal numbers.

<sup>51</sup> See JAMES G. GIMPEL, *LEGISLATING THE REVOLUTION: THE CONTRACT WITH AMERICA IN ITS FIRST 100 DAYS* (1996), 5-15; NICOL RAE, *CONSERVATIVE REFORMERS: THE REPUBLICAN FRESHMEN AND THE LESSONS OF THE 104TH CONGRESS* (1998), 42-43.

ambition to overhaul government was at an apex in the 104<sup>th</sup> Congress.<sup>52</sup> At the same time, conservative suspicion of Congress as an institution persisted, steering Republicans away from embracing the full reforming potential of Congress, and indeed steering them toward strengthening the presidency in spite of their animosity toward Clinton. This part proceeds thematically in examining what became of conservative ambitions.

#### A. Reforming Congress

First among the Contract's promises was a commitment to overhaul Congress itself. After hammering away at congressional corruption for so long, Gingrich and his allies were determined not to simply run the House as Democrats had done. As tempting as it was to simply turn the tables, they would instead attempt to professionalize the House in line with Gingrich's beliefs that government should be run more like business. Gingrich liked to meet with military and business leaders for inspiration, and he asked business executives to "tutor him in the intricacies of downsizing a large institution."<sup>53</sup> In July 1995, private businessman Donald Rumsfeld was brought in to testify based on his experience in downsizing two private companies, and he warned that the way to smaller government would not come through minute instructions from the legislature; "Smaller government is an impossible goal if Congress continues to tell the Executive Branch when to turn right, turn left, speed up, or slow down."<sup>54</sup> In other words, if conservatives were going to succeed in making the federal government more efficient, one of the first steps would be to rein in the out-of-control Congress itself.

The first act in this vein, as specified in the Contract, was to pass the Congressional Accountability Act, which subjected members of Congress and their staff to a number of federal labor and workplace safety laws from which they had formerly exempted themselves. Congress would no longer be given special treatment, but would be subject to the same laws as regular businesses. The House and Senate both passed versions of the law quickly, without dissent, and the President signed the Senate version into law on January 23, 1995.<sup>55</sup>

---

<sup>52</sup> At their freshman orientation, Republicans were treated to Rush Limbaugh warning them, "This is not the time to get moderate. This is not the time to start trying to be liked. This is not the time to start gaining the approval of the people you just defeated." Kornacki 2018, *supra* n. 17, at 336.

<sup>53</sup> DAVID MARANISS & MICHAEL WEISSKOPF, *TELL NEWT TO SHUT UP!* (1996), at 9.

<sup>54</sup> Donald Rumsfeld, *Thoughts from Business on Downsizing Government*, THE HERITAGE FOUNDATION (1995), <https://www.heritage.org/node/20749/print-display> (last visited Aug 20, 2020).

<sup>55</sup> 104<sup>th</sup> Congress, S.2, Pub.L.C. 104-1.

In the House, Republicans also made a number of changes through the enactment of their rules package. They ended some clearly anachronistic and wasteful amenities, including twice-daily deliveries of buckets of ice to each member's office.<sup>56</sup> One of their most enduring changes was to create a new officer of the House, the Chief Administrative Officer (CAO), who would take control of a huge range of back office functions that the (usually highly partisan) Committee on House Administration had previously handled. Reformers had advocated for the creation of such a single, business-like overseer since the Obey Commission in 1977, but Democrats had always preferred to keep patronage jobs under political jurisdiction.<sup>57</sup> Republicans promised to end such favoritism and the corrupt practices they said flowed out of it; they promised there would be regular bookkeeping and normal vendors subject to open bidding. The first CAO, Scot Faulkner, met significant resistance and was gone by 1996, charging Republicans with failing to keep their promise in various ways.<sup>58</sup> But the CAO has been an enduring institutional success story, exercising a stabilizing influence on House affairs through several partisan reversals. The House today is undoubtedly a more business-like environment than it was before the Republican Revolution.<sup>59</sup>

Having assailed congressional staff as bloated, Republicans also immediately cut House committee staff by one-third.<sup>60</sup> Given Gingrich's belief that committees incubated cozy relationships between legislators and the bureaucrats they were responsible for overseeing, this was a natural move for the new speaker. Legislative Service Organizations were defunded, a move mainly intended to kill off the Democratic Study Group.<sup>61</sup> During the appropriations cycle in 1995,

---

<sup>56</sup> For reporting on Gingrich's proud tale of ending the delivery of ice buckets, see Adam Clymer, *For Gingrich, Elections this Year Are Like 'Whitewater Canoeing'*, NEW YORK TIMES (October 25, 1996), A1.

<sup>57</sup> *Administrative Reorganization and Legislative Management: Communication from the Chairman, Commission on Administrative Review, U.S. House of Representatives*, vol. 1 of 2: *Administrative Units*, 95th Cong., 1st sess., H. Doc. 95-232 (1977).

<sup>58</sup> SCOT M. FAULKNER, *NAKED EMPERORS: THE FAILURE OF THE REPUBLICAN REVOLUTION* (2007). Faulkner's book describes, in minute detail, his confrontation with the Republican Chair of the House Oversight Committee, Bill Thomas (R-CA). In Faulkner's judgment, Thomas was willing to undermine the CAO's independence in order to enlarge his own committee's power. Gingrich belatedly attempted to bring Thomas into line with the CAO's reform agenda.

<sup>59</sup> One might wonder whether the less professional system may have had an easier time producing political compromises; for thoughts on this subject, see Philip A. Wallach, *Congress Rebuked but Not Reimagined*, LAW & LIBERTY (January 15, 2020), at <https://www.lawliberty.org/2020/01/15/congress-rebuked-but-not-reimagined/>.

<sup>60</sup> This is slightly less drastic than it seems, given that some of the functions carried out by committee staff would now be taken on by CAO personnel. Still, the new positions were not filled by the old employees, and so this reduction represented a significant cleaning of house.

<sup>61</sup> Gimpel 1996, *supra* n. 51, at 38.

Republicans also zeroed out funds for the Office of Technology Assessment, a congressional support agency they believed had become duplicative.<sup>62</sup>

Ambitious plans to restructure committee jurisdictions and reduce the number of committees ended up producing less sweeping change than incoming Rules Chairman David Dreier (R-CA) had hoped for, with just three full committees eliminated. But 31 out of 115 subcommittees were abolished, and the sprawling jurisdiction of the Energy and Commerce committee somewhat narrowed. Ten committees had their names changed.<sup>63</sup> More importantly, Gingrich made it clear that assigning committee chairmanships was his prerogative rather than based on strict respect for seniority, and he acted on this in a few important cases, including the Appropriations Committee. Representative Christopher Cox (R-CA) observed: “You don't have to change the head of every committee when you change just a few. Gingrich has given them a renewed sense that chairs serve at the Speaker's pleasure.”<sup>64</sup> Term limits for chairmanships further created an expectation that the Speaker and other leaders would determine how committee power could be used. Generally speaking, a shift from committee power (already much weaker than in its 1960s heyday) to Speaker power was the unifying thread in House rules changes.

Assorted other rules changes were meant to make Congress more accountable. Committees were required to publish their votes and banned from allowing proxy voting. Legislators were prohibited from revising their remarks in the Congressional Record. A ban on commemorative legislation was meant to keep Congress focused on important policymaking.<sup>65</sup>

It is important to note that few of these changes in the House had parallels in the Senate, which played to type in valuing continuity above nearly all else. Republicans had undertaken some reforms, including staff reductions, when they retook the Senate majority in 1981, but they showed little interest in internal reform in 1995. When one freshman Republican Senator was asked what

---

<sup>62</sup> Warren E. Leary, *Congress's Science Agency Prepares to Close Its Doors*, NY TIMES (September 24, 1995), A26.

<sup>63</sup> Rae 1998, *supra* n. 51, at 68. The committees eliminated were District of Columbia, Post Office and Civil Service, and Merchant Marine and Fisheries. Notable name changes include Education and Labor becoming Economic and Educational Opportunities, Government Operations becoming Government Reform and Oversight, and House Administration becoming House Oversight. See also A HISTORY OF THE COMMITTEE ON HOUSE ADMINISTRATION, 1947-2012 (2013), 56, available at <https://www.govinfo.gov/content/pkg/CPRT-112HPRT72170/pdf/CPRT-112HPRT72170.pdf>.

<sup>64</sup> Gimpel 1996, *supra* n. 51, at 36.

<sup>65</sup> Rae 1998, *supra* n. 51, at 76.

it was like to be part of the Republican Revolution, he replied: “I don’t know, I’m in the Senate!”<sup>66</sup> Senate Majority Leader Bob Dole and Speaker Gingrich could hardly have been more different in terms of personality, or in their willingness to defend the institution of Congress as it had existed for decades. Gingrich had once called Dole “the tax collector for the welfare state,” and they had a famously chilly relationship.<sup>67</sup> While Gingrich’s House could push through a number of internal reforms on its own, if Republicans were going to succeed in changing the trajectory of American policy or the basic structures of American government, they would have to stand together.

