

How Can Congress Reassert Control Over Federal Agencies?

May 18, 2017

Thank you, Dean. And thanks to all my friends at the Federalist Society for putting this event together. Notwithstanding the views of some of my colleagues in the Senate, who see the Federalist Society as a dangerous cabal, it's always a treat to speak to the Society and I appreciate your hard work and dedication to promoting the rule of law and individual liberty.

A little more than a year ago, I launched the Article 1 Project, or A1P, along with several other conservative lawmakers. Today, I want to update you on our progress.

The premise of the A1P is simple and goes hand-in-hand with today's conference: For the past 80 years, Congress has surrendered its constitutional duties to the executive branch. This has happened regardless of who occupies the White House and who controls Congress. It is one of the true bipartisan efforts in Washington.

The A1P is about understanding how we got to this point in history and how we go about fixing the problem.

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So, first, how did we get here?

Article I of our Constitution states in no uncertain terms that "All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The Framers anticipated that Congress would predominate over the other two branches of the federal government. That's why, in Federalist 48, Madison wrote: "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."

For the first hundred years or so of our republic, that is basically how it worked. Congress made the laws and the executive branch enforced them.

But in the beginning of the 20th Century, as the so-called progressive theory of government gained traction, the strict separation of government powers established in our Constitution began to be undermined.

By the time of his first inaugural address, President Franklin Roosevelt was able confidently – and happily – to announce that the Constitution should be changed. He announced that the Depression should be treated "as we would treat the emergency of war" and that "it may be that an unprecedented demand and need for undelayed action may call for [a] temporary departure from the normal balance of public procedure."

As it turns out, President Roosevelt's radical departure from the Constitution was anything but temporary. And the United States has been steadily departing from the normal balance of public procedure ever since.

The other two branches of government, the legislature and judiciary, did not take this upending of our constitutional order lying down. Subsequent Congresses were not as willing to give Roosevelt's new federal agencies a blank check to create new laws. And Roosevelt infamously had to threaten to pack the Supreme Court before the judicial branch came to an uneasy truce with this new regime.

It wasn't until Roosevelt died and President Truman came to power that the government adopted a more systematic and codified framework that set the ground rules for America's burgeoning administrative state. The cornerstone of this framework, as you know, is the Administrative Procedure Act.

In the years following the enactment of the APA, Congress granted agencies broad lawmaking authority. At the same time, in an effort to retain as much of its legislative authority as possible, Congress began inserting more and more “legislative veto” provisions into these otherwise broad grants of power.

This framework was not completely static over the next 40 years, but in the 1980s two Supreme Court cases fundamentally changed the balance of power between the branches.

In 1983, in *INS v. Chadha*, the Court held that legislative veto provisions were unconstitutional because they amounted to a second legislative act, thus violating the requirements of bicameralism and presentment.

A year later, in *Chevron U.S.A. v. NRDC*, the Supreme Court held that courts must defer to an agency’s interpretation of ambiguous statutory text, if they are charged with administering the law.

Whatever one thinks about the legal merits of these decisions, taken together these two cases caused a substantial transfer of power from the legislative and judicial branches to the executive branch.

Stripped of the power to veto regulations issued by executive agencies, Congress lost one of its most powerful tools to control federal bureaucrats. And in many cases, the courts could no longer question whether agency action exceeded the authority granted to it by the legislative branch.

I want to be clear: Congress, not the courts, bears primary responsibility for abdicating lawmaking responsibility. After *Chadha* and *Chevron*, we could have found new ways to exercise control over agencies. But over the years, we’ve chosen to outsource our constitutional prerogatives, because doing so is politically expedient.

The results have been staggering: The vast majority of federal “laws” are not passed by the House and Senate and signed by the president. They instead take the form of regulations or orders written by people who do not stand for election and using processes contrary to those contemplated in the Constitution. The Framers were in many ways ahead of their time, but they did not envision that the great issues of the day would be debated during notice and comment periods.

This upending of our constitutional order produces bad policy and contributes to the public’s deep distrust of our governing institutions.

