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RESTORING CONGRESS AS THE FIRST BRANCH

Kevin R. Kosar and Various Authors

INTRODUCTION

Kevin R. Kosar¹

In late 2014, the R Street Institute launched the Governance Project. Its task is large: to assess and improve the state of America's system of national self-governance, with particular attention to Congress.

The need for such inquiry should be obvious. Our federal republic is showing signs of dyspepsia, if not outright dysfunction. National public-policy issues, such as immigration reform, long have been deadlocked. Various government agencies – such as the Department of Veterans' Affairs, the Internal Revenue Service, and the Department of Defense – have been in the headlines due to major scandals and management failures. The nation's debts and deficits remain extraordinarily high.

Why focus on Congress? Quite simply, because most of these governance problems flow from our national legislature's actions and inactions. The U.S. Constitution made Congress the bedrock of our government. Article I declares

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“[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” These include fundamental powers of governance, such as establishing currency and fixing its value, regulating economic activity among the states and with other nations, declaring war, taxing the public and spending those funds. Our national charter also empowers Congress to conduct oversight to ensure our tax dollars are well-spent and our laws “faithfully executed” by the president and the bureaucracy. Hence, to remedy the ills of our federal government necessitates improving Congress.

The R Street Institute's Governance Project takes an institutional approach to the problem of governance. It focuses on what Congress does, why it does it and how its workings may be improved. To date, the governance project has published studies and essays on Congress and its role in regulatory policy, the Senate and its amendment process, congressional budgeting and various oversight issues (such as executive branch overreach.)²

2. For other Governance Project publications, see: <http://www.rstreet.org/tag/governance/>.

This white paper collects essays on congressional governance by incisive thinkers from across the political spectrum. The essays address some of the national legislature's afflictions and identify potential cures. The first footnote for each piece offers a link to the longer online pieces from which these short pieces are derived. The perspectives vary, but collectively, they underscore the need to right our constitutional system and restore Congress as the first branch.

NO LONGER THE FIRST BRANCH

Kevin R. Kosar³

The U.S. Constitution established Congress as the first branch of government. Article I is far longer than Article II (establishing the presidency) and Article III (creating the judiciary). Congress is given all lawmaking power, as well as complete authority over raising revenues. The national legislature has the authority to identify problems, craft policies and establish agencies to execute its policies.

As the Founding Fathers saw it, this plenitude of authority carried with it the major risk of despotism. James Madison observed in Federalist No. 48: "In republican government, the legislative authority necessarily predominates." It "alone has access to the pockets of the people," enabling it to extend "the sphere of its activity" and draw "all power into its impetuous vortex."

The executive branch, meanwhile, was envisioned as far less perilous. To ensure the presidency would not become the "foetus of monarchy," as Edmund Randolph colorfully put it, the founders gave it few powers. Article II is brief, and the president's powers are modest and mostly relate to international affairs. He may appoint "Officers of the United States" and "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." The executive may veto legislation (a power that is tucked into Article I) but Congress can override him. The president is deemed "commander in chief," but Congress retains the power to "raise and support armies," "provide and maintain a navy" and "declare war." The president's most fundamental duty is subservient to Congress: he shall "take Care that the Laws be faithfully executed."

Hence, it is remarkable to find ourselves in the exact opposite position. Congress clearly has been eclipsed by the executive branch. The executive branch comprises 180 agencies, 4.1

3. Kevin R. Kosar is the director of the governance project at the R Street Institute. He is the author of "How to Strengthen Congress," *National Affairs*, fall 2015. <http://www.nationalaffairs.com/publications/detail/how-to-strengthen-congress>

million civilian and active military employees and a budget of \$3.9 trillion per year. The legislative branch consists of a handful of agencies, has 30,000 employees⁴ and is funded at \$4.5 billion per year.⁵

Consider that Congress enacts perhaps 50 significant laws each year. Executive agencies issue 4,000 new rules per year and 80 to 100 of these have economic effects of \$100 million or more. These tallies do not include "guidance" documents issued by executive agencies, which can have the same effect as regulations. The Code of Federal Regulations, the corpus of current agency rules, holds more than 175,000 pages. Presidents regularly take America into armed conflicts without congressional authorization and make policy through executive orders.

A part-time, mostly amateur legislature cannot compete with a colossal, full-time executive branch.

The executive branch's growth in size and influence means more concentrated power and less democratic accountability. Each new exercise of executive power creates precedent to justify its future use. Today, the United States has an executive branch that can do just about anything it pleases, over the objections of the people's representatives, and sometimes to spectacularly bad effect.

The diminution of Congress and relative ascendancy of the executive branch is a long and complex story. Suffice to say that all three branches have been complicit in these developments.⁶

There are those in politics who assert that the less Congress is in session and the more gridlocked it is, the better the outcome for the people. The thinking goes that a Congress that does nothing is a Congress that does no harm.

Unfortunately, this philosophy does not work in the 21st century; certainly, not within our system of separate branches vying for power.⁷ The executive branch is a perpetual motion machine. The president is always on the job and agencies

4. Office of Personnel Management, Employment and Trends 2013. <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/employment-trends-data/2013/september/table-2/>

5. U.S. Congress, Legislative Branch Appropriations 2016, S. Rept. 114-64, June 11, 2015. <https://www.congress.gov/congressional-report/114th-congress/senate-report/64/1>

6. Kevin R. Kosar, "How to Strengthen Congress"; See also: Louis Fisher, *Congressional Abdication on War and Spending*, Texas A&M University Press, 2000.

7. On the perils of an energetic, unbound executive branch and a sluggish Congress, see Christopher DeMuth, Sr., "The Bucks Start Here," *Claremont Review of Books*, Aug. 26, 2013. <http://www.claremont.org/crb/article/the-bucks-start-here/>; See also: Christopher DeMuth, Sr., "Congress Incongruous," *Library of Law and Liberty*, Aug. 3, 2015. <http://www.libertylawsite.org/liberty-forum/congress-incongruous/>

operate 52 weeks a year.⁸ A part-time, mostly amateur legislature cannot compete with a colossal, full-time executive branch. Congress has foundered in its duty to comprehend, to say nothing of manage, a vast and fantastically complex federal government with a budget of \$3.9 trillion and an extremely large body of law (the U.S. Code volume of laws relating to agriculture alone runs 2,000 pages). It is time to lay to rest the appealing notion of the earnest, amateur legislator who can appear at the Capitol three days a week and govern with pure horse-sense. The federal government is too huge, complex and relentless for that.

