

**ARTICLE I: CONSTITUTIONAL PERSPECTIVES ON  
THE RESPONSIBILITY AND AUTHORITY OF THE  
LEGISLATIVE BRANCH**

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**MEETING**  
OF THE  
**COMMITTEE ON RULES**  
**HOUSE OF REPRESENTATIVES**  
ONE HUNDRED SIXTEENTH CONGRESS  
SECOND SESSION

\_\_\_\_\_  
TUESDAY, MARCH 3, 2020  
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## ARTICLE I: CONSTITUTIONAL PERSPECTIVES ON THE RESPONSIBILITY AND AUTHORITY OF THE LEGISLATIVE BRANCH

TUESDAY, MARCH 3, 2020

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON RULES,  
*Washington, D.C.*

The committee met, pursuant to call, at 10:02 a.m., in Room H-313, The Capitol, Hon. James P. McGovern [chairman of the committee] presiding.

Present: Representatives McGovern, Hastings, Perlmutter, Raskin, Scanlon, Morelle, Shalala, DeSaulnier, Cole, Woodall, Burgess, and Lesko.

The CHAIRMAN. The Rules Committee will come to order. I want to welcome our witnesses invited jointly by myself and Mr. Cole, and I want to thank them for being here.

I will begin with an opening statement from me and Mr. Cole, and then we will go to our distinguished witnesses.

Today the Rules Committee will hold a hearing to discuss how the Constitution separated powers between the legislative and executive branches and how the balance of power between these branches has shifted over time. We are doing this in the hopes of finding concrete, bipartisan solutions to better ensure Congress is playing the role our Nation's founders envisioned.

That is a lot, I know. And while a constitutional debate may be fun for law students and legal scholars, and Mr. Raskin—

Mr. HASTINGS. It wasn't fun when I was—

The CHAIRMAN [continuing]. For the rest of us, it could feel a little in the weeds. So for the rest of us, let me simplify.

You know, we throw around the phrase, "The People's House," a lot around here. But this really is about whether we remain the institution that our Nation's founders created to be the voice of the people.

The Constitution entrusts Congress with deciding how to spend Federal resources and to develop policy for the entire Nation on everything from healthcare and energy policy to trade and our Nation's farm policy. It also entrusts Congress with the very important job of determining when to commit the Nation to war and to put our servicemembers in harm's way.

These important tasks were put in Congress' hands because we are the closest to the people. Each Senator represents an entire State, but each of us in the House represents roughly 700,000 constituents. We are on the ballot every 2 years. This puts us closer

to the people, their worries, their needs, their frustrations, their hopes, and their fears, and makes us more responsive to them. Because our founders determined that some important tasks demand direct input from the people.

The President, the head of the executive branch, has important powers too. Among them is implementing and enforcing the laws that Congress enacts. They face regular elections as well, since there are no kings or queens in America. But sometimes Presidents of both parties have overstepped, and gone from enforcing policy to creating it in ways that our founders never imagined. And every time that happens, the power of Congress, the people's power, is diminished.

That is what we have seen for the past 20 or 30 years now. President after President has taken more and more of the power traditionally vested in the Congress. So the question is whether we are going to implement reforms and take our power back. Across our history, we have seen Congresses do just that, like in the 1970s when the War Powers Resolution, the National Emergencies Act, and the Arms Export Control Act, among other reforms, were enacted to reign in Presidential power.

And in the 1990s when Congress passed the Congressional Review Act to provide better oversight over regulations. I think the time has come for Congress to push back once more, not to reign in a particular President, but to reign in all Presidents. And that is with an S at the end.

Some people may wonder why we are doing this now. Well, I think this is the perfect time to do it. We are in an election year. We don't know who the next President will be. But what we do know, if history is any indicator, is that the next President is not going to have an epiphany and just hand Congress its power back. We need to seize it.

If the next President is a Republican, I know I will want to assert my full constitutional authority. And I guarantee that if he or she is a Democrat, my Republican friends will too.

So this is bigger than who will win the next election because when the executive doesn't consult with Congress, doesn't notify Congress, doesn't submit to oversight by Congress, sends our troops into harm's way without Congress being part of that discussion, it is not just this institution that is on the losing side of the tug-of-war with the executive; it is our constituents, the people we represent. Those people are the ones who lose.

So before we introduce the witnesses, I would like to discuss our format today. Our panel does not consist of majority or minority witnesses. The witnesses have been called by our ranking member and me jointly, and we relied on the Congressional Research Service to help us with background materials because we wanted just the facts.

Next, while we will ask our experts to keep their opening to 5 minutes, our Members are free to ask questions for as long as they would like. Now brevity is always rewarded, but we want to make sure that our members and our witnesses have ample time to discuss the issues. For the sake of this hearing, I would like to think that there are no Democrats or Republicans.

Finally, the only reason why we have been able to maintain a bipartisan approach—and I want to note this for the record—is because of our ranking member, Mr. Cole, and his very talented staff. You continue to be a collaborative and helpful partner, and I so appreciate you and your commitment to this House, as well as, my staff and the Members on both sides here.

Our hope is that this process will help us find opportunities to reassert congressional authority that both sides can agree on. Having said that, I am happy now to yield to our Ranking Member, Mr. Cole, for any remarks that he wishes to make.

Mr. COLE. Thank you very much, Mr. Chairman. I have a couple of off-the-cuff remarks before I get to my prepared remarks. You know, normally when I come into this committee, I always walk in thinking it is 9 to 4. Today I think it is 13 to zero, because frankly whether you are a liberal Democrat or a conservative Republican, whichever side of the philosophical or partisan divide you are on, I think there is probably a commonsense, throughout Congress honestly, not just on this committee, that there has been a many decades' long erosion of congressional authority and that it is time to do something about it.

We are also 13 and 0 today because we are all students and you are the instructors. As a matter of fact, some of us did our homework this weekend. I noticed Mr. Perlmutter cramming right to the last minute when he was reading the testimony, and all of us probably are in a little bit of awe of you, except again Mr. Raskin, as the chairman pointed out, since he is academically on a par with all of you. But we are very grateful for your participation.

And, Mr. Chairman, let me add again, I am very grateful for your leadership. Once again, you have established the Rules Committee as the model for civility in Congress, a new and unaccustomed role for us but one that we proudly claim under your leadership.

Today's original jurisdiction hearing covers what in my view is one of the most important issues facing Congress, the scope of Congress' power under Article I of the Constitution and the impact of separation of powers on governance.

I want to thank Chairman McGovern for arranging today's hearing. Though the chairman and I disagree on a lot of things, the constitutional authority entrusted to Congress is not one of them. Indeed, we are both equally concerned about protecting Congress' power under Article I of the Constitution, and we are both equally concerned about the erosion of that authority over the past several decades.

Though the shift has been gradual, Congress has not only ceded its authority at times, but Presidents of both parties have also claimed powers that belonged to the legislative branch.

The Constitution very clearly vests all legislative power in the Congress of the United States and all executive power in the President of the United States. This was carefully crafted to create a system of checks and balances that prevents any one branch from becoming too powerful and allows our republic to thrive.

So why then does Congress over the years consistently allow the reduction of its own authority? I am hopeful that our witnesses today will shed some light on this and discuss where practices of

the past went wrong. And I think probably all of us as practicing politicians and legislators have some pretty interesting thoughts on, again, where we see we have fallen short in many cases, of living up to our own responsibilities.

With today's hearing, we will hear from four experts who allow us to put all of this into perspective. We will hear about the constitutional provisions affecting both the legislative and executive powers, and we will hear testimony on the history of how this has all unfolded, and we will hopefully hear recommendations on what Congress can do to reclaim its authority.

At the end of this process, we may learn that there really is nothing specific Congress needs to do to reclaim and reauthorize its constitutional authority, other than act decisively to do so, and utilize the tools currently available to us. Or we may discover that substantive changes do need to be made. Either way, I am hopeful that Congress can act in a bipartisan manner to effectively use the legislative power, should it choose to do so. Today's hearing at the Rules Committee is an important first step in making that goal a reality.

Finally, I want to invite us all to remember and ponder this. When our founders envisioned the grand American experiment and put pen to paper on the distribution and separation of government powers in the U.S. Constitution, they first described the powers entrusted to Congress on behalf of the American people. Indeed, perhaps, the greatest power of the legislative branch, established in Article I, is how closely connected it remains to the views of the Nation citizens as my good friend, the chairman, pointed out.

With that, Mr. Chairman, I want to thank you again for calling today's hearing.

I want to thank our witnesses for being here today and for sharing their insights and expertise with us.

I want to thank the staff on both sides of the dais for their hard work in putting this hearing together.

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

The CHAIRMAN. Well, thank you very much. And I am now delighted to introduce our panel of witnesses.

Matt Spalding is the Kirby professor in constitutional government and dean of the Van Andel Graduate School of Government, as well as the vice president of Washington operations at Hillsdale College. He is the best selling author of "We Still Hold These Truths: Rediscovering Our Principles, Reclaiming Our Future," and is also executive editor of the "Heritage Guide to the Constitution."

Deborah Pearlstein is a professor of law and co-director of the Floersheimer Center for Constitutional Democracy at Cardozo Law School. Prior to this, she served as an associate research scholar in the law and public affairs program at Princeton University.

Laura Belmonte is a professor of history and dean of the Virginia Tech College of Liberal Arts and Human Sciences. She is co-author of "Global Americans: A Transnational U.S. History," author of "Selling the American Way: U.S. Propaganda in the Cold War." She served on the U.S. Department of State's Advisory Committee on Historical Diplomatic Documentation from 2009 to 2019.

And Sai Prakash is a James Monroe distinguished professor of law and Paul G. Mahoney research professor of law and senior fel-



low at the Miller Center of Public Affairs at the University of Virginia. He has also taught at Princeton and the University of San Diego School of Law. He clerked for Justice Antonin Scalia.

Thank you again all for joining us, and I am going to begin with Ms. Belmonte. You are recognized for your testimony.

**STATEMENT OF LAURA BELMONTE, DEAN, VIRGINIA TECH  
COLLEGE OF LIBERAL ARTS AND HUMAN SCIENCES, PRO-  
FESSOR OF HISTORY, VIRGINIA TECH UNIVERSITY**

Ms. BELMONTE. Good morning, Chairman McGovern, Ranking Member Cole, and members of the Rules Committee. Thank you for the opportunity to participate in this hearing on how Congress might reassert its constitutional authority and redress the current imbalance between the executive and legislative branches.

I appear before you as a scholar who has studied the history of the United States for over 30 years, particularly the history of U.S. foreign relations. I have spent my career explaining how and why the role of the U.S. Government has shifted over time. In my academic work and public facing scholarly activities, I have tried to present dispassionate explanations of the machinery of government, the actors who effect public policy change, and the reasons why certain events and individuals arise.

My key aims today are to place the current state of affairs into historic context and to stress that the present imbalance between the executive and legislative branches is a result of a decades' long shift, not a recent turn of events.

The United States has one of the most brilliantly conceived and enduring frameworks of government in the history of the world. The Constitution's articulation of separate powers for the three branches of government is the very essence of that system, a reflection of the Framers' fears of concentrated power.

In preparing this testimony, I have reflected upon the final day of the Constitutional Convention in 1787. Eager for news about what type of government the Framers had created, a crowd waited on the steps of Independence Hall. When Benjamin Franklin appeared, Elizabeth Willing Powell, the hostess of one of Philadelphia's best-known political salons, and wife of the city's mayor, asked Franklin, "What do we have, a republic or a monarchy?" He famously replied, "a republic, if you can keep it."

We, as a Nation, are at a critical juncture where substantive action is needed if we are to keep the Democratic Republic the Framers envisioned. The fact that you are convening this hearing is proof that you also recognize that.

I am honored to be part of the discussion.

[The statement of Ms. Belmonte follows:]

Statement of  
Laura A. Belmonte  
Dean, College of Liberal Arts and Human Sciences  
Professor of History  
Virginia Polytechnic Institute and State University

House Rules Committee

March 3, 2020

Good Morning Chairman McGovern, Ranking Member Cole, and members of the Rules Committee. Thank you for the opportunity to participate in this hearing on how Congress might reassert its constitutional authority and the current state of the relationship between the Executive and Legislative Branches.

Although I am the Dean of the College of Liberal Arts and Human Sciences at Virginia Tech, I wish to emphasize that my testimony reflects my own personal views, not those of my employer. I do not appear before this august body as a Republican or a Democrat. Rather I come as a former member of a government advisory committee that closely monitors declassification, records retention, and access to public documents. I am here as a scholar who has studied the history of the United States for over thirty years, particularly the history of U.S. foreign relations. I have a deep interest in the evolution of the balance of power both within the U.S. government and among the United States and other nations internationally.

I have spent my career studying the diplomatic and political history of the United States and explaining how and why the role of the U.S. government has shifted over time. In my academic work and public-facing scholarly activities, I have tried to present dispassionate explanations of the machinery of government, the actors who affect public policy change, and the context in which certain events and individuals arise. In my experience, many Americans are desperately seeking venues that impart neutral, factually grounded information that helps them understand the historic events that have shaped our country and the reasons our nation is currently in such an intensely polarized state.

Recent Gallup polls offer dispiriting snapshots of popular views of government and Congress. Last fall, near-record high numbers of Americans cited poor government and poor political leadership as the most pressing problem facing the United States, supplanting economic

issues. (“Mentions of Government as Top U.S. Problem Near Record High, October 21, 2019, [news.gallup.com](https://news.gallup.com)). While the political landscape is bleak, you have the power to restore the separation of powers and by extension, to break the gridlock that has eroded popular support for Congress and faith in our system of government.

My key aims today are to situate the current state of affairs into historic context and to stress that the present imbalance between the Executive and Legislative branches is the result of a decades-long shift, not a recent turn of events.

We remember the Declaration of Independence for its stirring preamble, its proclamation that “all men are created equal.” But let us not forget that the majority of the text is an enumeration of the colonists’ complaints about George III’s “history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.”

This history directly informed the Founders’ fears of concentrated power and their initial decision to form a loose form of centralized government—the Articles of Confederation. The Articles had no independent executive and did not include the power to veto. Passage of legislation required the unanimous consent of all states. Congress had no power to levy taxes. Upon recognition that this framework of government did not work well (particularly during a time of war), lawmakers made the decision first to revise and then, to abandon the Articles.

The framers of the Constitution brought their established fears of concentrated power into their deliberations of how best to restructure the U.S. government. Accordingly, they created three branches of government with specific roles. The Legislative branch makes laws through a bicameral Congress. The Executive branch enforces laws through a president, vice-president, and executive departments. The Judicial branch interprets law.

To ensure that one branch does not accumulate too much power, the Constitution includes several checks and balances. For example, the President can veto a law passed by Congress (which in turn can override a presidential veto). The Supreme Court can strike down actions taken by both the Executive and Legislative branches, but the President nominates Supreme Court justices who must be confirmed by the Senate. As James Madison wrote in Federalist No. 51, “In framing a government which is to be administered by men over men [because men aren’t angels], the great difficulty lies in this: You must first enable the government to control the governed, and in the next place, oblige it to control itself.”

A passionate belief in civic virtue undergirded the Framers’ deliberations on how to create a government that would not permit the rise of tyranny. However imperfectly the concept has been implemented over the course of U.S. history, I believe it is critical to remember that our republican form of government was radical in its time. The notion that people would wield power on behalf of a larger whole, not for self-interested purposes, but for the good of the nation, was a stark departure from monarchy. The Framers did not place many constraints on Executive power in the Constitution largely because of their fervent belief that presidents would put the interests of the nation over their own and would consult and compromise with other branches of the government.

Maintaining this delicate balance was easier when the federal government was small. The original federal bureaucracy consisted only of the Departments of Treasury, State, and War. At first, presidents did not have staff and performed many of the office’s correspondence and administrative duties themselves. They received no federal funding to pay whatever staff they had until 1857. Through the 19<sup>th</sup> century, the postal service was the largest part of the federal government.

Although the Constitution did not include political parties, factions that hardened into formal parties soon arose. While promising only to hire qualified people for federal jobs, George Washington selected mostly members of his own Federalist Party. When Thomas Jefferson took office, he dismissed many of these bureaucrats and replaced them with members of his party, the Democratic Republicans. By the late 1820s, President Andrew Jackson celebrated this system of patronage as a “spoils system” that served the country well by ensuring a rotation of government employees and preventing entrenched corruption.

Through the 19<sup>th</sup> century, the size of the U.S. government grew as the nation’s population and geographic footprint expanded. But there remained a deep distrust of centralized power and the size of the federal government remained limited. Most functions of government were handled at the state and local level. There were no national systems for banking or taxation.

This changed dramatically during the Civil War. The conflict created the opportunity for Congress to fundamentally change the scope and functions of the U.S. government. No longer constrained by southern opposition to federal programs aimed at fostering diversified economic development and generating national revenue, Congress instituted protective tariffs and passed sweeping legislation including the Homestead Act, the Pacific Railway Act, the Morrill Land Grant Act, and the National Banking Act. Federal land grants to railway companies and independent farmers, the first national paper currency, new federal taxes on manufactured goods and income, and the first government bonds were among the ways Congress financed the Civil War and promoted economic modernization. These changes led to an expansion of the federal workforce.

In 1881, after a disappointed federal office seeker assassinated President James Garfield, popular concerns about the patronage system intensified and Congress passed the Pendleton Act.

The law instituted a merit-based federal civil service. In place of politically connected government employees who were usually replaced with changeovers in presidential administrations, the Pendleton Act created a class of long-term government bureaucrats who were assumed to be politically impartial and competent. Initially, only about 10 percent of federal employees were hired under the civil service system. Now, nearly 90 percent are.

Complaints about the system's inefficiencies have sparked repeated calls for civil service reform. Vowing to restore Americans' trust in government in the aftermath of Watergate, President Jimmy Carter promised his administration would institute changes that rewarded merit. The Civil Service Reform Act of 1978 reorganized the federal agencies administering the federal personnel system and incentivized merit while continuing to protect employees from unfair labor practices. It created the Office of Personnel Management as an independent executive branch agency and allowed federal employees to form unions and bargain collectively. Since Carter signed the legislation, presidents have continued efforts to increase government efficiency, but have largely failed in the face of strong union opposition and congressional inaction.

