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## Centralizing Congressional Oversight

Matthew S. Brooker<sup>♦</sup> & Michael A. Livermore<sup>♦♦</sup>

The shared presidential and congressional responsibility to oversee administrative agencies creates an opportunity for productive public consideration of administrative policy making. It also creates a forum for hostile grandstanding that can, when taken to an extreme, gridlock the federal government. During periods of divided government, when party differences enhance inter-branch tension, there is greater risk that the constitutional system of shared powers will be thwarted by partisan incentives to compete rather than cooperate.<sup>1</sup> Indeed, the later years of the Obama administration serve as a kind of case study in the consequences of dysfunctional party relations for agency oversight.

Less well appreciated, however, is the inverse risk—that dysfunctional oversight institutions can undermine political parties. In particular, agency oversight is a highly decentralized form of congressional action, with individual members of Congress given a fair degree of leeway to pursue pet oversight projects. This decentralization drives power to relatively more activist constituencies in ways that can reduce the ability of parties to pursue mainstream, compromise-oriented agendas with broad majoritarian appeal.

Although current congressional oversight practices may reinforce centrifugal forces within contemporary political parties, legislative leaders that recognize this threat have reform opportunities that can reduce or even reverse this tendency. At least in theory, congressional oversight provides an excellent opportunity for a non-incumbent political party (i.e., the party not in power in the White House) to critique the administration's regulatory policies and offer an alternative vision to voters. This role, which is similar in kind to the one played by opposition parties in parliamentary systems, can add vigor and democratic accountability to the administrative state and, at the same time, enhance the governance capacity and electoral appeal of the non-incumbent party.

At least since Jimmy Carter, the risks to presidents and their parties from a lack of coordinated presidential oversight have been clear. After a disastrous early experiment with a decentralized approach to executive oversight, the Carter administration attempted to change tack toward

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<sup>1</sup> See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2312 (2006).

greater exertions of White House authority.<sup>2</sup> But substantial damage had already been done, and Carter was unable to fully implement these lessons before voters denied him a second term. Ronald Reagan and subsequent presidents have not repeated this mistake, and there has been an increasing tendency for the White House to take on a greater role in overseeing the activities of agencies under the President's control. Most paradigmatic has been the vesting of regulatory oversight authority in the Office of Information and Regulatory Affairs (OIRA) in the White House, a practice that has continued under presidents of both political parties since 1981. The presidency of Donald J. Trump, which has proven unusual in many respects, appears headed toward a departure from this general trend. At the very least *effective* supervision of the executive branch by the White House has been lacking. The risk faced by the Trump administration is a repeat of the Carter experience of intra-branch infighting that leads to an incoherent, and ultimately unpopular, policy agenda.

Congress has no similar oversight bureaucracy, and as a consequence, its review tends to be both less substantive and more scattershot. Oversight is conducted through the system of committees and sub-committees and individual members have some powers that they can exercise purely at their own prerogative, such as the ability of Senators to put an anonymous "hold" on a presidential nominee. Some oversight activities, such as hearings, are carried out in public, providing an almost irresistible urge to grandstand. Furthermore, as has been noted by political scientists for some time, individual members of Congress typically lack systematic incentives to invest in oversight.<sup>3</sup> As a consequence, there is a tendency for the most ideologically-oriented and activist members to be drawn to oversight, while more moderate members focus on traditional constituent-oriented activities.<sup>4</sup>

This short essay will argue that it is time for Congress to consider a more centralized approach to regulatory oversight. Given the inherently partisan nature of inter-branch relations, this centralized process could be intentionally designed to facilitate constructive rivalry between the parties

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<sup>2</sup> See THOMAS J. WEKO, *THE POLITICIZING PRESIDENCY: THE WHITE HOUSE PERSONNEL OFFICE, 1948–1994* 68–76 (1995).

<sup>3</sup> See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 31 (1990); Seymour Scher, *Conditions for Legislative Control*, 25 J. POL. 525, 532–34 (1963).

<sup>4</sup> Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences and Congressional Monitoring of the Administrative State*, 8 J. L. ECON. & POL'Y 23, 24 (2011) (finding that "legislators generally view subcommittees with oversight functions as undesirable" but that there is greater enthusiasm when opportunities to criticize the opposite part President arise); Diane L. Duffin, *Explaining Participation in Congressional Oversight Hearings*, 31 AM. POL. RES. 455 (2003) (finding participation in oversight is generally low, but party interests can increase attendance at hearings).

without undermining the operating effectiveness of the federal bureaucracy. By increasing the capacity of Congress to engage in substantively sophisticated review, centralized oversight institutions could also help the legislature reestablish itself as a competent actor with the ability to serve as a legitimate check on executive policy making.

