



# A BETTER WAY

OUR VISION FOR A CONFIDENT AMERICA

The Constitution

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## INTRODUCTION

The Constitution separates the powers of government to guard against the arbitrary use of power. James Madison warned that “[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may be justly pronounced the very definition of tyranny.”<sup>1</sup> So liberty itself is at stake when any of the branches violates the separation of powers.<sup>2</sup> But it is likewise in jeopardy when a branch fails to exercise its power. Madison warned that the Constitution is a “mere parchment barrier” unless each branch asserted its powers to keep the others in check.

The people granted Congress the power to write laws, raise revenues, and spend and borrow money on behalf of the United States. There is no power more consequential, and so the entire House of Representatives and one-third of the Senate face the voters every two years. But more than that, frequent elections allow the people to have a say in their government’s decisions.

Yet for decades, Congress has let this power atrophy—thereby depriving the people of their voice.

The executive and judicial branches have vastly increased their power—sometimes with and sometimes without Congress’s consent. In addition, the regulatory state has grown into a sort of fourth branch, which though part of the executive has accumulated all three powers—to make, enforce, and interpret the law. This is the very danger that Madison warned against. This task force seeks to right this constitutional imbalance and return power to the people’s elected representatives by:

- reestablishing and enforcing limits on agency authority;
- reforming the rulemaking process;
- exercising the power of the purse; and
- conducting more robust oversight of the executive branch.

### Reestablish and Enforce Limits on Agency Authority

One of the best tools that Congress can use to hold the president accountable is an authorization bill. This legislation is a grant of authority to establish or change an agency or program for a fixed or indefinite period of time. It can set forth duties, functions, organizational structure, and responsibilities for agency officials. By passing an authorization bill before funding an agency, Congress can define—and thus limit—the agency’s powers and hold up its performance to public scrutiny. For this reason, the very first Congress wrote authorization bills for the Departments of State, Treasury, and War.

A more modern example is the annual National Defense Authorization Act. The comprehensive bill gives detailed instructions to the government’s largest agency, the Department of Defense. It facilitates meaningful oversight because results can be measured against Congress’s expectations and, because Congress approves the bill every year, it can quickly correct abuses. But other agencies with vast rulemaking powers have no authorizing statute at all—most notably, the Environmental Protection Agency.

The Federal Records Act (FRA), which is only in part an agency authorizing statute, and the Freedom of Information Act (FOIA), also help to keep agencies in check. FRA requires the orderly creation and retention of documents to make agencies more accountable for their decisions. Likewise, FOIA allows the media and public to put sunshine on agencies. Important updates to these laws can add to the effectiveness of individual agency authorizations.

### Reform the Rulemaking Process

The harms of excessive red tape are well known: It hurts job creation, investment, wages, competition, and economic growth. Less well understood is that federal regulations hold the force of law—they are laws created by the executive branch alone.

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<sup>1</sup> (The Federalist 47).

<sup>2</sup> (J. Kennedy, 524 US 417, 449)

A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute. When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law.<sup>3</sup>

There are a number of good reasons why Congress may want to delegate rulemaking authority to agencies. Some agencies have special expertise in developing the technical rules necessary to administer a law. And usually, rulemaking must follow a process that allows for public comment under the Administrative Procedure Act (APA).

But when the grant of authority is too broad or open-ended, when the agency skirts the APA requirements, or when the courts reviewing a challenged regulation defer too much to an agency's supposed expertise, the agencies can abuse their power. As a result, agencies have issued rules that are too numerous to read and too complex to understand by anyone except experts, who constantly disagree.

Congress bears much responsibility for the rise of this massive, unaccountable bureaucracy. While it cannot undo this decades-long development in one fell swoop, it should take immediate action to restore its authority by explicitly authorizing agency activity and by limiting its delegation of lawmaking powers.

### **Exercise the Power of the Purse**

When Congress is unable to reach agreement on annual appropriations bills, it forfeits its ability to examine every program and activity of an agency and to make cuts or increases as good public policy requires. And when appropriations bills are not enacted, and Congress resorts to a stop-gap measure, called a continuing resolution, even for a short time, the result is greater inefficiency and dysfunction. For example, an agency cannot start new projects or may be forced to continue obsolete functions. It also allows the executive branch to act with great latitude. One Supreme Court Justice wrote about the need for Congress to exercise its spending authority: "It follows that if a citizen who is taxed has . . . the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened."<sup>4</sup> Only if Congress passes individual spending bills covering discrete functions of the executive branch can the people truly regain control of their government.

### **Conduct More Robust Oversight of Agency Actions**

Congress first used its oversight authority in the St. Clair investigation of 1797. After the Army's tragic defeat under the command of Major General Arthur St. Clair, Congress demanded access to people and documents to determine what had gone wrong. The House considered passing a resolution that would have required the President to conduct an inquiry, but instead it decided to investigate the matter itself. Congressman Hugh Williamson argued "an inquiry into the expenditure of all public money was the indispensable duty of this House. He proposed the appointment of a select committee to inquire and report." By a vote of 44–10, the House "resolved that a committee be appointed to inquire into the causes of the failure of the St. Clair [expedition] and that said committee be empowered to call such person, papers, and records, as may be necessary to their inquiry."

Ever since, the courts have respected this assertion of power. In *Eastland v. United States Serviceman's Fund*, the Supreme Court described the extent of congressional oversight: "[The] scope of its power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." Likewise, in *Watkins v. United States*, the Court ruled that the "power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."

House committees must continue to conduct robust oversight of laws, programs, and agencies within their jurisdiction, as required by House Rules. The House should also pursue other reforms, such as expedited access to federal courts to enforce subpoenas, to reassert the separation of powers.

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<sup>3</sup> *National Latino Media Coalition v. Federal Communications Commission*, 816 F.2d 785, 788 (D.C. Cir. 1987).

<sup>4</sup> *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring).

## REESTABLISH AND ENFORCE LIMITS ON AGENCY AUTHORITY

### Regular Reauthorizations or Terminations of Federal Programs

**Proposal: Require the chair of each authorizing committee to make recommendations for the disposition of unauthorized programs, agencies, and departments within his or her jurisdiction. All such recommendations should be included in the committee oversight plans.**

Once authorizations of appropriations are in place, discretionary funding is then provided separately in annual appropriation laws. Currently, many federal agencies and programs are being funded even though their statutory authorizations have expired. The Organizational Task Force, which was convened by the Speaker to review potential reforms to improve House and Republican Conference rules, should continue to evaluate this problem and consider ways to encourage committees to do more routine authorizing. Congress must return to periodically evaluating the need for each agency and how well it is performing before reauthorizing or terminating it. Chairmen can help ensure this happens by including a provision sun setting such an authorization, agency, office, or program in any bill establishing or continuing an agency, office or program.

**Proposal: Encourage every Member of Congress to work with committee chairs to authorize and reform programs, as well as reiterate Existing ways to address the unauthorized appropriations and legislative provisions in appropriations bills.**

Each year, the non-partisan Congressional Budget Office (CBO) reports to Congress on all funded programs and activities for which authorizations have expired and all those for which authorizations will expire in the current fiscal year. In its January 2016 report, CBO said that Congress spent about \$310 billion in fiscal year 2016 on these kinds of programs. But the problem is actually much broader, as CBO Director Keith Hall recently testified:

The report does not list every program and activity that is funded without an authorization because tracking all expiring organic legislation would be virtually impossible; nor does the report include appropriations that may have an organic authorization but have never had an explicit authorization of appropriations. In general, there is no well-defined categorization that links appropriations for many individual programs and activities to enabling authorizations.

