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Chairman Yarmuth, Ranking Member Smith, and members of the Committee, my name is Molly Reynolds and I am a Senior Fellow in the Governance Studies Program at the Brookings Institution. I appreciate the opportunity to testify today on how Congress can better fulfill its constitutional obligation to provide for, and effectively oversee, the executive branch. My research has explored a range of topics related to congressional rules and procedures, including changes in the congressional budget process since the adoption of the Congressional Budget and Impoundment Control Act. My goal today is to provide context for why and how Congress requires additional tools to effectively monitor the executive branch's execution of congressional decisions.

In this context, I want to make four main points today.

1. **The structure of the U.S. constitutional system and the incentives facing members of Congress mean that Congress needs procedures in place to ensure that that the executive branch is complying with congressional intent.**

   Because the Constitution separates legislative functions from executive ones, and because Congress must rely on the executive to implement its policy choices, divergence between Congress's intent and policy outcomes is inevitable; the individuals charged with executing federal programs on a daily basis—from agency heads down to career civil servants—will always encounter situations in which the language of the law does not provide sufficient guidance.[2] Indeed, it is because of this inevitability that Congress must design and, periodically, re-design mechanisms to monitor, as effectively as possible, the activities of the executive branch in response to congressional decisions.

   It is not only this constitutional division of labor that creates the need for effective oversight mechanisms. It is also the fact that, as the branch charged with implementing policy, the executive branch has types of expertise that make it better equipped to make certain detailed decisions. As the policy problems facing the nation have become more complex and numerous, Congress has frequently found itself incapable of writing statutes that set forth all of these specific choices.

   In addition, as a political matter, Congress often prefers to leave detailed decisions to the executive branch. In some cases, this is due to shared preferences between the congressional majority enacting a policy and the president charged with implementing it. But in other situations, it is because Congress prefers to leave the most politically challenging issues to another branch to resolve.

   Together, these circumstances mean that Congress must design ways to monitor this inevitable potential for slippage—divergence that can and does occur regardless of whether the branches are controlled by the same political party. Even in an era of high partisan polarization, it is vital to

[1]The views expressed are my own and do not necessarily reflect those of staff members, officers, or trustees of the Brookings Institution. Brookings does not take institutional positions on any issue.
[2] This section draws on a large body of political science research, summarized in B. Dan Wood, "Congress and the Executive Branch: Delegation and Presidential Dominance," in *The Oxford Handbook of the American Congress*, eds. George C. Edwards III, Frances E. Lee, and Eric Schickler (New York: Oxford University Press, 2011).

remember that the need for monitoring and oversight tools is structural and fundamental to the constitutional system.

2. Procedural innovations by Congress in response to changes in executive branch behavior are not new, and as the executive branch changes its behavior, so must Congress.

If divergence between Congress's intent and the executive branch's execution is inevitable, so too is the need for Congress to periodically revise its procedures to address the current exercise by the president and agencies of their implementation power. One goal of the Antideficiency Act's requirement that the executive branch apportion funds appropriated by Congress into smaller components, for example, is to prevent the executive branch from spending down its allocations quickly such that additional sums will be needed before the end of the fiscal year. In addition, when the Congressional Budget and Impoundment Control Act was enacted in 1974, several of its procedural provisions were expressly responding to aggressive assertions of power by the executive branch and to informational disadvantages facing Congress. The original provisions allowing Congress to review efforts by the president to rescind or defer funds are an example of the former, while the creation of the Congressional Budget Office as a counterweight to the Office of Management and Budget are an example of the latter.

Several components of the Power of the Purse Act—including those requiring budget authority proposed for rescission or deferral to be made available in time to be obligated; those requiring appropriations to be obligated no later than 90 calendar days before expiration; and those requiring apportionment decisions to be made public—are, in important ways, natural successors to these earlier budgetary provisions. Importantly, the presidential powers targeted by these provisions are statutory. If Congress, for example, felt compelled to direct the president to apportion appropriated funds for obligation, it should also feel comfortable periodically revising its approach to ensuring that apportionment is happening in the way Congress intends.

