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Congress and the New Administrative State

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Abstract

Congress delegates immense power to agencies, but when Congress delegates such broad power, it should ensure that checks and balances guide and limit the agency's exercise of that power. As Congress commits ever-greater powers to ever-less-accountable agencies, including agencies created by Dodd–Frank and the Affordable Care Act, it can also impose accountability through its other oversight powers—namely, oversight hearings backed by the force of Congress's power over appropriations and appointments. Proposals such as the REINS Act and the Regulatory Accountability Act would enhance checks and balances against regulatory overreach. To restore limits in the long run, Congress should narrow overbroad delegations, restore checks and balances to agency structure, and codify administrative procedures that enhance those checks and balances.

The administrative state begins with Congress. As the Supreme Court has observed, "an agency literally has no power to act... unless and until Congress confers power upon it."[1] So let me offer a few words about what previous Congresses have done to create the new administrative state and what Congress can do, today and tomorrow, to restore some limits.

Delegating Powers to Regulatory Agencies

Congress delegates immense power to regulators, but according to the Supreme Court, Congress's delegation of power to an agency will pass constitutional muster so long as Congress specifies an "intelligible principle" to guide the agency's exercise of discretion.[2]

This paper, in its entirety, can be found at **http://report.heritage.org/hl1247**

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Key Points

- By passing large, open-ended statutes, lawmakers can claim credit for acting while evading blame for specific regulations.
- When Congress delegates powers to an agency, it should ensure that checks and balances guide and limit the agency's exercise of that power.
- Delegation of power is constitutional as long as Congress specifies an intelligible principle to guide the agency's exercise of discretion.
- Congress can impose accountability through its other oversight powers: oversight hearings backed with the force of Congress's power over appropriations and appointments.
- Proposals such as the REINS Act and the Regulatory Accountability Act would enhance checks and balances against regulatory overreach.
- To restore limits in the long run, Congress should narrow overbroad delegations, restore checks and balances to agency structure, and codify administrative procedures that enhance those checks and balances.

That's the "nondelegation doctrine," and it's a relatively low hurdle. The Court itself observed that "in the history of the Court we have found the requisite 'intelligible principle' lacking in only *two* statutes, one of which provided literally *no* guidance for the exercise of discretion, and the other of which conferred authority to regulate the *entire economy*" with virtually no limits.[3] Both of those statutes were struck down in 1935; so as Harvard law professor and former Administrator of the Office of Information and Regulatory Affairs Cass Sunstein once remarked, "we might say" that the nondelegation rule "has had one good year, and 211 bad ones (and counting)."[4]

The nondelegation doctrine cannot singlehandedly save us from regulatory excess.

Professor Sunstein himself admits that it's really more nuanced than that,[5] and appellate courts have used the nondelegation doctrine to strike down statutes or to construe statutes narrowly, including one significant case last year.[6] But the basic point is sound: The nondelegation doctrine can't singlehandedly save us from regulatory excess.

In the last half-century, there has been another important shift. Many decades ago, for example, when the Court approved the delegation of power to the Federal Communications Commission to regulate airwaves "in the public interest," it stressed that Congress wasn't writing on a blank slate, because "the public interest" built upon a long regulatory and common law history.[7] Today, by contrast, Congress *does* often write on blank slates, and intentionally so. When Dodd–Frank empowered the Consumer Financial Protection Bureau (CFPB) to regulate "unfair, deceptive, or abusive" lending practices, Congress largely freed the agency from past precedents.

The CFPB is not afraid to construe its mandate broadly. Two years ago, the agency's director emphatically refused to explain what "abusive" means; instead, he told Congress that the statute's terms are "a puzzle," and the agency will further define them on a case-by-case basis. He added that for this new and potent statute, it wouldn't be "useful" to define the statute's terms "in the abstract."[8]He probably meant that it wouldn't be useful *to the agency*. An up-front definition would be very "useful" to the community banks and other small lenders that have to divine the CFPB's regulatory intent and comply with the vague statute.