Righting the imbalance between the branches of government necessitates Madisonian reforms that strengthen Congress *vis-à-vis* the executive branch. Strengthening democratic self-governance requires Congress to invest in itself as an institution and make progress in pruning the executive branch.

Congress should first increase the length of the congressional calendar. Congress cannot simply convene on a Tuesday through Thursday schedule and expect to be in Washington only one-third of the year. That schedule does not leave sufficient time to assess what government is doing and why, let alone to determine what to do about it. Legislators should work not less than five days a week for three weeks out of every five.

Even with a less “absentee Congress”⁹ – as Sen. Mike Lee, R-Utah, has called it – legislative branch staff must be augmented. The manpower of congressional committees and support agencies have been diminished over the past 20 years.¹⁰ Congress needs more experts and policy aides who can help it understand and oversee the executive branch.

Conversely, cutting the size of the executive branch can help redress the imbalance between the first and second branches. Congress should establish processes – similar to those used during the Base Realignment and Closure Process – to identify archaic and wasteful regulations and failed or needless executive-branch programs. Each commission would take suggestions from the public and work with congressional support agencies to ensure the cuts are sensible. Upon completion, each commission’s report would be delivered to Congress for introduction and a prompt up-or-down vote.

8. Kevin R. Kosar, “The Legislative Branch’s Big Oversight Problem,” *Public Administration Times*, Sept. 15, 2015. <http://patimes.org/legislative-branches-big-oversight-problem/>

9. Sen. Mike Lee, “Opening Remarks at the 2015 National Lawyers Convention,” Nov. 16, 2015. <http://goo.gl/cz2KTS>

10. The legislative support agencies are the Congressional Budget Office, the Congressional Research Service, the Government Accountability Office and the Library of Congress. On committee and support agency staffing levels, see Lee Drutman and Steven Teles, “A New Agenda for Political Reform,” *Washington Monthly*, March 2015. http://www.washingtonmonthly.com/magazine/marchaprilmay_2015/features/a_new_agenda_for_political_ref054226.php?page=all

The executive branch can’t be expected to give up any of its power voluntarily. Congress may be weakened, but it is not broken. It can regain, through several discrete and prudent steps, at least some of its former strength. Whatever its flaws, Congress is our most democratic branch and our best hope for self-governance.

CONGRESS LOBOTOMIZES ITSELF

Paul Glastris¹¹

In mid-October 2015, Bradley Podliska, a staffer on the House Select Committee on Benghazi, announced he was suing the committee for firing him the previous spring. Podliska asserted the cause for his termination was, among other things, that he resisted pressure to focus his investigative efforts solely on the State Department and Hillary Clinton’s role surrounding the Benghazi attack. The committee’s chairman – Rep. Trey Gowdy R-S.C. – disputed the staffer’s charge, saying he was instead fired for mishandling classified information and other matters.

It’s hard to know the truth about incidents like this, but three facts are worth noting. First, Podliska is an Air Force Reserve intelligence officer and a self-professed conservative Republican who was working for the GOP majority. Second, the intense focus on Clinton, which Podliska warned against, did turn out to be an immense substantive and political mistake for the committee’s GOP majority, as just about every pundit, left and right, agreed afterward. Many noted that the personal and partisan nature of the questioning stood in sharp contrast to much more professional, bipartisan congressional investigations of the past – the Watergate hearings being the oft-stated “gold standard.” A third point to note is that one of the staffers on that famous Watergate committee was a young woman by the name of Hillary Rodham.

This is more than an historical irony. An effective Congress, one that can play its constitutional role in providing a check on and overseeing the actions of the executive branch, relies more than most people realize on congressional staff. Traditionally, Congresses that have taken their role as the first branch of government seriously have put both resources and their trust into professional, bipartisan and nonpartisan staffs, especially at the level of committees and legislative support agencies like the Government Accountability Office.

11. Paul Glastris is the editor-in-chief of *Washington Monthly* magazine. He is the author (with Haley Sweetland Edwards) of “The Big Lobotomy: How Republicans Made Congress Stupid,” *Washington Monthly*, June 2014. http://www.washingtonmonthly.com/magazine/junejulyaugust_2014/features/the_big_lobotomy050642.php?page=all

What we have seen in recent years, however, is the opposite: a decimation and marginalization of staff and research capacity that my colleague Haley Sweetland Edwards and I have dubbed “the big lobotomy.” This diminishment of staff is hardly the only reason for Congress’s current dysfunction and disrepute. But it is a profoundly important and underappreciated factor, as both cause and, potentially, cure.

A little history: in the early 1940s, official Washington became concerned about the growing complexity of societal problems, as well as the unchecked growth of executive-branch power during the Great Depression and World War II. This concern prompted Congress in 1946 to pass the Legislative Reorganization Act.¹² This law rationalized committee structures and added permanent staff to the committees, as well as to support agencies like the Legislative Reference Service, Congress’ in-house think tank.¹³

Two-plus decades later, for very similar reasons, Congress passed another series of reforms. It bulked up the staffs of committees and member offices. It further expanded the Legislative Reference Service, renaming it the Congressional Research Service. It created the Congressional Budget Office (CBO) and the Office of Technology Assessment (OTA).¹⁴

The result was one of the great eras of congressional oversight, with the Church and Pike committees investigating intelligence abuses and the Watergate hearings exposing the crimes of the Nixon White House. The period saw the passage of several pieces of landmark legislation, from the Clean Water Act to the Jackson-Vanik Amendment, which helped millions of Jews escape the Soviet Union.

The bipartisan willingness to work together on substantive issues and oversight frayed in the late 1980s and early 1990s. But important work continued to be done, with empowered staff at the center of the action—the Tax Reform Act of 1986 being a great example.