The argument will proceed in three parts. First we will argue that, perhaps despite appearances, there is value in congressional regulatory oversight. When done rigorously, congressional oversight can improve regulatory decision making, increase the democratic accountability of administrative agencies, and help protect against an over-concentration of power in the White House. Oversight activities can also contribute to what political scientists refer to as “responsible party government” by offering a forum for constructive party rivalry.<sup>5</sup> Competition between the parties has a variety of democratic benefits, and the overlapping responsibility to oversee administrative agencies provides a host of potential opportunities for beneficial contestation.

Second, we will argue that congressional oversight has not lived up to this promise, and in its current form verges on dysfunction. For executive review, OIRA plays an essential role as a coordinating clearinghouse and central repository of expertise, and—at least for prior administrations—it has been clear that the President is the ultimate arbiter of intra-executive conflict. Congressional oversight, in contrast, is highly decentralized, leading to several important disadvantages. Individual members, and even reasonably well staffed congressional committees, lack the technocratic competence to engage in oversight at a sufficiently high degree of substantive sophistication. Diffusion also creates a serious “multiple principals” problem within Congress in which agencies are pointed in so many directions that almost any decision both accords with and is antagonistic to congressional signals.<sup>6</sup> In addition, decentralization of oversight authority augments centrifugal tendencies within contemporary political parties, making it difficult for moderating forces to fend off challenges from the ideological wings, contributing to instability and making productive intra- and inter-party compromise difficult.

Finally, we discuss the political prospects for more centralized congressional review. Because congressional oversight can take many forms, there are many potential avenues for reform. The time may be ripe for a renewed attempt to create a congressional agency, modeled on OIRA,

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<sup>5</sup> See generally E. E. SCHATTSCHEIDER, *PARTY GOVERNMENT* (1942).

<sup>6</sup> Joshua D. Clinton, David E. Lewis & Jennifer L. Selin, *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 AM. J. POL. SCI. 387, 389–97 (2014); Sean Gailmard, *Multiple Principals and Oversight of Bureaucratic Policy-Making*, 21 J. THEORETICAL POL. 161, 182 (2009).

that is charged with facilitating congressional review activity. This new bureaucracy could substantially increase the technocratic sophistication of congressional review. A prior effort in 2000 to house such a role in the Government Accountability Office (GAO) failed, but the political stars may be aligned for another try. We also discuss the potential for congressional leadership to grasp more firmly the reins of control over the oversight activities of individual members, sub-committees, and committees. Greater leadership involvement in coordinating oversight has the potential to add coherence and moderation to these activities, ultimately resulting in benefits for the parties as well as improved governance.

### I. THE VALUE OF CONGRESS

Congress's oversight of administrative decision making is accomplished through both formal and informal processes.<sup>7</sup> Formally, Congress can attempt to exert control through more specific statutes that limit agency discretion. Administrative procedures and institutional structure can also be used to bring about decisions that reflect the desires of the enacting coalition.<sup>8</sup> By contrast, informal congressional tools to monitor and influence agency activities include committee hearings, contacts with agency personnel, adverse publicity, audits, investigations, appropriations riders, budget cuts, sanctions, and pressures associated with the appointment process.<sup>9</sup>

In part as a response to the general ascendance of presidential agency oversight, some reformers have pushed for statutory changes to expand legislative influence over agencies. In 1996, for example, Congress enacted the Congressional Review Act,<sup>10</sup> which established, among other things, an

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<sup>7</sup> There are constitutional constraints that limit the pathways of congressional influence. For example, *INS v. Chadha*, 462 U.S. 919 (1983), struck down the legislative veto. Congress's power over appointments also has constitutional limits. *Bowsher v. Synar*, 478 U.S. 714 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

<sup>8</sup> See Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 673 (1992); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244 (1987) ("Procedural requirements affect the institutional environment in which agencies make decisions and thereby limit an agency's range of feasible policy actions.");

<sup>9</sup> See, e.g., Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 70 (2006) ("Congress's power over all legislation including the annual budget, the power of congressional committees to bottle up legislation, and the Senate's advice and consent power over appointments all create a strong incentive for the President and the rest of the executive branch to keep Congress happy.");

<sup>10</sup> 5 U.S.C. §§ 801–808 (2012).

