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# POLICY BRIEF

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## The Case for Congressional Empowerment

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U.S. Senator Mike Lee  
U.S. Representative Jeb Hensarling  
U.S. Senator Jeff Flake  
U.S. Representative Cynthia Lummis  
U.S. Representative Dave Brat

U.S. Representative Barry Loudermilk  
U.S. Representative Gary Palmer  
U.S. Representative Mia Love  
U.S. Representative John Ratcliffe  
U.S. Representative Mark Walker

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### Executive Summary

The authors of the Constitution intended Congress to be first among the federal government's three co-equal branches. Endowed with the power to legislate, tax, spend, and oversee the weaker Executive and Judicial branches – while simultaneously held to tighter public accountability – Congress was meant to be the driving force in federal policymaking.

In recent decades, however, Congress has surrendered too much of that role to the Executive Branch, and relegated itself to the backseat of American politics. This upending of our constitutional order has led not only to bad policy, but inexorably to greater public distrust for our governing institutions.

The good news is that what a passive Congress has broken a strong

Congress can fix. The constitutional powers necessary to put a representative, accountable federal government back to work for the American people are still right there in Article I, ready to be reasserted.

And so, today we are launching the Article I Project (A1P), a new network of House and Senate conservatives working together on a new agenda of congressional empowerment and accountability, to restore Congress's proper constitutional role.

A1P will develop and advocate specific, structural reforms – large and small – in four key areas at the heart of Washington dysfunction: reclaiming Congress's power of the purse; reforming legislative “cliffs;” restoring congressional power over federal regulations and regulators; and reining in executive discretion.

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Congress retains the power to insist on a federal government of, by, and for the people. A1P is committed to re-constitutionalizing Washington to make that happen.

### **The Problem: Congressional Weakness as Constitutional Crisis**

The federal government is broken. And while there is plenty of blame to go around, only Congress can fix it.

This is not an indictment of any one leader, or party, or even of a single generation of Congresses. The dysfunction in Washington today has accreted over decades, under Houses, Senates, presidents, and Supreme Courts of every partisan combination.

Nor is every misguided or unpopular federal policy a direct act of Congress. But that actually points toward the root problem. Increasingly harmful federal laws are increasingly written by people other than federal lawmakers. Moreover, these laws are imposed via processes contrary to those contemplated in the Constitution, and often with the explicit purpose of excluding the American people from their government and shielding policymakers from popular accountability.

Though all three branches of the federal government have contributed to this toxic state of affairs, Congress bears primary responsibility, both for the problem and its solution. In many ways,

the federal government is a mess today because Congress allows it to be.

Congress's constitutional powers – not just the power to legislate, but specifically the powers of taxation, spending, advice and consent and impeachment – are, by the Founders' design, orders of magnitude stronger than those of the Executive or Judicial Branches. Congress – not coincidentally authorized in Article I of the Constitution – was meant to be first among co-equal branches of government.

The stability and moral legitimacy of America's governing institutions depend on a representative, transparent, and accountable Congress to make federal law. Today, Congress willfully shirks this responsibility, and permits – and indeed, often encourages – the Executive Branch to do work the Constitution assigns to the legislature. Congress's refusal to use its powers – to do its duty – is the root cause of Washington's dysfunction and of the public scorn it invites.

This dysfunction is a large and growing problem for the American republic. And for conservatives, it represents something like a crisis for two reasons. First, conservatives believe in constitutionalism and the rule of law as bulwarks of freedom and justice in our society.

And second, the transfer of lawmaking power from Congress to the Executive Branch tends to thwart the kinds of policies that conservatives tend to advocate – policies that limit the size

and scope of government and protect the equal rights and opportunity of all Americans.

It's no wonder Congress's job approval ratings are at historic lows. In many ways we're not even doing our job, and the nation is paying for it.

### **The Solution: The Article I Project**

That is why today we are creating the Article I Project.

A1P is a new network of House and Senate conservatives working together on a broad agenda of structural reforms to strengthen Congress by reclaiming its constitutional legislative powers that today are being improperly exercised by the Executive Branch.

Specifically, A1P will focus on restoring congressional power in four key areas at the core of Washington's – and America's – broken status quo:

1. Reclaiming Congress's power of the purse;
2. Reforming legislative "cliffs" that unduly empower the executive;
3. Reclaiming congressional authority over regulations and regulators;
4. Reforming executive discretion.

### **Power of the Purse**

Congress's constitutional authority over the federal budget is exclusive and absolute. Yet for years, Congress has taken progressively less care in exercising this core responsibility.

More and more of the budget has been put on autopilot, while the remaining "discretionary" spending is often appropriated without sufficient debate, amendment, or scrutiny. Congress passes continuing resolutions or omnibus appropriations bills that lump together all or most line-items in the federal government's multi-trillion dollar budget together into one "all-or-nothing" vote. What little actual deliberation there is on funding bills is done behind closed doors, by a handful of Senators and Representatives. This process invariably advantages well-connected special interests whose lobbyists and contacts can influence these secret talks, while the hundreds of millions of ordinary Americans not represented in that select group are cut out of the process altogether.

