



POLICY BRIEF

Leashing Leviathan: The Case for a Congressional Regulatory Budget

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Executive Summary

The federal regulatory state is out of control.

It is out of control economically, costing Americans between \$1 trillion and \$2 trillion per year in artificially inflated prices. And it is out of control politically, as federal bureaucrats now write upwards of 95 percent of all new federal “laws” without winning a single vote in Congress or at the ballot box.

The Founders wrote our Constitution specifically to protect the American people from this kind of government without consent. They gave exclusive legislative power to the most accountable branch of the federal government – Congress. Having elected legislators solely responsible for federal law makes it easy for the American

people to know who to blame when policy decisions go bad.

This stringent accountability is inconvenient for elected officials. That’s why members of Congress have spent decades delegating their legislative powers to the Executive Branch – to duck political responsibility for actual policymaking. But Congress’s self-inflicted and self-serving enfeeblement – while helpful for some congressional re-election campaigns – undermines the democratic legitimacy and moral credibility of our entire system of government. When Congress hands its legislative powers to unelected bureaucrats, we cut the public out of the process – a gross perversion of our consent-based government that the American people are increasingly unwilling to tolerate.

The Article I Project was launched this year to develop a legislative agenda to restore Congress's constitutional power and democratic accountability. Central among A1P's goals is to restore direct, accountable congressional control over the federal regulatory system.

Today we introduce new legislation to do just that: the "Article I Regulatory Budget Act."

Our bill would, for the first time, require Congress to vote on the total regulatory burden each federal agency may impose on the American people each year – a budget for federal regulatory costs to mirror Congress's annual budget for taxes and spending.

Under the discipline of a regulatory budget, Congress would be directly responsible for the size and scope of the regulatory state. Executive agencies could still issue and enforce their rules, but only so long as their impact fits within the regulatory-cost limits established by Congress. This would give regulatory agencies – really for the first time – an incentive to make their regulations cost-effective. Regulators would be made to work for the American people instead of the other way around. And the American people, for their part, would be empowered to make informed judgments at the ballot box about economic regulations.

This is what the Founders had in mind when they wrote Article I of the Constitution in the first place: a lawmaking system accountable to – and

therefore legitimate in the eyes of – the people.

Though we are all conservatives who believe in a limited federal role in regulating American life, the regulatory-budget process we propose would not tip the scales in favor of "bigger" or "smaller" government. It would simply help ensure that the American people have a government of the size, shape, character, and cost that they want. At its core, the purpose of the Article I Regulatory Budget Act is to put the Legislative Branch back in charge of federal policy and, by extension, to put the American people back in charge of Washington.

The Political and Economic Costs of the Regulatory State

The fundamental problem with the federal government today is not simply that it is too big, or too expensive, or too incompetent, but that it is out of touch with the interests and values of the American people. The primary reason for this disconnect is that the vast majority of the federal government's do's and don'ts governing our lives are no longer written by the people's elected representatives in Congress, but by unelected, anonymous bureaucrats in the Executive Branch.

Consider, in 2014, that the people's elected representatives in Congress passed 3,291 pages of new laws that were signed by the president. Meanwhile, federal bureaucrats issued

79,066 pages of new regulations – about 24 times as much – all without a single vote being cast. Similarly, in the first three years of implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, executive agencies published 42 words of regulation for every word of law passed by Congress – an astonishing figure that nonetheless represents only a little more than one-third of all bureaucratic red tape expected to be spawned by Dodd-Frank.

This wholesale delegation of lawmaking authority to Executive Branch bureaucrats – who never have to stand for election and, in most cases, whose names the American people will never know – has spawned a shadowy “Fourth Branch” of the federal government that violates the social compact at the heart of our Republic.

In America, we believe that all men and women are equal under the law and therefore that government is a voluntary agreement among free and independent citizens authorized by popular consent. Thus the golden rule of republican government requires that the nation’s laws be made by representatives who are elected by the people.

