

**THE ORIGINAL UNDERSTANDING OF
THE ROLE OF CONGRESS AND
HOW FAR WE'VE DRIFTED FROM IT**

HEARING
BEFORE THE
EXECUTIVE OVERREACH TASK FORCE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTEENTH CONGRESS
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THE ORIGINAL UNDERSTANDING OF THE ROLE OF CONGRESS AND HOW FAR WE'VE DRIFTED FROM IT

TUESDAY, MARCH 1, 2016

HOUSE OF REPRESENTATIVES
EXECUTIVE OVERREACH TASK FORCE
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Task Force met, pursuant to call, at 10 a.m., in room 2237, Rayburn House Office Building, the Honorable Steve King (Chairman of the Task Force) presiding.

Present: Representatives King, Goodlatte, Issa, DeSantis, Bishop, Cohen, Conyers, Nadler, Johnson, Chu, Deutch, and Peters.

Staff present: (Majority) Paul Taylor, Chief Counsel, Executive Overreach Task Force; Zachary Somers, Parliamentarian & Chief Counsel, Committee on the Judiciary; Tricia White, Clerk; (Minority) James J. Park, Minority Counsel; and Veronica Eligan, Professional Staff Member.

Mr. KING. If the Executive Overreach Task Force will come to order, and without objection the Chair is authorized to declare recess of the Committee at any time. I would start with my opening statement.

I want to thank Chairman Goodlatte for supporting this special House Judiciary Committee Task Force on Executive Overreach, which will examine the problem of Congress' gradual ceding of legislative power to other parts of the Federal Government, and the President's taking additional legislative powers even beyond that.

This is much more than a mundane process problem. It is a tragic result for individual rights and liberties. Policies imposed by Federal agencies are crafted by unelected bureaucrats. Because those bureaucrats do not have to answer to the American citizens over the course of regular elections, they have little understanding of the desires and concerns of those Americans. And so they produce policies that, for example, make energy more expensive, take people's property through Federal regulations, drive down wages through lawless amnesty programs, and restrict communications on the Internet.

The Founders insisted and insisted on keeping policy making in the hands of regularly elected congressional representatives precisely to avoid these sorts of policy catastrophes. As the former his-

torian of the House of Representatives, Robert V. Remini has written, "The Framers of the Constitution were absolutely committed to the belief that a representative body accountable to its constituents was the surest means of protecting liberty and individual rights."

So anxious were they to affirm legislative supremacy in the new government that they failed to flesh out the executive and judicial departments in the Constitution, leaving the task to Congress and thereby assuring that the legislature would retain control of the structure and authority of both those branches of government.

And within that system of legislative supremacy the House of Representatives was to serve a unique role. Alone among all Federal institutions the House has consisted solely of those duly elected by the people.

Further, the Constitution grants the House the exclusive power to originate all legislation for raising revenue. The House of Representatives is the most regularly elected body in the Federal Government. In Federalist 39 James Madison wrote, "The House of Representatives is elected immediately by the great body of the people. As such the House of Representatives will derive its powers from the people of America."

In Federalist 52 Madison elaborated, "As it is essential to liberty that the government, in general, should have a common interest with the people, so it is particularly essential that the House should have an immediate dependence on and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured." That is James Madison.

In this age of hyper-partisanship when more and more attention is paid to political results and less and less to Constitutional means, we tend to lose sight of why the Founders created the system that they did. Focus not on results but on process and a separation of powers.

Under that system of a separation of powers each branch of the Federal Government was expected to protect its own Constitutional powers such that no single branch accrued power it was not allocated by the Constitution. The Founders understood that individuals were free in direct proportion to each branch of the Federal Government staying strictly within its own bounds, and the most important lane was the legislative lane; a narrow road of strictly enumerated powers written by a Congress consisted of duly elected representatives; with the House of Representatives the body most regularly elected, and with special powers over the origination of revenue bills in the driver's seat.

But today many legislative and budget powers have been ceded to Presidents and the executive branch through statutes delegating legislative responsibility to Federal regulatory agencies composed of unelected people; and statutes mandating automatic and increased spending on certain programs administered by the executive branch.

Other legislative powers have simply been seized by Presidents who exercise sheer will to trump the rule of law. Whatever the means of the loss of legislative power by Congress it is imperative that Congress reclaim it, not simply for its own sake, but because

without its individual rights and liberties cannot flourish as the Framers intended.

It has long been my view that the Framers of our Constitution structured the three branches of government in a fashion that, with as bright a line as they could draw, between each three branches of government. Understanding though that language could not precisely define the distinctions between an Article 1, Article 2, and Article Three authorities within the Constitution, but they did rely on human nature and they believed that each branch of government would jealously protect the powers granted to it in the Constitution, and there would be a static tension that would be achieved between the three branches of government.

I believe that has shifted over the years and we are here to address this in this Task Force. And, again, I thank Chairman Goodlatte for organizing this Task Force. And I would recognize the Ranking Member, Mr. Cohen, for his opening statement.

Mr. COHEN. Thank you, Mr. King, and pleased to be serving as the Ranking Member of this Committee, the Executive Overreach Task Force. I appreciate serving with Mr. Conyers and fellow Members of this Committee and being the Chair. Mr. King and I share a lot of things in common, that is true. We both have the first name Steve. Neither one of us endorses Donald Trump. But we believe in the Constitution, we want to have good government, and we care about government, and we work together on this Committee.

The Constitution makes clear that all legislative power is “vested” in the Congress, Article 1. Some of our witnesses today take the view that this vesting of legislative power means that Congress cannot constitutionally delegate power to executive branch agencies, even when it retains ultimate authority to determine when and how much power should be delegated.

They ask us to look only at what they define to be the founding generation’s view of government and the separation of powers, and asked us to reach that same conclusion. Telling us that much of the intervening 200 plus years is not of any real importance in understanding how our Constitution should work.

Perhaps unsurprisingly they suggest that the Constitution, as they claim it was understood by the Framers, may require Congress to cut funding for Social Security, Medicare, and Medicaid. Maybe coincidentally they argue that the reading of the Constitution raises questions about the Constitutionality of the Affordable Care Act, which has thus far provided 18 million Americans with health insurance, ended discrimination by insurers against those with pre-existing conditions, and allowed 2.3 million young adults under 26 to remain on their parent’s health insurance, among other benefits.

Indeed some of our witnesses contend that Congress went astray when it began to delegate authority to the executive branch to enforce regulations on Wall Street, protect public health and the environment, ensure worker’s rights, and guarantee civil rights. It is not too much of a stretch to say that some of our witnesses would like to extend much of the 20th and 21st century would like see much of that repealed. My guess is that they probably lack the votes to achieve such an end through the political process. So in-

stead they just turn to a Constitutional theory that says we should only look at one snapshot of our history and ignore all the rest.

Why is that that we have agencies that develop regulations? As the Supreme Court has recognized Congress' delegation of authority to the Executive arises from the practical recognition that our society and our economy have become far more complex, and problems far more technical than in the late 18th century, and indeed when the Founders created our Nation.

Congress had brought principles into statute and leaves it to expert agencies to carry out that statute in conformity with those principles. It is the Executive that does administer the law. In short, Congress retains ultimate legislative authority, it can delegate that authority, and it can also rescind or limit the scope of that delegation.

This process has worked well to millions of Americans for a wide variety of harms—protect millions of Americans from a wide variety of harms, enhance innovation, and economic growth, and ensure basic fairness and justice. And it was made possible by a broadly written Constitution that was flexible enough to accommodate changing times and circumstances.

That was the true wisdom of the Constitution's Framers to create a document and one strong enough to serve as a clear framework of government, but also adaptable so as to be enduring.

I look forward to hearing our witnesses' testimony. I yield back the balance.

Mr. KING. I thank the gentleman and now I recognize the Chairman of the full Committee, Mr. Goodlatte, from Virginia for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman. James Madison wrote in Federalist No. 47, "The concentration of executive, legislative, and judicial power in the same hands is the very definition of tyranny." Yet White House Chief of Staff, Denis McDonough, recently said, "Audacious executive actions are being crafted to make sure the steps we have taken are ones we can lock down, and not be subjected to undoing through Congress or otherwise." Beyond even those unconstitutional actions the President has already taken.

The Founders would have expected Members of the House of Representatives, known as the people's house for its most direct connection to the will of the people, to aggressively guard their role in the Constitutional legislative process. This Task Force will do just that in a manner that educates other Members and the public on the dangers to current and future generations of the ceding of power away from the people's house, and Congress generally.

In Federalist No. 57 Madison wrote, "The House of Representatives is so constituted as to support in the members and habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed."

Keeping legislative power, and in particular budgeting power, close to the will of the people was considered so important that the

Constitution specifically provides that the House of Representatives has the exclusive authority to originate revenue bills.

Indeed regarding budget matters when the first Congress in 1789 considered the law creating the Treasury Department in the executive branch, the bill as originally introduced authorized the Secretary of the Treasury to devise and report plans for the improvement and management of the revenue. But it was feared that even giving the Secretary of the Treasury the modest power to report plans implied too much authority for the executive branch. And so the bill was amended to authorize the Secretary only to prepare plans regarding the management of revenue.

The amended bill also specifically required the Secretary to make report and give information to either branch of the legislature in person or in writing, as he may be required, respecting all matters referred to him by the Senate of House of Representatives, or what shall appertain to his office.

It thereby allowed Congress to request financial information directly from the Treasury Secretary bypassing the President; and made clear that Congress and not the President was the ultimate authority on budget issues.

But today as our witnesses will elaborate, Congress exercises far less control over budget matters than was originally intended. Whereas early Congresses specified exactly how much money would be spent for how long to build a lighthouse or a post road, for example. Many Federal programs today enacted by Congresses decades ago are administered by the executive branch and funded on an autopilot basis, their allocations increasing automatically by statute without the need for any periodic review by Congress.

The threat posed by the ceding of legislative power by Congress to this generation and future generations, can often be seen abstract in the midst of intense policy debates in an historically hyper partisan environment.

As law Professor David Bernstein has written, "The authors of the Constitution expected that Congress as a whole would be motivated to preserve its authority against Presidential encroachment." The Founders, however, did not anticipate the development of our two party system. At any given time around half the Members of Congress belong to the same party as the President, and do not want to limit their President's authority.

Yet as then Chairman of the House Judiciary Committee Democrat John Conyers said under the Presidency of Republican George W. Bush, "I believe it is in all of our interests to work together to rein in any excesses of the executive branch, whether it is Democratic, Republican, or even Libertarian hands." I agree with Ranking Member Conyers, and I look forward to hearing from all of our witnesses today.

Mr. KING. Thank you, Mr. Chairman. Now I recognize the Ranking Member of the full Committee, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman, and I thank the previous speaker for his recollection of our comment at an earlier period. Members of the Committee I have expressed from time to time the hope that we could work collaboratively in some areas of mutual interest; but in particular those centering on strengthening

Congress' ability to conduct oversight of the executive branch. I am hopeful that there is room on this Task Force for bipartisan cooperation, as much as possible.

That being said, I also recognize that there will inevitably be areas of fundamental philosophical differences between the majority and the minority. On some level our hearing topic today on the original understanding the role of Congress and how far we have drifted from it reflects both potential paths for this Task Force.

To begin with there are indeed policy areas like war powers matters where Congress has, to me, failed to assert itself sufficiently leaving room for the President to expand his unilateral authority.

As one of our witnesses, Professor Vladeck, will testify in greater detail the earliest Congresses understood that inaction or indifference by Congress in placing specific limits on a President's war making authority, enables and even invites the expansion of Presidential power at Congress' expense. Simply put, if Congress fails to act to place limits on Presidential authority it has little basis to complain about separation of powers concerns.

It is also important to remember that when Congress has delimited executive power by statute, there is a difference between cases where a President simply ignores such limits and cases where a President interprets the broad delegation of authority by Congress.

A President might simply ignore clear statutory limits that Congress has placed on his power. President George W. Bush, for example, claimed the authority to ignore statutory limitations on his exercise of power with regard to national security, including prohibitions on torture and warrantless surveillance, among other things.

In other cases Congress has given a broad grant of authority to the executive branch for the purpose of implementing statutes, and there may be a dispute as to the precise scope of that grant of authority. It is important not to conflate these situations. The former is far more troubling from a separation of powers perspective than the latter.

Finally, we must ask why it is that Congress has chosen in many instances to delegate authority to the executive branch, particularly with respect to economic and health and safety regulation. In large part this is a reflection of the fact that we live in a society that is far more complex than the one that existed in the late 1700's.

As even our witnesses here this morning acknowledge, the country and the Congress were far smaller and simpler at that time. And the Framers wisely built in some "flex in the joints" of our Constitution precisely to capture all the changes to our society and economy that could not be foreseen in the 18th century.

It is important to remember that even where Congress has delegated authority to the executive branch, the power to legislate ultimately still resides with Congress. Congress is always free to rescind its delegation of authority or to narrow the scope of delegation. And so I look forward to an engaging discussion with our witnesses and among ourselves, and thank all of you for being here. Thank you, Mr. Chairman.

Mr. KING. I thank the dapper gentleman from Michigan for his statement.

And without objection, other Members' opening statements will be made a part of the record.

Let me now introduce our witnesses. Our first witness is Matthew Spalding; he is Associate Vice President and Dean of Educational Programs, Hillsdale College. Mr. Spalding also oversees the operations of the Allen P. Kirby, Jr. Center for Constitutional Studies and Citizenship here in Washington, D.C.

Our next witness is Joseph Postell; he is the Assistant Professor of Political Science at the University of Colorado at Colorado Springs. Professor Postell is currently completing a book titled, "Bureaucracy in America, The Administrative State, and American Constitutionalism."

Our third witness is James C. Capretta, visiting fellow at the American Enterprise Institute, and senior fellow at the Ethics and Policy Center. Mr. Capretta has served as an Associate Director at the White House Office of Management and Budget, and as a senior health policy and analyst at the U.S. Senate Budget Committee, and at the U.S. House Committee on Ways and Means.

Our fourth and final witness is Stephen Vladeck, Professor of Law at American University, Washington College of Law, and he is teaching in a research focused on Federal jurisdiction, Constitutional law, and national security law. We welcome you all here today and look forward to your testimony.

Each of the witnesses' statements will be entered into the record in its entirety. I ask that each witness summarize his testimony in 5 minutes or less to help you stay within that time. There is a timing light in front of you. The light will switch from green to yellow indicating you have got 1 minute to conclude your testimony. When it turns red it indicates that we appreciate it if you have concluded your testimony.

Before I recognize the witnesses it is the tradition of the Subcommittee that they be sworn in so please stand to be sworn in. Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

You may be seated. Let the record reflect that the witnesses answered in the affirmative. I now recognize our first witness, Mr. Spalding. Mr. Spalding, your 5 minutes.

TESTIMONY OF MATTHEW SPALDING, Ph.D. ASSOCIATE VICE PRESIDENT AND DEAN OF EDUCATIONAL PROGRAMS HILLSDALE COLLEGE

Mr. SPALDING. I thank you, Mr. Chairman. My thesis is actually quite simple. It was Congress, the intended primary branch of government, by choosing to diminish its Constitutional powers which enabled the rise of the so-called imperial Presidency and the temptations of executive overreach of our day. Likewise Congress has the power to stop the executive from overwhelming American self-government with bureaucratic rule should it choose to do so.

In my testimony I discuss the rule of law as it informed the American Constitution, culminating in absolute centrality of law-making and legislatures. The full implications of which are seen in the American founding itself, especially the consent to the government; hence, the importance of Article 1, which lodges a basic

power of government in the legislature and its ability to make laws.

Its core powers listed in Article 1, utmost of significance I point to the Power of the Purse, the Appropriations Clause in Article 1, Section Nine; a limit most notably on executive action.

And Congress, not the executive, has the authority needed to carry out additional functions under the necessary and proper clause. The separation of powers of the defining structural mechanism by way that this works such that the self-interests of each branch make it a check on the others, and they jealously protect their own powers.

This changed with the progressives. They positive a sharp distinction between politics and what they call administration. Politics would remain the realm of expressing opinions but the real decisions in theory, they argued, would—and the details of government would be handled by administrators in what they called the administrative state.

The Founders went to great length to preserve consent and limit government through public institutions and the separation of powers. The progressives held that the barriers erected by the Founders had to be removed, or circumvented, to unify and expand the powers of government. In this new conception government is administrative and bureaucratic; government must always evolve and expand. In theory it must remain unlimited.

We have been moving down this path slowly for some time. The most significant shift, I argue, occurred under the Great Society when the Federal Government set about creating programs to manage the whole range of socioeconomic policy. The expansion of activities led to vast new centralizing authority in the Federal Government, and a vast expansion of Federal regulatory authority. It also brought with it what we conventionally mean by big government, huge workforces, massive expenditures, extensive debt, and created a new source of conflict between the executive and the legislative.

At first Congress had the upper hand; Congress had been creating the bureaucracy to carry out its wishes. But the more Congress gave away its powers in the form of broad regulatory authority, the more bureaucrats effectively became the lawmakers. The rise of the new imperial Presidency, and it should be shocking but no surprise, as Congress has expanded the bureaucracy creating programs, delegating authority, neglecting budgeting; the executive has attained unprecedented levels of authority. Our executives can command the bureaucracy to implement new procedures and policies without the cooperation of Congress by abusing executive discretion, by exploiting the vagaries of poorly written laws, and now by willfully neglecting and disregarding the laws which indeed are clear.

By acting unilaterally without or against the authority of Congress, the executive not only assumes the duty of legislative powers without legislative accountability, but also avoids responsibility for executing the laws legitimately authorized by Congress. Once it has been established that the President can govern without Congress and, by extension, without the law it will prove difficult and

perhaps impossible to prevent future executives from following the same lawless path.

The only way to reverse the trend of a diminishing legislature and the continued expansion of the bureaucratic executive is for Congress to strengthen its Constitutional muscles. Congress must reassert its legislative authority and to cease delegating what amounts to power to make laws. If it allows administrators the discretion to create significant rules Congress can assert its authority to approve or reject those rules.

Second, Congress must regain legislative control or it stays in its labyrinth state bringing consent and responsibly back through better lawmaking up front and, as a result, better oversight after the fact. The day to day back and forth of overseeing the operations of government will do more than anything else to restore legislative control or it stays unlimited government.

Third, one place where the power of Congress is not entirely lost and where there is opportunity for gaining leverage over an unchecked executive is congress' Power of the Purse, strategically controlling using the budget process. If Congress does not act to correct the growing tilt toward executive bureaucratic power the structure of our republican government will be fundamentally and, perhaps, permanently altered.

Congress needs to think strategically and act as a Constitutional institution. And it must begin doing so forcefully stating its argument, putting down clear markers, and drawing enforceable institutional lines before the inauguration of the next President, whoever that might be, and regardless of their political party.

Thank you.

[The prepared statement of Mr. Spalding follows:]

CONGRESSIONAL TESTIMONY

**Congress,
Constitutional Government,
and the rise of
Executive-Bureaucratic Rule**

**Testimony before the
Task Force on Executive Overreach
Judiciary Committee
United States House of Representatives**

March 1, 2016

**Matthew Spalding, Ph.D.
Allan P. Kirby, Jr.
Center for Constitutional Studies & Citizenship
Hillsdale College**

Thank you, Mr. Chairman. I commend the creation of a task force to investigate executive overreach and, as part of that effort, this hearing to consider the original understanding of Congress' role in our constitutional structure and how far we have drifted from that understanding. These two themes are not unrelated. It was Congress itself, by choosing to diminish its constitutional powers, which enabled the rise of the so-called imperial presidency and the increasing executive overreach of our day. Likewise, Congress has the power to stop the executive from overwhelming American self-government with bureaucratic rule, should it choose to reassert its constitutional authority as the lawmaking branch.

This transfer of lawmaking power away from Congress to an oligarchy of unelected experts who rule through executive decree and judicial edict over virtually every aspect of our daily lives, under the guise of merely implementing the technical details of law, constitutes nothing less than a revolution against our constitutional order. The significance of this revolution cannot be overstated. It threatens to undo the development of the rule of law and constitutional government, the most significant and influential accomplishment of the long history of human liberty.

This revolution has created an increasingly unbalanced structural relationship between an ever more powerful, aggressive and bureaucratic executive branch and a weakening legislative branch unwilling to exercise its atrophied constitutional muscles to check the executive or rein in a metastasizing bureaucracy. If the executive–bureaucratic rule now threatening to overwhelm American society becomes the undisputed norm — accepted not only among the academic and political elites, but also by the American people, as the defining characteristic of the modern state — it could well mark the end of our great experiment in self-government.

The Rule of Law

The general concept of the rule of law—that government as well as the governed are subject to the law as promulgated and that all are to be equally protected by the law—long predates the

founding of the United States. Its roots can be traced to classical antiquity where the most celebrated political philosophers sought to distinguish the rule of law from that of individual rulers or an oligarchic few. In the works of Plato and as developed in Aristotle's writings, the rule of law implies obedience to positive law as well as rudimentary checks on rulers and magistrates.

Throughout most of human history, the rules by which life was governed were usually determined by force or fraud: Those who had the power—whether military strength or political dominance—made the rules. The command of the absolute monarch or tyrannical despot *was* the rule, and had the *coercive* force of the law. Rulers made up false stories of inheritance and rationalizations such as “divine right” to convince their subjects to accept their rule without question. This is still the case in many parts of the world, where the arbitrary rulings of government are wrongly associated with the rule of law.

One need only read Shakespeare to see that Anglo-American history is replete with the often violent back and forth between despotic rule and the slowly developing concept of the rule of law. Impatient English kings regularly sought to evade the rudimentary process of law by exercising prerogative power and enforcing their commands through various institutions such as the King's Council, the Star Chamber, or the High Commission. It was Magna Carta in 1215 that first challenged this absolutism and forced the monarch to abide by the mechanisms of law. The idea that the law is superior to human rulers is the cornerstone of English constitutional thought as it developed over centuries and directly informed the American Constitution.

The Glorious Revolution of 1688 established legislative supremacy over the monarch, a crucial step in the development of political liberty. But when that supremacy came to mean complete parliamentary sovereignty in which the acts of parliament were synonymous with the rule of law itself, there was no longer any higher, fundamental law to which that legislature was subject and against which its legislation could be judged and held accountable. This became

more and more apparent in the decades leading up to the American Revolution. In the Declaratory Act of 1766, Parliament declared it “had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the Crown of Great Britain, *in all cases whatsoever*.” That marked another break with the older principle that the rule of law is above any form of government and thus restrains legislatures just as much as monarchs.

The idea of the rule of law was transferred to the American colonies through numerous writers and jurists and can be seen expressed throughout colonial pamphlets and political writings.

Thomas Paine reflected this dramatically in *Common Sense*:

But where says some is the king of America? I'll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.

The classic American expression of the idea can be seen in the Massachusetts Constitution in 1780, written by John Adams, in which the powers of the commonwealth are divided in the document “to the end it may be a government of laws, not of men.”

The rule of law has four key components. First, the rule of law means a formal, regular process of law enforcement and adjudication. What we really mean by “a government of laws, not of men” is the rule of men bound by law, not subject to the arbitrary will of others. The rule of law means general rules of law that bind all people and are promulgated and enforced by a system of courts and law enforcement, not by mere discretionary authority. As James Madison writes in *Federalist 62*, speaking of Congress: “It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so

incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow." In order to secure equal rights to all citizens, government must apply law fairly and equally through this legal process. Notice, hearings, indictment, trial by jury, legal counsel, the right against self-incrimination—these are all part of a fair and equitable "due process of law" that provides regular procedural protections and safeguards against abuse by government authority. Among the complaints lodged against the king in the Declaration of Independence was that he had "obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers," and was "depriving us in many cases, of the benefits of trial by jury."

Second, the rule of law means that these rules must be binding on rulers and the ruled alike. If the American people, Madison writes in *Federalist* 57, "shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty." As all are subject to the law, so all—government and citizens, indeed all persons—are equal before the law, and equally subject to the legal system and its decisions. No one is above the law in respect to enforcement; no one is privileged to ignore the law, just as no one is outside the law in terms of its protection. As the phrase goes, all are presumed innocent until *proven* guilty. We see this equal application of equal laws reflected in the Constitution's references to "citizens" and "persons" rather than race, class, or some other group distinction, as in the Fifth Amendment's language that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." It appears again in the Fourteenth Amendment's guarantee that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The rights of all are dependent on the rights of each being defended and protected. In this sense, the rule of law is an expression of—indeed, is a requirement of—the idea of each person possessing equal rights.

Third, the rule of law implies that there are certain unwritten rules or generally understood standards to which specific laws and lawmaking must conform. There are some things that no

government legitimately based on the rule of law can do. Many of these particulars were developed over the course of the history of British constitutionalism, but they may be said to stem logically from the nature of law itself. Several examples can be seen in the clauses of the U.S. Constitution. There can be no “ex post facto” laws—that is, laws that classify an act as a crime leading to punishment after the act occurs. Nor can there be “bills of attainder,” which are laws that punish individuals or groups without a judicial trial. We have already mentioned the requirement of “due process,” but consider also the great writ of “habeas corpus” (no person may be imprisoned without legal cause) and the rule against “double jeopardy” (no person can be tried or punished twice for the same crime.) Strictly speaking, none of these rules are formal laws but follow from the nature of the rule of law. “Bills of attainder, ex-post facto laws and laws impairing the obligation of contracts,” Madison writes in *Federalist* 44, “are contrary to the first principles of the social compact, and to every principle of sound legislation.”

Lastly, even though much of its operation is the work of courts and judges, the rule of law is based on the absolute centrality of *lawmaking*. “The great end of men's entering into society, being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society,” writes John Locke in his *Second Treatise on Government*, “the first and fundamental positive law of all commonwealths is the establishing of the legislative power.” Locke continues:

This legislative is not only the supreme power of the common-wealth, but sacred and unalterable in the hands where the community have once placed it; nor can any edict of any body else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law, which has not its sanction from that legislative which the public has chosen and appointed: for without this the law could not have that, which is absolutely necessary to its being a law, the consent of the society, over whom no body can have a power to make laws, but by their own consent, and by authority received from them. (Sec. 134)

Locke concludes that the bounds set upon the legislative power in all forms of government, stemming from consent and “the law of God and nature” are to govern by promulgated,

established laws, not to raise taxes in particular without the consent of the people (recall the American rallying cry of 'no taxation without representation'), that laws are to be designed for no other end but the good of the people, and that the legislature "neither must nor can transfer the Power of making Laws to any body else, or place it anywhere but where the people have." Locke makes this last point clear:

The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the common-wealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands. (Sec. 141)

Lawmaking and the American Founding

The full implications of the constitutional development of the rule of law first appear in the principles and institutions of the American Founding. Virtually every government at the time was based on a claim to rule without popular consent. But the American Founders sought to break free of the old despotisms, characterized by the arbitrary will of the stronger, and to establish the rule of law and limited constitutional government based on consent. They held that man, though fallible and full of passions, is capable of governing himself and that none was so much better than another as to rule him without his consent.

