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CONGRESSIONAL INCENTIVES AND THE ADMINISTRATIVE STATE

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INTRODUCTION

When Judge Douglas H. Ginsburg delivered the Hayek lecture in 2016, his talk was based on an essay that he and Judge Steven J. Menashi co-authored called "Our Illiberal Administrative Law." That essay argued that even though the Administrative Procedure Act ("APA") was intended to promote accountability for agency action and to provide "a check upon administrators," as the Supreme Court once put it,[3] the body of administrative law that had developed around the APA often failed to provide that accountability. Deference to agencies was such that courts were often "relegat[ed] to the correction of procedural errors and of only the most blatant overreaching of an agency's statutory mandate."[4] The essay noted the lack of enforcement of the nondelegation doctrine, the extension of *Chevron* deference from policy-laden judgments to traditional legal questions, and the evasion of the requirements of notice-and-comment rulemaking through adjudications, interpretive rules, and guidance documents.

Since that essay was published in 2016, the Supreme Court has entertained significant changes to our administrative law. The Court has limited the circumstances under which courts must defer to an agency's interpretation of its own regulations.[5] It has reduced its reliance on *Chevron* deference,[6] and it is considering this term whether to retain the *Chevron* precedent at all.[7] The Court has expanded the "major questions doctrine," which some see as enforcing a nondelegation principle.[8] It has given renewed attention

[3] United States v. Morton Salt Co., 338 U.S. 632, 644 (1950).

[4] Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J. L. & LIBERTY 475, 479–80 (2016).

[5] Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

[6] Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 445 (2021) ("[A]t the Supreme Court level, *Chevron* today applies to an ever-shrinking range of cases, has little impact on the outcome of cases to which it still applies, and is of little use as a predictive tool for future disputes.").

[7] Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023); Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2023).

[8] *See* Brian Chen & Samuel Estreicher, *The New Nondelegation Regime*, 102 TEX. L. REV. 539 (2024). *But see* Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (describing the major questions doctrine as a linguistic canon).

to the requirements of the Appointments Clause and the President's right of removal.[9] It may have tightened the requirements for surviving arbitrary-and-capricious review.[10] And it is considering other issues this term, such as the accountability promoted by the Appropriations Clause and whether the Seventh Amendment precludes some agency adjudications.[11] So many of the administrative law doctrines that Judges Ginsburg and Menashi discussed in 2016 are being reconsidered.

Given these shifts in the administrative law landscape, it is difficult to sound a pessimistic note. But perhaps it is not so difficult if one addresses the flip side of the debate over administrative policymaking, which is the role of Congress.

Underlying the critique of deferential administrative law doctrines is the belief that administrative policymaking has displaced legislation—that the agencies are making policy decisions that should be made by elected representatives in Congress. And a prominent thought has been that if the courts were less indulgent of agency policymaking, it would force Congress to legislate more frequently, more specifically, and on a wider range of subjects—rather than delegate policymaking discretion to administrative agencies.

We are skeptical that is correct because Congress is not only responding to judicial doctrines. Rather, Congress has structural reasons and incentives for relying on agency policymaking and for engaging in activities such as oversight at the expense of its legislative role. Some proposals aim at bolstering Congress's legislative capacity, but there are reasons for thinking that enhancing the legislative function of Congress would not address the problems that critics of administrative policymaking identify with the administrative state. Congress can become bureaucratized too. And in many ways, congressional lawmaking looks a lot like administrative policymaking: dominated by an expert, unelected staff, marked by interest group bargaining with little public

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[9] Lucia v. SEC, 138 S. Ct. 2044 (2018); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); SEC v. Jarkesy, 143 S. Ct. 2688 (2023). *But see* Collins v. Yellen, 141 S. Ct. 1761, 1788-89 (2021) (explaining that a remedy is available only when a removal restriction can be shown to have inflicted compensable harm).

[10] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

[11] *Seila Law*, 140 S. Ct. 2183; *Jarkesy*, 143 S. Ct. 2688.

participation, and involving a correspondingly limited role for the broader public interest that Congress is supposed to represent.

We wanted to offer some thoughts about how we might think about the administrative state even if we do not expect Congress to resume the robust legislative function that its critics claim has been displaced by agency policymaking. In other words, if at least in the short term, Congress is not going to change dramatically, then the administrative state will be with us for better or for worse, and we might consider how to make it better rather than worse.

This Article proceeds in two basic parts. Part I surveys the story of congressional decline and some common proposals for congressional reform, and it provides some reasons for thinking that congressional structure and incentives make it unlikely that we will see a transformation in the short term. Part II addresses the values we may have lost in the decline of congressional lawmaking and the shift toward administrative policymaking. And it suggests that it would be worthwhile to consider how to incorporate those values into the administrative policymaking process that we have. To begin that consideration, we have two main proposals: focusing on congressional oversight, to which Congress is more inclined than legislation, and reforming the administrative process through executive order—that is, in ways that do not depend on congressional or judicial change.

I. CONGRESSIONAL DECLINE

We start with the basic story of congressional decline. In 1946, Senator Robert La Follette wrote that "[u]nder our form of government Congress is supposed to be the center of political gravity in so far as it reflects and expresses the popular will in the making of national policy."[12] But, he said, "[i]n recent decades the center of gravity has been shifting to the executive branch and our national legislature has steadily declined in public esteem."[13] He, as the main sponsor of the 1946 Legislative Reorganization Act ("LRA"), was concerned that Congress risked "los[ing] its constitutional place in the Federal scheme" given the continued delegation of authority to

[12] Robert La Follette, Jr., *Congress Wins a Victory Over Congress*, N.Y. TIMES (Aug. 4, 1946), at 11.

[13] *Id.*

the federal bureaucracy.[14] "With the expansion of Federal functions during the twentieth century," LaFollette warned, "Congress has perforce created many commissions and agencies to perform them and has delegated its rule-making power to them."[15]

A. Current Trends

That trend has accelerated. In addition to failing to legislate on major issues, Congress has only four times in the last five decades passed all spending bills on time, and in recent years, it has failed to pass *any* on time.[16] According to the Congressional Research Service, Congress has steadily reduced its policy staff and its committee staff, and thus the capacity to legislate on complex matters, in favor of communications and constituent services, and it has concentrated power in the hands of House and Senate leadership.[17]

Quantitative measures of partisanship demonstrate that congressional polarization is at its highest in at least five decades,[18] complicating the task of building the consensus necessary for most legislation. An academic analysis of the House of Representatives between 1949 and 2012 found that "despite short-term fluctuations, partisanship or non-cooperation in the U.S. Congress has been increasing exponentially for over 60 years with no sign of abating or reversing."[19]

Voting on individual bills with discrete issues has largely been replaced by must-pass end-of-year legislation, such as the annual National Defense Authorization Act and Consolidated Appropriations Act, which are often filled with hundreds of bills packaged into one.

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[14] *Id*.

[15] *Id*. at 45.

[16] Drew DeSilver, *Congress Has Long Struggled to Pass Spending Bills on Time,* PEW RESEARCH CENTER (Sept. 13, 2023), [https://perma.cc/DW8Y-PRDZ].

[17] R. Eric Petersen & Tyler L. Wolanin, *Senate Staff Levels, 1977-2022,* CONGRESSIONAL RESEARCH SERVICE, R43946 (Aug. 2, 2023), [https://perma.cc/S443-HXMW]; R. Eric Petersen, *House of Representatives Staff Levels, 1977-2023,* CONGRESSIONAL RESEARCH SERVICE, R43947 (Nov. 28, 2023), [https://perma.cc/SW7R-AAD2]; Kevin Kosar & Adam Chan, *A Case for Stronger Congressional Committees*, R STREET INSTITUTE (Aug. 17, 2016), at 2-5, [https://perma.cc/S7U3-YWQY].

[18] Drew DeSilver, *The Polarization in Today's Congress Has Roots That Go Back Decades,* PEW RESEARCH CENTER (Mar. 10, 2022), [https://perma.cc/AFG6-XYZM].

[19] Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, 10 PLOS ONE 4 (Apr. 21, 2015).