As my firm represents a community bank challenging the CFPB's constitutionality, let me pause here to highlight what an immense burden open-ended agency powers impose upon small, regulated companies. Big banks can rely upon an army of lawyers to help figure out how to comply with open-ended laws. A small bank or business, by contrast, can't afford such luxuries. That's precisely why one large bank's CEO recently said that the new regulatory environment is a "moat" that will protect his bank from smaller competitors.[9] Open-ended delega-

1. *See, e.g.*, New York v. Fed. Energy Regulatory Comm'n, 535 U.S. 1, 18 (2002).
2. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001).
3. *Id.* (emphasis added) (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).
4. Cass Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000).
5. *See generally id.*
6. Ass'n of Am. R.R. v. U.S. Dep't of Transp., 721 F.3d 666 (D.C. Cir. 2013); *see also* Int'l Union v. Occupational Safety and Health Admin., 938F.2d 1310, 1316–17 (D.C. Cir. 1991) (on narrow constructions of otherwise unconstitutional statutes).
7. *See, e.g.*, N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 25 (1932).
8. *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Fin. Servs. and Bailouts of Pub. & Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong., 2d Sess., at 69 (Jan. 24, 2012), *available at* http://oversight.house.gov/wp-content/uploads/2012/06/01-24-12-Subcommittee-on-TARP-Financial-Services-and-Bailouts-of-Public-and-Private-Programs-Hearing-Transcript.pdf ("we've been looking at it, trying to understand it, and we have determined that that is going to have to be a fact and circumstances issue").
9. *See* Citi Research, *JP Morgan & Chase Co (JPM)*, at 3 (Feb. 3, 2013); *see also* John Carney, *Surprise! Dodd–Frank Helps JPMorgan Chase*, CNBC.com (Feb. 4, 2013).

tions of power inherently favor big businesses over smaller ones.[10]

Congressional Checks and Balances on Regulatory Agencies

When Congress does delegate broad powers to an agency, it's all the more important that Congress ensures that checks and balances guide and limit the agency's exercise of that power. Or when an agency is freed from certain checks and balances, Congress must take care not to delegate too much power.[11]

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This is an increasingly important issue, as Congress commits ever-greater powers to ever-less-accountable agencies, such as the agencies created by Dodd–Frank and the Affordable Care Act.[12]

Of course, Dodd–Frank, the Affordable Care Act, and other broad grants of power, such as the Clean Air Act, are on the books, and the current Administration is unlikely to amend them. So what can be done now? What should be done in the long run?

Right now, Congress can't change the laws, but it can still impose at least some accountability through its other oversight powers—namely, oversight hearings backed with the force of Congress's power over appropriations and appointments.

First, Madison wrote that "the power of the purse" is Congress's "most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."[13] The Senate itself stressed in its 1977 report on the administrative state that "the appropriations process is the most potent form of Congressional oversight, particularly with regard to the federal regulatory agencies."[14]

They were right, and if you want proof, look no further than the fact that the people creating the new generation of independent agencies have worked so hard to *remove* those agencies from the appropriations process. Again, the CFPB, which is funded by the Federal Reserve, is a perfect example: Both the Administration and the Senate Banking Committee urged that making the CFPB "independent of the Congressional appropriations process" was "absolutely essential" to prevent Congress from influencing the agency's policies.[15] The CFPB wholeheartedly agrees, observing just a few weeks ago that its statutory entitlement to "funding outside of the congressional appropriations process" ensures the agency's "*full independence*" from Congress.[16]

10. *See, e.g.*, C. Boyden Gray & Adam J. White, *The Biggest Kiss*, Weekly Standard (Oct. 29, 2012), *available at* http://www.weeklystandard.com/articles/biggest-kiss_655091.html; *cf.* Scott R. Baker *et al.*, *Measuring Economic Policy Uncertainty*, Chicago Booth Paper No. 13-02 (Jan. 1, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2198490.

11. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 671–72 (1988) (stressing that the Independent Counsel's discretion is "restricted," leaving him no "authority to formulate policy for the Government or the Executive Branch"); *Whitman*, 531 U.S. at 475 ("the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred").

12. *See, e.g.*, C. Boyden Gray & John Shu, *The Dodd–Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?* (Dec. 2010), *available at* https://www.fed-soc.org/doclib/20101209_BoydenShuDoddFrankWP.pdf.

13. The Federalist No. 58; *see also* Noel Canning v. Nat'l Lab. Relations Bd., 705 F.3d 490, 510 (D.C. Cir. 2013) (quoting Federalist No. 58) ("The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist 'the overgrown prerogatives of the other branches of government.'").

