

IS CONGRESS A SALVAGEABLE INSTITUTION?*

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A review of PHILIP A. WALLACH, *WHY CONGRESS* (Oxford University Press 2023)

Constitutional law scholars and practitioners have focused substantial attention on the imbalances in power among the three branches of our federal government. Many conservative writers are troubled by the increasing reach of administrative agencies and by an expansive presidency.¹ Other writers, on both the Left and the Right, bemoan the power of the Supreme Court to effect societal changes.² Lurking in the background is a central question: why is Congress, the legislative branch of the government, not asserting its rightful place in our system of governance? By default, the executive branch and the federal judiciary aggressively fill the gap in lawmaking and thereby govern the lives of American citizens with little accountability. In *Why Congress*, Philip A. Wallach provides a fresh perspective on this debate.³ He makes a strong case that Congress can, and must, reassert its primacy as the national policymaker.

Wallach brings considerable expertise to this important task. He is a Senior Fellow at the American Enterprise Institute, where he studies separa-

* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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¹ See, e.g., RICHARD A. EPSTEIN, *THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW* (2020).

² See e.g., Brad Snyder, *The Supreme Court Has Too Much Power and Liberals Are to Blame*, POLITICO, July 27, 2022, <https://www.politico.com/news/magazine/2022/07/27/supreme-court-power-liberals-democrats-00048155>.

³ PHILIP A. WALLACH, *WHY CONGRESS* (2023).

tion-of-powers issues. Before joining AEI, Wallach was a Senior Fellow in governance studies at the Brookings Institution, where he authored *To the Edge: Legality, Legitimacy, and the Responses to the 2008 Financial Crisis*. He was also affiliated with the R Street Institute, and he served as a fellow with the House Select Committee on the Modernization of Congress in 2019. Wallach has a Ph.D. in Politics from Princeton University.

I. THE ESSENTIAL QUESTION – WHY CONGRESS?

Wallach’s thesis is that Congress is the unique institution in which Americans can and should reconcile their often divergent judgments about and interests in national policy. In other words, Congress “must be a place where many voices find ways to harmonize.”⁴ Wallach acknowledges that Congress, like our country at large, is deeply polarized and sometimes balks at enacting laws. But he contends that Congress has flexibility to adjust to various interests, and that when it works, its “fluctuating coalitions act as engines of national cohesion, and our representatives are able to make regular adjustments to the demands of a changing world.”⁵ Congress also faces a dual challenge. On the one hand, the Senate and the House each must determine how “to organize themselves to corral our nation’s dizzying diversity of interests rather than be stampeded by them.”⁶ But both bodies also must “resist the urge to achieve consensus by means of suppressing or excluding diverse voices.”⁷

Wallach also believes that the critics of Congress who deride its inefficiency, particularly when compared to the executive branch, miss several important points. Congress is “drawn from the whole of our diverse, factious country” and therefore “can forge a sense of national identity.”⁸ The critics also ignore the values that our representative government serves, including “building coalitions, generating trust, and creating real political accountability.”⁹ He points out that members of Congress can craft compromises, particularly when legislators encounter “unexpected issues” that cause political opponents to find common cause, and they can build trust to re-

⁴ Wallach *supra* note 3, at 1.

⁵ *Id.* at 3.

⁶ *Id.* at 16.

⁷ *Id.*

⁸ *Id.* at 40.

⁹ *Id.* at 41.

solve the specific problem.¹⁰ He also notes that the “continuous nature” of a representative assembly builds in incentives to cooperate; the “mutual give-and-take across the whole range of issues allows accommodation of different groups’ most intense preferences, while also allowing the ‘losers’ in one round of bargaining to keep faith with a larger process they trust will serve them in another round.”¹¹

Congress traces its origins to the English Parliament, an institution that evolved over many centuries. After the 1215 Magna Carta, it provided a practical forum in which to work out the “tensions between the king and his barons.”¹² Over time, it was to become an “embodiment of the nation and its interests.”¹³ For our Founders, however, the premise that the North American colonies’ interests were advanced by “virtual representation” in Parliament rang hollow. In 1774, James Wilson argued that the single most important protection in the British constitution was “the presence of representatives drawn from the body of the people,” but the colonists had no such representatives, nor were the members of Parliament affected by the laws they imposed on the colonists.¹⁴

Given that historical context, the Framers’ challenge was to create a sovereign national government that could govern effectively (unlike the loose system under the Articles of Confederation) while respecting federalist principles protecting state interests, large and small. Congress would have to be a “mediating body.”¹⁵ Wallach invokes James Madison’s counsel in *Federalist No. 10* that factions must be managed, not suppressed: we must “commit to a political system that copes with our differences.”¹⁶ He acknowledges the often bitter conflicts between the Federalists and the Republicans during the 1790s, but he does not discuss how Congress navigated these issues during the 19th century.¹⁷

Wallach explains that criticism of Congress mounted after the Civil War. Then-Professor Woodrow Wilson, in his 1885 book *Congressional*

¹⁰ *Id.* at 40.

