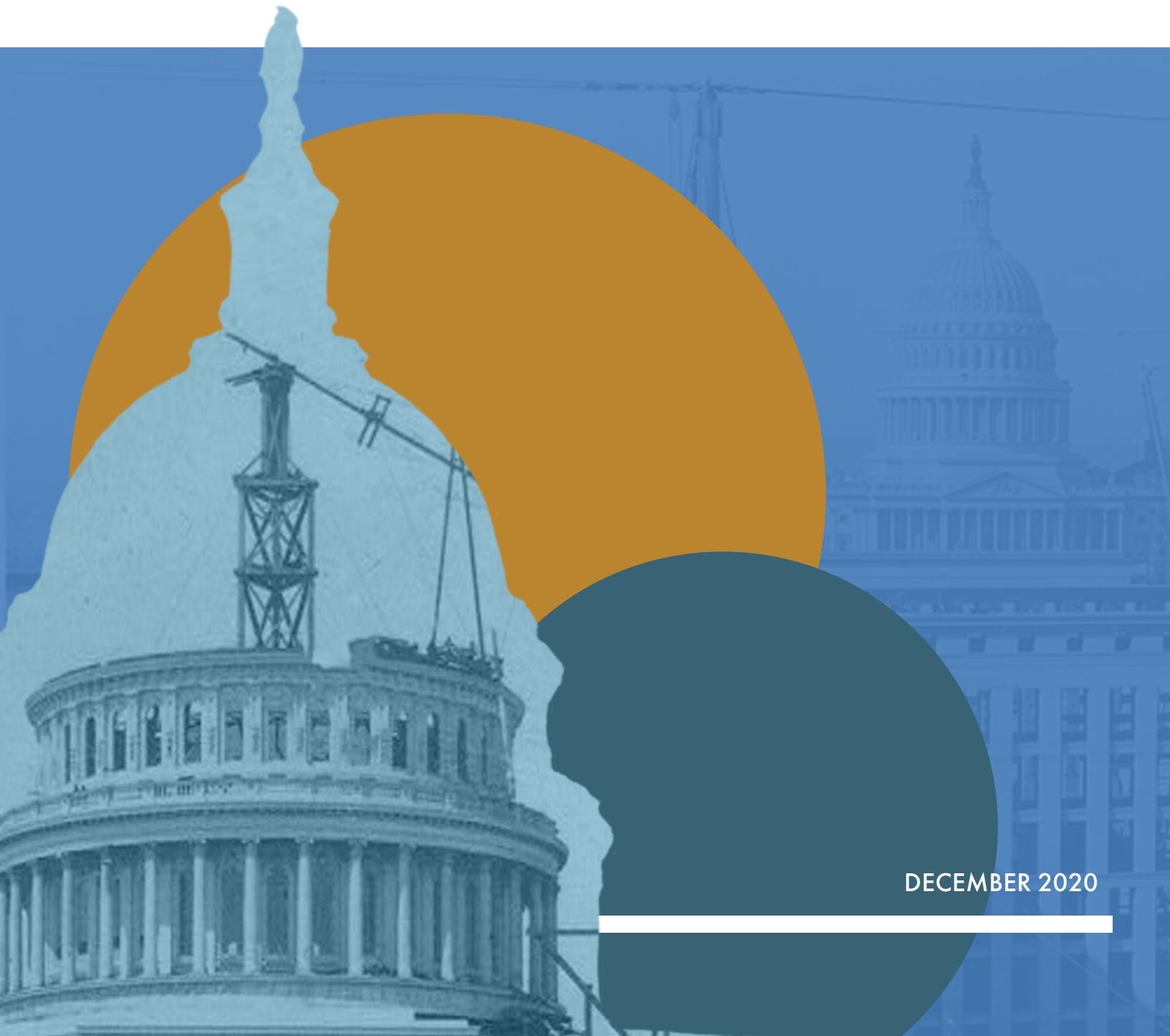


# Article One: Rebuilding Our Congress

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DEMAND PROGRESS EDUCATION FUND + PUBLIC CITIZEN



DECEMBER 2020



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# Executive Summary

What is the proper role of the Legislative branch in our system of government? When the framers wrote the Constitution, they understood that Congress must be strong even as its powers must be carefully restrained. Accordingly, they divided the legislature into two roughly co-equal chambers, varied the selection of its Members and terms of service, and provided for differing geographical representation. The framers assumed that the Legislative branch would jealously guard its powers against the Executive and Judicial branches — that ambition would check ambition. They did not anticipate our strong central government, our “imperial” presidency, and the willingness of legislators to sabotage the Legislative branch and accede power to the Executive.

The transfer of legislative power to the Executive branch has been ongoing since WWII with ebbs and flows, but over the last three decades much of the Legislative branch’s accumulated strength has eroded away. Congress has ceded many of its constitutionally delegated authorities, weakened its institutional infrastructure, and concentrated most of its remaining power in congressional leadership.

This report discusses the Legislative branch as an institution. It assesses where and how the Legislative branch has weakened itself and identifies potential avenues for restoring its strength. Specifically, it addresses, in the following four sections, the topics of Congressional capacity and modernization, Executive branch oversight, Foreign policy and national security, and the Power of the purse.

In Congressional capacity and modernization, we outline how Congress has underfunded its operations as compared to the rest of government and the consequences of that decision. This includes:

- Double-digit percentage cuts in funding to congressional personal offices and committees have resulted in high staff turnover, insufficiently experienced staff, increased lobbyist influence, and a shift from policymaking to showmanship.
- Double-digit percentage cuts in funding for support offices and agencies have undermined their ability to be independent sources of non-partisan information and support to the Legislative branch.
- The legislature’s inability to modernize its technology, address its pace of legislating, and foster member-to-member collaboration has left rank-and-file Members of Congress incapable of managing their workload or planning for the future, leaving them at the mercy of external factors.

In Executive branch oversight, we address the undermining of key tools for Congress to hold the Executive branch to account. For example:

- Subpoena authority and contempt powers in the House and Senate have become defunct, meaning the Legislature can no longer compel the Executive branch to meaningfully answer questions or be held to account.
- Support offices and agencies inside the Legislative branch have diminishing access to the information they need to support Congress, which undermines the quality of advice they can provide to legislators and weakens their ability to serve as watchdogs.

- Inspectors General, who are embedded in agencies and serve as independent internal watchdogs, are consistently undercut and undermined.
- Transparency to the public about agency activities could be an aide to congressional oversight, but the Executive branch has figured out how to slow-walk FOIA-requests, stifle and otherwise undermine journalists, and avoid proactive disclosure about its activities.

In Foreign policy and national security, we describe the current institutional framework for Congressional oversight and the causes for its decline. We then outline options available to Congress to rebuild its oversight capacity, which include:

- Enhancing congressional staff capabilities.
- Strengthening subpoena power.
- Modifying legislative procedures.
- Redressing foreign assistance authorizing legislation.
- Facilitating information sharing.
- Ensuring congressional staff have appropriate clearances.

Finally, in Power of the purse, we first describe how the Executive branch has encroached on the Legislative branch's spending authorities, focusing on apportionment, rescissions, and transfers and reprogramming. Then we address six options for Congress to reassert its powers:

- Withholding salaries.
- Requiring congressional approval of emergency declarations.
- Expediting review.
- Requiring congressional approval of rescissions.
- Enhancing transparency.
- Strengthening GAO's investigative authority.

Congress is an inherently strong institution, not a weak one. But the incentives of the institutional players — whether based on ideology, partisanship, or narrow personal interests in advancement — have come together to unbalance our political system and re-center political power in the Executive branch. When power is concentrated in the Executive branch, there is no practical democratic check on the exercise of that power, elections become manichean winner-take-all fights, and the vast majority of people are not represented in the decisions that are made.

Legislatures are the political bodies where our collective decisions about our future gain legitimacy. Our federal legislature must be strong, democratic, and representative.

For our democracy to survive, we must restore vigor to the Legislative branch.

*“By putting Members back in the driver’s seat on funding decisions, by making it easier for citizens to step up and serve, and by using technology to increase transparency and responsiveness, we can modernize the Congress and make it work for the people in the way our Founders intended.”*

*- House of Representative Majority Leader Steny Hoyer (D-MD)<sup>[1]</sup>*

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<sup>1</sup> House of Representatives Majority Leader Steny Hoyer (D-MD), Testimony given at the Select Committee on the Modernization of Congress Member Day Hearing, (March 12, 2019) <https://docs.house.gov/meetings/MH/MH00/20190312/109102/HHRG-116-MH00-Wstate-H000874-20190312.pdf>

## I. Introduction

What is the proper role of Congress in our constitutional framework of separated powers? As part of an effort to avoid a concentration of power, the U.S. Constitution divides the powers of the federal government among the Legislative (Article I), Executive (Article II), and Judicial (Article III) branches of government.

The framers of the Constitution expected Congress to emerge as the most powerful – and most dangerous – branch of government. But at the same time, the framers did not trust popular passions, so they worked to keep power in the hands of the elites. They further separated legislative powers into two chambers, balanced sectional and representational interests, and spent much of their time debating the Legislative branch's powers and duties. They believed that the Legislative branch would be jealous of its power and would work to defend it. On that point, at least, they could not see far enough into the future.

Compared to the intent of the founders, Congress is much diminished both in its exercise of power and in the esteem by which it is held by the American people. We do not need to retell here the story of WWII and the emergence of what political scientists often call the “imperial presidency.” There is a lesser known story about how Congress worked to strengthen itself against the transgressions of the Nixon administration, and in the post-Watergate era transformed itself into a powerful institution – with capable staff, empowered support agencies, tremendous oversight powers, and sufficient funding – that could check the excesses of an out-of-control and lawless Executive branch.

Nowadays, the Congress is much diminished. In the mid-1990s, Speaker Newt Gingrich strove to rip from the Legislative branch its most powerful tools. He reduced staff by 20% across the board, de-funded congressional agencies, and centralized power in the Speaker's office. His plan was to use Congress as an example of what he was going to do to the federal government. Instead, he undercut the Legislative branch and unbalanced the system that strove to hold the White House in check.

*“If the people who are elected to serve in Congress do not have an incentive to defend the powers given to Congress in the Constitution, then it should be no surprise that they will vote to give those powers away.”*

*-Representative Mike Gallagher (R-WI)<sup>[2]</sup>*

The danger of the Trump administration and lessons from the inability of Congress to hold it in check over the last four years are instructive. There is an appetite among some inside the Legislative branch to rebuild that institution. But there are also countervailing forces: some Members are afraid that a reinvigorated legislative body would undermine their personal power within the institution; others prefer to defer the president (if he is of their party) even though it creates enormous risks when that power shifts. It is our view that everyone benefits when our system of government works properly to advance our common interests and hold back those who wish to subvert them. In addition, a strong and responsive Congress can provide ballast against the anti-democratic winds that are sweeping across the country.

In the upcoming months, there are multiple points of opportunity to advance reforms via the legislative process.

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<sup>2</sup> Representative Mike Gallagher (R-WI), Testimony given at the Select Committee on the Modernization of Congress Member Day Hearing, (March 12, 2019) <https://docs.house.gov/meetings/MH/MH00/20190312/109102/HHRG-116-MH00-Wstate-G000579-20190312.pdf>

The Budget and Appropriations cycle offer opportunities to restore much of the funding that has been cut from the Legislative branch and wrest the power of the purse back to the people's representatives at the east end of Pennsylvania Avenue.

- The adoption of Democratic Caucus rules in the House and Senate provide opportunities to put in place a new way of ordering operations within the party structure. Similarly, the adoption of the House Rules at the start of the 117th Congress are a prime place to change the way the people's house operates.
- The National Defense Authorization Act and other must-pass legislation, such as a COVID-19 relief bill, are a chance to stamp new authorities into law that ensure the gigantic Executive branch is responsive to the direction of the American people. There will be other legislation that Congress and the President wish to enact that can be vehicles for ensuring that oversight and accountability are baked into our political process, such as whistleblower and Inspectors General protections.
- The danger of autocracy, in which a strong executive authority uses power to help friends and hurt enemies and disregard the welfare of the public, could not be more apparent. We can step back from the brink — our safety line is a new administration — and a new Congress that is powerful enough and determined enough to make sure we never again get this close to the edge.