The key turn in constitutional thinking came with the formal recognition that the inalienable rights belonging to each person by "the Laws of Nature and Nature's God" form the moral ground of government. For well over a century prior to the revolution, Americans had developed and become accustomed to the idea that governments are legitimately created only

through fundamental agreement authorized by popular consent. The concept can be seen in the Massachusetts Constitution of 1780, which declares: "The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people." But it is summarized very simply in the words of the Declaration of Independence, which posits as a self-evident truth "that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

In addition to the initial formation of government, consent also gives guidance concerning the processes by which legitimate government operates. Among the charges lodged against the king in the Declaration of Independence is that he assented to Parliament's "imposing Taxes on us without our Consent" and "has kept among us, in times of peace, Standing Armies without the Consent of our legislatures." Indeed, the first six charges against the king address interference with local legislation and legislatures, violating "the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only." Consent does not necessarily mean pure democratic rule, but it does require a process of popular agreement to lawmaking and governance. In America, this was understood to mean a popular form of representative government. Only a government that derived its power from "the great body of the people," according to *Federalist* 39, was compatible with the "genius of the American people," "the fundamental principles of the revolution," and a determination to "rest all our political experiments on the capacity of mankind for self-government."

The Importance of Article I

The Constitution establishes three branches of government of equal rank in relation to each other. These branches are separated in accordance with the distinct powers, duties, and responsibilities stemming from the primary functions of governing: to make laws, to execute and enforce the laws, and to uphold (judge or adjudicate) the rule of those laws by applying them to particular individuals or cases. No branch is higher or lower than any other, and no

branch controls the others. Each is vested with independent authority and unique powers that cannot be given away or delegated to others.

The order in which these branches are treated in the Constitution— legislature, executive, judiciary – is itself important. It moves from the most to the least “democratic” and from the most to the least directly chosen by the people. The members of the legislature “are distributed and dwell among the people at large,” writes Madison in *Federalist* 50. “Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people.” The Constitution lodges the basic power of government in the legislature not only because it is the branch most directly representative of popular consent but also because the very essence of governing according to the rule of law is centered on the legitimate authority to make laws.

Article I begins: “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” This language implies that while there might be other legislative powers, Congress is granted all those “herein” recognized, meaning listed in various clauses of the Constitution. The legislative power includes seventeen topics listed in Article I, Section 8: taxing and borrowing, interstate and foreign commerce, naturalization and bankruptcy, currency and counterfeiting, post offices and post roads, patents and copyrights, federal courts, piracy, the military, and the governance of the national capitol and certain federal enclaves. All told, the powers are not extensive, but they are vital. Apart from some relatively minor matters, the Constitution added to the authority already granted in the Articles of Confederation only the powers to regulate foreign and interstate commerce and to apportion “direct” taxes among the states according to population.

The diverse powers granted to Congress might at first seem rather disorganized, ranging from the clearly momentous (to declare war) to the seemingly minute (to fix weights and measures). But upon reflection, an underlying pattern emerges based on the distinction between key functions assigned to the national government and those left to the state governments. The two most important functions concern the nation's security (such as the powers to maintain national defense) and the national economy (such as the power to tax or to regulate interstate commerce). And as might be expected, many of the powers complement each other in supporting those functions: The power to regulate interstate commerce, for instance, is consistent with the power to control currency, which is supported in turn by the power to punish counterfeiting and to establish standards for weights and measures.

Of utmost significance is Congress' "power of the purse." The source of Congress's power to spend derives from Article I, Section 8, Clause 1. The Appropriations Clause, though, makes Congress the final arbiter of the use of public funds and gives it a mechanism to control or to limit spending by the federal government. The language here is of limitation, not authorization (No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law...) and it is placed in Section 9 of Article I, along with other restrictions on governmental actions to limit, most notably, executive action.

While the federal government's powers are limited, the powers granted to it are complete. The Founders sought to create an energetic government with all powers needed to do the jobs assigned to it. Consequently, the enumerated powers of the federal government are supported by the auxiliary authority needed to carry out these functions. The central example of this is the "necessary and proper" clause, which empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." While this language suggests a wide sweep of "implied" powers, it is not a grant to do anything and everything, but only to make those additional laws that are necessary and proper for execution of the powers expressed in the Constitution.

To further limit the expansion of legislative power and to prevent the legislature from intruding upon the powers of the other branches, Article I divides Congress into two chambers (bicameralism) chosen by two different political constituencies and with different terms of office: the House of Representatives, each member being elected by districts every two years, and the Senate, with members (originally) appointed by state legislatures to serve staggered terms of six years each. The House is based on popular representation, and the Senate on equal representation of all of the states. Unlike the House, which is intended to be responsive to the ebb and flow of popular opinion (which is why revenue bills originate in the House), the Senate—with its longer terms of office and a larger and distinct constituency—was to be more stable, deliberative, and oriented toward long-term state and national concerns. It is because of the nature of the Senate that the chamber is given unique responsibilities concerning the approval of executive appointments (for judges, ambassadors, and all other officers of the United States) and treaties with other countries.

The Separation of Powers

“In framing a government which is to be administered by men over men, the great difficulty lies in this,” Madison writes in *Federalist* 51. “You must first enable the government to control the governed; and in the next place oblige it to controul itself.” That meant that, in addition to performing its proper constitutional functions (lawmaking, executing and adjudicating the law), there needed to be an internal check to further limit the powers of government. Rather than create another coercive authority for that purpose (a dubious proposition to say the least), the Founders not only divided power but also set it against itself. This separation of powers, along with the further provisions for checks and balances, is the defining structural mechanism of the Constitution and creates a dynamism within the workings of government that uses the interests and incentives of those in government to enforce constitutional limits beyond their mere statement. It divides the powers of government among three branches and vests each with independent powers and responsibilities. Each has its own basis of authority and serves

different terms of office. No member of one branch can at the same time serve in another branch.

Preserving the separation of powers was hardly a trifling concern for the Founders. Keeping the powers of government divided among distinct branches is “admitted on all hands to be essential to the preservation of liberty,” Madison notes in *Federalist* 47. Here the founders were following the writings of Montesquieu, who made a strong case for such a division. “The accumulation of all powers,” Madison continues, “legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” For this reason, each branch has only those powers granted to it, and can do only what its particular grant of power authorizes it to do.

But it was not enough merely to define the powers of each branch and hope that they remained nicely confined within the written barriers of the Constitution. The Founders were acutely aware that each branch of government would be tempted to encroach upon the powers of the other. This was especially the case with the legislature: The “parchment barriers” of early state constitutions had proven an inadequate defense against a legislative proclivity toward “everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.” (*Federalist* 48) It is with this proclivity in mind that the Founders sought to grant each branch of government the means to preserve its rightful powers from encroachments by the others.

The solution is found in structuring government such that “its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places,” as Madison explains in *Federalist* 51. In other words, government is structured so that each branch has an interest in keeping an eye on the others, checking powers while jealously protecting its own. By giving each department an incentive to check the other—with overlapping functions and contending ambitions—the Founders devised a system that recognized and took advantage of

man's natural political motivations to both use power for the common good and to keep power within constitutional boundaries. Or as Madison put it, the "interest of the man [becomes] connected with the constitutional rights of the place."

To this end, each branch of government shares overlapping powers with the others. Before it becomes law, for instance, congressional legislation must be approved by the executive—who also has a check against Congress in the form of the qualified veto, which the legislature in turn can override by two-thirds votes in the House and the Senate. The president is commander in chief but the House has the power to declare war, and it is up to Congress to fund executive activities, including war-making. Treaties and judicial appointments are made by the executive but only with the advice and consent of the Senate. The Supreme Court can strike down executive or legislative actions that come up in cases before it as unconstitutional, but Congress has the power to reenact or modify overturned laws, strip the court's jurisdiction in many cases, and impeach federal judges. As Joseph Story writes in his *Commentaries on the Constitution of the United States*, because power is of "an encroaching nature" it ought to be effectually restrained from passing the limits assigned to it so that while sharing power none should have an "overruling influence" in the operation of another branch's powers.

The separation of powers and the introduction of legislative balances and checks, according to Hamilton in *Federalist* 9, are "means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided." They discourage the concentration of power and frustrate tyranny. At the same time, they require the branches of government to collaborate and cooperate in doing their work, limiting conflict and strengthening consensus. But these means also have the powerful effect of focusing individual actors on protecting their constitutional powers and carrying out their constitutional duties and functions—and that fact transforms the separation of powers from a mere negative concept to a positive and important contributor to limited government and constitutional fidelity.

Today, the separation of powers is often faulted for encouraging “gridlock.” The Founders, however, understood the need for the good administration of government — an important aspect of their “improved science of politics.” But they also understood that the administration of things was subordinate to the laws of Congress, and thus responsible to the people through election. As Alexander Hamilton points out in *Federalist* 68, it is a “heresy” to suggest that of all forms of government “that which is best administered is best.” In the end, liberty is assured not by the anarchy of no government, on the one hand, or the arbitrary rule of unlimited government, on the other, but through a carefully designed and maintained structure of government to secure rights and prevent tyranny through the rule of law.

The New Science of Politics

The concept of the modern state and its “new science of politics” can be traced to the likes of the French philosophes and continental utopians of the 18th century who were deeply enamored with the endless promises of reason and modern science to solve all aspects of the human condition. Just as science brought technological changes and new methods of study to the physical world, so it would bring great change and continuous improvement to society and man. The late-19th-century, so-called “Progressives” took this argument, combined it with ideas from German idealism and historicism, and Americanized it to reshape the old constitutional rule of law model—which was seen as obsolete, inefficient, and designed to stifle change—into a new, more efficient form of democratic government. Their view of scientific rationalism questioned the very idea of self-governing citizenship: Liberty, they asserted, is not, as understood by the Founders, a condition consistent with human nature and the exercise of God-given natural rights, but an evolving concept to be socially constructed.

While seeming to advocate more democracy, the first progressives — under a Republican president, Theodore Roosevelt, and then a Democratic one, Woodrow Wilson — pursued the opposite when it came to government action. “All that progressives ask or desire,” Wilson wrote in 1912, “is permission — in an era when ‘development,’ ‘evolution,’ is the scientific

word — to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine.” To encourage democratic change while directing and controlling it, progressives posited a sharp distinction between politics and what they called “administration.” Politics would remain the realm of expressing opinions — hence the continued relevance of Congress to provide rough guidelines — but the real decisions and details of governing would be handled by administrators, separate and supposedly immune from the influence of politics.

These administrators would be in charge of running a new form of government, designed to keep up with the ever-expanding aims of government, called “the administrative state.” Where the Founders went to great lengths to preserve consent and limit government through republican institutions and the separation of powers, the progressives held that the barriers erected by the Founders had to be removed or circumvented so as to unify and expand the powers of government and to direct its actions toward achieving more and more progress and social change.

The particulars of accomplishing the broad objectives of reform—the details of regulation and many rule-making functions previously left to legislatures—were to be given over to a new class of professionals who would reside in the recesses of agencies like the FCC (Federal Communications Commission), the SEC (Securities and Exchange Commission), the CPSC (Consumer Product Safety Commission), or OSHA (Occupational Safety and Health Administration). As “objective” and “neutral” experts, so the theory went, these administrators would act above petty partisanship and faction, making decisions mostly unseen and beyond public scrutiny to accomplish the broad objectives of policy reform. The term “bureaucracy” comes from the French for desk, and the Greek for rule. The word was originally satirical, but for the progressives, the rule of clerks is a noble endeavor — they are the true “agents of democracy,” as the progressive writer Herbert Croly put it.

The constantly changing structure of the administrative state requires dynamic management to keep it moving forward, of course, and so the new thinkers developed their own concept of “leadership” to complete their theory of government. If the times are constantly changing, and if the constitutional system must always evolve to adapt to that change, there must be a role for those who have the foresight and ability to lead the nation in the new directions of history, keeping ahead of popular opinion and always pointing the nation toward its future development. This clarity of vision and unity of direction—of rhetorical inspiration combined with strong political management—is to be provided especially by vigorous presidential leadership. In this new conception of the state, government is administrative and bureaucratic, subject only to the perceived wants of the popular will, under the forward-looking guidance of progressive leadership. In this view, government must always evolve and expand, and be ever more actively involved in day-to-day American life. Given the unlimited goal, government by definition must itself be unlimited. How could there be any limit? “It is denied that any limit can be set to governmental activity,” wrote the progressive political scientist Charles Merriam.

The exigencies of modern industrial and urban life have forced the state to intervene at so many points where an immediate individual interest is difficult to show, that the old doctrine has been given up for the theory that the state acts for the general welfare. It is not admitted that there are no limits to the action of the state, but on the other hand it is fully conceded that there are no natural rights which bar the way. The question is now one of expediency rather than of principle.

There was no longer any principle—whether natural rights or constitutional government derived from those rights—that limited the action of the state.

The Rise of Central Administration

The United States has been moving down the path of administrative government in fits and starts for some time, from the initial Progressive Era reforms through the New Deal’s interventions in the economy. But the most significant shift and expansion occurred more recently, under the Great Society and its progeny. Progressives had initially sought to regulate certain targeted commercial activity such as railroads, trucking, aviation, and banking. But when

the federal government assumed responsibility for the well-being of every American, it set about creating programs (and reforming old ones) to manage the whole range of socioeconomic policy, from employment, civil rights, welfare, and healthcare to the environment and elections. The expansion of regulatory activities on a society-wide scale in the 1960s and 1970s led to vast new centralizing authority in the federal government and a vast expansion of federal regulatory authority. This centralization of power brought with it what we conventionally mean by big government: huge workforces, massive expenditures, and extensive debt.

When administration is nationalized, though, it does not easily or naturally fall under the authority of one branch or another. As four decades of political history show, bureaucracy and its control created a new source of conflict between the executive and legislative branches. During the first part of our bureaucratic history, Congress had the upper hand, with presidents (at least since Richard Nixon) trying as they could to control the Fourth Branch. Congress, after all, had been creating these regulatory agencies to carry out its wishes and delegating its legislative powers to them in the form of broad regulatory authority. Congress was the first to adapt to the administrative state, continuously reorganizing itself since 1970 by committees and subcommittees to oversee and interact with the day-to-day operations of the bureaucratic apparatus. As the bureaucracy expanded, Congress sought to develop additional powers over the administrative state, the best-known of which was the legislative veto, held unconstitutional by the Supreme Court in 1983. Rather than control or diminish the bureaucracy through lawmaking or budget control, Congress has settled mostly on oversight of and providing “regulatory relief” from the bureaucracy.

Today, the primary function of modern government is to regulate. When Congress writes legislation, it uses very broad language that turns extensive power over to agencies, which are also given the authority of executing and usually adjudicating violations of their regulations in particular cases. The result is that most of the actual decisions of lawmaking and public policy—decisions previously the constitutional responsibility of elected legislators—are delegated to

bureaucrats whose “rules” there is no doubt have the full force and effect of laws passed by Congress. In 2014, Congress passed and the President signed about 220 pieces of legislation in to law, amounting to a little over 3,000 pages of law, while federal departments and agencies issued 79,066 pages of new and updated regulations. The modern Congress is almost exclusively a supervisory body exercising post-legislative oversight of administrative policymakers.

Modern administrative forms of governing consolidate the powers of government by exercising the lawmaking power, executing their own rules and then judging their application in administrative courts, binding individuals not through legislative law or judicial decision but through case-by-case rulemaking based on increasingly broad and undefined mandates, with more and more authority over an ever wider range of subjects, all the while less and less apparent and accountable to the political process and popular consent. The problem with such arbitrary, comprehensive, unchecked power is that it is not administration at all but rule outside of the law, outside of the Constitution and its checks and balances, and outside of (and thus not responsive to) our democratic institutions of government.

The consequences of the administrative state’s lack of accountability have been made much more severe by Congress’s current inclination to deal with every policy issue through comprehensive legislation. Congress has ceased to tackle distinct problems with simple laws that can be deliberated upon and then made known to the public. Instead, for everything from financial restructuring to environmental regulation to immigration reform, Congress proposes labyrinth bills that extend to every corner of civil society and impose an ever more complicated and expansive administrative apparatus upon a public that increasingly has no time or means to understand the laws it will be held accountable for. The Affordable Care Act is a perfect example. This law passed by Congress transferred massive regulatory authority over one-sixth of the American economy, not to mention over most health-care decisionmaking, to a collection of more than 100 federal agencies, bureaus, and commissions, along with new federal programs and an unprecedented delegation of power to the Secretary of Health and

Human Services. Little or nothing will be allowed outside the new regulatory scheme — no alternative state programs, no individuals or businesses that choose not to participate, no truly private market alternatives. Likewise, the Dodd-Frank Wall Street Reform and Consumer Protection Act. Its 2,300 pages require administrative rule-makings reaching not only to every financial institution but well in to every corner of the American economy. Its new bureaucracies, like the Consumer Financial Protection Bureau and the Financial Stability Oversight Council, operate outside of the public eye and are subject to virtually none of the traditional checks. The CFPB is literally outside the rule of law: it has an independent source of revenue, insulation from legislative or executive oversight, and the broad latitude and discretion to determine and enforce its own rulings—as so define the limits of its own authority—based on vague terms left undefined.

The rise of the new imperial presidency—acting by executive orders more than legislative direction—should come as no surprise given the overwhelming amount of authority that has been delegated to decision-making actors and bodies largely under executive control. As Congress has expanded the bureaucracy—creating innumerable agencies, delegating its lawmaking authority, neglecting control of the details of budgeting, and focusing on ex post facto checks—the executive has attained unprecedented levels of authority. Modern executives can command the bureaucracy to implement new policies without the cooperation of Congress by abusing executive discretion, by exploiting the vagaries of poorly written laws, and by willfully neglecting and disregarding even those laws which are clear and well-crafted. By acting unilaterally without or against the authority of Congress, the executive not only assumes a degree of legislative powers without legislative accountability but also avoids responsibility for executing the laws legitimately authorized by Congress. The next president—regardless of political party—will be sorely tempted and under significant pressure to achieve desired policy goals by following the precedent of prior administrations that ignored the will of Congress and the text of existing laws. Once it has been established that the president can govern by executive orders and regulations without Congress, and by extension the law itself, it

will prove difficult and perhaps impossible to prevent future executives from following this lawless path.

Rebuilding Congress

It may be a prudent option, especially in the face of today's pen-and-phone presidency, to assert checks and balances through litigation. There is, no doubt, something qualitatively different in how this president is using (and abusing) his powers, with and without congressional authorization. At the very least, a successful lawsuit could prevent things from getting worse. But this much is clear: the legislative branch going to the judicial branch to solve its disagreements with the executive branch is not going to solve the problem. If Congress' turning to litigation to assert its constitutional prerogative becomes the norm, it would have the perverse (and unintended) effect of further nullifying the institutional powers of Congress.

The only way to reverse the trend of a diminishing legislature and the continued expansion of the bureaucratic executive is for Congress to strengthen its constitutional muscles as a coequal branch of government in our separation of powers system. This is the solution envisioned by our Founders, and consistent with popular consent. A stronger legislative branch would go a long way toward making the role of government a proper political question, as it should be, subject to election rather than executive fiat or judicial decree.

The Constitution is grounded in the principle that governments derive their just powers from the consent of the governed. This means that laws must be made by the representatives elected by the people and not unelected bureaucrats. Thus the first step towards restoring the structural integrity of the Constitution is for Congress to reassert its legislative authority and, as much as possible, to cease delegating what amounts to the power to make laws to bureaucrats and administrative agencies. In any case where it allows administrators the discretion to create significant rules, Congress should assert its authority to approve or reject those rules.

Congress needs to relearn the art of lawmaking. It must regain legislative control over today's labyrinthine state, bringing consent and responsibility back to government through better lawmaking up front and, as a result, better oversight after the fact. Regular legislative order, especially the day-to-day back-and-forth of authorizing, appropriating and overseeing the operations of government, will do more than anything to restore the Article I powers of Congress and return legislative control over today's unlimited government.

And the one place where the power of Congress is not entirely lost—and where there is opportunity for gaining leverage over an unchecked executive – is Congress' power of the purse. Used well, it will also prevent Congress from continually getting cornered in time sensitive fights over messy and incomprehensible omnibus budgets at the end of every year, the settlement of which works to the advantage of the executive. Strategically controlling and using the budget process will turn the advantage back to Congress, forcing the executive to engage with the legislative branch and get back into the habit of executing the laws enacted by Congress—no more and no less.

If Congress does not act to correct the growing tilt toward executive-bureaucratic power, the structure of our government will be fundamentally, and perhaps permanently, altered. This imperils the constitutional design and great achievement of republican government. It is still possible for Congress to restore its legislative powers, and to correct this structural imbalance. But Congress needs to think strategically and act as a constitutional institution – indeed, the primary branch of constitutional government. And it must begin doing so now, forcefully stating its argument, putting down clear markers and drawing enforceable institutional lines before the inauguration of the next president—whoever they may be, and regardless of their political party.

Thank you.

Mr. KING. All right thank you, Mr. Spalding. And now I will recognize Mr. Postell for his testimony.

**TESTIMONY OF JOSEPH POSTELL, ASSISTANT PROFESSOR OF
POLITICAL SCIENCE, UNIVERSITY OF COLORADO, COLO-
RADO SPRINGS**

Mr. POSTELL. Thank you very much, Mr. Chairman, and Members of this Task Force. I am delighted to be here and I appreciate the opportunity to testify. In my written testimony and in my brief remarks this morning I am addressing two questions. The first, how the early Congresses avoided delegating its legislative power over to the executive. And second, how Congress structured itself in its early decades in order to ensure that it, and not the executive, set the legislative agenda.

Today Congress routinely delegates massive legislative law-making power over to administrative agencies. This is contrary to the text of the Constitution and it is contrary to the intentions of the Framers. Some scholars claim that early Congresses delegated power to the executive and, therefore, it is perfectly okay for Congress doing so today. The historical record, however, shows otherwise. Article 1 of the Constitution states plainly, "All legislative powers herein granted shall be vested in a Congress of the United States." It does not give Congress the option in Article 1 to delegate those powers. It sets up, in other words, a non-delegation principle.

Early Congresses observed this principle very carefully. The laws they passed were highly detailed, they limited the discretion of the executive. Congress wrote every detail of the tariff laws in its first decades, specifying not only the amounts of the taxation but the products to be taxed. Congress wrote in very specific detail the routes of the post roads in the early decades of the Republic.

In the second Congress James Madison, a Member of the House, said this, "We must distinguish between the deliberative functions of the house and the ministerial functions of the executive powers." Legislative determinations, he insisted, must remain in Congress' hands; ministerial execution of law is the job of the executive.

But this leads to my second point. Although Congress avoided delegating its legislative powers in the early decades of the Republic, the early Congresses ran into a related problem. The problem was the executive was influencing the legislative process, setting the agenda for Congress rather than letting leaders within the Congress set the agenda. Our first Treasury Secretary, Alexander Hamilton, was by all accounts the most important legislative policymaker in the first decade of the Republic.

As President, Thomas Jefferson actually wrote bills to be sent over to Congress to be passed. This was not appropriate for a system of separated powers and Congress knew to reverse this it had to reclaim the authority to set its own agenda. Congress' solution to the problem was to set up internal structures of power to provide the necessary leadership within Congress to allow it to set and implement its own agenda. Without leadership Congress realized it would succumb to what is called a collective action problem. That without leaders in the Congress, Members would cater to their districts back home rather than working together to pass laws in the national interest.

Throughout the 19th century Congress modified its internal procedures and strengthened its leadership in order to provide the solution to these collective action problems. By 1825 the House had set up 28 standing Committees to provide it with the expertise needed to free it from the expertise of the executive branch.

Later in the 1800's the Speaker was given significant, even massive, authority to set the legislative agenda and influence Members to promote that agenda. Most of that authority centralizing leadership in the Congress has since been eliminated by progressive reformers.

As a result of its internal leadership that it developed over the first century of its existence, Congress' ability to manage its affairs improved dramatically. And not coincidentally in the 19th century the power of the executive diminished dramatically. The early experience of the Congress, therefore, teaches us a second lesson. Without internal leadership Congress will follow the agenda set by the executive rather than its own. A Republican form of government is predicated upon a strong legislative branch to serve as the place of popular representation. One person in the White House cannot possibly adequately represent the American people. In seeking to preserve its role Congress should consult the lessons of its early experience.

Members of this Task Force, thank you very much for the opportunity to present this testimony. And I look forward to your questions.

[The prepared statement of Mr. Postell follows:]

Prepared Testimony of

Joseph Postell
Assistant Professor of Political Science
University of Colorado-Colorado Springs

Before the Executive Overreach Task Force
U.S. House of Representatives, 114th Congress

Tuesday, March 1, 2016
Hearing on “The Original Understanding of the Role of Congress
And How Far We’ve Drifted From It”

Mr. Chairman and members of this subcommittee, I am grateful for the invitation to present testimony on the original understanding of Congress's role in our political system, and how far we have drifted from that understanding.

I have been asked to address two questions: how and why Congress in its early decades refrained from delegating legislative power to administrative officials, and how Congress structured itself to ensure that it maintained control of the legislative and policy agenda rather than ceding control to the executive. On both of these issues there are important lessons we can learn from the experience of our early congresses.

Nondelegation in the Early Congress

Throughout the first century of its existence, Congress wrote the laws rather than delegating that power to the executive. In their view, both the text of the Constitution and the basic principles of republican government forbade them from relinquishing the legislative power that the people had placed in their hands.

Constitutional Text and Republican Principles

Article I opens with this simple but critical sentence: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Those words very clearly establish as a legal requirement that the legislative powers of the Constitution must remain in the hands of the House and the Senate. Even the most ardent defenders of legislative delegations to the administrative state admit that the Constitution forbids Congress from relinquishing this power.¹

The Framers of the Constitution placed this requirement at the beginning of Article I for two important reasons. First, since all political power is derived from the people, it must remain in the hands in which the people have placed it. This argument, often referred to as the Social Compact theory, proclaimed that the people were the only rightful source, or fountain of power. Only the people, therefore, could transfer or delegate that power to an agent to act on their behalf. Those to whom authority is delegated, by contrast, never actually possess that power. They merely act as the agents of those who do possess political authority. Since those who do not possess political power may not delegate it, the representatives of the people – the agents – may not further delegate that power.