As we know, even when Congress does legislate, it often does so by delegating authority to administrative agencies that then make many of the significant policy choices.[20] So agencies have filled the legislative vacuum—writing rules, adjudicating, and shaping policy based on broad delegations of authority. Keith Whittington has contrasted "much of the nineteenth century," during which "Congress largely held its status as the preeminent branch," with "the start of the twentieth century," when "the locus of governance shifted away from legislatures and courts and into administrative agencies and regulatory commissions."[21] The result is that many major policy questions are often addressed by executive agencies rather than by Congress.

B. Proposals for Reform

Scholars and critics have offered various proposals for addressing the problem of congressional decline. Many argue that changes in administrative law doctrine will shift Congress's behavior.[22] If the Court enforces the nondelegation doctrine, for example, Congress will delegate less and legislate more. If the Court limits deference doctrines, Congress will legislate more specifically. If the major questions doctrine is more often applied, Congress will pass more "clear authorizations." And so on.

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[20] *See* Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 273 (2010).

[21] Keith E. Whittington, *The Place of Congress in the Constitutional Order*, 40 HARV. J.L. & PUB. POL'Y 573, 598 (2017).

[22] *See, e.g.*, Jennifer L. Mascott & Eli Nachmany, *The Supreme Court Reminds the Executive Branch: Congress Makes the Laws*, WASH. POST (July 1, 2022), [https://perma.cc/WL6F-84VR] ("Congress must serve as the institutional actor reaching consequential policy choices by majority vote. . . . Under *West Virginia v. EPA*, . . . [l]awmakers will now face greater pressure to reach policy consensus more routinely and update old regulatory schemes to address new technological and industrial innovations. Re-situating Congress as the locus of policy control better reflects democratic will and restores a more constitutional order."); Philip Wallach, *Will West Virginia v. EPA Cripple Regulators? Not if Congress Steps Up*, BROOKINGS (July 1, 2022), [https://perma.cc/46EZ-NG3B]. *See also* Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., concurring) (justifying judicial enforcement of the nondelegation principle in part because "[t]he framers knew . . . that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress," given that "often enough, legislators will face rational incentives to pass problems to the executive branch").

Others have proposed changes to Congress itself.[23] Some focus on congressional capacity—calling for greater staffing levels and staff salaries, particularly at the committee level.[24] One proposal calls for doubling expert committee staff and tripling funding overall.[25] The idea is that when Congress is able to retain a greater number of senior, expert staff, it will have expertise rivaling administrative agencies and therefore will be better able to legislate on complicated subjects.

Some scholars also seek to strengthen congressional committees as power centers after decades of concentrated procedural power, staffing capacity, and control over party campaign spending in the congressional leadership.[26] Others have focused on restoring regular order—the consideration and passage of individual spending bills as opposed to large omnibus packages—as a way to facilitate congressional deliberation on individual issues and to promote accountability.[27] To illustrate the problem, last year's year-end omnibus bill, the Consolidated Appropriations Act of 2023, in addition to funding the entire government in one piece of legislation, also contained over 900 pages of measures unrelated to consolidated appropriations, including $45 billion in additional funding for Ukraine, $38 billion in funding for disaster relief, reform

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[23] *See, e.g.*, Mike Gallagher, *How to Salvage Congress*, THE ATLANTIC (Nov. 13, 2018), [https://perma.cc/8ZBF-J9KR].

[24] *See, e.g.*, Kevin R. Kosar, *How to Strengthen Congress*, NAT'L AFFS. (Fall 2015), [https://perma.cc/XY6C-UXRY]; Molly E. Reynolds, *Improving Congressional Capacity to Address Problems and Oversee the Executive Branch*, BROOKINGS (Dec. 4, 2019), [https://perma.cc/UX3U-7CD2]; Lee Drutman, *Political Dynamism: A New Approach to Making Government Work Again*, NEW AM. (2016), at 32–33, [https://perma.cc/3SF7-5CPT].

[25] Lee Drutman & Steven M. Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, THE ATLANTIC (Mar. 10, 2015), [https://perma.cc/PPE4-FWNC]; Molly E. Reynolds, *Improving Congressional Capacity to Address Problems and Oversee the Executive Branch*, BROOKINGS (Dec. 4, 2019), [https://perma.cc/UX3U-7CD2]; Molly E. Reynolds, *The Decline in Congressional Capacity*, *in* CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM 34-50 (Timothy M. LaPira et al. eds., 2020); *see also* Jesse M. Crosson et al., *How Experienced Legislative Staff Contribute to Effective Lawmaking*, *in* CONGRESS OVERWHELMED, *supra*, at 209-24.

[26] Kosar & Chan, *supra* note 17; Kosar, *How to Strengthen Congress*, *supra* note 24; Jeffery A. Jenkins & Charles Stewart, *The Deinstitutionalization of the House of Representatives: Reflections on Nelson Polsby's 'The Institutionalization of the U.S. House of Representatives' at Fifty*, 32 STUDIES IN AMER. POL. DEV. 166 (2018); Casey Burgat & Charles Hunt, *How Committee Staffers Clear the Runway for Legislative Action in Congress*, *in* CONGRESS OVERWHELMED, *supra* note 25, at 112-27.

[27] *See, e.g.*, Peter C. Hanson, *Restoring Regular Order in Congressional Appropriations*, BROOKINGS (Nov. 19, 2015), [https://perma.cc/4H6Z-EB8E].

of the Electoral Count Act and presidential transitions, a ban on TikTok on government devices, the Pump for Nursing Mothers Act, post office designations, a provision modernizing merger filing fees, a mandated six-year delay on new rules to protect the North Atlantic right whale, and much more.[28]

C. Why Congress Might Not Change

These proposals respond to real problems, but we are not certain such proposals are likely to generate a fundamental change in Congress's orientation toward legislation and the administrative state. For one thing, most observers tend not to appreciate the extent to which Congress has consciously organized itself around the mission of overseeing administrative policymaking rather than legislation. For another, the incentives that lead Congress to delegate policymaking and to focus on oversight are enduring and would seem to resist changes in judicial doctrine or shifts in congressional capacity.

1. Structure

First, a note on organization. Today, we tend to think of the Administrative Procedure Act as the primary check on administration. But Congress adopted the APA in 1946 alongside the Legislative Reorganization Act. One scholar has described these acts, which were adopted at the same time as the Federal Tort Claims Act and the Employment Act, as "a broad[] congressional effort . . . to reposition itself in order to exercise greater direction and control over the burgeoning post-New Deal federal administrative state." [29] Congress thought the APA and the LRA would work together.[30] The

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[28] H.R. 2617, 117th Cong. Divisions M, N, P, R, EE, JJ, KK (2022).

[29] David H. Rosenbloom, *1946: Framing a Lasting Congressional Response to the Administrative State*, 50 ADMIN. L. REV. 173, 173-74 (1998). The Employment Act directed the federal government to produce an annual economic report and to promote employment, production, and purchasing power. *See* Pub. L. No. 79-304.

[30] Joseph Postell, *The Decision of 1946: The Legislative Reorganization Act and the Administrative Procedure Act*, 28 GEO. MASON L. REV. 609, 609 (2021) ("Given the centrality of the APA to the functioning of the modern administrative state, and the importance of the LRA to how the modern Congress functions, it is surprising that these two laws are rarely considered in conjunction. The timing of their enactment suggests that members of Congress were not considering them as isolated or separate reforms."); DANIEL ZACHARY EPSTEIN, THE INVESTIGATIVE STATE: REGULATORY

LRA sprang from similar concerns about administrative agencies as did the APA. Senator LaFollette explained that "[p]ublic affairs are now handled by a host of administrative agencies headed by nonelected officials, with only casual oversight by Congress." [31] According to LaFollette, the LRA sought to "simplify the committee structure" and "to correlate it with the departments and agencies of the Federal Government." [32] It did so by creating standing committees that were paired with the agencies the committees would be overseeing. Section 136 of the LRA provided that "each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee." [33]

The LRA transformed the investigative work of the committees from being primarily regulatory—focused on investigating the private sphere for the purpose of developing legislative solutions to problems—to being primarily about overseeing the policymaking activity of agencies within the government.[34] The theory was that policymaking would occur in the

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OVERSIGHT IN THE UNITED STATES 39 (2023) ("While the passage of the Administrative Procedure Act (APA) in 1946 established ex ante administrative procedures, the Legislative Reorganization Act (LRA) of 1946 can be interpreted to have established ex post administrative procedures."); *see also id*. at 109 ("The promise of the Legislative Reorganization Act—that Congress would police waste, fraud and abuse in federal programs—has largely been met by a strategic delegation of 'continuous watchfulness' to the Inspectors General.").