All of this changed in 1995, when Republicans won the House majority for the first time in 40 years. The new Republican House leadership, led by Speaker Newt Gingrich, R-Ga., cut professional staff by a third. It reduced the legislative support staff at agencies like the General Accounting Office (renamed the Government Accountability Office in 2004) by one-third and killed the Office of Technology Assessment entirely.

12. Daniel Stid, “Political Science and the Challenge of Congressional Reform,” paper prepared for the Conference on Congress, the Constitution, and Contemporary Politics, at the American Enterprise Institute, October 2015.

13. U.S. House of Representatives, “Legislative Reorganization Act of 1946.” <http://history.house.gov/Historical-Highlights/1901-1950/The-Legislative-Reorganization-Act-of-1946/>

14. Federation of American Scientists, “Office of Technology Archives.” http://ota.fas.org/technology_assessment_and_congress/

Today, the GAO and the CRS each operate at about 80 percent of their 1979 capacity. Since 1995, the number of hearings has plummeted by nearly 50 percent in the House and by a quarter in Senate. While Senate committee staffs rebounded somewhat under Democratic control, every single House standing committee had fewer staffers in 2009 than in 1994. Since 2011, with a Tea Party-inspired GOP back in control of the House, Congress has cut its budget by a whopping 20 percent, a far higher ratio than any other federal agency. This has led, predictably, to staff layoffs, hiring and salary freezes and a drop in morale.¹⁵

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Why would conservative lawmakers decimate the staff and organizational capacity of an institution they themselves control? Part of it is political optics; what better way to show conservative voters back home that you’re serious about shrinking government than by cutting your own staff? But a bigger reason is strategic. The Gingrich Revolutionaries of 1995, the Tea Partiers of 2011 and the Freedom Caucusers of today share the same basic dream: to defund and dismantle the vast complex of agencies and programs that have been created by bipartisan majorities since the New Deal. The people in Congress who knew those agencies and programs best and were most invested in making them work—the professional staffers, the CRS analysts, the veteran committee chairs—were not going to consent to seeing them swept away. So *they* had to be swept away.

Of course, all of this slashing and cutting has done nothing to actually help shrink the federal government. Real federal spending has increased 50 percent since 1995, in line with the growth of the U.S. population and economy.^{16 17} This growth is, in part, a consequence of the decline in Congress’ institutional ability to monitor and investigate a growing and ever-more-complex federal government. While Congress continues to devote what limited investigative resources it has into the overfished waters of Benghazi, just in the last few years, we’ve witnessed two appalling government fiascoes that better congressional oversight might have avoided: the botched rollout of the health-insurance exchanges and the uncontrolled expansion of the National Security Agency’s surveillance programs. (Fun fact: while annual federal spending on intelligence has roughly doubled since 1997, staff levels on the Senate Select Committee on Intelligence have actually *declined*.)

15. “The Big Lobotomy”

16. “U.S. Federal Government Budget Over Time.” http://www.supportingevidence.com/Government/fed_budget_over_time.html

17. “US Real GDP by Year.” <http://www.multpl.com/us-gdp-inflation-adjusted/table>

As former Republican Sen. Tom Coburn, R-Okla., pointed out in a 2012 report, the decline in congressional oversight has resulted in wasted money, uncontrolled government programs and a panicky sense of “fire-alarm oversight” in which members of Congress don’t ask questions until a scandal breaks; then, there’s a mad scurry to assign blame.¹⁸

This widespread, decadeslong congressional lobotomy could be fixed overnight. Members of Congress, after all, control the national budget. All they need to do is allocate a couple of hundred million bucks—chump change in the \$5 trillion budget—to boost staff levels, increase salaries to retain the best staff and fill out the institutional capacity of the body.

The problem is that conservative members haven’t, as yet, generally seen this lack of expertise as a problem. When your aim is less government, why would you want to add legislative staff to increase government’s intellectual capacity?

The budget deal negotiated in late October 2015 will keep legislative-branch funding flat. This means Congress will spend another year lobotomized and underequipped to oversee the government. But if congressional conservatives spent time to look honestly at what’s transpired since 1995, they might recognize that making Congress dumber is not, in fact, a route to making government smaller.

A CONGRESS WITHOUT ITS OWN KNOWLEDGE IS A DEPENDENT CONGRESS

Lee Drutman¹⁹

Say you are a member of Congress concerned that drug prices are too high. What would you do?

Maybe you want to make it easier to get generic drugs onto the market. But what do you say to the branded drug lobbyists who tell you that reducing their patent protections would starve them of the resources to bring new drugs to market? Do you really know enough about health-care economics to feel confident this is the right policy approach? Even if you are confident, are you also confident that you could bring along enough fellow members of Congress, given all the resources you know drug makers are going to put into this fight? Why pick a fight like this?

18. Sen. Thomas Coburn, *Waste Book 2012*, pp. 4-6. <http://showmethespending.com/wp-content/uploads/2014/06/Wastebook2012.pdf>

19. Lee Drutman is a senior fellow in the program on political reform at New America. He is the author of *The Business of America is Lobbying*, Oxford University Press, 2015.

Or, say, you think the big banks ought to be smaller because you’re worried they’re still too big to fail. What’s the right policy lever? You hear plenty of talk that we ought to reinstate Glass-Steagall and separate commercial and investment banking like we did from 1933 to 1999. But the bank lobbyists who show up regularly at fundraisers have a very convincing story about why this would send the economy into chaos and move lots of jobs to London, and why what we really need to worry about is the unregulated “shadow banking” sector. Finance is complicated stuff. Do you really know enough to do anything but trust the industry’s expert lobbyists?

Dig into any policy area and you begin to understand that nothing is as simple as it seems at first blush. It sounds obvious to say it, but the world is a complicated place and becoming more so each year. The U.S. Code is complicated and made more so each year. We keep adding to it and we rarely make it smaller.

There’s too much to know and too little capacity within Congress to know it. Without adequately knowledge, Congress can’t perform its basic functions of writing the laws and overseeing the government, or at least, not without depending thoroughly on the wisdom of others. Those others are seldom accountable to the people in the same way that Congress is.