For these very reasons, we must use the expertise of our standing committees to identify and address these unauthorized programs. But every Member can address this issue through the appropriations process. Through the robust process that the Committee on Rules has provided for consideration of appropriations bills, any Member of the House may offer an amendment to strike an appropriation from a bill—and with 218 votes, any provision of the bill may be stricken. Raising the profile of unauthorized appropriations and building coalitions can ensure real change.

Another useful legislative tool is the Arney Protocol, which allows the chair of the committee of primary jurisdiction to request that the Rules Committee leave a specified provision in an appropriations bill exposed to a point of order under clause 2 of rule XXI (unauthorized appropriations or legislating). If the Rules Committee leaves such a provision exposed to appoint of order on the House floor, any Member may raise the point of order and, up on a ruling by the Chair, strike the provision from the bill without a vote. Because of the collaborative relationship between the Appropriations Committee and authorizers, which has substantially improved in recent years, the Arney Protocol has only been invoked 13 times since the beginning of the 112th Congress.

The Arney Protocol allows the Rules Committee to ensure that the jurisdictions of House committees are respected, while also allowing important legislative initiatives to proceed. With the growing interest in reducing the number of unauthorized programs, Members should work closely with the committee chairs to address their concerns. The Congress as a whole, and the House in particular, must rededicate itself to renewing authorizing legislation that allows programs to continue.

## Establish Best-Drafting Practices to Limit Ambiguity in Legislation and Enforce Congressional Intent

**Proposal: Congress must draft legislation more clearly to limit executive discretion and to ensure proper consultation with affected parties. Legislation should also include precise language detailing who a law is designed to benefit, in what way, and for what period of time.**

Agencies routinely exploit vaguely worded language or ignore the stated purpose altogether when promulgating regulations. These abuses occur in the rulemaking process and in executive actions taken to sidestep the rulemaking process altogether. Congress can limit the abuse of executive authorities by enacting clear and specific laws. If Congress also includes specific language detailing who a law is designed to benefit, it will help shed light on who has standing in the courts to challenge executive overreach.

At the beginning of the 113th Congress, the House rules package included a provision requiring all committees to include in their committee reports that accompanied bills a list of directed rulemakings required by the legislation. This was intended, in part, to require committees to be more mindful about how the executive branch will interpret congressional intent through the rulemaking process. Congress, however, must also be clear about what it does not intend a law to do.

To this end, Members and committees should follow best practices in crafting legislation to both ensure faithful execution of the laws and to limit unnecessary regulatory burdens. Bill sponsors should communicate these goals to those assisting in the drafting of legislation, including the Office of Legislative Counsel, the executive branch, and outside groups. To encourage the broad use of these best practices, the Committee on House Administration should coordinate with the Office of Legislative Counsel and convene seminars for Member offices and, separately, for committee staff on bill drafting.

Best drafting practices could include:

- 1) specific and prescriptive language supporting a well-defined congressional policy so that regulations are not necessary and executive discretion is confined
- 2) an unambiguous statement that the relevant agency cannot issue regulations (or guidance intended to substitute for regulations) to implement the law
- 3) for any bill that does authorize new rulemaking—
  - a requirement that regulations be written in plain English and be made available online;
  - a requirement that before any new major regulation may be imposed, the regulation must be submitted to Congress for an up-or-down vote;
  - a prerequisite that appropriate congressional committees be consulted before any new regulation is proposed;
  - a requirement that agencies use the least costly methods of fulfilling congressional mandates and assure accountability for regulatory costs and burdens (pending Administrative Procedure Act reforms);
  - an obligation that meaningful consultation with relevant state and local governments occur before a regulation is proposed, to avoid duplication, to minimize conflicts with state and local programs, to determine whether a regulation needs to be geographically tailored, and to assess more realistically intergovernmental impact costs under the Unfunded Mandates Reform Act;
  - a limitation on major “midnight rules” not necessary to protect human health, safety, national security, or constitutional rights;
  - strong authority for judicial review that strengthens a court’s ability to invalidate an unsupported or over-reaching regulation; and
  - a requirement that agencies and, in certain instances, the Inspectors General, establish a review plan for significant or major rules arising out of the bill that assesses the continued need for the rule and its economic impact and that the agencies report back to the committees of jurisdiction to determine whether to keep the rule on the books, sunset the regulation, or authorize the agency to update it.<sup>5</sup>

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<sup>5</sup> H.R. 1155, the “SCRUB Act” sponsored by Rep. Jason Smith (MO-8) passed the House of Representatives. The bill created a commission to review existing federal regulations in order to determine which ones can be repealed, reducing the regulatory burden on the U.S. economy.



## Strengthen Congress's Tools to Monitor the Executive Branch

**Proposal:** Pass a law requiring any federal official who establishes or implements a formal or informal policy to refrain from enforcing a federal law, or who becomes aware of such a policy, to report to Congress on the reason for the non-enforcement.

One glaring failure of this administration has been transparency, including its failure to tell Congress when it was no longer enforcing certain laws. The Justice Department is required by statute to report to Congress when it decides it will no longer enforce a law believed to be unconstitutional.<sup>6</sup> This is another law the administration has failed to follow. Thus, existing requirements should be extended more broadly to other agencies and applied beyond solely constitutional objections by the executive branch.<sup>7</sup>

**Proposal:** Enact a judicial procedure permitting the House, the Senate, or both chambers together to receive expedited review of a lawsuit against the executive branch for failure to execute the law.

Currently, the courts are considering a case brought by the House against the Department of Health and Human Services. The House authorized the Speaker to commence litigation to challenge the administration's spending money without Congress's approval. In another case, the Supreme Court is considering whether the President violated the Take Care Clause of the Constitution, Article II, Section 3, which requires that the President take care that the laws be faithfully executed. Pursuing cases such as these is vital to ensuring that Congress's constitutional powers are not undermined by the executive branch and should be vigorously pursued to the Supreme Court if necessary.

We can enhance this tool by passing legislation that could provide for expedited consideration of any such lawsuit, first through a three-judge panel at the federal district court level and then by providing for direct appeal to the United States Supreme Court.<sup>8</sup> Such an expedited review is crucial to ensure that when a lawsuit is brought against the administration to enforce our laws, the courts not only grant Congress standing, but also hear the case on a speedy timeline to prevent the president from stalling the litigation until his or her term ends. In addition, legislation could include statutory mandates that the courts set aside their own court-created standing rules in cases brought by Congress, thereby preventing courts from using procedural excuses to avoid making decisions in these important separation of powers cases.

## Empower the Inspectors General

**Proposal:** Strengthen the ability of inspectors general to identify fraud within the agency they oversee, to gather relevant evidence for investigations, and to identify and prevent improper or fraudulent payments.