[31] 92 CONG. REC. 6344 (1946); *see also* Aaron L. Ford, *The Legislative Reorganization Act of 1946*, 32 A.B.A. J. 741, 741 (1946) ("For many years the Executive Branch has requested, and the Congress had granted it, extraordinary powers to meet emergency needs. Complaint has arisen respecting the use of many of those grants. The situation became the target for criticism. Congress was strongly urged to reorganize and re-assert itself as a coordinate branch of the Government.").

[32] 92 CONG. REC. 6344 (1946) (statement of Sen. Robert La Follette).

[33] Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812, § 136 (codified as amended in scattered sections of 2 U.S.C.) (repealed 1995).

[34] EPSTEIN, *supra* note 30, at 28 ("The first century-and-a-half of committee investigations involved inquiries to corporations for purposes of informing both private bills and regulations of interstate commerce, where requests for testimony and documents could be compelled and enforced."); *see also id.* at 34 (citing Organization of the Congress, Reports of the Joint Committee on the Organization of Congress. 79th Cong., 2d Sess., Rept. No. 1011, at 6 (March 4, 1946)). To consider the significance of the legislative reforms of 1946, note that Title III of the LRA was the Regulation of Lobbying Act and Title IV was the Federal Tort Claims Act. Together with the first two titles of the Act, these provisions ended the private petitioning process whereby

agencies, but the committees would exercise enough oversight of agency activity to ensure democratic accountability. Strong committees, with expert staff and subpoena power, could use hearings to control agencies.[35] The Legislative Reorganization Act of 1970 built on this model by expanding oversight-specific subcommittees and investigative tools such as the Congressional Research Service and the Government Accountability Office.[36]

The point here is that Congress structured itself on the theory that policymaking will be done by regulators exercising delegated authority, and Congress's job is to exercise "continuous watchfulness" over their work.[37]

An interesting postscript to the LRA is that Congress has sought to delegate its oversight function as well. Title 5, where the APA is codified, also now includes a series of mechanisms that delegate investigative authority to the bureaucracy and mandate reporting to Congress. These include the Hatch Act, [38] the

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Congress adjudicated individual claims for government funds, and the Act also regulated private lobbying of Congress. Congress has previously engaged in adjudicatory activity. *See* H.R. REP. NO. 25-730, at 2-3 (1838). It delegated that activity to the bureaucracy first, retaining its rulemaking power as a check on administration, *see* Abraham Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 ADMIN. L. REV. 416 (1976), but by the time of the LRA had embraced the delegation of rulemaking powers as well.

[35] Postell, *supra* note 30, at 627.

[36] Legislative Reorganization Act of 1946, Pub. L. No. 79-601 (codified at 2 U.S.C. § 31) [hereinafter 1946 LRA]; Legislative Reorganization Act of 1970, Pub. L. No. 91-510 [hereinafter 1970 LRA]; *cf.* Walter Kravitz, *The Advent of the Modern Congress: The Legislative Reorganization Act of 1970*, 15 LEG. STUD Q. 375, 396-97 (1990).

[37] *See* SENATE COMM. ON GOV'T OPERATIONS, II CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES, S. DOC. NO. 95-26, at 5 (1st Sess. 1977) ("The American system of representation imposes a responsibility on the Congress and the President to maintain popular control over the regulatory agencies. The regulatory process should be one in which regulators who exercise delegated authority are ultimately answerable to the people. . . . [R]egulatory 'failure' is less likely to occur when Congress exercises effective oversight.") (footnote omitted).

[38] Hatch Act of 1939, 5 U.S.C. § 7321 *et seq*. The Hatch Act bars bribery and intimidation of voters and also limits the political activities in which federal employees are permitted to engage. It establishes the Merit Systems Protection Board and the Office of Special Counsel within the Executive Branch to enforce the Act. Although the Hatch Act was adopted in 1939—that is, before the LRA and APA—it was initially enforced by the Attorney General but now is enforced by the Office of the Special Counsel. *See* An Act to Prevent Pernicious Political Activities, 54 Stat. 1147, 1148 § 8 (Aug. 2, 1939) ("Any person who violates any of the foregoing provisions of this Act upon conviction thereof shall be fined not more than $1,000 or imprisoned for not more than one year, or both.").

Government Reports Act,[39] the creation of the Office of Special Counsel,[40] the creation of the Merit Systems Protection Board,[41] the Freedom of Information Act,[42] the Privacy Act,[43] the Federal Advisory Committee Act,[44] the Ethics in Government Act,[45] the Inspector General Act,[46] the Regulatory Flexibility Act,[47] and the Congressional Review Act.[48]

2. Incentives

Thus, the reality of delegated administrative policymaking is now part of Congress's structure and self-conception. In addition, there are also strong incentives that lead Congress to avoid

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[39] 5 U.S.C. § 2954. Pub. L. No. 45-611 (May 29, 1928) introduced the "Government Reports Act of 1928," 45 Stat. 996 § 2, which was recodified at 5 U.S.C. § 2954. Pub. L. No. 45-611 discontinued mandatory reports required by law to be delivered to Congress and enumerated those discontinued reporting requirements. The reports were mostly statements of expenditures. After enumerating in 127 clauses each report of each agency that was no longer required to be released, the 128th clause provides that those agencies from which information is requested by the members of the House or Senate expenditures committees shall produce that information. Part of Pub. L. No. 45-611 was codified at 5 U.S.C. § 2954 and other parts were codified at 44 U.S.C. § 3501 *et seq.* following the passage of the Federal Reports Act of 1942—now known as the Paperwork Reduction Act—once the Bureau of the Budget (now the Office of Management and Budget) moved to the Executive Office of the President.

[40] Powers and Functions of the Office of Special Counsel, 5 U.S.C. § 1212. The Office of Special Counsel investigates and brings actions for violations of the personnel laws of the Executive Branch as well as the Hatch Act.

[41] Powers and Functions of the Merit Systems Protection Board, 5 U.S.C. § 1204.

[42] Freedom of Information Act, 5 U.S.C. § 552.

[43] Privacy Act of 1974, 5 U.S.C. § 552a.

[44] Federal Advisory Committee Act, Pub. L. No. 92-463, § 2.

[45] Ethics in Government Act of 1978, Pub. L. No. 95-521, § 101. The Ethics in Government Act requires certain Executive Branch employees to comply with conflict-of-interest standards and to make detailed public disclosures of their financial information.

[46] Inspector General Reform Act of 2008, Pub. L. No. 110-409, § 1. The Inspector General Act of 1978 created the Office of Inspector General in most federal departments. In 1988, the Act was amended to establish Inspector General offices at an additional 30 "independent" agencies. The Act aims to enable agency Inspectors General to "conduct and supervise audits and investigations relating to the programs and operations" of the agencies. *Id.* § 2(1).

[47] Regulatory Flexibility Act, Pub. L. No. 96-354, 5 U.S.C. § 610. The Regulatory Flexibility Act requires federal agencies to review all existing regulations over ten-year periods and requires revisions of regulations that are duplicative, burdensome, or no longer necessary.

[48] Congressional Review Act, 5 U.S.C. § 801. The Congressional Review Act, in addition to enabling Congress to overturn legislative rules made by agencies, requires the Comptroller General to provide a report to congressional committees on major rules. *See* § 801(a)(2)(A).

addressing hard policy questions and to delegate policymaking authority to the agencies.