As John Locke argued in his famous *Two Treatises of Government*, “The power of the *Legislative*” is “derived from the people by a positive voluntary Grant and Institution.” And “it can be no other, than what that positive Grant conveyed.” Therefore, he concluded, “the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands.”

Alexander Hamilton made the same argument in *Federalist 84*. Hamilton claimed that the Constitution did not need a bill of rights, because the people never granted the government the power to infringe basic rights such as freedom of the press in the first place. Bills of rights, he argued, “have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain everything, they have no need of particular reservations.”² The people, in Hamilton’s formulation, never “surrender” their powers to the government. They merely entrust or delegate the use of that power to “immediate representatives and servants” who have no authority of their own, such as authority to further delegate legislative power, outside of the positive grant of the people.

Social Compact theory, in other words, does not treat political power as a gift given by the people to the government, with which the government can do what it wishes. Rather, it understands political power to be unalienable by the people, who are always the sovereign authority. They do not give political power away to the government, but merely delegate it. Since the government never actually owns the power granted, it cannot give it away or delegate it to other bodies.³

In addition to the argument derived from Social Compact theory, the Founders emphasized that republican government demands that laws are made by representatives elected by the people. In *Federalist 10* Madison defined a republic as “a government in which the scheme of representation takes place.” In the previous essay Hamilton wrote that one of America’s great “improvements” to the science of politics was “the representation of the people in the legislature, by deputies of their own election.” And in *Federalist 39* Madison explained that a republic is “a government which derives all its powers directly or indirectly from the great body of the people.” “It is *sufficient* for such a government,” he continued, “that the persons administering it be appointed, either directly or indirectly, by the people.” In these definitions

republican government is connected with the principle of representation through elections, particularly in the legislative branch.

In addition to this argument, the Framers made a very practical argument for why legislative power must remain in the hands of the people's representatives. As James Madison argued in *Federalist 52*: "As it is essential to liberty, that the government in general should have a common interest with the people; so it is particularly essential, that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy, by which this dependence and sympathy can be effectually secured." In short, the Framers believed that those who write the laws must be elected by the people, so that they will make the laws on their behalf. Without that connection between the people and their representatives in the legislature, the government will not have a sympathy for the people and a common interest with them. This will lead the government to make laws that are not in the best interests of the people as a whole.

In sum, the Framers made both a principled and a practical case against delegating the legislative power to administrative officials. It would not only violate the idea that the people alone are the legitimate source of political power, it would also break the connection between the people and their representatives that is central to the definition of a republican form of government.

Early Congresses Avoided Delegating Legislative Power

In the early decades of American history Congress did not shirk its constitutional responsibilities. On the contrary, the laws it passed were highly detailed and limited the discretion of executive officials who carried the laws into effect. As the preeminent scholar of America's administrative history writes, "The priority of the legislative power was...acknowledged on all sides, and the jealousy with which Congress guarded its position was amply illustrated during the Federalist era" of the 1790s.⁴

With regard to tariff laws and post roads, Congress was vigilant in retaining the power to make the law. Louis Jaffe notes that "Congress for many years wrote every detail of the tariff laws." In the tariff acts from 1789 to 1816, for example, Congress not only specified which products would be taxed, but also the rate at which they would be taxed.⁵

In addition, during the Second Congress a debate emerged over the detail Congress is required to include in statutes mapping out the route of post offices and post roads. Theodore Sedgwick, a prominent Massachusetts Federalist, believed that a general act giving the executive the authority to designate the specific route of post roads was not a delegation of legislative power. He admitted that “it was impossible precisely to define a boundary line between the business of Legislative and Executive,” but “he was induced to believe, that as a general rule, the establishment of principles was the peculiar province of the former, and the execution of them, that of the latter.”⁶ Madison echoed this distinction in a later debate, where he distinguished “between the deliberative functions of the House and the ministerial functions of the Executive powers... The fundamental principles of any measure, he was of opinion, should be decided in the House, perhaps even before a reference to a select committee.”⁷ Madison admitted that he “saw some difficulty in drawing the exact line between subjects of legislative and ministerial deliberations, *but still such a line most certainly existed.*”⁸

Both Sedgwick and Madison, two prominent figures in the early Congress, affirmed the principle that the Congress may not lawfully delegate its power to the executive. During Congress’s early years the debate was not over the legitimacy of the nondelegation principle but over its application to specific cases. Sedgwick and Madison both believed that a meaningful distinction could be drawn between the “deliberative” function of the “establishment of principles” and the “ministerial” function of the “execution” of principles.

On the question of post roads, Congress erred on the side of specificity in the statute versus delegating power to the executive to fill in the details. “[O]n five successive occasions,” one historian writes, “the Federalists tried...to vest the power in the executive [to define the route of the post road] but without success.”⁹ As a result the law specified in almost comic detail the route of the road.¹⁰

Some members in the early years of Congress sought to apply the principle so stringently that they objected to any reliance upon information or reports from the executive as a delegation of legislative authority. Many statutes during these early years referred matters to the various heads of departments for a report on a policy question. This is one way in which Alexander Hamilton gained influence over early congressional debates. Many of these references were challenged on nondelegation grounds. Responding to a proposal to refer a petition asking for the repeal of

duties on distilled spirits to the Secretary of the Treasury, Representative William Branch Giles of Virginia protested that the matter was “cognizable by the House only.”¹¹ His argument was that referring the petition to an outside actor would be an abdication of the House’s responsibility, even if the House would ultimately vote on the matter. Giles’s view prevailed and the proposal was defeated.

As the practice of referring policy matters to executive branch officials for reports and advice became more widespread, the clamor against the practice increased. Early in 1792, Representative John F. Mercer of Maryland proclaimed, “I have long remarked in this House that the executive, or rather the Treasury Department, was really *the efficient Legislature of the country*...”¹² Later that year, Representative Abraham Baldwin of Georgia argued that “The laws should be framed by the Legislature.” The Treasury Act, he asserted, was “couched in such general language as to afford a latitude for the introduction of new systems, such as were never expected by the Legislature.”¹³ Mercer further remarked that “the power of the House to originate plans of finance” was “incommunicable” to the Secretary.¹⁴ In March of 1792, James Madison weighed in, submitting that “a reference to the Secretary of the Treasury on subjects of loans, taxes, and provision for loans, &c., was, in fact, a delegation of the authority of the Legislature, although it would admit of much sophistical argument to the contrary.”¹⁵ Just a few years into the new government, the nondelegation doctrine was proving to be a central principle in many legislative debates. Even Madison came to the conclusion that referring these matters to executive agents violated the nondelegation principle.

Importantly, the Federalists defending these practices did not reject the principle of nondelegation. They merely affirmed the propriety of relying on information received from department heads as long as Congress had the last word in passing legislation in response to the information. Representative William Smith responded by reminding the House that “The ultimate decision...in no one point, is relinquished by such a reference. If such a reference was unconstitutional, he observed, much business had been conducted by the House in an unconstitutional manner, by repeated references to the Heads of Departments.”¹⁶ In other words, everyone in Congress agreed on the legitimacy of the nondelegation doctrine. Their dedication to that principle was so powerful that the argument was over whether allowing the executive to *influence* a vote in Congress was unconstitutional.

Historians note that, if anything, it could be argued that Congress entered too much into the details of administration. Rather than delegating its legislative powers routinely, it routinely settled matters of detail that could legitimately have been transferred to administrative officials. As Leonard White notes, “Congress itself decided upon the ports of entry and delivery rather than delegating this duty to the President or the Treasury,” though “it allowed the President to establish excise districts.” Congress also “specified what lighthouses were to be built.”¹⁷ One prominent defender of delegation concedes that in its early years Congress “micromanaged administration, particularly Treasury administration, through specific instructions. Many statutes laid out in excruciating detail the duties of officers and of private parties subject to the legislation.” The statute establishing a tax on Whiskey in 1791 “specifie[d] everything from the brand of hydrometer to be used in testing proof to the exact lettering to be used on casks that have been inspected and the wording of signs to be used to identify revenue officers.”¹⁸ Perhaps Congress could have given the Treasury Department the discretion to establish regulations governing these matters without violating the nondelegation doctrine, but legislators erred on the side of caution.

The Framers of the Constitution and members of the early Congress believed that a republican form of government demanded that elected legislators, to whom the people have delegated the legislative power in their Constitution, wrote the laws. In addition, they had a very clear definition of what law is, and what distinguished it from execution of the laws. As James Madison proclaimed in *Federalist* 62 “Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?” His chief collaborator in writing *The Federalist* Papers, Alexander Hamilton, offered a similar definition of law in *Federalist* 75: “The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of society.” Both of these definitions affirmed that lawmaking power was the power to make rules that govern action, to promote the proper regulation of society. Executive officials might be legitimately given the power to enact regulations, but not rules that govern action. Based on their clear understanding of this distinction, legislators in the early Congress refused to give the executive the power to enact regulations that were legislative in nature.¹⁹

Deliberation and Control over the Legislative Agenda in the Early Congress

The Framers of the Constitution were afraid of the dangers that an unchecked legislative branch posed to individual rights and the separation of powers. Although they originally feared executive power and directed their grievances at King George III in the Declaration of Independence in 1776, by 1787 they understood the problems that arose from their unconditional trust in elected legislatures. Having learned from their experience, they divided legislative power internally to keep it in check. James Madison called legislative power an “impetuous vortex” in *Federalist 48* and explained that the Constitution’s “remedy” for this “inconveniency” was to “divide the legislature into different branches; and to render them, by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit.”²⁰ In short, the Founders designed Congress to be internally checked against itself, with the House and the Senate each accountable to different constituencies and operating under different principles, so that it would not unite and subdue the other branches of the government.

On top of this, the Framers divided legislative power by dividing it up into districts, so that individual representatives would provide a voice for local interests and opinions rather than reflecting the views of national majorities and interests. Rather than implementing the immediate will of the national majority, which might be a majority tyranny, they wanted representatives to reflect the views of their local constituencies. Even if faction could not be removed from the political process, it could be checked by the introduction of even more factions, given voice by different representatives bringing the views of their constituents to the capitol.²¹

This fragmented organization of the legislative branch produced important advantages. It prevented a temporary majority from pushing its will through the legislative branch, and it ensured that the legislative power would remain in check. To make laws, a majority would have to win both the House and the Senate, which means that it would have to be a more reasonable, permanent majority. However, the organization of Congress also presented many difficulties. It made the Congress more prone to gridlock by introducing collective action problems. Members of Congress must serve their local constituencies, but they also must act collectively to advance the interest of the nation as a whole.

Early Congresses: Deliberation, but Executive Influence

In the 1790s, the first decade of Congress's existence, few legislators were concerned about collective action problems. The small size of the House and the Senate allowed all of the members to deliberate collectively on measures. When a proposal was introduced, either through a petition, resolution, or a recommendation from the executive branch, the entire House would debate it. The rules governing debate were minimal – since the House had only 59 members in 1789, there was little need for restrictions.

Once the House had decided collectively on the basic principles of legislation, it would be referred to a select committee that would be formed, draft the legislation, and then dissolve. In the Third Congress alone over 350 select committees were formed for this purpose. There were no standing committees with stable membership and defined jurisdiction. Once the select committee had done its work the legislation was sent back to the floor for passage.

The Speaker's role was limited to those of a presiding officer: ruling on points of order, counting and announcing votes, and preserve decorum.²² Decorum was not enforced strictly. William Maclay, a senator in the First Congress, wrote in his diary that the representatives in the House have "certainly greatly debased their dignity....Using base invective indecorous language," with "3 or 4 up at a time. Manifest signs of passion. The most disorderly Wandering, in their speeches, telling Stories, private anecdotes &c. &c."²³ In 1798 Matthew Lyon spat in the face of another member, Roger Griswold, on the floor of the House.²⁴ There were no powerful leaders in the House or Senate who could control debate or set the legislative agenda, and the early congresses were therefore prone to disorder.

Congress Develops Its Own Leadership

All things considered, the legislative process of the 1790s was chaotic and uncoordinated, but it gave all of the members an equal opportunity to participate in debating every measure that came before the House, as well as a forum for collective deliberation by the nation's representatives on important national policy questions.

One of the downsides, however, was the influence this chaotic legislative process gave to the executive branch. As described above, many Republicans in the Congress bitterly objected to the influence that Alexander Hamilton, the Secretary of the Treasury, had over like-minded

Federalists in the House. Because there were no centralized leadership structures or positions in the legislature, leadership came from outside the Congress. Even Thomas Jefferson, who strongly opposed the expansion of executive power, inserted himself routinely in the legislative process during his presidency to set the agenda for his Republican allies. Jefferson appointed floor leaders in the House, deposed political opponents from committee chairmanships, and even wrote legislation for Congress to pass on his behalf.²⁵ One scholar reports that “[v]irtually every important piece of legislation passed during Jefferson’s tenure [as president] originated with the administration.”²⁶ While Jefferson sought to conceal his interference in the legislative process, his Cabinet secretaries, particularly Treasury Secretary Albert Gallatin, publicly drafted legislation to be introduced in Congress, often at the behest of congressional committees.²⁷

It was clear that in order to overcome their collective action problems and retain control of the legislative agenda, Congress had to set up its own rules and procedures, including central leadership structures. This is precisely what Congress did throughout the 19th Century.²⁸ Congress began by establishing standing committees to provide a place for deliberation and to allow members to gain expertise in specific policy areas. By 1825 the House had created 28 standing committees. The Senate set up its own committee structure around the same time. As the size of the House and Senate increased, making orderly debate more difficult, these committees became a place where discussion and debate could occur and the principles of legislation settled. It also allowed Congress “to free itself from dependence on executive leadership.”²⁹

However, committees could not by themselves provide an overarching legislative agenda. That larger vision had to be asserted from a position of leadership. Party leaders, particularly the Speaker of the House, needed both the authority to set that agenda and the tools to incentivize members to put that agenda ahead of their personal interests. It took a long time for Speakers to gain these tools. Prior to the Civil War most Speakers were compromise selections who did not come into the position with a loyal following and broad support. The exception was Henry Clay, who used his power as Speaker beginning in 1811 to reassert Congress’s control over the policy agenda. Not coincidentally, Thomas Jefferson’s successor, James Madison, who served while Clay consolidated power as Speaker of the House, was a modest executive who deferred to Congress and refused to insert himself into the business of the legislative branch.

While Clay's strong leadership was an anomaly in the pre-Civil War Congress, it showed that strong central leadership in the Congress was the best way for the legislative branch to unify itself and advance its own agenda rather than subjecting itself to executive interference. Eventually, after the Civil War, the era of strong Speakers arrived and the Congress's ability to manage its affairs improved dramatically.³⁰

Conclusion

In this testimony I have sought to explain how Congress functioned in its early years, and why Congress eventually devised internal leadership in order to avoid ceding authority to the executive. I have also shown that Congress was dedicated to making the laws itself rather than delegating lawmaking authority to the executive branch.

Benjamin Franklin famously said that the Framers gave us "a republic, if you can keep it." Central to keeping our republic is the notion that our elected officials write the laws, rather than unelected officials in regulatory agencies. To ensure that we remain a republic, it is critical that Congress look at its own history to see how it can reclaim the power to make the laws and to fulfill its promises to the American people, who have delegated to Congress alone the authority to make the laws.

¹ See, e.g., Eric Posner and Adrian Vermeule, "Interring the Nondelegation Doctrine," *University of Chicago Law Review* 69 (2002), 1723; "[W]e agree that the Constitution bars the 'delegation of legislative power.'"

² Alexander Hamilton, *The Federalist*, no. 84, in Alexander Hamilton et al., *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 445. Subsequent references to *The Federalist* are to the page numbers in this edition.

³ As Philip Hamburger explains, since the people are the principal and the government is the agent "the question is not whether the principal can delegate the power, but whether the agent can subdelegate it." Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014), 377.

⁴ Leonard D. White, *The Federalists: A Study in Administrative History, 1789-1801*, paperback ed. (New York: The Free Press, 1965), 53.

⁵ See F.W. Taussig, *The Tariff History of the United States*, 6th ed. (New York and London: G.P. Putnam's Sons), 1914, pp. 1-108; in particular, for the 1789 Act see 14-15, and for later acts see 15-20.

⁶ *Annals of Congress*, III, 239-40 (December 7, 1791).

⁷ *Annals of Congress*, III, 698-99 (November 19, 1792).

⁸ *Annals of Congress*, III, 700 (November 19, 1792). Emphasis added.

⁹ Leonard White, *The Federalists*, 78.

¹⁰ "From Wiscasset in the district of Maine, to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester, Springfield, Hartford, Middletown, New Haven, Stratford, Fairfield, Norwalk, Stamford, New York, Newark, Elizabethtown, Woodbridge, Brunswick, Princeton, Trenton, Bristol, Philadelphia, Chester, Wilmington, Elkton, Charlestown, Havre de Grace, Hartford, Baltimore,

Bladensburg, Georgetown, Alexandria, Colchester, Dumfries, Fredericksburg, Bowling Green, Hanover Court House, Richmond, Petersburg, Halifax, Tarborough, Smithfield, Fayetteville, Newbridge over Drowning creek, Cheraw Court House, Camden, Statesburg, Columbia, Cambridge and Augusta; and from thence to Savannah....” Act of Feb. 20, 1792, ch.7, §1, 1 Stat. 232, cited in Gary S. Lawson, “Nondelegation and Original Meaning,” *Virginia Law Review* 88 (2002), 403.

¹¹ Cited in White, *The Federalists*, 69.

¹² *Annals*, III, 351 (January 27, 1792). Emphasis added.

¹³ *Annals*, III, 703 (November 20, 1792).

¹⁴ *Annals*, III, 696 (November 19, 1792).

¹⁵ *Annals*, III, 722 (November 21, 1792).

¹⁶ *Annals*, III, 697 (November 19, 1792).

¹⁷ White, *The Federalists*, 77.

¹⁸ Jerry Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012), 44.

¹⁹ See Philip Hamburger, *Is Administrative Law Unlawful?*, 402: “Congress can authorize the other branches to make non-binding rules....But the power to bind, whether by legislation or by adjudication, was delegated by the people, respectively, to Congress and the courts, and Congress therefore cannot transfer any such power to anybody.” This explains why Congress, in its first years, did delegate the power to make regulations in certain cases to the President. In these cases the power to make regulations did not include the power to create new binding rules of action, but merely rules to implement laws enacted by Congress.

²⁰ James Madison, *Federalist no. 48*, 257; Madison, *Federalist no. 51*, 269.

²¹ See generally James Madison, *Federalist no. 10*.

²² *Origins and Development of Congress*, 2d ed. (Washington, D.C.: CQ Press, 1982), 98.

²³ Quoted in Julian E. Zelizer, ed., *The American Congress: The Building of Democracy* (Boston: Houghton Mifflin, 2004), 33.

²⁴ A few weeks later, Griswold got his revenge, beating Lyon with a wooden cane on the House floor. Lyon eventually defended himself with the tongs sitting next to the fire pit.

²⁵ *Origins and Development of Congress*, 102.

²⁶ Richard J. Ellis, *The Development of the American Presidency* (New York: Routledge, 2012), 142.

²⁷ Ellis, *Development of the American Presidency*, 144.

²⁸ For further elaboration on this point see James Sundquist, *The Decline and Resurgence of Congress* (Washington, D.C.: Brookings Institution, 1981), 155-176.

²⁹ Sundquist, *Decline and Resurgence of Congress*, 22.

³⁰ James Sundquist described these trends succinctly in *The Decline and Resurgence of Congress*, 25-29.

Mr. KING. Thank you, Mr. Postell, for your testimony. And the Chair now recognizes Mr. Capretta for his testimony.

**TESTIMONY OF JAMES C. CAPRETTA, VISITING FELLOW,
AMERICAN ENTERPRISE INSTITUTE AND SENIOR FELLOW,
ETHICS AND PUBLIC POLICY CENTER**

Mr. CAPRETTA. Thank you, Mr. Chairman, and Members of the Task Force. I am very pleased to be here this morning. I am very pleased to be here this morning, thank you for inviting me.

The Power of the Purse is arguably the most important power granted to Congress in the Constitution. It is what separates our system of government from many others. The United States President, unlike a king, cannot decide to withdraw funds from the Treasury without an appropriation by Congress, no matter how pressing the purpose. Even in an emergency, such as in the aftermath of 9/11, Presidents must go to Congress and ask for the funding.

This Power of the Purse is the primary means by which the people's elected representatives exert control over the size, direction, and activities of the Federal Government.

Over recent decades Congress has chosen to steadily dilute this power by granting to the executive branch permanent, and oftentimes unlimited or ambiguous, appropriations. This granting of permanent spending authority, generally for programs that are called entitlements, has delegated to the executive branch significant discretion over the terms of this spending. Moreover because the spending authority is open ended or indefinite in appropriation terms, Congress has given up substantial control over the overall size of government, over total Federal spending, and over deficits and debt.

The list of programs with permanent spending authority in current law is long. It begins, of course, with the major entitlement programs but there are many other programs with permanent spending authority too. Including the Supplemental Nutrition Assistance Program, the Social Services Block Grant, some functions of border security and control, portions of Federal housing assistance, reinsurance and risk corridor payments to insurance companies under the Affordable Care Act, and much else.

The spending authority provided by Congress for other programs are often flexible enough to accommodate substantial and expensive executive discretion.

For instance, the current administration used its authority under the SNAP Program to waive the state enforced work requirements in the program for a number of years. The result has been a surge in enrollment in the program that is well above the historical norm, even after taking into account the soft labor market of recent years.

The provision of permanent and open-ended spending authority by Congress has resulted in a complete transformation of the Federal budget; 64 percent of the Federal budget was devoted to annually appropriated accounts in 1965. By 2015 that portion of the budget had shrunk to 32 percent, while spending on mandatory and entitlement programs now takes up more than three fifths of the entire Federal budget.

It is not a coincidence that as budgetary pressures have risen the growth of political pressures have built to cut discretionary appropriations. In recent budget deals it has been much easier for Congress to apply significant pressure on discretionary accounts than it is to apply pressure on the permanently appropriated accounts. And we can see the result of that in the long-term trend toward lower spending on that portion of the budget.

It will not be possible to reverse the trend toward permanent appropriations authority quickly, nor would it be advisable for Congress to undo such authority in every program. I am not arguing for that.

For instance, in Social Security it is important to have a program with some certainty associated with the provision of retirement benefits. Workers need that to make appropriate financial plans. But making allowances for the legitimate need for program certainty need not mean that Congress must cede all budgetary control to the executive branch. Congress should consider several steps to reverse current trends and bring more spending back under the direct control of the House and Senate.

Through the Budget Resolution Congress could consider imposing limits on what is spent on the non-discretionary portion of the budget. This would require a change of law before this could be done. Such a limit would need to be enforced with some automatic restraints if it were ever to be breached. And some programs could be accommodated with exemptions or adjustments, but the basic idea being putting an overall limit would restore Congress' ability to budget in this area of the budget that it is not controlling today.

Further, Congress could also begin to reassert its role by imposing specific limits on certain programs. For instance, Congress could specify that a program's permanent appropriation may not grow by more than some rule, such as the rate of inflation. If the program were projected to grow faster than that then the executive branch would be required to come back to the Congress and ask for additional spending authority, perhaps then triggering some reforms.

The U.S. Constitution gives Congress the sole power to appropriate funds out of the Treasury. Over many years, for understandable reasons, Congress has delegated a lot of that authority now to the executive branch. It's time to begin reversing that trend. Thank you.

[The prepared statement of Mr. Capretta follows:]

Testimony Presented to the Committee on the Judiciary's
Executive Overreach Task Force
U.S. House of Representatives

"The Original Understanding of the Role of Congress and
How Far We've Drifted From It"

James C. Capretta
Visiting Fellow, American Enterprise Institute and
Senior Fellow, Ethics and Public Policy Center

March 1, 2016

Mr. Chairman and members of the Task Force, thank you for inviting to me participate in this hearing.

Section 9 of Article I of the U.S. Constitution is one of the most important checks on executive power in the entire document. It states:

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

And, of course, the power to write laws resides with the Congress. So, unlike a king, a United States president cannot decide to withdraw funds from the treasury without an appropriation by Congress, no matter how pressing the purpose. Even in an emergency, such as in the aftermath of 9/11, presidents must go to Congress and ask for funding.

This "power of the purse" is arguably the most important power granted to Congress in the Constitution. It is the primary means by which the people's elected

representatives exert control over the size, direction, and activities of the federal government.

Over recent decades, Congress has chosen to steadily dilute its power over spending authority by granting to the executive branch permanent, and oftentimes unlimited or ambiguous, appropriations. This granting of permanent spending authority, generally for programs that are called “entitlements,” has delegated to the executive branch significant discretion over the terms of this spending. In effect, important aspects of the legislative function have been delegated to the executive.

Moreover, because much of this spending authority is open-ended (or “indefinite” in appropriations terms), Congress has also given up substantial control over the overall size of government, over total federal spending, and over deficits and debt.

Any examination of how Congress has lost some of its power to the executive branch must take into account this long-standing trend toward delegation through permanent appropriations, and what might be done to begin reversing it.

Programs with a Permanent Appropriation

The list of programs with permanent spending authority in current law is long. It begins, of course, with the major entitlement program: Social Security, Medicare, and Medicaid. But there are many other programs with permanent spending authority.

including: the Supplemental Nutrition Assistance Program (SNAP), the Social Services Block Grant; some functions of border security and control; portions of federal housing assistance; reinsurance and risk corridor payments to insurance companies under the Affordable Care Act; and much else.

Much of the spending associated with these programs is defined by detailed provisions written into law by Congress. For instance, Congress has written into law the formula for calculating benefits payable under the Social Security program, leaving little discretion in this regard to the executive branch.

But, even with such formulas in law, the executive branch has substantial discretion on other areas of program administration, some of which are just as consequential in terms of federal spending. For instance, the Social Security program provides benefits to retirees but also to workers who become disabled and can no longer work. Congress has provided open-ended spending authority to the executive branch to pay benefits to anyone determined to be disabled according to the lengthy and complex rules written by the Social Security Administration. Changes in those regulations, which have occurred intermittently throughout the program's history, have resulted in swings of billions of dollars in federal spending without any action being taken by Congress.