Agency Inspectors General (IGs) are one of the best investments of taxpayer dollars in all of government. In 2015, approximately 14,000 employees at 72 offices identified potential savings totaling approximately \$46.5 billion.<sup>9</sup> With the IG community's aggregate budget of approximately \$2.6 billion, these potential savings represent about an \$18 return on every taxpayer dollar invested in the IGs. The total savings, however, could have been even greater if the IGs had more tools to compel witnesses to cooperate with their investigations, and to access agency records that are often withheld despite the clear language of Section 6(a) of the Inspector General Act of 1978 (IG Act).<sup>10</sup>

The IGs have raised concerns about their ability to obtain testimony from non-government witnesses, especially in investigations involving contractors and former agency employees. The IGs have also described challenges with access to agency records, and they suggested legislative remedies that would allow the IGs to conduct more robust investigations. In fact, on August 5, 2014, 47 IGs sent a letter to Congress describing "serious limitations on access to records that have

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<sup>6</sup> 28 U.S.C. §530D

<sup>7</sup> H.R. 3973, introduced by Rep. Ron DeSantis (FL-6) and passed in the House of Representatives in the 113<sup>th</sup> Congress, would have required all federal officials who stop enforcing a law to report to Congress the reason for the non-enforcement.

<sup>8</sup> In the 113<sup>th</sup> Congress, H.R. 4138, the "ENFORCE the Law Act," sponsored by Rep. Trey Gowdy (SC-4), passed the House of Representatives with a bipartisan majority.

<sup>9</sup> Council of the Inspectors General on Integrity & Efficiency, Progress Report to the President, Fiscal Year 2014, (2014), available at <https://www.ignet.gov/sites/default/files/files/FY14-Progress-Report-to-the-President.pdf>.

<sup>10</sup> See 5 U.S.C. app. § 6(a).

recently impeded the work of Inspectors General.”<sup>11</sup> Making matters worse, in July 2015, the Department of Justice’s Office of Legal Counsel issued an opinion that attempts to limit certain access authorities of the IGs.<sup>12</sup>

The determination about what records are necessary to a review should be made by the IG and not by the component head or agency leadership. The House should pass legislation that clarifies that IG access extends to all information and materials available to the respective agency or establishment, and the only exceptions must be predicated in congressionally enacted law that expressly refers to IG access. Legislation can create a process whereby IGs can compel testimony from non-government witnesses. Legislation is also needed to exempt the IGs from the Computer Matching and Privacy Protection Act and the Paperwork Reduction Act, which will increase the efficiency of their oversight efforts.<sup>13</sup>

## **Increase Access to Federal Records by Modernizing the Federal Records Act**

**Proposal: Conduct oversight to ensure agencies are fully implementing the Federal Records Act (FRA) and reform the FRA to incentivize agencies to preserve records in electronic format and strengthen accountability for those who deliberately violate federal recordkeeping laws.**

Proper recordkeeping is essential for effective oversight. But today, the FRA largely envisions a world of paper-based communication. As a result, senior federal officials have used personal email accounts to communicate official business, bypassing the FRA and the Freedom of Information Act without consequence.<sup>14</sup> Many agencies preserve records only in paper format, allowing employees to self-select emails to print and preserve.<sup>15</sup> And when FRA violations occur, agencies fail to take corrective action and thereby violate the law, again without consequence.<sup>16</sup>

While agencies do not necessarily need a change in the law to modernize their recordkeeping practices, the lack of effort necessitates legislation. Congress should pass comprehensive legislation that clarifies electronic recordkeeping requirements and strictly limits the use of non-government devices for government business.

## **Crowdsource Oversight by Ensuring Public Access to Federal Records**

**Proposal: Strengthen the Freedom of Information Act (FOIA) by conducting robust oversight and passing legislative reforms to limit the ability to withhold information from public records.**

The Freedom of Information Act (FOIA) is one of the most important transparency tools the public has in holding the federal government accountable. It is incumbent on Congress to ensure the executive branch is complying with its statutory obligations and not withholding information the public is entitled to under FOIA.

But the FOIA process is broken. The federal government receives more than 700,000 FOIA requests each year.<sup>17</sup> In most years, the government processes fewer requests than it receives, leaving a backlog of more than 100,000 requests.<sup>18</sup> Some requests have been pending for a decade or more.<sup>19</sup> The executive branch fails to adequately devote resources to fulfilling these requests, in hopes many just go away due to delay.

Congress should conduct robust oversight of the failure of agencies to timely and fully respond to FOIA requests. Another area ripe for oversight is the use of FOIA exemptions to withhold information.

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<sup>11</sup> Letter from Michael G. Carroll, Acting Inspector General, Agency for Int’l Development, et al., to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, et al. (Aug. 5, 2014).

<sup>12</sup> See The Dep’t of Justice Inspector General’s Access to Info. Protected by the Fed. Wiretap Act, Rule 6(e) of the Fed. Rules of Criminal Procedure, & Section 626 of the Fair Credit Reporting Act, Op. O.L.C. (July 20, 2015).

<sup>13</sup> H.R. 2395, the “Inspector General Empowerment Act of 2015,” sponsored by Rep. Jason Chaffetz (UT-3), is already under active consideration. On July 16, 2015, the Committee on Oversight and Government Reform reported H.R. 2395 favorably to the House.

<sup>14</sup> Letter from Darrell E. Issa, H. Comm. On Oversight & Gov’t Reform, to Thomas E. Perez, U.S. Dept. of Justice (Apr. 17, 2013).

<sup>15</sup> NARA Bulletin 2014-06. Available at: <https://www.archives.gov/records-mgmt/bulletins/2014/2014-06.html>.

<sup>16</sup> Real Clear Politics, “U.S. Archivist: IRS ‘Did Not Follow the Law’ on Lois Lerner Emails,” June 24, 2014, available at: [http://www.realclearpolitics.com/video/2014/06/24/us\\_archivist\\_irs\\_did\\_not\\_follow\\_the\\_law\\_on\\_lois\\_lerner\\_emails.html](http://www.realclearpolitics.com/video/2014/06/24/us_archivist_irs_did_not_follow_the_law_on_lois_lerner_emails.html).

<sup>17</sup> U.S. Dep’t of Justice, Summary of Annual FOIA Reports for Fiscal Year 2015 (March 18, 2016).

<sup>18</sup> Id.

<sup>19</sup> Id.

In particular, the use of FOIA exemption (b)(3) should be carefully monitored. Exemption (b)(3) allows agencies to withhold information under FOIA if any other statute requires withholding or establishes particular criteria for withholding information from the public. Obscure statutory exemptions created by Congress can result in large unintended loopholes under exemption (b)(3) for select agencies. To date, the Oversight and Government Reform Committee has identified almost 300 exemptions found in statutes other than FOIA to redact information in over 167,000 instances from 2010–14.

Congress should pass legislation to address these problems, including:

- ensure agencies are responding to requests in a timely manner;
- create a clear and strong presumption for the production of any responsive document making it difficult for agencies to withhold information from the public;
- impose stronger limits on exemptions;
- provide requestors more clarity on the status of their requests and what information is needed to fulfill the request; and
- provide a list of all responsive documents withheld and with a legal justification.

The House has already passed legislation to reform FOIA, H.R. 653 – the FOIA Oversight and Implementation Act of 2016<sup>20</sup> — to accomplish these goals and will continue to seek enactment of this legislation.