### B. Pursuing deregulation

If Congress’s self-directed reforms can be treated as mostly self-contained, the same is not true for efforts to produce major shifts in policy or to change underlying structures of government. As always in politics, tradeoffs were inevitable and so attempts to push on one priority affected the pursuit of others. Collectively deciding which priority was most worth fighting for turned out to be a much greater challenge than Republicans imagined as they campaigned in 1994—perhaps not surprising, considering how long it had been since responsibility for governing fell on their shoulders.

One of their clearest priorities was deregulation. In the wake of their 1994 election triumph, it appeared that Republicans were in position to “reopen previously settled questions and to revive positions that have remained virtually dormant since the New Deal” regarding the regulatory state, according to one critical observer.<sup>68</sup> Rhetoric on the subject flew freely within the conference. Even such a usually genial player as John Boehner described the Occupational Safety and Health Administration (OSHA) as the “Gestapo of the federal government.”<sup>69</sup>

But the clear leader of the deregulatory push was the new Majority Whip, Tom DeLay (R-TX), who declared that his intention was to bring about “the demise of the modern era of government regulation.”<sup>70</sup> DeLay had spent most of his professional life as an exterminator and was constantly

---

<sup>66</sup> Rae 1998, *supra* n. 51, at 131.

<sup>67</sup> Kornacki 2018, *supra* n. 17, at 273.

<sup>68</sup> Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 UNIVERSITY OF CHICAGO LAW REVIEW 1463 (1996), at 1463.

<sup>69</sup> Maraniss and Weisskopf 1996, *supra* n. 53, at 56.

<sup>70</sup> *Id.*, at 11.

frustrated by federal environmental regulations, and he openly advertised his willingness to work hand in glove with all sorts of business interests to devise a new regulatory order.

Before the 104<sup>th</sup> Congress was sworn in, DeLay (with Gingrich's cooperation) already requested a hundred-day freeze on all federal agency rulemaking, only to be rebuffed by Clinton OIRA Director Sally Katzen.<sup>71</sup> He soon sought to use the new majority's power to accomplish the same goal, introducing the Regulatory Transition Act of 1995 in the first week of the new Congress and pushing it through to passage in the House on February 24, 1995.<sup>72</sup> It would have instituted a moratorium on all new regulation lasting until a law was passed requiring cost-benefit analysis for all rules, or December 31, 1995, whichever came first. It would also have required an inventory of all rules in progress and extended compliance deadlines. In other words, it would have given business a chance to regroup and strategize for larger action. The Senate, too, took up a bill called the Regulatory Transition Act of 1995, which it passed unanimously on March 29, 1995.<sup>73</sup> But, although it also contained a moratorium, it was quite different, with its most ambitious innovation being a system for congressional disapproval of new rules (similar to what would be enacted with the Congressional Review Act, to be discussed below). The House took up the Senate's bill, but passed an amendment in the nature of a substitute identical to their own bill. And the law died there, with no conference committee ever convened.

It may have been that GOP legislators were too busy moving on other deregulatory fronts. They worked on a Clean Water Act bill<sup>74</sup>, a strengthening of the Regulatory Flexibility Act<sup>75</sup>, a Democrat-sponsored bill to sunset agency rules on a regular basis<sup>76</sup>, major reform of the Administrative Procedure Act<sup>77</sup>, an attempt to strip the dreaded OSHA of much of its authority,<sup>78</sup>

---

<sup>71</sup> Letter from Sally Katzen, Administrator, Office of Information & Regulatory Affairs, Office of Management and Budget, to Rep. Newt Gingrich (Dec. 14, 1994) ("a moratorium is a blunderbuss that could work in unintended ways"), cited in Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J. 1883 (2012), at 1898.

<sup>72</sup> H.R. 450, 104<sup>th</sup> Congress, passed the House 276-146.

<sup>73</sup> S. 219, 104<sup>th</sup> Congress, passed Senate 100-0.

<sup>74</sup> H.R. 961, 104<sup>th</sup> Congress, passed House 240-185.

<sup>75</sup> H.R. 926, 104<sup>th</sup> Congress, passed House 415-15.

<sup>76</sup> H.R. 994, 104<sup>th</sup> Congress, sponsored by Jim Chapman (D-TX), which had 48 bipartisan cosponsors and was reported out of committee but never made it to the House floor; see H.Res. 368.

<sup>77</sup> Job Creation and Wage Enhancement Act of 1995, H.R. 9, 104<sup>th</sup> Congress, passed House 277-141 on March 3, 1995; S. 343, 104<sup>th</sup> Congress, reported out of committee; S. 291, 104<sup>th</sup> Congress;

<sup>78</sup> H.R. 1834, 104<sup>th</sup> Congress; H.R. 3234, 104<sup>th</sup> Congress; S. 1423, 104<sup>th</sup> Congress.

and an attempt to use appropriations riders to severely restrict the Environmental Protection Agency (EPA).

The last of these ended up causing a serious rift in the Republican conference, with moderates led by Sherwood Boehlert (R-NY) ultimately defeating the bill on the floor by combining their votes with Democrats'. Gingrich and other leaders engineered a revote that they managed to win as a result of Democratic absences, but the moderates' defection was the beginning of a major political debacle for Republicans on these issues. The Clinton administration "began to realize that it could gain public favor by emphasizing its differences with the revolution on environmental issues."<sup>79</sup> Constituents began to complain to GOP members that they didn't want "arsenic in their drinking water or toxins in the air."<sup>80</sup> Republicans apparently succeeded in intimidating federal agencies at first, with administrative actions falling during the 104<sup>th</sup> Congress.<sup>81</sup> But their bid for longer-lasting change ended up yielding very little.

As their ambitious bills stalled in Senate committees, House leaders soon came to believe that they had seriously overestimated their mandate on deregulation. In late 1995, Gingrich told his members: "Those bills aren't going anywhere this year. Let's regroup and get started in a more appropriate way next year."<sup>82</sup> The vaunted Revolution had proven unable to marshal unity within its own ranks on this key platform, and unable to withstand entirely predictable backlash.<sup>83</sup> They had over-interpreted their mandate, and paid the price.<sup>84</sup>

### C. Constitutional and subconstitutional reform efforts

Republicans had also promised to pursue several structural reforms as part of the Contract With America. They got off to a promising start by passing the Unfunded Mandates Reform Act of 1995, which passed without significant opposition and was signed into law by President Clinton

---

<sup>79</sup> Maraniss and Weisskopf 1996, supra n. 53, at 92.

<sup>80</sup> Id.

<sup>81</sup> See David Hedge & Renee J. Johnson, *The Plot That Failed: The Republican Revolution and Congressional Control of the Bureaucracy*, 12 JOURNAL OF PUBLIC ADMINISTRATION RESEARCH AND THEORY 333 (2002) (providing empirical evidence that administrative actions fell during the 104<sup>th</sup> Congress, only to rise again during the 105<sup>th</sup> and beyond).

<sup>82</sup> Maraniss and Weisskopf 1996, supra n. 53, at 144.

<sup>83</sup> Id., concluding: "The House's hardline posture turned into a source of embarrassment for party moderates who had considered environmental protection a bipartisan issue."

<sup>84</sup> See Richard F. Fenno, *LEARNING TO GOVERN: AN INSTITUTIONAL VIEW OF THE 104<sup>TH</sup> CONGRESS* (1997), at 6-8 (arguing that House Republicans' interpretation of their electoral victory in 1994 suffered badly from their party's institutional unfamiliarity with winning House elections).

on March 22, 1995.<sup>85</sup> By making it harder for Congress to foist new responsibilities on state governments without providing them any new funding, Republicans made good on their commitment to federalism. They would continue to pursue that goal, especially through pushing the block-granting of federal spending programs, and eventually have some successes, most notably in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the welfare reform bill that would be the Congress's marquee legislative success. Federalism was the one area where Republicans could claim to have made significant progress in restructuring American government in the 1990s, although, with hindsight, their achievements in this vein seem both incremental and temporary.

The Contract With America had also promised to take on the trial bar and what Republicans considered to be a litigation crisis. Both the House and Senate passed two major pieces of legislation, one on product liability reform and one on securities litigation. Clinton vetoed both, with Congress sustaining his veto on the former but overriding it on the latter.<sup>86</sup>

Republicans came very close to success on another reform that would have had a deep impact on the federal government's operation: a constitutional Balanced Budget Amendment. Although most Republicans preferred a version that included a requirement for a three-fifths supermajority to increase revenue and a group of around 40 freshmen insisted that such a provision was a must, that formulation was unlikely to gain the needed two-thirds support. GOP leadership set up a rule that allowed the House to vote on a version containing the provision and one, sponsored by Rep. Charles Stenholm (D-TX), without it, and then treat the bigger vote-getter as the House version. The Stenholm version won out, and moved on to the Senate with a vote of 300-132 on January 26, 1995.<sup>87</sup> After some maneuvering, the Senate set up a dramatic vote on passage of the Amendment on March 2, 1995. Senator Mark Hatfield (R-OR), the Chairman of the Appropriations Committee,

---

<sup>85</sup> Pub.L. 104-4.