The challenges facing Congress today are very different than they were in 1789. But they’re also different than they were even in 1978.²⁰ The demands for knowledge have grown exponentially. There is far more constituent attention. There is far more media spotlight. Most significantly, there is far more lobbying, especially corporate lobbying. Policy is far more complicated, yet Congress is staffed at roughly the same levels it was in 1978. There are actually fewer committee staff than there were then, particularly in the House, where committee staffing levels were decimated under Speaker Newt Gingrich from 1995 to 1999. These levels have never recovered.

More and more, offices are staffed primarily by inexperienced (but enthusiastic) twentysomethings, who are expected to be expert on two dozen issues, as of yesterday. Of course, they can’t be that, because nobody can. Instead, scrapped for time, they usually operate in reactive mode, responding to information as it comes to them. Almost all of that information is from interested parties.

By an overwhelming margin, that information comes from businesses and trade associations, who are looking out for their own bottom lines. They usually provide detailed justifications for their perspectives, often presented by extremely

20. Lee Drutman and Steven Teles, “A New Agenda for Political Reform,” *Washington Monthly*, March 2015. http://www.washingtonmonthly.com/magazine/marchapril-may_2015/features/a_new_agenda_for_political_ref054226.php?page=all

smart and experienced lawyers and lobbyists, many of whom are very well-connected.²¹ Often, they have ready-drafted legislation, along with an action plan to get it passed.²² Information from nominally “unbiased” sources is usually sporadic and thin, often presented by advocates who do not have the same depth of research and argument behind them, the same social networks or the same capacity to spread that message far and wide. So members and staffers naturally rely more on expert advice of interested parties to advance proposals.

If congressional offices had the independent capacity to analyze and synthesize information and to develop their own policies consistently, this would be less of a problem. But they don’t. They lack the deep expertise to understand most policy areas, particularly economic and regulatory issues, and to evaluate the trade-offs thoughtfully. Any attempt to challenge the status quo requires even deeper command of the issues and capacity to build widespread support. Members and their staffs rarely possess such capacity these days.

Members can’t be expected to become experts on much, given the other demands of their jobs. But staff ought to be, especially committee staff. But with the low salaries, especially relative to other D.C. opportunities, and lack of job security, it’s very hard to keep good people in Congress. As one lobbyist I interviewed for my book summed it up:

“It’s tough to live off the government pay check. You make so little money. One of the big things that’s wrong with the system is that somebody finally learns their job and then they have to move on, so you have a bunch of young folks who turn to lobbyists to figure out their jobs.”²³

Remarkably, Congress has continued to reduce its capacity. House GOP leaders have cut their own funding by 20 percent since taking back the majority in 2011.²⁴ As then-Ways and Means Committee Chairman Paul Ryan, R-Wis., put it during a February 2014 House Administration Committee hearing: “The committee needs to add staff, particularly in tax, health care and the economics fields.”²⁵ For Congress to legislate effectively, it needs staffers who understand policy.

21. Lee Drutman, *The Business of America Is Lobbying: How Corporations Became Politicized and Politics Became More Corporate*, Oxford University Press, 2015.

22. Richard L Hall and Alan V Deardorff, “Lobbying as Legislative Subsidy,” *American Political Science Review* 100, no. 1 (2006): 69–84.

23. Drutman, *The Business of America Is Lobbying*.

24. Bradford Fitch, “Budget Cuts to Congress Are Real Not ‘Gimmicks,’” Congressional Management Foundation website, Feb. 12, 2014. <http://www.congressfoundation.org/news/blog/1052-budget-cuts-to-congress-are-real-not-gimmicks>

25. Bridget Bowman, “After Years of Cuts or Freezes, Committee Leaders Hope to Bolster Budgets,” *Roll Call Blog: Hill Blotter*, Feb. 10, <http://blogs.rollcall.com/hill-blotter/committee-leaders-hope-to-bolster-committee-budgets/>.

It’s up to Congress to decide how much capacity it wants. While the politics of adding capacity are difficult, given Congress’ general unpopularity, the reality is that the vast majority of members of both the House and the Senate hold very safe seats; primary challenges are far rarer than the media makes them out to be. Members also ought to realize the reason Congress is so unpopular is because it’s unable to accomplish much, in part because it lacks the capacity. Much of what it does accomplish is the product of special-interest business lobbying. Consider that the one big recent bipartisan achievement in the House this last autumn was a discharge petition to renew the Export-Import Bank, an entity beloved by huge corporate interests.

Congress should vote itself more resources. It should hire more staff, especially at the committee level, and pay them more. It should also boost resources for its support agencies, especially the Congressional Research Service and help the CRS to modernize for the 21st century.²⁶

The bland truism is that knowledge is power. A Congress without much knowledge is a powerless Congress, one dependent on other sources for its power. It’s a Congress that can’t perform its constitutional duties.

REBUILD THE MACHINERY

Jonathan Rauch²⁷

Delivering his first address to the U.S. House of Representatives as its newly chosen speaker, Paul Ryan was not loath to use the C-word. Ordinary Americans “look at Washington,” he said, “and all they see is chaos.”²⁸

None of the nodding heads on the House floor seemed of a mind to disagree.

Partisan polarization gets a lot of attention from pundits and politicians. At least as important, however, is a different kind of problem: political disorganization. Or, as Richard Pildes of New York University Law School calls it, fragmentation.²⁹

26. CRS is Congress’ think-tank. It is staffed by civil servants and provides nonpartisan research and analysis to legislators, committees, and staff. On CRS reform, see Kevin R. Kosar, “How to Strengthen Congress,” *National Affairs*, fall 2015. <http://www.nationalaffairs.com/publications/detail/how-to-strengthen-congress>

27. Jonathan Rauch is a senior fellow at the Brookings Institution and the author of *Political Realism: How Hacks, Machines, Big Money, and Back-Room Deals Can Strengthen American Democracy*, Brookings Institution, 2015. <http://www.brookings.edu/research/reports2/2015/05/political-realism-rauch>

28. Speaker Paul Ryan, 161 *Congressional Record*, Oct. 29, 2015, p. H7339. <https://www.congress.gov/crec/2015/10/29/CREC-2015-10-29-pt1-PgH7337.pdf>

29. Richard Pildes, “Romanticizing Democracy, Political Fragmentation, and the Decline of American Government,” *Yale Law Journal*, vol. 124, 2014.