expedited process by which both houses of Congress can vote to disapprove “major” agency regulations.<sup>11</sup> Four years later Congress passed the Regulatory Right-to-Know Act of 2000,<sup>12</sup> which required that the Office of Management and Budget (OMB) submit to Congress an estimate of the total annual costs, benefits, and market impact of all executive agency regulations passed the previous year.<sup>13</sup> More recently, Republican members of Congress sponsored multiple proposals designed to increase the legislature’s involvement in the administrative state.<sup>14</sup>

It is impossible to evaluate whether these or other approaches to altering the landscape of Congress-agency interactions are justified without a general normative understanding of the value of congressional oversight. Some jurists and commentators defend increased congressional involvement on the basis of claims about constitutional design or the particular value of legislative policy judgment.<sup>15</sup> Others argue that congressional involvement should be scaled back to protect expert agencies from political interference.<sup>16</sup> A weakness in many conventional normative discussions of the administrative state is their failure to grapple adequately with the role of political parties, a particular problem when attempting to understand the relations of agencies and Congress, which are heavily conditioned by partisan considerations. In an earlier piece, *Political Parties and Presidential Oversight*, Livermore addresses this shortfall by proposing a normative framework that explicitly accounts for

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<sup>11</sup> The CRA was a response to growing complaints that “Congress ha[d] effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.” Joint Explanatory Statement of House and Senate Sponsors, 142 CONG. REC. 6922, 6926 (1996). The CRA, for better or worse, has been inconsequential. Only once in the CRA’s twenty-year history have Congress and the President agreed to overturn a rule promulgated by a federal agency.

<sup>12</sup> 31 U.S.C. § 1105 (2012).

<sup>13</sup> Like the CRA, the Right-to-Know Act has not had a great impact on agency rulemaking. The reports prepared by OMB are often criticized for being incomplete and untimely. See Jeff Rosen, *Putting Regulators on a Budget*, 27 NAT’L AFF. 42, 49 (2016) (“[I]n practice, these reports have been limited to a listing of selected rules for which agencies conducted cost-benefit studies, and they have excluded some agencies, so the reports have not met their intended purposes, and in recent years have not been issued in a timely way.”).

<sup>14</sup> Senator Rand Paul introduced the Regulations from the Executive in Need of Scrutiny (REINS) Act that would require a joint resolution of approval for major agency regulations. S. 226, 114th Cong. (2015). The House of Representatives passed the Sunshine for Regulations and Regulatory Decrees and Settlements Act that would require covered agencies to submit to Congress an annual report that includes the number, identity, and content of certain civil actions or settlement agreements involving regulatory bodies. H.R. 712, 114th Cong. (2015).

<sup>15</sup> See, e.g., Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 731 (2009); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233 (1994).

<sup>16</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2259–60 (2001).

parties.<sup>17</sup> Under this “responsible party administration” approach, structural and doctrinal choices are evaluated in light of how well they balance the benefits of robust competition between vibrant political parties against core administrative values, such as expertise, coherence, impartiality, and legality.<sup>18</sup> Although administrative values may militate in favor of agencies that are relatively insulated from political oversight, removing agencies altogether from such influence cuts policymaking off from electoral politics and undermines incentives to invest in political parties. “To be successful,” the argument goes, “modern administrative law must strike a middle course between agencies that are too responsive to demands from extreme constituencies within political parties and agencies that are too far removed from everyday democratic [i.e., partisan] politics.”<sup>19</sup>

There are two general strategies for promoting responsible party administration. The first is to “enhance party responsibility through institutions and doctrine that promote the development of normatively attractive forms of party rivalry.”<sup>20</sup> The goal for this first strategy is to avoid irresponsible parties that are overwhelmed by extreme ideologues or powerful special interests, while also ensuring that policymaking remains responsive to electoral politics. The second strategy is to “define[] a legitimate scope for party government in a context where administrative values are given their appropriate due.”<sup>21</sup> Agencies should be given some latitude to interpret statutory grants of authority in line with presidential priorities, but not *too much* latitude, lest violence be done to the administrative value of legality; partisan appointees should have some role in shaping administrative policy, but not *too much* of a role lest they undermine the administrative values of impartiality or expertise.

For obvious reasons, it may be far from obvious in individual cases how to carry out either of these strategies. Nevertheless, it is worthwhile to ask how congressional oversight might contribute to more responsible parties and how congressional oversight could be structured to appropriately balance party government and administrative values.

From the perspective of enhancing constructive party rivalry, oversight activities can, at least in theory, create a forum for valuable substantive public debate between the parties.<sup>22</sup> Congressional supervision of agencies

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<sup>17</sup> Michael A. Livermore, *Political Parties and Presidential Oversight*, 67 ALA. L. REV. 45, 110 (2015).

<sup>18</sup> *Id.* at 110.

