

How to Strengthen Congress

By Kevin R. Kosar

AFTER LAST NOVEMBER'S ELECTIONS left Republicans with control of the Senate and an expanded advantage in the House, triumphant party leaders announced their intention to do the hard work of governing. "Your priorities will be our priorities," Speaker John Boehner promised the public. The leadership of both chambers even pledged to work with the White House, against whom they had been campaigning for several years. "I think we ought to start with the view that maybe there are some things we can agree on to make progress for the country," Senate majority leader Mitch McConnell said. He even sounded a note of hope, observing that divided government was "not unusual" in American politics.

With congressional approval ratings at historic nadirs and Republican majorities in both chambers, GOP leaders promised to put an end to Congress's partisan sniping and dysfunction. To prove it, leadership would keep Congress in session more days. Regular order would return, with its attendant debate, amendment process, and open floor votes. Congress, in short, would behave like the first branch in the world's first modern democratic republic.

In the weeks and months that followed, however, Republicans quickly came to see how little power they actually had to govern. First, President Obama rebuked House Republicans for failing to pass his immigration-reform legislation; then, he took executive actions to change immigration policy. More displays of executive might followed. The National Labor Relations Board issued regulations to make it easier for unions to organize in open shops. The Federal Communications Commission, at the president's behest, proposed "net neutrality" rules,

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despite the express opposition of Congress. Obama vetoed the Keystone XL pipeline, which his State Department had tied up for years. With congressional negotiations over cyber-security policy ongoing, the president issued an executive order directing the Department of Homeland Security to act.

While the president and other executive agencies took action, Republicans were left spluttering over Obama's power grabs. It is easy to criticize the president for overreach, but that would fail to account for the more fundamental problem: Congress has not been the dominant branch for decades. The executive surpassed it long ago.

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.

Congress has been complicit in its own diminution, but any path to reining in the executive must begin with the legislative branch. The most democratic of the three branches, only Congress has sufficient constitutional power to bring the executive branch to heel. To reverse the current state of executive-dominated governance, Congress needs to take steps to remedy decades of neglect and bad decisions that have enfeebled the first branch while empowering the executive.

ECLIPSING CONGRESS

The founding fathers did not intend for the executive branch to be as large and powerful as it has become. Ironically, the founders feared that Congress, not the executive, would be the greatest threat to republican democracy. "In republican government," Madison declared in the *Federalist Papers*, "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."

Article I of the Constitution establishes the national legislature and grants all lawmaking power to it. Only Congress, not the government generally, may "coin Money" and regulate its value, "lay and collect Taxes," and "establish an uniform Rule of Naturalization." Congress, and especially the House of Representatives, is to be the place where the will of the people, the ultimate fountain of power, is represented.

In contrast to Article I, Article II of the Constitution is brief—a little more than 1,000 words, half of which are devoted to outlining how a president is to be selected, compensated, and removed. The president 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 president’s own enumerated powers mostly relate to international affairs. Even though the president is commander in chief, Congress retains the power to “raise and support armies,” “provide and maintain a navy,” and “declare war.” The president’s most fundamental duty is to “take Care that the Laws be faithfully executed.” That is it.

After rebelling against the tyranny of monarchy, the founders took great pains to conceive a new and much weaker executive, even after the Articles of Confederation failed in part for lack of a true executive. Alexander Hamilton, who was more enamored of a powerful executive than most of his peers, underscored how circumscribed the executive would be in Federalist No. 69:

The President of the United States would be an officer elected by the people for *four* years; the king of Great Britain is a perpetual and *hereditary* prince. . . . The one would have a *qualified* negative upon the acts of the legislative body; the other has an *absolute* negative. The one would have a right to command the military and naval forces of the nation; the other, in addition to this right, possesses that of *declaring* war, and of *raising* and *regulating* fleets and armies by his own authority. The one would have a concurrent power with a branch of the legislature in the formation of treaties; the other is the *sole possessor* of the power of making treaties. The one would have a like concurrent authority in appointing to offices; the other is the sole author of all appointments.