Congress is increasingly polarized into a bimodal distribution. In such an environment, consensus and compromise becomes more difficult.[49]

Members of Congress tend to benefit more from public messaging than from engaging in substantive legislation. One study by the political scientist Ju Yeon Park found that congressional oversight hearings provide an opportunity for what she called "cheap talk" to the public, which benefits a congressman's electoral fortunes. At the same time, she found that "members' effectiveness in legislative activities does not have any effect on their vote share."[50] Information technology and the rise of small dollar donors tends to contribute to this trend. A viral exchange at a hearing yields publicity, which reaches many voters, and attracts small-dollar donors.[51]

It is instructive to contrast the electoral rewards from oversight and public messaging with the rewards from legislation. The same study that found that voters reward "political grandstanding" found that donors and special interest groups have an "asymmetric reaction." That is, voters reward grandstanding while "organized donors are unlikely to be moved by members' political cheap talk but reward members' effective lawmaking activities instead."[52] An implication of these findings is that "the asymmetric reactions of voters and donors toward members' grandstanding behavior may incentivize members to appeal to voters by making impressive political speeches while legislating in favor of organized interests."[53]

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[49] *See* DAVID R. MAYHEW, THE IMPRINT OF CONGRESS 2 (2017); Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1103 (2018). *See generally* SARAH BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK (2003).

[50] Ju Yeon Park, *Electoral Rewards for Political Grandstanding*, PNAS, Vol. 120, No. 17, e2214697120, at 2 (2023).

[51] Alyce McFadden, *Small-Dollar Donors Get Behind Headline-Grabbing Lawmakers*, OPEN SECRETS (Apr. 20, 2021), [https://perma.cc/48P5-PJWU]. Since 1946, Congress has preferred to conduct more oversight hearings per session with less time spent per hearing. EPSTEIN, *supra* note 30, at 87. Prior to the transparency reforms of 1978, the average legislative oversight hearing lasted over a day but, after 1978, hearings last an hour or two at most. *Id.* at 87-91.

[52] Park, *supra* note 50, at 2.

[53] *Id.*

These dynamics highlight a perhaps counterintuitive point: It is Congress's oversight and messaging activities that engage the public at large while the legislative function has come to resemble administrative policymaking; the people paying attention are insiders with a special incentive to follow the legislative process, and an expert committee staff engages in bargaining among these special interests while the more diffuse public interest is not always represented.[54]

The trends pushing Congress toward oversight activities exacerbate the familiar reasons for congressional delegation to agencies. Broad delegations allow Congress to take credit for addressing problems but to disclaim responsibility for unpopular consequences as the policies are developed and implemented by the agencies.[55]

Scholars have noted other reasons why administrative regulation is more likely to occur than legislation.[56] Some public choice scholars have shown that agencies dominate the legislature in the budgetary process, which makes the agencies the most influential lobbyist in Congress.[57] Given this dynamic and Congress's dependence on agencies for expertise and implementation, the agencies can ensure that legislative resources will be directed to

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[54] *See generally* Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RESEARCH & THEORY 353 (2005); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RESEARCH & THEORY 245 (1998).

[55] *See* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 154 (2017); Ginsburg & Menashi, *supra* note 20, at 269–70 ("The Clean Air Act provides a useful illustration. . . . The Congress can claim to have delivered clean air but disclaim the costs associated with achieving that goal or, if there is no success, can disclaim responsibility for the failure."); *see also* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS (1999); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS (1991); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) ("Sometimes lawmakers may be tempted to delegate power to agencies to reduce the degree to which they will be held accountable for unpopular actions.") (internal quotation marks and alteration omitted).

[56] *See* Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 357 (1988) ("The legislator observes a particular political trade off in the election. Imposing that trade off on his bureaucratic agent is in the legislator's self-interest. That is, the bureaucrat's role is to transfer wealth or to implement legislation and policy in the direction of the legislator's preferred trade off.").

[57] *See* WILLIAM NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 24-35 (1971).

agency policymaking objectives.[58] George Stigler in *The Theory of Economic Regulation* established the capture theory of regulation, which suggests that industry has strong incentives to maintain the legislative status quo.[59] Moreover, bureaucrats have civil service protection while members must stand for reelection,[60] legislative representatives must bargain while agencies receive policy direction from a single presidential source,[61] and regulators are easier to capture outside the electoral process.[62] It is worth noting, too, that delegation itself further undermines the incentives to legislate. For example, Congress does not need to engage in logrolling or pork barrel politics when members can lobby the agencies for large pools of discretionary spending to secure rewards for their constituents without legislative compromise.[63]

II. PROMOTING PUBLIC INTERESTS

Given Congress's structure and incentives, it seems unlikely that the general shift of policymaking from congressional legislation to the administrative state will be reversed based only on changes to judicial doctrine or enhancements to congressional capacity. But before suggesting what we might do to make administrative policymaking better, it is important to specify the precise problem. What is it that we have lost as the locus of policymaking has shifted from Congress to the administrative state?

A. What's Lost?

Administrative policymaking is effective at bringing expertise—or at least experience—to bear on complicated policy questions. Notice-and-comment rulemaking yields important information from regulated industries and interested parties, and it forces the agency to adjust its policies to these realities on the ground. The problem is that the comments generally come from those special

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[58] *See* Brigham Daniels, *Agency as Principal*, 48 GA. L. REV. 335, 338, 361 (2014); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 126 (2005).

[59] George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

[60] WILLIAM RIKER, THE THEORY OF POLITICAL COALITIONS 47-48 (1962).

[61] JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 43-62 (1962).

[62] Niskanen, *supra* note 57.

[63] *See generally* JOHN HUDAK, PRESIDENTIAL PORK (2014).

interests with the incentive to engage in the rulemaking process,[64] and the broader interest of the public is not fully represented.[65] In this way, much agency policymaking is bargaining among special interest groups. As scholars have noted, agencies are subject to capture by industry,[66] and an agency often loses sight of the broader public interest as it tends to pursue a maximalist regulatory agenda in its own domain.[67] The political leadership of an agency is accountable to the public through the election of the President, but as Justice Kagan once observed, those "bare election results rarely provide conclusive grounds to infer similar support for even that candidate's most important positions, much less the sometimes arcane aspects of regulatory policy."[68]

By contrast, Congress is designed to represent the public, to which it is directly accountable. As Philip Wallach writes in his recent book *Why Congress?*, "Congress, in its distinctive Madisonian role, creates space for the messy representation of and deliberation between American society's diverse factions, and thus mediates between society and government."[69] Because Congress represents "the diversity of our vast citizenry[,] [o]nly congressional deliberation is capable of tackling the thorniest challenges in a way that the whole nation would accept as legitimate."[70] Congress

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[64] Golden, *supra* note 54; *see also* Furlong & Kerwin, *supra* note 54; Pamela Ban & Hye Young You, *Presence and Influence in Lobbying: Evidence from Dodd-Frank*, 21 BUS. & POL. 267, 272-73 (2019).

[65] *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1842-51 (2005); JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 9-11 (1978); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003) ("From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy.").

[66] *See generally* Stigler, *supra* note 59; Elizabeth Warren, *Corporate Capture of the Rulemaking Process*, THE REG. REV. (June 14, 2016), [https://perma.cc/HMH3-QAXY]. *See also* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J. L. ECON. & ORG. 167 (1990); Ronald A. Cass, *Regulatory Capture in Enforcement*, THE REG. REV. (June 29, 2016), [https://perma.cc/JC4W-CTMM]; Alexandra Hamilton, *When the Rule-Makers are Captured*, THE REG. REV. (Jul. 6, 2016), [https://perma.cc/8SFX-LMZQ].

[67] Ginsburg & Menashi, *supra* note 20, at 265 (describing "the natural tendency of an agency, formed with a narrow mandate, to pursue a maximalist agenda within its own field of authority and without regard to competing values, let alone the policy objectives of the rather remote President of the United States").

[68] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2334 (2001).

[69] PHILIP WALLACH, WHY CONGRESS? 46 (2023).

[70] *Id.* at 5.

facilitates public deliberation and public participation, and it is thereby the mechanism by which the public interest is translated into public policy. Administrative policymaking often lacks that representation of the wider public interest.[71]

B. What to Do?

If in the near-term Congress is unlikely to resume its role as the locus of public policymaking, that means—as we said earlier—that the administrative state will be with us, for better or for worse. And while it still makes sense to encourage Congress to legislate, we might at the same time consider how to make the administrative process better rather than worse. Making the administrative state "better" means seeking to include in the administrative process greater representation of the public interest and opportunities for public deliberation that we have lost through congressional decline.