President Trump has repeatedly called for major changes to the federal personnel system. In his 2018 State of the Union address, President Trump called on Congress to help cabinet agencies "reward good workers and remove federal employees who undermine the public trust or fail the American people." Soon after, Trump signed three executive orders making it easier to dismiss federal workers who receive bad reviews and placing new restrictions on federal employee unions. The move sparked several legal challenges, but a federal injunction barring implementation of these orders expired in October 2019.

Irrespective of civil service reforms, the regulatory power of federal bureaucracy has grown consistently since the creation of the Interstate Commerce Commission in 1887 and the

passage of the Sherman Antitrust Act in 1890. This trend escalated through the Progressive Era, during which the Food and Drug Administration (1906), the Federal Reserve (1913), and the Federal Trade Commission (1914) were created and the 16<sup>th</sup> Amendment allowing an income tax was ratified.

The most rapid growth in the federal bureaucracy occurred between 1933 and 1945. The New Deal ushered in scores of new federal programs and agencies. U.S. entry into World War II led to an explosion of the federal workforce and the armed services. The number of federal employees rose from approximately 500,000 in 1933 to over 3.5 million in 1945, the highest number in U.S. history. In the postwar era, although the size of the federal bureaucracy is smaller, (fluctuating between 2.5 and 3 million), its influence has grown significantly.

In the aftermath of World War II, as the United States confronted the rise of communism and became a global superpower, the executive branch increased its power. In 1947, passage of the National Security Act led to a reorganization of the nation's military and foreign policy establishments. The legislation created the National Security Council (NSC) and the Central Intelligence Agency (CIA), both of which became epicenters of increasing executive authority. The statute defines the members of the NSC as the President, Vice-President, and the Secretaries of State, Defense, and Treasury. The chair of the Joint Chiefs of Staff and the director of national intelligence are included in NSC meetings in an advisory capacity. Presidents have enlisted the NSC in different ways. Where Dwight Eisenhower made key foreign policy decisions during NSC meetings, Richard Nixon and Henry Kissinger convened NSC meetings infrequently and instead relied on the NSC for drafting hundreds of policy guidance memoranda. While serving as George H.W. Bush's National Security Advisor, Brett Scowcroft used the NSC as a neutral



forum for mediating the often-disparate views of the Department of State, the Pentagon, the Treasury Department, and the intelligence community.

Throughout its existence, the size of the staff supporting the National Security Council has varied markedly. Harry Truman had approximately twelve NSC staff members, all of whom were simultaneously holding other positions in the White House. Eisenhower added an additional 37 staffers. In keeping with his more intimate leadership style, John F. Kennedy reduced the NSC staff to 20. Although the NSC staff doubled to 40 during the Nixon and Ford administrations, it did not balloon significantly until the Cold War ended in the early 1990s. Bill Clinton increased its size to almost 100 and began to use it as a tool for consolidating foreign policymaking within the White House. In the aftermath of 9/11, George W. Bush expanded the NSC staff to 136. At its peak under the Obama administration, the NSC staff swelled to nearly 200 people, most of whom were temporarily detailed from primary assignments elsewhere in the federal bureaucracy. Obama charged them with the “management of the inter-agency process.” The Trump administration is currently slashing the size of the NSC staff to approximately 115 people.

As the Executive branch has accrued more power, the Legislative branch has become more reluctant to exercise its authority. This is particularly notable in the realms of military and foreign policy. Although Congress continues to shape U.S. military power through oversight and appropriations, it has not issued a formal declaration of war since June 1942, when it passed unanimous resolutions declaring war on Bulgaria, Hungary, and Romania as part of the larger war effort to defeat Nazi Germany and Japan (on both of whom Congress declared war in December 1941). When North Korea invaded South Korea in June 1950, President Truman only consulted with a few members of Congress and he did not seek a congressional declaration of

war. Instead, he obtained authorization for military intervention from the United Nations Security Council. The Korean War set a precedent for unilateral presidential action.

Since then, Congress has authorized the use of military force in conflicts as wide-ranging as the Vietnam War and war in Afghanistan using a combination of resolutions and authorizations falling short of formal war declarations. Perhaps the best-known example is the Gulf of Tonkin Resolution, swept unanimously through the House of Representatives and by a vote of 88-2 in the Senate in the aftermath of two reported North Vietnamese attacks on U.S. destroyers patrolling the Gulf of Tonkin. Without fully investigating the actual circumstances of the two attacks (later found to deviate from the Johnson administration's initial explanations) and with no hearings, Congress authorized virtually unlimited power to wage war in Southeast Asia. When two senators opposed the measure because it surrendered congressional powers to declare war and committed the United States to an open-ended conflict, they drew widespread condemnation in the media and popular opinion. Although J. William Fulbright, the Arkansas senator who shepherded the resolution through the Senate, later convened a notable series of hearings eliciting staunch criticism of the conflict, Congress continued financially supporting the war even after it became evident that U.S. officials had repeatedly misrepresented the success and geographic scope of the American effort to defeat communism in the region.

Despite long-standing concerns about the expense, power, and size of the federal bureaucracy, neither Congress nor the Executive branch has been terribly successful in reigning in the administrative state. In 1939, Congress passed the Hatch Act barring federal employees from many political activities including running for public office or raising money for a party or candidate. But in the early 1990s, Congress weakened the Hatch Act, maintaining the prohibition on federal employees seeking public office, but permitting them to be active in partisan political

activities. Civil service employees continue to possess robust job protections. Government regulations and procedures remain opaque and cumbersome. Nearly a dozen presidential efforts to reform government operations have been launched in the modern era, but none has yielded enduring, major change. Both the Executive and Legislative branches have used the federal bureaucracy as a potent tool for restricting the power of the other, especially in times of divided government. Recent refusals to increase the federal workforce have led to increased reliance on private contractors and even greater decentralization. Passage of enormous, vague legislation forces regulatory agencies and courts to interpret its terms.

Irrespective of the influence of the federal bureaucracy, Congress can still exert control over the Executive branch through appropriations, legislation, and nominations—provided it has the political will to use these checks and balances. Congress can refuse to approve funding for executive actions it finds objectionable. It can hold the president accountable for a failure to faithfully execute laws. Congress can confirm or reject presidential appointees. But these checks and balances do not work if Congress ignores Executive reallocation of congressionally approved appropriations in ways found to violate federal law; if the White House uses the power of Cabinet agencies to thwart its statutory obligations or disregards congressional efforts to exercise oversight through requesting documentary evidence and the opportunity to question witnesses; and if the use of acting appointments or a refusal of the Senate to exercise its powers to advise and consent on nominees upend the processes articulated in the Constitution for Senate consideration of presidential appointees to federal offices and the bench. An Executive refusal to nominate candidates for these posts at all presents an even more powerful demonstration of authority, one that simultaneously concentrates power within the White House and that undermines the entrenched federal bureaucracy. Leaving open these vacancies is a stark display

of distrust in an era where leaks from the Executive branch have been a strikingly common occurrence. These vacancies coexist with a spike in voluntary departures from federal jobs, a trend particularly notable among diplomats and scientists. Many of these individuals possess critical skills and institutional memory that is not easily replaceable. Applications to some federal agencies have also declined. Between October 2017 and October 2018, for example, the number of people taking the Foreign Service Officer Exam declined to 8,685, down from 21,039 in FY2013. It should, however, be noted that these applicants were competing for 300 available spots in the diplomatic corps.

In the recent past, the term “unprecedented” has been used so often, it has practically been rendered meaningless. It also does not apply when describing the current imbalance between the Executive and Legislative branches. To the contrary, history is replete with examples. In 1861, President Abraham Lincoln ignored the Supreme Court’s ruling in *Ex Parte Merryman* challenging his suspension of the writ of habeus corpus. In 1937, after the Supreme Court struck down some of his New Deal initiatives, Franklin Roosevelt introduced a plan to expand the size of the Court. The court packing scheme was castigated from across the political spectrum and Roosevelt abandoned it. Presidents have threatened to use Executive power to quash political upheavals. During a wave of post-WWII labor unrest, President Harry Truman, threatened to draft striking railroad workers into the army. In March 1947, in the early stages of the Cold War, Truman issued an executive order creating a loyalty program for federal employees aimed at preventing communist infiltration of the U.S. government. The federal program mushroomed into a Red Scare that affected much of the federal bureaucracy and that Congress abetted with its own investigations and legislation. Many state and local governments instituted similar measures. In 1953, Dwight Eisenhower issued an executive order that defined

gay and lesbian federal employees as national security risks, triggering a Lavender Scare that resulted in the resignations and dismissals of thousands of gay and lesbian Americans working for the U.S. government or serving in the U.S. armed forces.

Modern presidents have used surveillance to monitor subordinates and political opponents and to crush dissent. The FBI's COINTELPRO program surveilled civil rights activists. During the 1968 presidential campaign, after the Johnson administration learned of the Nixon campaign's secret efforts to use an intermediary to encourage South Vietnamese President Nguyen Thieu not to cooperate in peace talks, LBJ and his team opted not to reveal their discovery so as to avoid exposing their surveillance of the Nixon campaign. As President, Nixon later used surveillance, criminal break-ins, and threats of tax audits to damage perceived political enemies.

Both the Executive and Legislative branches have eroded norms. Although some Americans mistakenly believe that presidential candidates releasing their tax returns is a matter of law, the practice did not arise until December 1973, when Richard Nixon, then deeply engulfed in the Watergate scandal, released his tax returns to fend off allegations of improprieties. It turned out that he owed about \$475,000, the equivalent of \$2.5 million today. From 1974 to 2015, all presidential candidates followed suit, until Donald Trump opted not to. Presidential exemptions in federal ethics laws ensure that financial disclosures and disinvestment are optional. Keeping visitor logs and holding regular press briefings at the White House are merely customs.

In the Senate, a body that has historically prided itself on traditions that allow for substantive deliberations and muted partisan divisions, norms have also been recently

abandoned. The most significant example is the suspension of the filibuster first on federal judicial nominees and then on Supreme Court nominees.

Since 9/11, a number of factors have converged that have intensified political divisions and popular suspicion of government. The gutting of the budget for the National Archives has resulted in significant staff reductions and pervasive demoralization that undercut its mission of retaining public records and making them accessible. An explosion of digital records and overclassification of many of these records compounds the challenge of managing records and meeting federal guidelines for open records. The decline of civics education in secondary schools has contributed to a decline in many Americans' understanding of our system of government. The abolition of the Fairness Doctrine in 1987; the rise of talk radio, cable news, the internet, and social media; the collapse of popular trust in media; and foreign disinformation campaigns designed to inflame partisan divisions have left millions of Americans unsure what information is credible or content to believe whatever information reflects their own personal worldview.

Changes in elections law and voting rights have exacerbated popular anxieties. Gerrymandering has created congressional districts where a representative's constituents do not feel heard if they are not members of the same political party. *Citizens United v. Federal Election Commission* (2010) has injected millions of dollars from undisclosed donors into campaigns, exacerbating voters' sense of confusion and frustration with the political process. *Shelby County v. Holder* (2013) and state-level policy changes have dramatically restricted voting rights and access across the country. Over the last twenty years, two national elections where the candidate winning the popular vote has not prevailed in the electoral vote have undermined many Americans' regard for the Electoral College.

These same years have been accompanied by ever-greater concentrations of Executive power. The PATRIOT Act created the massive Department of Homeland Security and granted domestic law enforcement agencies and foreign intelligence agencies sweeping new powers in surveillance. Passed on September 18, 2001, the Authorization for Use of Military Force (AUMF) against those responsible for the 9/11 attacks has been repeatedly used as the legal basis for interventions all over the world and attempts to repeal it have so far failed. A May 2016 report issued by the Congressional Research Service found 37 instances of the AUMF being cited as justification for U.S. military actions taken in 14 countries including Afghanistan, Cuba (Guantanamo Bay), Djibouti, Eritrea, Ethiopia, Georgia, Iraq, Kenya, Libya, Philippines, Somalia, Syria and Yemen. In the face of congressional gridlock, President Barack Obama used executive orders to reshape federal policies on immigration, LGBTQ and workers' rights, and environmental protections. Donald Trump has used executive orders to reverse many of Obama's actions.

While the challenges in doing so may seem daunting, you have it in your power to restore the balance between the Executive and Legislative branches. The Constitution grants Congress the ability to restrain the president on issues like trade and foreign relations. Congress can exercise its oversight powers by conducting hearings that generate visibility and debate on critical policy issues. By replacing the current top-down culture that gives leadership tremendous power over the selection and term lengths of committee chairs; passing campaign finance reforms that would reduce the amount of time representatives spend on fundraising; assigning representatives to fewer committees; more widely distributing assignments to significant committees; and spending more time in D.C. and less time in home districts, congressional leaders could recreate the conditions that enabled a previous generation of lawmakers to develop

serious expertise in key areas like foreign policy. The cultivation of such depth of knowledge and the time to deploy it is essential if Congress is to reassert its power. The restoration of earmarks, abolished in 2011, may offer a way to restore incentives for representatives to compromise. Congress could begin restoring regular order by giving representatives enough time to read complex legislation, ending brinksmanship on the measures necessary to fund the federal government, and permitting debate and bipartisan amendments on legislation. Congress could increase staff compensation, thus incentivizing brilliant people to devote their energies to its work and not succumb to the lure of better-paying opportunities in this very expensive city. Congress could also rebuild the staff resources needed to conduct its affairs and fend off Executive overreach and the formidable ranks of lobbyists trying to influence public policy. Congress could reinstitute norms of passing appropriations bills on time. Congress could stop passing vague legislation and letting the Executive and the courts figure out its intent.



The CHAIRMAN. Dr. Spalding.

**STATEMENT OF MATTHEW SPALDING, DEAN, VAN ANDEL  
GRADUATE SCHOOL OF GOVERNMENT, KIRBY PROFESSOR  
IN CONSTITUTIONAL GOVERNMENT, VICE PRESIDENT,  
WASHINGTON OPERATIONS, HILLSDALE COLLEGE**

Mr. SPALDING. Chairman McGovern, Ranking Member Cole, members of the committee, thank you for inviting me to testify to the Committee on Rules.

Like many of you, I am concerned about the decline of congressional power relative to the modern executive, and I hasten to also add that this is not a recent development. During this administration, the previous administration, or many before that.

The sustained expansion of the executive and the prolonged narrowing of the legislative branch, in my opinion, are symptoms largely of a decades' long change in American government towards administrative rule. The result is a structurally unbalanced relationship between an increasingly powerful executive and a weakening legislative branch seemingly unwilling to exercise its institutional muscles.

My testimony makes three general points. First, the old ways that a constitutional government have been replaced for the most part by a new form of bureaucratic rule. By "the old ways," I mean the rule of law based on consent, government of delegated, enumerated powers, three separate branches, each with distinct powers, duties, and responsibilities, separation of powers to prevent the concentration of power, encourage cooperation for the common good.

The basic power of government is in the legislature because the essence of governing is centered on the legitimate authority to make laws. Congress' most important power is control of the government's purse as a check on the executive and the authority by which the legislature shapes national affairs.

The President is vested with unique constitutional powers that do not stem from congressional authority. This is especially the case when it comes to war and national security. The executive power is not unlimited, however, as the grant of power is mitigated by the fact that many traditionally executive powers were given to Congress. This system was further divided between the national and State governments in a system of Federalism, leaving ample room for self-government.

The practical result was the United States was centrally governed under the Constitution but administratively decentralized at the State and local level. This began to change after the Civil War when progressives advocated more administration in a new form of governing, they called the administrative state, to remove or circumvent structural barriers and make government more unified and streamlined.

Presidents of both political parties, Theodore Roosevelt and Woodrow Wilson in particular, advocated expanding the administrative role of government, which meant expanding the executive branch.

The most significant shift in this balance of power has occurred more recently, in my opinion, under the great society and its prog-

eny in both parties. Agree with the policies or not, this expansion of regulatory activities on a society-wide scale led to a vast new centralizing authority in the Federal Government and a vast expansion of regulatory authority in particular.

Both Congress and the Presidency have adapted to these new ways, but in the legislative executive battle to control the bureaucratic state, the executive has a distinct advantage. Congress was the first to adapt itself to this process but increasingly turned to back-end checks, such as the legislative veto that the Supreme Court declared unconstitutional, and has come largely to focus on post budgetary oversight and after-the-fact regulatory relief.

The rise of what I like to call the “neo-imperial Presidency” should not be that surprising, given the overwhelming amount of authority that has been delegated to decision-making actors and bodies largely under executive control.

As Congress expanded the bureaucracy, creating agencies, delegating lawmaking authority, losing control of the details of budgeting, focusing on post hoc checks, the executive has grown. Add to this the general breadth of legislative branch at executive discretion, as well as sometimes poorly written and conflicting laws, the modern executive can, more than ever, lead the bureaucracy to the President’s policy ends with or without the cooperation of Congress.

And in this competition to assert legislative or executive branch control over the fourth branch of government, the executive has a distinct advantage because administration, as Hamilton reminds us in the *Federalist Papers*, is inherently executive in nature.

My last point, the proper remedy to this imbalance is for Congress to reassert its core legislative powers. First, Congress must reassert its legislative muscles, not to paralyze the government but to command it. The courts are not going to solve the larger problem. And I think Congress is on stronger ground when it asserts its core legislative powers where the executive plays a secondary role. So, for instance, using the budget to control executive war powers.

Second, Congress, as much as possible, should cease delegating the lawmaking power and should not flinch from using its legislative powers to reclaim it. Congress should insert itself more in the regulatory process, perhaps through a regulatory budget or vehicles like the REINS Act in order to restrain the executive’s ability to make laws without legislation.

Third, regular legislative order, especially the day-to-day back-and-forth of budgeting and overseeing the operations government will do more than anything to restore Article I. If Congress objects to the extent of executive discretion, for instance, Congress needs to narrow that discretion through statutes that are clear, precise, and unambiguous.

And fourth and last, Congress is at its strongest, I believe, when it exercises the power of the purse. 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.

Thank you.

[The statement of Mr. Spalding follows:]

**CONGRESSIONAL TESTIMONY**

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**Congress, Constitutional Authority,  
and the Problem of Bureaucratic Government**

**Testimony before the  
Committee on Rules  
United States House of Representatives**

**March 3, 2020**

**Matthew Spalding, Ph.D.  
Kirby Professor in Constitutional Government  
Dean of the Van Andel Graduate School of Government  
Hillsdale College**

Chairman McGovern, Ranking Member Cole, members of the committee: thank you for inviting me to testify before the Committee on Rules of the House of Representatives. I commend you for holding this hearing on Article I: Constitutional Perspectives on the Responsibility and Authority of the Legislative Branch.