How then did the executive branch come to have so much control? In short, all three branches of government contributed to the flow of power from Congress to the executive.

Some of this growth has come from the executive branch’s own actions, as the executive has sought to expand its sphere of authority. The means of expansion vary: Bureaucratic policy entrepreneurs expand federal agencies’ missions by construing them broadly; regulatory and

other administrative authorities are employed to expand the scope of agency activities; interest groups urge bureaucrats to bring new problems to Congress for funding; and federal-employee organizations push for more jobs and higher compensation.

Article II's very parsimony has, paradoxically, also facilitated the growth of executive power, especially since the turn of the 20th century. In his autobiography, Theodore Roosevelt described a "stewardship" vision of the executive, which effectively interpreted Article II's silence as a blank check for action:

I declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition.

Some presidents have also claimed "inherent" — not to be confused with implied or emergency — powers in Article II's text. For example, Harry Truman justified the seizure of the steel industry on the grounds that he was commander in chief (although the Supreme Court struck down his action soon after). Truman intimated that this inherent authority would also allow him to take control of newspapers and radio stations.

The Supreme Court allowed the executive to grow by eliminating some structural barriers to federal spending in a couple of cases in the early 20th century. In 1923, the Supreme Court ruled in *Massachusetts v. Mellon* that the federal government could set up a matching-grant program with states to help needy mothers and their babies. In *Helvering v. Davis* — decided in 1937, just after the Supreme Court's progressive turn — the Court declared Social Security constitutional. The Supreme Court held in *Helvering* that "Congress may spend money in aid of the

‘general welfare,’” and, in determining what constitutes the general welfare, “[t]he discretion belongs to Congress.” These decisions and others invited Congress to spend money on local areas of policy and anything that might be reasonably construed to promote the general welfare—generating the need for a massive executive bureaucracy to administer these social programs.

Today, the executive branch has 4.1 million civilian and active military employees and a budget of \$3.9 trillion per year. The most recent *United States Government Manual* lists nearly 120 executive agencies, which does not include the 60 other “independent” entities, like the Federal Communications Commission, the heads of which are appointed by the president. The federal government also funds and directs the work of millions of proxies, as John DiIulio pointed out in these pages (see, “Facing Up to Big Government” in the Spring 2012 issue). The U.S. Defense Department relies on 710,000 contractors, while the federal Head Start program is administered by 200,000 state, local, and private-sector employees. A recent Environmental Protection Agency’s inventory of active contracts runs 79 pages, listing vendors from Archer, Inc., to Zero Waste Solutions, Inc.

Congress, however, must shoulder most of the blame for the burgeoning executive branch. Congress’s willingness to tax and borrow relentlessly and its inability to limit its spending to purely national purposes have only aided the growth of the executive’s reach and influence. Additionally, the legislature has frequently given away its lawmaking authority to regulatory agencies. In some instances, this has been understandable because the subject matter was so complex. But too often, Congress punts to avoid political disputes. As Christopher DeMuth observed in the Summer 2012 issue of *National Affairs*, “Congress is often unable or unwilling to agree on anything beyond such velleities as ‘protect the public health,’” or, as in “Congress’s mandate to the Consumer Financial Protection Bureau created by Dodd-Frank: ‘[E]nsure that all consumers have access to markets for consumer financial products and services . . . [that are] fair, transparent, and competitive.’” DeMuth rightly observes, “In these cases, the agencies make the hard policy choices. They are the lawmakers.”

The data here tell the tale. Congress enacts perhaps 50 significant laws each year. Agencies issue 4,000 new rules per year, and 80 to 100 have economic effects of \$100 million or more. And these numbers 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 170,000 pages. All this indicates that the executive branch has displaced Congress as the primary locus of lawmaking in the country.