<sup>86</sup> Product Liability Fairness Act of 1995, H.R. 956, 104<sup>th</sup> Congress, passed House 265-161, passed Senate 61-37, conference passed 259-158 and 59-40 in March 1996, vetoed by the President on May 2, 1996, override failed in House, 258-163 on May 9, 1996. Private Securities Litigation Reform Act of 1995, H.R. 1058, 104<sup>th</sup> Congress, passed House 325-99, passed Senate 69-30, conference passed in December 320-102 and 65-30, vetoed December 19, 1995, veto overridden 319-100 and 68-30, became Pub.L. 104-67.

<sup>87</sup> 104<sup>th</sup> Congress, 1<sup>st</sup> House Session, roll call no. 51. For discussion of the competition between the two versions of the amendment, see Gimpel 1996, *supra* n. 51, at 46-47.

decided to cast a lone Republican dissent and brought the Amendment one vote short of passage.<sup>88</sup> It was a vote of conscience; he said that while he agreed with the end, he did not believe a simple constitutional requirement provided sufficient guidance.<sup>89</sup> Conservative freshmen were furious at Hatfield and sought to have him censured or stripped of his chairmanship, but Dole repelled these efforts.<sup>90</sup> Republicans had actually mustered a supermajority in favor of a major constitutional overhaul—one that would have tied Congress’s hands—but they still fell just short.<sup>91</sup>

Another of their major attempts at structural reform of Congress was much more obviously destined to fail: the push for term limits. A number of senior Republicans were implacably opposed to term limits from the start, meaning that achieving the needed two-thirds supermajority even in the House would probably be impossible. But the House leadership nevertheless felt it was important to honor the Contract With America’s promise of a vote.<sup>92</sup> They delivered one for a version that would have capped election to the House at six full terms and election to the Senate at two, but indeed fell far short of the required votes.<sup>93</sup>

Finally, Republicans made serious attempts at two major changes designed to strengthen the presidency. The first was the line-item veto, which conservatives had long prescribed as the solution to Congress jamming the president with must-pass omnibus bills. As the next section details, as Republicans pushed their own omnibuses on Clinton, their ardor for the line-item veto cooled, but they nevertheless eventually passed it into law. A second reform that Gingrich was especially committed to was the repeal of the War Powers Resolution. Gingrich believed the law represented an unwise hindrance to strong presidential responses to crises abroad, and took to the

---

<sup>88</sup> 104<sup>th</sup> Congress, 1<sup>st</sup> Senate Session, roll call vote 98, on H.J. Res. 1. The vote was actually 65-35, two short of the needed 67, but Senate Majority Leader Dole voted “nay” for procedural reasons and would have voted “yea” had Hatfield voted in the affirmative.

<sup>89</sup> John H. Cushman Jr., *Dole Says Hatfield Offered to Quit Over Balanced-Budget Vote*, N.Y. TIMES (March 6, 1995), A11.

<sup>90</sup> Rae 1998, *supra* n. 51, at 154.

<sup>91</sup> Of course, it is also possible that the Balanced Budget Amendment might not have garnered the required ratification votes from three-fourths of the states.

<sup>92</sup> For discussion of the politics, see Gimpel 1996, *supra* n. 51, at 99-104.

<sup>93</sup> 104<sup>th</sup> Congress, H.J. Res. 73; the final vote on March 29, 1995 (roll call 277) was 227-204.

House floor to ask his fellow legislators to “allow the Commander in Chief to be the Commander in Chief.” He fell just short, losing the vote 201-217.<sup>94</sup>

#### D. The Fateful Showdown

For all of the energy that Republicans directed toward deregulation and structural reform, they concentrated their firepower most heavily on fiscal policy. Republicans in Congress, sensibly enough, decided that using the power of the purse would be the best way to take a stand for limited government. They would use the budget reconciliation procedure to avoid any Senate filibuster, and they would balance the budget by 2002. While President Clinton was willing to concede some modest cuts in entitlement programs, including Medicare, Republicans wanted to pair much deeper cuts with tax reduction. Notwithstanding the GOP complaints about the Democratic omnibus bills of the late 1980s, Republicans explicitly planned to advance most every part of their agenda via omnibus appropriations bills that (they thought) would be impossible for Clinton to veto.<sup>95</sup>

Getting all Republicans in both chambers on the same page was a major challenge. Some members, including House Budget Chairman John Kasich (R-OH), were absolutely committed to balancing the budget quickly. Others, it turned out, were more concerned with protecting their favored patch of federal spending, including urban members with transportation interests, farm district members, and defense hawks. Gingrich personally interceded to work through these intraparty conflicts, including through the creation of a Speaker’s Task Force on Transportation.<sup>96</sup>

The most consequential choice facing Republicans was what to do about Medicare and Medicaid. It was obvious that pursuing steep cuts in the elder healthcare program would come with a political cost, but for the conservative faithful this was the only way to get to a sustainable spending path. They set about attempting to brand their changes to Medicare as a way to “preserve and protect it”

---

<sup>94</sup> Katharine Q. Seelye, *House Defeats Bid to Repeal “War Powers,”* THE NEW YORK TIMES, June 8, 1995, <https://www.nytimes.com/1995/06/08/world/house-defeats-bid-to-repeal-war-powers.html> (last visited Aug 20, 2020). In this case, it seems that the older strain of conservative anti-Cesarism may have reared its head, with 44 Republican members, mostly older ones, joining the mostly-Democratic opposition to Gingrich’s move. Said Representative Toby Roth (R-WI), “Every President finds Congress inconvenient. But we’re a democracy, not a monarchy.” Id.

<sup>95</sup> Maraniss and Weisskopf 1996, *supra* n. 53, at 88. Dubbed the “Armed protocols” after House Majority Dick Armed (R-TX), the Republican plan to push substantive policy changes into the appropriations process was the leadership’s way of coping with the calendar jam that the Contract With America’s strict timeline had created.

<sup>96</sup> *Ibid.*, at 37-39, 50, 89.

from bankruptcy, and strenuously avoided the word “cuts.”<sup>97</sup> Meanwhile, Democrats (and especially organized labor) connected the Republicans’ \$270 billion reductions to their proposed \$245 billion in proposed tax relief.<sup>98</sup>

As they grappled for position with Clinton, Republicans had passed a continuing resolution at the end of the fiscal year that kept the government open through November 13.<sup>99</sup> Republicans passed another continuing resolution<sup>100</sup> and debt limit extension bill<sup>101</sup> on that day, including in them various process reforms and a Medicare premium increase. Republicans believed Clinton would have no choice but to accept their terms or be responsible for shutting down the government, but Clinton vetoed both. Gingrich, Dole, and other leaders met with Clinton at the White House on November 13 to seek some compromise. Clinton was intransigent:

I am not going to agree to your Medicaid package no matter what. I am not going to agree to education cuts. If you want to pass your budget, you’re going to have to put somebody else in this chair. I don’t care what happens. I don’t care if it all comes down around me. I don’t care if I go to five percent in the polls. I am not going to sign your budget. It is wrong. It is wrong for the country.<sup>102</sup>

There would be no meet-in-the-middle compromise. The government shutdown began on November 14.<sup>103</sup> Two days into this shutdown, Newt Gingrich made his famous blunder. After Clinton and his team chose not to speak with him on the long Air Force One flight returning from Israeli Prime Minister Yitzhak Rabin’s funeral, Gingrich complained to the press about the administration’s lack of courtesy. He was soon “lampooned in cartoons and columns and radio shows across the nation” as a crybaby.<sup>104</sup>

Republicans soon felt compelled to make another offer. They would pass another continuing resolution to open the government through mid-December if the Clinton administration would commit to negotiations about how to balance the budget within seven years. This led to a deal,

---

<sup>97</sup> Ibid., at 129-36.

<sup>98</sup> Ibid., at 140. The tax relief bill, which passed the House, was H.R. 1215, 104<sup>th</sup> Congress.

<sup>99</sup> Pub.L. 104-31.

<sup>100</sup> H.J.Res. 115, 104<sup>th</sup> Congress.

<sup>101</sup> H.R. 2586, 104<sup>th</sup> Congress.

<sup>102</sup> Maraniss and Weisskopf 1996, *supra* n. 53, at 148. Vice President Gore later commended Clinton for this show of strength but said that Clinton should have said he would stand firm even if his approval went to zero. Clinton put his arm around Gore and responded: “No, that’s not right, Al. If I go down to four percent, I’m caving.”