Like many of you, I am concerned about the decline of congressional power relative to the modern executive and join in the call for Congress to reassert its Article I powers. I hasten to point out that this is not a recent development, during this administration, or the last, or even the last several presidencies. The sustained expansion of the executive is largely the result of the prolonged narrowing of the legislative branch, and both of these institutional developments, in my opinion, are symptoms of a larger decades-long change in American government toward administrative rule and away from the constitutional rule of law.

Let me put it in the broadest perspective. If the development of the rule of law and constitutional government—rule by representative lawmaking rather than executive decree or judicial edict—is the great accomplishment of the long history of human liberty, then the greatest political revolution in the United States since the establishment of the Constitution has been the shift of power away from the lawmaking institutions of constitutional government to an administrative bureaucracy that regulates extensive aspects of American life, ostensibly under the authority of a modern executive. The result is a structurally unbalanced relationship between an increasingly powerful executive—bureaucratic branch and a weakening legislative branch seemingly unwilling to exercise its institutional muscles to check the executive or rein in a metastasizing bureaucracy of its own making.

If this executive—bureaucratic dominance becomes the undisputed norm—accepted not only by academic and political elites, but also by the American people—it would mark a fundamental restructuring of our system of constitutional self-government.

My testimony will make three general points:

1. Old ways of constitutional governance have been replaced for the most part by a new form of bureaucratic rule;
2. Both Congress and the presidency have adapted to these new ways, but in the legislative-executive battle to control the bureaucratic state the executive has a distinct advantage;
3. The proper remedy to this imbalance is for Congress to reassert its core legislative powers, especially concerning the primary legislative power of the purse.

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Throughout most of human history, the rules by which life was governed were usually determined by force or fraud: Those who had the power—usually the absolute monarch, tyrannical despot, or military dictator—made the rules and their commands had the coercive force of the law. One only need read Shakespeare to see that Anglo-American history of a thousand years 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 the prerogative power and enforcing their commands through various institutions such as the King's Council, the Star Chamber, or the

High Commission. Magna Carta in 1215 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 objective of America's founders was to break free of the old despotisms and to establish the rule of law and constitutional government based on the principle of consent. That idea is most famously expressed in 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." Only a government that derived its power from "the great body of the people," we are told in 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 Constitution creates a government of delegated and enumerated powers. Individuals possess equal rights by nature, and from those sovereign rights grant certain powers to government. Governments only possess those powers that are given (or delegated) to them by the people. The concept of enumerated (or listed) powers follows from the concept of delegated powers, as the functional purpose of a constitution is to write down and assign the powers granted to government. The delegation of powers to government along with a written agreement as to the extent (and limits) of those powers are critical (if not necessary) elements of limited constitutional government.

The very form of the Constitution separates the branches in accordance with 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. The Constitution creates three branches of government of equal rank in relation to each other; each is vested with independent authority and unique powers that cannot be given away or delegated to others. Nevertheless, the order of the branches – legislature, executive, judiciary – is important, moving from the most to the least “democratic” and from the most to the least directly chosen by the people. Which is to say that the legislative branch is the first among equals. 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 only those “herein” granted, meaning listed in various clauses of the Constitution. The legislative power extends to 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.

Beyond the general legislative power with which it is alone vested, Congress’ most important power is control of the government’s pocketbook. Congress holds the power of the purse not because it is necessarily better at exercising it than the president is –though it may well be – but because it has been given this particular power as a check on the executive. Unlike absolute rulers who control their national treasury, American presidents cannot withdraw a dime of funds without an appropriation from Congress. It is also the long-term authority by which the legislature maintains its role in national affairs. The executive “holds the sword of the community,” Alexander Hamilton reminds us in Federalist 78, but even the most energetic president cannot forget that the legislature “commands the purse.” As a result, James Madison concludes in Federalist 58 that this power over the government’s purse “may, in fact, be



regarded as the most complete and effectual weapon with which the Constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into and effect every just and salutary measure.” Congress has an obligation to jealously maintain control of the nation’s purse because, being closest to the people, it is the guardian of the public treasure.

In Article II “the executive Power shall be vested in a President of the United States of America.” The president plays an important role in legislation through the limited veto power (actually assigned in Article I) and the duty to recommend to Congress “such measures as he shall judge necessary and expedient.” With the advice and consent of the Senate, the president appoints judges (thus shaping the judiciary) and other federal officers (thus overseeing the executive branch). Reflecting the president’s role in directing the nation’s foreign affairs, the president also (again with the advice and consent of the Senate) appoints ambassadors and makes treaties with other nations. He also receives ambassadors from other countries and commissions all military officers of the United States.

The president is charged to “take care that the laws be faithfully executed” — a crucial responsibility necessary for the rule of law. The law to be executed is made by Congress, but when Congress creates programs and departments through its lawmaking function, those programs and departments operationally fall under the executive branch. More generally, it means that it is the president’s core responsibility to be the nation’s chief executive and law-enforcement officer, who is responsible for carrying out and enforcing federal law. Every member of Congress as well as the federal judiciary takes an oath to “support the Constitution,” but it is the president’s exclusive oath, prescribed in Article II, to “faithfully

execute the Office of President of the United States, and . . . preserve, protect and defend the Constitution of the United States.”

It is important to note that the president has unique constitutional powers that do not stem from congressional authority. The president is vested directly with power in Article II of the Constitution, not by virtue of Congress’ lawmaking power. Article II is a general grant of executive power to the president, very different from the “legislative powers, herein granted” to Congress in Article I. The president is granted all the executive powers, except for those specifically granted to Congress (noted below). This is especially the case when it comes to war and national security, for the president acts as the commander in chief of the armed forces.

The office of the president is the Constitution’s recognition of the basic responsibilities of government (foreign policy, national security, and the common defense) and the practical necessity that the task be directed by one person (rather than 535 members of Congress) with adequate support and competent powers to act with the decisiveness and speed that is often required in times of crisis and conflict. The executive power is not unlimited, though, as the general grant of power is mitigated by the fact that many traditionally executive powers—to coin money, to grant letters of marque and reprisal, to raise and support armies—were given to Congress. The most significant of these limits on the executive is that Congress has the sole power to declare war.

While the federal government’s powers are limited, the powers granted are complete. The objective was to create a strong government that could effectively accomplish its purposes. As such, the granted powers are supported by the auxiliary authority needed to carry out these

functions. The central example of this is what is called 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.

Keeping the powers of government divided in distinct branches is “admitted on all hands to be essential to the preservation of liberty,” Madison notes in Federalist 47. “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.”

It is with this proclivity in mind that the Constitution is designed to maintain three separate and distinct branches of government. Each branch has only those powers granted to it, and can do only what its particular grant of power authorizes it to do. But beyond the written barriers of the Constitution, each branch is to operate so as to “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 others’ 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.”

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.” Not only does it discourage the concentration of power and frustrate tyranny but it also requires the branches of government to collaborate and cooperate in doing their work, limiting conflict and strengthening consensus. By its actions, Congress establishes and represents a political consensus (derived from state and local majorities) which makes it possible to promulgate laws and establish budgets to carry out the policies required by law. The presidency participates in lawmaking by representing a political constituency that is established by a national majority (understood in terms of an electoral college majority). Consequently, the branches are forced to cooperate with each other on behalf of a national or common good. 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 transforms the separation of powers from a mere negative concept to a positive and important contributor to constitutional government.

The Founders well understood the need for the good administration of government — an important aspect of their “improved science of politics.” But 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 technocratic rule of administrative 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.

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The great challenge of free government, as the Founders understood it, was to restrict and structure the powers of government in order to secure the rights articulated in the Declaration of Independence, preventing tyranny while preserving liberty. Their solution was to create a strong, energetic government of limited authority, its powers enumerated in a written constitution, separated into different functions and responsibilities, and further divided between the national and the state governments in a system of federalism, leaving ample room for republican self-government. The practical result was that, for much of American history, despite the debates between the Jeffersonians and the Hamiltonians, the fall of the Whigs and the rise of the Jacksonians, and the divisions of the Civil War, the United States was centrally governed under the Constitution but was administratively decentralized at the state and local level.

In the years after the Civil War—with the unleashing of the Industrial Revolution, the expansion of urban society, and the development of the United States as a modern world power—many came to believe that the American political system could not adequately address the emerging character of society. Early Progressive thinkers 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 of policies—but the real

decisions and details of governing would be handled by trained administrators, separate and 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 expanding ends of government, called “the administrative state.” Where the Founders went to great lengths to preserve consent (and check human nature) through republican institutions and the separation of powers—as in entrusting Congress rather than the executive with the power of the purse—the progressives held that the barriers erected by the Founders had to be removed or circumvented and government unified and streamlined. Emphasis would be placed not on a *separation* of powers (which divided and checked government power) but rather a *combination* of powers (which would concentrate and direct government power) in order to bring about reform, consistent with the popular will. 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 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 “neutral” experts not susceptible to political bias, 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.<sup>1</sup>

Throughout much of the first half of the twentieth century, it was primarily progressive presidents of both political parties—Theodore Roosevelt, a Republican and then a Democratic

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<sup>1</sup> For a general history of administrative government, see Joseph Postell, *Bureaucracy in America: The Administrative State’s Challenge to Constitutional Government* (2017).

one, Woodrow Wilson, in particular—who advocated expanding the administrative role of government, which meant pushing Congress to expand the executive branch.<sup>2</sup> The developing structure of the administrative state required dynamic management to keep it moving forward, and so the new thinkers developed the concept of “leadership” to complete their administrative theory of government. An important reform promoted by progressives (and proposed by the Taft Commission), for example, was an executive dominated budget system so that the executive could represent the national will and lead a nonpartisan bureaucracy to carry out that will. The result was the 1921 Budget Act, signed in to law by President Warren Harding, which created the precursor to the Office of Management and Budget (OMB) and required the president to submit to Congress an annual budget for the entire federal government.<sup>3</sup>

Nevertheless, politics operated on the assumption that the legislature remained preeminent regarding legislative matters, and that the budget was the main process by which Congress maintained control of the operations of government. Congress, representing more local interests tied to state power, remained a defender of decentralized administration and insisted on maintaining its deliberative, representative, and lawmaking functions. Federal spending during peacetime remained at or near total revenues, meaning surpluses or small deficits. Even after massive spending during the Second World War, Congress quickly returned the budget to near fiscal balance. Administration at the national level was limited, consistent with a decentralized constitutional system and self-governing civil society.

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<sup>2</sup> On Woodrow Wilson in particular and his ideas about government reform, see Ronald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (2005).

<sup>3</sup> The best study of the budget and modern bureaucratic government is *The Politics Of Budget Control: Congress, The Presidency And Growth Of The Administrative State* (1992) by John Marini.

But the seeds of a new form of governing had been sown. The New Deal brought significant new interventions in the national economy and the creation of significant entitlement programs; Franklin Roosevelt recognized the constitutional significance of this shift when he moved the Bureau of the Budget from the Treasury to the new Executive Office of the President, establishing that henceforth presidential control of the budget would be key to controlling and directing the new elements of American government. The experience of World War II further centralized power in the executive and diminished the power of Congress.<sup>4</sup>

The most significant shift in the balance of powers in the executive's favor occurred more recently, under the Great Society and its progeny. Whereas initial regulations dealt with targeted specific commercial activity – such things as railroads, trucking, aviation, banking – when the federal government assumed responsibility for the well-being of American society generally, it created programs (and reformed old ones) to manage the whole range of socioeconomic policy, from employment, civil rights, welfare, and healthcare to the environment and elections. Agree with the policies or not, 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 in particular.

When administration is centralized at the national level it does not easily or naturally fall under the authority of the legislature. As four decades of political history show, control over the new bureaucracy created an endless source of conflict between the executive and legislative branches. Having created it, Congress was the first to adapt to the administrative state,

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<sup>4</sup> See *Congressional Abdication on War and Spending* (2000) by Louis Fisher.



reorganizing its committees and subcommittees in the 1970s to oversee and interact with the day-to-day operations of the bureaucratic apparatus. As the bureaucracy expanded, Congress tried to maintain its power over the administration through the authorization and appropriation process but increasingly turned to back-end checks, such as the legislative veto (which was held unconstitutional by the US Supreme Court in 1983). Over time, Congress has come to focus its power of the purse largely on post-budgetary oversight of and after-the-fact “regulatory relief” from the bureaucracy.

As Great Society programs grew, and new and hard to control entitlement spending absorbed ever more resources, there was less flexibility in the budget to set national priorities. In his second term, President Nixon sought to assert executive power over the bureaucracy not only by controlling department personnel and the regulatory process but also through impoundment (reduction of appropriated funds) not merely as a fiscal management tool but in order to challenge congressional policy. This led to the Congressional Budget and Impoundment Control Act of 1974, which President Nixon signed just before he resigned from office. While that law restored significant legislative authority over the budget process, allowing Congress to budget independently and comprehensively, it has not served to control spending and deficits as intended. Indeed, although there have been numerous amendments to its complex process, it seems to this observer that the Congressional Budget Act has been unraveling from the beginning and its model of congressional budgeting has all but totally collapsed. (The best indicator that Congress has lost control of the budget is its temporary but unsustainable attempts to turn to automatic budget cuts, such as Gramm-Rudman-Hollings and the recent sequester agreement.) Today lawmakers regularly, and often deliberately, miss budget

deadlines, the government often runs on temporary spending measures, and separate appropriations under regular order have been replaced by massive omnibus legislation.

Today, it is fair to say that the primary activity of modern government is regulation. When Congress writes legislation, it uses very broad language that effectively turns extensive power over to agencies and departments, which are often also given the authority of executing and 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” (whether there is a formal delegation or not) there is little doubt have the full force and effect of laws passed by Congress. In the 115th Congress, the legislature enacted 443 laws and passed 758 resolutions, while federal departments and agencies issued 5,731 rules, amounting to over 125,000 pages in the Federal Register. Today, the modern Congress is almost exclusively a supervisory body exercising limited oversight over administrative policymakers.

The rise of the neo-imperial presidency should not be that surprising given the overwhelming and tempting amount of authority that has been delegated to decision-making actors and bodies largely under executive control. While presidents, especially since 1968, have sometimes acted to diminish the administrative state, they have always without exception acted to control it. Indeed, since the mid 1990s, as party control of Congress changed for the first time in 40 years, presidents of both parties came to see the allure of bureaucratic power. As Congress expanded the bureaucracy—creating agencies, formally and informally delegating its lawmaking authority, losing control of the details of budgeting, and focusing on post hoc checks—the executive grew to new levels of authority. Add to this the general breadth of

legislatively granted executive discretion, as well as sometimes poorly written, ambiguous, and conflicting laws, the modern executive can more than ever lead the bureaucracy to the president's policy ends, with or without the cooperation of Congress.

In terms of what we are discussing here, neither Congress nor the executive governs as a constitutional institution. The separation of powers is less about distinguishing legislative and executive powers and resolving competing institutional prerogatives than about asserting legislative or executive branch control over a permanent "fourth branch" of government. And in this competition the executive has a distinct advantage because administration is inherently executive in nature. "The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary," Hamilton recognizes in Federalist 72 (writing about the executive), "but in its most usual, and perhaps its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department." As the constitutional rule of law (centered on legislation) has given way to administrative or executive rulemaking, so the administrative Congress of the 1970s and 1980s has been replaced by an administrative executive as the branch that dominates American politics.

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Congress needs to think strategically and act as a constitutional institution – indeed, the primary branch of constitutional government – if it wants to reverse the trend of the diminishing legislature and the continuing expansion of the modern executive.

- Congress must reassert its legislative authority not to paralyze government but to *command* it. It may be a prudent option for Congress to assert checks and balances on the executive through litigation; a successful lawsuit stops actions and prevent further harm. But let's be clear: courts are not going to solve the larger problem. Indeed, the notion of the legislative branch going to the judicial branch to solve its problems with the executive branch seems rather feckless and may have the unintended (and perverse) effect of further weakening the institutional powers of Congress. Likewise, while it is appropriate for Congress to robustly challenge the executive's use of inherent presidential powers, Congress should recognize that it is on weaker ground than when it exerts core legislative powers, where the executive plays a secondary role. The solution is for Congress to strengthen its constitutional muscles as a coequal branch of government in our separation of powers system. 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 first step towards restoring legislative integrity is for Congress, as much as possible, to cease delegating the power to make laws to bureaucrats and administrative agencies and not to flinch from using its legislative powers to rein them in. In cases where Congress gives departments and agencies the authority to create significant rules, Congress should assert its constitutional authority to approve or reject those rules. Congress should insert itself more in the regulatory process, perhaps through a regulatory budget or a vehicle like the REINS Act. Steps like these would restrain the executive's ability to make "laws" without legislation.

- Congress 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, but especially the day-to-day back-and-forth of authorizing, funding and overseeing the operations of government, will do more than anything to restore the Article I powers of Congress and get control of our seemingly unlimited government. If Congress objects to the extent of executive discretion in particular areas of law enforcement, then Congress needs to narrow that discretion through statutes that are clear, precise, and unambiguous.
- Congress is at its strongest—and there is best opportunity for gaining leverage over the executive – when it exercises the power of the purse. 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. Done well, it will also prevent Congress from continually getting cornered in large, messy, and unacceptable omnibus budgets at the end of the year, the settlement of which works to the advantage of the executive. While many budget reforms focus on how to promote more strategic long-term budgeting, fiscal restraint, and other worthy priorities, Congress should pursue reforms that will shift substantive control of the actions of government back to the legislature. The fundamental goal of budget reform should be budget *control*.

The Constitution is grounded in the principle that governments derive their just powers from the consent of the governed. This means that laws should be made by the representatives elected by the people and not unelected bureaucrats under the command

of the executive. The fundamental problem underlying this fight is that vast aspects of governing (lawmaking and executing) occur outside of the regular control of the constitutional institutions that were designed to perform those functions and ensure that governing is both deliberative and energetic, and subject to the electoral consent and political will of the American people. 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 outcome imperils not only the constitutional design but also the great achievement of republican self-government.

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The CHAIRMAN. Thank you.  
Professor Pearlstein.

**STATEMENT OF DEBORAH PEARLSTEIN, PROFESSOR OF LAW  
AND CO-DIRECTOR, FLOERSHEIMER CENTER FOR CON-  
STITUTIONAL DEMOCRACY, CARDOZO LAW SCHOOL**

Ms. PEARLSTEIN. Thank you.