¹¹ *Id.* at 40-41.

¹² *Id.* at 19.

¹³ *Id.* at 21.

¹⁴ *Id.* at 23.

¹⁵ *Id.* at 25.

¹⁶ *Id.* at 2 (citing THE FEDERALIST NO. 10, at 42-48 (James Madison) (George W. Carey & James McClellan eds., 2001)).

¹⁷ It is unfortunate that Wallach does not discuss how Congress functioned during the Civil War. For an excellent exposition on Congress’s relations with the Lincoln Administration, I recommend Fergus M. Bordewich’s CONGRESS AT WAR (2020).

Government, contended that Congress did its important work in closed committee rooms, with no oversight by the members; as a result, the public had no understanding of what Congress was enacting on the public's behalf.¹⁸ Wilson advocated governance by "responsible parties" headed by "a few authoritative leaders" who could develop better policy choices by reconciling competing interests in a "structured" setting.¹⁹ Wilson envied the strong leadership of the Liberal government of William Gladstone then dominant in the United Kingdom, which "he saw as incomparably better able to formulate and then implement a coherent program."²⁰ Soon thereafter, the House did enact several procedures that consolidated more control in the Speaker. Wallach notes that Congress perennially struggles with how it should organize itself internally to effectively govern. If Congress becomes too open, it faces ineffectiveness and susceptibility to undue influence by outside interests. If congressional leadership exercises tight control, there can be a stranglehold by specific factions or ideological interests.²¹

In 1908, Wilson wrote *Constitutional Government in the United States*, in which he contended that the "president's election by the whole nation made him the natural spokesperson for the general good."²² In other words, Wilson argued presidential leadership should push Congress out of the way of national policymaking.

II. WHEN CONGRESS WORKED

Wallach contends that the public perception that Congress is ineffective, or outmoded, is shaped in part by Wilson's influential narrative in which "a singular president would better represent the nation's interests than a plural Congress."²³ It was in the "simple, grand choices of presidents that the American people could give direction to their political leaders."²⁴ That perception is vindicated when Congress appears unable to reconcile the many

¹⁸ Wallach, *supra* note 3, at 32. See WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1885), available at <https://www.gutenberg.org/files/35861/35861-h/35861-h.htm>.

¹⁹ Wallach, *supra* note 3, at 32.

²⁰ *Id.*

²¹ *Id.* at 37-38.

²² WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1908), available at <https://www.loc.gov/item/08017752/>.

²³ Wallach, *supra* note 3, at 35.

²⁴ *Id.* at 34.

diverse interests to which its individual members must respond.²⁵ Wallach explains that Congress “has not always been as it is now.”²⁶ Instead, it “flourished in some of the last century’s most difficult moments.”²⁷

In two successive chapters, Wallach assembles persuasive evidence that Congress can function quite effectively and efficiently when circumstances require. He selects two examples: the World War II period, when Congress both partnered with the executive branch and acted to check against its excesses, and the Johnson Administration, when Congress enacted landmark civil rights legislation. Wallach recounts these episodes to show that Congress has been able to summon up the will to exercise its law- and policy-making authority.

Wallach observes that little attention has been paid to congressional activity during the World War II era.²⁸ Instead, an American’s typical image of wartime leadership is of the “rousing speeches and shrewd diplomacy” of President Franklin D. Roosevelt and of the military leadership of generals such as George Marshall, Dwight Eisenhower, George Patton, and Douglas MacArthur. Unfortunately, a false notion persists that the isolationist attitude of the pre-World War II Congress carried over to the time of the war. Wallach tries to set the story straight on how Congress operated effectively during that crisis.²⁹

During World War II, Congress sought to pursue the paramount interest of winning the war “without compromising the constitution.”³⁰ Congress supported the war effort by appropriating vast amounts of funding and increasing taxes. But Congress pushed back against efforts of the Roosevelt Administration to centralize government power over the economy. For example, Congress resisted the administration’s insistence on levying highly progressive taxes on wartime salaries. After the Republicans gained seats in the 1942 midterm elections, Congress repudiated Roosevelt’s ambitions. Wallach also emphasizes that Congress was not obstructionist; indeed, it attempted compromise over tax and expenditure policies.³¹

Congress also played a positive role in ensuring that the broad powers accumulated by the federal government during the War did not persist.