<sup>103</sup> For details on which agencies were funded, see Jim Saturno, *Federal Funding Gaps: A Brief Overview*, CRS Report RS20348 (updated 2019), at 6.

<sup>104</sup> Maraniss and Weisskopf 1996, *supra* n. 53, at 152.

ending the shutdown on November 19. Republicans expected that the press would treat Clinton's concession as a major victory for Republicans, but in fact it was Clinton's team that was portrayed as controlling events. Republicans were demoralized, believing the media was aligned against them.<sup>105</sup> As the next funding deadline approached, Republican leaders felt they were being constantly misled by the administration. House Republican freshmen were eager to reject all compromises in this environment and simply allow the government to shut down indefinitely; when Gingrich tried to talk them down, arguing that Republicans would be the political losers from another shutdown, they began to see him as an apostate.<sup>106</sup> Confronted with the possibility of a real rebellion in his ranks, Gingrich followed his conference, and so the government shut down again on December 16. As negotiations continued to sputter, this shutdown lasted all the way through Christmas and into the new year. Finally, on January 5, Gingrich pulled the plug, unilaterally deciding that the House would pass a pay bill and an interim spending bill, contingent on the White House offering a concrete plan to balance the budget by 2002. In a terrific anticlimax, the White House promptly produced such a plan—though, of course, not one that was to Republicans' liking.<sup>107</sup>

At that point, Republicans were totally discombobulated. They had assumed that, by wielding the power of the purse, they could ultimately dictate fiscal terms to Clinton. Gingrich had basically tried to displace the president's role as legislator-in-chief, claiming the mandate to set the national policy agenda—even on the most high-salience spending policies. He had managed to bring along the House, which was no mean feat, but his position as Speaker turned out to lack the resources needed to overawe the White House.

As things had played out, the combination of the president's veto and the media's unsympathetic coverage were enough to stymie Republicans' efforts and turn their demands into political liabilities. By 1996, "The very word, 'revolution,' while not censored from the Republican lexicon, had fallen into disuse, regarded in retrospect as a rhetorical mistake that overpromised and frightened the public."<sup>108</sup> After the end of the second shutdown, the leadership initiative shifted

---

<sup>105</sup> Rae 1998, *supra* n. 51, at 119.

<sup>106</sup> Maraniss and Weisskopf 1996, *supra* n. 53, at 165, 176.

<sup>107</sup> *Ibid.*, at 198-200.

<sup>108</sup> *Ibid.*, at 205.

away from Gingrich and the Revolutionaries over to the compromise-minded Senate, which was expected to pick up the pieces.<sup>109</sup>

The Revolution was basically exhausted, then, but there was still a need to extract at least some symbolic concession as the Republican Congress passed longer-term spending and debt limit increase bills that let Clinton move on. What they required as payment is quite revealing.

In exchange for raising the debt ceiling in March 1996, they forced Clinton to sign a bill grandiosely entitled the “Contract With America Advancement Act.”<sup>110</sup> This contained an increase in the allowable earnings limit on Social Security (which functioned as a tax cut for seniors), a modest regulatory reform measure for small business<sup>111</sup>, and the Congressional Review Act. It was also paired with passage of the line-item veto.<sup>112</sup>

The line-item veto was supposed to have been the rare item on which congressional Republicans, Democrats, and the President all agreed upon. But as they got ready to pass a statutory version into law in March 1995, Gingrich, Dole, and other Republicans had begun to fret about the negotiating leverage they would be giving Clinton, and they held up the conference committee.<sup>113</sup> Not until the last gasps of the appropriations and debt ceiling fights did they return to it, agreeing to pass it as part of the end of hostilities with Clinton at the end of March 1996.<sup>114</sup> Clinton signed it into law on April 9.<sup>115</sup> His speech at signing pulled straight from 1980s conservative discussions on the “constitutional balance of powers,” arguing that omnibuses were depriving the president of his rightful place in the constitutional lawmaking process.<sup>116</sup>

---

<sup>109</sup> Rae 1998, supra n. 51, at 161.

<sup>110</sup> Pub.L. 104-121.

<sup>111</sup> Title II of the Act, Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). By guaranteeing consultation with small businesses during rulemakings that would significantly affect them, SBREFA has been a successful and enduring reform.

<sup>112</sup> The Senate had first pushed through a line-item veto in the immediate wake of its voting down the Balanced Budget Amendment in March 1995. Line Item Veto Act, S. 4, 104<sup>th</sup> Congress, first passed March 23, 1995, 69-29 (record vote 115). For the connection to the Balanced Budget Amendment loss, see ELIZABETH DREW, *SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESSES AND THE CLINTON WHITE HOUSE* (1996), at 169. The House, having already passed its own bill (H.R. 2, 104<sup>th</sup> Congress, roll call 95, 294-134, on February 6, 1995), passed the Senate’s bill without objection.

<sup>113</sup> Gimpel 1996, supra n. 51, at 55.

<sup>114</sup> Consideration of the conference bill was enabled in the House by the same rule that brought up the other legislation, H.Res. 391, 104<sup>th</sup> Congress.

<sup>115</sup> Pub. L. 104-130.

<sup>116</sup> William J. Clinton, Statement on Signing the Line Item Veto Act, April 9, 1996, online by Gerhard Peters and John T. Woolley, The American Presidency Project, at <https://www.presidency.ucsb.edu/node/223132>.

Republicans had thus followed through on one of their presidentialist aspirations from the 1980s, despite having just found out how easily the president could already manipulate Congress in a negotiation over spending. Perhaps they thought that since it was an item in the Contract With America, they should take a nominal win wherever they could find one. Or, they may have supposed that the line-item veto power could only bias spending downward. But such reasoning is specious. Because the line-item veto provides a kind of security blanket for congressional irresponsibility, members would probably have felt liberated to include more pet projects, as Andrew Rudalevige has pointed out.<sup>117</sup> Actual experience with the federal line-item veto was, of course, limited, as the Supreme Court soon enough ruled it unconstitutional<sup>118</sup>, on formalist grounds mirroring its *INS v. Chadha* holding.

With the Congressional Review Act (CRA), Republicans did get through one provision that sought to rebalance power away from the administrative state and toward the elected legislature. Both the House and Senate had considered multiple bills containing regulatory review provisions throughout 1995, though all had stalled.<sup>119</sup> The three principal Senate sponsors of the congressional review language, Don Nickles, Harry Reid, and Ted Stevens, offered a statement in the Congressional Record explaining the thinking behind it. “This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.”<sup>120</sup>

They pointed out that at no time did the proposal encounter congressional resistance, and made it seem like the CRA was a wholly inevitable part of the congressional response to *INS v. Chadha*. Indeed, they claimed that Chadha left Congress no choice but to use a joint resolution of disapproval mechanism.<sup>121</sup>

---

<sup>117</sup> Andrew Rudalevige, *Deficit Politics and the Item Veto: Serving the Public, or the Congress?*, paper prepared for the 1997 Annual Meeting of the American Political Science Association, August 28-31, Washington, D.C.

<sup>118</sup> *Clinton v. City of New York*, 524 U.S. 417 (1998). Some observers believe that the form of the line-item veto that Congress finally passed was intended to be struck down by the Court.

<sup>119</sup> The Regulatory Oversight Act, S. 348, contained congressional review language that eventually was used as a substitute amendment to S. 219, which passed the Senate 100-0 as amended. It was again used as a substitute amendment for H.R. 450 (the Regulatory Transition Act of 1995, see supra n. 72 and accompanying text), and finally imported into H.R. 3136. Congressional review language had also appeared in S. 343 and S. 291, both reported out of Senate Governmental Affairs Committee; attached to H.R. 2586, the first debt limit extension bill which Clinton vetoed in November; H.R. 994; and S. 942.

<sup>120</sup> Congressional Record, April 18, 1996, at S3683.

<sup>121</sup> *Ibid.*, at S3684.