The aggrandizement of executive authority began a century ago, and its effects have compounded over time. The shift of power to the executive branch has eroded popular sovereignty and accountability, as lawmaking power has moved away from elected officials to anonymous, tenured-for-life bureaucrats. A diminished Congress has led predictably to an executive branch increasingly emboldened to do whatever it pleases.

The examples are legion. The National Security Agency vacuumed up more data than it was legally authorized to collect. The Internal Revenue Service subjected conservative groups to extra scrutiny. The Bureau of Alcohol, Tobacco, Firearms and Explosives allowed American guns to be sold to straw buyers for Mexican gangs. The Postal Inspection Service compromised citizen privacy and free-association rights by rubber-stamping law enforcement requests for correspondence data. The U.S. Justice Department’s Orwellian “equitable sharing” asset-seizure program has taken more than \$2 billion from individuals not charged with crimes. The Central Intelligence Agency snooped into the computers of Senate Intelligence Committee staff.

The growth of the executive leviathan and the long-term degradation of the first branch cannot be fully reversed. The combination of institutional inertia, an expansionist view of the presidency, and political self-interest means that the executive has likely been strengthened permanently. Certainly, the executive branch is not going to cede any powers voluntarily, and the Supreme Court gives no indication that it will revive the old fiscal curbs or significantly restrict regulatory lawmaking. Our best hope is a Madisonian solution: Congress must restore itself as a co-equal branch with sufficient strength to push back against executive expansion.

THE KNOWLEDGE PROBLEM

The founding fathers set up a kind of principal-agent relationship between Congress and the executive branch, with the president ideally executing the will of the legislature. The first branch could prevent the executive from becoming the “foetus of monarchy,” as Edmund

Randolph colorfully called it, through the power of the purse, impeachment of the president and civil officers, and the passage of laws over the president's veto. *Pace* the proponents of the “unitary executive” theory, Article I further provides Congress with some executive-like authorities, in that Congress may establish executive departments and “make Rules for the Government and Regulation of the land and naval Forces.”

In order for this relationship to work effectively, however, Congress has to know what the executive branch is doing. During the first century of our republic, when government posts were staffed largely by patronage, the knowledge gap between legislators and civil servants was modest. Congress could roughly apprehend the rudiments of the whole of the federal government: There were eight departments in 1900, with 230,000 employees, 135,000 of whom worked for the Post Office Department. Congressional policymaking and oversight concentrated on appropriations, private relief bills, and infrastructure and lands-related issues.

The information asymmetries between the branches today are severe compared to a century ago. Elected officials arrive at the Capitol as amateurs—that is the nature of republican government. Executive bureaucrats, in contrast, are professional and often effectively tenured for life. The Pendleton Act of 1883, meant to end federal patronage, regularized the federal hiring system and as a result expanded the knowledge gap between legislators and the executive agencies. Increased policy complexity and the breathtaking expansion of the federal government have attenuated and frayed the principal-agent relationship. At the start of the most recent Congress, 58% of House members and 54% of Senate members had no more than eight years of experience on the job. And congressmen spend just one-third of their time on policymaking and oversight, making it more difficult for these members to get up to speed. The rest of their time, according to a Congressional Management Foundation report, is devoted to meeting with constituents and interest groups, fundraising, and other activities.

A part-time, mostly amateur legislature cannot compete with a colossal, full-time executive branch. Congress has floundered in its duty to comprehend, to say nothing of manage, a 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 leviathan is too huge, complex, and relentless for that.

Congress can help decrease this knowledge gap by investing in its own capacity. It 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 learn what government is doing and why, let alone to determine what to do about it. Legislators should accept a mandate from congressional leadership to work five days a week for three weeks out of every five, regardless of accusations of having contracted “Potomac fever” or the threat of a primary challenge.