²⁵ *Id.* at 4, 9, 17-18.

²⁶ *Id.* at 1.

²⁷ *Id.*

²⁸ *Id.* at 45-46.

²⁹ *Id.* at 46-55.

³⁰ *Id.* at 46.

³¹ *Id.* at 47-51.

“Congress stood on the side of what might be called a return to normalcy, including restoring the primacy of free enterprise as soon as practicable and dismantling some of the [New Deal] bureaucracies.”³² Congress resisted the administration’s efforts to create invasive post-war economic planning in which the federal government would play an outsized role. In 1943, Congress terminated several New Deal agencies, including the Works Progress Administration and the National Youth Administration, that Congress believed had outlived their usefulness.³³ Congress also confronted the various problems created by the Office of Price Administration. Price controls had disrupted meat production, and support for the OPA waned due to the public outcry.³⁴

Congress also acted aggressively to prevent the Roosevelt Administration from creating an unprecedented civilian manpower draft.³⁵ The administration reasoned that the military’s Selective Service system could be expanded to impose the mandatory assignment of civilian employment under the auspices of the Office of War Mobilization. Congress countered by invoking public sentiment that civilian employment should remain a matter of free choice, rejecting a government regimentation of the workforce as had been adopted both by fascist Germany and Stalinist Russia.

Wallach cites this congressional activism as an important positive example for our present era.³⁶ Congress wanted to return to the pre-war path of “liberty and free opportunity,” rejecting reformist efforts to create a post-World War II New Deal with rights to guaranteed employment and medical care. The public supported Congress’s effort to resist the “executive-driven pressures toward state-managed, labor-dominated corporatism.”³⁷

Wallach’s second example of congressional action, also forgotten in our historical imagination, is how Congress achieved passage of the Civil Rights Act of 1964. Wallach notes that, contrary to the popular perception, the “foundational change in social relations” effected by that law was the result not solely of figures like President Lyndon B. Johnson or the Reverend Martin Luther King, Jr., but also was made possible by the close working relationship that Johnson had with Congress.³⁸ Wallach contends that

³² *Id.* at 60.

³³ *Id.* at 61.

³⁴ *Id.* at 62-63.

³⁵ *Id.* at 63-64.

³⁶ *Id.* at 66-67.

³⁷ *Id.*

³⁸ *Id.* at 70-71.

“[b]oth Democrats and Republicans felt intense pressure to establish themselves as the party of civil rights, leading to virtuous competition between them.”³⁹

Wallach frames his argument by noting that the administration of President John F. Kennedy inherited a divided Democratic party, with a liberal wing anxious for reform and a southern bloc that was resistant to upsetting the status quo.⁴⁰ Even before Kennedy’s assassination, he contends, Congress had begun to work on possible legislation, knowing that southern congressional resistance had to be overcome.⁴¹ Kennedy’s assassination created an opportunity for President Johnson to move aggressively for passage of a bill.⁴²

Wallach explains that moderate Democrats and moderate Republicans accommodated the southern senators’ demands to have a voice (on behalf of their constituents) in order to articulate their opposition to the legislation. The moderates tolerated extensive filibustering, but the southern senators ultimately conceded that the legislation was inevitable.⁴³ In that way, the southern Democrats preserved their public position and their ideological opposition to desegregation, but they ultimately yielded to majoritarian forces. As Wallach emphasizes, “they still told their constituents to accept the law of the land.”⁴⁴ Wallach singles out the late Senator Richard A. Russell as an example of that attitude.⁴⁵

Wallach contrasts the legislative struggle that culminated in the enactment of the Civil Rights Act of 1964 with administratively imposed affirmative action policies, which took on increased importance and occasioned bitter controversy in the decades following the Act.⁴⁶ He notes that then-Senator Hubert H. Humphrey characterized claims that the Act would create legal quotas as a “bugaboo.”⁴⁷ Affirmative action was “never properly contested in the legislative arena,” and, as a result, its opponents always have

³⁹ *Id.* at 71.

⁴⁰ *Id.* at 73-75.

⁴¹ *Id.* at 75-77.

⁴² *Id.* at 79-80.

⁴³ *Id.* at 83-90.

⁴⁴ *Id.* at 89.

⁴⁵ *Id.* at 88-90.

⁴⁶ *Id.* at 91-92.

⁴⁷ *Id.* at 91.

been able to question its basic legitimacy, and to seek its reversal in the courts.⁴⁸

III. HOW THINGS WENT BADLY WRONG

In Part Two of his book, “Congress Transformed,” Wallach describes how Congress as an institution significantly changed during the three decades after the Civil Rights Act of 1964.⁴⁹ One change was a diminishment of accountability.