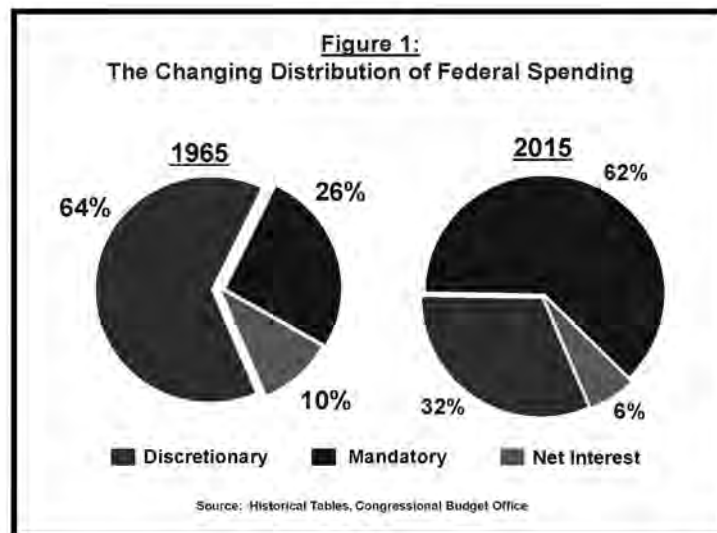
The spending authority provided by Congress for other programs are also flexible enough to accommodate substantial, and expensive, executive discretion. For instance, the Obama administration used its authority under the SNAP program to waive the state-

enforced work requirements in the program. The result has been a surge in SNAP spending that is well above the historical norm, even after taking into account the soft labor market of recent years.

The Fiscal Consequences of the Shift to Permanent Appropriations

The provision of permanent, and open-ended, spending authority by Congress has resulted in a complete transformation of the federal budget. As shown in Figure 1, in 1965, 64 percent of the federal budget was devoted to annually appropriated accounts, often called discretionary spending. This portion of the budget is heavily focused on the military and associated defense spending, but also includes funding for many bread-and-butter operations of the government such as health research, federal support for primary and secondary education, operation of the national parks, and funding for the federal bureaucracy. Spending on mandatory programs, or entitlements, accounted for 26 percent of the federal budget in 1965. Net interest payments on the national debt accounted for the final 10 percent of federal spending.

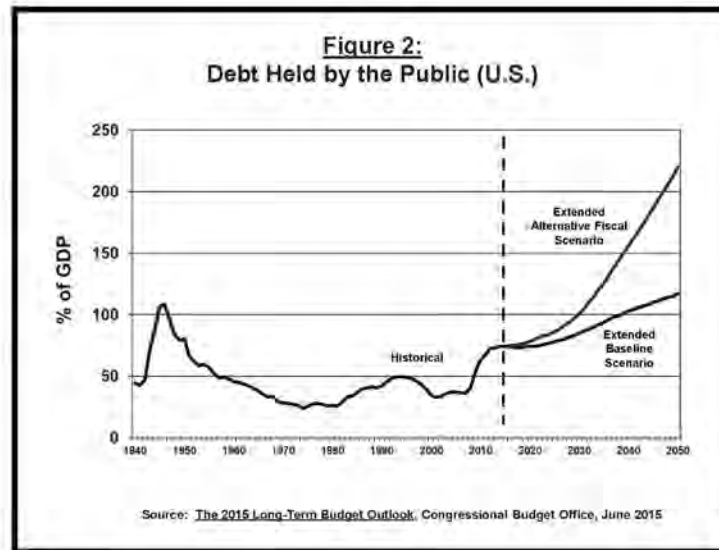
By 2015, the relative positions, in terms of portions of the overall budget, of discretionary and entitlement spending had flipped. Discretionary spending is now about one-third of all federal spending (32 percent) while spending on entitlements takes up more than three-fifths of the entire budget (62 percent).



Of course, it is not a coincidence that, as budgetary pressures have risen with the growth of entitlement spending, political pressure has built to cut discretionary appropriations. That trend is likely to intensify in the coming years as the retirement of the baby boom retires and rapid escalation in health costs push up spending on Social Security, Medicare, and Medicaid. Congress has very little budgetary control over these programs, so the easiest way to trim spending in the budget is to cut defense and other appropriated accounts. This is an important reason budget deals over the past twenty-five years have placed much more restraint on discretionary accounts.

But, as we saw last year, there is only so much that can be squeezed out of the military and even many other discretionary programs. Consequently, the continued rapid rise in mandatory spending will result in large and growing budget deficits in coming years, and will push federal debt above 100 percent of GDP by 2039, according to CBO. CBO has also projected what would happen to federal debt if certain optimistic assumptions, like a continued reduction in discretionary

spending, do not occur. Under that scenario, federal debt would exceed 100 percent of GDP as early as 2030.



Toward Restoration of Congressional Budgetary Control

It will not be possible to reverse the trend toward permanent appropriations authority quickly. Nor would it be advisable for Congress to undo such authority in every program. For instance, in Social Security, it is important to have a program with some certainty associated with the provision of retirement benefits; workers need that to make appropriate financial plans.

But making allowances for the legitimate need for program certainty need not mean that Congress must cede all budgetary control to the executive branch.

Congress should consider several steps to reverse current trends and bring more spending back under the direct control of the House and Senate:

- **Additional Spending Control:** Through the budget resolution, Congress can impose limits on what is spent on discretionary appropriations each year. The budget process could be amended to place an overall limit on total mandatory spending as well. This would go a long way toward restoring Congress' role in establishing a real budget for the federal government. Such a limit would need to be enforced with automatic cuts in spending if it were breached. If projections indicated that, absent a change in law, spending would exceed the overall limit imposed by Congress, then the budget reconciliation process could be used to set in motion reforms to the programs that would allow overall mandatory spending to fall below the upper limit.
- **Programmatic Limits:** Congress could also begin to reassert its role by imposing specific spending limits for certain programs. For instance, Congress could specify that a program's permanent appropriation may not grow by more than the rate of inflation each year (or perhaps not at all, if that were the appropriate benchmark). In the event a program were projected to grow faster than was allowed in permanent law, the executive branch would be forced to

come to Congress and ask for additional spending authority.

- **Conversion of Programs Back to Annually Appropriated Accounts:** Congress should also take away permanent appropriations from as many programs and functions as possible. For instance, in the Affordable Care Act, Congress provided a large, recurring appropriation of \$10 billion for the Center for Medicare and Medicaid Innovation. This agency and its mission should not receive automatic funding. Rather, it should be forced to compete with other agencies and programs for funds in the annual appropriations process.

Conclusion

The U.S. Constitution gives Congress the sole power to appropriate funds out of the treasury. Over many years, and for many understandable reasons, Congress has written into law permanent appropriations that have the effect of handing more power and control over the federal government to the executive branch.

Rapid growth in spending on programs with permanent spending authority is the reason the federal government is running large deficits today and is projected to run even larger deficits in the future. Moreover, ceding control over spending programs to the

executive branch runs counter to the original balance that the founders intended for the federal government.

It is time for Congress to begin reversing the trend of the past several decades with more limits on permanent, open-ended appropriations.

I would be happy to answer any questions.

Thank you.

Mr. KING. Thank you for your testimony, Mr. Capretta. And now I would recognize Mr. Vladeck for his testimony.

**TESTIMONY OF STEPHEN I. VLADECK, PROFESSOR OF LAW,
AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW**

Mr. VLADECK. Great. Thank you, Chairman King, Ranking Member Cohn, distinguished Members of the Task Force. Although many have been quick to blame the President for the perceived drift in the separation of powers, I want to suggest in my brief remarks today that any such drift is at least as much a result of legislative torpor. And unwillingness on the part of Congress to use substantive legislation to better define and police the authority delegated to the executive branch.

When discussing concerns over executive power the Founders would have distinguished, and did distinguish as I explain in more detail in my written statement, between three types of inter-branch disputes. The first type of inter-branch dispute, and by far the least significant from a separation of power standpoint, arises from disagreement between the Congress and the executive branch over the terms of a statute that the executive branch is enforcing.

In such cases the issue is not whether the President is acting unconstitutionally, but rather whether the actions of executive branch officials are consistent or not with whatever directives Congress has prescribed. Moreover, the Supreme Court has typically afforded deference to the executive branch's reasonable interpretations of ambiguities and the statutes it is tasked with enforcing, even if the courts or the current Congress, might read the same text differently.

The second type of inter-branch dispute involves cases in which the executive branch claims a Constitutional authority to act in the face of Congressional silence, as Justice Jackson explained in his celebrated concurring opinion in the Steel Seizure case. In such circumstances where no statute either authorizes or specifically limits the President's authority, "Congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable if not invite measures on independent Presidential responsibility."

The third type of dispute, which poses the gravest threat to the separation of powers, involves circumstances in which the President claims the authority to act in defiance of statutory limits on his authority because, in his view, such statutes unconstitutionally infringe upon his Constitutional powers.

As Justice Jackson put it in the Steel seizure case, "Presidential claim to a power at one so conclusive and preclusive must be scrutinized, excuse me, scrutinized with caution, for what is at stake is the equilibrium established by our Constitutional system."

I offer this taxonomy to underscore three points that I believe are central to today's hearing, and to the broader work of this Task Force. First, in my view most of the areas in which President Obama has been criticized for overreaching fall into the first of these categories and, therefore, reduced to good faith disputes over statutory interpretation and not over the scope of the President's Constitutional powers.

As a case in point consider the current debate over the President's legal authority to use military force against ISIL. The

Obama administration has maintained since September of 2014 that apart from isolated and limited acts of self-defense, its general authority to use such force derives not from Article 2 of the Constitution, but from the AUMF. Even though that statute, one, says nothing at all about ISIL and, two, only authorizes force against groups that were responsible for or assisted in the attacks of 9/11, which occurred before ISIL even existed.

Some agree with the Obama administration's legal reasoning, others do not. But even if the executive branch is incorrect in its interpretation of the AUMF, all that would mean is that the executive branch is mistaken in its reading of a statute, not that it is willfully abusing its inherent Constitutional authority. This is exactly why many, including President Obama himself, have repeatedly called upon this Congress to pass a new AUMF for ISIL. Not because they are convinced that the executive branch is acting unlawfully in using force under the 2001 AUMF, but because such a statute would reassert Congress' institutional role in war making, and would set the parameters for the current armed conflict whether or not the President already has statutory authority for the actions he is undertaking.

Second, President Obama has not been nearly as aggressive in claiming the kind of indefeasible executive power that was routinely invoked during the Bush administration. The authority to ignore statutes that, among other things, prohibited torture, limited the government's power to conduct warrantless surveillance, required statutory authorization for the detention of U.S. citizens as enemy combatants, and so on. A common refrain during the Bush administration was that statutes Congress enacted to limit the President's power were unconstitutional. We have heard far, far less of that argument from the White House over the past 7 years and, in my view, for good reason.

Third, and perhaps most importantly, unlike with respect to claims of indefeasible power concerns that the President is overreaching in either of the first two categories I have described can easily be ameliorated through new legislation clarifying the scope of an existing delegation, or circumscribing the President's power to act in the absence of statutory authority. In Federalist 51, James Madison famously explained that for our system of separated powers to function ambition must be made to counteract ambition. I could not agree more. But to date the 114th Congress has enacted 126 public laws, fewer than half the total of what was previously the most unproductive Congress in American history, the 112th, which passed 283. By contrast the 80th Congress, which President Truman famously derided as the "Do Nothing Congress," enacted 906 public laws.

Reasonable minds can and will surely will disagree about the merits of President Obama's policy ambitions and statutory interpretations, in these areas and others. What cannot be said is that this Congress has been uniquely reluctant to counteract or otherwise mitigate those ambitions through substantive legislation.

What this underscores, in my view, is that any contemporary drift from the historical balance between the branches has been at least as much a result of Congressional inability or unwillingness to do the hard work of legislation as it has been the result of Presi-

dential aggressiveness, and has already made solution not in hearings like this one, but in new substantive legislation that would more directly vindicate Congress' institutional and Constitutional role.

Thank you for your time and I look forward to your questions.
[The prepared statement of Mr. Vladeck follows:]

**THE ORIGINAL UNDERSTANDING OF THE ROLE OF CONGRESS
AND HOW FAR WE'VE DRIFTED FROM IT**

*Hearing Before the House Committee on the Judiciary
Executive Overreach Task Force*

Tuesday, March 1, 2016

Written Testimony of Stephen I. Vladeck

Professor of Law, American University Washington College of Law
Co-Editor-in-Chief, JUST SECURITY

Chairman King, Ranking Member Cohen, and distinguished members of the Task Force:

Thank you for inviting me to testify today on such a timely and important topic. Few structural relationships are more important in our constitutional system than the interplay between Congress and the Executive Branch, and I do not think there can be any doubt that there are reasons to fear for the contemporary and future health of this vital dynamic.

Where I suspect that I part company from my fellow witnesses, and from many Members of this Task Force, however, is in my assessment of the *causes* of the current breakdown in this relationship. Whereas many have been quick to place the blame on President Obama and the allegedly unfettered executive power he has repeatedly sought to wield throughout his Administration,¹ my own view is that the disease that currently plagues the separation of powers is far more attributable to legislative torpor — an unwillingness on the part of Congress aggressively to police the authority previously delegated to the Executive Branch through substantive legislation.

In *Federalist* 51, James Madison famously explained that, for our system of separated powers to function, “Ambition must be made to counteract ambition.”² I couldn’t agree more. But to date, the 114th Congress has enacted **126** Public Laws³ — fewer than half the total of the most unproductive Congress in American history, the 112th (which passed **283**).⁴ By contrast, the 80th Congress (which President Truman famously derided as the “Do-Nothing Congress”) enacted **906** public bills.⁵ And beyond this quantitative assessment, the legislation that this Congress *has* enacted has said virtually nothing about health care, immigration, environmental regulation, or the war powers — some of the substantive policy areas in which the criticisms of the current Administration have been the loudest.

Reasonable minds can and will surely disagree about the *merits* of President Obama’s policy ambitions in these areas (and others). What cannot be gainsaid is that this Congress has been uniquely reluctant to counteract or otherwise mitigate those ambitions through the conventional vehicle of substantive legislation. Thus, any contemporary drift from the original understanding, in my view, has been at least as

1. See, e.g., DAVID F. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION’S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* (2015).

2. *THE FEDERALIST* No. 51, at 321–22 (Clinton Rossiter ed., 1961) (James Madison).

3. See Public Laws, CONGRESS.GOV, <https://www.congress.gov/public-laws/114th-congress> (last visited Feb. 26, 2016).

4. See Statistics and Historical Comparison, GOVTRACK.US, <https://www.govtrack.us/congress/bills/statistics> (last visited Feb. 26, 2016).

5. See Résumé of Congressional Activity, Eightieth Congress, <http://www.senate.gov/reference/resources/pdf/80res.pdf> (last visited Feb. 26, 2016).

much a result of congressional passivity as it has been a result of presidential aggressiveness.

The reason why this matters, as I explain in my testimony this morning, is because of the subtle but crucial distinction between two different types of executive power: **Indefeasible** (or “preclusive”) power, pursuant to which the President claims the authority to ignore statutory constraints on his authority, and **defeasible** power, pursuant to which the President claims the authority to act unilaterally only in the face of congressional silence, and does **not** assert the authority to defy statutory prohibitions.

An overwhelming majority of the criticisms of the Obama administration of which I am aware fall into this latter category. Indeed, on a host of topics, the Administration has all-but disavowed any inclination to defy statutory constraints, such as the restrictions on the transfers of Guantánamo detainees into the United States.⁶ Contrast that with, for example, the Bush administration, which repeatedly made claims of *indefeasible* power — the authority to ignore statutes that, among other things, prohibited torture;⁷ limited the government’s power to conduct warrantless surveillance;⁸ required statutory authorization for the detention of U.S. citizens as “enemy combatants”;⁹ and so on.¹⁰ A common refrain during the Bush administration was that statutes Congress enacted to limit the President’s power were unconstitutional insofar as they succeeded in doing so. We’ve heard far less of that argument from the White House over the past seven years.

Once more, though, it is not my goal today to re-litigate the merits of the Bush administration’s claims to indefeasible power. Rather, the relevant point for present purposes is that, when the Executive Branch claims indefeasible power, it is the courts that are in the best position to stop it. But when the Executive Branch claims only *defeasible* power, that power can (and historically has been) meaningfully circumscribed by Congress — through statutes imposing limits on such authority. Thus, at the end of the day, the best solution to the contemporary perception, valid or otherwise, that the President is overreaching through claims of defeasible executive power is, quite simply, new legislation more precisely delimiting his authority.

6. See Marty Lederman, *The Insoluble Guantánamo Problem*, JUST SECURITY, Nov. 13, 2015, <https://www.justsecurity.org/27563/guantanamo-problem-remains-insoluble-part-three-executive-disregard-gtmo-restrictions-solution/>.

7. See 18 U.S.C. §§ 2340–2340A (2006).

8. See *id.* § 2511(2)(f).

9. See *id.* § 4001(a).

10. For links to the Administration’s legal arguments on this front, see Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 933, 937 n.22 (2007). For an exhaustive rebuttal of such claims, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb* (pts. 1–2), 121 HARV. L. REV. 689, 941 (2008).

I

As Justice Robert Jackson famously explained in his concurrence in the *Steel Seizure* case,

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.¹¹

But where no statute specifically limits the President's authority, in contrast, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."¹²

Although Justice Jackson's concurrence is often celebrated as a canonical articulation of how we ought to assess the merits of separation-of-powers disputes between the political branches, one can find the very same understanding in one of the Supreme Court's first separation-of-powers cases, *Little v. Barreme*.¹³ Because I believe it is reflective of the Founding-era understandings of the difference between defeasible and indefeasible executive power, it's worth laying out the decision's background in some detail:¹⁴

In response to escalating tension between the U.S. and French governments, largely a result of the 1794 Jay Treaty¹⁵ with Great Britain and the "XYZ Affair,"¹⁶ Congress in 1798 rescinded a series of 1778 treaties with France.¹⁷ During the same session, it enacted the controversial Alien¹⁸ and Sedition¹⁹ Acts and the oft-neglected but still extant Alien Enemy Act.²⁰ The Fifth Congress also enacted statutes suspending commerce with France and otherwise providing for reprisals against French shipping for

11. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

12. *Id.* at 637.

13. 6 U.S. (2 Cranch) 170 (1804).

14. Much of the discussion that follows is derived from Vladeck, *supra* note 10, at 941–43.

15. Treaty of Amity, Commerce, and Navigation, U.S.–Gr. Brit., Nov. 19, 1794, 8 Stat. 116.

16. See ALBERT BOWMAN, *THE STRUGGLE FOR NEUTRALITY: FRANCO-AMERICAN DIPLOMACY DURING THE FEDERALIST ERA* 306–33 (1974).

17. Act of July 7, 1798, ch. 67, 1 Stat. 578.

18. Act of June 25, 1798, ch. 58, 1 Stat. 570 (expired 1800).

19. Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

20. Act of July 6, 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21–24 (2000)).

offenses against U.S. merchant ships.²¹ President Adams did not request, nor did Congress provide, a declaration of war.²² Thus, the Quasi-War was America's first experience with the concept of "undeclared" or "imperfect" war, where the scope of the conflict depended far more directly on the specific terms of the underlying statutory authorizations.²³

Consequently, in the first Supreme Court case arising out of the conflict, *Bas v. Tingy*,²⁴ the issue was whether France was an "enemy" within the meaning of a 1799 Non-Intercourse Act²⁵ at the time that the cargo ship *Eliza* was captured by the *Ganges*, an armed U.S. vessel, notwithstanding the absence of a formal declaration of war by the United States Congress.²⁶ In seriatim opinions,²⁷ the Court concluded that France was in fact an "enemy," triggering the recovery provided for by the 1799 statute.

The second Supreme Court case stemming from the Quasi-War was *Talbot v. Seeman*,²⁸ which concerned the authority of the U.S. Navy to capture *neutral* vessels that the Navy had probable cause to believe were in fact French ships.²⁹ Although no Act of Congress expressly authorized such captures, Chief Justice Marshall, in his first published opinion, traced implicit authority for the capture to the language of several of the Fifth Congress's non-intercourse statutes, suggesting that such authority must come from congressional statutes, as opposed to inherent executive power.³⁰

But by far the most important of the Quasi-War cases, at least for present purposes, was the last³¹ of the trilogy—*Little*.³² At issue in *Little* was the scope of a congressional non-intercourse statute, enacted on February 9, 1799, which empowered the President to authorize "the commanders of the public armed ships of the United

21. See, e.g., Act of June 13, 1798, ch. 53, 1 Stat. 565; Act of June 25, 1798, ch. 60, 1 Stat. 572; Act of June 28, 1798, ch. 62, 1 Stat. 574; Act of July 9, 1798, ch. 68, 1 Stat. 578; Act of July 16, 1798, ch. 88, 1 Stat. 611.

22. See J. Gregory Sidak, *The Quasi-War Cases—and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 481 (2005).

23. See *id.*

24. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

25. See Act of Mar. 2, 1799, ch. 24, § 7, 1 Stat. 709, 716 (repealed 1800).

26. See *Bas*, 4 U.S. at 37. For a summary of the background of this case, see Sidak, *supra* note 22, at 483-86.

27. In *Bas*, separate opinions (reaching the same result) were filed by Justices Moore, Washington, Chase, and Paterson. See *id.* at 39-40 (Moore, J.); *id.* at 40-43 (Washington, J.); *id.* at 43-45 (Chase, J.); *id.* at 45-46 (Paterson, J.).

28. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801).

29. See Sidak, *supra* note 22, at 487-90 (summarizing the background to *Talbot*).

30. See *Talbot*, 5 U.S. at 28.

31. One curiosity concerning *Little* is the lengthy and heretofore unexplained (and unexplored) delay between when the case was argued—December 16 and 19, 1801—and when it was decided, February 27, 1804. Although the Supreme Court did not sit in 1802 per the terms of the 1802 Judiciary Act, *Little*, the only case argued at the December 1801 Term not decided during the same Term, was not handed down during the February 1803 Term (the Court's next sitting), either. See SUPREME COURT OF THE U.S., DATES OF SUPREME COURT DECISIONS AND ARGUMENTS: U.S. REPORTS, VOLUMES 2-107 (1791-1882), at 3-4 (2006), <http://www.supremecourtus.gov/opinions/datesofdecisions.pdf>.

32. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

States” to stop and search ships suspected of carrying French goods and to seize any such ship “bound or sailing to any port or place within the territory of the French Republic.”³³ President Adams, through the Secretary of the Navy, subsequently issued instructions authorizing seizures of vessels “bound to or from” French ports.³⁴ As Professor Sidak has summarized:

Captain George Little commanded the U.S. frigate *Boston*. On December 2, 1799, the *Boston* captured *The Flying-Fish*, a Danish ship carrying Danish and neutral cargo, as it sailed from Jeremie to the Danish port of St. Thomas in the Virgin Islands. Little was acting under executive orders in enforcing the non-intercourse law that prohibited American vessels from journeying to French ports, a statute that Little suspected *The Flying-Fish* of violating. The district court ordered restoration of the ship and cargo, but declined to award damages for capture and detention. The circuit court reversed and awarded damages, on the rationale that the capture would have been unlawful even if *The Flying-Fish* had been an American vessel.³⁵

Writing for a unanimous Court, Chief Justice Marshall affirmed, and held that Captain Little was liable for damages.³⁶ What commentators tend to overlook about Chief Justice Marshall’s short but forceful opinion in *Little* is the extent to which he clearly understood the distinction between unilateral presidential power in the absence of congressional action and the scope of such authority in the face of countervailing congressional limitations, even — as in *Little* — potentially illogical ones.³⁷ That is, Marshall plainly suggested that the issue might be different had Congress not interposed **any** limits on the Navy’s authority to capture suspected French ships, but that the existence of a limit rendered unlawful any seizures in violation thereof.³⁸ In his words,

It is by no means clear that the president of the United States whose high duty it is to “take care that the laws be faithfully executed,” and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit

33. Act of Feb. 9, 1799, ch. 2, § 5, 1 Stat. 613, 615 (expired 1800) (emphasis added).

34. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1394 (2001) (discussing *Little*).

35. Sidak, *supra* note **Error! Bookmark not defined.**, at 490 (footnotes omitted).

36. *Little*, 6 U.S. (2 Cranch) 170.

37. *See id.* at 177-78.

38. *Id.*

commerce. But when it is observed that . . . the 5th section [of the 1799 Non-Intercourse Act] gives a special authority to seize on the high seas, and **limits** that authority to the seizure of vessels bound or sailing **to** a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel **not** bound to a French port.³⁹

In other words, whether or not President Adams could have issued the instructions at issue in the absence of a statutory constraint, the existence of the constraint settled the illegality of Captain Little's actions.

To be sure, I don't mean to make too much of *Little*. But (1) as the *Steel Seizure* case underscores, Marshall's original understanding of the distinction between defeasible and indefeasible presidential power has persisted in the Supreme Court's separation of powers jurisprudence; and (2) if anything, it was even more forcefully reiterated by the Supreme Court just a decade ago, when Justice Stevens emphasized that, "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not **disregard limitations** that Congress has, in proper exercise of its own war powers, placed on his powers."⁴⁰

Of course, the President will still occasionally *prevail* in arguments that a substantive limitation imposed by Congress unconstitutionally interferes with his inherent constitutional authority; we need look no further than the Supreme Court's June 2015 decision in *Zivotofsky v. Kerry*⁴¹ for evidence of that. And as noted above, the purpose of my testimony is not to rehash the well-joined debate over when Congress may and may not impose such restraints. My point today is far more modest: Until and unless Congress actually *does* impose such limits on the President's powers, any perceived separation-of-powers violation is, in my view, far less pernicious than in the context of an inappropriate claim of indefeasible power, where even the most unambiguous legislative mandates may go unenforced.

II

Lest my testimony today be taken as a defense of the Obama administration's actions on Article II grounds, however, let me also note another recurring feature of separation-of-powers debates that are portrayed in defeasibility terms: Oftentimes, the dispute is not, in fact, over whether the President has the inherent constitutional

39. *Id.* at 177–78 (emphases added; original emphases omitted).

40. *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006).

41. 135 S. Ct. 2076 (2015) (invalidating an Act of Congress that required the State Department to list "Jerusalem, Israel" as the place of birth on the passports of U.S. citizens born in Jerusalem, because it contravened the President's constitutional authority to take no position on whether Jerusalem is part of Israel).

authority to act in the face of congressional silence, but rather whether the President is acting in good faith *pursuant to* the relevant statutory authorities.