<sup>19</sup> *Id.* at 53.

<sup>20</sup> *Id.* at 115.

<sup>21</sup> *Id.*

<sup>22</sup> See SCHATTSCHNEIDER, *supra* note 5.

gives the non-incumbent party the chance to criticize the administration's policy preferences and devise alternative positions to be evaluated and tested by voters during elections. In other words, agency oversight by Congress provides a vehicle for non-incumbents to enhance their electoral appeal by developing and vetting alternative policy programs. Congressional oversight can also increase the responsiveness of agencies to public preferences and the transparency of agency decision making—both important administrative values.

The benefits of legislative supervision must also be balanced against risks for both parties and agencies. If oversight empowers extreme voices within parties, then it can undermine, rather than facilitate, responsible party government. In addition, overly aggressive supervision can lead to agencies that are risk averse and incapable of action, or that are oversolicitous to special interest clients of congressional committees—neither a particularly attractive outcome. The challenge is to structure legislative oversight in such a way as to facilitate responsible parties and responsive agencies, while avoiding downside risks.

## II. THE DYSFUNCTIONS OF DECENTRALIZATION

The current system of highly diffused oversight authority within Congress leads to three interrelated dysfunctions that simultaneously undermine the value of congressional oversight and exacerbate pathologies in contemporary political parties. The first dysfunction is technocratic incompetence from a lack of adequate staffing and specialization; the second dysfunction is ineffectiveness that results from a surfeit of principals; the third dysfunction is a lack of moderating influence on ideological polarization.

As the administrative state has become more complex in recent decades, the level of technocratic sophistication needed to oversee agencies effectively has grown considerably. Courts, in conducting judicial review of agency decision making, have been clear about the problems imposed by the substantial advantages in expertise enjoyed by agencies.<sup>23</sup> As a practical matter, it is extremely difficult for generalist judges to evaluate the technical merits of agency decisions, and as a consequence, courts

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<sup>23</sup> See, e.g., *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (“[A] reviewing court must remember that the [agency] is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.”).

simply tend to defer to agencies within these areas.<sup>24</sup> This challenge has been well-recognized for decades and there is no obvious way to resolve it.<sup>25</sup>

Presidents have responded to this challenge by substantially increasing the institutional capacity of their office. This well-documented process occurred over several decades, beginning at the latest in the FDR administration.<sup>26</sup> There are two centerpieces of this strategy.<sup>27</sup> First, presidents have increased their influence over the appointments process to ensure that the senior management positions within agencies are staffed with competent personnel who are loyal to the President's policy program. Second, presidents have built a separate centralized oversight bureaucracy located in the White House. This oversight bureaucracy includes OIRA and other White House offices such as the Council of Economic Advisors and the Council on Environmental Quality, which also weigh in on relevant regulatory matters.<sup>28</sup>

Congress has not kept up. Individual members face the same difficulty as generalist judges, in the sense that they are not technical experts in any specific area. But they face further complications. Judges are professional attorneys, many with high quality educations and years of practical experience, who have the luxury of concentrating on a handful of cases at a time. Members of Congress are not as well-educated (64% of House members have advanced degrees<sup>29</sup>), and they are faced with a dizzying stream of demands on their time that makes it extremely difficult to focus in a sustained way on any single policy question. The committee system helps somewhat in allowing a degree of specialization, but members now serve on a large number of committees and sub-committees that can each have substantial policy portfolios.<sup>30</sup> In theory, staff can help carry this burden, but congressional offices remain relatively thinly staffed, with just

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<sup>24</sup> See Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 734 (2011).

<sup>25</sup> For a famous colloquy between Judges Bazelon and Leventhal of the D.C. Circuit four decades ago that nicely encapsulates the dilemma of generalist judges reviewing the work of highly expert agencies, compare *Ethyl Corp. v. EPA*, 541 F.2d 1, 66 (D.C. Cir. 1976) (Bazelon, J., concurring) with *id.* at 68–69 (Leventhal, J., concurring). For a more recent decision in which the D.C. Circuit deferred to an agency's decision not to use a relatively well-established economic technique to quantify the effects of its decisions, see *Center for Sustainable Economy v. Jewell*, 779 F.3d 588, 610–612 (2015).

<sup>26</sup> See Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235 (John E. Chubb & Paul E. Peterson eds., 1985).

<sup>27</sup> *Id.*

<sup>28</sup> See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

<sup>29</sup> Tessa Berenson, *Scott Walker Is a College Dropout, But So Are Many Americans*, TIME (Feb. 13, 2015), <http://time.com/3709341/scott-walker-education-2016/>.