This report, put together by Demand Progress Education Fund and Public Citizen, outlines the various ways the Legislative branch has weakened itself and ceded power to the Executive Branch. It covers, in the following four sections, the topics of (1) Congressional capacity and modernization, (2) Executive branch oversight, (3) Foreign policy and national security, and (4) the Power of the purse.

Our goal is not to identify solutions, although we have identified some options about what could be done. Rather, it is to tell the story — with numbers and data — about what has gone wrong in our Legislative branch — and why that is so dangerous for our democracy.

*"We must advance a House of Representatives that is diverse, dynamic and oriented toward the future, and that fulfills its Constitutional role as Article I, the first branch of government, co-equal to the other two."*

*-Speaker of the House of Representatives Nancy Pelosi (D-CA)<sup>[3]</sup>*

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<sup>3</sup> Speaker of the House of Representatives Nancy Pelosi (D-CA), Testimony given at the Select Committee on the Modernization of Congress Member Day Hearing, (March 12, 2019) <https://docs.house.gov/meetings/MH/MH00/20190312/109102/HHRG-116-MH00-Wstate-P000197-20190312.pdf>

## II. Congressional Capacity and Modernization

*“Much of the dysfunction and gridlock in Congress stems from the limitations and outdated systems of the institutions itself.”*

- Representative William Timmons (R-S.C.)<sup>[4]</sup>

For our democracy to function properly, it must have a well-functioning Legislative branch. How can we assess whether it is working properly? A good starting point is to look at its resources, capabilities, and incentives.

Compared to every prior Congress for the last quarter-century, this Congress has fewer and less experienced staff devoted to policy work. The technology available to support congressional operations is woefully inadequate. And structural incentives push power to the top, undermine collaboration among the members, and make long-range planning virtually impossible.

This chapter tells the tale of the systematic dismantling of Congress as a functioning body as a consequence of deliberate efforts to constrain its funding.

**Key takeaways:**

- The rate of funding for Congress has not kept pace with funding for the federal government as a whole.
- Executive branch employees are paid on average 30% more than their Legislative branch equivalents, with many Legislative branch staff suffering from cuts in pay compared to their predecessors.
- Overall funding for policy work in personal and committee offices is in significant decline.
- Legislative operations have not modernized to keep pace with operational changes in other parts of the government or the private sector. Staff are spending time performing manual work on matters that could be automated.

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<sup>4</sup> Representative William Timmons (R-S.C.), Press release, “Timmons supports bipartisan recommendations and report from the Select Committee on the Modernization of Congress,” (Sep. 24, 2020) <https://timmons.house.gov/media/press-releases/timmons-supports-bipartisan-recommendations-and-final-report-select-committee>

## THE BIG PICTURE ON CONGRESSIONAL FUNDING

Let's start by zooming out and look at overall funding for the Legislative branch.

The federal government spends approximately \$5 Trillion annually. About \$1.5 Trillion is considered discretionary spending, and a bit more than half of that goes to the military. What's left, approximately \$621.5 Billion, is discretionary funding that funds everything else. And of that \$621.5 Billion, a little less than \$5 Billion goes to the Legislative branch, or 0.7%.<sup>[5]</sup>

The percentage of non-defense discretionary spending (i.e., discretionary spending that does not go to the military) that has gone to the Legislative branch has been decreasing for at least a quarter-century. Since 1995, the non-defense discretionary pie has increased by 58%, but spending on the Legislative branch has increased only by 27%.<sup>[6]</sup> In other words, spending on the Legislative branch has increased at half the rate of overall spending.

The chart below illustrates the difference in growth rate between overall non-defense spending and Legislative branch spending. As you can see, the Legislative branch has been systematically defunding itself compared to other spending.<sup>[7]</sup>

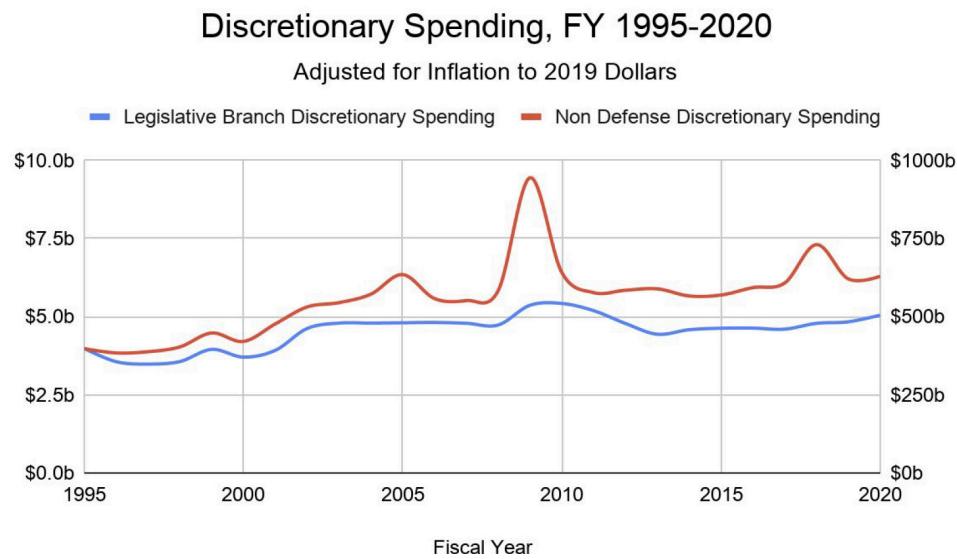


Figure 1 - (Source: *The Undermining of Congress, The First Branch Forecast*.)

You might be thinking that this doesn't sound so bad. But if you look inside the spending on the Legislative branch, the vast majority of new funding has gone to non-legislative functions.<sup>[8]</sup> Specifically, it has almost all gone to pay for building maintenance and police.

5 "The Undermining of Congress," The First Branch Forecast (February 17, 2020) <https://firstbranchforecast.com/2020/02/17/the-undermining-of-congress/>

6 Ibid.

7 Ibid.

8 "The Legislative branch is More Than Congress," First Branch Forecast (December 13, 2019) <https://firstbranchforecast.com/2019/12/13/the-legislative-branch-is-more-than-congress/>

Figure 2 below shows where the money inside the Legislative branch goes.<sup>[9]</sup>

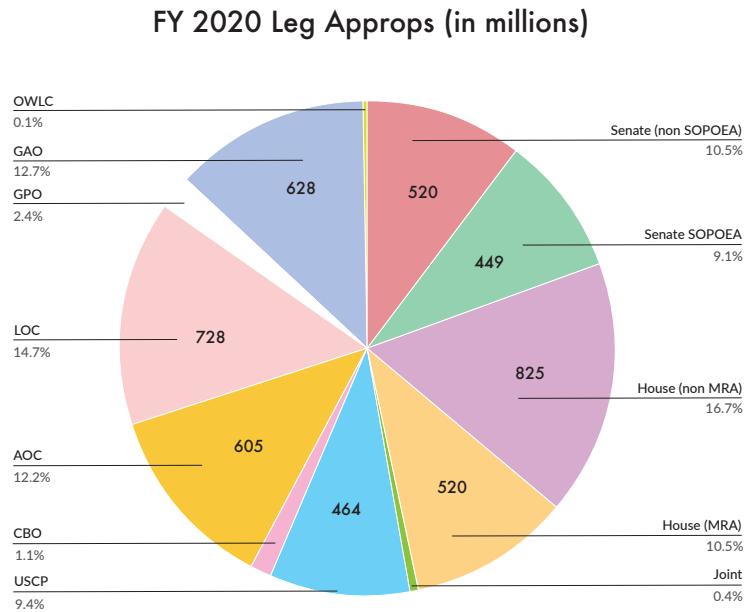


Figure 2 - (Source: *The Undermining of Congress, The First Branch Forecast.*) [ 10 ]

Most people think of Congress as its personal offices and its committees, although they are a small piece of the pie. What has been happening there?

## FUNDING AND STAFFING IN PERSONAL OFFICES IN THE HOUSE OF REPRESENTATIVES

*"The overwhelming majority of staffers who work within the halls of Congress do so out of a sense of patriotic duty and a passion for serving this nation. However, patriotism and public service are not the currency with which one can pay the bills for a growing family. If Congress is to retain talented, intelligent, and experienced staffers with the institutional knowledge needed to address ever-increasingly complex challenges, then we simply must invest the resources needed to offer staff salaries that are at least somewhat competitive with the private sector."*

- Representative Emanuel Cleaver (D-MO)<sup>[11]</sup>

9 "The Undermining of Congress," The First Branch Forecast (February 17, 2020) <https://firstbranchforecast.com/2020/02/17/the-undermining-of-congress/>

10 Chart acronyms: Architect of the Capitol (AOC), Congressional Budget Office (CBO), Joint Economic Committee (Joint), Government Accountability Office (GAO), Government Publishing Office (GPO), Library of Congress (LOC), Members' Representational Allowance (MRA), Open World Leadership Trust Fund (OWLC), Senators' Official Personnel and Office Expense Account (SOPOEA), and United States Capitol Police (USCP).

11 Representative Emanuel Cleaver (D-MO), quote given from The Office of Representative Emanuel Cleaver for the use of this report (December 11, 2020).

Funding for personal offices in the House of Representatives is paid out of a central fund known as the Members Representational Allowance (MRA). Figure 3 lets us look at how it has changed over the last decade (which, yes, we adjusted for inflation.)<sup>[12]</sup>

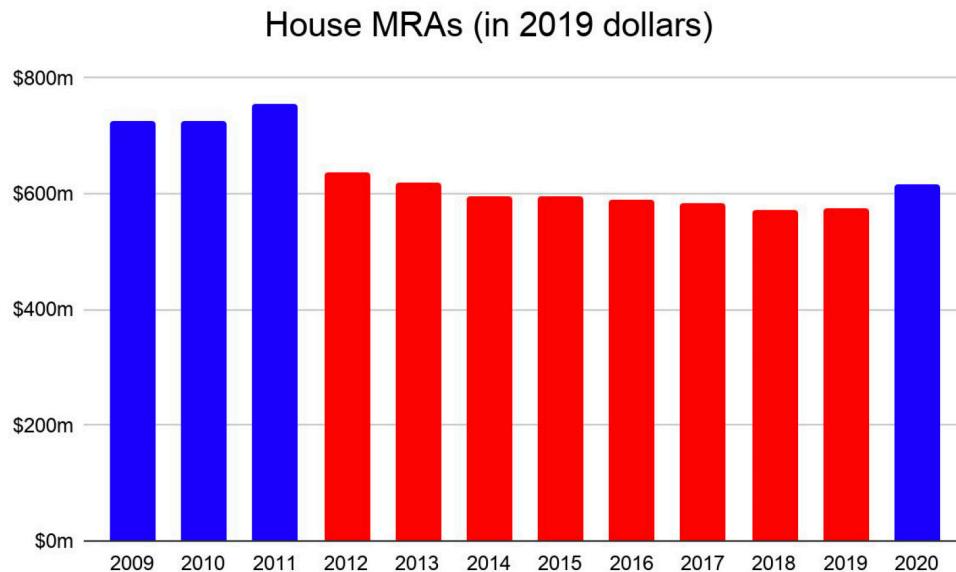


Figure 3 - (Source: *The Undermining of Congress, The First Branch Forecast*.)

As you can see, funding for the House personal offices is down by 15% as compared to a decade ago. For this past year, the MRA was set at \$615 million, but it was \$726 million in FY 2010.

What has this done to House personal office staff? We've seen a huge decline in the pay for personal office staff even as the cost of living in Washington, D.C. has skyrocketed. Entry level positions like staff assistants have seen a 12.8% decline in pay since 2001.<sup>[13]</sup> At the top, while chiefs of staff saw a modest increase in salaries since 2001 (3.2%), legislative directors, who oversee policymaking, saw a 9% decrease in pay.<sup>[14]</sup> The effect is that poorly paid staff have less expertise and turn over more quickly.