As a case in point, consider the current debate over the President's legal authority to use military force against the Islamic State in Iraq and the Levant (ISIL). The Obama administration has consistently maintained, since September 2014, that outside the specific context of self-defense, its general authority to use such force derives not from Article II of the Constitution, but from a statute, *i.e.*, the September 2001 Authorization for the Use of Military Force⁴² — even though that Act (1) says nothing at all about ISIL; and (2) only authorizes force against groups that were responsible for, or assisted in, the attacks of September 11 (which occurred before ISIL even existed).

Some agree with the Obama administration's legal reasoning; others do not. (In my view, the validity of the argument almost certainly turns upon factual details — about the origins of ISIL and its relationship with al Qaeda — that remain classified.⁴³) Regardless, even if the Obama administration is *incorrect* in its interpretation of the AUMF, all that conclusion would mean is that the Executive Branch is incorrectly interpreting a statute — not that it is willfully abusing its inherent constitutional authority. The same goes for the Administration's Clean Power Plan, its implementation of the Affordable Care Act, and its deferred action immigration program, among others; the disputes in all of these contexts reduce to whether or not the Executive Branch's interpretation of vague (and, at times, inconsistent) statutory delegations is permissible. You and I may answer those questions differently, but as with any question of statutory interpretation, the ultimate authority is Congress — which can always pass legislation clarifying the meaning of the original text, whether before, after, or in lieu of judicial interpretations thereof.

This is exactly why I, among others (including President Obama, who has submitted proposed legislation⁴⁴), have repeatedly called upon this Congress to pass a new AUMF for ISIL⁴⁵ — not because I am convinced that the Obama administration is acting *unlawfully* in using force under the 2001 AUMF, but because, from a separation-of-powers perspective, "Congress's inaction in the face of a President's debatable claims

42. Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note).

43. See Steve Vladeck, *ISIL as al Qaeda: Three Reactions*, LAWFARE, Sept. 11, 2014, <https://www.lawfareblog.com/isil-al-qaeda-three-reactions>.

44. See Joint Resolution, available at https://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf (last visited Feb. 26, 2016).

45. See, e.g., Jack Goldsmith, Ryan Goodman, and Steve Vladeck, *Five Principles That Should Govern Any U.S. Authorization of Force*, WASIL POST, Nov. 14, 2014, at A21.

to lawful use-of-force authority only invites *additional* unilateral presidential warmaking in the future.”⁴⁶ Indeed, as I’ve written before,

For Congress to be in session and to simply refuse to vote, one way or the other, on war powers the President is exercising (to a large degree openly), is for Congress to invite *future* presidents not just to engage in greater unilateral warmaking, but in greater unilateral action during wartime, writ large. It would be one thing if Congress wasn’t acting because it was convinced the President would *veto* any legislation (thereby exposing Congress’s institutional weakness). But here, the President has repeatedly suggested that he would welcome a bill, has drafted one of his own, and has supported drafts provided by various members.⁴⁷

In those circumstances, I simply don’t see the argument that the President is overreaching — or that, if he is, it isn’t with Congress’s knowing and willful acquiescence. And although my focus in my testimony today has been on how the war powers aspect of this conversation reflects my thesis, similar arguments can be made about the absence of legislation clarifying the scope of the President’s authority in virtually all of the other substantive policy areas of contemporary controversy.

Finally, I realize that one response to my testimony today may be to simply suggest that President Obama would veto any legislation seeking to clarify or overturn his Administration’s interpretations of existing authorities, which would render unrealistic any prospect of this Congress enacting such legislation. In my view, there are two separate — but equally compelling — rejoinders to such a response:

First, from a separation of powers perspective, legislation that the President vetoes over significantly substantial policy differences would be the system working exactly the way it’s supposed to — and if the legislation were perceived as reasserting Congress’s institutional role rather than simply staking out a partisan substantive policy position, there might well be sufficient votes to *override* such a veto. After all, American history is replete with presidential vetoes being overridden by bipartisan supermajorities in Congress. *Second*, and as importantly, as in the ISIL AUMF context, there is no guarantee that such a veto would be forthcoming. Indeed, during his tenure to date, President Obama has vetoed fewer bills (nine) than any two-term President since James Monroe.⁴⁸ That’s hardly the mark of a President who refuses to acknowledge Congress’s constitutional authority in cases in which it has actually been asserted.

⁴⁶ Steve Vladeck, *The Irresponsible Institutional Politics of an “Election Year,”* JUST SECURITY, Jan. 4, 2016, <https://www.justsecurity.org/28629/irresponsible-institutional-politics-election-year/>.

⁴⁷ *Id.*

⁴⁸ See Summary of Bills Vetoed, U.S. SENATE, <http://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm> (last visited Feb. 26, 2016).

If nothing else, more aggressive efforts from Congress to rein-in perceived excesses in executive power would present a far more conventional separation of powers debate than one in which Congress merely objects to such perceived excesses *without* doing anything to circumscribe them.

* * *

Thank you again for the opportunity to testify before the Task Force this morning. I look forward to your questions.

Mr. KING. Thank you for your testimony, Mr. Vladeck. I thank all the witnesses for your testimony. We will now proceed under the 5-minute rule with questions. And I will begin and direct my first question to Mr. Spalding.

Mr. Spalding, I noticed in your testimony that you referenced the 1688 Glorious Revolution and the establishment of a legislative supremacy over the monarch. Could you elaborate on that if that is the foundation by which our Founding Fathers looked to when they wrote Article 1 in the Constitution?

Mr. SPALDING. Thank you for the question. The importance of the Glorious Revolution to the American Revolution is high. The long establishment of the rule of law through British Constitution culminates in the Glorious Revolution, which could only go so far. It established legislative supremacy. Having said that that legislative supremacy used by Parliament against the Americans of the colonies was objectionable to them.

The American Founders perfected this question by constructing a Constitution of three coequal branch, the legislative being first. But with the power that we have talked about and the various checks on it, and the executive and the judiciary to the separation of power system.

Mr. KING. So in other words, that was what the Founding Fathers—one of the things they looked at when they said they need to have a method to restrain an over exuberant legislative branch that might have been all powerful. It helped them bring that to the balance of the three powers—branches of government.

Mr. SPALDING. And they did so by having a written Constitution, which was the main difference between the Glorious Revolution and the American Revolution.

Mr. KING. Indeed and thank you. And then so I also wanted to pose another question to you, Mr. Spalding. And that is that do you believe that our Founding Fathers imagined that there would be an executive that would threaten to veto any legislation that did not include all of his appropriations that he demanded in it? And in vetoing that legislation would bring about a government shutdown. What did you imagine our Founding Fathers thought would happen if an executive took that kind of a step, which we have seen in the last couple of years frequently?

Mr. SPALDING. Well the first thing to point out is the history of executive vetoes were to be used rarely; only if there were serious objections mostly having to do with Constitutional disagreements with Congress. The President has the right to choose however he wants to veto. But the idea of using a Constitutional power like the veto as a way to essentially leverage Congress to pass full budgets, I do not think they probably could have imagined that. But the main thing they could not have imagined is the massive shifting of a power within the separation of powers to the executive branch.

The fact is that that forces the Congress, in addition to its inability to pass its appropriations bills, into massive omnibus bills at the last moment which, in turn, give the executive massive amounts of authority to threaten the veto.

Mr. KING. Thank you, Mr. Spalding. I would like to turn then to Mr. Postell. And your testimony included Article 1 as not set up; you called it a non-delegation principle in Article 1. So take this

non-delegation principle to its extreme for us. Does that mean clawing back a lot of the things that are in the executive branch? Does that mean clawing back the rulemaking authority? Does that mean reaching into the EPA and bringing the operations out of there with the exception of the enforcement and field operations into the control of Congress? How do you envision this at its, say, taking it to the logical extreme?

Mr. POSTELL. Yeah, I think that it largely entails some of the things you are describing, which means not the abolition of any of these programs, not the abolition of any of these regulations, not the abolition of any of these agencies; but rather transferring certain authorities that have been given to those agencies back into the legislative branch.

So, for instance, Congress set up multiple departments and multiple agencies from the very beginning. But those agencies and those departments were executive or administrative, which meant they had powers such as investigation, prosecution, and enforcement. But they were not lawmaking entities because that was fundamentally the job of Congress.

So the rules that bind conduct have to be made by the legislative branch, otherwise we are not in a representative democracy anymore.

Mr. KING. Could a Congress, then, establish enforcement forces to carry out such actions?

Mr. POSTELL. I think so, yes.

Mr. KING. That would be my conclusion from listening to this. I wanted to take it to that level because this Committee and this Task Force, I believe, wants to look at the full breadth of this so that we can come at what is a reason judgment of the people, and we want to restore the power to the people in the end.

So I just quickly, Mr. Capretta, the tools that Congress has to enforce today against an executive branch how long is that list and what are they?

Mr. CAPRETTA. The tools to restrain executive spending authority you mean?

Mr. KING. To restrain an executive branch, an over exuberant executive branch, that might be operating outside the Constitution.

Mr. CAPRETTA. Well I think the budgetary powers should be restrained, so I would look at the list of programs that have permanent spending authority now. And some of that has been done by Congress, most—I mean that has been done by Congress. So I would not put it necessarily in a Constitutional question. But many statutes have delegated the spending authority to the Congress.

I think it has just become a pattern and a practice over many, many years. And it was done originally for programs that had a benefit associated with it and people wanted some certainty. But it has gone well beyond that to a lot of discretionary programs that are now getting mandatory funding, including agencies of government. I would target those first.

Mr. KING. Thank you, Mr. Capretta. My time has expired and now recognize the gentleman from Tennessee.

Mr. COHEN. Thank you, Mr. Chair. Mr. Spalding, you responded to the Chairman's question about how you thought the Founding Fathers would have looked at the President who vetoed a bill be-

cause he did not agree with all the appropriations. So you can kind of go back and envision what the Founding Fathers were thinking, I guess. What do you think the Founding Fathers who had a three-fifths clause for slaves in it would have thought about an African-American President? Women voting? Or Blacks and Whites eating together?

Mr. SPALDING. I think you are—sorry, I think you are correct in questioning the ability to envision what the Founders thought. I think you are absolutely right with that. We constructed it as best we can. I think the point of the three-fifths clause, given that that was introduced by abolitionists at the convention, was a move against slavery, was their intention, and that is what Frederick Douglas thought. So I think the intention on that one is actually pretty clear.

I think your point you are getting at, however, is correct which is that meanings of these things do change, and the Constitution and the intentions of the Founders should not be so rigid as they do not allow those changes. But my point is that that is where Congress especially comes in. Congress has the necessary and appropriate clause. Congress has those implied powers to make those adjustments. And it is within the legislative branch where those things are best solved not, in my opinion, by an executive who is unitary or a judiciary which makes binary decisions. That is what lawmaking means.

Mr. COHEN. Not to get off on a tangent but yeah the abolitionists were for three fifths so that they would not get full population—

Mr. SPALDING. The South wanted one for one, which means they their selves would get more representation in Congress and the establishment object to that.

Mr. COHEN. Both sides took as a given that slavery was something that was appropriate proper and not to be challenged—

Mr. SPALDING. That is right. If you read the transcripts of the convention, including Madison's writings in the Federalist papers, there was a lot of objection to slavery in the Constitution and the compromise—

Mr. COHEN. But it lost. The compromise—the Constitution did not outlaw slavery.

Mr. SPALDING. It made compromise with institution but set it on its road to ultimate extinction, which was Lincoln's position. It was a compromise in principle; that was, Frederick Douglas argues, not pro-slavery. So now it ensures the historical record is clear.

Mr. COHEN. You in your testimony describe the 1960's and 1970's as an era which gave birth to big government, because during that time the Federal Government assumed responsibility of the well-being of every American. Can you tell me what you believe the Framers would have thought—you have told us what you thought about maybe slavery, but what would they have thought about civil rights legislation that prohibits racial discrimination in public accommodations? And do you think civil rights laws, legislation of this nature, which the Supreme Court has upheld as a exercise in congressional powers under the Commerce Clause, comport with what you contend the Framers' views were of limited government?

Mr. SPALDING. I think the crucial point here, again, is that in the 1960's and 70's you saw—you did see a ramping up in change of

the nature of what government was actually doing as a practical matter. The content of those things civil rights, environmental law, education I am not here to debate. I think the Federal Government's being involved in civil rights is a monumental important move in American government, and in American society that would have been agreeable to the American Founders, on the same grounds that I answered my previous question.

But that did change the operational nature of our government. And it changed it such that it introduced a new form of governing, which the progressives call the administrative state, which we are trying to grapple with today. And that changed the nature between the legislative and executive competition such that I think today we have an executive with a—with having been delegated a lot of power by Congress, and a large apparatus underneath that executive. Whether they are Republican or Democrat has a lot of leeway to do things with or without specific congressional legislative authority, using discretion, using—looking at poorly written laws, and now seemingly to get away with the ability to directly act against something that was clearly stated in the law.

Mr. COHEN. The simple fact that we refer to the founders of our country as they were, as the Founding Fathers, negates over half of the population because they could have been founding mothers. But the fathers put the mothers in a second rate class just as they did Black individuals, just as the people who could not afford to pay property tax did not own property. The fact is the Constitution, which has gone on for many years and is a great document, was not written by infallible human beings. It was written by people White male property owners who were the elite, who wanted a society that protected their interests, and did it well.

This country has changed much and Jefferson even wrote about Constitutions should not be seen as never changing. That they should not be like a child in clothes that the child then grows out of and needs new clothes. You need to change as the times change. The process of amending the Constitution is very burdensome, and sometimes the legislature to see that the society which has evolved is properly taken care of has to give and delegate to the executive authority to carry out laws when the Congress is not here and for the larger government that exists with the difficulties that expire today.

I yield back my time.

Mr. KING. Thanks gentleman from Tennessee. And recognize the Chairman of the full Committee from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you very much, Mr. Chairman. Mr. Spalding, the issue is not whether or not the Constitution should not be changed over time, the issue is who changes it and how is it done, is that not right?

Mr. SPALDING. That is correct. And to go back to this point the Founders were not infallible but they created a framework, we call the Constitution in its structure, which has served us well to this day. It is precisely the responsibility of Congress as the legislative branch closest to consent and—

Mr. GOODLATTE. And Congress—

Mr. SPALDING [continuing]. To make those adjustments.

Mr. GOODLATTE. Right and Congress, by two-thirds votes in the House and the Senate, passed the 13th Amendment, which ended slavery; and Congress by two-thirds votes in the House and the Senate. And, by the way, then going to the states for ratification by three quarters of the state legislatures in each case extended the right of citizenship to people who had previously been slaves. And Congress, by virtue of the 19th Amendment, extended the right to vote to women, all of which properly should have been done.

We would probably agree with the gentleman from Tennessee that these took too long to occur. They were wrong in the first place. But the Constitution itself was created with a device to make those changes. Does the Constitution give the President of the United States the authority to make those changes without the consent of the people through their elected representatives or without seeking to have the Constitution changed?

Mr. SPALDING. No, absolutely not. Nor does it give that power to the judiciary. Those two institutions, especially executive, are there for particular purposes to act in light of legislative action through the lawmaking process. That is why precisely Congress is the first branch and it is the primary branch as intended by the Founders.

Mr. GOODLATTE. Is there anything in Professor Vladeck's testimony that you would like to respond to?

Mr. SPALDING. Well I think it is interesting the extent to which there is actually a lot of agreement here in a certain way. The difference being that he thinks it is a good thing whereas I would probably think it is a bad thing. When the executive does not have authority he is not free to act as he chooses. There is a lot of ambiguity in the laws how they are written, there is—they are interpretive debates.

But short of that the executives cannot do whatever they want. I would strongly encourage this Task Force to actually flesh out his three types of distinctions between—of executive actions and focusing on those that are the most problematic in here.

Mr. VLADECK. Well, I am in agreement with that.

Mr. GOODLATTE. And point of fact we are always going to have differences of interpretation of laws, and even of the Constitution itself between the executive branch, the legislative branch, and the judicial branch. But what we are about here is recognizing that over time, for a variety of reasons, the growth of the size of the Federal bureaucracy, the transfer of power by the Congress to that bureaucracy by passing laws that contain with them massive regulations, and other actions taken by the Congress, the Congress' powers are diminished.

The Congress is the body of the three most close to the people because all of us are directly are elected by the people. And the House very sensitive because every 2 years we are up for re-election. Only two people in the entire multi-million person executive branch are elected by the people, the President and the Vice President. And no one on the United States Supreme Court is directly elected by the people.

So the issue before this Task Force is to determine how best to restore those powers to the United States Congress, not whether there are not going to be differences of opinion; sure they are. But

what ways can the Congress assert itself to make sure that when it recognizes that it passed laws that are being misinterpreted by a President, that they are able to restore their authority.

Mr. SPALDING. That is why looking at this process, we refer to it as a separation of powers, is so crucially important, not as a legal technical matter on this or that specific thing, but as a general matter. This body should act as Constitutional institution in reclaiming those powers. And that should be true whether it is a Democratic Congress, a Republican Congress, and a Democratic President, or a Republican President. If you do not have that back and forth you have no check, and if you have no check, you have nothing to prevent the executive or the judiciary from doing as they wish and going forward.

Mr. GOODLATTE. Let me briefly go to Mr. Postell and Mr. Capretta and ask you what do you think are the best reforms for us to consider that would restore the role of Congress as originally understood?

Mr. POSTELL. Well, I think, as I tried to suggest in my written and oral testimony, that Congress needs more leadership from within the Congress in order to ensure that it is not following leadership outside of the Congress.

Mr. GOODLATTE. Mr. Capretta?

Mr. CAPRETTA. I would get a list of—pardon me. I would get a list of all the programs that have now gotten permanent spending authority, and especially the—outside the major entitlements, which I do not think will be changed. And look at those that have some spending authority that does not require them to come back to the Congress on a regular basis and review those as—to see if they are appropriately getting that funding or not, and change the statute and require those—many of those programs to get annual funding from the Congress.

Mr. GOODLATTE. Thank you very much. Thank you, Mr. Chairman.

Mr. KING. Gentleman returns his time and the Chair will now recognize the Ranking Member of the full Committee from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. Let me ask Professor Vladeck to respond to some of the responses that we have heard from your fellow witnesses.

Mr. VLADECK. Sure. I mean, I guess I just have two brief points. The first is I think you have heard a lot of consensus that the best solution is legislation. Right, that the best solution to Congress reclaiming its institutional role is for Congress to legislate more often and more aggressively. And with regard to Chairman King's point about the veto, it is worth stressing that President Obama has vetoed nine bills in his tenure. If that keeps up, that will be the fewest by a two-term President since James Monroe.

So, it is not exactly like this is a President who has been over aggressive in wielding the veto pen. Whether or not we might agree or disagree about the terms and the reasons for vetoing.

Briefly, on the founding era, sort of understanding the delegation, I think it is a bit of an overstatement to suggest that Congress never delegated power to the President in the early years.

One of the areas of my expertise is the use of the military. And if you look at the early statutes regarding the use of the military in domestic emergencies, they were full of delegations to the President to decide for himself when an emergency had arisen to decide how best to respond to the emergency. To figure out which forces to use and let me suggest to the Task Force, this was for a good reason. At the founding, Congress was out of session for most of the year, right. Congress was a part-time concern. And so, when, as in the case of the whiskey rebellion, you had domestic disturbances that arose when Congress was out of session. There has to be delegations of authority to the President, less to be unable to respond and to protect the public order.

So, Mr. CONYERS, I think my basic response is that I think there is a lot of common cause among the panelists that the real solution here is legislation. We might disagree about which legislation we would put first. For example, I might prioritize an AUMF for ISIL over some of the other bills that my fellow witnesses might prioritize. But I do not think the history is clearly as against the current constitutional structure as some of the questions have suggested.

Mr. CONYERS. Let me just ask in your written testimony, you discussed the difference between the feasible and infeasible executive power. Now, why, in your view is a separation of powers violation based on the misuse of defeasible power less pernicious than an inappropriate claim of infeasible power by the executive branch?

Mr. VLADECK. Sure. I mean, I think that the basic answer for that is again, the role of Congress. If the President is asserting defeasible power in the way Congress disputes. Congress can pass legislation to ring it in and the President's own theory would require that he defer to the statute. Infeasible power in contrast is the President's claim over the authority to not be bound by a statute. In that case, nothing Congress does can move the ball. The only thing that can happen is the courts could strike it down.

And I think this is what we saw, for example, in the early Supreme Court case I reference in my testimony, *Little v. Barreme*, where Chief Justice Marshall went out of his way to say the reason why a particular naval capture during the Quasi-War with France was unlawful was because Congress had legislated. Had Congress not legislated, the President might have had more power.

So, that is why I think there is a lot more concern in an infeasible case because in that context, the President is effectively disabling Congress from acting, as opposed to just waiting for Congress to act.

Mr. CONYERS. Do any of your three fellow witnesses want to add to the comments that were made by Professor Vladeck? Both of you, okay.

Mr. SPALDING. Again, I was struck by the amount of agreement, but we should see the striking disagreement here. The claim is not made that Congress cannot, under any circumstances, delegate authority. The question is what amounts of that authority and under what circumstances. There are clearly differences, but I think the point is that at some point, which I assert occurs sometime in the '60's or '70's, we have crossed a Rubicon such that the amount of

delegation across the board in different areas, now with different agencies giving them their own ability to raise their own money, has effectively created a circumstance where the lawmaking power has been delegated over to those in a way that I find objectionable, both in terms of violation of separation of powers and broadly it is a violation of the Constitution.

Mr. POSTELL. As Professor Vladeck suggested that the historical record is not as conclusive as I suggested in my testimony. He notes the existence of legislation early in American history where Congress said, "When such and such an event occurs, X will happen and the President gets to decide whether the event has occurred."

That is what we call contingent legislation. All legislation is contingent legislation. That is not a delegation of legislative power. It is a delegation to say, "When X happens, then the law is triggered and the executive gets to act." So, I would not point to those examples as illustrations of legislative delegations of legislative power.

Mr. CONYERS. Could I ask if Professor Vladeck has any closing comment?

Mr. VLADECK. And I just—I dispute the notion that everything changed in the 1960's. The first major administrative agency was created by Congress in 1887. That is the Interstate Commerce Commission. The Federal Government, gets a massively more expansive during the Second World War than modern administrative state is first upheld by the Supreme Court in 1932. So, I do not think we can look at the '60's as the moment where things went off the rails. If we really think that Congress has abdicated its constitutional responsibility by giving all this power to the administrative state, that is perfectly fine, but if that happened, it happened in 1887 and has been going ever since.

Mr. CONYERS. I thank the Chairman.

Mr. KING. The gentleman yields back the balance of his time. The Chair would now recognize the gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman. I think I agree with Professor Vladeck. 1887 probably is when the Founding Fathers were gone and forgotten and we, Congress, deciding that it was a lot of work and summers were hot here, decided that, "Well, what the heck? Let them do it. We still got the power of the purse."

Since before I came to Congress, I think all but two people on the dance probably—people still thought they could shut down the government by not funding and everything would be taken care because, of course, the executive would capitulate. We know that not to be true. It is the most impotent power we have, apparently, is the power of the purse. Proven by the impotency of those who shut down the government and then panic when, what a surprise, the government shuts down.

I am going to take a little different tact and Mr. Chairman, I ask unanimous consent that a sample of the 17 letters I sent on December 13, 2012 be placed on the record. This particular one is addressed to Attorney General Eric Holder.

Mr. KING. Without objection, so ordered.

[The information referred to follows:]



The Honorable Eric H. Holder, Jr.
 Attorney General
 U.S. Department of Justice
 950 Pennsylvania Avenue, NW
 Washington, D.C. 20530

Dear Attorney General Holder:

In conjunction with the Committee's oversight into improprieties associated with the Department of Energy's 1705 Loan Guarantee Program, the issue of the use of personal e-mail accounts to conduct official business arose on numerous occasions.¹ Energy Department employees brazenly used personal e-mail accounts to communicate about internal loan guarantee decisions. In doing so, they circumvented laws and regulations governing recordkeeping requirements, concealed their discussions, and attempted to insulate their communications from scrutiny. For example, Jonathan Silver, a political appointee in charge of the \$38 billion program, used his personal account to e-mail another DOE official's personal account, issuing a stern warning: "Don't ever send an email on doe email with a personal email addresses [sic]. That makes them subpoenaable."²

The challenges associated with electronic records preservation are not limited to the use of personal e-mail. Recently, allegations arose that EPA Administrator Lisa Jackson has used at least one alias e-mail account – under the name "Richard Windsor" – to conduct official business.³ Such use of an alias raises the potential for inadequate tagging to the proper official and incomplete archiving of these communications.

¹ See, e.g., Letter from Rep. Darrell Issa, Chairman, & Rep. Jim Jordan, Chairman, Subcommittee on Reg. Affairs, Stimulus Oversight, & Gov't Spending, H. Comm. on Oversight & Gov't Reform (OGR), to Richard Kaufmann, Senior Advisor to the Sec'y, U.S. Dep't of Energy, et al. (Aug. 15, 2012) (requesting communications from non-official e-mail accounts regarding section 1705 loan guarantee program).

² E-mail from Jonathan Silver to Morgan Wright (Aug. 21, 2011).

³ Brendan Sasso, *House Republicans Question EPA over Secret Email Accounts*, THE HILL, Nov. 17, 2012, <http://thehill.com/blogs/a2-wire/e2-wire/268605-republicans-question-epa-over-secret-email-accounts>; Michael Bastasch, *EPA Chief's Secret 'Alias' E-mail Account Revealed*, DAILY CALLER, Nov. 12, 2012, <http://dailycaller.com/2012/11/12/epa-chiefs-secret-alias-email-account-revealed/>.

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These examples suggest that the challenges this Administration has faced regarding the preservation of electronic communications used to conduct official business have persisted, rather than improved. Further, the growth of social media platforms – such as Facebook, Twitter, and G-chat – and mobile technologies – including laptops, handheld mobile devices, and iPads – pose new challenges for capturing and retaining records under existing federal law.