<sup>30</sup> See generally RICHARD L. HALL, PARTICIPATION IN CONGRESS (1996).

a handful of personnel (of which only a small number attend to policy). Even the committees, which are somewhat more well-staffed, draw on a relatively small number of experts.<sup>31</sup>

Lacking in expertise, unable to concentrate on a small number of issues, and inadequately staffed, it is difficult for members of Congress, on their own, to conduct anything other than superficial review of agency decision making. Lacking internal capacity, Congress must rely on external information and signals provided by interest groups.<sup>32</sup> This dynamic empowers specialized constituencies with the ability and incentive to invest in advocacy and lobbying efforts. Taken to an extreme, Congress's role devolves from that of an active agent with substantial agenda-shaping power into merely a conduit for special interest pressure. The inadequacy of this posture is particularly striking when juxtaposed with that of the President. Although special interests certainly attempt to influence the White House, the President, backed by the expertise of the institutional presidency, is an independent actor who is not fundamentally reliant on interest groups to carry out meaningful oversight.

A second problem with decentralization is that it directly reduces the effectiveness of congressional review by introducing conflicting voices into the oversight process. There are solid theoretical reasons for this concern that are supported by recent empirical findings. On the theoretical side, in a principal-agent model, the existence of multiple principals with conflicting preferences provides additional discretion for the agent.<sup>33</sup> In the regulatory state, this dynamic has typically been modeled in the context of multiple principals in the form of Congress and the President (and to some extent the judiciary).<sup>34</sup> Observers have also noted that Congress itself, apart from the other branches, presents a multiple principals problem.<sup>35</sup>

These theoretical results and anecdotal observations have been confirmed in recent empirical analyses. As part of a large effort to collect information on the federal bureaucracy called the *Survey on the Future of Government Service*, researchers gathered data from nearly two thousand career civil servants and political appointees in 128 agencies who served

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<sup>31</sup> See Barry Weingast, *The Congressional-Bureaucratic System: A Principal-Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147, 182 (1984).

<sup>32</sup> See McCubbins, Noll & Weingast, *supra* note 8.

<sup>33</sup> See Gailmard, *supra* note 6.

<sup>34</sup> See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 702–05 (2000); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy? Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-institutional Policy-Making*, 12 J. L. ECON. & ORG. 119, 140–42 (1996).

<sup>35</sup> JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 237 (1989) (“No agency is free to ignore the views of Congress. An agency may, however, defer to the views of one part of Congress.”).

during the 100<sup>th</sup> Congress (2007–2009).<sup>36</sup> Among the questions posed was one that concerned how agency personnel perceived the relative influence of different actors in the agency decision making process, with respondents given the choice of the majority party in Congress, congressional committees, the White House, and interest groups.<sup>37</sup> Participants were also asked about the number of congressional committees that exercise oversight over their agencies.

Comparing these responses in the aggregate generates a straightforward but important result: “the relative influence of the White House increases in a nearly linear fashion as the number of committees exercising active oversight increases.”<sup>38</sup> Correlation is not causation, of course, and the researchers examine a number of alternative hypotheses other than a multiple principals problem, including the number and salience of policy areas covered by the agency, the political preferences of agency personnel, and whether agencies are independent.<sup>39</sup> The findings are robust with regard to these controls, leading the researchers to conclude that, other things being equal, increasing the number of oversight committees leads to significant and meaningful increases in the relative influence of the President.<sup>40</sup> Based on these empirical results, along with strong theoretical models and qualitative reports, there is good reason to believe that the decentralized approach of agency supervision represented by the proliferation of oversight committees reduces the ability of Congress, as an institution, to actually influence agency decision making.

A third dysfunction of decentralization is that it empowers relatively more extreme voices within contemporary political parties. The results of the 2016 presidential election— have renewed debates in the political science literature about the nature of contemporary political parties.<sup>41</sup> Over the course of the twentieth century, there was a major shift in the American system of political parties. In that time, locally oriented and ideologically diverse parties faded away to be replaced by parties that are (relatively) more ideologically homogenous, as well as professionally sophisticated

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<sup>36</sup> See Clinton, Lewis & Selin, *supra* note 6; Joshua D. Clinton, David E. Lewis & Jennifer L. Selin, *Separated Powers in the United States: The Ideology of Agencies, Presidents and Congress*, 56 AM. J. POL. SCI. 341 (2012) (discussing broader project).

<sup>37</sup> See Clinton, Lewis & Selin, *supra* note 6, at 391.

<sup>38</sup> *Id.* at 392.

<sup>39</sup> *Id.* at 393.