The president is not the only actor whose changing behavior can require a procedural response from Congress. Prior to the Supreme Court's decision in *INS v. Chadha*, legislative veto provisions were an important tool in Congress's arsenal for overseeing executive branch decision-making. Because legislative veto provisions, like the one in the National Emergencies Act, often included procedures that expedited consideration of the review legislation, they demonstrate a powerful choice by some individual members of Congress: cede some of their individual power in order to give the institution a stronger voice. The Supreme Court's decision in *Chadha* disrupted that bargain, and Congress would be well-served to adapt its procedures in response.

Notably, statutory legislative procedures designed to enhance congressional oversight of the executive branch are far from unprecedented.[3] While many of these are like the National Emergencies Act, the Arms Export Control Act, and the Congressional Review Act in that they involve a joint resolution of disapproval—which, because the president is unlikely to sign a measure overturning his own action, effectively require a two-thirds majority in both chambers to go into effect—others contain *approval* provisions like those contained in Title III of the Power of the Purse Act—including the procedures for approving presidential rescission requests in the Congressional Budget and Impoundment Control Act.

[3] For a discussion of these and other expedited procedures, see Molly E. Reynolds, *Exceptions to the Rule: The Politics of Filibuster Limitations in the U.S. Senate* (Washington, D.C.: Brookings Institution Press, 2017).

3. **Changes in the nature of the legislative process have made procedural innovation in this area especially necessary.**

The need for reform is not just due to actions by the executive and judicial branches; the evolution of Congress's own approach to processing spending bills has also increased the need for new tools to enhance the legislature's oversight capacity.[4] While Congress is supposed to pass twelve appropriations bills by October 1 each year, it has not done so in several decades and temporary continuing resolutions are common. The appropriations process frequently ends with a single, large omnibus appropriations bill that contains all, or nearly all, of the discretionary spending for a fiscal year already in progress.

Relying on continuing resolutions and large omnibus bills breeds brinkmanship, where inaction means shutting down wide swaths of federal operations. Because the cost to Congress—and its constituents—of letting the government shut down is so high, legislators cannot credibly threaten to withhold funding from a specific executive branch priority or activity because the president or an agency has chosen to stray from congressional intent. In recent years, only the highest profile, partisan issues—like the Affordable Care Act and the wall along the southwestern border—have risen to the level at which Congress is willing to threaten a shutdown.[5] In addition, when there is a partial shutdown of federal operations, the executive branch has substantial discretion over determinations about exactly which activities cease and which ones can continue under exceptions to the Antideficiency Act's prohibition on obligating funds in the absence of an appropriation. [6] This discretion undermines Congress's power in shutdown confrontations further.

A common reaction to this brinkmanship that characterizes the current appropriations process is to call for a return to so-called "regular order," but little in Congress's recent experience suggests that it is likely; indeed, there are some elements of the omnibus appropriations process—including the fact that combining disparate issues together into a single bill can facilitate deal-making—that are adaptations to current political realities. Given this, Congress must turn to new tools like those in the Power of the Purse Act—such as requiring that funds are made available for obligation prudently; that apportionment documents are made public; that the executive branch notifies Congress if apportionments are not made within the statutorily required time period; and that other information is reported to Congress—to ensure it is getting the information it needs to ensure executive branch compliance without having to resort to threatening a shutdown.

4. **Likewise, changes in the nature of congressional oversight also mean that reforms to support Congress's work are needed.**

Historically, Congress's efforts to oversee the executive branch generally followed a model of accommodation. Each branch sought to protect its own institutional interest, with Congress able to threaten to subpoena the executive branch when it did not comply. While there were certainly

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[4] This section draws on Molly E. Reynolds and Philip A. Wallach, "Does the Executive Branch Control the Power of the Purse?," *American Enterprise Institute,* October 2020 <https://www.aei.org/wp-content/uploads/2020/10/Does-the-executive-branch-control-the-power-of-the-purse.pdf?x91208>.