The need to provide services to constituents has driven a reallocation of personal office staff away from policymaking roles, prompted in part by the addition of 70 million people to the U.S. population over the last quarter-century. This need for increased constituent services is unsurprising: while there were 44,000 citizens for each staffer in 1979, that number increased to 58,000 in 2005.<sup>[15]</sup> (The ratio is likely much worse today.)

This shift away from policymaking is illustrated in the allocation of staff between the policy-focused Washington, DC office and the constituent-focused district offices. In the House, the percentage of DC staff has changed in recent years, with 53% of House personal office staff based in Washington, DC in 2016 compared

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12 Ibid.

13 For exact salary information, see "Staff Pay Levels for Selected Positions in House Member Offices, 2001-2019" Congressional Research Service, p. 22 (February 11, 2020) <https://fas.org/sgp/crs/misc/R44323.pdf>

14 Ibid. p. 8, 17.

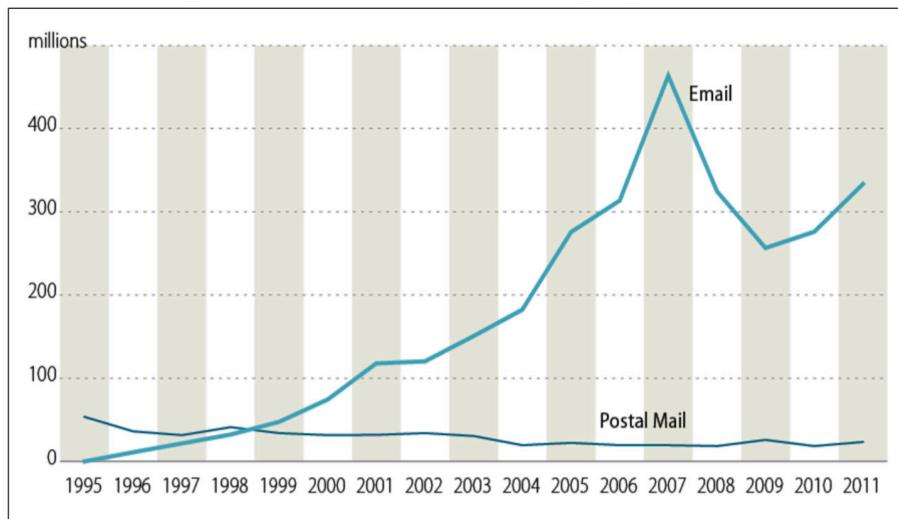
15 For more information, see "Keeping Congress Competent: The Senate's Brain Drain," First Branch Forecast (November 30, 2012) <https://firstbranch-forecast.com/2012/11/30/keeping-congress-competent-the-senates-brain-drain/>

to 65% in 1979.<sup>[16]</sup> The same trend can be observed in the Senate. In 1979, 75% of Senate personal office staff were based in Washington, DC, while only 57% were based there in 2016.<sup>[17]</sup>

Accordingly, in a constrained-funding environment, the number of personal office staff have borne the brunt of the cuts, with staff in a policymaking role declining by 14%.<sup>[18]</sup> Congressional staff report that they do not have enough time to do everything they need to do, and resource constraints cause the quality of their work to suffer.<sup>[19]</sup>

How strong is the signal to divert resources to responding to constituents? While the data is older, you can see the growth in communications to Congress through 2011, and there's reason to believe those numbers, especially with respect to social media, have continued to grow.<sup>[20]</sup> Figure 4 shows the overall increase in email communications.

**Figure 1. Email and Postal Mail to Congress, 1995-2011**



*Figure 4 - (Source: Congressional Research Service.)*

The House has taken steps in recent years to modernize its communications, such as with the release of a new Communications Standards Manual in 2019<sup>[21]</sup>. But this does not address the resources problems.

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16 Vital Statistics on Congress: Data on the U.S. Congress, Updated March 2019, The Brookings Institution, p. 6 (March 4, 2019) <https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-5.pdf>

17 Ibid. p. 8

18 For more information, see “Keeping Congress Competent: The Senate’s Brain Drain,” Daniel Schuman, Medium (June 6, 2018) <https://medium.com/@danielschuman/keeping-congress-competent-the-senates-brain-drain-493cf41a9dfa>

19 “Life in Congress: Aligning Work and Life in the U.S. House and Senate,” Congressional Management Foundation (2012) [http://www.congressfoundation.org/storage/documents/CMF\\_Pubs/life\\_in\\_congress\\_aligning\\_work\\_life.pdf](http://www.congressfoundation.org/storage/documents/CMF_Pubs/life_in_congress_aligning_work_life.pdf)

20 “Social Media in Congress: The Impact of Electronic Media on Member Communications,” Jacob Straus and Matthew Glassman, Congressional Research Service (May 26, 2016) <https://www.everycrsreport.com/reports/R44509.html>

21 “Bipartisan Praise For Updated House Communications Standards” Committee on House Administration, (December 19, 2019) <https://cha.house.gov/media/press-releases/bipartisan-praise-updated-house-communications-standards>

## FUNDING AND STAFFING IN PERSONAL OFFICES IN THE SENATE

The Senate has seen declines in funding for its personal offices. While not as severe as in the House — a formula propped up Senate funding for staff to support constituent services — it still has had significant effects on operational capacity. Figure 5 illustrates the overall funding levels in the Senators' Official Personnel and Office Expense Account, known as the SOPOEA.<sup>[22]</sup>

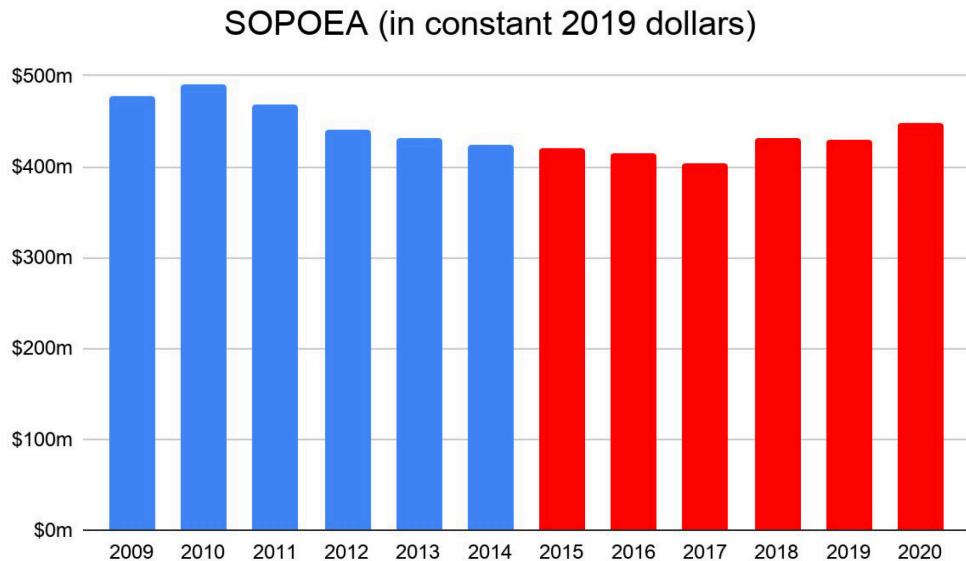


Figure 5 – (Source: *The Undermining of Congress, The First Branch Forecast*.)

For this past year, the SOPOEA was set at \$449 million, but it was \$490 million in FY 2010, which is an 8% reduction.

What has this done to Senate personal office staff? Salaries have been stagnant; e.g., staff assistants' pay has stayed flat for the past two decades.<sup>[23]</sup> At the top, chiefs of staff saw a huge 11% drop in wages since 2001,<sup>[24]</sup> while legislative directors saw a modest increase in compensation, about 7%.<sup>[25]</sup> Overall, nearly everyone is down. As a consequence, staff are generally less experienced and suffer from higher turnover rates than their predecessors.

## FUNDING AND STAFFING IN COMMITTEE AND LEADERSHIP OFFICES IN THE HOUSE

The decline in House committee funding and staff is worse than the Senate. Total spending on House committees is down by more than \$115 million from its peak, using inflation adjusted dollars. The House of Repre-

22 “The Undermining of Congress,” The First Branch Forecast (February 17, 2020) <https://firstbranchforecast.com/2020/02/17/the-undermining-of-congress/>

23 For exact salary information, see “Staff Pay Levels for Selected Positions in Senators’ Offices, FY2001-FY2018” Congressional Research Service, p. 21 (June 11, 2019) <https://fas.org/sgp/crs/misc/R44323.pdf>

24 Ibid. p. 11.

25 Ibid. p. 18.

sentatives put \$322.3 million towards committee funding in the 116th Congress, down from \$437.7 in the 111th Congress, which is the last time Democrats controlled the House. This represents a 25% cut in overall committee funding, reflected in Figure 6.<sup>[26]</sup>

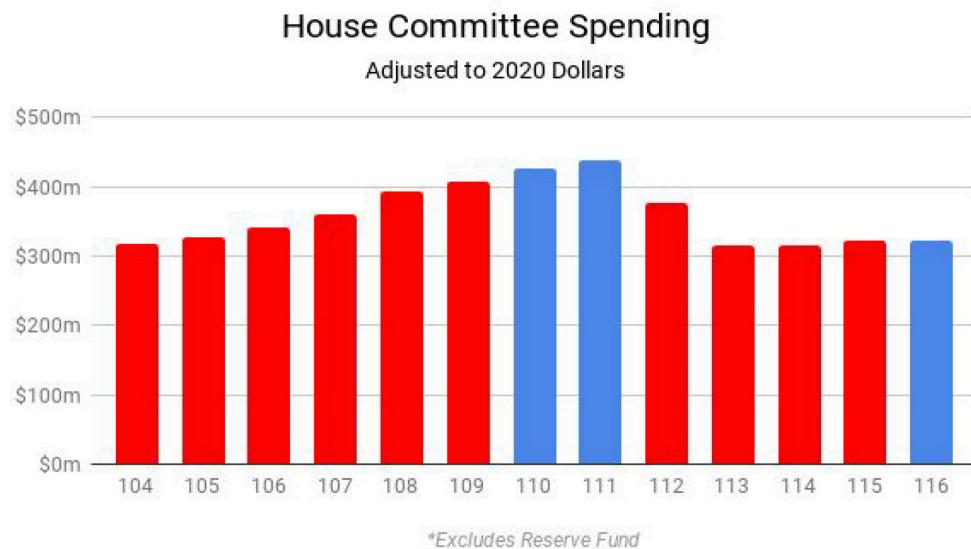


Figure 6 – (Source: *The Undermining of Congress, The First Branch Forecast.*) [ 27 ]

A decline in House committee staffing accompanied the decline in committee funding. House committee staffing reached its peak of 2,233 staffers in 1992, only to see it get reduced to 1,258 staffers in 1995 during the first year of the Gingrich regime.<sup>[28]</sup> Most recent data show that overall committee staffing has declined almost 44% since that 1992 peak. Figure 7 shows the trend in House committee staffing levels from 1981 to 2015.<sup>[29]</sup>

26 “The Undermining of Congress,” The First Branch Forecast (February 17, 2020) <https://firstbranchforecast.com/2020/02/17/the-undermining-of-congress/>

27 “How Committees Get Their Money,” Daniel Schuman, the First Branch Forecast (January 25, 2019), <https://firstbranchforecast.com/2019/01/25/how-house-committees-get-their-money/>

28 “House of Representatives Staff Levels in Member, Committee, Leadership, and Other Offices, 1977-2016” Congressional Research Service, p. 9-10 (September 13, 2016) <https://crsreports.congress.gov/product/pdf/R/R43947>