Spending more days in briefings and hearings likely will not do enough to shrink the knowledge gap. Legislators need more help to bridle the executive branch. Though federal spending today is ten times larger than it was in 1975, the House and Senate employ fewer staff members than they did then. Of the 16,000 congressional employees, half work outside Washington and devote themselves mostly to local and constituent issues. A significant percentage of the 8,000 Capitol Hill staffers have less than three years of experience, due to the low pay and grueling hours, and many members’ personal staffs—often to their despair—are devoted to constituent-service and communications duties, not policy work. Even those who *are* inclined to stick it out find that there are few policy positions to which they can ascend. The solution here is simple: Members should be granted the resources for more policy-focused staff positions.

Committees also need to be strengthened. Just a few decades ago, agency oversight hearings were a matter of course, and committees would publish hearing reports in which they assessed evidence and suggested reforms. Slow-to-respond agencies would be certain to face follow-up questioning from long-serving chairmen or ranking members. But ever since 1995, Republicans have placed a six-year term limit on chairmanships, absent a waiver. This has had the perverse effect of reducing the incentives for chairmen to approach their positions with a long view. Today, hearings often are spectacles for the press, and agency oversight no longer occurs with the same regularity it once did.

The frequent rotation of committee chairmen also contributes to talent loss. A new chairman usually dumps some and sometimes all of his predecessor’s staff, a practice that can gut a committee’s institutional

knowledge. Committees also lose many talented staffers to the private sector, which pays better and offers more pleasant working conditions. Committees could retain skilled talent by expanding their staffs, raising salaries, and making staff retention the norm.

The Senate should also give serious thought to reducing the number of committee assignments each member has. It is difficult for a senator to become an expert in any subject when he is assigned to seven different committees, each with vast jurisdiction. Fewer assignments would also shrink the unwieldy size of committees; the Senate Finance Committee, for example, has 26 members. With fewer policy dabblers on the dais, committees would function more professionally and effectively.

STRENGTHENING CONGRESSIONAL SUPPORT

Giving congressmen more resources would certainly help strengthen Congress as a whole, but Congress can do more than just expand its own staff and schedule. While federal spending and the executive branch have ballooned, Congress has downsized its research and analytical support staff by about one-third over the past 40 years. Congress currently spends \$4.5 billion, just 0.1% of annual federal spending, on the legislative branch, which includes itself, the Congressional Budget Office, Government Accountability Office, and Congressional Research Service. This has left Congress heavily dependent on lobbyists for legislative analysis, a less-than-ideal arrangement for obvious reasons.

The CBO's headcount has increased since it was established 40 years ago, but its 250 employees are inadequate to fulfill its mandate to create cost estimates for proposed legislation. The office does not have sufficient manpower to publish formal scores of every bill introduced in Congress. Instead, the agency largely limits itself to scoring legislation approved by committees, as well as to generating informal estimates, which are not released publicly, for some draft legislation and amendments. While imperfect, CBO estimates provide a starting point to assess the costs and benefits of new legislation. The office should be staffed to provide a price tag for every proposed bill so that congressmen and their constituents can see the cost of proposed ideas.

The GAO is Congress's watchdog. It has statutory investigative authority, which it employs to audit agencies' use of tax dollars and investigate allegations of waste, fraud, and abuse. The agency also provides policy analyses and legal opinions on executive-branch operations. GAO staff

members are often detailed to congressional committees for months to help with oversight. Every two years, the GAO publishes its “high-risk list,” which identifies the federal activities (such as Veterans Affairs health-care management) most at risk for fraud and failure. GAO studies regularly make news; for example, it was a GAO report that revealed the federal government had made \$125 billion in improper payments in 2014.

The office’s output is incredibly useful because it examines the work of executive agencies and forces them to defend their work publicly. One way the GAO holds agencies accountable is by generating metrics on their responses to criticism, noting that an agency has implemented, say, three of GAO’s ten recommendations. And the results are quite positive for taxpayers: By one estimate, the GAO saves taxpayers \$100 for every dollar of funding it receives. Yet the ranks of GAO staff have dwindled 40% since the 1970s, from about 5,000 to just 3,000.