For some time, the Committee on Oversight and Government reform has been aware of deficiencies in compliance with both the Presidential Records Act and the Federal Records Act. During the 110th Congress, under the leadership of then-Chairman Henry A. Waxman, the Committee sent letters to the heads of 23 Executive Branch departments and agencies regarding e-mail communications using non-official accounts.⁴ Early in the Obama Administration, on February 18, 2009, I wrote to Gregory B. Craig, then-Counsel to the President, regarding this very subject.⁵ In April 2010, reports emerged that Office of Science and Technology Policy Deputy Chief Technology Officer Andrew McLaughlin had used his personal e-mail account to engage in official business. Specifically, he used his personal account to engage in discussion regarding policy matters under his review with his former employer, Google, Inc.⁶ In light of these and other reports documenting transparency failures, I alerted then-Committee Chairman Edolphus Towns of the need to investigate the matter further.⁷

On May 3, 2011, the full Committee held a hearing entitled, “Presidential Records in the New Millennium: Updating the Presidential Records Act and Other Federal Recordkeeping Statutes to Improve Electronic Records Preservation.” The hearing examined the enhanced transparency technology offers, particularly to improve citizens’ ability to interact with the federal government. It also highlighted the challenge of preventing federal officials from hiding their actions from public scrutiny in spite of these technological advancements. Finally, earlier this year, I wrote to White House Chief of Staff Jack Lew on August 3, 2012, requesting details of the use of personal e-mail accounts by White House staff to conduct official business.⁸

President Obama stressed improving the public’s ability to scrutinize government actions and decisions as part of his commitment to having the “most open and transparent [government] in history.”⁹ The growth of technology, however, continues to create new challenges for electronic records preservation, and this Administration has struggled to ensure that official actions are appropriately captured and documented.

⁴ See, e.g., Letter from Rep. Henry Waxman, Chairman, OGR, to Hon. Michael Astrue, Comm’r, U.S. Soc. Sec. Admin., *et al.* (Apr. 12, 2007).

⁵ Letter from Rep. Darrell Issa, Ranking Mem., OGR, to Hon. Gregory B. Craig, Counsel to the President (Feb. 18, 2009) (requesting detailed information about White House’s Presidential Records Act compliance efforts).

⁶ Kim Hart, *Former Googler To Resign from White House*, POLITICO, Dec. 22, 2010, <http://www.politico.com/news/stories/1210/46740.html>.

⁷ See, e.g., Letter from Rep. Darrell Issa, Ranking Mem., OGR, to Rep. Edolphus Towns, Chairman, OGR (June 30, 2010) (requesting investigation of use of personal e-mail accounts by Administration officials reported in media).

⁸ Letter from Rep. Darrell Issa, Chairman, OGR, to Hon. Jack Lew, Chief of Staff, The White House (Aug. 3, 2012).

⁹ The White House Blog, *Change has come to WhiteHouse.gov*, http://www.whitehouse.gov/blog/change_has_come_to_whitehouse.gov (Jan. 20, 2009).

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To better assess the extent of this pervasive problem across the Executive Branch, I am writing to request information about your agency's policies and practices regarding the use of personal e-mail and other forms of electronic communication to conduct official business. Please provide the following information as soon as possible, but by no later than January 7, 2013:

1. Have you or any senior agency official ever used a personal e-mail account to conduct official business? If so, please identify the account used.
2. Have you or any senior agency official ever used an alias e-mail account to conduct official business? If so, please identify the account used.
3. Have you or any senior agency official ever used text messages, sent from an official or personal device, to conduct official business? If so, please identify the number or account used.
4. Please provide written documentation of the agency's policies regarding the use of non-official e-mail accounts to conduct official business, including, but not limited to, archiving and recordkeeping procedures, as well as disciplinary proceedings for employees in violation of these policies.
5. Does the agency require employees to certify on a periodic basis or at the end of their employment with the agency they have turned over any communications involving official business that they have sent or received using non-official accounts?
6. What is the agency's policy for retention of information posted on social networking platforms, including, but not limited to, Twitter or Facebook?
7. What agency policies and procedures are currently in place to ensure that all messages related to official business sent or received by federal employees and contractors on private, non-governmental e-mail accounts or social networking platforms are properly categorized as federal records?
8. Have any agency employees been subject to disciplinary proceedings for using non-official e-mail accounts to conduct official business since January 20, 2009? If so, please provide a list of names, dates of proceedings, and final outcomes.


The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X.

Please deliver your responses to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers to receive all documents in electronic format.

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If you have any questions about this request, please call Ashley Callen or John Ohly of the Committee Staff at (202) 225-5074. Thank you for your prompt attention to this matter.

Sincerely,



Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

Mr. ISSA. Thank you. During a different part of my service, my job was oversight, and overreach, mismanagement, abuse of power is the primary jurisdiction of Congress through oversight to determine. Now, this particular letter, I will use and I am going to ask each of you a couple of questions related to it. This one happens to make a point that there is a rampant problem within the government that government officials at high and not so high level are failing to comply with the Federal Records Act and circumventing the requirement that their emails and other communications be kept under the Federal Records Act.

Now, that includes, Secretary Hillary Clinton, we now know at an abusive level. She simply had none and left the government with 100 percent of those documents. It included one of the key figures in Solyndra, a fellow named Jonathan Silver who wrote and this was included in the letter to the attorney general as an example of something we should be careful about. In his email, he said, "Do not ever send an email on DOE email with a personal email address. That makes it subpoenaable."

In fact, a person who has never been punished, went out of his way to advise others how to circumvent the oversight of Congress by eliminating the very existence of the documents that would be necessary.

Now, December 13, 2012 is interesting only in that I asked 17 Cabinet level officers about the private use of email. One of them was Secretary Clinton, who, of course, did not answer. And her successor, Secretary Kerry, answered erroneously, not admitting that obviously his predecessor had used it widely and left with all of them.

Oddly enough, Eric Holder also did not respond during his tenure and later responded essentially in the negative. We now know that Eric Holder actually emailed from his personal email, oh, sorry. Email—was aware of the personal emails, but in his case, another part of this was, I asked if you were using any pseudonyms because that also had been a tendency over at EPA and he did not mention that he used Kareem Abdul Jabbar's true name as his false email. Damned if know. There you go, thank you, John.

So, my question to each of you and I am going to get to professor too is, since the Congress appears not to have the tools to hold them accountable, is not the most important thing we do to build the tools to hold these executive branch officials accountable up to and including the ability to get a quick redress in the courts.

And I will close with this and then I want each of your answers, Brian Terry was murdered in Arizona in 2010. In January 2011, this Congress was lied to about the Fast and the Furious. As of today, we are still in the court. Have not even gotten to appeal the judge's ruling to get the documents related to it. It that acceptable and should not this Committee's primary remedy for this to get an expedited ability to get to the courts, so that if, in fact, Professor Vladeck is right, and these are just misunderstandings and disagreement, that, in fact, they can be arbitrated fairly. Mr. Spalding?

Mr. SPALDING. Thank you, Mr. Issa. I agree with your overall point about rebuilding the tools. And I also agree with your point about the subpoena power and being able to get a quick decision

from the judiciary. I think you are right about that, so yes, but I would say as a general matter, I do not think Congress' powers to purse are impotent. I think there are some great possibilities.

So, I would include in terms of rebuilding the tools also, rebuilding your day-to-day tools, which is going to give you control over the executive, so that you do oversight before, in the early writing of legislation. That will make your oversight later much easier. Mr. Postell, quickly because I did kind of use all the time.

Mr. KING. Okay, Mr. Capretta.

Mr. CAPRETTA. I would just agree with Matthew on the power of the purse that done right—if it is just all or nothing. If you just try to shut down the entire Federal Government, of course, that becomes a cataclysm, but I think if the Congress starts to reassert its role in limits on individual appropriations across the board and reassert that in the appropriations process, agency-by-agency, program-by-program, so that those programs do not have as much discretion and they have to come back to the Congress more regularly, you will get more control.

Mr. VLADECK. I will just say very briefly, I am a big fan of Judge Bates' 2008 ruling in House Committee of the *Judiciary v. Miers*, which I—

Mr. KING. So am I. As a matter of fact, I hope Mr. Conyers is still a fan of that since it was in his favor.

Mr. VLADECK. But just to be clear, just to amplify briefly, if I may. I think the reason why that opinion makes so much sense is because at that point litigation had become the last tool to avoid potentially holding a member of the executive branch in contempt unnecessarily, and so I think there are remedies that can be exhausted within this body before resorting to the courts and this is exactly what Judge Bates understood in that ruling.

Mr. ISSA. Mr. Conyers, I know my time is expired, but is that your recollection that you went to court rather than holding someone in contempt? Was it not that you held them in contempt and that gave you the ability to go to the court. I just want to make sure we make the record straight and that was your action.

Mr. CONYERS. I believe that is correct.

Mr. ISSA. Thank you, thank you Mr.—

Mr. CONYERS. Can we hear Mr.—Professor Vladeck's comments on that because he was vigorously shaking his head.

Mr. KING. The gentleman's time has expired, however the Chair would recognize the gentleman from New York for his 5 minutes.

Mr. ISSA. Before that we hear Professor Vladeck's comments on that last thing too. Of course, Mr. Chairman.

Mr. VLADECK. All I would say is if I recall correctly, the posture of that case was a declaratory judgment action by the Judiciary Committee to litigate Ms. Miers claim of executive privilege in anticipation of whether she could be held in contempt. So, we had not yet been held in contempt when the declaratory judgment action was brought.

Mr. KING. The gentleman's time has now finally expired and we recognize the gentleman from New York for his 5 minutes.

Mr. NADLER. Thank you. I appreciate that clarification. Let me ask first, Professor—oh, what is it? Capretta. You testify about Congress' permanent appropriate to things like Social Security and

Medicare and various other things. This is a bad thing because we give up our power.

Now my first question was, so in other words, you think we should abolish Social Security and Medicare and Medicaid. But then you said, "No, you would not suggest that, but we ought to bring these programs under control by programmatic limits by additional spending control, et cetera." But what you are saying is and tell me why I am wrong in this, is that the only way for Congress to avoid what you see as the evil in these permanent appropriations, as you put them, is to put automatic clauses into effect that would have the effect of cutting Social Security automatically, or cutting Medicare automatically, unless Congress from time-to-time stepped in to change that.

Mr. CAPRETTA. Congress could have a lot of different ways of going about this. I would start with the list of programs that have mandatory spending authority goes well beyond the big three, which I would put Medicare and Medicaid and Social Security into that category. There are many other programs that have it.

For instance, let me give you an example. There is an administrative agency in the Department of Health and Human Services, called the Centers for Medicare—Medicare and Medicaid Innovation.

Mr. NADLER. Administers to Medicare.

Mr. CAPRETTA. No, this part of HHS does not administer Medicare per se. What they do is run a series of demonstration programs to test new approaches to organizing and paying for medical care under both Medicare and Medicaid. It is a demonstration part of the Medicare program and Medicaid as well. It gets a \$10 billion appropriation every 10 years in perpetuity. So, every 10 years, it is going to get \$10 billion automatically from the Treasury and does not ever have to come back to the Congress again. It is in the——

Mr. NADLER. Except in 10 years.

Mr. CAPRETTA. It continues indefinitely and on a permanent basis. And then the funding can then be used to test any number of different things, which they can then take nationwide and implement both Medicare and Medicaid. Really open-ended authority to change drastically how the program is run. I think it is delegated way too much authority to this one agency. So, I would——

Mr. NADLER. You do not argue that it is unconstitutional, you argue that it is wrong as a matter of policy.

Mr. CAPRETTA. Right and just for the record, I am not a professor and I am not a lawyer so, you know, my ability to comment on this constitutional aspect is very, very—you can take it as an amateur, so I am not going to, but I think it is a statutory——

Mr. NADLER. Professor Vladeck, we have heard about the impermissible—the basic subject of the hearing seems to be the impermissible delegation of powers by Congress. Does adherence to separation of powers require that the Congress not delegate rule-making authority to the executive branch? And obviously, can you think of Supreme Court jurisprudence—any Supreme Court jurisprudence that supports this—what I would characterize as an extreme view of the Constitution?

Mr. VLADECK. I can, but it is 80-years old. Right, so there was for a time, a period where the Supreme Court recognized something called the Non-delegation Doctrine that died in 1937. There was a case a couple of years ago where—

Mr. NADLER. Now, is the switch in time that saved nine?

Mr. VLADECK. Among other amendments, it happened in 1937. There was a case a couple of years ago where the parties tried to get the Supreme Court to reassert the Non-delegation Doctrine and the court politely declined. I think partly because it is very hard to figure out where the line would be if one were to have a judicially enforceable Non-delegation Doctrine between what Congress may and what Congress may not allow—

Mr. NADLER. Let me ask—thank you. Let me ask Mr. Spalding, I think. Do you think that as part of this Non-delegation Doctrine, for instance, Congress has delegated and it has been somewhat controversial? We have delegated powers to the EPA and we have said that, “Thou shalt prohibit or regulate toxic chemicals in the air.”

Do you think it would be practical or the better practice for Congress to say in each case well, CO₂ can be six points per million and nitrous oxide, seven points per million and when we discover some new chemical that comes out of manufacturing something else that may be poisonous, Congress must act on that, the EPA cannot say that is noxious.

Mr. SPALDING. The point I am making is not that the delegation argument as understood by the courts, which gave up on it back in 1930 is somehow to be revived. I think the court should rethink that. I am making more practical argument when it comes to Congress. Congress is a co-equal branch of government that—

Mr. NADLER. Yes, but my question is are you saying that—you are saying that we have and not just you, but I mean, the general political thing here is a lot of people say Congress has delegated too much power and they have focused in, for example, on the EPA and others too, my question is, would it be practical or right to require Congress, or even if not right, is it mandated by the Constitution to require Congress to say, “Okay, every time a manufacturing process introduces a new chemical into the atmosphere,” Congress must—it is okay until Congress comes along and says, “That chemical cannot be introduced into the atmosphere or that chemical can only be introduced at six parts per trillion.”

Do we have the expertise or could we possibly develop the expertise to do that? Or is there something wrong with saying to the EPA, “You make such determinations. We are telling you generally keep poisons out of the atmosphere.”

Mr. SPALDING. I think the Constitution does mandate Congress to keep control of the lawmaking process.

Mr. NADLER. And so, your answer is yes.

Mr. SPALDING. And the details of which are to be returned by Congress as to how far to go.

Mr. NADLER. So, your answer to me is yes.

Mr. SPALDING. If you look at all the places it has done, it has gone way too far.

Mr. NADLER. So, your answer to me is yes. Congress would have to say how much—which chemicals and how many parts per trillion are okay in the atmosphere until——

Mr. SPALDING. No.

Mr. NADLER. Why not? Where would you go on?

Mr. SPALDING. I think the problem now is that there is—the line is not, “Do not do nothing. You can do everything.” The line is somewhere in the middle and Congress should have done a better job at determining that.

Mr. NADLER. Okay, so you think we have not done a good enough job. Last question, Professor Vladeck, Mr. Spalding asserts that there is no doubt that there is something qualitatively different to how this President is using and abusing his powers. Do you agree with his statement that there is something different about the current administration’s use of rulemaking authority or exercise of executive authority and if so, can you explain what that something is?

Mr. KING. The gentleman’s time has expired, the witness will be allowed to answer the question briefly.

Mr. NADLER. Thank you.

Mr. VLADECK. Thank you, Mr. Chairman. All I would say very briefly is I think that if there is a difference, it is only because of the paucity of legislation, which has left the President with, I think, a lot more areas where there is less legislative direction. Otherwise, I do not think it is a difference in degree or kind.

Mr. NADLER. Thank you.

Mr. KING. Thanks the witness. The gentleman’s time has expired. The Chair recognizes the gentleman from Florida, Mr. DeSantis for his 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman. I am listening. I hear some of the witnesses talking about having three co-equal branches of government and I—as I look at the Constitution and read, you know, the Federalist Papers, it seems to me that we have three separate competing branches of government. I do not know that it is right to say that the Founders believed that they would be equal.

I mean, for example, Madison said that the legislative authority would be the predominant branch and Hamilton said, “The courts were by far the weakest of the three branches.” And so, Mr. Spalding, am I wrong to say that, you know, we do have, you know, demarcations of legislative, executive and judiciary authority, but they are competing branches. But the Founders did not necessarily think the courts would be equal to the legislative power.

Mr. SPALDING. I agree with you. That is right. The distinction I would make is that when it comes to exercising their constitutional responsibilities, each branch should carry out its constitutional responsibilities according to its work. So the court does it in terms of cases of controversy that come before it. The executive does it in executing the law and Congress, which is the primary branch of government by intention, must do it by legislating.

So, in that sense, they have different responsibilities and they compete on those. But all three are taken an oath to uphold the Constitution and act according to its dictates.

Mr. DESANTIS. And so, I mean, in just looking at how the branches are exercising authority now in terms of—there is cer-

tainly, I do not think anyone could say that they are exercising equal authority. I mean, I think the executive is by far the most powerful because you have all the executive powers that are in Article 2 of the Constitution, but then you have mostly—most of the lawmaking or policymaking is done in the executive branch now. I mean, is that accurate?

Mr. SPALDING. It is approximate, I would say that is yes. The Congress has given over many of its broad authority to make laws, to officers that fall under Article 2 who pass what fall into—are laws. When you look at the amount of regulations and the extent of regulations and the effect on most people's day-to-day lives, those are the laws. This is why most Americans, when they want to get regulatory relief, they do not come here as much anymore. They go to the executive branch. They know where the bread is buttered in this institution.

Mr. DESANTIS. Or they come to us and ask us to write letters begging the executive branch to not add that to do. That is an idea which is probably not the—

Mr. SPALDING. I mean, we can argue ad infinitum as to minute details and judicial points and this, that and the other, but as a practical matter, I would argue that patent the obvious where laws are made in this country nowadays.

Mr. DESANTIS. Is there historical precedent we talk about this particular administration seems to me one of the things they seemed to have done is go back to statutes that have been on the books for decades and usher in really significant new policy changes that have a really significant effect. I mean, across the energy sector, financial services, all these other things. Is that out of the ordinary or has that been done in modern American history to that extent?

Mr. SPALDING. I think the Founders recognized very clearly the ambition would be a driving force in American politics. You can go back to Richard Nixon who appointed the first czar, right. Presidents will always to try to find ways to get around the laws of Congress. It is not this particular President, although this particular President has figured out a way to do it actually quite well. And he is doing it very creatively and it just so happens you have now a coincidence between the intentions of a bureaucratic body, which is driving toward a certain policy outcome and executive who actually is in agreement with that. That, coming together, I think is a new circumstance.

Having said that, a Republican President will come in and will feel a lot of those same pressures to use those authorities they are given to assume and go after their policy objectives, which is why I think Congress, right now, should be thinking all this through in a sort of—in terms of asserting its authority regardless of who the next President is.

Mr. DESANTIS. Sometimes the press will report or say, "Oh, you know, in this case we are probably going to assert a claim about the Obama administration." But he has issued less executive orders than these other Presidents. I mean, the number of executive actions, is that a good measure to just tell us whether—

Mr. SPALDING. I am not sure it is the number going back to the point about the veto. He has not actually done that many vetoes.

It is not the number of things. It is the intention and what is being done with these powers that amounts to essentially driving a legislative agenda without the authority of Congress. That is the violation.

Mr. DESANTIS. I mean, you could do a dozen executive actions before breakfast if they are within Article II or authorized by statute. Then, that is just a decision the President is making. The issue is, is there executive authority that goes outside the Article 2 powers, correct?

Mr. SPALDING. That is correct.

Mr. DESANTIS. Thank you. I yield back. I think I am out, but whatever is remaining.

Mr. ISSA. For the 10 seconds left, Mr. Conyers, colloquy, do you recall the vote on the floor of contempt during the issue over firing the nine U.S. attorneys? My staff has reiterated that there was a contempt vote on the floor. You might remember that Mr. Boehner and a number of Republicans walked out during that one.

Does that refresh your memory? It is a small point, but it is one in which I think it is important that it was not a—it was not an arbitrated Bates decision. They got to Bates because you bought to the floor a contempt which passed, if you recall.

Mr. CONYERS. Where is this leading?

Mr. ISSA. Well, I would just like the record clear, Professor Vladeck seems to want to talk about the Bates' decision being some sort of declaratory judgment that was arbitrary. We do not have the authority to get to the court except through that contempt vote. That was your means for getting it. And it is extreme and it happened to take very little time compared to other ones, but it did take some time.

Mr. CONYERS. You agree with that, do you not, Mr. Vladeck?

Mr. VLADECK. What I was trying to suggest perhaps in-artfully to accomplish my study is just that the lawsuit was a declaratory judgment action. In the past, when the House had held an individual member in contempt, it was that member's, or it was that person's, or that witness' appeal that came rise to judicial review. In this case, it was——

Mr. ISSA. In this case, the U.S. attorney refused to prosecute and Chairman Conyers then had to go and ask the court to allow him a civil remedy and it took about a year for Bates to make a decision that we had that authority. And it was landmarked because it is the only way that we get any authority right now because we have no explicit statutory authority, but it was in fact, the hubris of President George W. Bush, not only saying he could fire them, but that he would not send Harriet Miers and then when held in contempt, told the U.S. Attorney through the Attorney General not to comply with an act of Congress.

So, I think it is important when I talk about some impotence of our authority and the need for more that we admit that even with the extraordinary issue that Chairman Conyers did, we ultimately still took more than a year and the case came to a settlement only because George W. Bush was leaving office and did not want to leave it to a successor.

Mr. VLADECK. And also——

Mr. KING. The gentleman from Florida's time has expired and he has departed the room or he would reclaim his time and so, we will now recognize the gentleman from Georgia, Mr. Johnson, for his 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman. Mr. Spalding, is it not true that the delegation of legislative power to the executive branch has been effectuated by allowing the use of executive orders by the President? Would you agree to that?

Mr. SPALDING. In the sense that the delegation have become more and more complicated?

Mr. JOHNSON. Well, no, I am just saying generally speaking, it is because Congress has not challenged the use of executive orders that the use of executive orders has resulted in the delegation of legislative power to the executive branch. Is that—

Mr. SPALDING. Well, there are different ways in which the President can claim authority to issue an executive order as he carries out the law.

Mr. JOHNSON. I am just talking in terms of executive orders. That is one of the ways that the legislative branch improperly delegates its authority to the executive branch.

Mr. SPALDING. By delegating more authority to the executive branch, the executive has more room and more authority to issue executive orders, yes.

Mr. JOHNSON. And that is what has happened with President Obama. As you say, this President does it quite well. Is that correct?

Mr. SPALDING. In some cases, when he is given legislation that allows for broad interpretations or different interpretations easily enough, that gives him more ability to issue a broader executive order. The sheer amount of—

Mr. JOHNSON. Do you believe that this President has abused the executive order?

Mr. SPALDING. No, I think the answer is yes, but I would divide it as in different categories.

Mr. JOHNSON. Let me ask you this then, since you believe the President has abused his executive order authority if there be any. Do you happen to know how many executive orders this President has issued during his 7 years in office?

Mr. SPALDING. Formal number, no.

Mr. JOHNSON. Do you know how many President George Walker Bush issued during his 8 years?

Mr. SPALDING. I would assume probably as many or more.

Mr. JOHNSON. Why would you assume more?

Mr. SPALDING. Because the way that the executive carries out, executes the law is by using executive orders. That is how he instructs the body of people under him to do things.

Mr. JOHNSON. So, you believe that George Bush was a greater abuser of the executive order than President Obama?

Mr. SPALDING. The sheer number of executive orders does not necessarily equal abuse or non-abuse. It is just the use of it. It is a legitimate activity of the President to issue an executive order. Nothing wrong with it per se.

Mr. JOHNSON. Would it surprise you to know that Reagan issued more executive orders than George W. Bush?

Mr. SPALDING. No.

Mr. JOHNSON. It would not surprise you? Why not?

Mr. SPALDING. Especially in a two-term President, they are going to issue a lot of executive orders. The issuance of an executive order is a perfectly legitimate activity.

Mr. JOHNSON. Well, now President Obama is a two-term President who has issued fewer executive orders than President Reagan during his 8 years in. Is that surprising to you?

Mr. SPALDING. No, it is what the executive order covers, what is looking to—

Mr. JOHNSON. Well, let me ask you, what executive orders has President Obama issued that are far more expansive than those—any of those that say, Ronald Reagan issued?

Mr. SPALDING. I think the question is if an executive order is issued—

Mr. JOHNSON. Can you answer that question?

Mr. SPALDING. I am trying to. I would agree with the professor at the other end and I would divide it into different categories. I think when the, you know, some executive orders are very straightforward—

Mr. JOHNSON. My time is running out. Let me ask you this question. Do you believe that when President Lincoln issued the executive order on January 1, 1963, that is, excuse me, 1863 known as the Emancipation Proclamation, was it a user patient of legislative authority?

Mr. SPALDING. No. Because Lincoln made it very clear he was acting under his authority during a civil war.

Mr. JOHNSON. How about when H.W. Bush and Reagan issued executive orders extending amnesty to family members not covered under the 1986 Immigration Law. Was that a user patient of legislative authority and executive overreach?

Mr. SPALDING. I would have to go back and look at the particulars, but the President does have certain abilities to give legal forgiveness.

Mr. JOHNSON. Well, what I have noticed from you is that Republicans are okay with the use of executive orders, but President Obama is not and with that I will yield back.

Mr. ISSA. Mr. Chairman, I would ask you to have his consent.

Mr. KING. Without objection.

Mr. ISSA. Well, the unanimous consent—unanimous is on putting in the record from the Cornell Library, a very definitive document by Josh Chafetz; it is on executive branch contempt of Congress, which covers the Harriet Miers case.

Mr. KING. Without objection, the documents will be entered into the record.

[The information referred to follows:]

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Executive Branch Contempt of Congress

Josh Chafetz

Cornell Law School, jc2284@cornell.edu

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Executive Branch Contempt of Congress

Josh Chafetz†

After former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten refused to comply with subpoenas issued by a congressional committee investigating the firing of a number of United States Attorneys, the House of Representatives voted in 2008 to hold them in contempt. The House then chose a curious method of enforcing its contempt citation: it filed a federal lawsuit seeking a declaratory judgment that Miers and Bolten were in contempt of Congress and an injunction ordering them to comply with the subpoenas. The district court ruled for the House, although that ruling was subsequently stayed and a compromise was reached.

This Article examines the constellation of issues arising out of contempt of Congress proceedings against executive branch officials. After briefly describing the Miers litigation, it examines the development of legislative contempt against executive officials in Anglo-American law. It shows that the contempt power played a significant role in power struggles between the Crown and Parliament and between the Crown and colonial American legislatures, and that this role continued into the early state legislatures. It then traces Congress's uses of the contempt power against executive branch officials, including in two cases that have generally been overlooked by both judicial and academic commentators, in which a house of Congress sent its sergeant-at-arms to arrest an executive branch officer.