Here, we have two broad recommendations. First is to embrace congressional oversight. That is, to regard congressional oversight not as a distraction from the "real" business of Congress but as an essential function that promotes democratic accountability. Second is to consider reforms to the administrative process itself. We describe some reforms that have been accomplished by executive order, but such reforms may come in that form, as part of a legislative package, or in changes to agency procedures.

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[71] *See* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986) ("We all know that a government agency charged with the responsibility of defending the nation or constructing highways or promoting trade will invariably wish to spend 'too much' on its goals. An agency succeeds by accomplishing the goals Congress set for it as thoroughly as possible—not by balancing its goals against other, equally worthy goals."); *see also Protecting the Public Interest: Understanding the Threat of Agency Capture: Hearing before the Subcomm. on Admin. Oversight and the Cts. of the S. Comm. on the Judiciary*, 111th Cong. 8 (2010) (statement of Sidney Shapiro, Wake Forest University School of Law) ("Capture can also occur from an imbalance in representation. . . . In one . . . study of 39 controversial and technical, complex air pollutant rules, industry averaged 77.5 percent of the total comments while public interest groups averaged only 5 percent of the comments. In fact, public interest groups file comments for only 46 percent of the total number of rulemakings."); *cf.* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465 (2015) ("The vesting of this power in a multimember legislature reflects a fundamental commitment to republican government and the representation of diverse interests in the lawmaking process."); Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1962 (2020).

1. Oversight

As the preceding discussion explains, Congress has organized itself to do oversight, it is incentivized to do oversight, and its oversight function engages the public to a greater extent than its legislative function. So it should do oversight.

It seems to us that many proposals for increasing congressional capacity would further bureaucratize Congress, replicating the administrative state within the legislative branch by increasing the number of permanent expert staff and tasking them with negotiating among competing proposals from those special interests incentivized to participate in the legislative process. That risks compounding the problem.

While the public generally does not pay attention to regulatory proposals from administrative agencies, congressional oversight can bring administrative policymaking to public attention and promote public deliberation. Effective congressional oversight includes hearings that investigate or debate regulatory proposals or question the officials of an agency; obtaining information from agencies; auditing an agency's use of appropriated funds; letters to agencies requesting information on rulemakings, adjudications, or other enforcement actions; "messaging bills" that are unlikely to pass into law but that get many cosponsors and might pass out of committee to raise public attention. And it can also be accomplished through formal and informal public statements, media appearances by members, and even social media posts.

For the reasons Congress now finds it difficult to legislate, Congress is well-suited to conduct oversight. As discussed earlier, Congress is organized to conduct oversight. The congressional committee system, with committees corresponding to the federal agencies, ensures that there are bodies within Congress oriented toward monitoring specific agencies.[72] Indeed, since the passage of the LRA, there has been an explosive increase in the number of congressional hearings per year.[73]

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[72] For example, the Department of Agriculture is subject to the jurisdiction of the House and Senate Agriculture Committees, the various subcommittees of those committees, and the subcommittees of the House and Senate Appropriations Committees that fund the Department of Agriculture.

[73] EPSTEIN, *supra* note 30, at 86.

Oversight is easier to achieve than legislation. While legislation in practice requires support from the relevant committee chairmen in both chambers, support from a majority on both committees, support from leadership in both chambers, support from majorities in both chambers, and support from the President, productive oversight can be carried out by a single committee, subcommittee, or even individual member. While staff levels and expertise may be inadequate for adopting complex legislation, young, inexperienced, or communications-focused staffers can support oversight efforts—and might even be better at it.

Oversight also corresponds to existing congressional incentives. While partisanship deters bipartisan legislation, it can incentivize robust oversight. There will always be senators and representatives from a different party than the President; sixteen out of the last twenty-two congresses featured at least one chamber controlled by the opposition party. Oversight surges when an opposition party takes control of a chamber.[74] And the media environment and rise of small-dollar donors incentivizes the sort of public messaging that drives effective oversight and engages the public.

We know from empirical research that oversight hearings are effective at curbing legislative drift in the bureaucracy.[75] That is, more oversight by Congress prevents an agency from straying beyond the bounds of its legislative mandate. Brian Feinstein conducted an exhaustive study of over 14,000 agency actions that are typically subject to congressional oversight.[76] He found that when Congress holds public hearings based on allegations of unlawful agency action, the likelihood the agency infraction will recur is reduced by 18.5 percent compared to those agency infractions for which no congressional hearing was held.[77] "Considering that

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[74] *See* DAVID MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002 (2005); Molly E. Reynolds & Naomi Maehr, *How Partisan and Policy Dynamics Shape Congressional Oversight in the Post-Trump Era*, GOVERNANCE STUDIES AT BROOKINGS (2023), [https://perma.cc/DBZ3-KZC3]; MORRIS S. OGUL, CONGRESS OVERSEES THE BUREAUCRACY: STUDIES IN LEGISLATIVE SUPERVISION (1976).

[75] Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1187, 1190-91 (2018) (empirically showing that oversight hearings are "a powerful tool to influence administration").

[76] *Id.* at 1240.

[77] *Id.* ("[O]versight can be highly consequential, reducing the rate of recurrence of infractions by 18.5%.").

oversight hearings are sometimes dismissed as little more than venues for political posturing," Feinstein writes, "this finding is noteworthy, and should be cause for optimism among those that see congressional engagement with the administrative state as important."[78]

There are many, but two recent examples show the potential of oversight to bring the public interest to bear on the administrative state. In October 2022, a commissioner of the U.S. Consumer Product Safety Commission, Richard Trumka Jr., directed the CPSC to request "public input on hazards associated with gas stoves and proposed solutions to those hazards."[79] After a public statement from Trumka suggesting that the CPSC might consider banning gas stoves, congressional Republicans reacted on social media, with posts attracting tens of millions of views.[80] Within hours, the CPSC disclaimed the effort to ban gas stoves.[81] Congress nevertheless continued to salt the earth where the proposal had grown, issuing letters to the CPSC and other agencies and introducing messaging bills, such as the STOVE Act.[82] The episode shows that even simple oversight can have a dramatic impact on agency activity and it need not be expert-led or bipartisan to be effective.

Another recent example is the bipartisan Select Committee on China. While the Select Committee has not passed any sweeping legislation, through its letters, hearings, reports, media engagement, and messaging bills, it has promoted greater public deliberation and participation in administrative agency actions relating to China—such as the Department of Commerce's export control rules, the enforcement by the Departments of State and Homeland Security of sanctions and import bans, the FCC's regulation of Chinese-controlled cellular modules that connect Internet-of-Things devices to the Internet, and the Department of the Treasury's rules governing

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[78] *Id.*

[79] Minutes of Commission Meeting, *Decisional Matter: Fiscal Year 2023 Operating Plan*, UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION (Oct 26, 2022), at 16, [https://perma.cc/XM8N-G74G].

[80] Ted Cruz, @tedcruz, X (Jan. 9, 2023, 12:31 PM), [https://perma.cc/REB3-6WFY]; Ronny Jackson, @RonnyJacksonTX, X (Jan. 10, 2023, 10:52 AM), [https://perma.cc/4FDC-W4YM].

[81] Nick Penzenstadler, *Is the Government Coming for Your Gas Stove? Here's How the Controversy First Got Cooking*, USA TODAY (May 30, 2023), [https://perma.cc/77QY-DT63].

[82] *Id.*; STOVE Act § 2 (2023).

tax incentives under the Inflation Reduction Act for Chinese companies. Such oversight has yielded changes in agency actions and promoted public awareness and participation. But it also injects the public interest into administrative processes that rarely receive such input. While proposed rules on export controls typically receive comments dominated by businesses and industry groups, the China Committee has brought the public interest into these policymaking processes.