One reason for the change in that period was a broad push for social and economic reform by some liberal House Democrats. They believed that the conservative chairmen of the committees were obstacles to liberal legislation, and over time in the 1970s, the reformers were able to defeat some of the chairs.⁵⁰ The House Democratic Caucus enacted rules that “transformed subcommittees into independent bastions of power.”⁵¹ Ironically, Wallach notes, this “fragmentation of power” created “more access points for special interests,” which could target a few staffers on various subcommittees to advance their agendas by, among other things, blocking unfavorable legislation.⁵² The Senate, in turn, made it harder to filibuster a bill.⁵³

The Legislative Reorganization Act of 1970 made committee hearings and roll call votes public and created easier procedures to consider amendments to bills. Wallach observes that some of these changes made committee meetings “more performative and less deliberative.”⁵⁴ Finally, although the 1970s campaign finance reform laws created some welcome restrictions on financial contributions to members of Congress, the restrictions had several unintended effects. “The absence of public financing for congressional campaigns, along with the lack of aggregate limits on political action committee (PAC) contributions, incentivized interest groups to spread their influence widely throughout Congress,” and its decentralized system gave them multiple opportunities to do so.⁵⁵ While one objective of these reforms had been to enable Congress to “grapple with the major issues of the

⁴⁸ *Id.* at 92.

⁴⁹ *Id.* at 97-175.

⁵⁰ *Id.* at 100-03.

⁵¹ *Id.* at 103.

⁵² *Id.*

⁵³ *Id.* at 105-06.

⁵⁴ *Id.* at 108-09.

⁵⁵ *Id.* at 109.

day,” they instead “drove Congress to an extreme of decentralization that spread members’ attention thin.”⁵⁶

Congress in this era also augmented its ability to conduct oversight over operations of the executive branch. It placed sunset provisions into the funding of many of the newer administrative agencies, and it attached appropriations riders to some bills to forbid agency officials from using funds to carry out specific policies.⁵⁷ Congress also created the Congressional Research Service to assist it in policy development, and it created the Office of Technology Assessment to provide it expertise on technological issues.⁵⁸ It enacted the Budget and Impoundment Control Act of 1974, a rebuff to President Nixon’s refusal to spend appropriated funds on programs that he opposed.⁵⁹ A War Powers Resolution halted presidential discretion in funding the unpopular Vietnam War.⁶⁰ The now widely-respected Congressional Budget Office was also created during that period.⁶¹

But increased oversight also resulted in more members engaging in “mere spectacle,” rather than actual lawmaking.⁶² The reforms were well-intended, but Congress could not function as a second executive branch and could not push back effectively against the president or the agencies.⁶³

Turning to the 1980s, Wallach observes that Congress fractured, often along partisan lines, during both the Carter and Reagan Administrations.⁶⁴ The Democrats were divided between conservatives and liberals, and Congress did not work well with the one-term Carter Administration. One illustration was the cumbersome process by which Congress enacted an energy regulation package in 1978. In the Senate, 17 subcommittees claimed jurisdiction over the issue, and the bill “was adulterated by interests of every variety.”⁶⁵ Wallach acknowledges that the compromise legislation was the result of a “Madisonian accommodation.”⁶⁶ But he contends that the decentralization of power in Congress made it less manageable.⁶⁷ The pub-

⁵⁶ *Id.* at 109, 8.

⁵⁷ *Id.* at 113-14.

⁵⁸ *Id.* at 112.

⁵⁹ *Id.* at 111.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 113.

⁶³ *Id.* at 119.

⁶⁴ *Id.* at 125-35.

⁶⁵ *Id.* at 116.

⁶⁶ *Id.*

⁶⁷ *Id.* at 114-17.

lic's perceptions of Congress also were "abysmal" during this period—approval dropped from 47% in 1974 to 19% in fall 1979.⁶⁸

President Reagan's 1980 election victory resulted in Republican control of the Senate for the first time since 1955. With the cooperation of Democratic House Speaker Thomas P. "Tip" O'Neill, Jr., bipartisan coalitions enacted a number of important budget reconciliation bills, the rescue of the cash-strapped Social Security system in 1983, and the Gramm-Rudman-Hollings Act of 1985, which was intended to get control over the nation's out-of-control deficits.⁶⁹ Despite these examples of legislative cooperation, various House rules changes resulted in increased centralization of committee power, and committees became "instrumentalities of ideological majorities."⁷⁰ Speaker O'Neill's successor, Jim Wright, abandoned "consensual politics" and tried to exert personal control over the House.⁷¹