The CRS modestly describes its role as “providing policy and legal analysis to committees and members of both the House and Senate, regardless of party affiliation.” In truth, CRS policy analysts, attorneys, and reference librarians help Congress with just about everything. They draft digests of every bill introduced, write analyses and legal opinions, and offer research assistance to harried congressional staff. CRS staff train new members and advise experienced lawmakers in legislative procedure. CRS experts help committees to prepare for oversight hearings and sometimes are called on to testify themselves.

While Congress’s demand for research assistance has skyrocketed, the staff of CRS has shrunk, dropping 22% between 1979 and 2011. Many CRS analysts answer hundreds of congressional requests each year. Congress would greatly help itself by funding more staff for CRS, particularly reference librarians, whose assistance would free up analysts to do more in-depth research for congressional committees. The CRS also needs more flexibility in personnel decisions; currently, the agency must follow antiquated and onerous Library of Congress and government-wide hiring, promotion, and retention rules. Neither CRS nor Congress benefits when it takes months to hire a new analyst or years to remove an underperforming one.

Congress should strengthen these institutions, but it still lacks an institution to deal directly with new executive regulations. The GAO conducts a basic review of significant rules that have economic effects of \$100 million or more, but such examinations tend to be limited to considerations

of whether an agency followed due process. Congress should establish a Congressional Regulation Office, modeled on the CBO, to help it deal with new regulations. This new CRO would employ experts who track regulations and field questions from members and committees. Critically, the CRO could provide analysis of the substance of rules and whether agencies are using proper metrics in conducting their cost-benefit analyses.

Finally, Congress could make better use of its most obvious allies in its ongoing battle with the executive: inspectors general. The inspectors general are part of the executive branch, but Congress should seek to make them more independent of the agencies that they monitor—and as a result make them a more potent oversight institution and a better ally of Congress.

By law, the job of an inspector general is to “promote economy, efficiency, and effectiveness” and “prevent and detect fraud” in his particular agency. There are more than 70 inspectors general working in large cabinet agencies, in small entities like the Equal Employment Opportunity Commission, and in temporary, “special” capacities (e.g., the Special Inspector General for the Troubled Asset Relief Program). Within the bureaucratic state, inspector-general offices are often treated as turncoats whose work should be impeded. Their investigations and audits regularly identify corruption and waste, embarrassing the agency but helping the taxpayer. A study of 19 inspectors general by John Hudak and Grace Wallack of the Brookings Institution found that all 19 provided a positive return on investment. For every \$1 spent on the Department of Health and Human Services inspector general, for example, over \$19 were returned in improper payments recovered or errant outlays avoided.

Congress can strengthen the role of inspectors general in two ways. First, it ought to make all inspectors general presidentially appointed and Senate approved. Currently, about half are appointed by the heads of the very agencies they must investigate, which creates potential conflicts of interest. Second, each inspector general should be authorized to submit his budget requests directly to Congress. Many presently must seek their funding from agency heads, which compromises their independence from the agency they are meant to monitor.

SHRINKING THE EXECUTIVE

More legislative-branch staff and external support will enable Congress to better comprehend the scope of executive power and expose its

misdeeds. But for Congress to regain its stature as a co-equal branch, it must also trim the executive to a more manageable size.

The problem is not that there are too many federal employees; the federal workforce is about the same size as it was in 1960. Rather, as Steven Teles has observed, the problem is the executive branch's incoherence and impenetrable complexity, or "kludgeocracy" (for more on this, see "Kludgeocracy in America" in the Fall 2013 issue of *National Affairs*). The GAO has issued many reports on overlap, duplication, and fragmentation among federal programs. There are 82 different programs focused on improving teacher quality operated by ten different agencies, to take just one example.