As discussed above in Part II.D in connection with the replacement of the legislative veto provisions in the War Powers Resolution and National Emergencies Act, it is genuinely difficult to know why legislators would make it seem as though a joint resolution of disapproval was the only mechanism available to them. As with those cases, the CRA set up a dynamic where congressional action is only likely to be effective if there is no threat of a presidential veto—a situation likely to prevail only in the case of a presidential transition.<sup>122</sup> Their professed ignorance of other practical options is especially confusing given the presence in the 104<sup>th</sup> Congress of the Congressional Responsibility Act, a bill introduced in December 1995 and attracting 58 cosponsors.<sup>123</sup> That other “CRA” would have created a system of prospective approval for major new regulations, such that Congress would have to take up-or-down votes to either send a regulation into the rulebook or reject it (similar to the REINS Act discussed below in Part IV.C). One can argue that this would have created genuine legislative accountability, whereas the CRA we ended up with produces mostly an illusion of the same.<sup>124</sup>

After the climax of the January confrontation, the March-April accord had the feel of denouement. After that, the dynamic of the 104<sup>th</sup> Congress markedly shifted. The President was reinvigorated and trumpeted his taming of Republicans to whomever would listen.<sup>125</sup> After Dole resigned to concentrate on his presidential campaign in May 1996, Trent Lott (R-MS) became Senate Majority Leader. He became the face of bipartisan compromise and “de facto leader of the demoralized congressional GOP.”<sup>126</sup> Far from reaffirming their revolutionary commitments as they campaigned against Clinton in 1996, Republicans turned toward the center and focused on the particular needs of their districts in order to save their majorities even as Clinton handily dispatched Dole.<sup>127</sup>

What lessons about congressional reform generally can be drawn from the Republican Revolution’s repulsion? Was it inevitable that they should have pushed through so little of their

---

<sup>122</sup> For helpful commentary on the limitations and uses of the CRA, see Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162 (2009).

<sup>123</sup> H.R. 2727, 104<sup>th</sup> Congress.

<sup>124</sup> For an elaboration of this point of view, see the discussion of REINS in Philip Wallach, “LegBranch Conversations: An interview with David Schoenbrod,” LEGBRANCH.ORG (June 12, 2018), at <https://www.legbranch.org/2018-6-12-legbranch-conversations-an-interview-with-david-schoenbrod/>.

<sup>125</sup> Fenno 1997, *supra* n. 84, at 47.

<sup>126</sup> Rae 1998, *supra* n. 51, at 187.

<sup>127</sup> *Ibid.*, at 196.

ambitious agenda, or should the episode be viewed as a missed opportunity? Were they doomed from the start, or merely outmaneuvered?

Most observers seem to agree that, as Clinton's aide George Stephanopoulos put it in the midst of the budget showdown, "Newt's very good...But he has a very bad hand."<sup>128</sup> This was true both in the sense that the Republican House freshmen were committed to policies more conservative than the American people actually wanted to see implemented, and in the sense that Clinton demonstrated the overall superiority of his office for shaping media narratives of politics and policy alike. Gingrich never had the momentum he believed he had upon becoming Speaker.

But it is worth considering how much Republicans may have been handicapped by their own cramped understanding of the institution they controlled. Gingrich, in particular, was never a congressional institutionalist. Rather, he was the quintessential anti-institutionalist working within Congress. His time as Speaker did push him toward a more compromise-oriented way of thinking, but he was not terribly well-suited to the role of negotiator. After one difficult and fruitless session with the White House, he admitted: "This is draining stuff. I like to give speeches. It's more fun."<sup>129</sup> Parties to the crucial negotiations were aghast at how little he had considered realistic endgames.<sup>130</sup>

Gingrich rose to power by promising to throw the bastards out, and he remade the House as an emanation of his own will as much as possible. But he never considered how a less partisan, less top-down deliberative approach might have strengthened Congress's hand in negotiating with the president or in making the case for reform to the American people. If Republicans were constantly being surprised by the public's reactions to their proposals, that reflected poorly on their deliberative method or lack thereof. Having prejudged congressional Democrats as corrupted protectors of the bureaucracy they wanted to upend, Republicans made themselves less able to build the broad coalitions that would have been necessary to make lasting structural reforms.

---

<sup>128</sup> Quoted in Maraniss and Weisskopf, *supra* n. 53, at 142.

<sup>129</sup> *Ibid.*, at 182. Gingrich's limitations can be conceptualized in other ways, too. Reflecting on the Speaker's orientation to committee jurisdiction reforms, one Republican staffer said: "Newt isn't a nuts and bolts guy. He wants to know how [realigning committees] will affect his goals. Will it help elect a dozen new Republicans? Will it help win the White House?" Quoted in Evans and Oleszek 1997, *supra* n. 20, at 94.

<sup>130</sup> Fenno 1997, *supra* n. 84, at 20-21, 41-43.

#### IV. Choosing Administration over Congressional Action, 1997-2018

Gingrich and his conservative allies had taken their best shot at revolutionizing government during the 104<sup>th</sup> Congress, and they had for the most part been repelled. In part, that was because they lacked a clear sense of Congress's institutional strengths. One might think that over the next decade, during which Republicans continued to control the House and (except for a period from mid-2001 through 2002) Senate, their views about the legislature would evolve. One could argue that their less-revolutionary engagement with Clinton on various policy issues, including entitlement spending, produced good results during his second term—though, of course, it was the frustrating and politically fruitless impeachment they pursued during those years that left the clearest legacy. But once Clinton was succeeded by George W. Bush, congressional Republicans hastened back to their presidentialist priors. Much to the dismay of conservative opponents of federal spending, most of their learning during this time was about the legislature's many patronage opportunities.

After four years of Democratic control of Congress, conservatives stormed back in 2010, mounting a takeover of the House reminiscent of the 1994 revolution. During the Obama administration, these congressional conservatives did begin to self-consciously develop a theory of why the legislature, rather than the president, ought to be the preeminent branch for setting the direction of policy. But the reforms that Republicans managed to put into effect tended to constrain Congress itself, rather than the presidency. And once Donald Trump unexpectedly saved them from the prospect of another four years with a Clinton in the White House, their willingness to mount an organized challenge to the presidency evaporated.

##### A. The Non-Revolutionary 105<sup>th</sup> and 106<sup>th</sup> Congresses

For all that the confrontation in late 1995 and early 1996 redounded to Clinton's political benefit, the president's reelection in 1996 failed to give Democrats a resounding mandate. Although Clinton earned a landslide in the electoral college, he won just under half of the popular vote and voters returned Republican majorities in the House and Senate. Given voters' split verdict, neither party could see itself as dominant in the 105<sup>th</sup> Congress. There would have to be either compromise or gridlock.

On the fiscal matters that had so roiled the previous Congress, compromise would be unexpectedly easy to achieve thanks to a booming economy boosting revenues. Congress and the President could chart out a path to a balanced budget by 2002 without either having to make any serious sacrifices—indeed, with both sides getting to satisfy some of their desires beyond fiscal balance.<sup>131</sup> The Balanced Budget Act of 1997<sup>132</sup> included the State Children’s Health Insurance Program (SCHIP) and a \$500 per-child tax credit, while including Medicare reductions smaller than the Republicans of the 104<sup>th</sup> had sought.<sup>133</sup> A few other modest reform laws were passed with strong bipartisan support, but nothing even vaguely reminiscent of the revolutionary ambitions of the 104<sup>th</sup> Congress.<sup>134</sup>

Instead, Republicans eventually turned their energies toward a direct attack on Clinton that targeted his affair with a White House intern and subsequent obfuscations of fact. Gingrich and other GOP leaders hoped that a relentless focus on Clinton’s ethical problems would bring them the 1974-sized majorities that would allow them to dictate the agenda.<sup>135</sup> On October 8, 1998, they formally initiated impeachment proceedings.<sup>136</sup> Some Republicans certainly tried to frame the impeachment as a matter of high constitutional principle; Judiciary Committee Chairman Rep. Henry Hyde, for example, told his colleagues, “We are the heirs of the 20<sup>th</sup> century’s great struggles against totalitarianism, in which the rule of law was defended at immense cost against the worst

---

<sup>131</sup> Gingrich has sometimes argued that the balanced budgets of the late 1990s show that Republicans actually triumphed in the mid-decade clashes. E.g., Newt Gingrich, “The GOP Revolution Holds Powerful Lessons for Changing Washington,” in *THE REPUBLICAN REVOLUTION 10 YEARS LATER* (Chris Edwards & John Samples eds., 2005), at 4. But rather than resulting from a major shift in policy, the shrinking budget deficits resulted from the economic boom of the late 1990s, and receded just as quickly. When one looks at the overall trajectory of entitlement spending from the time of the GOP Revolution through the present, it is difficult to understand how fiscal conservatives could claim any sort of meaningful victory.

<sup>132</sup> Pub.L. 105-33.

<sup>133</sup> For brief but helpful discussion, see Sarah A. Binder and Thomas E. Mann, “The 105<sup>th</sup>: It Could’ve Been a Contender,” *WASHINGTON POST* (October 18, 1998). Another Balanced Budget Amendment, S.J.Res. 1, once again received support from 66 Senators, one short of the needed two-thirds supermajority.

<sup>134</sup> E.g., Food and Drug Modernization Act of 1997, Pub.L. 105-115; Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105-206; Securities Litigation Uniform Standards Act of 1998, Pub.L. 105-353. Perhaps the most ambitious reform affecting the administrative state pursued during the 105<sup>th</sup> Congress was the Congressional Office of Regulatory Analysis Creation Act, H.R. 1704, 105<sup>th</sup> Congress, which had 47 (mostly Republican) cosponsors and was favorably reported out of the House Committee on Government Reform in June 1998 but went no further. It would have created a new congressional support agency designed to give Congress its own capacity for cost-benefit analyses. See H.Rept. 105-441.