29 Ibid.

### Number of House Committee Employees (1981-2015)

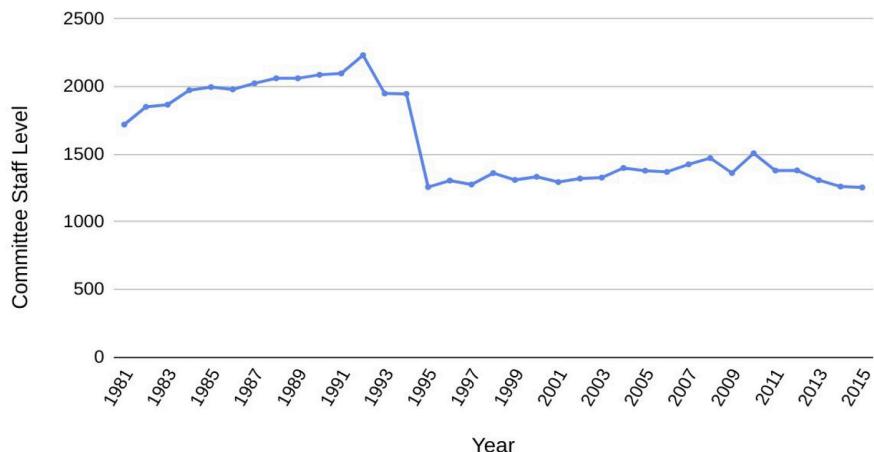


Figure 7 - (Source: Data from the Congressional Research Service)

### FUNDING AND STAFFING IN COMMITTEE AND LEADERSHIP OFFICES IN THE SENATE

While the Senate did a somewhat better job of retaining capacity in its personal offices than the House, the Senate did not retain capacity in its committees. Overall, the Senate spent about \$244 million (in 2019 adjusted dollars) on its committees, which is significantly less than its peak of \$327 million during the Democratically-controlled 111th Congress (in 2019 adjusted dollars). Figure 8 shows the recent decline.<sup>[30]</sup>

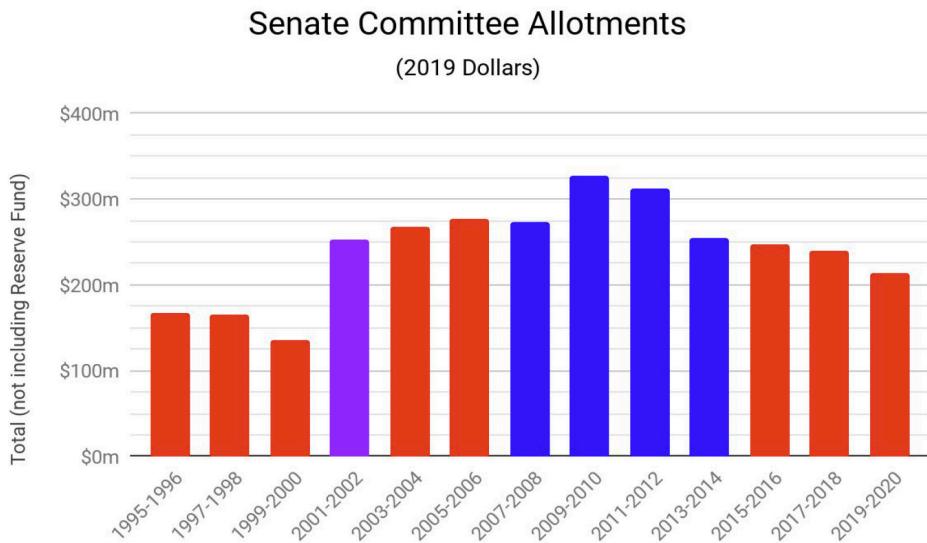


Figure 8 - (Source: The Undermining of Congress, The First Branch Forecast.)

<sup>30</sup> "The Undermining of Congress," The First Branch Forecast (February 17, 2020) <https://firstbranchforecast.com/2020/02/17/the-undermining-of-congress/>

While the House saw its committee staffing levels fall off a cliff in the mid-1990s, the Senate staff levels saw a modest decline. (We do not have information that allows us to look at the effects on pay rates, which all indications suggest have decreased).

Figure 9 shows the trend in Senate committee staffing levels from 1981 to 2015 (the latest data available).<sup>[31]</sup>

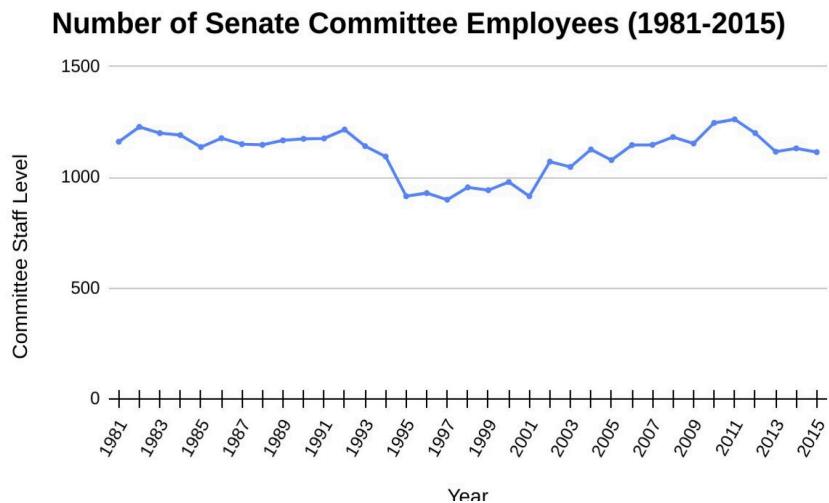


Figure 9 – (Source: Data from the Congressional Research Service)

As committees' capacity declined in the House, the power vacuum was filled by congressional leadership. Between 1994 and 2016, the number of House leadership staff increased from 112 to 239 (+113.4%).<sup>[32]</sup> During that same period, the number of Senate leadership staff decreased slightly from 163 to 160.<sup>[33]</sup>

## FUNDING AND STAFFING FOR LEGISLATIVE SUPPORT OFFICES AND AGENCIES

The Legislative branch has a number of support offices and agencies, which is where significant funding goes. As we mentioned above, major funding flows to non-legislative purposes, such as to the U.S. Capitol Police and the Architect of the Capitol.

The big policy-formulation support entities are GAO, CBO, CRS, and are responsible for roughly 16% of the entire leg branch budget (\$805 million enacted).<sup>[34]</sup> The big policy-support entities are the House Clerk, the CAO, and the Sergeant at Arms, and they're responsible (in part) for only about 4% (\$204 million enacted).<sup>[35]</sup>

31 Figure created using exact staffing data from "Senate Staff Levels in Member, Committee, Leadership, and Other Offices, 1977-2016," R. Eric Petersen and Amber Hope Wilhelm, Congressional Research Service, p. 7 (September 13, 2016) [https://www.everycrsreport.com/files/20160913\\_R43946\\_9d82f82510af41260cd64c6994c959debaeb8a4e.pdf](https://www.everycrsreport.com/files/20160913_R43946_9d82f82510af41260cd64c6994c959debaeb8a4e.pdf)

32 "House of Representatives Staff Levels in Member, Committee, Leadership, and Other Offices, 1977-2016" Congressional Research Service, p. 9-10 (September 13, 2016) <https://crsreports.congress.gov/product/pdf/R/R43947>

33 "Senate Staff Levels in Member, Committee, Leadership, and Other Offices, 1997-2016," Eric Peterson and Amber Wilhelm, Congressional Research Service, p. 7 (September 13, 2016) <https://fas.org/sgp/crs/misc/R43946.pdf>

34 For exact agency funding numbers, see "Legislative Branch: FY 2020 Appropriations," Congressional Research Service, p. 24 (February 12, 2020) <https://fas.org/sgp/crs/misc/R45755.pdf>

35 Ibid. p. 26

Funding for these entities has suffered over time as well. Looking at them over the last 25 years, it is clear that funding has mostly gone to capital projects and policing rather than staffing and support. The Architect of the Capitol currently receives \$610 million in funding (12% of the total budget), which represents a 383.3% increase since 1995.<sup>[36]</sup> Meanwhile, U.S. Capitol Police receives a \$464 million budget (roughly 9.5% of the total budget), representing a 291.8% increase during the same period.

Figure 10 shows the percent change in appropriations funding for major Legislative branch support agencies from 1995 to 2020 in 2019 constant dollars.<sup>[37]</sup>

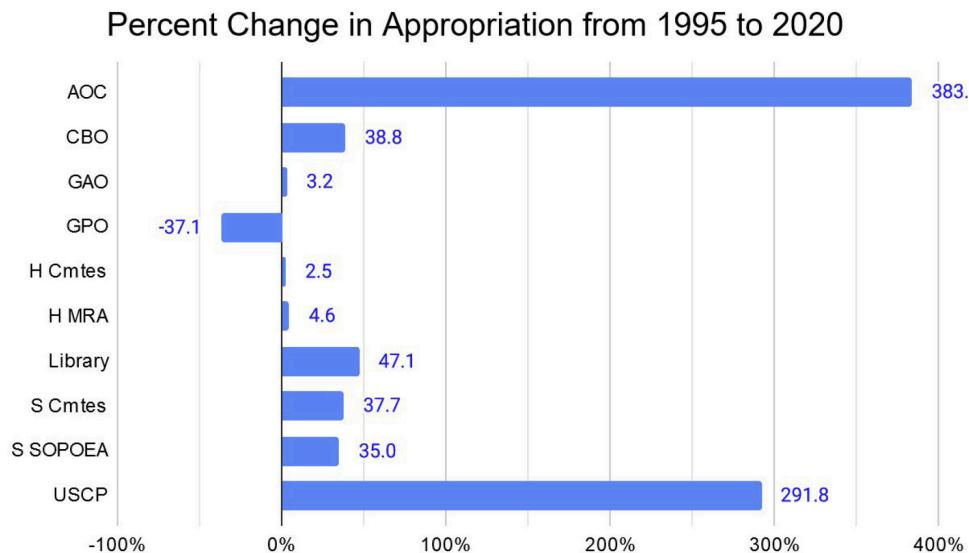


Figure 10 - (Source: *The Undermining of Congress, The First Branch Forecast.*)

Staffing for legislative support agencies is also decreasing at a rapid pace. From 1979 to 2015, CRS' staff shrunk by 28%—a loss of 238 positions.<sup>[38]</sup> It is even worse at GAO, where the department staff was cut by 44%, 2,314 positions, during that same period.<sup>[39]</sup> CBO staff has seen a slight increase, with 207 staffers in 1979 and 235 staffers in 2015.<sup>[40]</sup>

36 [1] “Cannon Renewal Could be \$100 Over Budget; Hazardous Materials Found,” Chris Marquette, Roll Call (September 10, 2019) <https://www.roll-call.com/2019/09/10/cannon-renewal-could-be-100-million-over-budget-hazardous-materials-found/> [2] “Hostile Workplace Persists at Architect of the Capitol, Lawsuit Alleges,” Chris Marquette, Roll Call (February 27, 2020) <https://www.rollcall.com/2020/02/27/hostile-workplace-persists-at-architect-of-the-capitol-lawsuit-alleges/>

37 “The Undermining of Congress,” The First Branch Forecast (February 17, 2020) <https://firstbranchforecast.com/2020/02/17/the-undermining-of-congress/>

38 For exact staffing numbers, see “Vital Statistics on Congress: Data on the U.S. Congress: Chapter 5,” Updated March 2019, The Brookings Institution, p. 18 (March 4, 2019) <https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-5.pdf>

39 Ibid.

40 Ibid.

## BIG PICTURE MODERNIZATION QUESTIONS

*“We’ve seen an erosion of the ability of Congress to function efficiently, to effectively solve problems for the American people, and to live up to its Article One authorities as a coequal branch of government. There’s no silver bullet for fixing these problems – it’s more like silver buckshot.*

*Toward that end, this Congress, the Select Committee on the Modernization of Congress made real progress to reform the institution – passing 97 unanimous recommendations to reform how Congress works. Our recommendations included steps to modernize how the institution uses technology to solve problems and communicate with constituents, to enable Congress to recruit and retain a talented and diverse staff, to foster more transparency and accessibility, to reduce dysfunction, and to make Congress work better for the American people.”*

– Representative Derek Kilmer (D-WA), Chairman of the Select Committee on the Modernization of Congress [ 41 ]

There are more issues on the table regarding modernizing Congress besides its funding levels and number of staff. This past Congress, the House Select Committee on the Modernization of Congress issued 97 recommendations that address some of the low-hanging fruit,<sup>[42]</sup> and Demand Progress published a series of recommendations to modernize the rules of the House,<sup>[43]</sup> the operations of the Senate,<sup>[44]</sup> and improve Legislative branch operations.<sup>[45]</sup>

We will highlight three issues that act as a constraint on Congress’s ability to engage in policymaking. They include technology deficiencies, an intractable calendar, and difficulties around collaboration. There are other issues, of course, but this is a useful starting point.