[5] Molly E. Reynolds, "Members of Congress Have Lost Control Over Spending," *Washington Post,* August 27, 2020.

[6] Eloise Pasachoff, "The President's Budget Powers in the Trump Era," in *Executive Policymaking: The Role of the OMB in the Presidency*, ed. Meena Bose and Andrew Rudalevige (Washington, DC: Brookings Institution Press, 2020), 69–98.

high-profile disputes that ended up in the courts,[7] both institutional parties were often able to reach some sort of mutually acceptable agreement. As former Representative Tom Davis (R-Va.) once described this, "you ask for the moon and you end up with a moon rock."[8] This accommodations process, however, has eroded, and Congress has had more difficulty enforcing subpoenas against the executive branch. Declines in staff capacity have also made engaging in substantive oversight more challenging.[9]

Given this, Congress would be well served to strengthen its hand as it seeks information from the executive branch. Several provisions in the Power of the Purse Act aim to do this, including the requirement that the executive branch provides the Government Accountability Office with timely access to information and to employees for interviews if requested by the Comptroller General; the requirement that agencies respond to GAO requests for budget and appropriations law decisions; the expansion of suits that the Comptroller General can bring under the Impoundment Control Act; the authorization of administrative discipline for responsible officials who violate the Impoundment Control Act; and the publication requirement for Office of Legal Counsel memos on budget and appropriations law.

It is important to remember, however, that even if Congress takes steps to enhance its ability to use the federal courts as a remedy to check the executive branch, this is often a suboptimal approach—even in instances where courts are likely to side with Congress.[10] Consider a few recent examples. First, take the legal battle over the Affordable Care Act's payments directly to insurance companies to reduce out-of-pocket expenditures by low-income individuals purchasing health insurance on the individual marketplaces. The Obama administration requested funds for these subsidies, and when Congress did not allocate money for them, the executive branch asserted that an existing permanent appropriation authority for tax refunds covered the payments. House Republicans sued in November 2014 and won in the District Court for the District of Columbia in 2016—but the judge stayed her own ruling while the appeals process proceeded. Executive action following the change in administration in 2017 ended the payments, but only after a two-plus year court battle that ultimately remained unresolved. The legal fight over the use of transfer authority by President Trump to fund the expansion of the border fence displays a similar dynamic: lawsuits filed in 2019 that remained unresolved when President Biden assumed office in January 2021.

These are but two examples of the ways in which the slow speed at which the federal courts move constrains Congress's ability to use them effectively as the mechanism to ensure executive compliance.[11] While relying heavily on them is sometimes necessary, it is not the optimal approach available to Congress. The legislative branch must work on its own behalf, just as previous Congresses have been willing to as part of the continual push and pull between the branches. While other periods of heavy congressional delegation to the executive, like the 1930s and 1960s, were followed by enhancements by Congress of its own capacity to oversee those actions in the 1940s and 1970s, the expansion of executive power that began after September 11,

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[7] Todd Garvey, "Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure," *Congressional Research Service*, May 12, 2017.
[8] Byron Tau, "House Democrats, Trump Gear Up for Battle Over Subpoenas," *Wall Street Journal*, April 29, 2019.
[9] Molly E. Reynolds, "Improving Congressional Capacity to Address Problems and Oversee the Executive Branch," *The Brookings Institution,* December 2019 <https://www.brookings.edu/policy2020/bigideas/improving-congressional-capacity-to-address-problems-and-oversee-the-executive-branch/>.
[10] This section also draws heavily from Reynolds and Wallach 2020.
[11] For several other examples, see Molly E. Reynolds and Margaret L. Taylor, "The Consequences of Recent Court Decisions for Congress," *Lawfare,* October 5, 2020 <https://www.lawfareblog.com/consequences-recent-court-decisions-congress>.

has not been met with a similar assertion of congressional authority. The Power of the Purse Act represents an important part of that necessary effort.