The modern regulatory state flips this constitutional logic on its head, severing the line of electoral accountability and consent that connects the people to their government. Unlike legislators in Congress, whose jobs depend on the voting public’s support, the millions of rule-writing officials who work in the federal government’s

Executive Branch can almost never be fired – even in cases of poor performance or misconduct.

The Washington bureaucracy offers a case study of what happens when government officials are insulated from public control: accountability evaporates, the public good is subordinated to special interests, and wealth is redistributed up the economic scale, from the poor and middle class to the wealthy and well connected.

Federal regulations are estimated to cost the American people between \$1 trillion and \$2 trillion in compliance costs per year. For instance, a recent analysis found that 36 Executive Branch regulations issued since 2009 have inflated the prices of household appliances – items such as dishwashers, microwave ovens, and air conditioners – by \$1,639. The regulatory price inflation was even more dramatic for another staple product for most Americans: cars and trucks. The same 36 regulations issued during President Obama’s administration included several fuel-efficiency and safety requirements that pushed up the price of vehicles by a whopping \$9,100.

These compliance costs are often described as the “hidden tax” of our regulatory state. But unlike our income tax system, the financial burdens of federal regulations fall disproportionately on the poor and middle class. Regulations not only inflate the cost of goods and services, squeezing the household budgets of the

economically insecure, but they also drive up the cost of doing business, so that only the biggest firms and their armies of lawyers, accountants, and compliance officers can thrive.

Congressional Abdication, Not Executive Overreach, Created the Regulatory State

Given the dysfunction in the Regulatory State, it is not uncommon to hear members of Congress rail against the Executive Branch, accusing regulatory bureaucrats of usurping the legislature's constitutional authority to make the laws. But while some regulatory bodies do exceed their lawful authority (the Environmental Protection Agency's air quality rule, which the Supreme Court struck down in July 2015, is a case in point), most of these allegations of executive overreach miss the mark.

The truth is that much of the lawmaking power now exercised by the Executive Branch was not stolen by bureaucratic agents – it was intentionally given away by members of Congress, for their own convenience. To understand why Congress would do this, one must recognize that lawmaking is not just a power – it's also a responsibility.

Legislating is hard, often thankless, work. It involves conducting extensive research, weighing projected costs against the potential benefits, building coalitions, negotiating with dissenters, soliciting public support, navigating the

complicated legislative process, and ultimately finding consensus among 535 members of Congress who represent some 318 million Americans living in thousands of communities spread across 50 sovereign states.

Legislating is also *risky*: if, after all that work, your constituents dislike the legislation you wrote or supported, they may vote you out of office the next chance they get!

To the Founders – and to us – this is exactly what republican self-government requires. But over the course of the twentieth century, and accelerating in the twenty-first, members of Congress sought to escape the hard work and harder accountability inherent in constitutional lawmaking by empowering bureaucrats to legislate for them. Presidents of both parties have been only too happy to accept this new, extra-constitutional lawmaking power.

So today, the largest and most consequential bills passed by Congress are not laws in any meaningful sense. Instead of enumerating specific rules of action and clear-cut standards of legality for public consumption, Congress writes major laws for bureaucratic interpretation, establishing aspirational guidelines while delegating to Executive Branch agencies the power to decide on the specifics.

For instance, the Occupational Safety and Health Act of 1970 created an administrative agency, the Occupational Safety and Health Administration

(OSHA), and delegated to it the power to establish “occupational safety and health standards” that are “reasonably necessary or appropriate to provide safe or healthful employment.” Likewise, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 created a new independent agency, the Consumer Financial Protection Bureau (CFPB), and granted it the power to regulate “unfair, deceptive, or abusive” lending practices.

On the surface, Congress’s mandates for OSHA and the CFPB sound perfectly sensible – after all, who wouldn’t want to provide workers with safe working environments or protect consumers from predatory lending practice? But, as ever, the devil is in the details: the quality of the laws depends on how the terms of the agencies’ mandates are defined. And in both laws, Congress assigns this responsibility to the regulators, whose conception of their agencies’ powers often evolve – and expand – over time.