<sup>135</sup> They also expended considerable energy passing bills they knew had no chance of becoming law but which were intended to excite their base, including a tax cut and abortion limits. See Binder and Mann 1998, *supra* n. 133.

<sup>136</sup> H.Res. 581, 105<sup>th</sup> Congress.

tyrannies in human history.” By defining the “parameters of permissible presidential conduct,” the House would be taking a stand for the separation of powers.<sup>137</sup>

But most observers rejected this framing as window-dressing on what was really a personalized vendetta against the president.<sup>138</sup> Far from turning against Clinton, the American people largely rejected impeachment. In the 1998 midterms, Republicans held their ground in the Senate but lost five seats in the House, leaving them with a razor-thin majority there. After the unusual midterm loss for the party out of the White House, Gingrich resigned the Speakership and left Congress.

Gingrich’s successor as Speaker, Dennis Hastert (R-IL), had been the least conspicuous member of the leadership team. He offered himself up as Speaker only after Bob Livingston (R-LA), who had been the powerful Chairman of the House Appropriations Committee and was chosen by the Republican Conference to succeed Gingrich, resigned his post before ever assuming it because of marital infidelities. Hastert, who projected a soft-spoken grandfatherly calm, emerged as a stabilizing force. Upon being voted Speaker in January 1999, he promised to move on from Congress’s bitterness and personal attacks and initiate a new era of bipartisan comity and compromise.<sup>139</sup>

Hastert’s first Congress as Speaker, the 106<sup>th</sup>, which began with the matter of Clinton’s impeachment trial, did advance several notable pieces of legislation with bipartisan support.<sup>140</sup> But, on the whole, it was far from an era of good feelings. Observers felt that “this Congress seemed to be almost as much about positioning for the elections as about making law.”<sup>141</sup> House Majority Leader Tom DeLay noted that Hastert “has set a much softer tone to the whole year, which has allowed us to build a team,” while Minority Leader Richard Gephardt denounced

---

<sup>137</sup> Speech of December 18, 1998, available at <https://web.archive.org/web/20110517141350/http://judiciary.house.gov/Legacy/101370.htm>.

<sup>138</sup> Keith E Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 JOURNAL OF CONSTITUTIONAL LAW 422 (2000).

<sup>139</sup> Speech of January 7, 1999, reprinted in N.Y. TIMES (January 7, 1999), A24, available at <https://www.nytimes.com/1999/01/07/us/106th-congress-remarks-congress-dennis-hastert-his-first-day-speaker-house.html>.

<sup>140</sup> Of special importance are the Gramm-Leach-Bliley Financial Modernization Act of 1999, Pub.L. 106-102, the Commodity Futures Modernization Act of 2000, Pub.L. 106-554 (each of which would later be blamed for contributing to the financial crisis of the next decade), and the approval of China’s accession to normal trade relations, Pub.L. 106-632.

<sup>141</sup> Adam Clymer and Lizette Alvarez, “With Minimal Fanfare, Congress Calls It Quits,” N.Y. Times (Dec. 17, 2000), A48.

Republicans' "my way or the highway" approach.<sup>142</sup> While Republicans certainly frustrated many of the Clinton administration's ambitions<sup>143</sup>, there was little remaining sign that Congress was interested in effecting a deep transformation of itself or the federal government.

#### B. Presidentialism Ascendant during the George W. Bush Administration

While Republicans had temporarily put on the mantle of presidential skeptics during the Clinton impeachment, the victory of George W. Bush in the contentious 2000 election quickly turned the party back toward presidentialism. This was evident even before the attacks of September 11, 2001, but of course intensified thereafter.<sup>144</sup> Meanwhile, the Republican congresses of 2001-2006 continued to show very little interest in the kinds of structural reforms that had attracted their predecessors in the revolutionary 104<sup>th</sup>.<sup>145</sup>

Bush himself was well positioned to take up the strand of managerial accountability that had been pioneered during the Reagan administration and further refined under Clinton.<sup>146</sup> Having received a Masters of Business Administration, Bush espoused a particularly management-centered view of the presidency, which emphasized the executive branch's separation from Congress rather than overlapping responsibilities.<sup>147</sup>

Bush's cabinet officials and other appointees took pains to distinguish themselves from hardline opponents of the regulatory state. Said Cameron Findlay, Bush's Deputy Secretary of Labor, "We are not a bunch of crazy, wild-eyed deregulators. But we want to look at the costs as well as the benefits. And we don't want to do anything stupid."<sup>148</sup> In that vein, Bush's Office of Management

---

<sup>142</sup> Id.

<sup>143</sup> They made increasing use of limitation riders to prohibit particular uses of agency funds; see Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AMERICAN POLITICAL SCIENCE REVIEW 766-782 (2017).

<sup>144</sup> Rudalevige 2005, supra n. 11, at 211-13.

<sup>145</sup> These congresses were perhaps more productive than many people remember. They famously passed two rounds of tax cuts, in 2001 and 2003, as well as adding the Medicare prescription drug benefit. But they also passed a major reform of corporate accounting and auditing practices in the wake of the Enron scandal (Sarbanes-Oxley), the Energy Policy Act of 2005, and the Secure Fence Act of 2006, each of significant consequence. Less important but especially laudable were the Do-Not-Call Implementation Act of 2003 and CAN-SPAM Act of 2003. But the only major enactment that seems to fit into the earlier reform agenda is the Class Action Fairness Act of 2005.

<sup>146</sup> Elena Kagan, *Presidential Administration*, 114 HARVARD LAW REVIEW 2245 (2000).

<sup>147</sup> Charles O. Jones, "The US Congress and Chief Executive George W. Bush," in *THE POLARIZED PRESIDENCY OF GEORGE W. BUSH* (George C. Edwards III and Desmond King, eds., 2007), 387-418, at 399-401

<sup>148</sup> John Harwood & Kathy Chen, *Regulatory Rollback Under Bush Has a Major Impact on Economy*, WALL STREET JOURNAL, August 3, 2001, <https://www.wsj.com/articles/SB996784092217452045> (last visited Jan 27, 2020).

and Budget aggressively reviewed the policies crafted across the administrative state, even showing a willingness to “quietly influence agencies’ scientific decisions.”<sup>149</sup> Bush leaned heavily on OIRA throughout his presidency to push a rationalized, disciplined form of regulation that demanded benefits outweigh costs.<sup>150</sup> Under Bush, the Office of Management and Budget also instituted a new performance management tool, Program Assessment Rating Tool (PART) scores, which eventually gave a 0-100 effectiveness rating to around a thousand federal government programs.<sup>151</sup>

The Republican congresses of these years apparently looked on approvingly at these enhancements of the president’s control over the bureaucracy, apparently satisfied that allowing a generally conservative president effectively directing the bureaucracy was an adequate substitute for having a conservative Congress take the lead itself.<sup>152</sup> Congress and President Bush coordinated remarkably closely during these years; indeed, Bush did not issue a single veto until the sixth year of his presidency. Continuing their presidentialism from the Reagan Era, Republicans were largely unconcerned with questions of whether a system dominated by presidential management would be accountable.<sup>153</sup>

The Bush administration’s far better-known development of presidentialism came in the sphere of foreign policy. There, Vice President Cheney brought to bear his longstanding view, formed during his time in the Ford administration and reaffirmed when he served as the leading defender of the Reagan administration during Iran-Contra, that if the president gave Congress an inch, it would

---

<sup>149</sup> Kathryn A Watts, *Controlling Presidential Control*, 114 MICHIGAN LAW REVIEW 683 (2016), at 692.

<sup>150</sup> John D. Graham, Paul R. Noe & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URBAN LAW JOURNAL 933 (2006). See also John D. Graham, BUSH ON THE HOME FRONT: DOMESTIC POLICY TRIUMPHS AND SETBACKS (2010).

<sup>151</sup> Donald P. Moynihan, *Advancing the Empirical Study of Performance Management: What We Learned From the Program Assessment Rating Tool*, 43 AMERICAN REVIEW OF PUBLIC ADMINISTRATION 499-517 (2013); Jonathan D. Breul, *Three Bush Administration Management Reform Initiatives: The President’s Management Agenda, Freedom to Manage Legislative Proposals, and the Program Assessment Rating Tool*, 67 PUBLIC ADMINISTRATION REVIEW 21 (2007).

<sup>152</sup> Cf. David J Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEORGE WASHINGTON LAW REVIEW 1095-1152 (2008), at 1096 (“For all the debate over the legality of a White House hostile takeover, therefore, the real story may be that Presidents have effected a peaceful merger with the federal bureaucracy by transforming the nation’s administrative agencies from within”).