Pruning the executive will require Congress to launch a two-pronged attack that both slows the production of new initiatives and chops the existing number of programs. There are several steps Congress can take to slow the growth of government. Sequestration and budget caps, such as those enacted in the Budget Control Act of 2011, are crude tools, but these hard limits indisputably serve to slow the growth of the executive branch. If preserved in its current form, the BCA could shave \$2 trillion in discretionary spending over a decade. But the caps have been revised once already, and Congress faces intense political pressure to repeal the BCA's caps completely. Ensuring that there are no more than modest future adjustments to the BCA's spending limits would help restrain the growth of government. But in keeping the caps, Congress should ensure that cuts do not fall on its own support agencies or the inspectors general.

Further, the legislative branch would be well-served by requiring Congressional approval for the most significant agency regulations. This should be limited to a handful of major rules that have substantial, tangible costs to the public or the private sector. The idea of legislative review of regulations is not novel and is commonly practiced at the state level. Connecticut has a Legislative Regulation Review Committee that approves regulations before they take effect. The proposed REINS Act (Regulations from the Executive In Need of Scrutiny) would implement this requirement at the federal level and has passed the House three times in recent years. Congressional review of legislation could slow executive power grabs and would have the additional benefit of forcing regulatory policy onto the congressional calendar.

These two mechanisms would slow the growth of the executive, but Congress should also try to cut the number of existing federal programs.

Attempts to abolish any single federal program or activity tend to be stymied by the simple reality that every policy, program, and bureaucracy has advocates both inside and outside of Congress. One potential avenue to overcome this impediment would be to bundle proposed cuts into an omnibus, up-or-down legislative process, as has been used in the Base Realignment and Closure process or so-called “fast-track” trade-promotion authority. A commission could be appointed to identify cuts, which would be rolled into a single bill that could not be amended, and Congress would then vote the package either up or down, thereby cutting out the horse-trading that so often leaves federal programs intact.

A similar tool, which has been on the books for 40 years, is the budget reconciliation process. It has been used a couple dozen times since 1975, most famously at President Ronald Reagan’s behest in 1981. The process requires Congress to adopt a budget resolution pegged to aggregate spending levels and to include instructions for one or more committees to achieve particular spending reductions. Once committees report their cuts, the entire budget package receives a prompt vote.

Additionally, Congress should establish a commission to identify archaic and wasteful regulations and another to identify failed or needless executive-branch programs. Each 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. So long as the program and spending reductions and terminations are modest and defensible, congressmen would have a difficult time voting against such a package.

STRENGTHENING REPUBLICAN DEMOCRACY

For supporters of republican democracy, the efforts by the current Congress to govern and rein in the executive branch are heartening. It has spent more time in session and more time actually legislating than many recent Congresses, according to initial metrics from the Bipartisan Policy Center. Committees are reporting bills, and both chambers are showing signs of being more deliberative. In May, Congress adopted a budget resolution for the first time in several years. It invoked the Congressional Review Act in an attempt to strike down new regulations by the National Labor Relations Board (although President Obama vetoed the resolution), and Congress lined up disapproval resolutions to

quash the Federal Communications Commission's net-neutrality regulations and the EPA's jurisdiction-expanding "Waters of the U.S." rule.

These efforts have had limited impact, however. A can-do attitude plainly is not enough. Even though the executive and legislative branches are meant to check and balance each other, when one is vastly larger and more powerful, the other cannot play its constitutional role effectively. The result is a government that is off balance, less democratic, and more vulnerable to tyranny.

In order to begin to restore the constitutional republic that the founders envisioned, Congress must invest in itself as an institution and make some real progress in pruning the executive branch. Congress cannot wait for the Supreme Court to change its mind, and it cannot expect the executive to give up any of its power. Congress may be weakened, but it is not broken, and it can regain, through several discrete and prudent steps, at least some of its former strength.



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