In 2012, for instance, when testifying before Congress, the director of the CFPB explained that his agency’s mandate was “a puzzle” and that CFPB bureaucrats would define “unfair, deceptive, [and] abusive” on a case-by-case basis. This not-uncommon mindset of federal bureaucrats explains why laws passed decades ago are still spawning new regulations today. For example, in the years since Congress first passed the Clean Air Act in 1977, federal bureaucrats have used the law to enact more than 13,500 pages of regulations – roughly 30 pages for every page of

legislative text. The way regulations work today, the devil is in the details, and Congress isn’t.

Writing laws that are couched in vague terms, centered around gauzy goals instead of strictly defined rules, allows members of Congress to take credit for “doing something” – protecting worker safety, disciplining the financial industry – while avoiding responsibility for any negative consequences. For decades, successive generations of lawmakers have embraced this approach to lawmaking, whatever the consequences to our constitutional order, because it makes *their* lives easier. The American people are being deliberately cut out of the process, and they know it. The public doesn’t trust the federal government, and has good reason not to. Herein lies the root cause of public dissatisfaction with the federal government.

When unelected bureaucrats routinely use decades-old laws to write new regulations, extracting trillions of dollars from American businesses and families every year and subjecting the country to government without consent, our public institutions – and Congress in particular – lose their moral credibility. And without the people’s trust, the stability of the entire political system is threatened.

The Article I Regulatory Budget Act

Rebuilding the American people's trust in their public institutions – by making those institutions more trustworthy and attentive to the interests and values of the people – is the chief objective of the Article I Project's agenda to re-empower Congress. That's why today we're introducing the Article I Regulatory Budget Act: to put the Legislative Branch back in charge of federal policy and, by extension, to put the American people back in charge of Washington.

The premise behind this bill is simple. Just as Congress binds the federal government to a *spending* budget every year, it has the power – and we believe the obligation – to maintain an annual *regulatory* budget, so that the American people know the cost of the rules and regulations with which they must comply.

Here's how our regulatory budget would work.

Every year, Congress would be required to establish a compliance-cost budget for each bureaucratic agency, limiting the annual regulatory costs that the agency is permitted to impose on the economy. So, for example, if Congress approved \$200 billion in regulatory-cost authority for the Department of Energy (DOE), and if the cumulative compliance costs of all existing DOE regulations totaled \$190 billion at the time that Congress approved their regulatory budget (for perspective, regulations

issued by DOE since just 2006 cost more than \$174 billion), the Department would have \$10 billion of regulatory-cost authority remaining for any new regulations to be issued in that fiscal year.

If an agency were to surpass its annual compliance-cost budget, the Article I Regulatory Budget Act would require a provision to be inserted into that agency's appropriations bill prohibiting it from spending any money to implement the budget-busting rule.

The effect of our regulatory budget would be twofold. First, the regulatory-cost caps established by Congress would provide federal bureaucrats a much-needed incentive to reduce the unnecessary economic friction in their rules, by modernizing (and, in some cases, eliminating) old rules and by making all new rules as cost-effective as possible. Second, the regulatory budget would take a significant step toward making Congress once again responsible for the nation's laws.

On its own, this regulatory budget would not revoke all lawmaking powers that the Legislative Branch has delegated to the Executive Branch over the decades. Nor would it tilt the policymaking playing field for or against any particular regulatory goals. All it would do is compel the people's elected lawmakers in Congress to confront the out-of-control regulatory state that they have enabled by making them politically responsible for its costs.

The American Founders knew that, for all the innovative checks and balances embedded in our Constitution, the best way to maintain the American people's control over – and therefore their trust in – the political system is to entrust the most important power of government, the power to make laws, exclusively to officials who are elected by the people.

They – like us – understood that the fabric of America is woven together by consent of the people, as citizens not subjects. So, by putting Congress back in charge of the federal regulatory state – by bringing the bureaucracy out of the shadows and back under the public's control – we can begin the hard work of winning back the people's trust and rebuilding this still exceptional nation.