As Wallach explains, Wright's conduct engendered a strong backlash from Republicans, especially Congressman Newt Gingrich, who, with other conservatives, issued broad critiques of congressional power in several books published by AEI and the Heritage Foundation.⁷² Gingrich championed a "mature anti-Congress ideology," embraced by his party after its loss of the Senate in the 1986 midterm elections.⁷³ Conservatives criticized the expanded oversight of the executive branch through congressional investigations and budget limitation riders, and they advocated a line-item veto for the president.⁷⁴ Ironically, some Reaganites began to mirror Woodrow Wilson's advocacy of a powerful presidency.⁷⁵ Wallach observes that this "anti-Congress, pro-executive synthesis" championed by some conservatives reflected frustration with the House Democrats' control of that chamber, but also a new embrace of the president as a voice above the clash of special interests.⁷⁶ Conservatives also contended that congressional Democrats were "meddling" in foreign policy through intrusive oversight investigations;

⁶⁸ *Id.* at 118.

⁶⁹ *Id.* at 124-25.

⁷⁰ *Id.* at 125-26.

⁷¹ *Id.* at 128-29.

⁷² *Id.* at 126-27.

⁷³ *Id.* at 130.

⁷⁴ *Id.*

⁷⁵ *Id.* at 131.

⁷⁶ *Id.* at 131-32.

such policymaking, they argued, was uniquely within the president's purview.⁷⁷

Wallach describes the 1990s as a time of complex political maneuvering.⁷⁸ After a Republican victory in the 1994 midterm elections, then-House Speaker Gingrich began an aggressive reform campaign. He pushed enactment of the Unfunded Mandates Reform Act, which was intended to deter Congress from imposing new responsibilities on states without new funding, and the Congressional Accountability Act, which subjected members of Congress and their staffs to various federal labor laws.⁷⁹ But he failed to enact a balanced budget amendment.⁸⁰ A line-item veto statute was enacted, but the Supreme Court later held it unconstitutional.⁸¹ There was a continued "redistribution of power away from committees and toward the Speaker."⁸² Gingrich engaged in unsuccessful brinkmanship with President Clinton over omnibus appropriation bills to fund the government in 1995-1996, resulting in an unpopular and disruptive government shutdown.⁸³ Wallach's verdict is that Gingrich "was a quintessential anti-institutionalist working within Congress," whose "uncompromising stance" weakened Congress.⁸⁴

As he continues his narrative of Congress's largely unsuccessful efforts to be sufficiently effective as a lawmaking body, Wallach concedes that bipartisanship has persisted in three "highly consequential areas: defense authorizations, annual appropriations, and crisis responses."⁸⁵ But with respect to appropriations, government shutdowns occurred in 2013, 2018, and 2019, and "debt ceiling standoffs led to frayed nerves" in 2011, 2013, and 2021. These problems continue to crop up in the context of the rapid deterioration of the United States' overall fiscal situation. We recently experienced another round of brinkmanship on the debt ceiling, and are due for more in the not-too-distant future.⁸⁶ Wallach observes that these all-too-frequent crises "consume huge amounts of legislative energy and create serious ad-

⁷⁷ *Id.* at 133.

⁷⁸ *Id.* at 133-45.

⁷⁹ *Id.* at 139-40, 137.

⁸⁰ *Id.* at 140.

⁸¹ *Clinton v. City of New York*, 524 U.S. 417 (1988).

⁸² Wallach, *supra* note 3, at 137.

⁸³ *Id.* at 141-42.

⁸⁴ *Id.* at 145.

⁸⁵ *Id.* at 171.

⁸⁶ *Id.* at 172.

ministrative difficulties—not to mention being deeply embarrassing.”⁸⁷ While sometimes there is vigorous congressional action, particularly in response to national emergencies, this style of “bipartisan crisis legislating,” although “vastly superior to paralysis,” does not serve the country well.⁸⁸

Wallach identifies two prominent examples of Congress’s failure to perform its lawmaking function. First, he outlines its failure to develop a coherent immigration policy, a failure that “reveals a Congress that is failing to live up to its constitutional responsibility.”⁸⁹ Second, he describes its reaction to the recent COVID-19 pandemic and examines “why Congress did so little to attempt to resolve thorny conflicts.”⁹⁰