The federal budget is now so large – approximately \$4 trillion – and the work of program-by-program oversight so time-consuming, difficult and politically thankless, that individual members of Congress have little incentive to even try it.

This helps explain why the majority of federal spending is now "mandatory" – appropriated automatically rather than annually reviewed and approved. The single largest program in the federal

government – Social Security – has even been removed from the official “budget” altogether, operating on auto-pilot in a parallel fiscal universe where most spending isn’t appropriated and other spending supposedly doesn’t even count.

Even within the formal budget, Congress has made many agencies “self-funding,” empowering them to collect and spend taxpayer money at their own discretion, without relying on a vote from Congress and without a penny ever touching the U.S. Treasury.

Under the current budget process (if it can even be called that anymore) Congress – by choice – exerts shockingly little affirmative control over federal spending, which makes it harder (a) for Representatives and Senators to hold Executive agencies accountable for quality control and cost-effectiveness, and (b) for Americans to hold Representatives and Senators accountable for policy mistakes.

This state of affairs directly contradicts the Founders’ design of a system of checks and balances. The Constitution does not grant Congress the power of the purse for its convenience, but to protect the American people – to check what the Founders’ knew were politicians’ natural impulses toward fiscal profligacy. Though ignored, that check is still embedded in Article I of the Constitution. So A1P members will propose structural reforms to reverse the perverse political incentives of the budget process, forcing Congress to make fiscal policy decisions in the open

and subject to public scrutiny and accountability.

Specifically, A1P members will recommend reforms to:

- Modernize the federal budget process for a post-earmark Congress;
- Bring federal entitlement programs “on budget” to restore fiscal integrity to the process;
- Make self-funding agencies subject to congressional appropriations;
- Reform the Congressional Budget Office and Joint Committee on Taxation procedures to allow for greater transparency in Congress’s official fiscal analysis.

### Legislative “Cliff” Reform

One of the most effective ways Congress suppresses public scrutiny of fiscal policymaking – and thereby weakening its position vis-a-vis the presidency and in the eyes of a frustrated citizenry – is the so called legislative “cliff.”

Unlike many controversial policy decisions which can be avoided or delegated to the Executive Branch, some policies still require congressional action. The passage of appropriations (spending) bills and increasing the federal debt limit are the two most prominent, but there are other examples involving, for instance, expiring transportation and tax policies.

Most members of Congress see extensions of these policies as “must-pass” legislation because of the consequences of not passing them.

In the past, members’ “tough votes” for these bills were made easier through the use of spending “earmarks,” which allowed members to compensate for unpopular positions by delivering special spending programs directly to their states or districts. But after years of public outrage about wasteful and abusive earmarks (like the infamous “Bridge to Nowhere”), both the House and Senate banned the practice in 2011.

Now that reluctant Senators and Representatives cannot be enticed with earmarks, they are instead threatened with “cliffs.” Congressional leaders often delay consideration of controversial legislation like the debt limit and spending bills until right before the current authorizations expire, when the costs of inaction are highest. Even if both Houses begin working to move legislation in a timely fashion, the Executive Branch has no incentive to not drag out the process until the 11<sup>th</sup> hour in order to preserve the leverage that cliffs hand to the presidency. Up against these manufactured crises, members face a political shake-down – *Vote for an important, expensive bill of the president’s liking, with little debate or amendment, possibly without even reading it, or be blamed for the harmful consequences of going over the cliff – even if it is a presidential veto that forces us over.*

Thus, in Washington today, reform is often castigated as “dangerous,” while perpetuation of the dysfunctional status quo is praised as “responsible.”

Legislating by cliff certainly gets bills passed, but the costs in institutional credibility are enormous. Cliffs simultaneously undermine Congress’s constitutional authority over fiscal policy and invite public contempt for the politicians responsible for the unnecessary brinksmanship. Even the structure of the debates surrounding such cliffs inherently favors the president, since the dynamics of these debates deny legislators the time to do their jobs and punish them for refusing to comply with the president’s demands.

Therefore, A1P members will recommend reforms to:

- Prevent government shutdowns and incentivize Congress and the president to act on crucial fiscal bills well before statutory deadlines;
- Eliminate the risk of default and prioritize spending to end debt-limit brinksmanship.

### **Reclaiming Congressional Authority over Regulations and Regulators**

Most of the federal government’s involvement in Americans’ lives – laws that say “do this” or “don’t do that” – are not passed by Congress anymore at all. They are imposed unilaterally by the Executive Branch through the regulatory process.

In 2014, for instance, Congress passed and the president signed 3,291 pages of new laws. But federal agencies issued 79,066 pages of new regulations – about 24 times as much.