<sup>153</sup> For a good discussion of why this complacency was problematic, see Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 44 (2017) (arguing that supposed decisional limits on presidential control are easily defeated).

take a mile.<sup>154</sup> Cheney, his legal counsel David Addington, and John Yoo, a member of the president's Office of Legal Counsel, together developed a view of presidential authority to respond to foreign threats that was all but unlimited, and which specifically denied the constitutional authority of Congress to tie the president's hands.<sup>155</sup> The administration also intensified the use of presidential signing statements that denied the constitutionality of part of a congressional enactment, thereby announcing that the president would not consider himself bound by such provisions.<sup>156</sup>

Instead of bridling at the administration's dismissive attitude of the legislature's place in foreign policy, congressional Republicans styled themselves as defender of the Commander-in-Chief's prerogatives. They were extraordinarily deferential to Bush as he took the country to war in Iraq, making it very difficult for anyone in their party to oppose the president. Speaker Hastert said that those who stood in Bush's way "may not undermine the president as he leads us into war, and they may not give comfort to our adversaries—but they come mighty close."<sup>157</sup>

There is nothing particularly remarkable about the Bush administration itself expounding theories and advancing practices that strengthened the presidency. What is noteworthy here is Congress's willingness to accept a construction of the presidency that seemingly left so little room for legislatively-guaranteed accountability—or, indeed, any clear story about how a president would be made accountable beyond quadrennial elections.<sup>158</sup> Once again, there were important consequences of conservatives failing to develop a constructive idea of Congress's role in their revolutionary years.

---

<sup>154</sup> For the evolution of Cheney's views (and also Rumsfeld's), see Scott Shane, *Recent Flexing of Presidential Powers Had Personal Roots in Ford White House*, THE NEW YORK TIMES, December 30, 2006, <https://www.nytimes.com/2006/12/30/washington/30roots.html> (last visited Aug 11, 2020).

<sup>155</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007), 78-98. The administration also showed a notable willingness to fight for their ability to preserve secrecy from congressional inquiry. See Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE LAW JOURNAL 403 (2002).

<sup>156</sup> Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUDIES QUARTERLY 515 (2005).

<sup>157</sup> Quoted in Rudalevige 2005, *supra* n. 11, at 256.

<sup>158</sup> Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARVARD LAW REVIEW 2070-2103 (2009), at 2079.

### C. Nascent Congressional Resurgence Under Obama, and Abandonment under Trump

Some conservatives began to shift away from presidentialism during the financial crisis that struck in the last year of George W. Bush's second term. Bush's willingness to push federal bailouts of failing banks and auto companies clashed with some conservatives' desire to see the free market purge itself of weak firms, and these members began to rediscover some institutional self-regard when they felt that Bush and his Treasury Secretary, Henry Paulson, were trying to steamroll opposition and secure for themselves a blank check.<sup>159</sup>

Not surprisingly, that conservative skepticism of the president began to flower after the election of Barack Obama. A central claim of the Tea Party movement that gathered momentum in 2009 and 2010 was that the Obama administration was regularly overstepping its constitutional bounds.<sup>160</sup> Such claims only intensified after Republicans regained control of the House and found themselves locked in a standoff over federal spending reminiscent of the one during the 104<sup>th</sup> Congress. At that time, conservatives did manage to win what they considered a major victory. The Budget Control Act of 2011 set a decade's worth of caps on discretionary spending, with a sequester mechanism providing automatic enforcement.<sup>161</sup> This conservative victory was a case of Congress trying to limit itself; quite the opposite of trying to build the legislature as a constructive body, it assumed that Congress was fundamentally incapable of responsibly budgeting on an annual basis and therefore needed to be subjected to an unbending discipline written into law.<sup>162</sup>

Republicans did also begin to give some thought to how Congress might check the president more effectively, especially in response to Obama's explicit declaration that he would deal with congressional intransigence by using executive action to work around them (his "pen and phone" strategy).<sup>163</sup> This trend continued throughout Obama's two terms in office, as Obama continued to develop the mechanisms of presidential management that his predecessors had strengthened; he

---

<sup>159</sup> See PHILIP A. WALLACH, *TO THE EDGE: LEGALITY, LEGITIMACY, AND THE RESPONSES TO THE 2008 FINANCIAL CRISIS* (2015), 83-86.

<sup>160</sup> For one book that encapsulates these arguments from the early years of the Obama administration, see PHIL KERPER, *DEMOCRACY DENIED: HOW OBAMA IS IGNORING YOU AND BYPASSING CONGRESS TO RADICALLY TRANSFORM AMERICA* (2011).

<sup>161</sup> Pub.L. 112-25.

<sup>162</sup> For a critique of the efficacy of this type of automatic control, see Philip Wallach, *The Perils of Automatic Budgeting*, 15 *NATIONAL AFFAIRS* 3 (2013).

<sup>163</sup> See Tamara Keith, *Wielding a Pen and Phone, Obama Goes It Alone*, NPR (January 20, 2014), available at <https://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone>.

arguably “elevated White House control over agencies’ regulatory activity to its highest level ever, relying on a mix of covert control and overt command.”<sup>164</sup>

Republicans introduced scores of bills during Obama’s presidency meant to reassert the power of Congress. One that received special emphasis was the Regulations from the Executive In Need of Scrutiny (REINS) Act, which passed the House of Representatives in each Congress from 2011 through 2018, and which would have forced all new significant regulations to receive the support of both chambers before becoming effective. But one could justly question the depth of Republicans’ commitment to such Congress-empowering legislation given that no such law was passed during the 114<sup>th</sup> Congress of 2015-2016, when Republicans once again controlled the Senate. Indeed, various decisions about the packaging of the REINS Act suggest that Republicans never fully committed themselves to passing it.<sup>165</sup>

Still, there was at least growing rhetorical support for a stronger Congress among Republicans as they anticipated a possible Hillary Clinton presidency after the 2016 election. Under the auspices of Speaker Paul Ryan’s office, House Republicans in 2016 developed an agenda called, “A Better Way.” It offered six main areas of reform, the first of which was “A Better Way to Uphold the Constitution.” On the booklet’s first page of substantive text, it denounced the accumulation of power in the executive branch and “a Congress that has yielded some of its most fundamental duties,” and (at least obliquely) suggested that a restoration of congressional seriousness is the best way for the federal government to win the trust of the American people.<sup>166</sup>

Fading echoes of this commitment persisted after Trump’s election. Many of the same reform bills were reintroduced—some even having the president’s nominal support.<sup>167</sup> But even when these bills might have offered congressional Democrats a way to constrain the Trump administration, there was little evidence of any bipartisan comity on these issues.<sup>168</sup> The bill pursued most

---

<sup>164</sup> Watts 2016, *supra* n. 149, at 698.

<sup>165</sup> For a full analysis of REINS’ legislative history, see Philip Wallach, *Losing Hold of the REINS: How Republicans’ attempt to cut back on regulations has impeded Congress’s ability to assert itself*, BROOKINGS CENTER ON REGULATION AND MARKETS (May 2, 2019), available at <https://www.brookings.edu/research/losing-hold-of-the-reins/>.

<sup>166</sup> A Better Way (2016), now available at [http://www.gop.gov/wp-content/uploads/2016/07/ABetterBooklet\\_update.pdf](http://www.gop.gov/wp-content/uploads/2016/07/ABetterBooklet_update.pdf), at 6.

<sup>167</sup> Green, *supra* n. 21, provides a complete listing of relevant legislative proposals, at 150-163.

<sup>168</sup> Philip Wallach, *The Ironic Politics of Regulatory Reform*, BROOKINGS INSTITUTION CENTER ON REGULATION AND MARKETS, March 26, 2018, available at <https://www.brookings.edu/research/the-ironic-politics-of-regulatory-reform/>.

seriously was probably the Regulatory Accountability Act, the House version of which included a provision to end Chevron deference, but, like the REINS Act, it never advanced toward passage in the Senate.<sup>169</sup> Various other bills to empower Congress in areas such as trade also failed to gain traction.<sup>170</sup>

As Congress failed to act, the Trump administration built on the practices of presidential management established by his predecessors. They sought to control a wide variety of agency policymaking through executive orders, some of which broke new ground, including instituting a regulatory budget.<sup>171</sup> Conservative skeptics of the administrative state have mostly sought to effect change through litigation, sometimes winning victories, but it remains doubtful whether courts will ever be willing to demand any seismic changes through their rulings.<sup>172</sup>

## V. Conclusion: The Potential of the Path Not Taken

Gillian Metzger, a sharp critic of modern conservative attempts to restrain the administrative state, argues that today's "anti-administrativists" trying to topple *Chevron* and win judicial enforcement of the non-delegation doctrine are the intellectual and political heirs of the foes of the New Deal in the 1930s, such as the Liberty League. What marks both the contemporary litigants and their forbears is "a strong turn to the courts as the means to curb administrative power; and a heavy constitutional overlay, wherein the contemporary administrative state is portrayed as at odds with the basic constitutional structure and the original understanding of separation of powers."<sup>173</sup>

---

<sup>169</sup> Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017); the bill included the Separation of Powers Restoration Act, which would have instructed courts to stop giving agencies *Chevron* deference, was included as § 202.