The CHAIRMAN. Just make sure your mike is on.

Ms. PEARLSTEIN. Oh, thank you.

Thank you. Chairman McGovern and Ranking Member Cole, members of the committee, thank you for your leadership in convening this bipartisan hearing and for the opportunity to take part as you consider ways Congress might reassert its authority under Article I.

While my written testimony offers some explanations for and some recommendations for correcting our current skewed balance of powers among the Federal branches, in these brief remarks, I would like to just share several of the broader understandings that inform the testimony I have provided.

First, while members of this committee well know that the Constitution's basic architecture allocates particular limited powers to Congress in Article I, and to the President in Article II, and to the courts in Article III, teaching Constitutional law to first-year law students has reminded me repeatedly that the lessons of high school civics don't always stick as well as we might hope they do.

Among other things, without fail, each semester, at least some students express surprise when I put up on PowerPoint slides right next to each other, a list of Congress' powers on the one hand and a list of the executive's powers as printed in the Constitution on the other, that Congress' list is so very much longer than the list of powers granted to the executive. This is, of course, true not only in matters of fiscal and economic responsibility but also national security and foreign affairs.

But while, for example, the President has the power to negotiate treaties and receive ambassadors, and as our armed forces' Commander in Chief, the Constitution gives to Congress a far lengthier list, not only to declare war but also to regulate commerce with foreign nations, define and punish offenses against the law of Nations, make rules for the government in regulation of the armed forces, appropriate funds to provide for the common defense, indeed, defense spending every 2 years in public the Constitution requires, and, indeed, should the Framers have left anything out in any of those powers, Congress is given the catch-all authority to make all laws which shall be necessary and proper for carrying into execution any of those.

But it is not hard to see where the students' surprise came from. Popular accounts have long described an imperial Presidency that regularly deploys military force with no regard for congressional preferences. Executive branch lawyers and others regularly invoke memorable, if not judicially meaningful, rhetoric about the President's signal role in Foreign Affairs. Even Members of Congress and the courts talk frequently about the President's unique expertise in this realm, and this rhetoric and this popular story matter.



So by now, we shouldn't be surprised to find, as one recent poll did, that only a third of American college students can correctly identify Congress as the branch of government with the power to declare war.

In short, we have some work to do in the first instance, to remind others in Congress and the American people, that the Constitution assumed Congress would have access to its own expertise, and Congress, not the executive, would be the primary agent of change in setting U.S. national policy, foreign and domestic.

Second, the scope of congressional delegations of authority to the executive is undoubtedly among the reasons why Congress feels frustrated in its ability to constrain executive power today. Yet, while some are understandably focused on the role of administrative agencies writ large, among the most significant delegations of power to the executive are found in statutes that give authority to the President alone triggered by factual or policy determinations made solely by the President himself.

These delegations aren't to the administrative state. They are to the President. A few such statutes relate to war powers directly, most famously the 2001 AUMF, but the vast majority of statutes of this type address other Federal policies, from trade sanctions and domestic emergencies to economic regulation and even immigration. These delegations are particularly worrisome, in my view, but they are also particularly likely, or should be particularly likely, to generate bipartisan interest in correcting.

Particularly worrisome, because unlike broad delegations of power to administrative agencies, the President is not bound in exercising these powers by the Administrative Procedures Act, the statute that requires agency decisionmaking to involve input from experts and other members of the public, and subjects them to judicial review to ensure they are reasoned and supported by facts.

Presidents may decide to consult their expert advisers. They may decide to follow an internal process, but the APA itself doesn't require them to do so. It is for this reason that both parties should be interested in making reforms at this level. While it may be essential in some circumstances to afford the Presidents flexibility to respond to particular national emergencies, it is difficult to understand why any such response is not informed, or not required to be informed, by our Nation's best possible expertise.

Finally, I want to caution against any temptation to treat delegation as such, or administrative agencies as such, as a bad or uniform thing. As recent events make clear, we need an effective CDC. We need an effective NIH. We need effective Departments of State and Defense and others. And delegation of powers to these and other agencies are an indispensable tool of good governance.

But delegation is not an on-off switch. What makes it good or bad, more or less effective, depends in significant part on how well Congress chooses from its broad suite of tools to channel and monitor administrative discretion—from providing concrete statutory guidance about what and when Congress believes action is needed, to imposing restrictions on the exercise of that action, like requiring the President to consult with Congress or with relevant experts, document findings, or imposing automatic termination or

sunset restrictions that prevent delegations from lasting in perpetuity.

With meaningful, tailored reforms, Congress can succeed both in reclaiming its power and improving the effective functioning of government for all Americans.

Again, I am grateful for the committee's efforts and for the opportunity to share my views.

[The statement of Ms. Pearlstein follows:]

**Statement of  
Deborah N. Pearlstein**

**Prepared Testimony to the  
Committee on Rules  
United States House of Representatives  
March 3, 2020**

**Hearing on  
Article I: Constitutional Perspectives on the Responsibility and  
Authority of the Legislative Branch**

**Statement of  
Deborah N. Pearlstein  
Prepared Testimony to the  
Committee on Rules  
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March 3, 2020**

**Article I: Constitutional Perspectives  
on the Responsibility and Authority of the Legislative Branch**

**Introduction**

Chairman McGovern, Ranking Member Cole, members of the Committee, thank you for giving me the opportunity to participate in the Committee’s important consideration of ways for Congress to reassert its constitutional authority under Article I. It is hardly a coincidence that the Constitution’s very first command provides for the allocation of “[a]ll legislative powers” to the Congress of the United States.<sup>1</sup> A central goal of the Constitution was to correct for the failings of the weak Articles of Confederation government that had gone before, creating a vigorous legislature with powers enough not only to ensure the effective functioning of our republic, but also to resist excessive assertions of power by the other branches. It was through such interbranch competition for power, through “[a]mbition [being] made to counteract ambition,” Madison famously believed, that no one branch of government would be able to assert powers that threatened the democratic nature of government or the fundamental liberty of the people.<sup>2</sup>

As I argue below, it has been decades since Congress has effectively asserted its “ambition” to guard against the staggering accretion of power in the presidency. The reasons for this are many. Part I of this testimony highlights just three. First, Congress has delegated sweeping power, not just to administrative agencies, which are constrained by rules of process

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<sup>1</sup> U.S. Const., art. I, cl. 1.

<sup>2</sup> THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

and reliance on expertise, but directly to the President, who is subject to no such general statutory limits. Second, Congress has acquiesced to broad presidential assertions of authority to act without congressional authorization, an acquiescence that has strengthened the President's claims in influential Executive Branch legal opinions and in the courts to sweeping, independent constitutional authority. Third, Congress has allowed its own vast reserves of constitutional authority to address pressing national problems to go unused, hamstrung in key respects by partisan polarization that internal congressional processes have not been designed to combat.

All of these habits are longstanding, not the fault of any one individual or political party. Yet together, they have effectively undermined one of the Constitution's most important mechanisms for constraining the exercise of executive power. In Part II, this testimony thus offers several suggestions for how Congress might begin to address each.

## **I. How Congress Has Ceded Its Constitutional Authority**

### **Delegating Power to the President Alone**

While Congress has focused significant attention in recent years on the role of federal administrative agencies, among the most significant delegations of power to the Executive Branch are found in statutes that give authority to the President alone, triggered by factual or policy determinations made solely by the President himself. A few such statutes relate to war powers directly, most famously the 2001 Authorization for Use of Military Force ("AUMF"), authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."<sup>3</sup> But the vast majority of statutes of this type

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<sup>3</sup> Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note).

address other federal policies, from trade sanctions and domestic emergencies, to economic regulation and immigration. The 1976 National Emergency Act (“NEA”),<sup>4</sup> for example, authorizes the President in his discretion to declare the existence of a national emergency, and to thereby unlock the ability to invoke any of dozens of other federal statutes applicable in such events, including statutes empowering the President to shut down communications facilities, seize property, deploy troops abroad, or restrict travel.<sup>5</sup> Under the 1977 International Emergency Economic Powers Act (“IEEPA”), the President can regulate or prohibit any foreign exchange transactions and the import or export of currencies or securities, and nullify property holdings in the United States upon a similarly discretionary declaration of emergency relating to “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>6</sup> Trade sanctions laws equally base the authority to impose sanctions on presidential determinations, for example, that any person has “knowingly engage[d] in significant activities undermining cybersecurity against any person . . . or government on behalf of [Russia].”<sup>7</sup> Even broader are various immigration provisions, including the 1952 Immigration and Nationality Act (“INA”), which affords the President discretion to exclude any aliens from the United States whenever he finds their entry would be “detrimental to the interests of the United States.”<sup>8</sup>

Such statutes unquestionably address matters of grave public significance. But in leaving their operation almost entirely to the discretion of the President alone, Congress affords the President far greater control over federal policy than it does when it delegates similar authorities

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<sup>4</sup> National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).

<sup>5</sup> See BRENNAN CENTER FOR JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE, Sept. 4, 2019, available at <https://www.brennancenter.org/analysis/emergency-powers> [hereinafter BRENNAN CENTER REPORT].

<sup>6</sup> 50 U.S.C. §§ 1701–1702 (2012).

<sup>7</sup> Countering America’s Adversaries Through Sanctions Act, Pub. L. No. 115–44 (codified at 22 U.S.C. § 9524(a)).

<sup>8</sup> 8 U.S.C. § 1182(f) (2012).

to federal agencies. In part, this is a function of statutory language itself. Such statutes generally contain scant substantive guidance that might itself cabin the President's discretion, such as a definition or clear limiting rules about what Congress envisioned would count as a relevant "detriment," "threat," or "emergency." Thus, notwithstanding the Constitution's express grant of authority to Congress to, for example, "regulate Commerce with foreign Nations,"<sup>9</sup> it has been the President, acting under IEEPA, who has determined the shape of current U.S. economic policies toward governments or factions in North Korea, Venezuela, Iran, Iraq, Syria, Libya, Somalia, Yemen, Sudan, the Balkans, Zimbabwe, the Democratic Republic of the Congo, the Central African Republic, Burundi, Lebanon, Russia, Belarus, and Ukraine.<sup>10</sup> (Indeed, there is nothing in IEEPA that precludes a president from invoking these authorities against China, India, or any other country in the world.) Critically, unlike broad delegations to federal agencies, the President is not bound by the requirements of the Administrative Procedure Act ("APA"), which mandates, among other things, that agency policy-making follow an open, public process, with input from experts, and subjects it to meaningful judicial review to ensure decisions that are well-reasoned, supported by the facts, and in compliance with statutory requirements.<sup>11</sup> Presidents *may* decide to include such safeguards in their own decision-making, but the APA itself does not apply.<sup>12</sup>

Although many of these statutes were enacted in the 1970s as part of a wave of reform efforts designed to better constrain presidential authority – and to that end include some important checks on the President's ability to invoke these powers, including reporting and

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<sup>9</sup> U.S. CONST., art. I, sec. 8, cl. 3.

<sup>10</sup> See Brennan Center for Justice, "Declared National Emergencies Under the National Emergencies Act," available [https://www.brennancenter.org/sites/default/files/analysis/DeclaredNationalEmergenciesUndertheNationalEmergenciesAct\\_2.14.19.pdf](https://www.brennancenter.org/sites/default/files/analysis/DeclaredNationalEmergenciesUndertheNationalEmergenciesAct_2.14.19.pdf).

<sup>11</sup> See 5 U.S.C. §551 *et seq.*

<sup>12</sup> *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements.").

consultation requirements with Congress – one of the most significant such checks has been disabled from functioning since 1983. The NEA, for example, requires Congress to consider voting to end any declared emergency every six months, a theoretically significant requirement designed to preclude emergencies (and associated exceptional powers) from dragging on indefinitely, as many have.<sup>13</sup> As originally designed, the Act would allow Congress to terminate any presidential emergency by concurrent resolution, that is, by a vote requiring a majority of both houses of Congress, but not the signature of the President.<sup>14</sup> But in 1983, within a decade of the Act's passage, the Supreme Court ruled in *INS v. Chadha* that a legislative veto of executive action was a form of legislation, and so required passage in both houses and presentation to the President.<sup>15</sup> Under this rule, because the President retains the veto power, even a majority vote in both Houses of Congress would be insufficient to overcome presidential initiative. Put differently, current law requires the stroke of a presidential pen to declare an emergency, but a supermajority of Congress to end one. Statutes that depended upon the effectiveness of concurrent resolutions to limit the scope of power delegated to the President today require reinforcement to function even as originally intended.

### **Congress Acquiesced to Non-Delegated Assertions of Presidential Power**

Even when Congress has not expressly delegated power to the President, presidential practice standing alone can have a pivotal effect on how the courts, and often more practically significant, how Executive Branch legal counsel, interpret the scope of presidential power under the Constitution. The Supreme Court and the Justice Department Office of Legal Counsel

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<sup>13</sup> See BRENNAN CENTER REPORT, *supra* note 5.

<sup>14</sup> See also War Powers Resolution, H.R. REP. NO. 93-1305 (1974).

<sup>15</sup> *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).



(“OLC”) have both long relied on presidential practice to illuminate the meaning of the largely spare provisions of the Constitution’s Article II.<sup>16</sup> As Justice Frankfurter explained in grappling with whether President Truman had the power to seize and operate privately owned steel mills in the United States, “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, ... may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”<sup>17</sup> This basic formula – presidential practice, coupled with congressional acquiescence – has since come to support a vast range of constitutional powers in the presidency, powers otherwise unspecified in the Constitution. The “gloss” of presidential practice today justifies the President’s power to conclude agreements with foreign countries without Senate approval or other congressional engagement,<sup>18</sup> and his power unilaterally to use force abroad.<sup>19</sup> Practice – with congressional acquiescence – has likewise proven central to constitutional interpretations of the scope of the President’s pardon power and his ability to invoke executive privilege.<sup>20</sup>

At the same time, Congress’s non-acquiescence – either through subsequent legislation or other express condemnation – can change the constitutional calculus substantially. As the

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<sup>16</sup> See, e.g., Bradley and Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417-24 (2012) (canvassing examples of cases relying on executive practice).

<sup>17</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring); see also *id.*, at 635 (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”); see also, e.g., Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel to the Att’y Gen., *Authority to Use Military Force in Libya* 7, 14 (Apr. 1, 2011) (“historical practice is an important indication of constitutional meaning, because it reflects the two political branches’ practical understanding, developed since the founding of the Republic, of their respective roles and responsibilities with respect to national defense.”) [hereinafter 2011 OLC Memo].

<sup>18</sup> See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (while “[p]ast practice does not, by itself, create power, ... ‘long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent...’”).

<sup>19</sup> 2011 OLC Memo, *supra* note 17, at 8 (arguing that, with respect to the “limited” presidential use of force abroad, the “pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, ‘evidences the existence of broad constitutional power’”).

<sup>20</sup> See, e.g., *Ex parte Grossman*, 267 U.S. 87, 118-19 (1925) (on the scope of the pardon power); JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW* 10-19 (2007) (on the scope of executive privilege).

Supreme Court has long recognized: “Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress.”<sup>21</sup> While the President’s power is at its constitutional maximum when he acts pursuant to express congressional authorization, and constitutionally plausible in the face of congressional silence or acquiescence, presidential power is “at its lowest ebb” when the President takes steps “incompatible with the expressed or implied will of Congress.”<sup>22</sup> Indeed, it is because of just such non-acquiescence to presidential initiatives that Congress has thus far managed to preserve its most fundamental Article I powers, from appropriating and imposing conditions on the expenditure of funds,<sup>23</sup> to making rules for the government and regulation of the armed forces.<sup>24</sup>

But not every presidential initiative is as visible or as readily legislated against as the executive actions that gave rise to the enactment of the Anti-Deficiency Act or the Impoundment Control Act, just cited. Indeed, some of the most consequential understandings of the President’s constitutional power may be found in Executive Branch legal opinions from offices like the OLC, which produces public (and non-public) opinions addressing issues from war powers to executive privilege that are rarely if ever tested in federal court. For this reason, Congress must explore ways to engage with Executive Branch legal opinions – making public statements of disagreement where warranted – in order to assert its power of non-acquiescence effectively.

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<sup>21</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

<sup>22</sup> *Id.*, at 637-638.

<sup>23</sup> See, e.g., U.S. CONST., art. I, sec. 9 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”); see also Anti-Deficiency Act, 31 U.S.C. § 1341 (government may not “make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation”); Impoundment Control Act, 2 U.S.C. § 684 (restricting Executive’s ability to refused to release congressionally appropriated funds).

<sup>24</sup> See U.S. CONST., art. I, sec. 8; see also, e.g., Military Commissions Act of 2009, H.R. REP. NO. 2647 (providing rules for the conduct of trials by military commission); War Powers Resolution of 1974, H.R. REP. NO. 93-1305, §4 (requiring the submission of War Powers Reports to Congress for any introduction of U.S. forces into hostilities).

### **Congress Sacrificed Legislative Power to Partisanship**

Perhaps no greater threat has emerged to the maintenance of Congress's constitutional authority in recent years than the stark partisan polarization that has compromised Congress's ability to exercise its most basic power: enacting legislation to address pressing matters of public concern. While Madison may fairly be faulted for having failed to anticipate the significance of political party affiliation in the willingness of one branch of government to check the overreaching of another,<sup>25</sup> partisan polarization worsened dramatically beginning in the 1970s.<sup>26</sup> As political scientists have extensively demonstrated, differences between Republican and Democratic voting records reveal a Congress significantly more polarized today than at any time since before World War I.<sup>27</sup> Attributable largely to the decline in the number of moderate members of political parties, the effects of this polarization are apparent: a significant decrease in congressional productivity (measured by, among other indicators, number of bills passed), and a corresponding decline in Congress's power compared to that of other branches.<sup>28</sup> Put differently, Congress's failure to address major national problems has led presidents to step into the breach.

Consider, for example, national policy on immigration. Informed by the findings of the bipartisan Commission on Immigration Reform, and introduced by bipartisan members of both chambers, the last significant piece of comprehensive immigration legislation passed Congress in 1986.<sup>29</sup> Since then, Congress has established just one other bipartisan commission of experts on

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<sup>25</sup> Levinson & Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

<sup>26</sup> See, e.g., NOLAN MCCARTY, *POLARIZATION* (2019).

<sup>27</sup> See, e.g., *id.*, at 25.