## REFORM THE RULEMAKING PROCESS

### Modernize Regulations to Be Cost-Effective and Accountable

**Proposal: Reform the Administrative Procedure Act to require federal agencies to use the least costly methods of fulfilling congressional mandates and to publicize the regulatory costs and benefits.**

The Administrative Procedure Act of 1946 (APA) allows agencies to issue new regulations as long as just a handful of steps are followed. Essentially, an agency must provide the public with notice of what it proposes to issue, receive public comments for a short period of time, then respond to the comments and proceed with its final decision. The courts then are generally required to uphold the agency’s decision, so long as it was “minimally rational,” or, in other words, not “arbitrary or capricious.”

These requirements do not ensure that agencies will seriously entertain better alternatives proposed by the public. They do not require that agencies choose the most cost-effective alternatives. They do not require agencies to consider impacts of proposed regulations on jobs, wages, or the poor. They do not even require that the agency identify a specific market failure or other specific problem that warrants new agency action. In short, the notice-and-comment process does not have to be much more than window dressing. Even still, agencies try to avoid these minimal requirements by using “interim” regulations and issuing “soft” new rules in the form of agency “guidance” that does not go through notice and comment.

It is long past time to modernize the APA’s requirements. Fortunately, administrations of both parties have, since the Carter and Reagan administrations, pioneered numerous additional procedures that are now of proven worth. These include the use of cost-benefit analyses, more cost-effective solutions, the best reasonably obtainable science, and alternatives that rely on economic incentives rather than command-and-control regulation.

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<sup>20</sup> H.R. 653, sponsored by Rep. Darrell Issa (R-CA), passed the House of Representatives by voice vote on January 11, 2016. Similar legislation, S. 337, sponsored by Senator John Cornyn (R-TX), passed the Senate with unanimous consent on March 15, 2016 and passed the House of Representatives by voice vote on June 13, 2016.

Up to now, these requirements have not been law. It is time to include these and other modernizing procedures in the statutory, judicially enforceable provisions of the APA. That way, Congress can ensure that agencies:

- explain the specific problem they propose to address and whether it warrants new regulation;
- account for the impacts of proposed new regulations on jobs, wages, and lower-income populations;
- choose the lowest-cost regulation that meets statutory objectives;
- improve public outreach and fact-finding to identify more efficient regulatory alternatives;
- provide advance notice of proposed major rulemakings to increase public input before costly agency positions are proposed and entrenched;
- use the best reasonably obtainable science;
- provide on-the-record but streamlined administrative hearings in the highest-impact rulemakings—those that impose \$1 billion or more in annual costs—so interested parties can subject critical evidence to cross-examination;
- limit the use of “interim” regulations to circumvent otherwise applicable rulemaking requirements;
- use agency guidance properly, to help the public understand how regulations work and how to comply with them, not to issue what are actually “soft” new rules cloaked in the form of guidance to avoid statutory requirements and judicial scrutiny;
- receive stronger judicial review of new agency regulations through the federal courts’ enforcement of these requirements; and
- end excessive judicial deference to agencies’ self-serving interpretations of statutes and regulations.

The House has already passed legislation to reform the Administrative Procedure Act — the Regulatory Accountability Act, H.R. 185 — to accomplish these goals and will continue to seek enactment of this legislation.<sup>21</sup>

## End Excessive Judicial Deference to Agencies

**Proposal: End judicial deference to agencies under the *Chevron* and *Auer* doctrines that makes it easier for agencies to overreach the bounds of their statutory powers.**

Most Americans don’t know it, but under Supreme Court decisions dating from the 1980s and 1990s — *Chevron v. NRDC* and *Auer v. Robbins* — lower courts have been allowed to abdicate their duty of saying what the law means in many regulatory cases. Instead, the courts regularly and generously “defer” to the agencies’ self-serving interpretations of statutes (*Chevron*), and can defer even more to agencies’ interpretations of their own regulations (*Auer*). *They can do this, despite the fact that the APA says it is the courts’ job to decide “all questions of law.”*

It is the judiciary’s deference to agencies that emboldens bureaucrats to read new meanings into old statutes. And it is the knowledge that agencies can get *Chevron* and *Auer* deference that encourages agency enablers in Congress to duck hard choices and write sweeping statutes that must be interpreted by agencies.

House Republicans will seek the enactment of legislation to clamp down on judicial deference—without authorizing judicial activism—thus reinforcing the courts’ role as the final interpreter of regulatory statutes and regulations issued under them. This will not only strengthen the courts’ power to strike down overreaching regulations, it will strengthen Congress’s incentives to write clearer statutes and rein in federal agencies.<sup>22</sup>

## Force Full Disclosure of the President’s Regulatory Agenda

**Proposal: Require presidential administrations to disclose full information on regulations in development, including regulatory objectives, costs, legal bases, and status of development.**

By law, agencies long have been required to provide semiannual disclosures about planned regulations and annual disclosures about overall regulatory costs. These disclosures are important to job creators, who must plan for new regulations’ impacts

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<sup>21</sup> H.R. 185, sponsored by Rep. Bob Goodlatte (VA-6), passed on a bipartisan vote of 250-185.

<sup>22</sup> H.R. 4768, the “Separation of Powers Restoration Act of 2016,” sponsored by Rep. John Ratcliffe (TX-4), is already under active consideration. On June 8, 2016, the Committee on the Judiciary ordered H.R. 4768 to be reported favorably to the House.

on their budgets, operations, and hiring. But the administration repeatedly has refused to make disclosures on time. In fact, in 2012, it made no disclosures until after the general election.

Even when on time, these disclosures do not say when regulations will be promulgated and what costs they will impose. And when agencies finally propose new rules, they too often fail to describe their proposals in common-sense terms that any member of the public can understand.

Americans deserve to know what new regulations agencies plan to send their way, how much they will cost, and when they will be imposed. Agencies must also be required to meaningfully address public input that challenges their cost estimates. The House has already passed legislation, H.R. 1759, the ALERT Act, to force agencies to provide more detailed disclosures about planned and final regulations and their expected costs—including through monthly, online updates on planned new regulations.<sup>23</sup> House Republicans will continue to seek enactment of such legislation. Agencies like the Department of Transportation have already adopted the best practice of online publication; all agencies should follow them online.

## **Require Agencies to Write in Clear, Plain Language**

**Proposal: Require agencies to write regulations in clear, plain language—and publish them online.**

Written in legalese, federal regulators' proposed rules can be very hard for the public to understand. Without an army of lawyers to help them, the average family or small business owner can struggle to understand what is being proposed, how to improve it, or even how to comply with it.

Each agency should publish, online, a simple 100-word summary of any new, proposed regulation. House Republicans have already passed H.R. 690, the Providing Accountability through Transparency Act, to accomplish this and will continue to work to make this requirement a reality.<sup>24</sup>

## **Stop Overly Burdensome Regulations**

**Proposal: Require all federal agencies to submit major regulations to Congress for approval.**

Major regulations—that is, those that impose \$100 million or more in annual costs—are so consequential that they should be subject to congressional approval.