Wallach traces the origin of our immigration policy crisis to a 1965 statute that liberalized immigration.⁹¹ He notes that the statute resulted in both elevated levels of legal immigration and a “major influx of unauthorized immigrants.”⁹² According to Wallach, the estimated unauthorized population more than doubled in the 1990s, to more than 8 million in 2000, and would rise to more than 12 million in 2007.⁹³ Congress attempted immigration reform in the 1980s, but critics perceived its efforts as intended to benefit special interests like agribusiness and pro-immigration groups.⁹⁴ Looking back at the 1980s, Wallach concludes that the early reform efforts failed in part because congressional leaders did not try to build broad coalitions—in sharp contrast to the efforts that led to the Civil Rights Act of 1964.⁹⁵

After years of witnessing Congress’s failure to reform immigration law, the Obama Administration sought to ease restrictions by executive order.⁹⁶ The Trump Administration rescinded the order and attempted (unsuccessfully) to construct a southern border wall using emergency funds.⁹⁷ These actions show that the failure of Congress to legislate invites the executive

⁸⁷ *Id.*

⁸⁸ *Id.* at 173.

⁸⁹ *Id.* at 182.

⁹⁰ *Id.* at 202.

⁹¹ *Id.* at 182-83.

⁹² *Id.* at 183.

⁹³ *Id.* at 185.

⁹⁴ *Id.* at 186.

⁹⁵ *Id.* at 187.

⁹⁶ *Id.* at 188-90.

⁹⁷ *Id.* at 192-95.

branch to fill the vacuum.⁹⁸ That failure results in policy that “is likely to be fragmented, unreliable, and illegitimate.”⁹⁹

Wallach blames the legislative standstill on immigration policy on a lack of trust between the proponents of reform and skeptics of high levels of immigration.¹⁰⁰ He asserts that “immigration policy offers so many dimensions on which to form compromise,” but Congress has failed to grapple with the issues because of partisan and special interest group divisions, not even attempting to have an open debate and exploration of possible reform measures.¹⁰¹

Wallach’s final case study is Congress’s response to the Covid pandemic. He has a mixed verdict on how well Congress reacted. On the one hand, he acknowledges that Congress acted quickly on a series of appropriations laws that sought to address the potential economic side-effects of the pandemic, such as by sending funds to prop up state and local government finances.¹⁰² On the other hand, he is highly critical of Congress’s reluctance to scrutinize the actions of the Centers for Disease Control of issuing “guidance” to state and local officials leading to closure of schools and churches and widespread social distancing.¹⁰³ He contends that Congress should have engaged in much more aggressive oversight of the agency’s decision-making, and that it could have, and should have, blocked the agency edicts that resulted in the closure of public schools and mandatory masking and social distancing of American citizens.¹⁰⁴ Wallach is particularly skeptical of how the CDC was able, essentially, to shut down the nation’s economy based on very slim empirical data as to the spread of the COVID virus.¹⁰⁵ Wallach also observes that Congress inquired little into how the Food and Drug Administration engaged in testing for effective vaccines.¹⁰⁶ Some individual legislators criticized the public health agencies that made emergency decisions, but Congress did not actively assert its legislative responsibility to answer these questions as a body.¹⁰⁷ Instead, it “tended to shovel more

⁹⁸ *Id.* at 197.

⁹⁹ *Id.* at 181.

¹⁰⁰ *Id.* at 185-87, 196.

¹⁰¹ *Id.* at 197.

¹⁰² *Id.* at 204-08.

¹⁰³ *Id.* at 213-16.

¹⁰⁴ *Id.* at 215.

¹⁰⁵ *Id.* at 214-16.

¹⁰⁶ *Id.* at 219.

¹⁰⁷ *Id.* at 216.

money into these same agencies and add to their remits.”¹⁰⁸ In summary, Congress failed to seek any kind of resolution on some of the most difficult political questions posed by the pandemic.¹⁰⁹

Wallach warns that congressional paralysis means that political struggles will be relocated to the courts and agencies.¹¹⁰ He is skeptical of the openness of federal executive agencies to diverse views and observes that, “in practice well-organized, directly interested parties dominate comment processes.”¹¹¹ Nor should courts be expected to act as super-legislatures given the limited records before them for review.¹¹² The relocation of responsibility and authority to the courts and agencies undermines Congress as our legislature. If this persists, over time, citizens will conclude that they have no recourse for solving their problems other than the courts and the agencies.¹¹³

IV. WHAT CAN BE DONE TO REPAIR CONGRESS?

In the final part of his book, “Three Futures for Congress,” Wallach imagines several directions that Congress could take in the 2020s and beyond.¹¹⁴ He looks at Congress from the perspective of hypothetical observers in 2039, the institution’s 250th anniversary.¹¹⁵ Wallach designs these imagined futures to show the reader how Congress could become wholly irrelevant to the governing of our country, or how it could reassert itself and emerge again as the nation’s premier lawmaking body.¹¹⁶

Wallach begins with the most pessimistic narrative, “Decrepitude.”¹¹⁷ In a letter, “Reflections on Congress at 250: An Institution Hollowed Out but Capable of Mischief,” a “Disappointed Observer” laments Congress’s decline.¹¹⁸ The era is marked by government shutdowns. Congress’s failure to

¹⁰⁸ *Id.* at 220.