<sup>28</sup> See, e.g., Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in *SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* 15, 42 (Nathaniel Persily ed., 2015); Carmines & Folwer, *The Temptation of Executive Authority*, 24 IND. J. GLOBAL LEGAL STUD. 369 (2017).

<sup>29</sup> Michael Barber and Nolan McCarty, *Causes and Consequences of Polarization*, in *NEGOTIATING AGREEMENT IN POLITICS: TASK FORCE REPORT OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION* 39 (Mansbridge & Martin, eds. 2013) (citing The Immigration Reform and Control Act, Pub. L. No. 99-603 (1986)).

immigration to examine the problems independently, and based on research and analysis, develop recommendations for reform.<sup>30</sup> While there have been multiple efforts to enact immigration reform legislation since then, including significant bills in 2005, 2006, 2010, and 2013 that garnered bipartisan sponsorship, the bills ultimately foundered in the face of objections from non-moderates in either the House or Senate chamber.<sup>31</sup>

Yet despite Congress's relative inaction on immigration, the result of this gridlock has not meant immigration issues have gone entirely unaddressed. Rather, presidents throughout this era have taken significant steps to address immigration issues through executive action alone, including, among others, the Obama Administration's Deferred Action on Childhood Arrivals program, and the Trump Administration's series of executive orders restricting the entry of nationals from certain countries.<sup>32</sup> Beyond generating multiple challenges in the federal courts, such programs have generated renewed debate about the growing sweep of executive authority. The absence of comprehensive reform has, likewise, ensured that immigration remains a vigorous subject of public division and debate.

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<sup>30</sup> The Jordan Commission was established in 1990 and concluded its work by 1997. Commission on Legal Immigration Reform, P.L. 101-649, 104 Stat. 5001, November 29, 1990.

<sup>31</sup> See *id.*, at 39-40, see also Carmines & Folwer, *supra* note 28 (describing various legislative initiatives).

<sup>32</sup> See, e.g., Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977 (2017) (blocking the entry of nationals from certain foreign countries into the United States); Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to León Rodríguez, Director for U.S. Citizenship and Immigration Services, et al. (June 15, 2012), available at [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) (announcing Deferred Action for Childhood Arrivals policy).

## **II. Recommendations for Reclaiming Power**

The range of problems just outlined will require an equally broad range of remedies to correct, many of which must be tailored to specific statutory schemes. For present purposes, it is perhaps most helpful to identify several categories of reform that may aid in addressing each of the causes for the decline in congressional power discussed.

First, Congress should narrow the scope of power delegated to the President through generalized statutory authorities like the AUMF, NEA, INA, and IEEPA. Narrowed delegations can be accomplished in part by including definitions of terms to guide the exercise of discretion around broad concepts like “detriment,” “threat,” or “emergency.” But even without such specifications, Congress has the authority to include a wide range of restrictions on the exercise of any such authority, including requiring the President to consult with Congress or with relevant experts inside the Executive Branch before acting; requiring relevant Executive Branch officials to certify or demonstrate that statutory requirements are met; requiring the President to report to Congress regularly, to compile and submit a factual record supporting the determination to invoke the statute, to publish relevant findings in the Federal Register or through executive order or proclamation; or by imposing automatic termination or sunset restrictions. While some of the statutes above have some of these features, most have only a few. More, the pre-*Chadha* statutes (including the NEA and the War Powers Resolution) tended to rely heavily on the availability of concurrent resolutions to override Executive actions. For those statutes, automatic termination or sunset requirements are essential to correct the dilemma highlighted above – namely, the President’s ability to invoke delegated power with the stroke of a pen, and Congress’s inability to terminate those authorities in the absence of a supermajority of Congress.

Second, given the importance that both the courts and Executive Branch lawyers place on presidential practice in interpreting the scope of the President's constitutional authority, Congress should develop a mechanism for regularly reviewing Executive Branch assertions of constitutional authority, and formally expressing its disagreement when the President asserts a form of authority that Congress believes extends beyond that the Constitution permits. Congress of course has multiple formal mechanisms for expressing non-acquiescence with Executive Branch actions as it stands, from impeachment and censure to the (more common) enactment of contrary legislation. But Congress lacks a legislative version of the OLC, that is, of an office that could review and monitor executive assertions of power, and produce public, constitutional opinions about the scope of constitutional authority properly available to the President. Such statements would be no more binding on the constitutional judgment of the federal courts than OLC opinions are today.<sup>33</sup> But they would provide a critical counterweight to claims that Congress has acquiesced to more the exercise of more presidential power than it really has.

Third, while the problem of partisan polarization has been driven by a variety of causes, some likely beyond the ability of Congress alone to address, Congress can certainly take steps to foster, rather than inhibit, bipartisan engagement among its own members, and to strengthen the prospect that *legislative*, rather than partisan, ambition might be made to counteract claims of the Executive Branch. Consider, for example, the use of congressional advisory commissions such as those in the immigration example mentioned above. Such commissions not only provide a forum for bipartisan engagement, they generate a source of independent, expert advice that enables Congress to develop its own understandings of policy needs without exclusive reliance

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<sup>33</sup> See *Comm. on Judiciary v. McGahn*, No. 19-CV-2379 (KBJ), 2019 WL 6312011 (D.D.C. Nov. 25, 2019) (noting that the "longevity" of views of executive power contained in OLC opinions "alone does not transform an unsupported notion into law").

on analysis generated by the Executive Branch.<sup>34</sup> Likewise, congressional agencies, like the now-abandoned Office of Technology Assessment (“OTA”), provided a similar source of non-partisan expert policy advice that was not only capable of helping educate congressional Members, but critically available to provide a check against the judgments of Executive Branch agencies alone. If configured to produce guidance in a form and on a timescale that meets lawmakers’ needs, OTA-type agencies can help serve as an independent source of expert staff on which Members can draw – instead of pulling temporary experts from the Executive Branch – that further Congress’s ability to check Executive Branch positions.

Finally, opportunities for bipartisan interaction need not only arise through formal commissions or agencies. Bipartisan lunches, Committee hearings that allow time for dialogue among Members as well as with witnesses, informal opportunities for conversation outside party-based organizations – such modest changes can be essential first steps in helping Congress move away from its current position as an institution gripped by partisan paralysis, and toward one capable of counteracting the power of the President with constitutional ambition of its own.

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<sup>34</sup> See CONG. RESEARCH SERV., CONGRESSIONAL COMMISSIONS: OVERVIEW AND CONSIDERATIONS FOR CONGRESS (2019), <https://fas.org/sgp/crs/misc/R40076.pdf>.

The CHAIRMAN. Thank you.  
Professor Prakash.

**STATEMENT OF SAIKRISHNA PRAKASH, JAMES MONROE DISTINGUISHED PROFESSOR OF LAW AND PAUL G. MAHONEY RESEARCH PROFESSOR OF LAW, SENIOR FELLOW, MILLER CENTER OF PUBLIC AFFAIRS, UNIVERSITY OF VIRGINIA**

Mr. PRAKASH. Dear Chairman McGovern, Ranking Member Cole, and other distinguished members of the committee, it is an honor and a pleasure to be here today.

In my view, the first branch risks becoming the second branch. What was formerly a branch with great power and great responsibilities has gradually ceded its authority to the executive or sat idly by while the executive seized authority.

*Where we are today:* I think we find ourselves at a point in time where the executive branch continually adds to its own authority. If a previous President or Presidents have taken some acts, those acts form the building blocks of subsequent acts of future Presidents, and this is a bipartisan problem. And so transgressive acts become the material, if you will, of a new constitutional conception. And this happens over and over again, in both statutory and constitutional contexts.

My colleagues here have mentioned the war powers of Congress being usurped by the Presidency, and that is certainly an instance where the Presidency over time has claimed authority to wage war, basically in the constitution's terms, to declare war. In the process, they have decided that you have lost your monopoly on the power to declare war.

I think similarly, Presidents have acquired various lawmaking authorities from you. Sometimes it is delegated by you. Sometimes it is seized from you by the President. And these are revolutionary changes in our constitutional structure, because now the Presidency, the executive branch, understands that it too is a lawmaker in various ways, either through lawmaking authority you delegated or through rather creative forms of interpretation.

*How did we get here:* I think four factors help explain how we got here. Presidents today conceive themselves as policy reformers. They don't view themselves as principally executive officers. And, in fact, when Presidents talk about their law execution role, people are a bit confused by it. Many people think the Attorney General is the chief law enforcement officer. I think by the Constitution, the President is.

This mind-set makes it more likely that presidents will usurp power because they run on a policy platform and feel as if they must implement it.

As you are well aware, Presidents are also party chieftains, and they expect and receive support for their initiatives from their co-partisans almost without regard to whether the initiatives are legal or constitutional. And this, of course, gives them tremendous weight in the public mind and, of course, within the halls of Congress.

Presidents have a mighty bureaucracy at their backs, supplied by you—the lawyers in the White House Counsel's Office and in the



Office of Legal Counsel, and all the executive officers are supplied and funded by you.

And then the final factor, I think, is a more general factor, and relates to the idea of a living Constitution. If Congress can acquire new authorities by a practice, if the courts can reform our conceptions of constitutional rights, it is little wonder that Presidents believe that they too can reform the office of the Presidency.

And I would submit to you that the Presidents are most able to change our Constitution because they are most able to act with speed and decision and repetitively in a way that creates new facts on the ground.

I did not put my timer on, unfortunately.

The CHAIRMAN. No, you are fine. You are fine. You are fine.

Mr. PRAKASH. "So whither we are tending" to quote Abraham Lincoln, I think the continued concentration in the hands of the executive is what we can see in the future if reforms aren't made.

If the war powers and the legislative powers of Congress can be seized by a President, what can't be seized by our chief executives? You risk becoming a college debating society or a potted plant, in the words of Brendan Sullivan, a famous lawyer.

I have a chapter of a book that is going to come out very soon that I want to share with the Members. This copy is for the chairman, but I would like all of you to take a look at it. The last chapter, chapter 9, describes 13 reforms that Congress can enact, either with the President's consent or over his veto.

For instance, I think Congress ought to bulk up its staff. I think it is very hard to fight a behemoth when you are David. You need more staff, and they need to be paid more. I know that the staff would like to hear that. But I also think that there shouldn't be a situation where the minority staff turns over, you know, when the majority becomes the minority that the staff are immediately fired. It doesn't make sense to me that you are running yourself on the cheap in a fight with an executive behemoth.

I would perhaps disagree with Professor Pearlstein. I think that delegating legislative power to the executive branch, either the President or otherwise, feeds the sense that the President is a lawmaker. And I don't think you can make vast and important rules without that lawmaking mind-set seeping into the executive branch.

And so I think you should certainly curb back all the delegations that go to the executive branch and the administrative agencies. It is your job, not theirs, to come up with rules. If you are going to delegate, make those delegations sunset, and if these agencies are going to create rules, make those rules sunset, and make them or you reenact them.

I think, I would try to get Members of Congress to think more about executive privilege. I think in the modern era, it is basically a means of stymieing your investigations. I don't doubt that Presidents need confidential conversations, but when we see those conversations spill out daily in the Washington Post, The New York Times, in books, it is sort of odd to think that whatever doesn't make those pages has to be kept from you as you go about investigating the Presidency and the executive branch and thinking about whom to impeach.

Two other final reforms. I think that you can incentivize bounty hunters to police the executive branch's compliance with the law. As you know, there are qui tam and informer actions that go back to the first Congress. They basically authorized individuals to inform on executive officers who were absconding with federal funds, and I think that sort of system can be used to police the appropriations power that you folks should enjoy, and, for that matter, also police the war powers.

And that brings me to my last suggestion. The War Powers Resolution should be strengthened. I think the way to strengthen it is just to have an automatic cut in appropriations if the President chooses to take us to war. And maybe, you know, an automatic cut to weapons programs in particular because the military is not going to want to see its weapons budget cut in order to wage war against some nation overseas.

I agree with Chairman McGovern. The best time is now. No one knows who the next President is going to be. No one knows who is going to control the House or the Senate. And it is precisely in this climate of uncertainty that people can put partisanship aside and act in the best interest of the Nation.

Thank you so much.

[The statement of Mr. Prakash follows:]

Statement of  
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House Rules Committee

March 3, 2020

Good Morning Chairman McGovern, Ranking Member Cole, and members of the House Rules Committee. Thank you for the opportunity to participate in this hearing on Article I: Constitutional Perspectives on the Responsibility and Authority of the Legislative Branch. For this adopted son of America, it is a distinct honor to be here today, particularly because I sense a sincere bipartisan yearning to right a ship of state that continuously leans towards a muscular presidency.

Though I am a Professor of Law and Miller Center Senior Fellow at the University of Virginia, my testimony reflects no one's views, save my own. I also wish to emphasize that I don't come here as a Republican or Democrat. Nor do I come today as a supporter or opponent of the incumbent President. Rather I come as an American, a lawyer, and a legal scholar with an abiding interest in Congress's foundational role in our constitutional system.

I have spent my career studying the Constitution's separation of powers. I have authored a book, *Imperial from the Beginning*, one that describes a powerful office coupled with a host of express and implied constraints on presidential power. I have a forthcoming book, *The Living Presidency: An Originalist Argument Against its Ever-Expanding Powers*, that will be available in April from Harvard Press. Much of my testimony draws on lessons I absorbed in the course of writing these books, particularly the second book.

The place to begin is with the perceptive advice of Abraham Lincoln: "If we could first know where we are, and whither we are tending, we could better judge what to do, and how to do it." So, my testimony has four parts. I will discuss where we are, how we got here, whither we are tending, and what you, the Congress, ought to do.

Where we are: We have a mutating presidency, one whose boundaries and authorities regularly expand. In the well-known case of *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Felix Frankfurter endorsed the idea of repeated practices placing a “gloss on the executive power,” meaning amending the preexisting sense and scope of presidential power. The modern executive branch, particularly its lawyers, applauds this theory. Exploiting this self-serving formula, the executive branch shows no hesitation in concluding that presidential powers have expanded as a result of actions that transgressed earlier, narrower conceptions of executive authority. In other words, the executive cites earlier presidential usurpations as the building blocks for new vistas of presidential power. While ordinary Americans face sharp consequences for violating the law, it seems that presidents can amend the Constitution by repeatedly violating it.

Think of war powers and the modern claim that Commanders in Chief, by their successive actions across decades, have acquired a power to wage war against other nations. Pardon the pun, but this claim is at war with the Founders’ Constitution. No one at the Founding supposed that presidents could wage war on their own say-so. And to my knowledge, no sensible person thought this before the Korean War. Harry Truman’s war—one he fatuously called a police action—was followed by other significant uses of force, each building on (and citing) previous presidential wars. Recall Grenada, Kosovo, Libya, and Syria.

Or consider the role that presidents play in lawmaking. Most of our laws come from agencies controlled by presidential appointees, meaning that presidential law has largely supplanted your laws, if not always in importance, certainly in volume. Relatedly, presidents elected on a platform of radically reforming existing legislation (Dreamers, Build a Wall, and

Medicare for All) are increasingly willing to read existing laws—your laws—in extremely creative ways that enable them to claim that they kept their election promises. Judging by what many Americans read and hear, they can be forgiven for supposing that presidents may lawfully change your law by the stroke of a pen. Relatedly more and more Americans may rightfully wonder what the point of a Congress is.

More examples are not wanting. But the point is sufficiently obvious to most knowledgeable observers. The executive seems forever on the march, staking claim to new territory, most often at your expense.

*How did we arrive at this point:* Over the course of centuries, the presidency has been radically transformed, both conceptually and practically. First, we conceive of the presidency in ways that were mostly unfathomable at the founding and these changes have had profound consequences for presidential power. For instance, we think of presidents as legislative reformers. For the first several decades of the Republic, however, presidential candidates never ran on a policy platform, much less made promises. Nor did they conceive themselves as the representative of the entire American people. They had duties coupled with a dose of discretion. Their principle job was to *execute your laws*. In contrast, modern candidates promise dozens of reforms, some incredibly substantial. Once in office, presidents claim an electoral mandate to implement their agendas and expect Congress to enact them or get out of the way. Modern presidents cast about for ways to keep their promises, supposing that they must fulfill them, by hook or by crook. After all, the route to presidential greatness is strewn with actual reforms, not shattered promises.

Second, our presidents are the undisputed leaders of political parties, making it very difficult for their co-partisans to criticize them, much less oppose them. Lincoln warned that a house divided against itself cannot stand. And the same must be said of you. A House of Representatives divided by partisanship will find it very difficult to stand up to usurping presidents, whatever their party. President Barack Obama knew that there would be a phalanx of Democrats behind him for almost any of his policies, and even greater support for those policies especially favored by the Democratic base. President Donald Trump knows the same with respect to his co-partisans in Congress. Any perceived illegality is an embarrassment to be gotten over, minimized, or rubbished. One cannot overestimate the leeway that comes from knowing that a cohort of co-partisans stand ready to praise your reforms and defend you from attacks.

Third, presidents deftly exploit the executive bureaucracy supplied by Congress to advance their interests. A vast presidential staff of almost 2000 gives presidents the practical ability to do much of consequence because these aides act as a force multiplier. There is little doubt that the modern presidency would be a shadow of its familiar self were it not for the congressional funding of personnel within the Executive Office of the Presidency. Similarly, Congress also funds elite executive lawyers who defend the presidency, both the institution and its periodic occupants. On questions of presidential power, these lawyers perhaps think of themselves not as expanding executive power but instead as merely illuminating its reach. Yet because these lawyers labor in the executive branch, it is hardly surprising that their opinions often endorse expansive readings of presidential power. Over time, new opinions advance the arguments found in previous opinions, resulting in presidential creep. Even when the law seems to stand in the way, these attorneys attempt to find a workaround that allows presidents to at least partially advance their agendas.

A fourth element behind the rise of presidential power is the ascendancy of living constitutionalism. Living constitutionalism posits that the meaning of the Constitution can and should change over time. The idea has its greatest appeal with respect to individual rights, where many believe that following outdated conceptions would mean abandoning several rights that Americans have come to cherish. Once one embraces the idea of living constitutionalism, however, the door swings open to living presidentialism. Because changes in the living constitution arise through changes in conceptions and practices, presidents are extremely well positioned to effect those changes. Presidents are certainly best equipped to create new conceptions and practices that advance the presidency's institutional interests and the particular policies of the incumbent. It is no exaggeration to say that presidents collectively have the greatest influence on the future contours of constitutional law, particularly the presidency.