The Article then uses that history to consider how cases of executive branch contempt of Congress should be dealt with today. It notes the variety of political tools that Anglo-American legislatures have used to enforce their contempt findings, as well as the fact that they did not turn to the courts to resolve such disputes until the late twentieth century. It then argues that the resolution of such disputes by the courts does significant harm to the American body politic. This Article therefore concludes both that Congress erred in seeking judicial resolution of the Miers dispute and that the courts erred in finding it justiciable.

INTRODUCTION

In 2008, for only the second time in the nation's history, a house of Congress sued high-ranking executive branch officials in an attempt to enforce a subpoena for their testimony in the face of the officials' claims of executive privilege.¹ Unlike the previous suit, in which the

† Assistant Professor of Law, Cornell Law School.

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¹ See *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 55–56 (D.D.C. 2008) (holding that the House Judiciary Committee can bring an action in a district court to compel an executive official to testify before the committee).

defendant was none other than the president of the United States,² the 2008 suit was successful.³ This is a nearly perfect separation of powers storm: the *legislature* invoked the aid of the *judiciary* in an attempt to get what it wanted from the *executive*. More precisely, in seeking a declaratory judgment that the executive officials must comply with the congressional subpoena, the House of Representatives was asking the court to adjudicate between the executive privilege of confidential communication and the legislative privileges of investigation and punishment for contempt.

This Article examines the constellation of issues arising from such situations. It should be noted that this Article does not focus on the merits of any particular executive privilege claim. Rather, the focus here is on the various contempt options available to a house of Congress to deal with an uncooperative executive branch, the options available for punishing executive branch officials, and the question of whether there is a role for the judiciary in such disputes. This necessarily involves a historical examination of the role of the contempt power in disputes between Anglo-American legislatures and executives. The political context for these disputes is crucial; it is a fundamental contention of this Article that the legislative contempt power has played, and should continue to play, a key role in resolving contested questions of the allocation of power within the federal government.

Part I briefly describes both the events surrounding the House of Representatives' 2008 determination that former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten were in contempt of Congress and the district court decision arising out of that determination.

² See *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 370 F. Supp. 521, 522–24 (DDC 1974) (refusing to enforce a Senate committee's subpoena against the president because the committee did not demonstrate that the subpoenaed tapes were needed for further public hearings and nondisclosure was important to protect the fairness of pending criminal prosecutions), *aff'd* 498 F.2d 725, 733 (DC Cir 1974). Oddly, both the Congressional Research Service and the Judiciary Committee in the 2008 case at first seemed unaware of the *Nixon* precedent. See Morton Rosenberg and Todd B. Tatelman, *Congress's Contempt Power: Law, History, Practice, and Procedure* 65 CRS Report RL34097 (Apr. 15, 2008) (claiming mistakenly that the *Miers* suit is "the first civil lawsuit filed by a House of Congress in an attempt to enforce its prerogatives"); William Branigin, *House Panel Sues to Force Bush Aides to the Table*, *Wash. Post A3* (Mar. 11, 2008) ("The committee's action marked the first time in U.S. history that either chamber of Congress has sued the Executive Branch to enforce a subpoena, according to a spokesman for the House Judiciary Committee."). The *Nixon* case is discussed at length in Part IV.B.3.

³ See *Miers*, 558 F. Supp. 2d at 56, 108 (ruling that the executive officials must testify in front of the committee and produce any nonprivileged documents requested through subpoena).

Part II begins the Article's historical analysis of the scope of legislative contempt findings, examining the development of the contempt power in the English Parliament. This historical treatment is necessary because Congress's privileges have their origins in Parliament's, and Congress has traditionally looked to parliamentary precedents in understanding its privileges.⁴ This Part pays special attention to the numerous findings of breach of privilege against Charles I and presents the onset of the English Civil War as a struggle between royal prerogative—a precursor to executive privilege—and Parliament's contempt powers. This Part demonstrates the ways in which contempt findings were used to combat attempts to consolidate and expand royal power, and it examines the numerous methods relied upon by the houses of Parliament to give teeth to their contempt findings.

Part III traces the contempt power into preconstitutional America, showing that both colonial legislatures and pre-1789 state legislatures made use of the contempt power in their struggles with executive officials. That is, it traces how this parliamentary privilege came to be translated into American legislative practice.

Part IV looks at the congressional houses' contempt powers under the Constitution. It shows that these British and preconstitutional American practices continued into a long American history of holding executive branch officials—including presidents themselves—in contempt of Congress or breach of privilege. This Part moreover discusses two cases, which have been generally neglected by both judicial and academic commentators, in which a house of Congress sent its sergeant-at-arms to arrest an executive branch official.

Finally, Part V considers the lessons of this historical treatment. It concludes that the houses of Congress have the authority to hold executive branch officials in contempt, and that defiance of a congressional subpoena qualifies as contempt. Most notably, it argues that each house is properly understood as the final arbiter of disputes arising out of its contempt power—that is, when an executive branch official raises executive privilege as a defense justifying her defiance of a congressional subpoena, the house of Congress is the proper tribunal to determine whether the invocation of executive privilege was ap-

⁴ In this regard, it is worth noting that Thomas Jefferson's *Manual of Parliamentary Practice*, which remains the authoritative manual of practice in the House of Representatives and is widely consulted in Senate practice, discusses British precedent in great detail. See generally Thomas Jefferson, *Manual of Parliamentary Practice*, in *Constitution of the United States of America, with the Amendments Therein: To Which Are Added Jefferson's Manual of Parliamentary Practice, the Standing Rules and Orders for Conducting Business in the House of Representatives and Senate of the United States, and Barclay's Digest* (GPO 1861).

propriate. This means that legislative-executive disputes over the contempt power should be understood to be nonjusticiable. This Part notes that the houses of Congress, like their historical predecessors, have a large number of tools by which to enforce compliance with their contempt findings, including the powers of arrest, impeachment, and obstruction of the president's agenda. Moreover, this Part argues that Congress has been wrong, since the 1970s, in seeking judicial enforcement of contempt citations against executive branch officials, and that the courts have been wrong in finding such disputes justiciable, for two reasons. First, the courts' interpretation of Congress's contempt power has been substantively too stingy and court-centric; second, and perhaps more importantly, Congress's abdication of this power aggrandizes the executive and judicial branches at Congress's expense, upsetting the proper balance of the separation of powers. Finally, this Part will apply these lessons to *Miers*, arguing that this case shows that, while both the executive and judicial branches are comfortable pushing their powers to their limits, Congress has become too timid to do so. This Part argues that this congressional timidity is harmful to the polity as a whole.

I. THE *MIERS* CASE

The events surrounding the Bush administration's politically motivated dismissal of nine United States Attorneys in 2006 have been well described elsewhere, both in the scholarly⁵ and journalistic literature,⁶ and it is unnecessary to rehash the details here. For the purposes

⁵ See, for example, John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 Seattle U L Rev 265, 265-92 (2008) (providing an overview of the firing of the United States Attorneys and discussing the problems with politically motivated dismissals of prosecutors); Mark J. Rozell and Mitchel A. Sollenberger, *Executive Privilege and the U.S. Attorney Firings*, 38 Pres Stud Q 315, 319-24 (2008) (describing the confrontation between the president and Congress over whether the executive branch must turn over information); David C. Weiss, Note, *Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretextual Justification in the U.S. Attorney Removals*, 107 Mich L Rev 317, 322-27 (2008) (examining the public information regarding the attorneys' firings and concluding that legislation should be enacted to prevent partisan-inspired firings of federal prosecutors).

⁶ See, for example, Allegra Hartley, *Timeline: How the U.S. Attorneys Were Fired*, US News & World Rep (Mar 21, 2007), online at <http://www.usnews.com/usnews/news/articles/070321/21attorneys-timeline.htm> (visited Sept 1, 2009) (providing a detailed chronology of the actions leading up to the United States Attorneys' firings); Adam Zagorin, *Why Were These U.S. Attorneys Fired?*, Time (Mar 7, 2007), online at <http://www.time.com/time/nation/article/0,8599,1597085,00.html> (visited Sept 1, 2009) (same); Dan Eggen and Paul Kane, *Fired U.S. Attorneys Tell of Calls, Threats before Dismissal*, Wash Post A1 (Mar 7, 2007) (describing the various methods the White House used to force several United States Attorneys to resign); Dan Eggen, *6 of 7 Dismissed U.S. Attorneys Had Positive Job Evaluations*, Wash Post A11 (Feb 18, 2007) (contradicting Alberto

of this Article, it suffices to note that, after the dismissals became public, the House and Senate Judiciary Committees sought testimony and documents from various executive branch officials. In March 2007, White House Counsel Fred Fielding told the Senate Judiciary Committee that the White House would allow the House and Senate Judiciary Committees to conduct private interviews with White House advisor Karl Rove, former White House Counsel Harriet Miers, Deputy White House Counsel William Kelley, and Rove aide Scott Jennings. The interviews were to be conducted behind closed doors, with no transcript taken, and with no oath having been administered; the committees would also have to agree not to subpoena those officials in the future.⁷ The White House also agreed to turn over certain communications regarding the dismissals, but not any communications between White House officials.⁸ The committees rejected the offer,⁹ and two days later, the House Judiciary Committee voted to authorize subpoenas for the testimony of Rove, Miers, Kelley, Jennings, and Kyle Sampson, the former chief of staff to former Attorney General Alberto Gonzales, as well as documents in their possession concerning the firings.¹⁰ Although the subpoenas were authorized, the committee did not vote to issue them, in the hopes that the matter would be resolved through further negotiation with the White House.¹¹

On June 13, 2007, after almost three months of fruitless discussions, the House Judiciary Committee issued two subpoenas: one to Miers, directing her to testify and produce certain documents, and the other to White House Chief of Staff Joshua Bolten, directing him to produce documents.¹² (The Senate on the same day subpoenaed for-

Gonzales's assertions that the United States Attorneys had poor performance reviews); Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says*, Wash Post A2 (Jan 19, 2007) (reporting Gonzales's claim that the United States Attorneys were fired over "performance issues"). For an excellent detailed overview of the key events, see *TPM Canned US Attorney Scandal Timeline*, Talking Points Memo (May 14, 2007), online at <http://www.talkingpointsmemo.com/usa-timeline.php> (visited Sept 1, 2009).

⁷ Sheryl Gay Stolenberg, *Bush in Conflict with Lawmakers on Prosecutors*, NY Times A1 (Mar 21, 2007).

⁸ *Id.*

⁹ *Id.* (quoting Senator Patrick Leahy that the offer "is not constructive" and that "it is not helpful to be telling the Senate how to do [the] investigation or to prejudge its outcome").

¹⁰ Carl Hulse, *Panel Approves Rove Subpoena on Prosecutors*, NY Times A1 (Mar 22, 2007).

¹¹ *Id.*

¹² *Miers*, 558 F Supp 2d at 61 (detailing the timeline of the requests for testimony made by the House Judiciary Committee to Bolten and Miers).

mer White House political director Sara Taylor.¹³) On the advice of Acting Attorney General Paul Clement, President George W. Bush asserted executive privilege and informed the committees that the executive branch would neither produce the requested documents nor make the former officials available to testify.¹⁴

When Miers and Bolten failed to respond to the subpoenas, Representative Linda Sanchez, Chairwoman of the House Subcommittee on Commercial and Administrative Law, ruled that the assertion of executive privilege did not excuse them from complying with the subpoenas. Sanchez's ruling was upheld by a vote of the subcommittee.¹⁵ On July 25, 2007, the full House Judiciary Committee adopted a resolution recommending that Bolten and Miers be cited for contempt of Congress.¹⁶ After several more months of failed attempts at a negotiated settlement, the House of Representatives voted to hold Miers and Bolten in contempt on February 14, 2008.¹⁷ The House also adopted two resolutions: one provided for the Speaker to certify the Judiciary Committee's report to the United States Attorney for the District of Columbia "to the end that [Miers and Bolten] be proceeded against in the manner and form provided by law,"¹⁸ while the other authorized the Chairman of the Judiciary Committee

to initiate or intervene in judicial proceedings in any Federal court of competent jurisdiction, on behalf of the Committee on the Judiciary, to seek declaratory judgments affirming the duty of any individual to comply with any subpoena . . . issued to such individual by the Committee as part of its investigation into the firing of certain United States Attorneys and related matters, and to seek appropriate ancillary relief, including injunctive relief.¹⁹

Two weeks later, the Speaker of the House certified the contempt report to Jeffrey Taylor, the United States Attorney for the District of Columbia,²⁰ and she called on the Attorney General to ensure that

¹³ Dan Eggen and Paul Kane, *2 Former Aides to Bush Get Subpoenas*, Wash Post A1 (June 14, 2007) (claiming that Taylor played a large role in efforts to name a former colleague as a United States Attorney).

¹⁴ Michael Abramowitz and Amy Goldstein, *Bush Claims Executive Privilege on Subpoenas*, Wash Post A1 (June 29, 2007).

¹⁵ 153 Cong Rec D969 (July 12, 2007); 153 Cong Rec D1015 (July 19, 2007).

¹⁶ 153 Cong Rec D1055 (July 25, 2007).


¹⁷ 154 Cong Rec H962 (Feb 14, 2008) (noting that the final vote was 223 to 32).

¹⁸ H Res 979, 2d Sess 110th Cong (Feb 13, 2008).

¹⁹ H Res 980, 2d Sess 110th Cong (Feb 13, 2008).

²⁰ Letter from Representative Nancy Pelosi, Speaker of the House, to Jeffrey A. Taylor, United States Attorney for the District of Columbia (Feb 28, 2008), online at

Taylor filed criminal contempt charges against Miers and Bolten.²³ The next day, the Attorney General replied that, because (in the Department of Justice's view) Bolten and Miers had properly invoked executive privilege in refusing to comply with the subpoenas, "non-compliance by Mr. Bolten and Ms. Miers with the Judiciary Committee subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers."²⁴

 The Judiciary Committee then filed suit in the United States District Court for the District of Columbia, seeking a declaratory judgment that Miers and Bolten were in contempt and an injunction ordering them to comply with the congressional subpoenas.²⁵ Miers and Bolten moved to dismiss on the grounds that the committee lacked standing to bring the suit, that there was no proper cause of action, that the suit was nonjusticiable, and that the court should decline jurisdiction on discretionary bases. They also entered a defense on the merits, arguing for a broad executive privilege.²⁶

On the question of standing, Miers and Bolten raised two arguments: first, that the Judiciary Committee had not suffered a cognizable personal injury; and second, that the case did not present "the type of dispute traditionally capable of resolution before an Article III court."²⁷ As to the first argument, the court, relying on DC Circuit precedent, found that the committee had standing to sue to enforce a duly issued subpoena.²⁸ The court found that the committee suffered injuries both in its loss of access to the information it sought and in "the institutional diminution of its subpoena power."²⁹ As to the second argument, the court found the case resolvable for two reasons:

<http://judiciary.house.gov/hearings/pdf/Pelosi080228.pdf> (visited Sept 1, 2009) (citing the failure of Miers and Bolten to "appear, testify, and furnish certain documents" as required by the subpoena).

²¹ Letter from Representative Nancy Pelosi, Speaker of the House, to Attorney General Michael B. Mukasey (Feb. 28, 2008), online at <http://judiciary.house.gov/hearings/pdf/PelosiToMukasey080228.pdf> (visited Apr 22, 2009) (suggesting that the Attorney General should not tolerate a witness ignoring a subpoena to appear before a federal grand jury).

²² Letter from Attorney General Michael B. Mukasey to Representative Nancy Pelosi, Speaker of the House 2 (Feb 29, 2008), online at <http://judiciary.house.gov/hearings/pdf/Mukasey080229.pdf> (visited Sept 1, 2009).

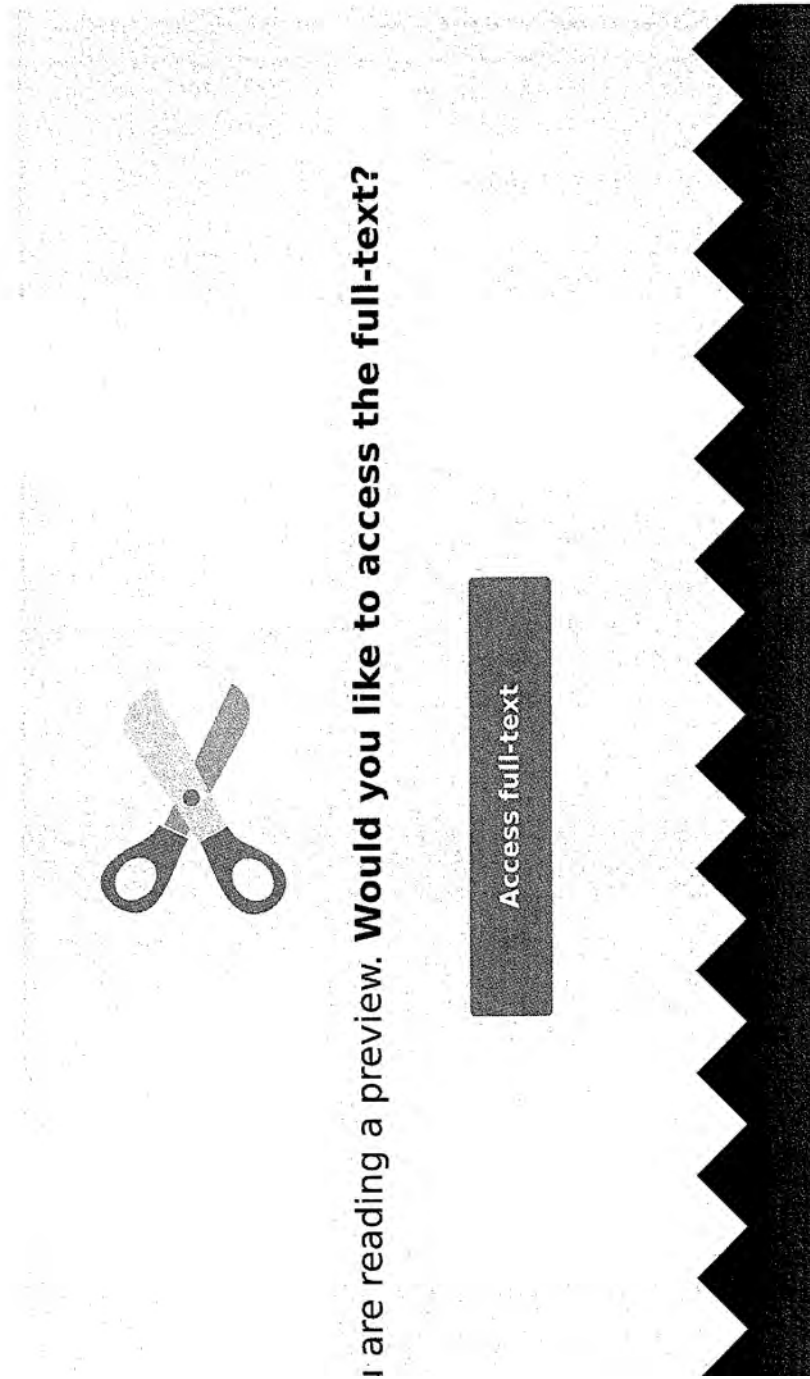
²³ *Miers*, 558 F. Supp. 2d at 55, 63–64.

²⁴ *Id.* at 55–56.

²⁵ *Id.* at 66.

²⁶ *Id.* at 68–71, citing *United States v. American Telephone and Telegraph Co.*, 551 F.2d 384, 391 (DC Cir 1976).

²⁷ *Miers*, 558 F. Supp. 2d at 71.



case of a congressional subpoena would, of course, be a willingness on the part of the congressional committee to hear out the executive's privilege claim. But this distinction was lost on a court accustomed to seeing everything through judicially tinted glasses.

(Indeed, this distinction also provides a rejoinder to those who might argue that the judiciary ought to have a role in such disputes not because it is superior to the other branches, but rather because, in a dispute between two coequal branches, it is good to have the third coequal branch serve as a neutral arbiter. If this were true, then it should be the case that executive privilege claims raised in response to judicial proceedings—for example, the *Nixon Tapes Case*—should be submitted to Congress for neutral arbitration. If courts are the proper adjudicatory body for charges of executive branch contempt of court, then a claim that Congress is not the proper adjudicatory body for charges of executive branch contempt of Congress cannot be based on an appeal to the desirability of a third party arbiter.)

Finally, it must be noted that courts tend to move at a pace that is poorly suited to Congress's need for timely information: even if, at the end of the day, the courts ordered the executive branch official to turn over information to Congress, it might well come too late for Congress's purposes.⁴⁷⁷

The result of the suite of executive privilege cases arising out of Watergate, then, was an assertion that executive privilege claims are stronger against Congress than they are against criminal process—despite the facts that (a) the president is the federal prosecutor-in-chief and should therefore be able to structure prosecutions as he sees fit,⁴⁷⁸ and (b) Congress has constitutionally assigned roles in overseeing, including impeaching, executive branch officials.⁴⁷⁹ The consequences of this assertion of power by the judiciary are far-reaching. There is significant public benefit in being governed by those who are—and are seen to be—capable of transcending narrow personal and partisan interest and pursuing a broader public interest.⁴⁸⁰ As Robert

⁴⁷⁷ See Stanley M. Brand and Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands against Executive Branch Officials*, 36 Cath U L Rev 71, 81, 84 (1986) (noting the effect of delay in the Gorsuch case).

⁴⁷⁸ See Akhil Reed Amar, *Nixon's Shadow*, 83 Minn L Rev 1405, 1405–06 (1999) (arguing that the Court was wrong to order Nixon to turn the tapes over to the Watergate special prosecutor, who, constitutionally, could only be an inferior executive branch officer).

⁴⁷⁹ See Part V.A.2.

⁴⁸⁰ I have defended this republican vision of public service at greater length in Chafetz, 58 Duke L J at 182–83, 224–36 (cited in note 32); Josh Chafetz, *Curing Congress's Ills: Criminal Law*

Burt has noted, the House of Representatives' conduct in the Nixon impeachment inquiry was meant to reinforce this republican conception of service, which the president's actions had badly tarnished:

In the conduct of its deliberations, the [House Judiciary] Committee worked assiduously to avoid the actuality or the appearance of partisan divisions. In its decision to subpoena the Nixon tapes on its own authority, without recourse to judicial enforcement proceedings, the Committee signified that it would not admit that the judiciary had become the sole institutional repository of impartial judgment.⁴⁸¹

But "[t]he Supreme Court's intervention in the *Nixon Tapes* case aborted this redemptive process,"⁴⁸² by hastily and inmodestly swooping in and demanding that the tapes be turned over to the courts. Although Burt does not discuss the *Senate Select Committee* case, it makes his argument that much stronger—not only did the courts demand that the tapes be turned over to themselves, but they denied that Congress had a right to them, as well. In insisting that they, and only they, could stand up to Nixon, the courts reinforced the notion that Congress was impotent at best, corrupt at worst—that, in Gerald Gunther's words, "somehow it is the Court's special obligation to save the nation in episodes of constitutional crisis."⁴⁸³ The courts thus made themselves the heroes of the Watergate story, but only by acting in such a way as to suggest that Congress was not up to the task. The more frequently such suggestions are made and absorbed by the public, of course, the lower Congress's reserve of institutional legitimacy falls, and the less able it is to assert a strong institutional role in the future. This, in turn, only reinforces a conception of politics as inherently debased, a conception that is deeply inimical to self-government.⁴⁸⁴

as the *Wrong Paradigm for Congressional Ethics*, 117 Yale L.J. Pocket Part 238, 239–42 (2008), online at <http://thepocketpart.org/2008/04/17/chafetz.html> (visited Apr. 20, 2009) (arguing that congressional ethics enforcement should be understood as aimed primarily at the maintenance of public trust, not at the detection and punishment of wrongdoing); Josh Chafetz, Comment, *Cleaning House: Congressional Commissioners for Standards*, 117 Yale L.J. 165, 171–72 (2007) (recommending the creation of Congressional Commissioners for Standards, who would be tasked with enforcing each house's ethics rules); Josh Chafetz, *Politician, Police Themselves*, NY Times A15 (Dec. 2, 2006) (arguing that the houses of Congress should use their inherent power to arrest and imprison their own members when those members break house rules).

⁴⁸¹ Robert A. Burt, *The Constitution in Conflict* 325 (Harvard 1992).

⁴⁸² *Id.*

⁴⁸³ Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. Rev. 30, 33 (1974).

⁴⁸⁴ See Chafetz, 58 Duke L.J. at 182–83, 224–36 (cited in note 52) (arguing that congressional procedure should reinforce our aspirational conception of politics).

If these disputes should not be in the courts, then what can Congress do when an executive branch officer refuses to comply with a subpoena? First, and most crudely, each house has a sergeant-at-arms, and the Capitol building has its own jail. The sergeant can be sent to arrest contemnors and, if necessary, hold them in his custody until either their contempt is purged or the congressional session ends. Indeed, we have seen that a house of Congress has twice arrested and held executive branch officials—Seward and Marshall. Undoubtedly, the contemnor would then seek habeas relief from a court, but such relief should be narrowly circumscribed. The court, like the *Marshall* and *Powell* courts,⁴⁸⁵ could inquire into whether the house was jurisdictionally competent to hold the contemnor—that is, whether he was, in fact, accused of something that properly qualifies as a contempt of Congress—but it could not inquire into the merits. As noted above, defiance of a congressional subpoena is clearly within Congress's contempt power;⁴⁸⁶ the house of Congress itself, then, and not a court on collateral review, is the proper tribunal to adjudicate an executive privilege defense.

Short of sending its sergeant out trolling the streets, the House of Representatives can always begin impeachment proceedings to vindicate its contempt finding.⁴⁸⁷ Even former executive branch officials may be impeached,⁴⁸⁸ and the punishment may encompass "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."⁴⁸⁹ The Senate may always refuse to confirm the president's nominees to positions in the administration⁴⁹⁰—for example, stalling any new Justice Department appointments until its concerns about the running of the Department are addressed. Congress also has the power of the purse—like the colonial legislatures,⁴⁹¹ Congress can simply zero-out the salary of a specific official.⁴⁹² Finally, Congress can, like

⁴⁸⁵ See text accompanying notes 466–469.

⁴⁸⁶ See Part V.A.3.

⁴⁸⁷ See US Const Art I, § 2, cl 5 ("The House of Representatives . . . shall have the sole Power of Impeachment.").