Or, as Paul Ryan called it, chaos.

Call it what you like, the capacity of political leaders to organize their forces and set a coherent direction has reached an ebb probably lower than the country has seen before, especially in the Republican Party, which barely functions as a political party at all.

When lack of consensus in the country or Congress blocks movement on an issue, the resulting gridlock may be a pity, but it accurately reflects political reality. Disorganization—“chaos”—is a different kind of problem. When majorities in both chambers, plus the president, plus in some cases majorities in both *parties* in both chambers, all favor movement, but leaders still can’t organize their forces to pass a deal, that’s not a failure to achieve a consensus. It’s a failure to implement one.

Politicians need to organize their world and will build machines naturally, if you let them.

Over the past five or so years, we have seen this new sort of organizational failure arise repeatedly. Budget and immigration deals failed to gel despite having had more than enough support to pass on the floor in both chambers. Perhaps more worryingly, Congress has struggled to perform routine legislative tasks: passing a farm bill, a surface transportation bill, appropriations bills; keeping the Department of Homeland Security or, indeed, the government open; raising the debt limit. Paul Ryan’s predecessor, former House Speaker John Boehner, finally gave up in exhaustion and resigned. As Boehner implied when he remarked ruefully to Jay Leno that “a leader without followers is simply a man taking a walk,” Congress faces not a crisis of leadership but a crisis of followership.³⁰

The cost is significant. Opportunities for compromise and reform slip away, all the more a pity in that they come less and less often. Government-by-crisis displaces routine legislative business and regular order. Congress, rightly intended by the Founding Fathers to be the pre-eminent branch, becomes marginalized. Its unused power flows to the president, independent agencies and the courts.

What causes chaos? Institutional and procedural changes on Capitol Hill have played their part. So have many changes in society and American politics, from polarization to social media. Not to be neglected, however, is the role of deliberate policy choices that have weakened politicians’ ability to

organize their environment and thus have reduced leaders’ capacity to lead. These choices have been driven by ideologies that enjoy widespread intellectual support, and politicians continue to push for more of the same.

Unlike a parliamentary system, the American constitutional system provides no built-in mechanism to make politicians accountable to each other. Leaders can do little to reward and punish rank-and-file members directly, because all are elected independently. Instead, the U.S. system relies on informal political organizations to build hierarchies of mutual accountability—otherwise known as political machines and political parties. These informal organizations use all kinds of incentives (mostly rewards and favors, but occasionally punishments) to instill loyalty, delegate decision-making, broker agreements and weld diverse factions into more or less coherent coalitions. Their role was aptly described by the great political scientist James Q. Wilson as “assembling power in the formal government.”³¹

Politicians need to organize their world and will build machines naturally, if you let them. Since the 1970s, however, reformers of three stripes—progressive, populist and libertarian—have (while agreeing on little else) agreed to define machine-style politics as corrupt. To progressives, political deal-making deviates from meritocratic decision-making. To populists, it deviates from democratic decision-making. To libertarians, it deviates from market-based decision-making. As a result, successive reforms have systematically weakened the tools of political leadership:

Gatekeeping: Machines and leaders need to be able to protect rank-and-file members who take tough votes for the team. They need to be able to reward loyalists by easing their path toward nomination (or renomination) and election (or re-election). But the modern primary system and related, less-formal changes have stripped party professionals of their ability to act as gatekeepers.

Money: Machines and leaders need to be able to steer resources to team players. But campaign-finance laws have severely restricted the ability of parties to support candidates. The perverse result has been to clear the way for independent organizations that operate without accountability to voters and often in secrecy.

Coordination: Machines and leaders need to deploy resources and rewards strategically across many politicians and priorities. But rules against so-called “coordination” among parties, candidates and financial supporters have complicated and, in some cases, even criminalized that task, driving much of it underground.

30. Emma Dumain, “Boehner Tells Leno Government Shutdown a ‘Predictable Disaster,’” *Roll Call*, Jan. 24, 2014. <http://blogs.rollcall.com/218/boehner-tells-leno-government-shutdown-a-predictable-disaster/>

31. James Q. Wilson, *The Amateur Democrat: Club Politics in Three Cities*, University of Chicago Press, 1962; reprinted with a new preface in 1966.

Privacy: Machines and leaders need to be able to broker complicated deals in negotiations where nothing is settled until everything is settled. This requires private spaces for candid exchanges and trial offers, out-of-sight of television cameras and potential spoilers. A series of pro-“sunlight” reforms and a culture that condemns political privacy have complicated that task, as well.

Professionalism: Machines and leaders need to reward time-servers and professionals who stay in the game and prove themselves to be reliable, team-oriented players. But changes in institutional arrangements (such as the vitiation of the seniority system on Capitol Hill) and, more important, in the political culture (which demonizes political “careerists”) have weakened the influence of hacks. These changes have correspondingly empowered amateurs who worry more about ideological purity than long-term consequences.

Pork: Machines and leaders need to be able to sugarcoat painful votes with pecuniary incentives, such as pork-barrel spending and earmarks. In a fit of piety, Congress banned earmarks in 2010. The hobbling of the traditional appropriations process has also reduced the availability of pork.

All those reforms were well-intended and many were supported by reasonable arguments. Alas, reformers paid inadequate attention to the cumulative effect on parties’ and machines’ capacity to “assemble power in the formal government.” As Trent Lott, a Republican former Senate majority leader and House minority whip, told CNN in 2013:

“Trying to be a leader where you have no sticks and very few carrots is dang near impossible. Members don’t get anything from you and leaders don’t give anything. They don’t feel like you can reward them or punish them.”³²

Fortunately, among both scholars and practitioners, awareness is growing of the need to accommodate the realities of governing and to restore and foster informal political structures.