<sup>40</sup> *Id.*

<sup>41</sup> Danielle Kurtzleben, ‘Politics Has Become Celebrity Driven’: How 2016 Surprised Political Thinkers, NPR POLITICS (July 17, 2016, 7:00 AM), <http://www.npr.org/2016/07/17/484016283/-politics-has-become-celebrity-driven-how-2016-surprised-political-thinkers>; *Pushback*, THE ECONOMIST, (May 5, 2016), <http://www.economist.com/news/books-and-arts/21693910-2016-campaign-putting-most-influential-political-science-book-recent-memory>.

and nationally oriented.<sup>42</sup> Political scientists argue about the relative degree of power held by various actors within these contemporary political parties. The leading theories can be divided into group-centered accounts and politician-centered accounts. In the former, well-organized constituencies are the main players and they seek to influence electoral results to achieve specific policy outcomes. In the latter, politicians are the main players, and they are motivated by the perquisites of power with little concern for policy.<sup>43</sup> A growing consensus toward group-centered accounts of parties had grown based on analyses of prior presidential elections that showed the degree to which party insiders were able to dominate the candidate selection process during presidential primaries.<sup>44</sup> Donald J. Trump's ascendancy to the White House scrambled that consensus, given the degree to which insiders appeared unable to stop his candidacy despite a seemingly strong desire to do so. The Trump victory seems to accord better with politician-centered accounts in which parties are vehicles for politicians to secure the benefits of office, rather than for groups to achieve policy outcomes.

Although Trump's victory in the Republican primary led many to question the descriptive value of the group-centered account,<sup>45</sup> the Trump transition and the early days of the Trump administration indicate that a purely politician-centered account has limitations as well. In *Political Parties and Presidential Oversight*, Livermore argues that contemporary parties provide invaluable governance services to Presidents, even if their control over the nomination process has waned. In particular,

Contemporary parties that can supply a group of readily identifiable technocrats who are committed to a consistent

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<sup>42</sup> See JOHN ALDRICH, *WHY PARTIES? A SECOND LOOK* (2011).

<sup>43</sup> See MARTY COHEN, DAVID KAROL, HANS NOEL & JOHN ZALLER, *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM 40* (2008).

<sup>44</sup> Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 *PERSP. ON POL.* 571, 571–72, 586 (2012).

<sup>45</sup> See, e.g., Matthew MacWilliams, *Who Decides When The Party Doesn't? Authoritarian Voters and the Rise of Donald Trump*, 49 *PS: POL. SCI. & POL.* 716 (2016), <https://www.cambridge.org/core/journals/ps-political-science-and-politics/article/who-decides-when-the-party-doesnt-authoritarian-voters-and-the-rise-of-donald-trump/8751AFAC70288BD234A8305F4687B1C7>; Marty Cohen et al., *Party Versus Faction in the Reformed Presidential Nominating System*, 49 *PS: POL. SCI. & POL.* 701, <https://gvpt.umd.edu/sites/gvpt.umd.edu/files/pubs/party-versus-faction-in-the-reformed-presidential-nominating-system.pdf>; Matthew MacWilliams, *Donald Trump's victories show that authoritarian voters are now in control of the Republican nomination process*, LONDON SCH. OF ECON. BLOG (February 27, 2016), <http://eprints.lse.ac.uk/65819/1/blogs.lse.ac.uk-Donald%20Trumps%20victories%20show%20that%20authoritarian%20voters%20are%20now%20in%20control%20of%20the%20Republican%20nominatio.pdf>.

set of policy initiatives associated with a party program and who have experience balancing the interests of the party's various constituencies provide an extremely valuable service for [the] [P]resident. . . . It is hard to image anything more useful for an incoming Executive than an extensive network of committed, well-trained, enthusiastic, and loyal potential personnel to fill vital, difficult-to-supervise, and controversial roles.<sup>46</sup>

Perhaps ironically, given President Trump's status as a political outsider, his Administration may ultimately rely on the intellectual and personnel infrastructure provided by the Republican party even more than a traditional politician with closer roots to the party establishment would have.

Assuming the group-centered account retains some of its descriptive power, there are obvious normative problems: ideologically extreme activists and powerful special interests use parties as a means to "capture and use government for their particular goals,"<sup>47</sup> typically at the expense of majoritarian preferences and broad diffuse interests. Politician-centered parties, at least in theory, will seek to maximize vote share rather than achieve specific policy goals, resulting in policies that better track the desires of the electorate.<sup>48</sup> Transferring power to more moderate actors within parties who are more interested in winning elections than instituting specific policy proposals reduces the risks associated with overbearing influence from extreme groups.