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41 Representative Derek Kilmer (D-WA), quote given from The Office of Representative Derek Kilmer for the use of this report, (December 11, 2020).

42 For the complete list of recommendations, see “Final Report,” Select Committee on the Modernization of Congress, (October 2020) <https://modernizecongress.house.gov/final-report>

43 For the complete list of recommendations, see “Recommendation for Updating House Rules, 117th Congress,” Demand Progress (September 24, 2020) [https://s3.amazonaws.com/demandprogress/reports/Recommendation\\_for\\_Updating\\_the\\_House\\_Rules\\_117th\\_Congress.pdf](https://s3.amazonaws.com/demandprogress/reports/Recommendation_for_Updating_the_House_Rules_117th_Congress.pdf)

44 For the complete list of recommendations, see “Recommendations for Strengthening the Senate, 117th Congress,” Demand Progress (September 30, 2020) [https://s3.amazonaws.com/demandprogress/reports/Recommendations\\_for\\_Strengthening\\_the\\_Senate\\_-\\_117th\\_Congress.pdf](https://s3.amazonaws.com/demandprogress/reports/Recommendations_for_Strengthening_the_Senate_-_117th_Congress.pdf)

45 For the complete list of requests, see “Demand Progress Appropriations Requests, FY 2021,” Demand Progress (March 2, 2020) [https://s3.amazonaws.com/demandprogress/reports/Demand\\_Progress\\_FY\\_2021\\_Appropriations\\_Requests.pdf](https://s3.amazonaws.com/demandprogress/reports/Demand_Progress_FY_2021_Appropriations_Requests.pdf)

## Technology

In the private sector, employees have become more productive because they have better technology available to them. This has reduced some of the drudgery and increased the efficiency by which they can access information, communicate, and accomplish their tasks.

Unfortunately, Congress has fallen behind regarding IT infrastructure. While digital tools have lowered barriers to communication with our elected representatives, Congress's information technology infrastructure and staffing have failed to keep up with the new influx of communications. Internal IT budgets have been significantly constrained, and the Clerk of the House has testified that she cannot pay senior staff enough to keep them. In addition, outdated rules and siloed service providers make it difficult for outside vendors to conduct business with congressional operators, which leaves very little room for public interest technologists and civic hackers to meaningfully contribute.<sup>[46]</sup>

*“Congress is making it harder to represent our constituents and exercise our Article One responsibilities by not investing in the latest technology.”*

*- Representative David Trone (D-MD)<sup>[47]</sup>*

Despite its IT shortcomings, the Legislative branch has made significant advances in releasing legislative information to the public as data, largely prompted by lobbying from civic organizations. This has served Congress well, as it has facilitated Congress' access to its own data—both as raw structured data and as data refined by third parties. These data publication initiatives have included the online publishing of bills; committee schedules, documents, and videos; an online House phone directory; CRS reports; the bills and amendments scheduled for a floor vote in the House; the Statement of Disbursements; the new joint meetings calendar; as well as holding regular meetings of the Bulk Data Task Force and the annual Legislative Data and Transparency Conference.<sup>[48]</sup>

In addition, Congress does not centralize access to reports provided to it by the Executive branch, systematically manage spending information, or even maximize efficient access to its own information. In addition, there is no entity with the focus of facilitating the development of a knowledge repository, act as a connector across IT silos, or provide support to stakeholders. Simply put, no one is responsible for working on congressional IT as an integrated system.

## The Congressional Calendar

The congressional calendar is the calendar of when the House or Senate are in session or when Members are expected to be in their district. Its current structure creates an inefficient legislative and collaborative workflow.

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46 “Doing Business With Congress: A Primer on Information Technology Acquisition in the Legislative Branch,” Ken Ward and Zach Graves, The Lincoln Network (December 2018) <https://joinlincoln.org/papers/doing-business-with-congress>

47 Representative David Tone (D-MD), Testimony given at the Select Committee on the Modernization of Congress Member Day Hearing, (March 12, 2019) <https://docs.house.gov/meetings/MH/MH00/20190312/109102/HHRG-116-MH00-Wstate-T000483-20190312.pdf>

48 [1] The Select Committee on the Modernization of Congress' recommendation 96 urges the House to make the Bulk Data Task Force permanent and rename it the Congressional Data Task Force. <https://modernizecongress.house.gov/recommendations> [2] For additional information on the Bulk Data Task Force and the Legislative Data Transparency Conference, see “Events,” Legislative Branch Innovation Hub <https://usgpo.github.io/innovation/events/>

The way the calendar is currently organized, Members travel roughly 66 days a year while only having 66 in-session work days in Washington, DC. This arises because they are in Washington from Tuesday-Thursday and travel home for the weekends. (This was not the case historically.)

This travel schedule forces Members to spend enormous amounts of time traveling, leaving them with very little time to build relationships with other Members or work collaboratively to understand issues and solve problems. While in session, Members are double- or triple-booked for hearings, party and caucus meetings, press conferences, meetings with constituents and lobbyists, and fundraising calls.<sup>[49]</sup> There are proposals, such as for a two-week on, two-week off schedule, that would reduce the number of travel days to 20 while still affording Members more work time in DC and in the district.

#### *Member-to-Member Collaborations*

In the House of Representatives, a long-standing tool for Member-to-Member collaboration was Legislative Support Organizations (LSOs). Abolished in 1995, LSOs were working groups for Members of Congress who cared about a particular set of issues. They were semi-independent entities that received funds from member accounts, employed staff, often were granted office space in the capitol complex, and were regulated and overseen by the House.<sup>[50]</sup>

LSOs were incredibly effective at shaping legislative debate and supporting policymaking. For example, the Democratic Study Group, established in 1959, wrote briefing papers and provided information on scheduled floor votes that were essential reading material for many Members. It operated under a dues-paying Membership model and ranged from 115 Members in the early 1970s to about 200 through the 1980s.<sup>[51]</sup>

As part of an effort to centralize power by party leadership, the LSOs were abolished and replaced with Congressional Member Organizations (CMOs) in 1995. CMOs largely were not afforded the same privileges or status as LSOs.

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49 “Double-booked: Busy budget season highlights scheduling woes,” by Katherine Tully-McManus, Roll Call (February 27, 2020) <https://www.rollcall.com/2020/02/27/double-booked-busy-budget-season-highlights-scheduling-woes/>

50 For more information Congressional Member Organizations, see “Eligible Congressional Member Organization Handbook.” Committee on House Administration 116th Congress, [https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/committee\\_docs/Committee%20on%20House%20Administration%20Resolution%20116-06.pdf](https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/committee_docs/Committee%20on%20House%20Administration%20Resolution%20116-06.pdf)

51 For more history of the most famous LSO, the Democratic Study Group, read “When Liberals Were Organized,” The American Prospect (January 22, 2015), <https://prospect.org/power/liberals-organized/>.

### III. Executive Branch Oversight

The oversight functions of Congress are essential to creating an accountable federal government and upholding our democracy's system of checks and balances. Congress' lawmaking role does not end when it passes legislation, and often it is oversight that prompts the introduction of legislation. In the words of the Congressional Research Service, "Oversight is considered fundamental to making sure that laws work and are being administered in an effective, efficient, and economical manner. This function is seen as one of Congress's principal roles as it grapples with the complexities of American government."<sup>[52]</sup>

*"We have a responsibility to hold government accountable because the people have a right to know what they get from their government and because they deserve an efficient, effective government that works for them. During my time as Chairman of the House Oversight Committee, I saw time and time again the lengths some would go to avoid transparency or turning over documents or materials that our committee was entitled to."*

- Representative Darrell Issa (R-CA)<sup>[53]</sup>

Congress's lack of investment in itself has significantly hindered its ability to properly conduct federal oversight. In Congressional Undersight, Professor Casey Burgat notes, "Congress's oversight capacity is alarmingly lacking. The Legislative branch simply does not have the levels of staff resources, funding or expertise to conduct effective oversight of the Executive branch, including—and perhaps even especially—on matters of foreign affairs, intelligence and national security. Congressional committees are supremely overmatched by the resources of the executive agencies they are tasked with overseeing, and as a result, they cannot reasonably keep up with the decisions, plans, and results produced by the sprawling military bureaucracy."<sup>[54]</sup>

#### Key takeaways:

- Congressional subpoena power is defunct and requires action to make it effective once again.
- Congressional support offices and agencies, which provide independent, non-partisan information to the Legislative branch, need to be restored to their historic vigor.
- Inspectors General, the independent watchdogs located inside agencies, need further protection.
- Public transparency is a useful mechanism to support Congressional oversight and should be strengthened.

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52 "Congressional Oversight Manual," Congressional Research Service (Updated January 16, 2020) <https://fas.org/sgp/crs/misc/RL30240.pdf>

53 Representative Darrell Issa (R-CA), Press release, "House passes subpoena enforcement bill to strengthen Congress' oversight powers," (Oct. 23, 2017 <https://republicans-judiciary.house.gov/press-release/house-passes-subpoena-enforcement-bill-strengthen-congress-oversight-powers/>

54 "Congress and Foreign Affairs: Reasserting the Power of the First Branch" Casey Burgat, James Wallner, et al. R Street Institute, p. 8 <https://www.rstreet.org/wp-content/uploads/2020/08/Final-Congress-and-Foreign-Affairs.pdf#page=8>

- Agency rulemakings can be a place of particular Executive branch mischief and overreach and require particular attention.

## CONGRESSIONAL ACCESS TO INFORMATION: SUBPOENA POWER AND RESOURCES

The power of Congress to investigate and obtain information is very broad. While there is no express provision in the Constitution that addresses the investigative power, the Supreme Court has recognized that Congress has the power to issue subpoenas because a “legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.”<sup>[55]</sup> If Congress does not have the information it needs, it must have the power to acquire it. A subpoena may be issued by a subcommittee, full committee, or the chamber itself.

Enforcing that subpoena is another matter entirely. The organization Good Government Now describes the problem:

*The refusal of Executive branch officials to comply with congressional subpoenas for documents and testimony has become commonplace. Indeed, recent experience suggests that congressional subpoenas of Executive branch personnel are oftentimes meaningless and clearly not being enforced effectively in the face of determined obstruction. These declining congressional oversight, subpoena enforcement, and contempt enforcement capacities have been growing progressively worse over the past forty years. This situation is intolerable because Congress cannot perform its constitutional duties of oversight of the executive and judicial branches of government if it cannot obtain accurate information from them in timely fashion.*<sup>[56]</sup>

Congress has two tools to enforce contempt: statutory contempt and inherent contempt, but both are problematic at present.

In 1857, Congress enacted a statutory criminal contempt procedure, whereby a person may be fined or jailed for non-compliance with a Congressional request for information or testimony. After a chamber certified a finding of contempt, the Department of Justice must bring the action before a grand jury. In both the Obama and Trump administrations, the Justice Department declined to pursue prosecution, calling into question the effectiveness of the statutory remedy. In addition, the Executive branch has become adept at using non-compliance to draw out the process in the courts, which often results in the Congress expiring before the courts can reach a result on the litigation.