This is a constitutional disaster, effectively subjecting the American people to government without consent. It's also an economic disaster. Federal regulations are estimated to cost the American people between \$1 trillion and \$2 trillion per year. And that money doesn't just disappear. Those trillions in regulatory costs are transferred – redistributed *up* the economic scale – from consumers who pay artificially inflated prices for goods and services to all the lawyers, consultants, and special-interest middle-men who get rich off the red tape.

Not only that, under the governing statute of the regulatory state - the Administrative Procedure Act – the armies of bureaucrats who write the regulations also enforce them. And after they charge, fine, and threaten their oftentimes innocent targets, the agencies even serve as quasi-courts adjudicating challenges to their decisions.

Why would Members of Congress allow such an unfair, undemocratic process to guide 96 percent of new federal “laws”? Once again, for their own convenience. By delegating regulatory power to the Executive Branch, Congress liberates itself from the hard work and ruthless accountability intrinsic to constitutional legislating. The regulatory system, by contrast, allows

Congress to pass intentionally vague bills ordering the Executive Branch to achieve gauzy, laudable goals – like “clean air” or “affordable health care” – without bothering with the devil in the details.

This is a win-win for the politicians, who get to take credit for “doing something” without bearing the blame when things go wrong. Of course, it's a win-win for the bureaucracy, too, which gets to impose its will on the American people with impunity. But it's a lose-lose for the American people, who are subject to an ever more intrusive and expensive regulatory state they cannot easily change at the ballot box.

And all of it occurs, ultimately, with Congress's passive consent. Therefore A1P members will develop and recommend structural reforms that force Congress to assume its exclusive Article I power to make laws and regulate interstate commerce, including:

- Establishing a congressional regulatory budget that caps the permissible economic impact of regulations under each federal agency;
- Modernizing the Administrative Procedure Act to put regulatory agencies under closer congressional supervision;
- Requiring new major regulations to be affirmatively approved by votes in the House and Senate before implementation;
- Modernizing the civil service system and clarifying the status of agency Inspectors General.

## Reforming Executive Discretion

One of the main obstacles to checking the regulatory state is the legal principle of “administrative deference,” which was established in its current form in the 1984 Supreme Court case *Chevron U.S.A. v. Natural Resources Defense Council*. The ruling in the case held that federal courts must accept an agency’s interpretation of any federal law so long as the agency’s opinion is “reasonable.”

Under this “*Chevron* deference” standard, Executive Branch agencies can do almost anything they want, without congressional approval, so long as they have a clever enough justification. The agencies’ lawmaking powers are further insulated from challenges because the regulatory appeals process is so rigged against American citizens that few even bother fighting back in the first place, even when they have done nothing wrong. Regulatory fines can be extremely expensive – especially for the innocent – but under the current system of executive discretion, even unfair punishments can be more affordable than justice.

The Constitution was designed specifically to protect the American people from such arbitrary governance. Congress has the power and the responsibility to define standards of executive discretion, to ensure the regulatory system reflects rather than subverts government by consent. Therefore, A1P members will offer policy reforms to:

- Clarify the deference courts should give to executive agencies’ interpretation of congressional statutes as well as their own regulations;
- End the abuse of “guidance,” “dear colleague” letters, and other regulatory “dark matter” that agencies use to bring about preferred outcomes without issuing formal rules;
- Balance the scales to ensure a fair process to citizens, communities, and businesses targeted by federal regulators.

## Conclusion

What A1P seeks is not so much to change Congress as to revive it, to make it once again live up to its founding purpose. Congress exists to make the laws of the United States – with all the thankless work and political risk that comes with that job. Our mission is to make Congress once again responsible, both in the sense of discharging its constitutional duties and making itself accountable for the consequences.

The Founders meant for Congress to be strong – not for the sake of politicians’ ambitions, but to protect and empower the American people. Under a strong, transparent, and accountable Congress, the federal government by definition works for the American people, instead of the other way around. Congressional weakness is the foremost reason for the public’s dissatisfaction

with the institution, and a key cause of Americans' distrust of Washington.

Though A1P is comprised of conservatives, the Project's goals are in no way partisan. Whether the American people lean left or right at any given moment, only a strong Congress can ensure federal policy reflects the considered will of the public, and is subject to public oversight on Election Day. And indeed, the 2016 presidential campaign has been nothing thus far if not a cry from the American people to reassert their rightful authority over a federal government that has grown contemptuously indifferent to the

interests of too many ordinary citizens. Indeed, this seemingly intractable dysfunction has led some Americans to entertain avenues of change outside the letter and spirit of the Constitution.

Yet, just as Congress's surrender of its constitutional powers to the Executive Branch has led to political dysfunction and public distrust, a reclamation of those powers by the House and Senate can lead to a healthier, happier republic.

All that stands between Americans and a renewed government of, by, and for the people is the will of the Congress to finally step up and do its job.