Decentralized review tends to provide a forum for fringe voices within parties. Politicians who are interested in securing benefits for their constituents often have little to gain from investing in regulatory oversight—any effect from oversight would be broadly diffuse and, frequently, would not result in concrete returns for a congressional district or even states. Except in special cases—for example, when a farm-state Senator engages in oversight of the Department of Agriculture—incentives for oversight typically come from non-constituent sources such as interest group lobbying or ideological pressure.

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<sup>46</sup> Livermore *supra* note 18, at 80.

<sup>47</sup> Bawn et al. *supra* note 44, at 571.

<sup>48</sup> Politicians, of course, need other assets to run campaigns, specifically volunteers and donations. Even electorally motivated politicians must balance demands from these sources of resources with the preferences of the electorate, leading to parties that do not perfectly track the median voter. See ALDRICH, *supra* note 42, at 224.

A coordinated approach to oversight focused on maximizing electoral appeal would balance competing pressure from different groups of highly motivated policy demanders within the party with concerns about party branding and the ability to attract mainstream voters. Oversight activities would be sanctioned if, all things considered, they improved the electoral chances of party-affiliated politicians. Decentralization of oversight will tend to reduce the importance of party brand in these decisions because—for any individual politician—the brand is a shared resource subject to free rider problems. Individual politicians will seek to appeal to organized interests or ideological activists through potentially extreme oversight activities that benefit those politicians individually, even if they harm the party brand. Decisions that are rational at the level of individual politicians can result in actions that, collectively, place the party in a worse electoral position as intense policy demanders see their desires catered to while the need to generate broader voter appeal is neglected.

Strong centralized party institutions can help counteract this natural centrifugal tendency, if individual politicians are willing to give up power to leaders capable of preserving collective goods like attractive party brands.<sup>49</sup> As it stands, oversight is a context where legislative leadership exercises relatively little control, and committees, sub-committees, and individual members have a substantial amount of prerogative. The result is oversight pursued on behalf of relatively extreme constituencies that pays little heed to the desires or preferences of unorganized voters. As a consequence, oversight tends to favor well-organized interests at the expense of the broader public, and oversight efforts tend to harm a party's overall electoral appeal.

### III. TOWARD GREATER CENTRALIZATION

In the past, when presidents have augmented the bureaucratic capacity of the presidency to oversee the expanding federal bureaucracy, Congress has responded in kind with its own expansion. A canonical example is the creation of the Congressional Budget Office (CBO). The FDR administration expanded its ability to oversee agency spending when it moved the recently created Bureau of the Budget to the Executive Office of the President in 1939, a move that eventually led to the creation of the OMB in 1970. As the President's budgetary capacity increased, leaders in Congress realized that the congressional committee system was not an adequate alternative, and the CBO was created in 1975.

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<sup>49</sup> See *id.* at 31–32, 61–62.

In the early years of regulatory review, Congress was extremely hostile to OIRA's new role.<sup>50</sup> But rather than attempting to build an institutional counterweight, Congress mainly criticized and tried to undo President Reagan's innovation by arguing that power should be returned to agencies. Conflict over OIRA during the Reagan administration eventually culminated in a sustained effort to defund the office throughout the George H.W. Bush years. That effort, in turn, brought about reforms that included subjecting the OIRA Administrator to the confirmation process.<sup>51</sup> After this initial round of battles, OIRA's role has been largely cemented in place, although latent congressional hostility has led to a decline in funding over the years, leaving the office in a strained position.

The one significant effort by Congress to match the President's institutional capacity for regulatory review ended in abject failure. In 2000, Congress passed, and President Clinton signed, the Truth in Regulating Act, which provided for a pilot program in which the GAO would conduct an "independent evaluation" of any "economically significant rule" upon the request of "a chairman or ranking member of a committee of jurisdiction of either house of Congress."<sup>52</sup> In performing this independent evaluation, GAO was tasked with scrutinizing the agency's analysis of costs and benefits as well as the alternatives examined by the agency and any other component of the regulatory impact assessment. The bill also included a specific proviso specifying that the GAO would move forward with the pilot project each year only if "a specific annual appropriation not less than \$5,200,000" was made. This language was included, it appears, to meet GAO's objection that it not be burdened with significant new responsibilities without additional resources.<sup>53</sup>

No appropriation was ever made, and the GAO pilot project died.<sup>54</sup> The political reasons for the demise are not difficult to discern. The law was passed during a Republican Congress when fervor to check the Democratic President was high. President Clinton signed the bill in the

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<sup>50</sup> See RICHARD L. REVEWZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008). There was a partisan overlay of this as well, as Democrats and their affiliated interests opposed the political program of the Reagan administration.