Being realistic, political realism, as I call this new awareness, makes no magical promises, nor does it demand that the clock somehow be turned back. It does provide a timely corrective. It is generating practical ideas with growing support across blue-red lines: for example, raising the limits on parties’ ability to raise money and coordinate with candidates. In my recent essay “Political Realism: How Hacks, Machines, Big Money and Back-Room Deals Can Strengthen American Democracy,” I explore such ideas in more detail.

32. Dan Merica, “Longing for Pork: Could Earmarks Help Congress Get Things Done?” CNN.com, Oct. 17, 2013. <http://www.cnn.com/2013/10/17/politics/earmarks-help-congress/>

Equally important, realists are pushing back against the ideologies which seek to define transactional politics as corruption. To borrow from Daniel Patrick Moynihan: a polity that demolishes its political machines and demonizes its political professionals asks for and gets chaos.³³

WILL RYAN'S REFORMS STRENGTHEN THE HOUSE?

Molly Reynolds³⁴

In his speech to the House of Representatives after being elected speaker, Rep. Paul D. Ryan, R-Wis., promised he would “make some changes, starting with how the House does business.”³⁵ Ryan wasted little time making initial down-payments on these assurances³⁶ and we’re likely to hear more about other ideas in the weeks and months ahead. Can the ideas Ryan is exploring—including a more open amendment process, changes to the Republican Steering Committee, reliance on standing and conference committees and opportunities for input from rank-and-file members—address some of the challenges described by other contributors to this white paper and help make Congress more effective?

It’s no secret that Ryan’s promises were initially offered as part of the negotiations with the House Freedom Caucus that elevated him to the position.³⁷ When we analyze the institutional consequences of these reforms, we must therefore consider how they represent a response to those political realities that underlie their adoption. On this point, some historical context is helpful. For example, take the reliance on a rigid seniority system for assigning committee chairmanships during the mid-20th century. The then-majority Democrats had a large and diverse caucus and using neutral selection rules helped keep the peace between factions. By the mid-1970s, when strict adherence to this system had produced a set of conservative Southern Democratic chairs who many junior members thought were preventing liberal policy changes, new reforms enhanced the power of subcommittee

33. Daniel Patrick Moynihan, “‘Bosses’ and ‘Reformers’: A Profile of the New York Democrats,” *Commentary*, June 1, 1961.

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35. “Paul Ryan Elected Speaker Transcript,” *Politico*, Oct. 29, 2015. <http://www.politico.com/story/2015/10/paul-ryan-elected-speaker-transcript-full-text-215351>

36. Molly E. Reynolds, “Can Paul Ryan Keep His Promise on Amendment Opportunities to the Rank and File?” *FixGov Blog*, Nov. 16, 2015. <http://www.brookings.edu/blogs/fixgov/posts/2015/11/16-open-amending-process-speaker-ryan-reynolds>

37. Sarah Binder, “Can Paul Ryan Disarm the Freedom Caucus?” *The Monkey Cage*, Oct. 26, 2015. <https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/26/can-paul-ryan-disarm-the-freedom-caucus/>

chairs and party leaders at the expense of the chairmen.³⁸ When Republicans assumed control after the 1994 elections, Speaker Newt Gingrich, R-Ga., undertook similar changes, disrupting the seniority structure in favor of chairmen who would advocate for his conservative policy priorities.³⁹

At the same time, procedural change can address political realities while *also* strengthening Congress' capacity as an institution. For example, consider the Congressional Budget Act (CBA) of 1974, which created the House and Senate budget committees and tasked them with setting broad contours for annual taxing and spending through the budget resolution. Many accounts of the law's enactment focus on two underlying institutional dynamics as drivers of its passage. First, Congress felt hamstrung in its ability to influence fiscal policy because it lacked a process to debate aggregate budget totals and deliberate the trade-offs between big-picture priorities.⁴⁰ This internal weakness was made worse by President Richard Nixon's aggressive use of his power to cut, rescind and impound funds explicitly appropriated by Congress in various policy areas. These included Housing and Urban Development grants, water pollution funds and farm loans and grants, beginning in 1971.⁴¹

At the same time, creating a new budget process allowed Democratic congressional majorities to accomplish important *political* goals. By reforming the budget process, Democrats both avoided possible electoral blame for incoherent fiscal policy and gained the opportunity to take a strong stand against a president of the opposite party.⁴² The CBA is an example of a reform that strengthened Congress as an institution while also addressing the majority party's political needs. Can Ryan's reforms serve a similar, dual purpose?

The prospects are mixed. Certainly, some could have potential. Take, for example, Ryan's pledge that "committees should take the lead in drafting all major legislation."⁴³ Members will only expend their personal resources (including time and cognitive effort) in their committee work if there's an incentive to do so.⁴⁴ As more major legislative deals have been negoti-

ated by leadership, rather than in committee, that motivation has declined.⁴⁵ Couple this with the fact that, as several other contributors have argued at length elsewhere,⁴⁶ committee staff capacity has been steadily declining since the 1990s, and it becomes clear that it has become more difficult for committees to function as the autonomous centers of policy expertise that help make Congress function effectively.

A credible commitment from Ryan to rely more on committee-generated proposals could begin to reverse this trend. Ryan's promise to make increased use of formal conference committees could achieve a similar end;⁴⁷ the knowledge that upfront investment to develop legislation might also increase the chances that committee members get to participate in negotiations over the ultimate version of the bill with the Senate could also increase the value of committee deliberation.

If we hope to increase the capacity of committees as specialized loci of expertise in the House, taking even symbolic steps to diminish the prestige of a committee position will not help that cause.

At the same time, other proposals do much less to encourage this kind of investment in committee service. Consider the series of "listening sessions" held in late November 2015 to give rank-and-file members a chance to weigh in, in detail, on individual provisions in the six appropriations bills that did not receive any floor consideration in the House during 2015.⁴⁸ Look also to the decision to remove the six standing committee chairmen from the Republican Steering Committee and replace them with members selected from among the broader conference.⁴⁹ While the substantive effects of these changes may be limited,⁵⁰ they may still have important symbolic value. Both elevate, at least symbolically, the voices of rank-and-file legislators at the expense of committee members, which does little to motivate those committee members to invest their resources in their committee service.