14. S. Comm. on Gov't Operations, 95th Cong., 1st Sess., 2 Study on Federal Regulations: Congressional Oversight of Regulatory Agencies 42 (1977). This point is elaborated in an *amicus* brief that my firm filed in the *Noel Canning* recess appointment litigation. *See* Br. of State Nat'l Bank *et al.* at 8–14, Nat'l Lab. Relations Bd. v. Noel Canning, No. 12-1281 (Nov. 25, 2013), *available at* http://www.boydengrayassociates.com/947/.

15. S. Rep. No. 111-176, at 163 (2010); *see also* Treasury Dep't, Financial Regulation Reform: A New Foundation Rebuilding Financial Supervision and Regulation 58 (2009) (calling for a "stable and robust funding" to ensure the agency's "independence").

16. Consumer Fin. Prot. Bureau. Strategic Plan, Budget, and Performance Plan and Report at 89 (Mar. 2014) (emphasis added), *available at* http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2013-15.pdf.

Second, Hamilton stressed that the Senate's power to confirm or reject nominations would be "an efficacious source of stability in the administration."[17] More recently, Judge Henry Friendly, a great legal mind and a thoughtful scholar of administrative law, stressed that the appointments power allows Congress to "look at how the agency is doing its job in general"; even if the Senate rejects nominees only sparingly, "that prerogative is not to be relinquished."[18]

The legislative and judicial checks and balances created by the REINS Act and the Regulatory Accountability Act would improve substantially upon the current system.

Here, too, these theories are proven by the fact that this Administration and its supporters in the Senate moved heaven and earth to eliminate the Senate's power to filibuster nominations. According to *Politico*, the Democrats' next "nuclear option" may be to end the long-standing "blue slips" process for reviewing appointments,[19] furthering weakening the Senate's traditional oversight power.

Third, there are oversight hearings themselves. Justice Louis Brandeis famously said that "sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[20] Oversight hearings can shine a light on regulatory overreach.[21]

Let me offer a recent example: In January, the Department of Health and Human Services (HHS) proposed to begin interfering with negotiations between prescription drug plans (PDPs) and pharmacies through the Medicare Part D program.[22] That's not just bad policy; it's illegal: Federal law expressly prohibits regulators from interfering with "negotiations between drug manufacturers and pharmacies and PDP sponsors."[23] Two months later, HHS rescinded its proposal,[24] but only after the House Energy and Commerce Committee convened a public hearing and confronted the agency with the fact that its proposal was illegal.[25]

Appropriation, appointments, and oversight hearings are the short-term tools. I do not mean to *overstate* how useful these after-the-fact checks and balances can be when agencies enjoy broad powers under pre-existing statutes, but we must not *understate* them either. They are critically important.

In the long term, however, there is much more that can and should be done. Congress is now quite familiar with a variety of administrative law reforms, such as the REINS Act and the Regulatory Account-

17. The Federalist No. 76.

18. Henry J. Friendly, *A Look at the Federal Administrative Agencies*, 60 Colum. L. Rev. 429, 445 (1960). This point, too, is elaborated in our aforementioned *amicus* brief in *Noel Canning*, at pp. 14–16.

19. Edward-Isaac Dovere, *White House Weighs the Next Nuclear Option*, Politico (Mar. 24, 2014).

20. Louis D. Brandeis, Other People's Money: And How The Bankers Use It 92 (1914).

21. But when an agency is not subject to Congress's power of the purse, the agency can take such hearings much less seriously. *See, e.g.*, Rachel Witkowski, *Lawmakers Fume Over Unanswered Questions to CFPB*, Am. Banker (Sept. 12, 2013) ("Lawmakers blasted the [CFPB] on Thursday, claiming it had failed to respond to questions lawmakers have about its data gathering activities. During the CFPB's semi-annual report to the House Financial Services Committee, lawmakers demanded to know why the agency's director, Richard Cordray, and his staff have not yet answered roughly 200 questions sent to the agency....").

22. 79 Fed. Reg. 1918, 1971 (Jan. 10, 2014).

23. 42 U.S.C. § 1395w-111(i).

24. Letter from CMS Administrator Marilyn Tavenner to Rep. Sander Levin (May 10, 2014), *available at* http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/Levin.pdf.