This administration has issued an unprecedented number of new major regulations. During just the first six years of the administration, federal regulators added an average of 81 new major regulations per year, or nearly 500 in total. To make matters worse, the executive branch unilaterally issues new major regulations to do an end-run around Congress.<sup>25</sup> And half of President Obama's vetoes have been used to block CRA resolutions adopted by the people's representatives in Congress to disapprove new regulations, including major regulations.

The House has already passed legislation—the REINS Act—to make Congress accountable for decisions to impose new major regulations on the American people.<sup>26</sup> House Republicans will continue to seek enactment of such legislation.

In addition, House Republicans should also call for all authorization bills that provide rulemaking authority to specify that, before any new major regulation may be imposed under that legislation, the regulation must be presented to Congress for an up-or-down vote.

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<sup>23</sup>H.R. 1759, sponsored by Rep. John Ratcliffe (TX-4), passed this term on a bipartisan vote of 244-173 as title II of H.R. 712.

<sup>24</sup>H.R. 690, sponsored by Rep. Blaine Luetkemeyer (MO-3), passed this term on a bipartisan vote of 244-173 as title III of H.R. 712.

<sup>25</sup>See Clyde Wayne Crews, Competitive Enterprise Institute, *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State at 2 (2016)* (hereinafter *CEI 10,000 Commandments*), available at <https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202016%20-%20Wayne%20Crews%20-%20May%204%202016.pdf>

<sup>26</sup>H.R. 427, the REINS Act, which is sponsored by Rep. Todd Young (IN-9), has passed the House four times since the beginning of the 112<sup>th</sup> Congress.

**Proposal: Strengthen oversight of agencies that impose significant regulations without public comment.**

Agencies routinely avoid notice-and-comment rulemaking and review by the Office of Information and Regulatory Affairs (OIRA). Certain types of rules are exempt from OIRA review, including interpretive rules—often issued by the Internal Revenue Service (IRS).<sup>27</sup> Agencies also issue interpretive policy or guidance documents or use other exemptions within the Administrative Procedure Act. GAO has found that agencies do not always justify their use of such exceptions.<sup>28</sup>

In 2012, the GAO issued a report on agency response to comments in rulemakings.<sup>29</sup> GAO found that agencies did not publish a notice of proposed rulemaking for 35 percent of major rules and 44 percent of non-major rules published, which denied the public opportunities to comment on the rules before they were implemented.<sup>30</sup> And even when agencies did request comments, they were inconsistent in responding to them.<sup>31</sup>

In addition to addressing loopholes in the APA through legislation, Congress can push agencies to comply with the law and conduct thorough analyses prior to issuing costly rulemakings. Focusing oversight on these agencies will allow Congress to assess whether more legislation is necessary.

**Proposal: Strengthen the Congressional Review Act so agencies submit their new regulations to Congress for review.**

House Republicans will work to strengthen the Congressional Review Act to ensure agencies submit new regulations to Congress for review. Since the Congressional Review Act's enactment in 1996, it has been crystal clear that agencies must submit new regulations to Congress for review and an opportunity to disapprove them. But over time, agencies have failed to submit their regulations, especially under this administration: nearly 2,000 regulations from 2014 through 2015, including numerous major regulations.<sup>32</sup> A recent report prepared for the Administrative Conference of the United States revealed that at least 43 recent major rules were never submitted for review under the CRA.<sup>33</sup> Agencies also routinely fail to submit interpretive rules and other guidance. House Republicans will tighten submission requirements so that no regulations or covered guidance escape Congress's review and will authorize courts to find invalid and unenforceable rules that have not been submitted to Congress under the CRA.

But Congress need not wait until agencies finalize new regulations to check their overreach. Aggressive oversight, appropriations limitations, and even supplemental legislation to block new proposed regulations from ever being finalized are all available tools.

**Proposal: Reform the Congressional Review Act to allow a single, up-or-down vote on “midnight regulations” issued by outgoing administrations.**

A recurring problem that has thwarted the will of the voters and frustrated incoming administrations in recent decades is the problem of “midnight regulations.” These are regulations—often major—that an outgoing administration rushes out the door during its last months in office. Midnight regulations impose the outgoing administration's agenda on the country before an incoming administration can stop it.<sup>34</sup>

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<sup>27</sup> In 2015 the Oversight Committee sent a bipartisan request to GAO to review the IRS' use of guidance and interpretive rules, which are often utilized in enforcing Department of Treasury regulations. The GAO report is expected in August, 2016.

<sup>28</sup> Government Accountability Office, *Agencies Could Take Additional Steps to Respond to Public Comments*, GAO-13-12 (Dec. 2012).

<sup>29</sup> Government Accountability Office, *Agencies Could Take Additional Steps to Respond to Public Comments*, GAO-13-12 (Dec. 2012).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Sam Batkins, *Accountability and Transparency Reform at the Office of Information and Regulatory Affairs*, (testimony before the U.S. House of Representatives Oversight and Government Reform Committee, Subcommittee on Government Operations), at 4-5 (Mar. 15, 2016) (available at <https://oversight.house.gov/wp-content/uploads/2016/03/2016-03-15-Sam-Batkins-Testimony.pdf>).

<sup>33</sup> Curtis W. Copeland, *Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress*, at 2 (2014) (available at <http://www.thecre.com/forum2/wp-content/uploads/2014/08/CRA-Report-0725.pdf>).

<sup>34</sup> See, e.g., Sam Batkins, *Midnight Regulations: Examining Executive Branch Overreach* (2016) (reprint of testimony before the Committee on Science, U.S. House of Representatives (available at <http://www.americanactionforum.org/testimony/midnight-regulations-examining-executive-branch-overreach/>).

There is a simple and effective way to end this abuse: Reform the Congressional Review Act to allow Congress to hold an up-or-down vote on all of an outgoing administration's midnight regulations. Under the current CRA, Congress can vote on only one regulation at a time. It takes too much time to vote on every regulation, and so Congress doesn't hold the votes.

House Republicans will seek an amendment to the CRA that will allow Congress to act in one vote on as many midnight regulations as necessary and appropriate. It would clear the way for the voters' will to be honored.

## **Compensate for Congress's Loss of the Traditional Legislative Veto with New Means of Checking and Balancing Agency Overreach**

**Proposal: Institute new congressional channels of action to disapprove executive branch overreach to replace the use of unicameral legislative-veto mechanisms**

For many decades prior to the 1980s, Congress relied on use of the one-house legislative veto to check and balance executive branch overreach and other things of which Congress did not approve. The use of this traditional form of the legislative veto, however, was found to be contrary to the Constitution by the Supreme Court in its 1983 decision in *INS v. Chadha*, 462 U.S. 919. As a result, Congress is no longer able to use these powers, which were codified in many laws before the decision, to check the executive branch.

Congress has yet to respond fully with proposals to replace through constitutional means the tool it lost in *Chadha*. It is high time, however, that it did. And there are many ways to do this.

First, Congress can establish procedures through which, using its power of the purse, it can bring to bear its disapproval of executive branch overreach. For example, Congress could coordinate more closely efforts in authorization committees with annual funding measures that better enable the House and the Senate to block funding for implementation of improper actions upon the recommendations of the authorizing committees of jurisdiction.

Second, through the REINS Act, as discussed above, Congress can adopt procedures under which new major regulations will not become effective unless they are approved by joint resolutions of the House and Senate and the President signs each approval resolution into law.