Whither we are a tending: The future is unknown. But if the past is prologue, the only thing that one can confidently predict is that the presidency of tomorrow will be different from today's presidency in the same way that today's presidency is rather different from versions in yesteryears. Saying that some presidential acts are unconstitutional or illegal today in no way implies that they will be in the future. Change is the only constant.

We perhaps cannot see this change just as it happens. We are too close to it and too focused on the political disputes that surround it. But decades later, the change becomes apparent. Are presidents going to become secondary legislators, on par with Congress? They are not there yet but who can say what tomorrow will bring. Are presidents going to reach parity with



the Supreme Court when it comes to constitutional interpretation? I would guess not. But nothing is beyond the realm of the possible.

Consider a concrete example: impeachment. I believe that one way of understanding the Clinton and Trump Impeachment episodes is that hundreds of members of Congress supposed that it should be harder to remove presidents. For judges, Congress is apt to ask whether something is a high crime and misdemeanor and not spend much time wondering whether the punishment fits the crime. Either the judge committed the impeachable offense, or she did not.

For presidents, whether the “crime” warrants removal is paramount. Because presidents are so singular and special, members of Congress are apt to ask the question “should we remove him from office,” which is a rather different question than whether a president committed high crimes and misdemeanors. For President Bill Clinton, enough Democrats supposed that obstructing justice and lying under oath was not worthy of removal, a judgment that many Americans supported. For President Donald Trump, enough Republicans supposed that what he was accused of—obstructing Congress and abuse of power—was not worthy of ouster. These were contextual judgments based on a host of fact and factors. But the end result is that the impeachment standard may now be said to be rather different for presidents. If that is so, it vividly demonstrates that there are no limits to how presidential power may expand over time.

What Congress ought to do:

If Congress does not act, it risks becoming more and more irrelevant. The first branch may become the proverbial potted plant: a thing of beauty that is ornamental rather than

consequential. It may become a byzantine debating society, full of motions, restricted amendment trees, and occasionally meekly and belatedly reacting to laws crafted in the White House.

Congress has the means to push back. History supplies examples of Congress pushing back against executive overreach. During Reconstruction, Congress mistrusted Andrew Johnson because they perceived him as too soft towards the South. To bring him to heel, Congress passed laws to weaken the presidency and render officers independent of his will. Whether constitutional or not, these laws represent a successful counterreaction.

Another instance of congressional pushback can be found in the post-Watergate years, where Congress enacted a slew of statutes designed to check the executive. With the Vietnam War, the firing of Archibald Cox, the destruction of Oval Office tapes, and the Watergate burglary still fresh memories, Congress reined in executive authority. Congress passed the Ethics in Government Act, with its Independent Counsel. It approved the Congressional Budget and Impoundment Control Act to limit refusals to expend appropriated funds. Congress regulated covert actions. And Congress passed the War Powers Resolution to rein in executive war making.

In my book, I offer thirteen suggestions for Congress, some easy, some bold. Today, I'll mention a handful.

#### *1. Congress Must Bulk Up*

The size of congressional staff has declined precipitously since 1985. The size of personal staff of Representatives has declined 20%. Institutional staff (e.g., staff for the Sergeant at Arms) has declined by 83%. Committee staff has declined 50%. Though Senate declines are less drastic, staff levels are lower. The two largest congressional agencies, the Governmental Accountability Office and the Congressional Research Service, have likewise faced severe cuts.

Congress must reverse this trend and expand its staff. Agency staff at the GAO and CRS should be massively boosted. Personal staff for members should be vastly increased to enable Representatives and Senators to better carry out their legislative and oversight functions. Committee staff should be augmented, particularly personnel tasked with oversight functions. Minority staff also should be enlarged, for legislators in the minority also assist with oversight and there is no reason for committee staff to be disproportionately apportioned as has long been the practice. The current system of committee staff turnover, where hundreds of experienced personnel are tossed out with a change in the chamber majority, discourages individuals from serving on committee staff. Finally, congressional staff should receive pay raises. These staff are undercompensated for the work they do, which predictably leads many to seek greener pastures.

Relatedly, Congress ought to consider creating new agencies. For instance, Congress should create an Office of Legal Counsel for each chamber. Each should be staffed with personnel proportional to the Office of Legal Counsel in the Department of Justice. Each should supply written and oral advice about the scope of Congress's constitutional authority, the constitutionality and meaning of bills and laws, and the legality of executive action.

## *2. Halt the Delegation of Legislative Power to the Executive*

Another reform would consist of curbing excessive delegations of legislative power. There are distinct policy reasons for doubting the wisdom of allowing executive and independent agencies to write laws under the guise of writing rules. For our purposes, the delegations to executive branch institutions make the presidency rather powerful.

The best way to curtail these delegations would be to provide that the executive's rules will not be law unless Congress first approves them. This would preserve the executive's traditional authority—making legislative “recommendations” as the Constitution expressly authorizes. And it would leave Congress wholly possessed of the legislative power, for the executive could not make laws. Rather its rules would be mere proposals. If the executive's measures are wise, Congress can adopt them. If not, the nation is not saddled with executive lawmaking.

Moreover, when Congress chooses to actually delegate its legislative authority, it should provide that the delegation sunsets. In other words, delegations of lawmaking authority should expire after a set number of years, say two or three, with Congress forced to reconsider the wisdom of the delegation. If Congress believes the agency has done a poor job, it can do nothing and grant no renewed authority. Or it can curb or expand the delegation, tailoring it to new circumstances.

Finally, Congress should decree that agency rules sunset after a period of time. It is bad enough that many of Congress's laws do not come with an expiration date, thereby allowing laws from centuries ago to remain on the books with little reconsideration. But at least in those cases, the laws came from Congress, the entity with constitutional power to legislate. There is no sound reason why laws made by unelected bureaucrats should last for decades without some reconsideration by Congress, much less the agency that first enacted them.

### 3. *Regulate Delegations of Emergency Powers*

One class of delegation is particularly troubling: delegations authorizing presidents to declare national emergencies. Embarrassingly, dozens of these emergency declarations have lasted for decades. Congress is helpless because presidents often wish to retain authority previously

delegated. As a result of a possible veto, Congress can amend or overturn a presidential emergency only there is an overwhelming congressional majority in both chambers or when a president is willing to sign a bill that contains such modification or rescission.

By law, Congress ought to declare that every emergency declaration can last no longer than six weeks after Congress next meets. This would ensure that if emergency measures are to endure, Congress must decide. Any congressional extension of emergency measures ought likewise to have sunset periods, ones that ensure legislative reassessment of whether a crisis continues.

#### 4. *End Executive Privilege*

In recent decades, we have witnessed an acceleration of the trend of the executive refusing to comply with congressional demands for information. This is often called “executive privilege” and is said to be grounded on the principle that presidents have a right to frank advice. No one will give them candid advice if Congress can pry into the inner recesses and workings of the presidency and reveal the advice being given.

Presidents need advice, of course. Indeed, there is a constitutional clause—the Opinions Clause—that (redundantly) ensures that they may secure advice. But whether they have a right to confidential advice is rather doubtful. The Opinions Clause speaks of “written opinions” presumably so that others may hold those opining responsible for bad advice. Moreover, despite the executive’s need for confidential advice, such briefings, opinions, and judgments do not remain secret for long. Sometimes the New York Times or some other outlet reveals the confidential advice that a president received. Other times, tell-all books supply details about the terrible advice that others gave and the sagacious advice of the author. The general point is that

no advice to the president has any promise of confidentiality anymore. Presidential advisers are naïve if they suppose that what they tell the president, will remain in confidence.

So why do we continue to have executive privilege? It seems to me that one of its principle roles is to stymie congressional investigations of the executive. That is precisely how Dwight Eisenhower—the inventor of the phrase—used the privilege. He wanted to thwart congressional investigations of his administration. Perhaps he had good reason for doing so. After all, he regarded Joseph McCarthy—the red-baiting Wisconsin Senator—as a cancer.

Yet as a matter of constitutional law, Congress has a right to gather information both to pass bills and to oversee, and potentially impeach and remove, federal officers. This power of oversight and impeachment extends to the highest office of the land, the presidency. Indeed, presidents have an express duty to provide Congress with information on the “state of the union,” information that would include the operations and functioning of the executive branch. Congress cannot lose its right to access information needed for legislation and oversight merely because Senator McCarthy abused the congressional power of investigation, any more than presidents can lose their veto because some renegade president vetoed too many bills.

Congress should openly declare its considered position that executive privilege does not apply to matters of congressional oversight. While keeping executive-branch communications confidential is undeniably desirable, the absolute need for congressional oversight of the executive rests upon unassailable constitutional foundations. Our system of checks and balances requires a Congress able to check the executive, something impossible if the executive can block inquiries via invocations of executive privilege.

### 5. *Utilize Bounty Hunters*

Congress can call upon the people to check the executive. In particular, it can enact “informer” laws that incentivize the public to help curb executive overreach. Such laws can impose fines payable to the Treasury for certain illegal or unconstitutional activity—say starting wars or spending federal funds without an appropriation. Executive officials guilty of the underlying offenses would pay these fines out of their own pockets. Citizens who brought suit against the executive officers, prevailed in court, and collected the fines would then get a portion of the fines, say a quarter or a third of the total amount. Essentially, Congress would pay a bounty to citizens who successfully prove that executive officials have violated federal law.

Such suits (and the underlying laws) are constitutional. These informer statutes date back to before the Revolution and early Congresses passed many such statutes, including ones that harnessed private avarice to ensure that executive officials complied with the law. The courts have made clear that they will hear such cases because the individuals bringing suit have a concrete interest in the outcome. Moreover, presidents have little reason to complain because if the underlying acts are in fact legal, the officials will prevail. If the acts are illegal, however, then presidents should be grateful that the system is calculated to prevent official misconduct.

### 6. *A Resolute War Powers Resolution*

Congress can put stronger teeth, with actual bite, in a renewed War Powers Resolution. It could declare that if a president attacks another nation without congressional authorization, the attack immediately triggers a reduction in the military budget by three quarters. Everyone agrees that Congress controls the purse strings and can decide how best to fund the armed forces and the wars they wage. The draconian cut in funding would incentivize presidents to secure congressional preapproval of wars, a process that the Constitution actually requires.

*Conclusion: There is No Better Time than the Present*

Because members of Congress are habituated to act like loyal party men and women, the best time for adopting any reforms is during the waning months of a presidential term but before a presidential election. Better yet is the same scenario coupled with widespread and deep uncertainty about the next occupant of the Oval Office. Even better still: if the two presidential candidates are polarizing, members of both parties have much to gain from trying to bind and constrain the executive because they might be risk averse and more willing to limit their upside in return for drastically limiting their worst-case scenarios. Nothing would stir the reformist passions of Democrats more than a tax-cutting, insular, politically incorrect Republican candidate. Nothing would more galvanize Republicans than a leftist, big-spending, “woke” Democrat.

Behind this useful veil of ignorance, federal legislators can be united in their fear and more systematically devoted to protecting congressional prerogatives and checking presidential power. Something like this state of uncertainty exists every four years and legislators should exploit their dreads and horrors and temporarily unite to protect their institution and check the executive.



The CHAIRMAN. Thank you very much. I want to thank you all. We have a distinguished panel here. Thank you all for your excellent testimony.

Before I go to my questions, I just want to acknowledge in the audience a former colleague, Congressman John Hostettler from Indiana, who is here. Great to see you back, and thanks for coming.

You know, the Constitution puts the power to declare war in the hands of Congress and the power to wage war in the hands of the executive. And in some ways, this seems pretty simple, particularly when you think about how things were at the founding. Congress controlled the funds. There was no standing Army. The President barely had staff. And the President had to come to Congress for funds to do just about everything. I am sure I have oversimplified all of that, but bear with me.

As the Nation grew, things got more complicated. Today, we have a large standing Army. The President has, let's just say, a lot of staff. Congress still controls the funds, but Presidents seem more and more willing to move money around to suit them. Starting in the 1950s, and then coming to a head in the 1970s, we saw Presidents of both parties engage in military actions, sometimes without Congress' knowledge, let alone consultation or approval.

To stop unauthorized, protracted wars like Vietnam, Congress passed, over a Presidential veto, the War Powers Act in the mid-1970s. Key to that Congress' reform effort was inclusion of a legislative veto where, through a concurrent resolution by both Houses, Congress would be able to stop a President's unauthorized military action.

With the War Powers Act, Congress did not delegate any new authorities to the executive. Instead, Congress was merely setting up a mechanism to ensure consultation, notification, and communication with the executive on questions of war and peace, a communication that could be enforced with a legislative veto of a President's action.

Then INS versus Chadha rolls around, an immigration case in 1983 that invalidated legislative vetoes across the board. One of the consequences of the Chadha decision is that we went from needing a majority of Congress to make a war and to also make peace, to needing a majority to make war, but a likely a supermajority to make peace. This is an absurd outcome and has been an absurd reality here in the Congress.

So my first question is this: In the wake of the Chadha decision, is it time to update, reform, merely do some housekeeping around the War Powers Act to ensure that the aims of the act—again, consultation, notification, and communication—are achieved? I open this to anybody. Professor Pearlstein.

Ms. PEARLSTEIN. Sure. The short answer is yes.

Ms. PEARLSTEIN. I think there are—in fact, there have been a number of efforts. There was a wonderful bipartisan commission that included Senator McCain some years back. There have been a number of efforts to propose changes to the War Powers Act. I think many of these recommended changes that are out there are very good. I think there are a couple in particular that warrant consideration.

One, you mentioned secret wars. And the way the current War Powers Act is framed, it attaches the notification requirement, the reporting requirement to the trigger that starts the 60-day clock after which, right, the President is supposed to seek congressional authorization. You can readily detach that reporting requirement from the notification trigger.

I support funding cutoff, automatic funding cutoff mechanisms. The traditional story is indeed with multiple conflicts, including Venezuela which I testified about last year. Before force is used, Congress' view, in a bipartisan way, is, we don't want to constrain the President's flexibility. And after force is used, bipartisan Members of Congress say, well, we don't want to interfere or compromise or undermine troops on the ground. Those are the before and after arguments invariably in every use of force, which is why a war powers, a framework statute, and a funding cutoff mechanism, I think, is necessary.

I guess I will here just mention one other thing which I think is really important, and that is the definition of hostilities. The current War Powers Act sets up as a trigger the requirement that either the funding must be—in my amended version, the funding would be cut off, or in the current version, the President would seek congressional authorization any time forces are introduced into hostilities or a substantial risk of hostilities.

Over the years, Presidents have interpreted—Democratic and Republican Presidents have interpreted that word “hostilities” more and more narrowly such that even vast uses of force, sustained air campaigns in foreign countries and so forth, Presidents have argued, don't count as hostilities triggering the requirements of the act.

We need a much meatier or more specific definition of what kinds of hostilities we are talking about, one that is not specific to domain, meaning Army, Air Force, Navy, Marines, cyber, right, but that encompasses the range of ways in which the U.S. Government is now capable of waging hostilities.

The CHAIRMAN. Professor Prakash.

Mr. PRAKASH. I agree with much of what Professor Pearlstein said. I guess I would be wary of trying to amend the act because the act, as originally understood, did not authorize the President to use force for 60 or 90 days. But in practice, the executive branch believes that the act either authorizes the use of force for 60 or 90 days or is written in such a way as to assume that the President has constitutional authority to use force for 60 or 90 days.

And so if you just tinker with it, those preexisting understandings will continue on. I think you are better off starting from scratch, importing whatever you think is useful from the act.

I think the fundamental question is, do you want to essentially authorize the President to engage in war or use of military force for some small period of time and then have that authority automatically expire, or do you want him to always come to you first? And I think once you decide that, then you can construct a new War Powers framework that is consistent with the Constitution and consistent with your desires.

The CHAIRMAN. No, and I personally, wherever it is possible, would like the President to come to us first to get authorization.

I guess if we had former Presidents here, they would say, well, you know, there are national emergencies, here might be something we have to act immediately, and Congress may be in recess, or we can't get you all here. I think that is some of the pushback you get.

Dr. Spalding.

Mr. SPALDING. Yeah. That really goes to the heart of the problem. To put it in very broad terms, the more you want to legislate it, the more problematic it gets and the stronger grounds the President is on to not abide by it. I mean, it is no coincidence every President, both parties, has considered the War Powers Resolution to be unconstitutional as a restriction.

Now, that doesn't mean there is not a ground somewhere to find a way for Congress to influence that discussion, but it goes to the inherent problem of, look, how do you have a republican form of government—the founders debated this specific discussion—in which the legislature is the dominant power, especially when it comes to the general operation of government, but you created in a republican, small R, form an executive who is capable of energy, action, immediate things that Hamilton talked in Federalist 70.

That balance is extremely hard to establish. And the things,—the more things Congress does that puts timelines and hampers the executive, they are naturally going to pull back from that. And I think that courts increasingly, in general, will side with the executive, because of the sheer necessity of having that ability to occur with and keep government safe.

That is one of the reasons why, in thinking this through, in many ways, for a lot of the same reasons, I am inclined to, as was generally the case, I think Congress is on stronger grounds when it is shifting to its primary powers, such as the purse, as I have emphasized in my testimony, as a way to control that.

If you wish to control the President's activities in this expanded notion of what they can do in international affairs, then don't fund them. You have the power not to fund, which means if you don't do it, they can't actually do it. It doesn't require a super majority to overcome something. You can pull that power back.

I think those powers that Congress has are very strong, and you should go to your strength first. When you start going out and trying to put timelines on the executive's powers, I think Congress should exert that, they should push, they should disagree, but I think you are just naturally on weaker ground.

The CHAIRMAN. Dean Belmonte.

Ms. BELMONTE. I think that one of the things you need to be very careful about is what constitutes an emergency even prior to the era when the War Powers Act existed. You have two pretty salient examples. In June 1950, when North Korea invaded South Korea, Harry Truman took advantage of the fact that the Soviet Union was temporarily boycotting the U.N. Security Council for its refusal to seat communist China, and therefore, was not there to veto a resolution to put a multinational force in Korea. This became the first, but certainly not the last, unilateral Presidential action that committed the United States to a long-term conflict in which over 33,000 Americans eventually died.

Then the second example, of course, occurred in August 1964 in the Gulf of Tonkin when the Johnson administration used two epi-

sodes, the second of which was determined not even to have occurred, but that was long after Congress quickly and without hearings of any kind, spirited the resolution to passage. Only two Senators, Ernest Gruening and Wayne Morse, voted opposed to that resolution, which basically granted the President unlimited authority to wage war in much of southeast Asia.