Inherent contempt is the assertion of contempt power on the basis that the power is inherent in the powers provided to the House or Senate by the Constitution. An individual can be brought and tried before the House or Senate and imprisoned if found in contempt, either as punishment or to coerce the individual into compliance. However, this power was considered cumbersome, time consuming, and ineffective. It has not been used in more than 100 years, although there are efforts to revive it.

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55 McGrain v. Daugherty, 273 U.S. 135 (January 17, 1927) <https://www.law.cornell.edu/supremecourt/text/273/135>

56 For more information, see “Inherent Contempt Fines Rule,” Dr. William J. Murphy, Good Government Now (September 22, 2018) <https://goodgovernmentnow.org/2018/09/22/ggn-inherent-contempt-enforcement-rule/>

*“Congress has an explicit constitutional responsibility to conduct oversight. Clearly implied in that duty is our authority to issue and enforce subpoenas. Congress must revive our power of inherent contempt.”*

*- Representative Gerald Connolly (D-VA)*<sup>[57]</sup>

There are a number of proposals<sup>[58]</sup> to either fix the statutory contempt process (which would require passing new legislation in circumstances where any president would likely oppose) or to renew usage of inherent contempt (which the Courts may no longer recognize). Congress does have other oversight powers at its disposal,<sup>[59]</sup> but they can also be slow, hard to use, and require the support of political partisans on the other side of the aisle.

## **SUPPORT OFFICE AND AGENCY INFORMATION ACCESS**

*“Over the last few years, this Administration has weakened Congressional power to conduct oversight. It’s imperative that we repair these systems to safeguard against these kinds of abuses in the future.”*

*- Rep. Katie Porter (D-CA)*<sup>[60]</sup>

During the Watergate era, Congress learned the lesson of not relying on the Executive branch for information. Instead, it beefed up its own investigative agencies, empowered independent overseers in the Executive branch agencies, and strengthened its internal analytical capabilities. In fact, some of these agencies had originally been created as a consequence of progressive-era reforms a half-century earlier. These legislative support agencies provided a foundation in support of a strong Congress, but they too have experienced significant funding cuts. These entities are the Government Accountability Office, the Library of Congress (especially the Congressional Research Service and Law Library), the Congressional Budget Office, the Government Publishing Office (to a lesser extent), and the now-defunded Office of Technology Assessment.

In the era in which we find ourselves, a Congress with young and inexperienced staff relies heavily on its support agencies to conduct oversight.

The Government Accountability Office, which is known as Congress' watchdog, has a large, capable, and experienced staff, although they suffered huge cuts in the number of personnel at the start of the Gingrich era. In addition to diminished resources, they have trouble getting access to information. At a House Budget Committee hearing in March, GAO's general counsel testified that GAO has had “difficulty getting timely responses

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57 Representative Gerald Connolly (D-MD), quote given from The Office of Representative Gerald Connolly for the use in this report, (December 10, 2020).

58 For more information, see “Subpoena and Contempt Powers,” Daniel Schuman, GitHub <https://github.com/DanielSchuman/Policy/wiki/Subpoena-and-Contempt-Powers>

59 For more information, see “When Congress Comes Calling,” The Constitution Project At The Project on Government Oversight (May 23, 2017) <https://archive.constitutionproject.org/documents/when-congress-comes-calling-2/>

60 Representative Katie Porter (D-CA), quote given from The Office of Representative Katie Porter for the use of this paper, (December 10, 2020).

from agencies, and, in some cases, we have not received responses at all.”<sup>[61]</sup> The Intelligence Community, for example, routinely ignores requests for information.

In June 2020, the House Appropriations committee favorably reported the FY 2021 Financial Services and General Government bill, which included report language that requires the Executive branch to respond to GAO within 20 days, grants GAO access to federal employees for interviews, and imposes administrative discipline for noncompliance.<sup>[62]</sup> The language also indicates that Congress be notified of any lapses and if apportionments are not made in the required time. That is, if the Executive branch does not spend money as directed, it has to tell Congress.

Under the bill, GAO would be empowered “through attorneys of their own selection, to bring a civil action in the United States District Court for the District of Columbia.”<sup>[63]</sup> This means GAO, a Legislative branch agency, would not have to rely on the Executive branch. These reforms are an important step in reclaiming congressional power.

Unfortunately, while the legislation has passed the House, the FY 2021 appropriations package will most likely not pass Congress until the next year, if then.

The Congressional Budget Office, established in 1975, provides independent analyses of budgetary and economic issues to support the congressional budget process. Each year, the agency’s economists and budget analysts produce scores of reports and hundreds of cost estimates for proposed legislation. They, too, can have difficulty accessing Executive branch information necessary to do their work. CBO negotiates data sharing agreements with federal agencies, which can be complex to draft and time consuming to negotiate. The ensuing delays could negatively affect CBO’s ability to obtain essential information necessary to provide timely analyses to Congress.

The Congressional Research Service, located in the Library of Congress, is a shadow of its former self. The agency is responsible for providing rapid and detailed analysis to Congress in the form of confidential briefings, memos, and reports. The agency suffered significant funding cuts, but it also changed its culture to avoid saying anything that anyone could find politically controversial.<sup>[64]</sup> Previously, it would give Members and staff the benefit of its expert analysis on the strengths and weaknesses of arguments. Now it has eliminated many of its senior staff and its advice is generally limited to bland equivocations and a refusal to identify which arguments are stronger.

The Office of Technology Assessment provided Science and Technology advice to the Legislative branch for more than 20 years. It created long-form analytical products that engaged in horizon-scanning on important questions like gene research and missile-based defense that provided insights that were valuable for years. While it would not recommend policies, it would provide an analysis of the trade-offs for different paths. The agency was defunded at the start of the Gingrich era for political reasons — Gingrich wanted to keep a promise to defund an agency. There are many proposals to revive OTA or an OTA-like entity,<sup>[65]</sup> especially

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61 [1] Protecting Congress’ Power of the Purse and the Rule of Law, House Committee on the Budget (March 11, 2020) <https://budget.house.gov/legislation/hearings/protecting-congress-power-purse-and-rule-law-0> [2] Testimony from Thomas H. Armstrong, General Counsel, U.S. Government Accountability Office (March 11, 2020) [https://budget.house.gov/sites/democrats.budget.house.gov/files/documents/Armstrong\\_Testimony.pdf](https://budget.house.gov/sites/democrats.budget.house.gov/files/documents/Armstrong_Testimony.pdf)

62 House of Representatives FY2021 Financial Services and General Government Appropriations bill, p. 164 <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/FY21%20FSGG%20Bill%20Chairman%27s%20Mark.pdf#page=164>

63 Id., p. 167 <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/FY21%20FSGG%20Bill%20Chairman%27s%20Mark.pdf#page=167>

64 For more information, see “Why I Quit the Congressional Research Service,” Kevin R. Kosar, Washington Monthly (January/February 2015) <https://washingtonmonthly.com/magazine/janfeb-2015/why-i-quit-the-congressional-research-service/>

65 For OTA and OTA-like entity proposals, see “Science, Technology, and Democracy: Building a Modern Congressional Technology Assessment Office,” Zach Graves and Daniel Schuman (January 2020) <https://ash.harvard.edu/publications/science-technology-and-democracybuilding-modern-congressional-technology-assessment>

in the light that our modern era is so dependent on science and technology that Congress needs independent experts to give it an honest take on what is going on and providing real options to address our nation's challenges.

## INSPECTORS GENERAL

The Inspector General Act of 1978 "established 12 independent Inspectors General (IGs) within Federal agencies to conduct agency oversight and promote program integrity."<sup>[66]</sup> There are now more than 70 federal IGs and 14,000 IG employees fighting government fraud, waste, and abuse. Most of the IGs coordinate their work through the Council of the Inspectors General on Integrity and Efficiency.<sup>[67]</sup>

*"Today's new [GAO] report sounds the alarm on the need to protect the independence of Inspectors General. This report warns against the dangers of the president naming as 'acting' IGs political appointees who are already serving in senior positions under the Department head they are supposed to oversee. This abuse must end."*

- Representative Carolyn Maloney (D-NY)<sup>[68]</sup>

IGs can decide which audits and investigations to undertake, recommend corrective actions, issue subpoenas, receive complaints, and refer criminal and civil matters to the Attorney General. These actions are to be undertaken without improper interference from agency heads, and IGs should have full access to all agency records and materials.

The Project on Government Oversight issued a series of recommendations on the 40th anniversary of the IG Act to strengthen IGs, who already return almost \$17 for every \$1 invested in them.<sup>[69]</sup> The recommendations include addressing IG vacancies, inadequate funding (particularly when an agency receives a surge in funding but an IG's oversight funding remains constant), improved public access to reports, and whistleblower protection.

## TRANSPARENCY AS A MECHANISM FOR ACCOUNTABILITY

It is imperative for Congress to have access to Executive branch information to determine if it is functioning ethically and effectively. To this end, there is a need for direct and indirect transparency for proper oversight. Congress must have the tools to see within the Executive branch, as well as enforcement mechanisms to ensure compliance.

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66 "The Inspector General Act: 40 Years Later, Office of the Inspector General," Social Security Administration (October 11, 2018) <https://oig.ssa.gov/newsroom/blog/oct11-ig-act-anniversary>

67 Mission, Council of the Inspectors General on Integrity and Efficiency <https://www.ignet.gov/content/mission-0>

68 Representative Carolyn Maloney (D-NY), Press release, "Chairs Maloney, Connolly, and Lynch Laud GAO Report Touting Importance of Inspector General Independence," (June 8, 2020) <https://oversight.house.gov/news/press-releases/chairs-maloney-connolly-and-lynch-laud-gao-report-touting-importance-of>

69 "The Watchdogs After Forty Years: Recommendations for Our Nation's Federal Inspectors General," Liz Hempowicz, Peter Tyler, et al, The Project on Government Oversight (July 9, 2018) <https://www.pogo.org/report/2018/07/watchdogs-after-forty-years-recommendations-for-our-nations-federal-inspectors-general/>

To help achieve these goals, Congress should have direct access to real-time data, especially to monitor spending. Also important is indirect transparency to Congress via the public. If data is available and digital, the public and civil society can also conduct oversight and hold the government accountable, acting as an auxiliary to Congress.

There is a lengthy discussion to be had about what information should be provided to Congress or the public automatically, what should be required, and the rare circumstances in which it can be withheld.

## AGENCY RULEMAKING

A special instance of where Congress must engage in oversight over the Executive branch is agency rulemakings. Laws enacted by Congress usually contain gaps in how they are to be implemented. Agencies engage in a rulemaking process to fill in those gaps. At times, those legislative gaps can be incredibly broad, with the agency responsible for putting into effect very broad policy directives. In doing so, agencies often express the preferences of the Executive branch and not the wishes of Congress in making policymaking determinations, also they can even change their views as to what was commanded by Congress. Indeed, there is a pernicious (and erroneous) school of thought that the agencies are merely functionaries of the president, known as unitary-executive theory, which discounts the fact that the agencies are created by Congress to accomplish its purposes.<sup>[70]</sup>

Congress has attempted to deal with this principal-agent problem. In the 1990s, it enacted legislation, the Congressional Review Act, that would allow Congress to overturn agency rulemakings.<sup>[71]</sup> In practice, however, this law is significantly flawed as it only works when the Legislative and Executive branches are controlled by the same political party. The law also set up a mechanism by which GAO monitors major agency rulemakings.

In theory, Congress can overturn agency rules by legislating and prescribe what is to be done. As a practical matter, however, this is difficult to accomplish because it requires the passage of a new law, which requires a high level of agreement about what is to be done.

There is a tension here. It is not unusual for Members of Congress to have to compromise on what legislation can be enacted, which means the choice is between passing a law that leaves gaps for agencies to fill or doing nothing. Agencies also have expertise that Congress currently lacks and they can be more nimble in updating regulations as circumstances change. On the other hand, agencies are engaged in a legislative role – writing laws (i.e. regulations) – and those decisions may be better made by the people's elected representatives than by agency bureaucracy.