<sup>170</sup> For a survey of bills that would have enhanced Congress's role in trade policy, see Clark Packard and Philip A. Wallach, *Restraining the president: Congress and trade policy*, R STREET INSTITUTE POLICY STUDY NO. 158 (November 2018), available at <https://www.rstreet.org/2018/11/13/restraining-the-president-congress-and-trade-policy/>.

<sup>171</sup> E.O. 13771 (January 30, 2017).

<sup>172</sup> Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 *Notre Dame Law Review* 1599–1651 (2018), at 1609 ("Usually, the hopes of administrative state skeptics are dashed as it becomes clear that [the steps the Supreme Court is willing to take] are actually quite moderate, making marginal adjustments to the structure of government while leaving the core intact.") See also David Zaring, *Toward Separation of Powers Realism*, 37 *YALE JOURNAL ON REGULATION* 708–758 (2020), which comprehensively surveys recent separation of powers cases and explains why judges of every philosophy have avoided adopting powerful remedies and are likely to continue to do so.

<sup>173</sup> Gillian E Metzger, *1930s Redux: The Administrative State Under Siege*, 131 *HARVARD LAW REVIEW* 1–96 (2017), at 34.

Because “background separation of powers concerns can be addressed in a variety of ways, including approaches that embrace the administrative state rather than cabin it,” she doubts there is much chance they will succeed in significantly restructuring the shape of our government.<sup>174</sup> Still, she fears they may do considerable harm by “undercut[ing] the legitimacy of national administrative governance.”<sup>175</sup>

Supposing that she is correct, there is nevertheless a different tradition of thought that critics of administrative dominance can draw on—one that relies on Congress, and not courts, as the counterweight to the modern presidency and the guarantor of meaningful self-government. While the Liberty League may be judged as a bump in the road along America’s state development, there was a far more potent and fertile strain of conservative criticism of the New Deal’s proliferation of federal government agencies.

At the American Bar Association’s national convention in 1939, its president, Frank Hogan, told his audience that “reliance against the exercise of arbitrary power must be placed by the people henceforth in the legislative rather than the judicial department of the National Government.”<sup>176</sup> Hogan was not an isolated case, but was articulating what might be called the anti-Cesarist school of thought that was developing in reaction to Franklin Roosevelt’s dominance of American politics in the 1930s. Some adherents of that school did hope to knock out the New Deal by having the Supreme Court declare it entirely unconstitutional, but a greater number turned to Congress as the embodiment of deliberation, representative government, and the rule of law. Looking to the experience of Europe in the 1930s, they warned of the dangers of plebiscitary democracy.<sup>177</sup>

This anti-Cesarist sensibility was not confined to scholarly observers or journalistic commentators, either, but encompassed plenty of politicians, both Republicans and conservative southern Democrats. Nor was it confined to mere rhetoric. In the mid-1940s, its proponents helped push through the 22<sup>nd</sup> Amendment to the United States Constitution, preventing someone from being elected to the presidency in more than two consecutive elections and thereby preventing the

---

<sup>174</sup> *Ibid.*, at 44.

<sup>175</sup> *Ibid.*, at 46.

<sup>176</sup> Quoted in Piper 1991, *supra* n. 14, at 37.

<sup>177</sup> *Ibid.*, 37-40 (listing more than a dozen authors that contributed to this school).

possibility that FDR's role as president-for-life would be reprised.<sup>178</sup> The anti-Cesarist tendency was also at work in the Congress-bolstering Legislative Reorganization Act of 1946 and the anti-arbitrariness bulwark of the Administrative Procedure Act of 1946.<sup>179</sup>

As southern conservatism came to be exclusively associated with opposition to civil rights and as the exigencies of the Cold War led many conservatives to embrace a strong presidential power, conservative anti-Cesarism diminished in importance.<sup>180</sup> As Part II explains, after the election of Richard Nixon conservatives tended to be presidentialists. One might argue that the anti-Cesarist torch was passed from conservatives over to reformist liberals who opposed the imperial presidency in response to Vietnam and Watergate. But while the liberals of the 1970s undoubtedly shared the anti-Cesarists' suspicions of a powerful and potentially reckless federal government, they were fixated on accountability to the mass public by means of radical transparency—a kind of accountability that the conservative champions of Congress and representative government would have seen as too comfortable with mass democracy. The newer reformers had a very narrow sense of what representativeness ought to mean, which ultimately put them at war with the idea of a decentralized Congress.

We might conclude from the diminished standing of anti-Cesarism that it is simply an anachronism. In this way of thinking, champions of conservative goals are best served if they learn to love the administrative state and focus on using it for their own purposes.<sup>181</sup> Congress is best thought of as a vestigial organ, whose “endemic weaknesses” mean that it can never play a leading role in our public life.<sup>182</sup> Rather than being preoccupied with abstract procedural values, conservatives ought to just directly pursue policies that serve their substantive commitments, through whatever bureaucratic means present themselves.

---

<sup>178</sup> For a description of the politics surrounding the amendment, see Bruce G. Peabody and Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINNESOTA LAW REVIEW 565 (1999).

<sup>179</sup> On the connections between these two acts, see DAVID H. ROSENBLOOM, *BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION* (2000); see also Joseph Postell's paper for this Gray Center research roundtable.

<sup>180</sup> On the conservatives' reversal in orientation, see Jack Goldsmith, *The Accountable Presidency*, THE NEW REPUBLIC (February 1, 2010), available at <https://newrepublic.com/article/72810/the-accountable-presidency>.

<sup>181</sup> The clearest distillation of this view is Adrian Vermeule, *Integration From Within*, 2 AMERICAN AFFAIRS 202 (Spring 2018).

<sup>182</sup> Sundquist 1981, *supra* n. 9, at 150-160.

This way of thinking makes a great deal of sense if one believes that the nation's problems are clear and we possess a set of solutions that only needs to be implemented to advance the common good. It is striking, however, how little room it leaves for any kind of politics.

During a debate over the scope of the president's war-making power in 1951, Senator Robert Taft was asked if openly debating foreign policy gave aid and comfort to the enemy. He replied: "I think that the value of such aid and comfort is grossly exaggerated. The only thing that can give real aid and comfort to the enemy is the adoption of a policy that plays into their hands."<sup>183</sup> Taft's implication was that short-circuiting debate to impose a particular outcome deemed congenial to the national interest was likely to lead to short-sighted blunders, while conducting serious and open debate would be more likely to arrive at a clearer conception of how to serve the national interest.

Such faith in the power of deliberation, where representatives of good faith seek to persuade those who disagree with them, is thought naïve in our current political moment. Congress as it has evolved since the Republican revolution certainly does not instantiate it.

But the Congress-centered government sought by Taft and the anti-Cesarists, which had at its center the idea that in a self-governing republic, "laws, not men" must control, would be precisely the antidote needed to restore the health of our nation's rapidly degenerating political life.

Congressionally-centered government must be comfortable with incrementalism; working by committee is conducive to responding to new information and even learning from failures, but not to restarting things from the ground up. Putting Congress closer to the center of policymaking cannot, ironically, satisfy those who wish to see an end to delegation and an erasure of America's administrative state, because Congress is a representative body and there is no significant constituency for such a radical structural change. Not can it hope to satisfy those who await a sudden conversion away from a morally compromised past, because it frowns on the very possibility of the centralized power needed to execute such a turn. In other words, what it cannot deliver is a revolution.

What it can offer, instead, is a kind of constitutional fortitude that seems to be ebbing out of our increasingly plebiscitary politics today—a confidence in our ability to cope with our problems and eventually work through them together, however many missteps it may require. It is a regime that

---

<sup>183</sup> Quoted in Schlesinger 1973, *supra* n. 8, at 137.

can handle the dizzying complexity of an extended republic far better than a system dominated by a president atop an administrative state, because it begins from an acceptance of the legitimacy of differing interests and the need for compromise between them.

Perhaps it is fitting to give the last word to one of the anti-Cesarists' most powerful voices. In his 1959 *CONGRESS AND THE AMERICAN TRADITION*, James Burnham wrote words that ring just as true today:

Necessarily, the active, daily direction of the managerial state is in the hands of the executive, his principal officers and the higher echelons of the permanent bureaucratic apparatus. Their fingers are on the throttle. Liberty's problem in our day is to keep someone else, someone independent of their control and designs, at their side to restrain them somehow, to be ready to reach for the brake when the signals show red or the tracks plunge downhill.<sup>184</sup>

---

<sup>184</sup> JAMES BURNHAM, *CONGRESS AND THE AMERICAN TRADITION* (1959), at 340.