¹⁰⁹ *Id.* at 221.

¹¹⁰ *Id.* at 181, 197.

¹¹¹ *Id.* at 231.

¹¹² *Id.*

¹¹³ *Id.* at 229-31.

¹¹⁴ *Id.* at 223-64.

¹¹⁵ These scenarios recall the famous 1888 novel by Edward Bellamy, *LOOKING BACKWARD: FROM 2000 TO 1887*, in which an American awakes to discover that the United States has become a utopian socialist society. See <https://www.gutenberg.org/files/624/624-h/624-h.htm>.

¹¹⁶ Wallach, *supra* note 3, at 223-24.

¹¹⁷ *Id.* at 225-35.

¹¹⁸ *Id.* at 225-28.

deal with a debt ceiling crisis leads directly to the financial panic of 2032, which results in a decline in the United States' financial standing. Total public debt has risen above 150% of GDP. Domestic politics are "nastier as appropriators fight over an ever-shrinking slice of the pie."¹¹⁹

Because Congress is failing, executive agencies have a free hand "so long as they go through the motions of providing a vaguely plausible legal justification."¹²⁰ The Supreme Court functions as a super-legislature, and "each of the nine justices is treated as an avatar of certain causes and groups."¹²¹ In this dismal scenario, members of Congress continue to solicit donors, perform some constituent services, and use the floor of each chamber to advance their causes, but they do little lawmaking.¹²²

Wallach explains that this scenario describes a Congress that continues to act as it has, without correction. He warns that this scenario will mean leader dominance squeezing out all cross-partisan activity, even fewer attempts at incremental problem-solving through legislation, more weaponization of oversight hearings, and a "routinization of impeachments."¹²³ Wallach observes that "we can say with some certainty that the decrepit Congress described here would be unlikely to show any creativity, charity, or even common sense" in addressing national policy issues.¹²⁴ Congress would be the mere shell of an institution. Social media would distort the voices of special interests, and the host platforms would censor speech (as they do today).¹²⁵

Wallach next imagines a scenario in which Congress is a "Rubber Stamp," a status imaginable based on its response to the Covid pandemic.¹²⁶ In this hypothetical future, the House of Representatives adopts remote voting and eliminates floor voting. More importantly, a 2024 shutdown results in the automatic continuation of appropriations at their pre-existing levels. Congress, in order to advance democracy, expands the number of representatives to 1,776, making it more likely that representatives serve coherent communities.¹²⁷ The Senate abolishes the filibuster, and a consti-

¹¹⁹ *Id.* at 226.

¹²⁰ *Id.* at 227.

¹²¹ *Id.*

¹²² *Id.* at 227-28

¹²³ *Id.* at 229.

¹²⁴ *Id.*

¹²⁵ *Id.* at 232-33.

¹²⁶ *Id.* at 239-47.

¹²⁷ *Id.* at 237-38.

tutional amendment dictates that presidential appointees are automatically confirmed if the Senate fails to act on their nominations within specified time periods.¹²⁸ The appropriations process moves with dispatch because each chamber must act under deadlines.¹²⁹

Wallach depicts these possible changes as arguably establishing a truly democratic national government, no longer bound by traditional anti-majoritarian principles. These reforms would address the concerns, first expressed by the Wilsonians, that a “parochial Congress stands between America and good governance.”¹³⁰ Wallach cautions that, although this scenario might appear to resemble the British parliamentary system, the reality would be a concentration of power in the presidency.¹³¹ Congress would be relegated to the minor role of providing constituent services. The fundamental Madisonian principle that Congress is designed to regulate factions would be destroyed.¹³² Wallach warns that if we subordinate Congress to the popular will, we are abandoning pluralism.¹³³ He also cites the late political scientist (and prominent conservative) James Burnham, who emphasized in 1959 that a vigorous Congress is indispensable to the protection of “constitutional government, juridical defense, and liberty.”¹³⁴

Wallach’s final chapter, “Revival,” paints an optimistic picture of a possible future Congress.¹³⁵ In this scenario, Congress faces an immigration crisis in 2027 straightforwardly and enacts legislation.¹³⁶ As part of that process, a new House Speaker first secures committee chairs sympathetic to the bill’s passage, then commits to significant independence for such chairs, and polls the entire House before making appointments to the Rules Committee.¹³⁷ After vigorous floor debates in the House and the Senate, and several filibusters, an “old-fashioned conference committee” crafts a final bill that is

¹²⁸ *Id.* at 239.