38. David W. Rohde, *Parties and Leaders in the Postreform House*, University of Chicago Press, 1991.

39. John Aldrich and David W. Rohde, "The Transition to Republican Rule in the House: Implications for Theories of Congressional Politics," *Political Science Quarterly*, Winter 1997-98, vol. 112, no 4, pp. 541-567.

40. See, for example, Lance T. LeLoup, *The Fiscal Congress: Legislative Control of the Budget*, Greenwood Press, 1980.

41. Howard E. Shuman, *Politics and the Budget: The Struggle between the President and Congress*, Prentice-Hall, 1984, especially pp. 207-11.

42. Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress*, Princeton University Press, 2001.

43. "Paul Ryan Elected Speaker Transcript," *Politico*, Oct. 29, 2015. <http://www.politico.com/story/2015/10/paul-ryan-elected-speaker-transcript-full-text-215351>

44. Richard L. Hall, *Participation in Congress*, New Haven, Conn.: Yale University Press, 1996; Kevin M. Esterling, "Buying Expertise: Campaign Contributions and Attention to Policy Analysis in Congressional Committees," *American Political Science Review*,

February 2007, vol. 101, no 1, pp. 93-109.

45. For a recent example of a high-profile bill largely developed outside of the regular committee process, see Peter Sullivan, "How Boehner and Pelosi Surprised Everyone with a \$200 Billion Deal," *The Hill*, March 28, 2015.

46. Lee Drutman and Steve Teles, "A New Agenda for Political Reform," *Washington Monthly*, March 2015, pp. 23-32; and Kevin Kosar, "How to Strengthen Congress," *National Affairs*, fall 2015, no 25, pp. 48-61.

47. "House Speaker Weekly Briefing," C-SPAN, Nov. 19, 2015. <http://www.c-span.org/video/?400968-1/house-speaker-paul-ryan-weekly-briefing>

48. Ryan McCrimmon, "House GOP Appropriators' Ears Bent in Listening Sessions," *CQ News*, Nov. 20, 2015.

49. For the rest of the 114th Congress, these new members will be elected at-large; beginning in 2017, they will be additional regional representatives. See Scott Wong, "House GOP Approves of Overhaul of Powerful Steering Panel," *The Hill*, Nov. 19, 2015.

50. Molly E. Reynolds, "Speaker Ryan is 'Steering' the Congress toward More Changes," *FixGov Blog*, Nov. 20, 2015. <http://www.brookings.edu/blogs/fixgov/posts/2015/11/20-paul-ryan-steering-congress-to-more-changes-reynolds>

Put differently, if we hope to increase the capacity of committees as specialized loci of expertise in the House, taking even symbolic steps to diminish the prestige of a committee position will not help that cause.

Finally, there are some reforms under consideration that could improve congressional capacity, but are simply unlikely to stick, such as the use of an open-amendment process. Analysts of various political stripes have highlighted the negative effects on deliberation of preventing rank-and-file members, especially those in the minority party, from offering amendments on the floor.⁵¹ At the same time, restrictive rules prove to be extremely important tools for the majority party leadership, both to prevent difficult votes on amendments that divide the party and to keep the House running efficiently under significant time constraints.⁵² Given a well-organized, conservative faction within the House Republican Party like the Freedom Caucus, and an especially tight congressional calendar in 2016, the circumstances that make restrictive rules attractive aren't likely to get better in the near future. Add in recent evidence from the Senate that legislators may be offering more messaging amendments than substantive ones,⁵³ and it is difficult to imagine that Ryan will be able to maintain an open-amendment process in the future.

Speaker Ryan's efforts to use institutional reform to address the political realities of managing his caucus (and the chamber more generally) are consistent with a long historical precedent and should be understood as such. But as a way to improve Congress's institutional standing in the separation of powers system—a problem laid out in detail, and from a range of perspectives, by my fellow contributors—their prospects are mixed, at best.

51. See, for example, Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress is Failing America and How to Get it Back on Track*, Oxford University Press, 2006; and Gerald B.H. Solomon and Donald R. Wolfensberger, "The Decline of Deliberative Democracy in the House and Proposals for Reform," *Harvard Journal on Legislation*, 1994, vol. 31, pp. 321-370.

52. For an example of when an open rule kept the majority party from preventing a tough amendment vote, see Cristina Marcos, "House Cancels Vote amid Fight over Confederate Flag," *The Hill*, July 9, 2015. For an example of when a restrictive rule helped manage time pressures, see Matt Fuller, "Boehner Backs Bill, Condemns 'Cromnibus' Process," *Roll Call*, Dec. 11, 2014. <http://blogs.rollcall.com/218/boehner-backs-bill-condemns-cromnibus-process/>. For an academic treatment of restrictive rules, see Stanley Bach and Steven S. Smith, *Managing Uncertainty in the House of Representatives: Adaptation and Innovation in Special Rules* (Washington, D.C.: Brookings Institution Press, 1988).

53. Anthony J. Madonna and Kevin R. Kosar, "Could the Modern Senate Manage an Open-Amendment Process?" R Street Policy Study No. 42, October 2015. <http://www.rstreet.org/wp-content/uploads/2015/10/RSTREET42.pdf>

FOUR STEPS FOR REVIVING THE FIRST BRANCH

Yuval Levin⁵⁴

Everyone agrees that Congress is dysfunctional. But how is it dysfunctional, really? What function is it failing to perform?

Answers to this question often reflect policy priorities more than an assessment of Congress as an institution. Some observers think the problem is that Congress isn't passing enough major legislation to address the country's major problems by creating major programs. Others think Congress isn't doing enough to reverse the damage done by the major legislation enacted in recent years. Some think Congress doesn't compromise enough; others think it avoids essential disagreements. Some think party leaders have too much power; others think they have too little.

These different definitions of dysfunction lead to different diagnoses and prescriptions: Maybe Congress needs stronger professional and analytical support. Maybe it needs less centralized rules and more bottom-up legislating. Maybe it needs to be less consolidated or maybe it needs to be more so.