25. *See* Press Release, H. Comm. on Energy & Commerce, Administration Unable to Assure Proposed Medicare Part D Rule Will Not Lead to More Broken Promises for Nation's Seniors (Feb. 26, 2014), *available at* https://energycommerce.house.gov/press-release/administration-unable-assure-proposed-medicare-part-drule-will-not-lead-more. My firm's founding partner, C. Boyden Gray, explained the unlawfulness of HHS's policy in an opinion letter in support of Douglas Holtz-Eakin's testimony before the House Comm. on Energy & Commerce. *See* Memorandum from C. Boyden Gray on the Medicare Modernization Act's Prohibition Against Federal Negotiation of Drug Prices (Feb. 24, 2014), *available at* http://boydengrayassociates.com/the-medicare-modernization-acts-prohibition-against-federal-negotiation-of-drug-prices/.

ability Act, that would enhance checks and balances against regulatory overreach. Indeed, those two proposals and others have been passed in the House with strong majorities. Much has been said about them, particularly with respect to their establishment of statutory cost-benefit requirements.

But let me suggest that what makes these bills important is not cost-benefit analysis *per se*, but rather the fact that they would subject the agencies' own analysis to checks and balances by *other branches of government*. The Regulatory Accountability Act, for example, would provide judicial review of the agencies' cost-benefit analyses. The courts would not micromanage agencies' cost-benefit analyses, but they would ensure that the agencies' analyses are reasonable, thorough, and transparent.

The legislative and judicial checks and balances created by the REINS Act and the Regulatory Accountability Act would improve substantially upon the current system.[26] Currently, the executive branch largely reviews its own regulations—a system that, despite its virtues, still allows agencies to exaggerate their regulations' alleged benefits[27] and to insulate themselves from meaningful White House review.[28]

Simply put, cost-benefit analysis is important, but checks and balances by the other branches are *indispensable*.

Claiming Credit While Evading Blame

The Framers gave us a system premised upon the branches checking and balancing one another—ambition countering ambition, as Madison put it.[29] So how did the executive branch and the administrative state succeed in amassing such broad, unchecked power?

There are many reasons,[30] but today's report highlights an important one: By passing large, open-ended statutes such as Dodd–Frank and the Affordable Care Act, lawmakers can "claim credit for 'doing something' while evading blame for specific regulations."[31]

This is, unfortunately, not a new problem.[32] I think that the late John Hart Ely put it best when he wrote: "It is common to style this shift [from Congress to the executive branch] a usurpation, but that oversimplifies to the point of misstatement"; Congress "ceded the ground without a fight. In fact... the legislative surrender was a self-interested one: Accountability is pretty frightening stuff."[33]

Today's *Red Tape Rising* report shows the costs that our nation incurs in the absence of such accountability. In the short run, I hope that it inspires Congress to continue to reclaim its constitutional powers and responsibilities. And in the long run, I hope that it inspires more fundamental changes: narrowing overbroad delegations, restoring checks and balances to agency structure, and codifying administrative procedures that enhance those checks and balances.

*—**Adam J. White** is counsel at Boyden Gray & Associates, a law firm that works on various constitutional and regulatory issues. These remarks are not offered on behalf of the firm or its clients.*

26. *See, e.g.*, *Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery, Hearing Before the H. Judiciary Comm.*, 112th Cong. (Sept. 20, 2012) (statement of C. Boyden Gray); Christopher DeMuth, *The Regulatory State*, National Affairs (Summer 2012).
27. Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, 47 Bus. Econ. 175 (2012).
28. Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 Harv. L. Rev. 1755 (2013).
29. The Federalist No. 51.
30. *See, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 1 (2006); Richard A. Epstein, *Why Parties and Powers Both Matter: A Separationist Response to Levinson and Pildes*, 119 Harv. L. Rev. F. 210 (2006); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001); Jack M. Beermann, *Congressional Administration*, 43 San Diego L. Rev. 61 (2006).
31. James L. Gattuso and Diane Katz, *Red Tape Rising: Five Years of Regulatory Expansion*, Heritage Foundation Backgrounder No. 2895 at 2 (Mar. 26, 2014).
32. *See* David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation (1995).
33. John Hart Ely, War and Responsibility at ix (1993).