Third, through the work of its committees, Congress can review comprehensively statutes still on the books that contain pre-*Chadha* legislative-veto language. Since those statutes were only enacted with legislative veto provisions included, it is fair to assume that Congress would never have enacted many of them to begin with, had it only known that their legislative-veto provisions ultimately would be lost. It is time that Congress undertook to review this large body of statutes to determine which should be repealed or replaced post-*Chadha*, and which can safely be left as they are.<sup>35</sup>

Collectively, these tools and others like them – whether they rely on the power of the purse, aggressive oversight, or new legislation – will greatly strengthen the ability of the people's elected representatives in Congress to block unsound, unilateral actions of Washington's unelected bureaucracy. And, at the same time, they will provide strong incentives for agencies to steer clear of improper actions to begin with, and work with Congress to assure that new agency initiatives are ones that the people's representatives support.

## **Establish Transparency and Accountability at the Office of Information and Regulatory Affairs**

**Proposal: codify the government-wide regulatory review and coordination function of the Office of Information and Regulatory Affairs**

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<sup>35</sup> For a full listing and descriptions of those statutes, see *Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, Ninety-Eighth Congress, First Session on the Supreme Court Decision in INS v. Chadha and Its Implications for Congressional Oversight and Agency Rulemaking* at 24-102, 98<sup>th</sup> Cong. 2<sup>nd</sup> Sess. 98-18 (1983) (available at <https://archive.org/details/supremecourtdeci00unit>).

The Office of Information and Regulatory Affairs (OIRA) is responsible for overseeing federal regulatory, paperwork and information resource management activities. OIRA can and should be the first line of defense against overly burdensome regulations that are not explicitly authorized by Congress. However, most of OIRA's regulatory review functions are not established by statute. Congress should reassert its role over the regulatory process by empowering OIRA to serve as our partner in regulatory oversight.

OIRA was created by the Paperwork Reduction Act in 1980 to review paperwork burdens imposed on the public by the federal government.<sup>36</sup> Shortly thereafter, President Reagan required OIRA to review regulatory actions as well, and in 1993, President Clinton issued Executive Order 12866, which established OIRA's regulatory responsibilities and those of federal agencies when proposing a regulation.<sup>37</sup> OIRA was designated as the "repository of expertise concerning regulatory issues."<sup>38</sup> OIRA reviews "significant regulatory actions" and accompanying cost-benefit analyses from federal agencies at the proposed and final rulemaking stages.<sup>39</sup> President Obama issued E.O. 13563 in 2011, reaffirming the principles and requirements of E.O. 12866.<sup>40</sup>

The regulatory state is expanding each year, imposing significant new costs on individuals, small businesses, and state and local governments. In this year alone, the administration has issued 58 new final rules at a cost to the economy of nearly \$70 billion.<sup>41</sup> Proposed rules are similarly stacking up, with 38 new proposed rules at a cost of \$13 billion in regulatory costs.<sup>42</sup> OIRA needs to take a stronger role in reviewing these regulations to ensure that the agencies are only passing regulations that are necessary and authorized by Congress. The President's regulatory priorities should never take priority over compliance with the letter and spirit of the law.

In a March 2015 hearing before the Committee on Oversight and Government Reform, OIRA Administrator Howard Shelanski confirmed that OIRA does not review rules unless an agency proactively submits them for review. While OIRA makes the determination of whether a regulatory action is "significant" and therefore must go through formal review under Executive Order 12866, it only does so based upon a list of regulatory actions submitted by the agency, and oftentimes upon the agency's own assertion of whether an action will be "significant." Agencies therefore have wide discretion in determining what will or will not undergo OIRA's scrutiny during the rulemaking process.

Placing OIRA's regulatory responsibilities in statute will reaffirm Congress's authority over the regulatory process to both OIRA and the rest of the federal agencies. These authorities represent a well-accepted and bipartisan approach to ensuring that federal agencies are following the law when issuing regulations.

## EXERCISE POWER OF THE PURSE

### Enact Annual Appropriations Bills

**Proposal: Pass all annual appropriations bills.**

The power to determine the spending of the federal government is vested in the Congress under Section 9 of Article I of the Constitution, which states that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Historically, that power has been exercised through the enactment of annual Appropriations bills.

However, over time, Congressional control over federal spending has eroded. Direct or mandatory spending, which, once established by legislation, does not require annual congressional action, has grown over time to constitute two-thirds of the \$3 trillion annual federal budget. Congress has routinely ceded control over spending to the executive branch or has failed to act in a timely manner to enact spending bills, allowing excessive executive discretion on the allocation of funding.

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<sup>36</sup> Paperwork Reduction Act, 44 U.S.C. §§3501-3521 (2006).

<sup>37</sup> E.O. 12866, 58 Fed. Reg. 51005 (Sep. 29, 1993).

<sup>38</sup> *Supra* note 2 at § 2(b).

<sup>39</sup> *Id.*

<sup>40</sup> E.O. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>41</sup> Sam Batkins, *American Action Forum, Week in Regulation*, (May 16, 2016) available at: <http://www.americanactionforum.org/week-in-regulation/week-regulation-day/>.

<sup>42</sup> *Id.*



Congress must return to passing annual appropriations bills. Writing appropriations bills, considering them in the committee process, amending them on the House and Senate floors, and reconciling the differences in a conference committee assure that all Members have a say in how funds are spent. After all, Congress is supposed to write the law; the executive branch is supposed to enforce it.

Passing individual bills is far superior to using a catch-all omnibus. Oftentimes, resorting to an omnibus disenfranchises rank-and-file Members that have not had an opportunity to offer amendments to or vote for or against individual appropriations bills. Further, when an individual bill is negotiated with the Senate, the majority party decides the majority of disputes on all issues debated in a conference. When Congress puts together an omnibus bill, on the other hand, the administration has much more leverage over the negotiations. So passing individual bills allows Congress to maintain tighter control over how federal funds are spent.

**Proposal: Work with the Senate to remove the impediments to passing annual appropriations bills.**

Over the past several years, both the House and the Senate have struggled to meet the target of passing all appropriations bills. On the House side, there have been many factors challenging the passage of appropriations bills. On the Senate side, there have been hurdles as a result of the threshold required to proceed to consideration of individual appropriations bills. While Republicans in the Senate led by Majority Leader McConnell have made significant gains in restoring regular order, the Senate requirement for 60 votes to bring a bill to the Senate floor for consideration has been a difficult obstacle it is incumbent on Congress as a whole to forge a new path. The House and Senate must each work to ensure their internal procedures enable, rather than impede, the process and must work together to pass all 12 appropriations bills every year.

### **Congressional Authority over Federal Agencies and Spending**

**Proposal: Committees of jurisdiction should complete comprehensive reviews of all spending that is not subject to annual appropriations, and Make recommendations on reforms necessary to restore congressional control over the funding of agencies and programs.**

It has been a long time since there has been comprehensive review of agencies and programs that are funded with mandatory spending and thus are outside of annual congressional control. The Oversight and Government Reform Committee is now undertaking a study of agencies' assessment and use of fines and penalties, which allows the administration to serve as the judge, jury, and regulator of its own enforcement activities. The Government Accountability Office recently found that in the case of the Department of Justice, such alternative sources of funding make up a substantial portion of the agency's budget and warrant better management.<sup>43</sup> Because these funds generally lie outside of the annual appropriations process, they are not subject to the same scrutiny. While the Miscellaneous Receipts Act requires agencies to turn over funds collected to the Treasury General Fund in absence of statutory exemption, agencies exercise a certain level of discretion over the use of retained funds and even supplement their operations in some cases.