So the context matters, and taking the time to determine the veracity of the justification is critically important.

The CHAIRMAN. Professor Pearlstein, you wanted to—

Ms. PEARLSTEIN. I mean, if I may, I wanted to just maybe clarify or emphasize a couple of points. First, I quite agree, and the Framers quite agreed as well, that the President has, within his own Article II powers, the power to—the language is from the convention—repel sudden attacks. Right? So there has never been an argument that the President lacks the power to, for example, defend the United States, or Americans from attack in immediate circumstance or where that threat is imminent.

The good thing that the War Powers Act does is not—or an amended War Powers Act could do, or a new statute that accomplishes something similar, is not disable the President from continuing the use of force. Right? So if you had a funding cutoff after 60 days, for example, that automatically takes effect. It is not that the United States can't fight the war any longer. It is that it requires Congress to vote to fight the war if it continues. This is a straight-up political accountability mechanism that is designed to make the American people and their representatives feel and bear the costs of war.

The CHAIRMAN. Dr. Spalding.

Mr. SPALDING. I think that despite the fact that everybody else, you know, discriminates when you get into particulars, I think in the broad sense, there is probably great agreement which is that, at one extreme, the President clearly needs to have the ability to respond to immediate threats, which could be somewhat broadly defined, but on the other hand, the actual taking the United States into a situation of war, in which the whole country is at war with another country, or a broadly determined sense of what war is, I don't think there is much discriminate there.

The harder cases are all those things in the middle that I think are somewhat unanswered. I mean, the Congress, they did—the Convention did specifically use the word declare war, which I think they meant a formality of taking us into a situation of warfare.

The other thing I think you should think about is on this notion of—if the President has done something, there should be automatic cuts. And within—Congress can do that at any moment if they choose to. They don't need a—a certain amount of time for it to occur automatically. I think it is—Congress should make those decisions and push back at any moment they choose to do so.

The CHAIRMAN. But with respect, I mean, Congress won't, and that has been one of the problems. I mean, that is one of the reasons why I think having this hearing and trying to look at some of these issues is so incredibly important. I am focused on war powers right now, and you know, we have—we back in 2001 and 2002 we passed an AUMF. I think like 17 percent of the Members of Congress who were present when we voted for that are still here.

And yet, when Republicans were in charge, now Democrats are in charge, we just don't have the political will to readjust it or to sunset it or to have these debates. I mean, we should, and there is nothing that prevents us, other than sometimes partisanship gets in the way. Sometimes when the President is somebody of our party, we don't want to put that person in a bad light.

But the fact of the matter is, I don't think any of us who were here, 18, 19 years ago, thought that we would still be using that same AUMF to justify the military actions that we are taking today. And if you think about it, if we don't do anything, a hundred years from now, you could have a President go back to the 2001, 2002 AUMF to justify some action.

Part of the challenge here is that, yeah, we can affirmatively do some stuff, but I think we are going to have to put some checks and balances in place that force us to do some stuff. And people can vote whatever way they want.

I am going to yield to Professor Prakash in just 1 second, but my view—and I have said this because I have been very, very frustrated about this—and my friend, Mr. Cole, and I, we share this concern over these AUMFs that were passed a long, long time ago. I think we do such a disservice to the men and women who are in harm's way that we don't even discuss these things.

Our mission in Afghanistan, for example, has changed so many times and then the AUMF is interpreted to justify a number of military operations around the world. And it just doesn't seem right.

I think a lot of times, we don't want to take on some of these things because they are controversial. Look, when you cast a vote on war, it is a tough, tough vote. It is probably the toughest vote anybody takes. We have had members who have voted for some conflicts that were popular at the time that then became unpopular, and they have to deal with the political repercussions, and I am sure the reverse is true.

But that is our job, and I think sometimes we are guilty of moral cowardice when we don't take on some of these things. What we are trying to figure out is, are there ways, no matter who is in charge, no matter who the President is, that when we are dealing with some of these issues, where clearly our authority is being usurped, that if we don't have the moral courage to act, should there be some sort of a procedure or process in place that forces us to deal with it?

I will yield to Professor Prakash, and then I am going to go to Mr. Cole.

Mr. PRAKASH. Well, Chairman, I completely agree with you. Political scientists describe a rally-around effect once a war has begun and the war is very popular. It will be very hard at that point for Members of Congress to pass a statute that cuts off funding over the President's expected veto. I think expiration dates serve useful purposes. Right? Library books come with a date that you have to return. If you don't have it, you will just keep the book for months or years, right, because you might eventually get around to reading it.

I think Professor Spalding and I have a difference of opinion on the scope of the war power. The power to declare war is the power

to go to war, to use military force. And in the 18th century, most wars were declared from the mouths of cannons in attacks. They weren't actually started with a formal piece of paper. This power was given to Congress so that Congress would decide whether to wage war. Full stop.

No early President ever thought that they could just use force against a foreign nation. All right? All the uses of force in the early years were authorized by Congress in the Washington administration and the Adams administration, et cetera.

So I think the Constitution has a belt, rope, and suspenders approach to war powers. You decide whether to wage war, you can decide how to wage it, and you can decide to cut off the funds. But relying upon the last thing as the only means of curbing wars is a mistake.

And finally, the emergency point. If you gave the President emergency authority to use military force until 10 days after Congress next met, that would be sufficient for him to deal or her to deal with the emergency, and then you would decide whether to continue.

The CHAIRMAN. Right.

Mr. PRAKASH. And I don't think there is anything wrong with that.

The CHAIRMAN. No. I appreciate that. The situation we are in right now is that if Congress were to vote to cut off wars, they could have cut off funds for a war that a particular President doesn't want to admit was failing or was wrong, we would need a supermajority because we would have to override his or her veto.

And so it might make sense, or at least be worth considering, that Congress put in a provision where after a period of time if Congress didn't vote, that Congress would automatically cut off the funds or something like that.

I studied history in college, and you read the books on the war in Vietnam, for example, and one of the frustrating things is, you read now, after all these years, all these accounts of how Presidents knew that it wasn't working, but the issue of credibility and saving face took precedence over making a sound, rational decision as to whether we should continue it.

And again I think that is why we need to figure out other processes or procedures we can put in place to serve as better checks and balances.

I thank you. I want to yield to my friend, Mr. Cole.

Mr. COLE. Just to add onto that just quickly to make a point, I mean, it is awfully hard to cut off funding when there is American forces in the field. I mean, just to tell you, I don't care which side of the debate that you are on, it is just extremely difficult. And I think about the Vietnam era. You have to remember, most American forces really weren't in the field by the time that decision was made. They were out of Vietnam. We had training missions and we mostly were fighting an air war in the country.

So really the executive branch had extracted most of the American ground troops. So it became easier. And that is not to take anything away from what those folks did. I think they got us out of an unpopular and unwinnable war, but it is hard.

First of all, I want to thank all four of you. I really did diligently read my homework assignment this weekend, and I thought there were a lot of really excellent suggestions in there, things that we can literally pick up and do legislatively. Your suggestion, Doctor, about bulking up staff is certainly one of them, or having a legal arm that is commensurate with the legal resources that we, ourselves, have placed at the—

And I would nominate Mr. Raskin to head that up for us, but at the—have an executive branch, that makes a lot of sense. Putting determinative time limits on emergency powers so that within a few weeks, the next Congress has to act to move—those things make a lot of sense to me, and I actually think those are things, when we get done with our hearings, maybe we could sit down and work on together.

I am going to pull your attention, though, to two larger trends and get your comments on them. Because when I see behavior change inside a political institution over time, it usually tells me something outside the political institution that impacts how the actors perceive themselves and what they are doing is going on.

I think about my own congressional district. I live in a district that voted for Dwight Eisenhower twice, that voted for Richard Nixon in 1960, 1968, and 1972, by ever greater margins, that voted for Ronald Reagan overwhelmingly twice, and voted for George H.W. Bush twice. And in all that time, there was a Democratic Congressman there, two different figures, and only one time did their party achieve their objective.

I look at it now. I will promise you this, if I didn't vote the way my constituents vote Presidentially, I would not be there the next time. And in the upcoming elections, the guy that used to run politics—and this has changed dramatically in my time in political life which began in the late 1970s to now—you know, about 95 percent of the people that vote for Donald Trump are going to vote Republican for Congress, and about 95 percent of the people who vote against the President or for the Democratic nominee are probably going to vote Democrat. That is not like any other—you know, so this polarization inside the population really affects what happens inside the institution.

And to think that politicians will ignore that for the sake of defending institutional prerogatives, I think, is to be naive. They didn't have to do that in the past. Literally, the Congressman and sometimes—sometimes it was more important locally than the President of the United States. We don't live in a culture where that exists any longer.

My last election—or in 2016, I happened to mention to a friend of mine that Donald Trump got 66 percent of the vote in my district, I got 70. And he goes, I guess that means you are independent. And I said no, if we get into a fight, I will keep my four, and he will keep his 66. So that is kind of the way it works. And I see my Democratic colleagues in much the same position in their respective districts.

So I am just curious how you think these larger forces, because they are not easily correctible by tweaking institutional changes—as important and useful as I think the things you have suggested would be—how did those things get let loose to where we have

them? And I will tell you, we live—effectively, politically, we live in a constitutional republic full of checks and balances, but we operate in a parliamentary system politically, where there is a prime minister—we call him the President—and where it is very difficult for anybody of that prime minister, that President's party, to consistently vote against him.

It has to be a really dramatic moment, and it is a high-risk moment politically for—any time you do it on a major issue. It is not very often you consistently—well, forget consistently—if it is a big issue, you can do a lot of independence, but it is very difficult. So, one, how did we get there? Two, how to get out of there. And I will start—since you are diligently putting your notes down, Ms. Belmonte, I will start with you and just kind of work across.

The CHAIRMAN. Just make sure your mike is on.

Ms. BELMONTE. Well, I think one of the things that has happened in the last 15 or so years is a lot of Americans just have lost faith in the electoral process in general. You add the cumulative effect of gerrymandering on behalf of both parties, the Shelby decision, Citizens United, two elections in the last 20 years where the winner of the popular vote didn't prevail in the electoral college, and the impact of that is that a lot of Americans have just checked out, who have lost their faith in this body in looking after their interests. Forty-one percent of eligible voters in the last Presidential election didn't vote at all.

And I think that what you guys could do, perhaps, is change the tone. A lot of people feel that it is just white hot meeting white hot at all times, and, in the face of that, it is exhausting and really makes people lose faith that the institutions we have can work.

Mr. COLE. Dr. Spalding.

Mr. SPALDING. I guess the one thing I would put out here is, I think there are large numbers of people in both parties but especially in the kind of movement that elected the current President—and this is no comment on him or what he is up to—who are increasingly of the opinion that it is not clear who now makes the laws anymore.

When you have a situation where agencies, departments, unknown people somewhere down in the bowels somewhere are writing what, for all intents and purposes, are laws at, you know, numbers of many thousands versus hundred-and-some, and oftentimes that then gets enforced and adjudicated within the same body. And that—

Mr. COLE. Could I—

Mr. SPALDING. I think that pushes a lot of people to wonder, what is really going on here? And so there is a lot of frustration about that.

Mr. COLE. I want to agree very much with that. And it is actually—and one of you mentioned discussion about the REINS Act. But this idea of forcing Congress, at some level, in some way, to either legitimize or knock out rules and regulations I think is a really good idea. I mean, we need to put our fingerprints on the murder weapon, so to speak, one way or the other and go from there.

But, you know, a lot of times—and our leaders do this—and I don't say this critically; it is one of their jobs. You know, you will



see leaders protect Members from tough votes because they don't want to risk their majorities. And I have seen it on both sides, where they might not want to vote on a war powers thing because I don't want to put my people out there and risk not just them but also the majority itself.

So, I mean, that is, again, building in institutionally things where we are forced to do exactly what you suggest. And, you know, I have a lot of colleagues on both sides that like to rail against the administrative state, but they certainly wouldn't want to have to vote on all those rules and regulations, because they are high-risk votes.

Mr. SPALDING. So just——

Mr. COLE. If you represent a rural district, just try voting for waters of the U.S.——

Mr. SPALDING. Right.

Mr. COLE [continuing]. And go home and explain that to any farmer in your district. You are going to be in big trouble.

Mr. SPALDING. So just to finish my point. People will like or dislike the policies. That is not my point here. The principle of the American Constitution is consent, which means responsibility. And it is not clear who is responsible anymore.

Mr. COLE. Uh-huh.

Mr. SPALDING. And I asserted a Republican Congress to check a Democratic President and, now, vice versa. There has to be accountability.

I am not against all delegation. Some delegation is necessary, given the scope of government. I am open to being persuaded about this question about how to deal with authorization of use of force—that is a problem and sunseting may be a good solution.

I think it is important to kind of take a step back and recognize the reality for what it is. A lot of what goes on for governing this country, it is not clear who is responsible for it. And that has given the Executive a lot of running room that, in my opinion, they ought not to have, can be misused, and, electorally, they can take a lot of credit for things that they had nothing to do with.

But, a lot of times, you guys don't have a lot to do with that either, because, you know, a lot of the big laws that Congress passes say you shall do this, you shall do that, but the details are left to other people to determine. And the Executive then can step in, through their political powers and appointees, and direct those actions.

Laws are meant to be general laws. This is your problem, right? Laws have to be general laws. But the actual administering of government requires more and more and more detail. That is where the Executive has an advantage. Because if your reaction is, well, we need to get more detailed in our lawmaking to control all this, you actually have to think about the extent to which you actually are granting more power to the Executive, because the executive branch is the one who is going to administer it and execute those things.

So I think that stepping back and looking at it in those broad terms are important. And I would say that the changes over time—again, agree or disagree with what the policies or the objectives were, just the changes over the course of the 20th century in terms

of how we govern, regulations and laws and all of that—has changed the extent of how our system works. And that is the situation in which we are now operating.

Like the policies or not—and you, as an institution, are trying to get back in control of your authority, which is lawmaking. And you have a lot of the, kind of, basic, hard work of legislating in committees and whatnot. That is why, although it is not the exclusive answer, I think getting control of the budget is really important. Historically, Presidents would sit in fear when Congress decided to get control of an agency and get rid of somebody. Your budget power is a strong power you can employ to get control of the actions of the government.

Mr. COLE. I would tell you, before we move on, we actually have control of the discretionary budget. You know, we are in a debate right now over coronavirus. If you looked at the Trump budget, you will see cuts for NIH, CDC, whatever. If you look at the budget the Republican Congress passed and a Democratic Congress now passed, CDC funding in 5 years is up 24 percent; NIH funding is up 39 percent; strategic stockpile is up almost, you know, again, 34, 35 percent; Infectious Disease Rapid Response Fund, a Republican idea, put in now more money in there.

So, actually, the budget, it works. The problem tends to be Medicare, Medicaid, Social Security, the entitlement stuff. We actually control that budget in ways—again, just look at any President's budget—President Obama, President Trump, anybody else—and then look what is there at the end and see if they look remotely alike. They really don't.

I mean, appropriators really are—I say this as one—pretty much give-and-take kind of politicians that find the middle or become experts in areas where they really—you know, I think of our friends Chairman Upton, when he was chairman, and—gosh, who was his counterpart? Think of 21st Century Cures, a great, bipartisan, overwhelming vote that probably had more to do with medical innovation and streamlining and research than anything else. So, actually, that kind of stuff we do pretty well.

Mr. SPALDING. I don't disagree with that. My only point is, if you don't like something the administration is doing in terms of executing one of your policies, one of the most powerful things you can use is the phrase, "no money shall be spent on . . ."

Mr. COLE. Yeah. Couldn't agree more.

Dr. Pearlstein.

Ms. PEARLSTEIN. Thank you.

Backing up for a second to your question about the causes of the intense polarization, I included in my testimony—and there has been some wonderful political science done that documented exactly the sense that you were describing about the polarization of your district and others across the country. That is real.

And its causes are, I think, many, most of which are beyond my pay grade in the sense that, right, I am a constitutional law professor. But I do want to flag a couple because they are, potentially at least, within Congress's ability to engage or change.

I think one that may not fall into this category is the extent to which the existing primary system favors non-moderate members of both parties. So the most motivated voters come out for pri-

maries, and that tends to favor less moderate candidates. And that is a significant problem. For this, you need an election law scholar and an election law hearing, but that is something I think we can't underestimate.

Equally, money in politics is a growing problem. It has been a problem for a while, but the ability of outside groups, of both sides, to spend effectively on limited amounts of money has also tended to increase polarization. It favors the extremes. That is where, often, the money comes from, and that is a problem as well.

Social media requires some attention that has been not just because of outside interference but internally becomes a, sort of, source of growing polarization. It makes it easier. And that is something that requires, I think, congressional attention, ultimately, as well.

And then, finally—and this gets back to more in my neck of the woods—the response in the executive branch to the reforms of the 1970s, which we talked about some—the War Powers Act, the National Emergencies Act. There was a, sort of, suite of legislative efforts to, in response to perceived excesses of the decades before, constrain executive power. The response within the executive branch, and in particular among executive branch legal counsel, has been to very effectively, over decades, explain, develop interpretations of both the Constitution and those pieces of legislation that effectively make them toothless constraints.

Now, it is not the only reason that they are toothless or less toothful constraints, but the role of the Office of Legal Counsel within the executive branch—some of my best friends are veterans of the Office of Legal Counsel, but they are executive-minded lawyers, and they are good lawyers, and Congress has no mechanism for—we favor competition in every other way—no mechanism for competing regularly with respect to voicing the constitutional understanding that this is not, in fact, the power of the Executive. We are not acquiescing to this assertion of authority. OLC might say it; that doesn't make it the law.

Mr. COLE. Yeah. I thought that was a great point that a number of you made.

Dr. Prakash.

Mr. PRAKASH. Representative Cole, I am not a doctor, but my parents will be happy that I became one today.

Mr. COLE. I have just promoted you.

Mr. PRAKASH. I think your question is very perceptive. And I, too, feel I am little—I am not quite situated to answer it, because it is not really a legal question; it is a culture question.

I think the fact that there is this hearing today and that people on the committee are genuinely interested in working together and not trying to score points against one or some other President, I think, is a good thing.

I think when Members of Congress model good behavior, people are perhaps likely to take lessons. I think of Senator McCain talking to some group where he was running for President and someone said something about Senator Obama and he chastised or kind of corrected that person. I think that is good behavior. So I think tone, you know, is important for you folks to maintain.