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70 For more, see “Building a Legislative-Centered Public Administration,” David H. Rosenbloom. (2000).

71 “The Congressional Review Act (CRA): Frequently Asked Questions,” Congressional Research Service (January 14, 2020), <https://www.everycrsre.com/reports/R43992.html>

## IV. Foreign Policy & National Security

As noted earlier, the U.S. Constitution divides the powers of the federal government among the legislative (Article I), executive (Article II) and judicial (Article III) branches of government.

Article I grants lawmaking power to Congress and enumerates several congressional foreign affairs powers, including to “regulate commerce with foreign nations,” “declare war,” and the “regulation of the land and naval forces.” Beyond these, Congress also has an oversight role, with authority to conduct hearings and investigations into foreign policy and national security concerns.

Article II enumerates the powers of the president in the conduct of foreign affairs and national emergencies. In contrast to Article I, Article II is brief.<sup>[72]</sup> It grants the executive the powers to make treaties and appoint ambassadors and makes the president “commander in chief of the army and navy.”

Nevertheless, the Executive branch has steadfastly usurped greater control over foreign affairs and national security. Ever since the 1980s, congressional engagement in foreign policy and national security has dramatically declined.<sup>[73]</sup> As Congress has grown more polarized, and the Executive branch has vastly expanded in size and scope, Congress has deferred more powers to the Executive branch. NYU’s Brennan Center for Justice has compiled a list of no fewer than 123 statutes that give the president extraordinary powers over national emergencies.<sup>[74]</sup> At the same time, presidents have freely exercised the authority to make war and dictate foreign policies with limited interference from Congress. There has been a significant decrease in foreign policy oversight hearings by both the Foreign Relations and Armed Services committees in both chambers.<sup>[75]</sup>

*“If Congress is troubled by recent emergency declarations made pursuant to the National Emergencies Act, they only have themselves to blame. Congress gave these legislative powers away in 1976 and it is far past time that we as an institution took them back”*

– Senator Mike Lee (R-UT)<sup>[76]</sup>

Congress is not fulfilling its constitutional responsibilities to oversee foreign policy and national security, as is the case pretty much across the board on most oversight matters. As illustrated below, from a peak in the 1970s, the total number of congressional public hearings has steadily declined, reaching a low point today. In the realm of national security, the infrequent hearing rarely lasts more than four hours.

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72 For more information, see “The Foreign Policy Role of the President: Origins and Limitations,” Jody S. Fink, Hofstra Law Review, Vol. 11, Issue 2, Article 6 (1983) <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1476&context=hlr>

73 “At a Crossroads, Part III: Reassuring Congress’ Oversight Role in Foreign Policy,” Tommy Ross, War on the Rock (June 19, 2018) <https://warontherocks.com/2018/06/at-a-crossroads-part-iii-reasserting-congress-oversight-role-in-foreign-policy/>

74 “Emergency Powers,” Brennan Center for Justice <https://www.brennancenter.org/issues/bolster-checks-balances/executive-power/emergency-powers>

75 “The Long Decline of Congressional Oversight,” Linda Fowler, Foreign Affairs (November 15, 2018) <https://www.foreignaffairs.com/articles/2018-11-15/long-decline-congressional-oversight>

76 Senator Mike Lee (R-Utah), Press release, “Sen. Lee introduces ARTICLE ONE Act,” (March 12, 2019) <https://www.lee.senate.gov/public/index.cfm/2019/3/sen-lee-introduces-article-one-act-to-reclaim-congressional-power>

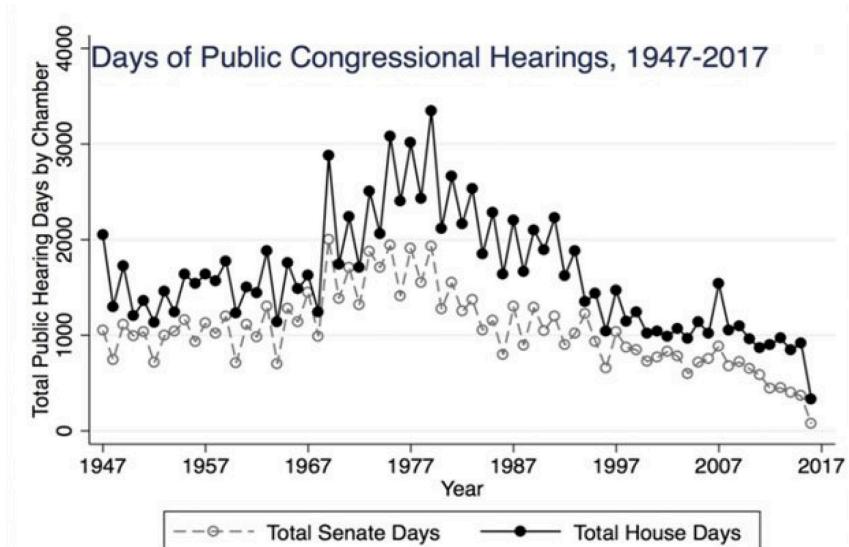


Figure 11 – (The Long Decline in Congressional Oversight, Foreign Affairs.)

Key takeaways:

- Congressional oversight of foreign policy is in grave decline.
- There are several causes for that decline, including polarization, a lack of expertise, insufficient Executive branch cooperation, and undue deference to the Executive branch.
- There is much Congress can do to restore the proper balance, including increasing the number and expertise of its own staff, strengthening its ability to get answers to its questions, and changing the mechanisms for how the Legislative branch can check Executive branch decisions.

## CURRENT INSTITUTIONAL FRAMEWORK FOR CONGRESSIONAL OVERSIGHT

Though a wide range of laws affect the balance of power between Congress and the president when it comes to foreign policy and national security, two laws in particular set the general institutional framework. Under both the War Powers Act and the National Emergencies Act, Congress may exercise veto authority over decisions by the president to take military action abroad or declare national emergencies at home or abroad. Under the War Powers Act, the president may initiate military action for up to 90 days without a declaration of war by Congress. The Act, however, does not specify what constitutes congressional approval nor does it clarify what Congress can do if the president refuses to comply. Under the National Emergencies Act, Congress may veto most emergency declarations by the president after a period of time.

Today, Congress routinely fails to exercise its veto authority over foreign policy and national security actions. Congressional approval of funds for military actions is viewed as congressional consent even without an actual declaration of war. And an increasingly polarized Congress can rarely muster the votes needed to rescind a presidential declaration of emergency.

Congress has relegated oversight of foreign policy and national security issues to specialized standing committees.<sup>[77]</sup> Many different committees exert jurisdiction over some particular aspects of foreign policy and national security, such as trade or resource management. However, the Armed Services Committees in the House and Senate, and the Foreign Relations Committee in the Senate and Foreign Affairs Committee in the House, oversee the most important Executive branch agencies in foreign affairs, the State Department and Department of Defense. As noted above, these committees have become less active over recent decades.

## CAUSES OF THE DECLINE IN CONGRESSIONAL OVERSIGHT

Congressional oversight of foreign policy and national security has suffered from a variety of factors. Some of the key factors undermining congressional oversight include:

- Political polarization of Congress. There is no clear majority in Congress, and members are more sharply divided along party lines and unwilling to work across party aisles.<sup>[78]</sup>
- Inadequate knowledge of foreign affairs and national security. Though there is no definitive list of Executive branch agencies and divisions, the number and scope has skyrocketed, yet congressional staff capacity has declined.<sup>[79]</sup> Furthermore, the expansion of executive agencies has meant increasing specialization. Divisions and agencies have been created that focus on very specific issue areas, while congressional staff are much more generalized in their focus, which gives the executive a corner on expertise.
- Obstruction of congressional deliberations. Deliberations by both Congress as a whole and its committees are plagued by Congress' inability to secure information and testimony from the Executive branch on a timely and thorough basis, with executive agencies frequently refusing to submit to congressional requests for information or even comply with congressional subpoenas for records and testimony.<sup>[80]</sup>
- Excessive legislative deference to the Executive branch. Over recent decades, Congress has relegated to the president more and more powers to determine foreign affairs and national security policies.<sup>[81]</sup>

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77 "U.S. Foreign Policy Powers: Congress and the President," Jonathan Masters, Council on Foreign Relations (March 2, 2017) <https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president>

78 "Improving Congressional Capacity to Address Problems and Oversee the Executive Branch," Molly E. Reynolds, The Brookings Institution (December 4, 2019) <https://www.brookings.edu/policy2020/bigideas/improving-congressional-capacity-to-address-problems-and-oversee-the-executive-branch/>

79 "How Many Federal Agencies Exist? We Can't Drain The Swamp Until We Know," Clyde Wayne Crews Jr., Forbes (July 5, 2017) <https://www.forbes.com/sites/waynecrews/2017/07/05/how-many-federal-agencies-exist-we-cant-drain-the-swamp-until-we-know/#e97b76b1aa28>

80 "Trump's Troubling Rebuke of Congressional Oversight," Victoria Bassetti and Tim Lau (May 7, 2019) <https://www.brennancenter.org/our-work/analysis-opinion/trumps-troubling-rebuke-congressional-oversight>

81 "Structured-Induced Deference or Equal and Coordinate Actor: Congressional Influence on American Foreign Policy," Eric Paul Svensen, American Politics Research, Volume 47, no. 1, p. 88–118 (January 2019) <https://journals.sagepub.com/doi/pdf/10.1177/1532673X18782204>

## **OPTIONS FOR CONGRESS TO CHECK THE POWERS OF THE EXECUTIVE ON FOREIGN AFFAIRS AND NATIONAL SECURITY PRIORITIES?**

Congress may have limited options for addressing some of the global factors hindering its oversight role in foreign affairs and national security issues, such as political polarization, but that does not mean congressional reforms are futile. Several options are available for Congress to reassert its role in the constitutional framework. These reforms include:

### *Enhancing Congressional Staff Capacity*

Providing congressional offices and committees with the resources to hire more staff and the means to train staff to become effective overseers of the Executive branch should be high on the list of reforms. Enhancing congressional access to expertise could be bolstered with a congressional support agency in specialized issue areas similar to what is found in the Executive branch.

### *Strengthen Congressional Authority to Enforce Compliance for Records Requests and Subpoenas*

This could be achieved through at least two different means. One would be reinvigorating Congress' inherent contempt power, which, as discussed above, is an existing but rarely used legal authority to levy fines or other punishments on persons who refuse to comply with congressional requests or orders.<sup>[82]</sup> Alternatively, Congress currently turns to the courts for enforcement of congressional orders but this is a slow process. Congress could be granted expedited court review for compliance to congressional subpoenas and orders.<sup>[83]</sup>

### *Modify Legislative Procedures on Checks and Balances*

Mandate that such official actions by the Executive branch, such as presidential declarations of emergencies and military actions abroad must be approved, rather than vetoed, by Congress within a specified period of time in order to continue. Clarify that the actual procedures for such approval must be done by an explicit vote of Congress. Even in a polarized atmosphere, an approval threshold will compel Congress to deliberate and exercise oversight. Review and, if appropriate, repeal other statutes that circumvent ordinary lawmaking procedures in deference to the Executive branch.

### *Approve Foreign Assistance Authorization Legislation*

Foreign assistance authorization bills can be used to establish priorities and expectations for the Executive branch, particularly for such departments as State and Defense. This avenue is currently available to Congress but it is not regularly employed.

### *Facilitate Information Sharing*

Many congressional committees have overlapping jurisdictions. A system of information sharing and cooperation between committees could be implemented to improve oversight. Similarly, routine briefings between intelligence agencies and committee leadership could be implemented on a systematic basis.