2. Some Ideas for Strengthening Congressional Oversight

If we think that congressional oversight plays an important role in promoting accountability in the administrative state, how do we enhance that role? Here we have three suggestions. First, critics of congressional decline should stop deriding congressional oversight as "performative," "messaging," "political," "partisan," or a distraction from legislation.[83] Agencies respond to incentives, and oversight that engages the public and draws public attention changes agency incentives in the direction of greater public accountability.[84]

Second, administrative law practitioners should think of congressional oversight as a means of redress for clients adversely affected by agency action. Practitioners bring thousands of lawsuits against administrative agencies, with over 7,000 cases in the Courts of Appeals brought against administrative agencies in 2021.[85] In 1946, Congress expected that the APA and the LRA would work together, with APA lawsuits raising issues that congressional overseers would want to investigate.[86] It has not exactly worked out that way. But there is no reason why the lawyers with the most

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[83] *See, e.g.*, Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance,'* 12 LEG. STUD. Q. 477-79 (1987); Aaron Blake, *GOP's 'Weaponization' Committee Viewed as More Suspect than Its Target Is*, WASH. POST (Feb. 6, 2023), [https://perma.cc/W58G-S5GV].

[84] *Cf.* Alexander Fourinaies & Andrew B. Hall, *How Do Electoral Incentives Affect Legislator Behavior?*, LEGBRANCH WORKING GROUP (June 19, 2018), [https://perma.cc/C8XB-HN35].

[85] Statistic Report, *Federal Judicial Caseload Statistics 2021*, U.S. COURTS, [https://perma.cc/NKW2-WEZB].

[86] *See* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1579 (2018) ("Together, the LRA and the APA redefined the petition process."); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 169, 173-74 (1984); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics,* 90 NW. U.L. REV 1557, 1680-82 (1996).

extensive knowledge of agency behavior should not petition the congressional committees charged with oversight as a way to rein in possible excesses. And congressional committees, charged with exercising "continuous watchfulness" over those agencies, should be receptive to hearing about possible excesses.[87]

Third, Congress could reform its committee staffing structure to extend the reach of congressional oversight. The common proposal to increase the number of expert committee staff could undermine rather than enhance Congress's democratic character. Expert committee staff are mostly unaccountable to individual members, engage primarily with special interest groups, and prevent proposed congressional initiatives from reaching the public.

The current committee staffing system does not promote democratic accountability. For most congressional committees, staff are hired, fired, managed, and generally employed at will by the chairman and the ranking member. Therefore, the agenda—for both legislation and oversight—is set by the chairman for the majority members and by the ranking member for the minority members. Committee members and even subcommittee chairmen, without staff answerable to them, are often dependent on the support of unelected and chairman-directed committee staff. Because the chairman and the ranking member are the only elected officials overseeing around 100 committee staffers, committee staff must screen which issues are elevated and which are not. In practice, this means that most issues the staff address are never elevated to an elected official, giving the committee staff control over whether to pursue legislative and oversight proposals from committee members.[88]

In this way, committees are subject to same critique often applied to administrative agencies, in which unelected expert officials might decide questions that are never elevated to

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[87] *Cf.* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2157 (1998); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 156–57 (1986).

[88] *Cf.* Ginsburg & Menashi, *supra* note 20, at 268 (noting "the circumstance in which the President can most effectively exercise his power to persuade, as the ultimate decisionmaker, by mediating intra-branch disputes and shaping final agreements" and that "[s]uch policy leadership is impossible when important questions are resolved without ever reaching the White House").

accountable appointees. So influential are the committee staffs that members often decide whether to sponsor legislation based on whether the committee staff supports or opposes it.

Centralized control over committee staff is particularly problematic because the scope of the committees' jurisdiction has expanded beyond what reformers in the LRA era envisioned. For example, the House Energy and Commerce Committee has jurisdiction over, among others, the Departments of Energy and Commerce, but also HHS (along with Medicare, Medicaid, CHIP, and the Affordable Care Act), the CDC, the NIH, the EPA, the Nuclear Regulatory Commission, the FERC, the FCC, and large chunks of various other agencies. A single committee chairman cannot effectively direct oversight of so wide a range of agency activity.

Expanding and further empowering the committee staff under the control of the chairman would make Congress look more like the problematic aspects of the administrative state—an entrenched expert bureaucracy disconnected from public accountability. The centralized model might make sense from the perspective of Congress's legislative function. That is, it might help to force through controversial legislation when achieving consensus would be difficult. But the staff-dominated process impedes subcommittee and committee member initiative in pursuing oversight agendas that do not need consensus.

If we think that oversight is a way for Congress to make policymaking more democratically accountable, Congress might consider democratizing its committee staff structure. That means rules changes that would allow committee staff to be shared with individual member offices—that is, to be accountable to individual members rather than only to the chairman and the ranking member. Perhaps half of the committee staff could be allocated to subcommittee chairmen and ranking members and to individual committee members. In that way, subcommittees and individual members could pursue their own oversight agendas—holding hearings, requesting information, engaging the public, and so on. This would make a committee's oversight agenda not only more energetic and diverse, engaging different parts of the country and the public-at-large, but also more representative of the public interest, as represented by the committee members rather than the entrenched

staff. The oversight work could be divided among different subcommittees, promoting a pluralistic agenda.

The Senate Judiciary Committee is one of the only committees that has a staffing model along these lines. As anyone who has seen a judicial confirmation hearing knows, different members of the Committee often pursue their own lines of inquiry, in part because they have their committee staff to assist them and are not reliant on a staff accountable only to the chairman or ranking member.

When oversight is decentralized to individual members, each member will have more tools at his or her disposal. An individual member concerned with administrative fidelity to a statute—or persuaded to be concerned by lawyers representing regulated parties—can lobby a committee chairman to take action, write a letter to the agency or direct personal office staff to communicate informally with the agency, ask the agency inspector general or the Comptroller General at the Government Accountability Office to investigate, or even file a Freedom of Information Act request to obtain information.[89] Centralized control is a constraint but without it, individual members have a number of avenues for exercising oversight of administration.

3. Reforms by Executive Order

Reforms to the administrative process do not need to await changes in judicial doctrine or rules changes in Congress.

Perhaps the most dramatic change to the administrative state came through President Clinton's Executive Order 12866, which succeeded President Reagan's executive orders on regulatory review and is still in force. Under that order, federal agencies may regulate only insofar as the regulations are "required by law," "are necessary to interpret the law," or "are made necessary by compelling public need." [90] The order requires agencies to conduct a cost-benefit analysis "[i]n deciding whether and how to regulate," and it subjects

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[89] Keith Lowande, *Who Polices the Administrative State?*, 112 AM. POL. SCI. REV. 878 (2018) (explaining that informal oversight inquiries are not subject to the same institutional constraints as procedures governed by committee rules); *see also* Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 228 (1990) (describing the rules governing oversight as "cumbersome, complicated, technically inappropriate structures").

[90] Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

significant regulatory actions to review by the Office of Information and Regulatory Affairs in the Office of Management and Budget.[91] In this way, it injects consideration of the public interest into the rulemaking process and it promotes democratic accountability by ensuring oversight of regulatory activity by the President.[92]

Given the transformation of administrative policymaking occasioned by Executive Order 12866, one might wonder why scholars or critics have not developed many other proposals to reform administration in this way. To illustrate the possibility, we describe three executive orders issued during the Trump Administration that aimed to promote fairness and accountability in agency practices.

On October 9, 2019, President Trump signed two executive orders, Number 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents," and Number 13892, "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication."