But if there is one function of Congress that might stand above partisan politics and policy differences, it is its role in keeping our constitutional order well-balanced, and therefore broadly functional itself. And on this front, there can be little question that the Congress is dysfunctional.

Indeed, the weakness of the Congress is the foremost problem now confronting our constitutional system. Many observers, especially on the right, tend to describe this problem in terms of the excesses of the other two branches—and so we call it executive overreach or judicial activism. But the hyperactivity of the other two branches is made possible, and even unavoidable, by the underactivity of the first branch.

For decades now, under presidents and congressional majorities of both parties, Congress has willingly ceded power to the president and to judges and has abided the erosion of its primary position in our system of government. Congress has done this for a variety of reasons, though above all, because its members (of both parties) would rather avoid responsibility for hard policy choices and because members of the president's party at any given time incline to think their policy preferences would be better served by an assertive executive who shares them.

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To bring our system back into balance, Congress must begin to reassert its position and reclaim its authority; not by using its power to threaten to paralyze the government, but by using its power to make the laws that command the government. Arguing that these will be ignored by imperial presidents won't cut it: Congress is being ignored largely because it wants to be. The first step toward a recovery of its authority has to be the will to recover it.

If that will were in evidence, Congress could act on it by changing some of the basic rules governing the interaction of the branches. The beginning of that sort of reassertion might involve at least four elements.

First, a reassertion of the power of the purse, not to be used as a weapon at midnight on the last day of the fiscal year, but to be used as a means of constitutional control of the government.⁵⁵ Congress should, for instance, break up the appropriations process from its 12 large pieces (which have lately been consolidated into one) into many smaller appropriations measures taken up year-round. This would give the legislature more real say over funding choices, rather than just a kind of reverse veto power. Congress should also prohibit any fee-funding of federal agencies, let alone the preposterous practice of having such agencies funded by the Federal Reserve. The consolidated structure and decision-making of the executive branch should not be countered by consolidating Congress' own work (which has often been the instinct of reformers in the past) but rather mitigated by breaking up the budget process into a form that plays better to Congress' innate strengths.

Second, and relatedly, Congress needs to change the defaults in the budget process to avoid showdowns and crises that are structurally biased toward empowering the executive. When appropriations run out, an automatic continuing resolution should take over. Such resolutions would fund the government at current levels for a few months and then require across-the-board cuts of about 1 percent every few months until new appropriating legislation is enacted. Sen. Rob Portman, R-Ohio, has proposed one attractive form of this idea.⁵⁶ This would take the pressure off budget deadlines, but in a way that made modest spending restraint the default. Congress should also set the debt limit to automatically increase with appropriating legislation (since an appropriation under deficit conditions is unavoidably an authorization for more borrowing) but could pursue various ways of setting debt targets in the budget process. Showdowns do not make the Congress relatively stronger, and emergencies inevitably benefit

the executive. Compelling the president to come to the table and ask for legislation would be better.

Third, Congress needs to rein in executive rulemaking and insert itself more forcefully into the regulatory process. This could involve a regulatory budget, with explicit overall net cost caps for new rules and individual agency caps (as Sen. Marco Rubio, R-Fla, has proposed).⁵⁷ It could involve something like the REINS Act, which requires the most expensive new rules to be approved by Congress.⁵⁸ It could involve a new relationship between Congress and the inspectors general of executive agencies. All of these would restrain the executive's ability effectively to make laws without legislation, which Congress has not only allowed but also encouraged for decades.

Congress is being ignored largely because it wants to be. The first step toward a recovery of its authority has to be the will to recover it.

And fourth, Congress should rein in discretion by better defining it in law. This would mean statutory definitions of executive discretion that narrow the deference now given to the agencies and to the president. It could perhaps mean creating explicit categories or levels of discretion for Congress to employ in legislation (and for the courts to then employ in statutory interpretation); clear definitions of prosecutorial discretion at the federal level; and a rethinking of the place of the "independent" (and frequently unaccountable) executive agencies in the constitutional system.

Each of these four elements would get at different ways that Congress has become weaker relative to the other branches. Obviously, most of this agenda could not be enacted under this president. But reforms like these should be advanced to make the reassertion of the Congress a priority, to identify the problem for the public and to box in the 2016 presidential candidates on this front. It would force them to commit not to use the super-constitutional powers that President Barack Obama has adapted for himself and to help rebalance our system if they are elected.

Reviving and modernizing the Congress will take more than this. The institution is now beset by a crippling nostalgia among more senior members for an old, centralized legislative process driven by leadership and oiled by earmarks that is simply not likely to (and should not) come back anytime

55. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. Constitution, Article I, section 9, clause 7.

56. S. 334, End Government Shutdowns Act, introduced Feb. 22, 2015. <https://www.congress.gov/bill/114th-congress/senate-bill/334>

57. For the text of Rubio's specific proposal, see http://www.rubio.senate.gov/public/index.cfm/files/serve/?File_id=394c6155-ccb5-4737-9317-873489b5d1c5

58. H.R. 427, Regulations from the Executive in Need of Scrutiny Act, introduced July 29, 2015. <https://www.congress.gov/bill/114th-congress/house-bill/427>

soon. Making the new Congress work, rather than wishing the old Congress could return, will require some different ways of thinking about where and how legislation begins, how the various congressional support agencies work, what the role of the committees needs to be and how outsiders should and should not inform the process. That will take a long time and a generational change in both parties that has only just begun.

But for now, focusing on rebalancing our constitutional system and recovering the prerogatives of the first branch should make for a reasonable agenda of congressional reform—to better enable Congress to take up any substantive policy agenda that most of its members prefer.

To restore Congress's proper role in the modern administrative state, it is not enough for members of Congress to effectively oversee regulatory lawmaking. Congress must regularly legislate to reauthorize and modernize the statutes that govern federal agencies, to respond to regulatory activity with which Congress disagrees, and to preserve the separation of powers between legislation and regulation. To place the administrative state into perspective, I first present the theoretical justifications for America's traditional form of government followed by the theoretical justifications for the administrative state, especially promoted by early public administration scholars.