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82 "Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure," Congressional Research Service (May 12, 2017) <https://crsreports.congress.gov/product/pdf/RL/RL34097>

83 "House Report 115-360: Congressional Subpoena Compliance and Enforcement Act of 2017," U.S. House of Representatives (October 23, 2017) <https://www.govinfo.gov/content/pkg/CRPT-115hrpt360/html/CRPT-115hrpt360.htm>

### *Ensure Congressional Staff Have Appropriate Clearances*

While the Executive branch hands out high level clearances to hundreds of thousands of staff and contractors, very few Congressional staff are provided sufficient clearances to access information held by the Executive branch.<sup>[84]</sup> An obvious fix is to redress the balance by ensuring that many more Congressional staff have the necessary clearances to do their jobs.

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84 “A Primer on Congressional Staff Clearances,” Daniel Schuman and Mandy Smithberger, Demand Progress and the Project on Government Oversight (February 5, 2020) [https://s3.amazonaws.com/demandprogress/reports/A\\_Primer\\_on\\_Congressional\\_Staff\\_Clearances\\_2020-02-05.pdf](https://s3.amazonaws.com/demandprogress/reports/A_Primer_on_Congressional_Staff_Clearances_2020-02-05.pdf)

## V. Power of the Purse

Checks and balances between the three co-equal branches of the federal government is one of the most critical pillars of the American democratic experiment. The Founders of the U.S. Constitution set up the system of various checks and balances to ensure that one branch of government does not dominate federal governance and supersede its constitutional limits on power. Perhaps the most critical constitutional authority of Congress to keep the Executive branch in check is the “power of the purse.”

The Founders firmly believed that giving Congress the authority to make funding decisions builds a firewall against the Executive branch, and the president in particular, from usurping too much control over the federal government. An unchecked Executive branch would endanger the democratic system with the same monarchical authority that the Founders sought desperately to contain. This power is outlined in Article I, Section 9, Clause 7 of the U.S. Constitution (known as the “Appropriations Clause”) and Article I, Section 8, Clause 1 (known as the “Taxing and Spending Clause”).<sup>[85]</sup>

*“When Congress appropriates federal dollars expect those dollars to be used as directed. We expect appropriations laws to be upheld. And we expect the Administration to be transparent in its actions. But for too many years, presidents of both parties have encroached on the power of the purse as they have tried to expand their budgetary powers, and in some cases substitute their judgement for that of Congress. “*

- Senator Patrick Leahy (D-VT)<sup>[86]</sup>

Two permanent fiscal statutes are on the books designed to protect Congress’s constitutional power of the purse. One is the Antideficiency Act that prohibits Executive branch agencies from spending funds that Congress has not approved or allocated to the agencies.<sup>[87]</sup> The other is the Impoundment Control Act that requires agencies to spend the funds allocated to them by Congress as instructed and restricts the president’s authority to override the lawful instructions by Congress.<sup>[88]</sup>

However, the Executive branch has steadily encroached on congressional powers to control the federal budget, as presidents of both parties have usurped greater discretion over spending decisions, often even contradicting or ignoring the explicit will of Congress.

**Key takeaways:**

- Congress is the body that should be making spending decisions.

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85 [1] “Appropriations Clause,” Kate Stith, National Constitution Center <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/756> [2] “Spending Power,” Constitution Annotated, Congressional Research Service [https://constitution.congress.gov/browse/essay/artI\\_S8\\_C1\\_2/](https://constitution.congress.gov/browse/essay/artI_S8_C1_2/)

86 Senator Patrick Leahy (D-VT), Press release, “Leahy unveils legislation to defend the power of the purse,” (June 3, 2020) <https://www.leahy.senate.gov/press/leahy-unveils-legislation-to-defend-power-of-the-purse>

87 “Antideficiency Act Resources,” Government Accountability Office <https://www.gao.gov/legal/appropriations-law-decisions/resources>

88 “The Impoundment Control Act of 1974: What Is It? Why Does It Matter?” House Committee on the Budget (October 23, 2019) <https://budget.house.gov/publications/report/impoundment-control-act-1974-what-it-why-does-it-matter>

- The Executive branch has worked to usurp Congressional powers by refusing to spend money authorized by Congress or spending it for purposes unauthorized by Congress.
- Congress can reassert control by imposing greater reporting requirements, changing the mechanisms by which decisions to spend or withhold money are made, and creating disincentives for non-compliance.

## HOW HAS THE EXECUTIVE BRANCH ENCROACHED ON CONGRESSIONAL SPENDING AUTHORITY?

Presidents of both parties over the decades have enlisted a variety of means to usurp the power of the purse from Congress. The most recent mechanism was when President Donald Trump exercised his authority to declare a national emergency under the National Emergencies Act of 1976 to appropriate funds for his border wall policy priority.<sup>[89]</sup> Only twice before has a president invoked emergency declarations to reallocate funds and both were for wartime projects. This is the first time such a reallocation has been made under the National Emergencies Act for a policy priority after Congress specifically refused to do so legislatively.

### *Apportionment*

An obscure but influential statutory tool that presidents have employed to gain authority over spending decisions is “apportionment.”<sup>[90]</sup> Congress granted a minor technical authority in the Antideficiency Act to the president via the Office of Management and Budget (OMB) to adjust the flow of money so that agencies could avoid running out of funds before the end of the fiscal year. OMB has increasingly used this authority, on behalf of the president, to impose its own spending priorities over those of the agencies and even Congress. The withholding of aid to Ukraine in 2019 is one recent example of apportionment by the Executive branch.

### *Rescissions*

Rescissions is another controversial tool used by the Executive branch to avoid spending funds allocated by Congress.<sup>[91]</sup> The Executive branch may seek congressional approval to rescind spending decisions. But OMB has asserted the authority to withhold funds in the last two months of a fiscal year until they expire, regardless of congressional instructions.

### *Transfers and reprogramming*

Transfers and reprogramming of funds also are often employed by the Executive branch.<sup>[92]</sup> Originally conceived by Congress as another technical authority to agencies to smooth the budget process, transfers and

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89 “Trump is Undermining Congress’s Power of the Purse. Republicans Must Vote to Stop it,” Marc A. Thiessen, The Washington Post (March 7, 2019) [https://www.washingtonpost.com/opinions/trump-is-undermining-congresss-power-of-the-purse-republicans-must-vote-to-stop-it/2019/03/07/f3857e40-40fb-11e9-9361-301fb5bd5e6\\_story.html](https://www.washingtonpost.com/opinions/trump-is-undermining-congresss-power-of-the-purse-republicans-must-vote-to-stop-it/2019/03/07/f3857e40-40fb-11e9-9361-301fb5bd5e6_story.html)

90 “Section 120—Apportionment Process,” Obama White House (2016) [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/a11\\_current\\_year/s120.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/a11_current_year/s120.pdf)

91 “Rediscovering Rescissions,” Gordon Gray, American Action Forum (April 4, 2018) <https://www.americanactionforum.org/insight/rediscovering-rescissions/>

92 “Transfer and Reprogramming of Appropriations: An Overview of Authorities, Limitations, and Procedures,” Congressional Research Service (June 6, 2013) [https://www.everycrsreport.com/files/20130606\\_R43098\\_2e2663208c29af0cb779ec92d9147f17f4311b54.pdf](https://www.everycrsreport.com/files/20130606_R43098_2e2663208c29af0cb779ec92d9147f17f4311b54.pdf)

reprogramming have been increasingly used to override congressional spending decisions. Federal law allows agencies to “transfer” funds from one appropriation to another, and “reprogramming” funds from one purpose to another, under limited circumstances. But the lack of public information of such movement of funds makes it difficult for Congress to monitor and intervene in such spending decisions.

Finally, and perhaps most importantly, is self-policing by the Executive branch for compliance with the budget process. The Executive branch claims the authority of implementing and enforcing laws, which creates the risk that laws duly passed by Congress, including budgetary matters, sometimes are derailed by self-serving interpretations by Executive branch agencies, the Department of Justice or White House Counsel, frustrating the will of Congress. These contradictory interpretations of the law, say for example of the Antideficiency Act, often are a source of friction between the General Accounting Office, which works for Congress, and OMB, which works for the Executive branch.<sup>[93]</sup> An administration closely under the political influence of the White House across agencies can be particularly noncompliant with congressional instructions.

### *Options for Congress Reasserting Its Power of the Purse?*

The problems of executive overreach over spending decisions have been simmering for decades. Congress has usually found itself on the defensive. Nevertheless, Congress has the ability to exert its proper constitutional role in the budget process through legislation and even rulemaking. Some steps that should be considered to reclaim Congress’s power of the purse are discussed below.

#### *Withhold Salaries*

Appropriations bills may include language allowing the Department of Treasury to withhold or recover the salary of a federal official responsible for causing noncompliance with congressional instructions on spending decisions. Such actions should target the personal salaries of officials responsible for noncompliance with congressional instructions or violations of the Antideficiency Act or Impoundment Control Act as determined by the GAO.

#### *Require Congressional Approval of Emergency Declarations*

Currently, presidential declarations of emergency may be rejected by Congress after a set period of time. But the congressional role should be flipped. Instead of trying to rally a congressional veto of an emergency declaration, any such declaration should be required to be approved by Congress after a set period of time. Declarations that fail to receive congressional approval should expire.

#### *Expedited Review*

Establish a system of expedited court review of alleged violations of the Antideficiency Act, Impoundment Control Act, or failure to comply with congressional instructions on spending bills. The Executive branch may wield authority to implement and enforce the laws, but Congress should have expedited access to court review of any such decisions by the Executive branch to interfere with the power of the purse.

#### *Require Congressional Approval of Rescissions*

Make OMB release funding at least 90 days before it expires, whether or not spending is being delayed by rescission or deferral request.

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93 “White House Tells Agencies They Can Ignore Legal Decisions on Spending Violations,” Eric Katz, GovExec (Nov. 19, 2019) <https://www.govexec.com/management/2019/11/white-house-tells-agencies-they-can-ignore-legal-decisions-spending-violations/161395/>

### *Enhance Transparency*

Mandate that OMB make apportionments publicly available and publish the positions of officials delegated with apportionment authority.

Require the Executive branch to report to Congress on alleged violations of the Antideficiency Act or Impoundment Control Act identified by GAO.

Require all agencies to publicly disclose amounts and explanations of transferred, reprogrammed or cancelled funds or new obligations acquired.

Ensure that opinions by the Department of Justice's Office of Legal Counsel, which often secretly interprets the law in favor of the Executive branch, is required to make those opinions publicly available, including ones that relate to spending matters.

### *Grant GAO Investigative Enforcement Authority*

When it comes to Congress's power of the purse, a power vested in the U.S. Constitution, the GAO should be granted enforcement authority to compel agencies to cooperate promptly with GAO investigations into compliance with appropriations and budget laws and require agencies to report violations discovered by GAO to Congress.

# Conclusion

As Benjamin Franklin left the Constitutional Convention in 1787 he was asked "Doctor, what have we got? A republic or a monarchy?" He famously replied "A republic, if you can keep it."<sup>[94]</sup>

The history of political power is always about who has it, who wants it, and to whom it is denied. Our American experiment is grounded in an 18th century response to the problems of that era, and it has evolved in fits and starts along the way. Were we to construct a modern political system *ex nihilo* today, it is doubtful it would look anything like our current arrangement. The Constitution provides both a framework for change and a framework for continuity.

Recent decades have seen a shift in power to the president, to concentrated wealth, and to the elites. In many ways, this is a return to our roots, where a handful ruled the many. This system of government, with the trappings but not the actuality of democratic governance, even has a cute phrase: illiberal democracy. This is an outcome we must avoid.

Congress is the only political institution that has enough inherent power to make room for everyone at the table. It is the only institution that is capable of implementing lasting reform. Congress is the vehicle for reform and the vehicle for oppression. But in the absence of a strong Congress, we are at the mercy of the vagaries of the president and the non-democratic forces in our society. If we are to have a say in our collective fate, we must strengthen and modernize the one institution that can legitimately transform popular will into law.

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<sup>94</sup> "A republic, if you can keep it": Did Ben Franklin really say Impeachment Day's favorite quote?" Washington Post (December 18, 2019) <https://www.washingtonpost.com/history/2019/12/18/public-if-you-can-keep-it-did-ben-franklin-really-say-impeachment-days-favorite-quote>