<sup>51</sup> Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 *TEX. L. REV.* 1137, 1176 (2014); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 *ADMIN. L. REV.* 1, 8–9 (1994).

<sup>52</sup> Truth in Regulating Act of 2000, Pub. L. No. 106-312, 114 Stat. 1248, 1248–49.

<sup>53</sup> Letter from David M. Walker, Comptroller Gen. of the U. S., to Congressman Tom Davis, Chairman of House of Representatives Comm. on Gov't Reform (June 7, 2006), <http://www.gao.gov/assets/380/377239.pdf>.

<sup>54</sup> Susan E. Dudley, *Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future*, 65 *CASE W. RES. L. REV.* 1027, 1053 (2015); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 *HARV. L. REV.* 1755, 1834 (2013).

waning months of his administration, perhaps with an eye toward improving the electoral prospects of his Vice President, Al Gore. At the conclusion of the 2000 election, however, with a Republican in the White House and Republican control over both houses of Congress, appetite for legislative review within the controlling coalition bottomed out.<sup>55</sup> Given that the pilot program authorized ranking members of congressional committees to make review requests of GAO, the Republican Congress would be giving an obvious tool to the opposition party to publically criticize their co-partisan in the White House—the political downsides of such a move are obvious.

The ill-fated Truth in Regulating Act provides an object lesson in the difficulty of a more centralized approach to congressional regulatory oversight. During periods of united government (when the same party controls both Congress and the White House), members of the majority legislative party have partisan incentives to avoid harsh public criticisms of the administration, and they are likely better served by pursuing their regulatory interests through informal channels. During periods of divided government, the incentives flip, but many different actors within Congress are hungry for opportunities to enhance their personal recognition through flamboyant oversight. Thus, efforts on the part of leadership to centralize oversight may be met with opposition, even if the majority party would, in the aggregate, be better served by a more systematic approach. In addition, serious reforms, such as those contemplated in the Truth in Regulating Act, would potentially require presidential approval, which would ordinarily be difficult to secure.

There may be reasons to be optimistic that a Congress in the near future could overcome these difficulties and engage in serious reforms. Changes within the committee system could help centralized review by reducing the number of committees and sub-committees with oversight jurisdiction. Leadership could also exercise greater control over oversight hearings, information requests, and demands for administrative testimony. Reforms to the appointments process could eliminate the ability of individual Senators to place “holds” on nominees. All of these reforms could be undertaken without presidential approval.

Our current political landscape may favor such efforts. The election of Donald Trump as the President of the United States may lead to a serious rift within the Republican party. One potential effect of the aftermath of the Trump victory may be efforts on the part of certain party factions to reform party institutions, including, within the legislature, to consolidate

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<sup>55</sup> See generally Levinson & Pildes, *supra* note 1.

power. Similarly, the outcome of the 2016 presidential election only underscores that the Republican Party has captured the popular presidential vote once since 1992. If the Party views its prospects of maintaining control of the White House in the coming years as sufficiently dim, more effective regulatory review may be one of its few pathways to genuine policy influence. If that is the case, the relative value of symbolic posturing on the part of individual members may give way to the political and policy payoffs of consolidating oversight authority within party leadership so that it can be used strategically and intelligently.

Of course, these political dynamics are temporary and the future is difficult to predict. The Trump presidency may presage a new period of increasingly volatile partisan alignments that opens new possibilities for institutional reform.<sup>56</sup> Or, the existing party system may right itself quickly and return to well established patterns, in which case gridlock and inaction may be the most likely course.

What is clearer is that the current model of highly decentralized congressional review does not serve either Congress or the political parties terribly well. Congressional review that is fractured across many committees and lacks institutionalized technocratic support is ineffective and gives a public platform to the most extreme voices. Individual members pursuing their own political self-interest are often happy to undermine the collective good of their party's brand when there are returns for their careers. Without tools to check such actions, leadership cannot maximize the electoral appeal or policy effectiveness of their parties. Reforming and centralizing review provides an opportunity that will benefit both the institution of Congress and the parties that vie for its control—the question is whether individual legislators will be willing to give up some of the freedom of action that they currently enjoy to gain these collective benefits.

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<sup>56</sup> See Stephen Skowronek's interview in Richard Kreitner, *What Time is it? Here's What the 2016 Election Tells Us About Obama, Trump, and What Comes Next*, THE NATION, Nov. 22, 2016, <https://www.thenation.com/article/what-time-is-it-heres-what-the-2016-election-tells-us-about-obama-trump-and-what-comes-next/>.