¹²⁹ *Id.*

¹³⁰ *Id.* at 242.

¹³¹ *Id.* at 242-43.

¹³² *Id.* at 246-48.

¹³³ *Id.* at 248.

¹³⁴ *Id.* at 249 n.20 (citing JAMES BURNHAM, CONGRESS AND THE AMERICAN TRADITION 401 (1959)).

¹³⁵ *Id.* at 251-63.

¹³⁶ *Id.* at 253-54.

¹³⁷ *Id.* at 253.

a product of broad coalition building.¹³⁸ Success then leads to a series of new laws on antitrust, Big Tech, and other issues.¹³⁹

With reinvigorated committees, Congress also creates two support agencies: the Congressional Regulation Office and the Congressional Artificial Intelligence Lab.¹⁴⁰ Finally, the nation's worsening fiscal crisis results in a new budget law that coordinates the committee process to address issues such as health care entitlements.¹⁴¹

Wallach asks whether Congress can only be revived through a reshaping of our political processes or institutions. He points out that some commentators have recommended changing the law to allow House elections to use multimember districts, in which votes would be apportioned, as opposed to the current system of single-member winner-takes-all elections.¹⁴² Some reformers have recommended a "radical expansion" of the House, including a recent report by the American Academy of Arts and Sciences that recommends increasing the size of the House to 585 seats.¹⁴³ That modest reform might give the House needed energy. Additional campaign finance reform measures may reduce the distortions of today's politics.¹⁴⁴

Wallach's primary critique is of the structure of congressional processes, including the tight control and limited debate imposed by both Democratic and Republican leadership.¹⁴⁵ In contrast, he does not view the filibuster as an obstacle to reform and proper congressional functioning.¹⁴⁶ Wallach suggests some reforms, including that the Senate adopt unanimous consent agreements and require a continuous floor presence of its members.¹⁴⁷ He also says Congress should work bills through committees and have extensive floor debate so that diverse ideas can be considered before final passage of a bill.¹⁴⁸ Weakening the Speaker's control of the House Rules Committee also would help restore the neglected committee system.¹⁴⁹

¹³⁸ *Id.*

¹³⁹ *Id.* at 254.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 252-55.

¹⁴² *Id.* at 257.

¹⁴³ *Id.* at 258.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 258-60.

¹⁴⁶ *Id.* at 259-60.

¹⁴⁷ *Id.* at 259.

¹⁴⁸ *Id.* at 260.

¹⁴⁹ *Id.*

Wallach acknowledges that Congress faces an almost overwhelming challenge in trying to regulate the manifold activities of executive branch agencies.¹⁵⁰ Here, he diverges from many conservative commentators who would rein in the broad delegations of lawmaking authority to agencies that are permitted under Supreme Court precedent and through congressional complacency.¹⁵¹ Wallach states that “lawmakers have neither the will nor the ability to take on that role.”¹⁵² He recommends consideration of bills such as the REINS (Regulations in the Executive In Need of Scrutiny) Act, under which economically significant agency rulemakings would require congressional approval.¹⁵³

Wallach concludes on a positive note. He contends that the American people have the right to have “an assembly that includes all of the most important of the diverse elements in our society, taking each of their concerns seriously.”¹⁵⁴ This is different from “blunt majority rule.”¹⁵⁵ He urges that we revitalize Congress as “a bulwark against tyranny”—“the only way we know to make our extended republic thrive.”¹⁵⁶

Other Views:

- THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH (L. Gordon Crovitz & Jeremy Rabkin eds., American Enterprise Institute 1989), *available at* <https://www.aei.org/wp-content/uploads/2017/03/The-Fettered-Presidency.pdf>.
- WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1885), *available at* <https://www.gutenberg.org/files/35861/35861-h/35861-h.htm>.
- Kathy Kiely, *Congress is a mess, these books argue — but maybe not messy enough*, WASHINGTON POST, April 5, 2023, <https://www.washingtonpost.com/books/2023/04/05/katie-porter-book-why-congress/>.

¹⁵⁰ *Id.* at 259-62.

¹⁵¹ *See, e.g.*, Epstein, *supra* note 1; PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE (2018).

¹⁵² Wallach, *supra* note 3, at 261.

¹⁵³ *Id.* at 261-262.

¹⁵⁴ *Id.* at 263.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*