Executive Order 13891 addressed the practice of issuing "guidance documents." As Judges Ginsburg and Menashi wrote a few years ago, "In recent years, agencies have increasingly issued informal statements of policy that effectively impose new regulations. Instead of actually imposing a regulation, which would require notice-and-comment procedures, agencies simply announce their view of when an enforcement action would properly be

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[91] *Id.*

[92] Kagan, *supra* note 68, at 2331-39, 2359-61. There have been recent changes to the OIRA process. President Biden issued Executive Order 14094, "Modernizing Regulatory Review," in April 2023. That order (1) amended Sections 3(f)(1) and 3(f)(4) of Executive Order 12866 to increase the monetary threshold for economically significant regulatory actions to $200 million and (2) set forth principles for encouraging greater public participation in the regulatory process. The OIRA director explained that "fewer regulatory actions will be reviewed by OIRA under this section and fewer analyses will be required under E.O. 12866 Section 6(a)(3)(C)." Richard L. Revesz, Administrator, Office of Information and Regulatory Affairs, Memorandum re: Implementation of Modernizing Regulatory Review Executive Order at 3 (Apr. 6, 2023), [https://perma.cc/5U6S-QPGB]. OIRA review still will "cover regulatory actions that 'raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in this Executive order.'" *Id.* at 5. Executive Order 14094 also mandates that regulatory activities "be designed to promote equitable and meaningful participation by a range of interested or affected parties, including underserved communities." For a critical view of these developments, see Statement, *U.S. Chamber Opposes Changes to Regulatory Cost-Benefit Analysis That Would Unleash More Regulatory Overreach*, U.S. CHAMBER OF COM. (Apr. 7, 2023), [https://perma.cc/2ATQ-QRJM].

brought."[93] Agencies often treat such documents as having legal force.[94] The concern is that guidance documents may effectively impose new requirements on the regulated public despite not going through the necessary public process for rulemaking.[95] Through this mechanism, the D.C. Circuit has cautioned, "Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations."[96]

Executive Order 13891, however, ordered agencies not to use guidance documents to impose legally binding requirements on the public. The order described the agencies' authority to "clarify existing obligations through non-binding guidance documents, which the [APA] exempts from notice-and-comment requirements."[97] Yet it explained that "agencies have sometimes used this authority inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA."[98] In recognition of this possibility, the order "require[d] that agencies treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract, take public input into account when appropriate in formulating guidance documents, and make guidance documents readily available to the public."[99] Among other

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[93] Ginsburg & Menashi, *supra* note 4, at 516.

[94] *See, e.g.*, Clyde Wayne Crews Jr., *A Partial Eclipse of the Administrative State*, COMPETITIVE ENTER. INST. (Oct. 3, 2018), [https://perma.cc/KK53-KTLU].

[95] *See* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 266 (2018) ("The distinction between legislative rules and guidance is routinely described as fuzzy, tenuous, blurred, and enshrouded in considerable smog."). In a study of guidance documents, Nicholas Parrillo has written that agency officials are not normally "engaged in a bad-faith effort to coerce the public without lawful procedures" but "[r]egulated parties often face overwhelming pressure to follow guidance, and agencies are sometimes inflexible." Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 166 (2019); *see also* Nicholas R. Parrillo & Lee Liberman Otis, *Understanding and Addressing Controversies About Agency Guidance*, THE REG. REV. (Mar. 5, 2018), [https://perma.cc/E2H4-N65N] ("[F]ollowing guidance may be the best way to avoid the initiation of an enforcement proceeding, which firms often do not want to risk, regardless of how it turns out. Firms may seek to avoid enforcement altogether because markets may take it as a signal that the firm cannot be trusted by its counter-parties (as in accounting) or because the statutorily authorized sanctions are so draconian that many firms dare not refuse whatever 'deal' the enforcers offer them and thus never get to a neutral adjudicator (as with Medicare exclusion).").

[96] Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

[97] Exec. Order No. 13891, 84 Fed. Reg. 55235, 55235 (2019).

[98] *Id.*

[99] *Id.*

requirements, the order mandated, for certain "significant" guidance documents, "a period of public notice and comment of at least 30 days before issuance of a final guidance document, and [with an exception for good cause] a public response from the agency to major concerns raised in comments."[100] While the order noted that agencies sometimes accompany guidance documents with "a disclaimer that it is non-binding," it cautioned that "a guidance document issued by an agency may carry the implicit threat of enforcement action if the regulated public does not comply."[101]

These requirements corresponded with a provision of Executive Order 13892 that "[t]he agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations" and "[w]hen an agency uses a guidance document to state the legal applicability of a statute or regulation, that document can do no more, with respect to prohibition of conduct, than articulate the agency's understanding of how a statute or regulation applies to particular circumstances."[102]

Section 3 of Order 13891 required all agencies to place their guidance documents on a single, searchable online database and to rescind guidance documents that were no longer in effect. The idea was that transparency would deter arbitrary agency enforcement against regulated entities and provide notice to the public.[103] Section 4 required the agencies to have formal, transparent procedures by which guidance documents are adopted. The agencies were directed to use notice-and-comment rulemaking to establish a process for issuing guidance documents.[104] Those rules needed to include requirements that guidance documents clearly state their non-binding character, identify whether the guidance document was significant—that is, whether it met a threshold of cost or burden on

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[100] *Id.* at 55237.

[101] *Id.* at 55255.

[102] Exec. Order No. 13892, 84 Fed. Reg. 55239, 55240 (2019).

[103] On the importance of transparency, see Adam Candeub, *Transparency in the Administrative State*, 51 HOUS. L. REV. 385, 409-11 (2013); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 506 (2003); *see also* Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 2009-12 (2015) (describing the requirement that agencies publicly justify administrative actions as serving the role to guard against arbitrariness).

[104] Exec. Order No. 13891, 84 Fed. Reg. 55235, 55237 (2019).

the public—and establish procedures allowing the public to petition for the withdrawal or modification of the guidance document.[105]

On the same day that the President signed Executive Order 13891, he also signed Executive Order 13892.[106] Perhaps what is most notable about that order is that it effectively modified the *Chenery II* doctrine for agencies subject to the order. In *Chenery II*, the Supreme Court laid out the principle that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."[107] The resulting doctrine has been subject to criticism because agencies may proceed through rulemaking or adjudication when "announcing and applying a new standard of conduct," even if the new standard announced in the adjudication "might have a retroactive effect."[108] Retroactive application of a new legal standard is thought to conflict with fair notice and due process principles.

Recently, Gary Lawson and Joseph Postell have criticized the *Chenery II* doctrine for reading the Court's decision too broadly[109] and for sidestepping "constitutional concerns" that warrant "at least a presumption against recognizing agency power to choose adjudication as a form of lawmaking."[110] Lawson and Postell urge a judicial reconsideration of the doctrine, but Executive Order 13892 effectively modified the doctrine by promising not to take advantage of it. The order explained that "[n]o person should be subjected to a civil administrative enforcement action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct."[111] To that end, it directed that

> [w]hen an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it may apply only

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[105] *Id.*

[106] Exec. Order No. 13892, 84 Fed. Reg. 55239 (2019).

[107] SEC v. Chenery (*Chenery II*), 332 U.S. 194, 203 (1947).

[108] *Id.*

[109] *See* Gary S. Lawson & Joseph Postell, *Against the* Chenery II *"Doctrine,"* 99 NOTRE DAME L. REV. 47, 48 (2023).

[110] *Id.* at 49. *But see* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN 102 (2020).

[111] Exec. Order No. 13892, 84 Fed. Reg. 55239, 55239 (2019).

> standards of conduct that have been publicly stated in a manner that would not cause unfair surprise. An agency must avoid unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law.[112]

This sort of reform does not require a change in applicable precedent. In addition to this limitation on *Chenery II*, three other provisions of Executive Order 13892 are worth describing here.

First, sometimes agencies issue "warning letters" to regulated parties finding those parties in violation of law and urging them to alter their behavior but deferring the final agency action, such as an assessment of penalties, to a future date.[113] This sort of practice denies private parties the opportunity to contest the allegations against them because a mere noncompliance notice is generally not a final agency action subject to judicial review under the APA. The Supreme Court eventually addressed this issue in the second *Sackett* case.[114] But before that case was decided, Executive Order 13892 addressed the practice by providing a right to a hearing. The order directed that

> before an agency takes any action with respect to a particular person that has legal consequence for that person, including by issuing to such a person a no-action letter, notice of noncompliance, or other similar notice, the agency must afford that person an opportunity to be heard, in person or in writing, regarding the agency's proposed legal and factual determinations. The agency must respond in writing and articulate the basis for its action.[115]

Second, Executive Order 13892 further provided for transparency in administrative inspections by requiring each agency to publish a rule that would govern how the agency would conduct such inspections and the materials on which it would rely when

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[112] *Id.* at 55241.