⁴⁸⁸ See generally Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 Tex Rev L & Pol 13 (2001).

⁴⁸⁹ US Const Art I, § 3, cl 7.

⁴⁹⁰ See US Const Art II § 2, cl 2 (requiring the "Advice and Consent of the Senate" for the appointment of principal officers).

⁴⁹¹ See text accompanying notes 283–285.

⁴⁹² See L. Anthony Sutin, *Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 J Legis 221, 223 (2000) ("Legislative efforts to halt the pay of executive branch officials are not uncommon. Their most familiar form is a restriction on the use of appro-

the House of Lords during the Arundel controversy, simply refuse to turn to matters that the president cares about until its concerns are addressed. In its most extreme form, Congress can shut down the federal government by refusing to pass a budget.⁴⁹³ Importantly, none of these options requires cooperation from another branch. None of them constitutes a concession by Congress that it is unable to carry out its constitutional role without help.

B. *Miers*, Redux

From this vantage, the problem in *Miers* is that every actor *except Congress* is being institutionally supremacist. The executive branch has made wide-ranging assertions of privilege and announced that it will exercise its own independent legal judgment in refusing to prosecute Miers and Bolten for criminal contempt. The court has referred to itself as the “ultimate arbiter” of executive privilege claims *in all contexts* and has treated its own hearing of the case as unproblematic. Only Congress has proven unsure of its own powers by seeking a judicial declaration that Miers and Bolten must comply with its subpoenas. As we have seen, the houses of Congress undoubtedly have the right to issue subpoenas, and they undoubtedly have the right to hold anyone in contempt who defies those subpoenas. They also have enforcement options at their disposal. By going to court, instead of using their own enforcement mechanisms, they further ratify the notions that only the courts act in a principled manner and that the courts must therefore watch over the actions of the political branches. By seeking judicial approval of their actions, they implicitly acknowledge that the judiciary has the final word. But why should it? This is a matter between the legislative and executive branches. The Constitution does not set the judiciary up as a parent figure, ready to solve disputes between fractious political siblings.

And what of the court’s repeated insistence that it is the “ultimate arbiter” of executive privilege claims?⁴⁹⁴ It is worth noting that the Supreme Court referred to itself as the “ultimate arbiter” of any-

riated funds to pay the salary of an identified position or, in one notorious instance, three specifically named officials.”).

⁴⁹³ See Peter M. Shane, *When Inter-branch Norms Break Down: Of Arms-for-hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups,”* 12 Cornell J.L. & Pub. Policy 503, 516–21 (2003) (describing two shutdowns of the federal government in 1995 resulting from congressional refusal to pass a budget unless President Bill Clinton relented on certain policy matters).

⁴⁹⁴ *Committee on the Judiciary v. Miers*, 558 F.Supp.2d 53, 56, 76, 96, 103, 107 (D.D.C. 2008) (referring to the judiciary as the “ultimate arbiter”).

thing only once before the twentieth century—and that was in the context of denying a claim that state courts could have the final say as to the extent of federal jurisdiction.⁴⁹⁵ In matters that are properly before a federal court, that court may well be the ultimate arbiter of the law.⁴⁹⁶ But this principle cannot give us a theory of which matters are properly before a federal court.⁴⁹⁷ The courts have never offered a persuasive reason why a congressional subpoena to an executive branch official is a matter of which the judiciary can properly take notice. Meanwhile, while the judiciary took its time considering the case, concerns about the pace of judicial proceedings were largely borne out. Although a settlement was eventually reached, the Congress that originally issued the subpoenas had ended, as had the administration that the subpoenas were intended to help Congress oversee.⁴⁹⁸ To the extent that enforcement of congressional subpoenas is left to the courts, future administrations now know that they can delay compliance for years.

The *Miers* court was also concerned about the possibility of

a stand-off between the Sergeant-at-Arms and executive branch law enforcement officials concerning taking Mr. Bolten into custody and detaining him. Such unseemly, provocative clashes should be avoided, and there is no need to run the risk of such mischief when a civil action can resolve the same issues in an orderly fashion.⁴⁹⁹

Note carefully the unstated premise here: the executive might resist the House sergeant, but it would never dare resist a court order. Why risk political “mischief” when everything can be handled in a nice, neat, orderly, “civil,” judicial manner? The *Miers* court was apparently unaware that the executive branch sometimes disobeys even the judiciary.⁵⁰⁰ Presumably such disobedience would be met with a finding of

⁴⁹⁵ *Freeman v Howe*, 65 US 450, 459–60 (1860).

⁴⁹⁶ See William Baude, *The Judgment Power*, 96 Georgetown L.J. 1807, 1809 (2008) (“[T]he judicial power vested in Article III courts allows them to render binding judgments that must be enforced by the Executive Branch so long as those courts have jurisdiction over the case.”) (emphasis added).

⁴⁹⁷ *Id.* at 1810 (“[I]f the controversy is not one that the court is authorized to resolve, the judgment binds nobody.”).

⁴⁹⁸ See text accompanying notes 49–50 (describing the settlement of the *Miers* case).

⁴⁹⁹ *Miers*, 558 F Supp 2d at 92 (citation omitted).

⁵⁰⁰ President Jefferson defied, on executive privilege grounds, a subpoena issued by Chief Justice John Marshall, riding circuit, in the treason trial of Aaron Burr, *United States v Burr*, 25 F Cas 187, 189 (CC Va 1807). See John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 Minn L. Rev. 1435, 1446–63 (1999). In response to *Worcester v Georgia*, 31 US (6 Pet) 515 (1832), President Jackson is reported to have exclaimed, “John Marshall has made his decision, now let him enforce it.” (Although the quotation is quite likely apo-

contempt of court—followed, perhaps, by a “stand-off between [judicial marshals] and executive branch law enforcement officials.”⁵⁰⁰ But even if, as an empirical matter, the executive branch was more likely to obey a court order than a congressional one, the court erred in treating this fact as somehow exogenous to its ruling. If the courts are treated as the only institutions that make reasoned, principled judgments, then it stands to reason that people will come to accord greater legitimacy to those judgments. But that does not mean that the courts *are* the only institutions that make such judgments. Nonjudicial institutions can still behave judiciously, and, as we have seen, the congressional committees investigating Nixon were careful to behave in such a manner.⁵⁰¹ Indeed, so were the congressional committees investigating the United States Attorneys firings, holding numerous hearings and making repeated attempts at negotiation before issuing the contempt citations. The court, in sweeping aside the results of that process, once again projected an air of legitimacy at the expense of Congress. And Congress not only let the court do it; it *asked* the court to do it.

CONCLUSION

For centuries, the contempt power has served Anglo-American legislatures well in their clashes with executive authorities. For nearly all of that time, legislative houses themselves have enforced their contempt power, using either their sergeants or any of the other political weapons at their disposal. Since the 1970s, however, the courts have entered into the fray, claiming the right to determine the merits of disputes between the political branches over the extent of the contempt power. Congress has, shortsightedly, been an enthusiastic supporter of the courts’ arrogation of this power. This has had short-term deleterious consequences for Congress, as when the courts ruled that Nixon did not have to turn tapes over to the Senate Select Committee. Less apparent but more insidious are the long-term consequences. In abdicating such matters to the courts, Congress has furthered the perception that the courts are the sole repository of the republican virtue of reasoned and impartial judgment. As the executive continues to

cryptal, the dismissiveness toward judicial authority that it expresses was quite real.) See Gerard N. Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes* 49 (Kansas 2007). President Abraham Lincoln famously ignored Chief Justice Roger Taney’s ruling in *Ex parte Merryman*, 17 F Cas 144, 153 (CCD Md 1861) (ordering that “the civil process of the United States”—in particular, the writ of habeas corpus—“be respected and enforced”). See Baude, 96 Georgetown L J at 1853–61 (cited in note 496).

⁵⁰¹ See text accompanying note 499.

⁵⁰² See text accompanying note 481.

make expansive claims for its powers and privileges, and as courts continue to position themselves as the “ultimate arbiters” of inter-branch conflicts, Congress has ceded ground to both. Given that Congress is the most broadly representative branch, and given that a strong Congress would help check an increasingly strong executive branch, this development is unfortunate for the body politic.

Mr. KING. Thank you, Mr. Issa. The Chair would now recognize the gentleman from Michigan, Mr. Bishop.

Mr. BISHOP. Thank you Mr. Chair. Thank you to those of you who have spent the time with us today. Very interesting subject. I do think I do want to start by building on what my colleague from Georgia was alluding to with regard to executive orders and ask Mr. Spalding are executive orders the only way that the executive can infringe upon the powers of Congress? And so, it really is not the best judge. The number of executive orders is not the best judge of whether or not an executive has infringed upon the role of Congress. There are other ways.

Mr. SPALDING. Yeah, I think if you look at the totality of all of their actions.

Mr. BISHOP. Yeah, departments, administrative agencies.

Mr. SPALDING. Appointments—how they deal with their departments, how they conduct their activities, how they exercise and deal with treaties—all of the above. I think we are in an unusual situation which we are taking a step back, as I understand it and looking at this from an institutional point of view. And I think Congress looking at it, both in terms of previous administrations and this administration. I do not think it is necessarily tied to a Democrat or Republican, in my opinion. There has been over time a rising activity in the executive branch, large in my opinion because of the amount of authority they have been given to use their capacities. Executive orders being a great example of that, to direct that bureaucracy for their own political purposes.

On the one hand, that is perfectly natural in a political system. An executive will do that, but from a separation of powers point of view, that leads me to conclude that the real law-making authority that should be controlling those decisions and the executive executing those policies has been moved away from toward a different form of governing.

Mr. BISHOP. Thank you very much and I would commend you on this, what I think is the bible of constitutional scholar information and this book that you wrote, *We Still Hold These Truths*, is just an excellent, I think intro into these issues and review of these issues. So, thank you for doing that. I want—would like to ask Mr. Capretta, if I could, Mr. Vladeck suggested that the best solution to this situation to—is to pass a law which would ameliorate the passing of executive orders or whatever issues are that Congress could resolve this all by passing a law. Is that practical in today's world? Do you view that as a solution to what we are seeing today in the overreach?

Mr. CAPRETTA. I do largely agree with the point, which is that I think much of the concern that has been expressed this morning has to do with things that were passed in previous laws. And so, you are probably going to have to do some of the hard work of going back into those previous laws and say, "Did we go too far in delegation of some interpretative authority and including spending authority?"

Mr. BISHOP. There are many bills in Congress right now addressing these issues.

Mr. CAPRETTA. Yes.

Mr. BISHOP. There is a practical problem here in that those laws have to be signed by the very executive that we are attempting to address his constitutional authority. I mean, I do not know how we can get the executive to—in states, we have a different state legislation. We have a thing called, the Committee on Administrative Rules, Joint Committee on Administrative Rules and the role of that entity is to bring any rules that are promulgated by departments or un-elected bodies to this—in front of this Committee. And they can decide whether or not it is an appropriate solution.

In Congress, strangely enough, we just do not have that power to do that. We cannot stop a rule promulgated by a rogue committee or an agency that has decided to go off on a different course. And frankly, it may not even matter whether or not they are going in a direction that is good for the environment in which they are regulating. What can we do in this environment so that we can capture—recapture that power in Congress?

Mr. CAPRETTA. This is very complicated, but look, if you put everything one big bill at the end of the year with everything all in it, you lose a lot of leverage because then you will shut down the government if that one bill goes down and so, I think part of the problem is to begin to take these on piecemeal, one at a time, in smaller bites and the President cannot—certainly can veto lots of things if he wants to, but he cannot veto everything.

And so, you know, Rome was not built in a day and so, you are going to have to assert your authority one-by-one, issue-by-issue and win the argument. This program should have a limitation. It is reasonable to impose one. It is okay to do that. Congress will be here if you want to get more money, you come back to us. Asking for that type of authority across the board in a lot of programs, it is going to be hard to argue against it.

Mr. BISHOP. Thank you. I yield back.

Mr. KING. The gentleman yields back. The Chair will now recognize the gentleman from Florida, Mr. Deutch.

Mr. DEUTCH. Thank you, Mr. Chairman. I want to just go back and focus on comments that we have heard in various ways throughout this hearing. The responsibility of Congress to make adjustments, the leadership of Congress, the role that Congress plays and I want to just focus on a couple of areas where the President has taken executive action and I have not heard a lot about it, so—but I thought I would throw it on the table.

When the Senate—oh and I learned, Mr. Chairman, I have learned a couple of things today also, that one, that the—that we should be grateful for the three branch clause in the Constitution that it was in fact strongly anti-slavery and respectful of equal rights of everyone and second, that we do not have three co-equal branches of government.

And I do not know if my college in central Florida was sending a message to our current President or this being Super Tuesday was perhaps sending a message to the leading Republican candidate for President. Time will tell on that. But I have to ask if you look at immigration, an area where the President has received from many on this Committee harsh attacks and you go back the actions in the Senate and the passage of the Rubio Schumer legislation that provided a path to citizenship that made massive in-

vestments in border security that was the product of compromise and then you look at what has happened in the House and this fundamental question when it is the House's responsibility, Congress' responsibility to act.

And you see that in this House and in this Committee in particular, there have been no efforts to craft any sort—first of all, no efforts either in this Committee or bi-House leadership to bring up that bipartisan legislation from the Senate and give us a chance to debate it, amend it and perhaps address this serious issue.

And so, when the President took his—issued his deferred action for childhood arrivals, which, of course, was aimed for undocumented immigrants who entered the country before their 16th birthday and before June 2007 to get this renewal work permit and exemption from deportation and then that was extended, of course, when the President expanded that to parents of U.S. citizens and legal permanent residents. We know that Congress does not authorize enough funds to DHS to deport 11 million people. And it is a big discussion in our debate.

Again, leading Republican candidate thinks it is exactly what we ought to do. So, it seems to be catching on. We will have plenty of time to debate that, but we do not do it. So, of course, there are going to be decisions made by the executive branch on how to allocate those funds that Congress provides.

And why would it not be within the discretion of the President, in this case, to allocate those funds in a way, since Congress refuses to act, utterly refuses to act. Why would it not be in the discretion of the President to take action to recognize that perhaps since we have limited funds that Congress is giving us, why not use those limited funds to go after criminals and those who pose a danger to our society, instead of tearing families apart, taking kids who came here, who know no other country as their home, other than the United States and deporting them? That is one issue.

Second issue I would touch on if the issue of guns and gun violence. Now, Congress, I agree has a responsibility to that and I if I had a nickel for every time in this—in our Judiciary Committee that we were told that there is no reason to take action because there are plenty of laws on the books, well, I would—I think I would have sufficient funds to address many of the problems that we face in our society because that is all we hear over and over. And yet, in this case, you have a law from 1968 that prohibited anyone other than licensed gun dealers to engage in the business of dealing firearms, a loophole that we have been trying to close that Congress has refused to take up.

By the way, as an aside, I point out, refused to take up a single piece of gun safety legislation since New Town. Despite the ongoing moments of silence to take place in the House week after week after week, when there is another mass shooting.

And so, Congress refused to act and the President took executive action to clarify what the private sale of guns are. And to help close that loophole and the President did it because Congress failed to act. I do not understand how that has been characterized as over-reach when the fundamental issue here, whether it is on immigration or on guns, or on protecting our environment or a whole host

of other issues that when Congress, as we have heard over and over and over this morning has a responsibility to act.

Well, when Congress fails to act and there is a necessity to use and enforce and interpret existing law and that is what the President does, it strikes me that it is exactly what the President ought to do. Unfortunately, I am out of time. I yield back.

Mr. KING. The gentleman's time has expired. The hearing, no question, the Chair would recognize the gentleman from Texas, Mr. Poe.

Mr. POE. Thank the Chairman. Thank you gentlemen for being here. It is interesting that my friends on the other side like to use the same excuse that I heard as a judge down in Texas. I would have a person come to court charged with theft and occasionally, they would say, "Well, judge, everybody steals in Texas. Give me a break." And the defense being, "Well, other people do it, so let me go."

And, you know, I am a little a tired of hearing if George Bush did it, so it is okay for the President to do it. This issue is not about who does it. It is what position violates the Constitution in overreach.

Now, we can go all the way back to Andrew Jackson if you want to. Some historians think that his invasion into Spanish territory of Florida to kill the Seminoles who were raiding my friend, Mr. Johnson's now home state of Georgia, that executive action was illegal because the President did not get authority from Congress.

Andrew Jackson also, when Texas was a country, in some states still is, to Morris, Texas, independent state, in case you are wondering, gentlemen, 180 years. Texas is an independent country, took Congress forever to decide whether or not to recognize Texas as a country. Andrew Jackson said, "Sure, I recognize them. They are an independent country." And there was debate about whether or not that was legal or not.

So, executive overreach has been debated a long time. And in my opinion, Congress just sits back and lets it happen. All of you—you probably memorize the Constitution and the way I read it, the Article 1, Section I, the first word—the first word is all, "All legislative powers are granted shall be vested in Congress of the United States." It does not say, "All legislative powers are granted and vested in Congress of the United States unless Congress fails to act, then the President can pass his own legislation."

There is no exception clause. It is the word all. Framers, Madison, probably had a good reason for putting the first word in the first article, all, all legislative power. The question has been Congress sometimes does not use its authority. Does that give the President the authority to say, "Okay, I am going to make my own rules?" Probably not.

I mean, historically, the way I understand the Constitution was written, Article 1 deals with the legislative branch of government because it was supposed to be the most powerful. Then Article 2 deals with the executive branch and the Article 3 deals with the judiciary, which was really supposed to be the weakest branch of government.

I think as a practical matter today, in 2016 the judiciary is the strongest branch of government because they make laws too. And

then you got the President and you got the legislative branch, which basically is very weak because we do not do a lot.

And we have brought some of this on ourselves because when the lawmaking authority comes around, we decide to make some bureaucracy to enforce that law. Some of those bureaucracies are legislative. Some of those are done by the administration. We tell them to go out and make that law happen and then we criticize the bureaucrats for doing the job that we told them to do because we will not do it.

So, I say all that to say, is this—do you agree, Mr. Postell, I will ask you this question, do you agree or not? Failure of Congress to act and failure to act really is an action. Failure to deal with gun violence is an action by Congress. They have made their decision. We have made our decision. But is there an exception clause in the Constitution that gives the executive the right to go ahead and go it his way. Like Burger King, have it your way because those legislators, those Members of Congress, they do not act.

Mr. POSTELL. There is nothing in Article 2 of the Constitution that gives the President the power to make law and that is because of the reasons you have just indicated. Article 1 gives all of the legislative powers to Congress. So, any excuse that relies upon Congress' inaction cannot be used to justify the granting of a new power, the assuming of a new power by the President. So, if Congress does not act, there is no law to execute.

Mr. POE. Even if the action by the President is a good idea.

Mr. POSTELL. Yeah, I think it is important to separate results and policy from process. And a lot of the comments this morning in conversation is centered around, if you insist upon this sort of process, you might jeopardize the kind of results we want. But good process is important in and of itself. Especially a process that says we are going to rule ourselves throughout own elected representatives in the legislative branch.

So, regardless of the outcomes we produce, it would be a good idea to preserve the principle that our elected representatives makes the law.

Mr. POE. Thank you, Mr. Chairman, I yield back.

Mr. KING. The gentleman yields back and the Chair would now recognize the gentlelady from California, Ms. Chu.

Ms. CHU. Oh, Professor Vladeck, in your testimony, you state that some forms of executive action are appropriate when Congress is silent or vague on the matter. In recent years, has Congress through its inaction created an environment that necessitates unilateral executive action and can you give us examples that stand out in your mind?

Mr. VLADECK. Sure. I mean, I think we will probably disagree among all of us in this room about which are the best cases, but, you know, I think the ISIL example that I reference in my testimony is actually a very powerful one. When Congress enacted the UMF in 2001, it did not even know that Al Qaeda was responsible for the September 11th attack, so it left up to the President to determine who was responsible.

This administration is now claiming that, that statute enacted on September 14, 2001, somehow covers the use of military force in countries far afield of Afghanistan, against groups completely

unconnected to Al Qaeda. And I think that is a very powerful example of where the absence of subsequent legislation has all but invited both this President and his predecessor to actually take this pre-existing statute and run with it in ways the original justices of that statute probably would have been very surprised to see.

Ms. CHU. And under what constitutional authority does the President to have act in cases such as that?

Mr. VLADECK. Well, in that case, I mean, I think the problem there is that, that is an issue where the President is arguing that he has delegate statutory authority. And so, my colleagues who think that authority cannot be delegated in the first place have a bit of an easier time because they say, of course, that delegation was impermissible in the first place.

I, instead, am left to say I do not believe that is a fair reading of the statute and then it comes down to a disagreement between me and, for example, administration lawyers about what a particular statute means. That is the kind of disagreement that we see all the time. It is one that this body could fix very easily by just passing a new statute.

Ms. CHU. Now, in instances where Congress perceives that the executive branch is overstepped its authority, what can Congress do to restore the balance of power?

Mr. VLADECK. Sure, as I say in my testimony, I think in most of the cases we are talking about, new legislation would do most of the work. The only time where I do not think legislation would be effective in scaling back the kinds of Presidential excesses that some have criticized, is where the President is claiming the authority to defy acts of Congress and to not be bound by acts of Congress.

And frankly, we have seen very little of that argument over the past 7 years. So, I think in other context, in all of the circumstances, new legislation could do a lot of the work.

Ms. CHU. And how would you respond to the critics that argued that the President would simply veto any attempts by Congress to redress executive overreach?

Mr. VLADECK. Sure, I mean I think there are two responses. I think the first is, this President has not used the veto pen that often. As I mentioned earlier, he has vetoed the fewest bills of a two-term President since James Monroe, so in 200 years, but second, if there came a point where the President was using his veto powers in a way that was not just to achieve partisan policy outcomes, but actually was jeopardizing the institutional role of Congress, it would be my fervent hope that Members across the aisle and form a super-majority to override the veto, there is a long history in this country of Congress overriding vetoes on areas where I believe the President was acting unconstitutionally.

Ms. CHU. Now, there are witnesses that argue that by creating a permanent appropriations for programs such as Social Security, Medicare and Medicaid, Congress has seated too much power to the executive branch. What are the benefits of creating permanent appropriations for certain safety net programs like these?

Mr. VLADECK. Sure and I think there are a number of benefits. I think first and foremost, it provides stability to those programs. That they are not dependent on the annual budget process in ways

that I think other programs are often held up in the balance at the last minute.

Second, I think it allows Congress to actually not spend so much time in the nitty-gritty of whether X amount of money should be appropriated for Y medical procedure under Medicare, for example. You know, so I think the time it frees from Congress, the stability it creates for the program, the ability to allow the executive branch to use its expertise to figure out how best to implement these programs, I think are all benefits of such standing appropriations.

Ms. CHU. Many of our witnesses are arguing that the Constitution precludes Congress from delegating its rulemaking authority to the executive branch to carry out the will of Congress. Is it unconstitutional for Congress to ask obtaining assistance from the other branches to execute Congress' will? If so, what are the examples?

Mr. VLADECK. I mean, frankly, I think this is where some of the other witnesses might differ. I do not think the Constitution includes a non-delegation principle and I think I am with the Supreme Court which has not recognized one since 1936. So, you know, I think Congress cannot arrogate the power of the other branches.

Congress cannot commandeer the other branches, but do far as this is a cooperative enterprise, I do think Congress has a role, a very powerful role that I think it has just stopped exercising as frequently in involving the other branches, especially the executive branch in the implementation of Federal policy.

Ms. CHU. And what is the standard that Congress must follow in enlisting the executive branch's assistance?

Ms. VLADECK. I mean, the basic rule of the Supreme Court as given, as long as there is any intelligible principle to govern the delegation. So, as long as there is some reasoned basis on which the executive branch is exercising the power delegated to it, that is somehow related to the underlying statute is permissible. You know, we can sit around and debate whether there should be a stronger connection, whether there should be a more tighter rule. I guess, you know, insofar as our differences are primarily about policy, I do not think that rises to the level of a separation of powers problem.

Ms. CHU. Thank you. I yield back.

Mr. KING. The gentlelady's time has expired. The Chair recognizes the gentleman from California, Mr. Peters.

Mr. PETERS. Thank you, Mr. Chairman. I appreciate the hearing and the chance to hear from the witnesses. It has been very illuminating. And what struck me in all the testimony that there was an agreement that this is really not a Task Force on Executive Overreach as much as it is on legislative under-reach. As every single one of the witnesses agrees that Congress could, if we decided to, take a hand and correct this imbalance.

I heard, you know, legislative tort, inertia, indifference, quiescence, inability, unwillingness, and delegation. These are all things that Congress is responsible for doing and we can do. So, at the conclusion of this hearing, I am left with the impression that probably what we should do is get back to work on legislation. Legisla-

tion from the House of Representatives with which the Senate would agree the President might sign.

We have not taken up the authorization for use of military force. There was a lot of human cry about whether President Obama should have the power to take care of this. I am willing to take that up. The Congress has not been willing to take about it. We had an immigration reform bill in the Senate in 2013, which got 69 votes.

Immigration is one of the areas in which the President has been active and has been criticized for being so active. But we did not even get a vote on that in the House of Representatives. That was a bipartisan immigration bill. We could have taken that up right here, maybe amended it, but we were prevented from that vote on the House floor.

There is a regulatory reform provision that came through the House. It has no chance of passing this—through this—the President's signature. I got an idea that we could achieve some of the same objectives with the President's cooperation. Tax reform is something in which actually, I agree with many of my Republican colleagues on some of the tax policy issues.

Chairman Camp, when he was Chairman of Ways and Means issued a plan to start working on that. Speaker Boehner killed it the next day. So, we are not going to talk about it. Really, what we have here is, as a witness has suggested, is a failure of Congress, not something to criticize President Obama about. And, you know, sometimes, I think it is a little bit like me asking myself, "Why is my hair not combed?" It is because I did not comb it. We have all the power we need to take care of this.

Mr. Capretta said on the issues on entitlement spending or social insurance that we should take those statutes and amend them. And that is something we have the power to do. I think Mr. Postell said, "What we needed is more leadership within Congress." Well, I am ready for that and I think what we could do probably rather than have hearings about what Congress is not doing, we should just get about the business of doing Congressional work and with that I yield back.

Mr. KING. The gentleman yields back. This concludes today's hearing. Thanks to all of our witnesses for attending. Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

I thank the witnesses and I thank the Members of the audience. This hearing is adjourned.

[Whereupon, at 12 p.m., the Task Force was adjourned.]