There is a need for further review of all other programs and activities not subject to annual appropriations, and for legislation to return those programs and activities to the discretionary side of the ledger. For instance, the House has passed H.R. 3340 to bring the Financial Stability Oversight Council and the Office of Financial Research under the regular appropriations process. The work of the Oversight and Government Reform Committee and the recommendations from all committees of jurisdiction will be useful in identifying reforms needed for agencies, programs and other spending currently on automatic pilot.

Additionally, the Organizational Task Force should identify the ways in which congressional authority over programs and spending not subject to annual appropriations can be enhanced and the growth of uncontrolled spending can be checked.

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<sup>43</sup> GAO-15-48, Feb. 2015.

### **Proposal: Overhaul the outdated and needlessly complex Congressional Budget Act.**

The Constitution makes clear that budgeting is not ancillary to the larger governing process, but rather is fundamental to it. As detailed elsewhere in this paper, Article I gives Congress the power of the purse. Congress writes the laws that govern this land, and it appropriates the funds necessary to help carry out those laws. The Constitution does not prescribe a specific budget process for Congress to follow. The architects of our republic left it to Congress to devise that process. Unfortunately, in some respects, we do not have a system in place that serves the people well or that holds Congress accountable. It does not do enough to rein in this nation's \$19.3 trillion debt.

The current congressional budget process was established by the Congressional Budget Act of 1974. After 42 years, it is long overdue for an update. A new process should reinforce Congress' power of the purse and improve its oversight of the Executive Branch's activities. Since the Budget Act was enacted in 1974, mandatory spending has increasingly become the driver of the upward spiral of federal spending and the deficit. The House Budget Committee has already begun to work with Members of Congress to look at ways to modernize the process, in order to give Congress the tools to better shape the policies of these drivers to correct this unsustainable fiscal trajectory.

### **Proposal: Prohibit Executive-directed spending through settlement provisions that provide for donations to non-victim third-party groups in circumvention of Congress's spending and oversight authority.**

Congress's power of the purse is also being subverted by the diversion of monetary settlements from lawsuits. For example, the Department of Justice has used its settlement authority in cases brought against banks to funnel money to favored groups without congressional approval. While this practice began in cases against banks, there is a danger it will spread to other types of cases.

A year-long investigation by the House Judiciary and Financial Services Committees has revealed that DOJ is requiring or prompting multiple, major settling defendants to make donations to non-victim third-party groups, including advocacy groups. As an incentive, donations to these groups earn up to *double* the credit against defendants' overall settlement-payment obligations compared to that received for providing direct relief to consumer victims. In just the last 18 months, DOJ has allowed for nearly half-a-billion dollars to be directed to favored groups.

These settlement payments occur entirely outside of the congressional appropriations and grant-oversight process. Indeed, one settlement reviewed by the Judiciary Committee explicitly disclaimed any government oversight of how the donation was spent. In other cases, the DOJ-prompted donations actually restored funding that Congress had specifically cut. Further investigation revealed that the groups that stood to gain from these donation provisions lobbied DOJ to include them in the relevant settlements. Accordingly, House Republicans will seek legislation requiring that money received by the government from any source be deposited in the U.S. Treasury. Directing a defendant to pay money directly to a third-party interest group is simply an end-run around the law.

## **Enforcing Compliance with Congress's Power of the Purse**

### **Proposal: Promote the strategic use of limitations, funding conditionality, and funding availability to make congressional action in appropriations bills more effective.**

There are three fundamental ways to enforce compliance with congressional intent in the implementation of programs funded in appropriations acts—through the amount of funding provided, through provisions in the texts of the appropriations acts, and through committee oversight after enactment.

The first option, especially if it takes the form of reducing or terminating spending, speaks for itself in making congressional intent clear that a given program is not performing its functions and needs to be curtailed or eliminated.

The second way in which Congress can enforce compliance with congressional intent is to include provisions in the texts of appropriations bills, which could come in the form of funding prohibitions, such as riders; contingent funding (making the availability of funding dependent upon complying with a condition); and periodic funding (making funds available over shorter periods of time). These are legislative mechanisms that can only be put into place if they are agreed to by the Congress and

signed into law by the President. Used strategically, these mechanisms can advance Congress's intent and reinforce its power of the purse.

The third way, effective congressional oversight, ensures that taxpayer dollars are appropriately spent. Often this means empowering our oversight partners like the Government Accountability Office and the Inspectors General. The work they do gives the public significant insight into the working of the executive branch. Such insight leads to legislative reforms and reconsideration of ineffective taxpayer spending.

There is a need to build a strategic focus into the use of these legislative mechanisms to make them a more effective component of the congressional power of the purse. There are many practical considerations: Can a proposed funding prohibition pass the House of Representatives and the Senate? Will the President sign it into law? Has Congress carefully considered unintended consequences that could result from the proposal? Will the proposal constitute authorizing on an appropriations bill and therefore require coordination between the appropriations committee, authorizing committees, and the Rules Committee? In order to address these considerations, Members proposing legislative language to address these areas of concern must work closely with the appropriations committee and, if applicable, any authorizing committees of jurisdiction to better coordinate and understand the impact of their proposals. Members must engage much earlier in the process—even before bills are drafted and certainly before the bill is reported—to ensure there will be a coordinated, successful approach to reining in the executive branch.

**Proposal: Strengthen the Anti-Deficiency Act to prevent illegal spending by the executive branch.**

The Anti-Deficiency Act (ADA) prohibits federal agencies from obligating or expending federal funds in advance or in excess of an appropriation, or from accepting voluntary services. Federal employees who violate the ADA are subject to two types of sanctions: administrative and punitive. Employees may be subject to appropriate discipline, including, when circumstances warrant, suspension from duty without pay or removal from office. In addition, employees may also be subject to fines and/or imprisonment.

But there have been almost no instances of prosecutions against individuals in violation of the act and no consequences for the agency that has been judged deficient. Consequently, there is a need to reinforce this mechanism and provide real consequences to any agency that breaks the law. This task force recommends strengthening the law by requiring that an employee be fired for a violation, unless the agency head personally intervenes, and including the option of imposing a monetary fine against the individual and the agency up to the amounts illegally obligated.

## **CONDUCT MORE ROBUST OVERSIGHT OF THE EXECUTIVE BRANCH**

### **Hold Agency Heads Accountable**

**Proposal: Foster Better Relationships with Agency heads and Engage in frequent member briefings before and after hearings.**

Congressional testimony is vetted by lawyers, congressional liaisons, and the Office of Management and Budget. After written testimony has fully run the gamut, it is often watered down and overly positive about the agency's prospects. Frequently, hearing preparation with zealous agency insiders and watered down talking points results in hearing witnesses that are unwilling to deviate from the preapproved content. By establishing and maintaining relationships with agency heads, Members of Congress can communicate directly with the official responsible for implementing laws, responding to congressional requests, and providing insight into the agency. These informal conversations are an effective way to obtain more detailed information about the goings-on at the agency and identify challenges to implementing the law. These conversations can also provide an avenue to express the concerns of the American people directly to the agencies responsible.