[113] *See, e.g.*, Sackett v. EPA, 566 U.S. 120 (2012); Rhea Lana v. U.S. Dep't of Labor, 271 F. Supp. 3d 284 (D.D.C. 2017).

[114] Sackett v. EPA (*Sackett II*), 598 U.S. 651 (2023).

[115] Exec. Order No. 13892, 84 Fed. Reg. 55239, 55242 (2019)

investigating regulated parties. Related to that provision, Executive Order 13892 also addressed the problem of "structuring" information collections. When an agency wants to conduct an investigation that is not necessarily within its statutory purview, the agency will sometimes send an information request to fewer than ten entities in order to avoid the restrictions that the Paperwork Reduction Act ("PRA") places on information collections by agencies. As former FTC Commissioner Noah Phillips once wrote, in a dissenting statement objecting to the issuance by the FTC enforcement staff of investigative requests to a series of technology companies:

> The only plausible benefit to drawing the lines the Commission has is targeting a number of high profile companies and, by limiting the number to nine, avoiding the review process required under the Paperwork Reduction Act, which is not triggered if fewer than ten entities are subject to requests. Under the PRA, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) analyzes government information requests for burden to avoid unnecessary or duplicative requests for information and ensure that data collected are accurate, helpful, and a good fit for their proposed use. The PRA also mandates a public comment process to guide requests toward high-quality and useful data.[116]

If an information collection receives approval, it would be sent out with an OMB control number and a series of disclaimers about the receiving party's rights with respect to the collected information.[117]

To address the problem of agencies structuring information collections to avoid the PRA, Executive Order 13892 provided that

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[116] Dissenting Statement of Commissioner Noah Joshua Phillips, Social Media Service Providers Privacy 6(b), Matter No. P205402 (Dec. 14, 2020), [https://perma.cc/2CQT-EB9Q] (internal citations omitted).

[117] For the PRA requirements applicable to information collections, see Daniel Epstein, *Procedural Pluralism: A Model for Enforcing Internal Administrative Law*, 51 HASTINGS CONST. L.Q. at nn.20-38 (forthcoming 2024), [https://perma.cc/4CNA-2JDP].

"[a]ny agency seeking to collect information from a person about the compliance of that person or of any other person with legal requirements must ensure that such collections of information comply with the provisions of the Paperwork Reduction Act" and that "any collection of information during the conduct of an investigation" must either display a valid OMB control number or "inform the recipient through prominently displayed plain language that no response is legally required."[118]

Third, Executive Order 13892 encouraged agencies to adopt procedures "to encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reductions or waivers of civil penalties"; "to encourage voluntary information sharing by regulated parties"; and "to provide pre-enforcement rulings to regulated parties." On this last point, the executive order required the agencies to report on their compliance with the Small Business Regulatory Enforcement Fairness Act,[119] which empowers small businesses to request pre-enforcement rulings on whether some conduct would subject the business to administrative liability.[120] Information sharing between regulated parties and the regulated limits administrative burden, and pre-enforcement rulings decrease the chance of unfair surprise in administrative enforcement.

All told, these executive orders identified possible abuses within the administrative state and leveraged the President's control of the executive branch to modify the administrative process. Of course, not all executive orders are long-lasting. The Biden Administration rescinded these orders, explaining that "executive departments and agencies . . . must be equipped with the flexibility to use robust regulatory action to address national priorities."[121]

Still, it is a model for reform of the administrative state that does not depend on dramatic changes from Congress or the courts. And it is not difficult to think of other issues that might be addressed.

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[118] *See also* Dissenting Statement, *supra* note 116 ("Concern about accountability and fairness in agency actions led the President to issue Executive Order 13892, which among other things requires compliance with the PRA in the collection of information. For an undertaking of this scope, failing to submit to PRA review is not a good thing; and the 6(b) orders issued today would have benefited immensely from the important checks and balances that process and Executive Order 13892 are designed to ensure.").

[119] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121.

[120] Exec. Order No. 13892, 84 Fed. Reg. 55239, 55242 (2019).

[121] Exec. Order No. 13992, 86 Fed. Reg. 7049, 7049 (2021).

In *Axon Enterprise, Inc. v. FTC*, Justice Thomas indicated that he has "grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end." [122] A presidential administration concerned about the adjudication of private rights within agencies might—to the extent the agency has discretion to decide between administrative and judicial adjudication—direct what sorts of proceedings should be brought where.[123]

We mentioned a third executive order. On May 19, 2020, President Trump issued Executive Order 13924, "Regulatory Relief to Support Economic Recovery." Executive Order 13924 was issued in the midst of the COVID pandemic and it sought to exempt businesses from regulations that inhibited economic recovery.[124] In particular, section 4 directed agency heads to "identify regulatory standards that may inhibit economic recovery" and to take "appropriate action" including to "rescind, modify, waive, or exempt persons or entities from those requirements." [125] Section 6 of the order provided that the "heads of all agencies shall consider the principles of fairness in administrative enforcement and adjudication" and shall "revise their procedures and practices in light of them." And the order listed those principles:

1. The Government should bear the burden of proving an alleged violation of law; the subject of enforcement should not bear the burden of proving compliance.

2. Administrative enforcement should be prompt and fair.

3. Administrative adjudicators should be independent of enforcement staff.

4. Consistent with any executive branch confidentiality interests, the Government should provide favorable relevant evidence in possession of the agency to the subject

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[122] Axon Enter., Inc. v. FTC, 598 U.S. 175, 196 (2023) (Thomas, J., concurring).

[123] *See also* SEC v. Jarkesy, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

[124] Exec. Order No. 13924, 85 Fed. Reg. 31353, 31353 (2020).

[125] *Id.* at 31354.

of an administrative enforcement action.

5. All rules of evidence and procedure should be public, clear, and effective.

6. Penalties should be proportionate, transparent, and imposed in adherence to consistent standards and only as authorized by law.

7. Administrative enforcement should be free of improper Government coercion.

8. Liability should be imposed only for violations of statutes or duly issued regulations, after notice and an opportunity to respond.

9. Administrative enforcement should be free of unfair surprise.

10. Agencies must be accountable for their administrative enforcement decisions.[126]

These are principles that might form the basis for a bipartisan consensus, and agencies might also make such principles binding by regulation.[127] In any event, it is worth remembering that

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[126] *Id*. at 31355.

[127] On December 27, 2019, the Department of Transportation issued a final rule to govern the Department's rulemaking procedures that, among other things, limited the agency's use of guidance documents, imposed due process requirements in rulemaking, and imposed requirements on new rules, including that two old rules must be overturned for each new one. *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 84 Fed. Reg. 71714 (Dec. 27, 2019). Congress might even be able to legislate here. While Congress would likely deadlock on sweeping reforms, procedural reforms to administrative policymaking might pass. Recently, Congress adopted the Providing Accountability Through Transparency Act of 2023, which became law in July after passing unanimously through both chambers of Congress and receiving the signature of President Biden. The Act amends 5 U.S.C. § 553(b) by adding a fourth piece of information that agencies must publish in their notices of proposed rulemaking. Agencies must now include "the Internet address of a summary of not more than 100 words in length of the proposed rule, in plain language" to be posted on regulations.gov. Providing Accountability Through Transparency Act of 2023, Pub. L. No. 118-9, § 2(4). According to the Senate committee report accompanying the bill, this change was motivated by a concern that the ability of non-expert Americans "to offer useful feedback [on rules] through comments is dependent upon the clarity and simplicity of the proposal." S. REP. NO. 118-28, at 2 (2023). Some

asserting such principles does not require waiting for Congress to fundamentally change its character or for the Supreme Court to revisit its precedents.

CONCLUSION

Traditional explanations for congressional delegation focus on the lack of institutional resources by Congress and the need to rely on bureaucratic expertise to make informed policy decisions. But delegation responds to incentives that members of Congress face. Congress seeks structures that promote its electoral interests. Because congressional oversight can advance members' electoral interests while promoting accountability in administration, it makes sense to embrace rules that expand oversight activities and that otherwise promote accountability without expecting a fundamental change in congressional behavior.

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reforms of administration could be low salience; even without regular order, perhaps an amendment to an omnibus budget might pass Congress with a small but committed group of members.