And for conservatives, it represents something of a crisis. First, conservatives believe in constitutionally limited government and the rule of law in their own right – as bulwarks of freedom and justice in our society. The Federalist Society itself is based on these principles.

Second, the transfer of lawmaking power from Congress to the Executive Branch tilts the policy playing field, rigging the lawmaking process to benefit the wealthy and well-connected at everyone else’s expense. When elected representatives in Congress tie their own hands and empower unelected bureaucrats to make the law, it thwarts the kinds of policies that conservatives tend to advocate – policies that limit the size and scope of government and protect Americans from government overreach.

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This is where the Article 1 Project comes in. Our goal is to develop, advance, and ultimately enact an agenda of structural reforms to strengthen Congress by reclaiming the legislative powers that have been ceded to the Executive Branch.

At the core of our mission is restoring congressional authority over regulations and regulators. So I am beyond pleased to see that the first panel this morning will discuss the basic – but vital – question: “What is Congress doing to reassert its power over agencies?”

With respect to the esteemed lawyers on the panel, I’d like to take a shot at answering that question, by highlighting three pieces of legislation that will begin the process of reinvigorating the separation of powers at the heart of our constitutional system.

First, the REINS Act – REINS stands for “Regulations from the Executive in Need of Scrutiny” – would help restore the balance between the executive and legislative branches by requiring congressional approval for any new regulation that would impose \$100 million or more in compliance costs on the American people.

Under this law, the specialized and technical know-how of executive-branch agencies would still contribute to the regulatory process, but ultimately Congress would be responsible for every major regulation that went into effect. This would make it easier for American voters to know who to blame for bad policies. As things currently stand, lawmakers can have it both ways. For example, when the EPA promulgates an expensive environmental regulation, we can tell our constituents that of course we support clean air and clean water, but we had no idea the EPA would regulate in such a costly manner. I am pretty sure the Framers would not approve of reducing the legislative process to a game of Three Card Monte. The REINS Act will fix this.

Next, the Separation of Powers Restoration Act will functionally overturn the Chevron doctrine by reinstating federal judges’ power – and, indeed, obligation – to interpret federal statutes. Specifically, the bill amends the APA and requires judges who are hearing challenges to agency actions to review all relevant questions of law “de novo.” In other words, the bill would end the dysfunctional status quo that tilts the legal playing field in favor of federal bureaucracies. If passed, this legislation would place federal law into the hands of legislators empowered to write it and judges empowered to interpret it, just as the Constitution contemplates.

Finally, the Agency Accountability Act makes federal agencies accountable again by directing most fines, fees, and unappropriated proceeds to the Treasury, instead of letting federal agencies keep and spend money as they see fit.

The Constitution gives Congress – and only Congress – the power and responsibility to direct spending of federal dollars. The power of the purse is one of Congress’ most potent tools for controlling federal bureaucrats, which is why so many agencies have sought to secure their own revenue streams, operating free from the scrutiny and accountability of congressional oversight.

Passing the Agency Accountability Act would go a long way toward putting Congress – and by extension, the American people – back in charge of how federal bureaucracies spend money.

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Many Americans now feel that they are not in control of their own government. It’s because they aren’t. The administrative state is designed to be insulated from politics – that is, it’s designed to be insulated from the will of the people. This vast, unaccountable morass of programs, agencies, and commissions are all easily captured by the powerful and well-connected, and all dedicated to the regulation of the minutiae of everyday life.

But we can push back. If we are able to pass even one of the legislative reforms I’ve outlined – the REINS Act, the Separation of Powers Restoration Act, or the Agency Accountability Act – then we will have made real progress toward returning power to the people.

And if we can do more – if we can pass all three bills – it would constitute a fundamental shift of power in this country. A transfer of power not merely from one party to another, but from Washington back to the American people.

I’m encouraged by the progress we’ve made over the past year. And I’m encouraged that the Federalist Society and other organizations continue to hold events devoted to the proposition that our governing institutions should function the way the Framers intended. What we do in Congress matters. But what you do matters more. Restoring our constitutional republic will require structural shifts in our government and fundamental changes in our political culture. That’s why events like today’s conference are so important.

Thank you.