### **Create Accessible and Transparent Financial Data**

**Proposal: make federal agency spending data more accessible, searchable, and reliable.**

For too many federal agencies, information remains largely opaque to the public. We need to improve the quantity and quality of information available to the public.

The DATA Act of 2014 was enacted to bring transparency to federal data and spending.<sup>44</sup> If fully implemented, these policies will make federal spending data more accessible, searchable, and reliable. They will not only make it easier to understand how the federal government spends taxpayer dollars but will also serve as a tool for better oversight, data-centric decision-making, and innovation both inside and outside of government. However, government-wide adoption of the data transparency policies has been slow. Federal agencies are the worst offenders. More needs to be done to allow Congress and taxpayers access to information about how tax dollars are being spent.

**Proposal: push agencies to make budget and expenditure information accessible through centralized online dashboards and in machine-readable, standardized formats.**

The Office of Management and Budget (OMB) and the Department of the Treasury are responsible for implementation of the DATA Act. To date, they have established an initial set of data elements and issued technical guidance to agencies on how to report the data in a standardized format. While significant progress has been made, there are also unclear definitions, insufficient progress on the required pilot program, and a lack of attention at OMB.<sup>45</sup>

In July 2015, the GAO identified a key area that may need congressional attention if the executive branch refuses to act.<sup>46</sup> The initial governance structure established by OMB and Treasury is not sustainable over the long term. Institutionalized policies and processes for developing standards and for adjudicating changes is essential for the long-term success of the standardization effort.

If OMB and Treasury are unable to establish a sustainable governance structure, Congress may need to establish one through legislative action. While the DATA Act is clear, Congress will pursue all avenues available to ensure agencies undertake a standardization of all financial data throughout the federal government.

**Proposal: Link financial data and performance data across the federal government.**

Financial data is only one piece of the puzzle. In addition to understanding where the money goes, Congress needs to understand how well it is spent. By standardizing performance data and linking it with financial data, Congress can figure out which programs are working—and which aren't.

The first step is to enact legislation such as H.R. 598, The Taxpayer Right to Know Act<sup>47</sup>, which already passed the House. H.R. 598 reaffirms OMB's requirement to establish a program inventory and further requires detailed program information. Then, Congress needs to encourage and, as necessary, require that the program level data be machine-readable and standardized such that it can be easily linked to financial data. To effectuate both visions, the House will need to work closely with the Senate, to ensure a bipartisan, bicameral approach, as previously accomplished with the DATA Act.

**Proposal: Require agencies to post additional information about federal spending online.**

The amount of federal dollars appropriated for grants continues to increase.<sup>48</sup> In fiscal year 2015, the government issued \$624,354 million in grants, almost 17 percent of total federal outlays.<sup>49</sup> These grants provide funding for crucial research, innovative projects, and many other actions. However, the sheer size of the government's grant portfolio leaves it vulnerable to waste and abuse.

Federal grant dollars are distributed across many agencies, allowing grant funding to be closely tied to agency missions. Grants.gov, a central portal that links to grant opportunities at agencies, allows access to all open grants across the government. Still, it is difficult to track information on individual grant awards and any subgrants issued thereafter. The federal

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<sup>44</sup> P.L. 113-101.

<sup>45</sup> <http://www.datacoalition.org/presidents-budget-request-released-data-act-implementation-moves-forward-at-treasury-and-key-agencies-but-omb-isnt-focusing/>; <http://gao.gov/products/GAO-16-438>;

<sup>46</sup> <http://gao.gov/assets/680/671721.pdf>

<sup>47</sup> H.R. 598, sponsored by Rep. Tim Walberg (R-MI), passed the House of Representatives by a vote of 413-0.

<sup>48</sup> To demonstrate this growth, in 1940, the federal government appropriated \$13.2 billion in FY2005 dollars. *Cong. Research Office, Federal Grants-in-Aid Administration: A Primer* (Oct. 3, 2012) (R42769).

<sup>49</sup> Office of Mgmt. and Budget, *Fiscal Year 2017 Historical Tables*, Table 12.1 (March 29, 2016).

government does not consistently post information about award winners and why those awards were selected. This lack of transparency and accountability makes it difficult to track how well grant dollars are being used and whether grants are awarded under fair competition.

## **Strengthen Enforcement of Congressional Subpoenas**

### **Proposal: Clarify the criminal contempt statute and expedite Congress's ability to civilly enforce subpoenas.**

Congressional committees issue a subpoena as a last resort when an agency or other entity has refused to comply with a voluntary request either for documents or for witness testimony at a hearing or deposition. To ensure timely compliance with a subpoena, Congress needs an effective and swift avenue to enforce a subpoena in a federal court.

When the recipient of a subpoena refuses to comply, Congress generally either certifies a contempt order to the appropriate United States attorney under the criminal contempt statute or brings a civil action to enforce the subpoena.

Despite the clear language of the criminal contempt statute, the Department of Justice has refused to comply with statutory duties for individuals Congress holds in criminal contempt. According to the process laid out in statute, the House certifies and sends the contempt order to the appropriate U.S. attorney, "whose duty it shall be to bring the matter before the grand jury for its action." Former U.S. Attorney for the District of Columbia Ronald Machen asserted he alone could determine whether the order was presented to a grand jury due to prosecutorial discretion.

By reading in prosecutorial discretion, one U.S. attorney believed he can choose to override the entire House or Senate. This is counter to the plain, unambiguous statutory language.

Legislation could address this problem by:

- clarifying the nondiscretionary duty of a U.S. attorney to present a certified order for criminal contempt to a grand jury;
- requiring the executive branch to comply with deadlines in congressional subpoenas;
- statutorily eliminating any privileges asserted by the executive branch when used against a congressional request for information; and,
- providing a process for expedited court review when the House or Senate decides to bring litigation to enforce a committee subpoena, including expedited review by a three-judge panel at the district court level with immediate appeal to the Supreme Court.

Expediting the congressional subpoena enforcement process will allow Congress to get the information it needs to conduct meaningful oversight and investigations and effectively legislate based on those findings. In addition, once subpoena enforcement is more efficient, it will encourage compliance with subpoenas, hopefully obviating the need for enforcement, criminal or civil.

## CONCLUSION

No one bill will rebuild Congress's institutional strength. No one decision will safeguard the Constitution's integrity. Only consistent practice can restore the constitutional balance. Congress must continue to write laws clearly and concisely, make sure agencies adhere to the letter of the law, guard the power of the purse by completing the appropriations process, and conduct robust oversight of the executive branch. All these things will require a lot of hard work and political will from both parties. But though the task is difficult, it is more than necessary.

As George H. W. Bush once said, "A government that remembers that the people are its master is a good and needed thing." When all three branches do what the American people have told them to do—and no more—they are ultimately showing respect for the will of the people. It is that respect that is so lacking today. That is why this project is so important. A constitutional government is a good, fair, decent government—one that listens to the people and promotes their well-being. That is the government we need—and that is the government we will have—as we work to create a more perfect Union.