I think this would be bad for some of you, but, you know, I think the gerrymandering problem is something you can fix. You have authority to regulate Federal elections. You can set districts for the States, and you can set them randomly. What happens now, as you know, the State legislatures sort of cram a bunch of Republicans or Democrats in a particular district, and that tends to make the Representatives from those districts more either right or left. And that is——

Mr. COLE. Let me—not to contest, but as a guy that used to do this stuff for a living, I will tell you, that is a lot less of a factor than most people think. My district hasn't been gerrymandered, and it has changed dramatically. And, in my State, every district was drawn by Democrats for 100 years. We reached a point under that system where every seat was a Republican seat, in terms of the congressional delegation.

So, again, look, I used to practice the dark arts, so I understand, you know, trying to tilt the table around the edges. But I also know that that is not really what has driven this. I mean, I think those kind of technical solutions miss the bigger point.

You know, when I first got here, all of Arkansas, except one seat, was Democratic—three out of four House Members, both Senators—right next door to my State. They are all Republicans today. And it wouldn't matter how you drew those lines; they are very red.

When I first got here, Connecticut, three out of the five Members from Connecticut were Republicans in 2002. They are all Democrats today. And you can draw the line however you want, they are going to stay Democrats.

So there is something much deeper than politicians tilting the table here going on in our country broadly through the political culture. And all I am suggesting is that manifests itself inside the institution in terms of the kind of behavior individual Members follow or feel the need to follow.

And I say that with no judgment on either side. I am just telling you, anybody that is up here is pretty politically pragmatic if you are here for any length of time, whether you are on the left or right. So that means they are usually making pretty pragmatic political decisions, at least in terms of their individual interests. And that doesn't mean they are not capable of rising above that and thinking of the greater good. I have seen a lot of instances of that on both sides of the aisle since I have been here. But practicalities will drive decisions 95 percent of the time.

Anyway, I have one other question. And if I interrupted you, I am sorry.

Mr. PRAKASH. No.

Mr. COLE. And it is the reverse of this problem. And this is, again, just to get your thoughts on, because you study—and this is almost an inside-the-institution question.

I will tell you, I sat for a while in Republican leadership and, during that period of time as an elected Republican leader, basically not going to any of my committees. And I am talking to other Republicans, and almost every meeting is about how we can beat the other guys, how we can beat them legislatively and how we can

win electorally. It doesn't mean policy doesn't come into it, and you are formed by your previous policy.

And I suspect that is true—as a matter of fact, I know that is true, when I talk to my Democratic friends that occupy similar kinds of positions. The minute you become a leader at the higher levels, you are not going to committee meetings anymore.

I bet you I talk to more Democrats in a day than any member of Democratic leadership talked to Republicans in a day. And vice versa, I bet my colleagues at the committee levels talk to more Republicans by going to their committees, interchanging, interacting, maybe working on legislation. My friend Mr. Perlmutter just, you know, brought a marijuana thing that brought, my God, Christian conservatives and, you know, liberal California people together on the same side. I don't know how he did it, but he did it.

The CHAIRMAN. It might help fix the tone.

Mr. COLE. It might help fix the tone, yeah. I already think you guys are entirely too mellow.

But, seriously, you know, the bigger acts of bipartisanship that I see tend to be from individual Members, you know, actually operating in the milieu because they are building the relationship back.

The way we operate, leadership around here, they don't do that. I mean, I guarantee you the leadership of the two parties very seldom, if ever, sits down, short of a national crisis like, you know, TARP or something like that, and says, "Okay, I wonder, this year—we all know our entitlement programs are out of control. Are there two or three things we could do together that we could—or any things like that?"

They are not having the kind of discussion we are having right now, thanks to my friend Chairman McGovern, where they are talking—we know we all agree the institutional powers of Congress have weakened. I guarantee you every member of Democratic and Republican leadership probably agree with that, just like every Member, I think, in the body would agree with that. You think any of them are talking about how to reassert that? I will guarantee you they are not.

They are not sitting down, having read the papers you were nice enough to prepare for us, and saying, well, here are two or three things that are not particularly partisan, you know, that are institutional, if we are going to talk about bulking up our legal—I think that is not a partisan thing; that is an institutional argument—if we are going to talk about, you know, declaring national emergencies end within 6 weeks of the next Congress unless Congress reaffirms, or if we are going to talk about we are going to have some congressional say over this rulemaking authority that the bureaucratic state is churning out, whether it is a Democratic or Republican administration. Those discussions just simply aren't happening at the highest level.

So I say that both to highlight it and maybe to flag that for your consideration going forward, because we have to think of some ways that the great acts of bipartisanship don't just start in a committee, like Fred Upton on 21st Century Cures. I guarantee you, my friend Rosa DeLauro and I worked very well together on funding for NIH and CDC and all that. We have a shared consensus about: This is a national priority, we don't care what Presidents

say much, we are going to put more money here. And we have. And we did it under Republicans, and we have done it under Democrats. We have done it with Democratic administrations and Republican administrations.

So there are places where I see this occurring. I see it on the Armed Services Committee very regularly, a very historically bipartisan committee. Yeah, they have their fights, but, most of the time, the bills roll out of there, like, 62-to-2 after they have gotten everything worked out.

So, you know, I don't know how mechanized—well, I would just shoot up this flare, because we have to get our leaders sitting down, thinking about institutional kinds of concerns as well. It can't just be the Rules Committee. We have set up—we have a very good bipartisan committee on the modernization of Congress, but you have to get Speakers and leaders and whips around the table talking about this stuff and say, "Well, I guess I will just set this up. And you guys go over here and kind of think about that. We are going to try and play the real game," which is getting our side back in power or keeping our side in power and executing the President's agenda of the party to which we belong.

Anyway, if you have any thoughts on that, fine. Otherwise, I will just turn it back to my friend, the chairman. And I have been doing a lot of thinking out loud, but your papers were very provocative and helpful in that way.

Ms. BELMONTE. It is unquestionable that the whole culture of Washington has changed dramatically in the last 50 years.

It used to be common for Representatives to live in Washington. Not many of them do that anymore. The dictates of having to continually raise money not only for your own campaign but for the party itself create a lot of necessity for travel, for being in the home district.

I think of Lyndon Johnson, who was very good friends with Senator Everett Dirksen, who would come to the White House all the time and talk about that. I don't imagine those kind of bilateral relationships, bipartisan relationships exist anymore. And I think that has just really undercut not only the willingness but the opportunities to build the social capital that can lead to the places where compromise can be struck.

I think the dramatically changed media landscape has played a huge difference as well. It would have been really difficult for a first-term Representative prior to the age of cable news and the internet to just catapult to the national stage and develop a reputation of being a rebel to the party leadership. That would have been really difficult in the age of someone like Tip O'Neill.

And all of that collectively, I think, has created the opportunity where you are not governing as much as you used to because of the other dictates on your time and the travel.

Mr. SPALDING. I agree with that. But I think, to put it in the context of what we are talking about here, what you have described is, itself, a symptom of the general problem we have already kind of laid out. I think we to think more about politics, which I don't necessarily mean in a partisan sense but in a grander sense. Congress has shifted authority to the executive branch, and you have to think about the political implications of that.

You know, the stories of the past, right, people would come to Congress, because that is where the power is, to get something done or prevent something. That is not as true anymore. And, largely, what do they do? They want to go lobby the administration, because that is where the real decisions are made. The political balance of power has shifted. And, as a result, I think that has changed how a lot of people think about their own political interests.

Remember, in "The Federalist Papers," Madison tells us, the key is to make the interests of the man, meaning you folks—connect that with the place. You have an interest in your institution. And that is key to making this work.

Your example, I think, is exactly right, which is that a lot of the bipartisanship is kind of personal bipartisanship. You know this person; you work out something. Rarely is there that type of bipartisanship in which the individuals, even though they disagree, think institutionally.

Congress very rarely thinks as an institution. It either thinks individually as Members, my own reelection, or how do I get to be President of the United States because that is where the political power is, or, increasingly, because of that shift of power, leadership in both political parties thinks the more important thing is to have partisan control in order to support the Executive in their party because that is where the real authority is, as opposed to, whether it is a Republican or Democrat, having some institutional separation and sometimes pushing back, because that is necessary to defend your institution.

And Congress doesn't think that way as much anymore because—part of it is that the political landscape, intentionally and unintentionally, has shifted the focus of politics. Morris Fiorina wrote a famous book, "Congress: Keystone of the Washington establishment." That was back in the late 1980s. Now, I think that is no longer true. I think the President, by which I mean the bureaucratic presidency is now the keystone of the Washington establishment.

Mr. COLE. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

And let me just say, I agree with everything Mr. Cole just said. The thing is, though, is the tone, right? That is very difficult to change, given the attitudes in the country and the media and the polarization on a lot of issues. Maybe we all need to be in intensive therapy up here to try to work some of our issues out.

But short of that, I mean, the question is, how do we do our job, and not avoid doing our job because it is politically inconvenient or it is uncomfortable for us? And are there processes and procedures that we need to put in place? We talked about war powers, but we have national emergencies that were declared when Jimmy Carter was President of the United States that are still in place. I mean, that doesn't make any sense, right?

And maybe, going back to what Mr. Cole said in his opening statement, we are not going to be able to fix everything, but maybe there are some areas where we can actually, you know, make some tweaks and legislative fixes that will actually eliminate some of the

stuff that I think we all can look at right now and say, this doesn't make any sense.

Mr. Hastings.

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

And toward that end, one thing that we can do is use the subcommittees of the Rules Committee to perhaps dig into the weeds a bit more and come up with a handful of solutions.

Like Mr. Cole, I read a lot of this material, and you all have done us proud with your presentations.

Regrettably, everything around here is top-down. We have been here an hour and a half, and we have heard from the two top members. And that would be virtually the same thing if you were in committee. You hear them bragging about how he and Rosa DeLauro got along. Well, there is something called a manager's amendment at the end of that. And if you are a backbencher, you have hell to pay to try to get some understanding inside of that particular sphere.

I think what happens here and what has happened—and I am the longest-serving Member on this—not this committee, but in this committee now, I am the longest-serving Member. I have been here 27 years. And when I came here, it was a pleasurable place. It is no longer. And I fear that it will never be again.

I served on two little committees that existed then, the Post Office Committee and the Merchant Marine Committee. Amazingly, I got more legislation done in 1993 than I have in 2019 and 2020. And that was because of relationships.

And, yes, they did stay here, but more than stay here, they got to know each other. And what happens today is we don't get to know each other. After I was here maybe 6 years, you could just point to me somebody on the floor, on either side, and I could pretty much tell you where they were from, what their committees were. And that is because we got to know each other. And that is not happening.

And we are driven largely by our constituents that also call us to have this immense polarization that is going on in this country.

Mr. Spalding, you said something that distressed me. And I promise you I am not going to use 30 minutes. But a part of what you suggested in your original commentary was that the courts are not going to solve our problems. While I tend to agree, it is distressing.

You went further, in a second portion, to say that the courts generally are going to side with the administration. And that doesn't mean this administration; that means any administration. And I have seen evidence of that, as have you.

But I think those Article III judges have a specific role to play. And just in those two little committees that I served, I could write a letter, and in less than a month I would hear from the bureaucracy. I can get 100 Members to write a letter now, and I will be damned if we will hear from the bureaucracy.

Not this administration; let me criticize every one before this administration, including—we have spent a lot of time here on the War Powers Act. I criticize Barack Obama actively about Libya and the War Powers Act. And push back real quick and I will stop.



All this business about "Congress doesn't have the time to declare war." How did Franklin Roosevelt get those Members to declare war in the Second World War? They didn't have no damn internet. You understand? They didn't have no airplanes that flew fast. But they managed to get back here and to declare war. And that is our responsibility.

And I don't care—I don't want to take away the President's powers to go forward and to do whatever he or she feels is necessary to defend the United States of America. I want to collaborate with that President. I want to have a clear understanding about why we are doing what we are doing.

I will leave it at that, because there are so many members. And if you all don't mind, I will go offline and write a few questions to you. But, remember, we would be well-advised, those of us here, not only to hear your words but to remember that, although we may be of a particular philosophy, ideology, persuasion, and parties, we are also stewards of this institution. And we owe it to those who come after us to leave it as strong as it can be so it may best serve the American people.

And, Dr. Pearlstein, I had originally wanted to talk with you about something Mr. Woodall and others and I have spent a lot of time on. One more vignette from my history. I went to very segregated schools—very. And by that, I mean I rode 30 miles each way to go to high school, past three white high schools.

I got to a high school that did not have a library, did not teach foreign languages, did not teach geometry. And somehow or another, the elementary school I went to was four grades.

But you know what? I knew who the Governor was. I knew who the Congressperson was. I knew who the superintendent of schools were. I damn sure knew who the sheriff was. And, all things considered, they were doing a better job of teaching civics, even though they didn't deliver newspapers to our area of the town. The teachers would somehow or another cut out old newspaper articles and bring them in and we would have civics lessons.

I maintain that something has gone awry in this country when it is that one-third, as you said, of high school or college students—college students don't understand the dynamics of separation of powers.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Dr. Burgess.

Dr. BURGESS. Thank you.

And thanks to our witness panel for being here today.

A rare moment, I find myself in agreement with Mr. Hastings about the teaching of civics. And—

Mr. HASTINGS. You ought to try it. It doesn't hurt.

Dr. BURGESS. Yeah, it does. Yeah, it does. Let me correct you on that.

And I also agree with Mr. Cole about the fingerprints being on the weapon. I just disagree that it is—maybe a weapon to inflict a self-inflicted injury, not an injury on someone else.

As—and I have not spent nearly the amount of time here in Congress that other people have, but just my observation is the erosion of Article I powers is something that happens gradually. Sometimes we see rather pronounced demonstrations.

Chairman McGovern and I, last night, had a little discussion and disagreement about this supplemental bill that is going to go to the floor under suspension. Yes, coronavirus is an emergency. An emergency was declared in January. The Secretary of Health and Human Services enacted a travel ban at the end of January. We spent the entire month of February in one of the committees of jurisdiction that I also sit on, the Energy and Commerce Committee, and did not have really a single hearing. We added about an hour onto a budgetary hearing right at the end of February.

But we are the committee that is supposed to get the data. We are the subject-matter experts. We are supposed to interview the people from the administration and come up with the information to help our friends on the appropriations side come up with the correct answers and the correct funding for those answers.

But, you know, real-time, real-world, we have given that up in this crisis. And this generally does happen at the time of a crisis. It is not the first time it has happened. I probably predict it will not be the last time it is going to happen. But every time we allow that, as the United States House of Representatives, we lose something in the translation.

And there was a lot of criticism when Secretary Azar came to our committee last week. And, again, he was there for a budget hearing, which I was grateful for. We need to speak to our agency heads about their budget. And then, right at the end of it, he had the hour of coronavirus discussion. There was a lot of criticism for the administration's budget that was produced. Mr. Cole has already referenced, there were some cuts in CDC, some cuts in NIH.

Well, that was the President's budget. And, yes, it was prepared in December before we knew what was happening in January, so, yeah, you do have to make adjustments as the world changes. And it can change quickly, as we all know. But we can't complain about the President's budget when we don't do a budget.

And we are not doing a budget this year. I take some exception with what my friend from Oklahoma said. It is not a budget. It is an appropriations agreement that we are coming to. It is a spending agreement. But it is not based upon a budget. I actually believe we should do a budget and we should budget for emergencies, because we always seem to have an emergency every damn year.

But we are not doing a budget. I don't see that we have the bandwidth to criticize the administration for getting their budget wrong in December before they knew that this crisis was going to happen. They propose; we dispose. We are the ones who are supposed to control those budgetary pens and write that budgetary agreement.

So I realize that is more of a statement than a question. I will be interested to hear if anyone has any comment on that.

Also, just on the subject of the budget—I am sure Mr. Woodall will do a much better job, if he has not already done so. Mr. Cole already alluded to the two-thirds of the budget that we no longer control in the appropriations process. And, again, that didn't happen overnight. It has happened little bit by little bit. I think that needs to be reversed.

I agree with Mr. Cole, those would be very, very hard votes. They would probably be career-ending votes for some Members. But,

honestly, that is what we are supposed to do: make those tough votes and be held accountable. And if we are not representing the folks back home, they will get a better idea about who can.

I recognize how hard it would be to reclaim all two-thirds of that budget, but I would welcome anyone's advice or suggestion to begin to bend that curve back a little bit and bring that power back into the legislative branch where it belongs.

All kinds of mandatory spending out there. Yes, there are places, I think, where we should perhaps think about bringing some of those programs back on budget. And I realize the reason they have gone off budget is because no one wants to touch that. That is like the third rail of politics; you touch it, you die. But we need to do it for the sake of the generations who are yet to follow us.

And, again, I realize this has all been more of a rant than a question, but I will be happy to get your input on any of those observations. I guess we will start at this end this time and go that way, since Mr. Cole went the other direction.

Mr. PRAKASH. Well, thank you, Congressman.

I, too, share the concern that two-thirds of the budget is on autopilot and never voted upon by Congress, because that obviously leads to a situation where some things are never reconsidered or relooked at because they are seen as sacrosanct.

I wasn't prepared to talk about the budget process or the lack of a budget process for the entitlements, but, my recollection is that Ronald Reagan got together with Democrats in the House and passed the Social Security Reform Act. And I think it is possible—I was hopeful that President Obama—he had a commission that was headed by Bowles and Simpson, and I was hopeful something would come of that. I think that is what needs to happen in order for people to have cover to do something that would otherwise be super-politically-unpalatable.

I think you are right that a lot of people would try to exploit the situation, saying you voted to cut this or that. But it is sort of irresponsible to just spend money without thought for decades upon decades.

Ms. PEARLSTEIN. Thank you.

I guess I would like to respond generally to the concerns that I think both you and Mr. Cole expressed, because I think they are related. How do you carve out, in a highly polarized political environment, space for serious conversations that are politically difficult and in many respects politically impossible in different ways?

Congress used to do a better job at creating bipartisan spaces. And you can call these, if you were in any other organization, institution-building spaces. But Congress did this through, for example, creating bipartisan commissions. It has done that in the past on immigration and after 9/11 and in many other circumstances. And these commissions, for some reason, have gotten a bad reputation as never quite producing the results that they want, but they sometimes do produce results. And they certainly produce results more often than not having them produces results. So those kinds of commissions.

Congress having its own agreed-upon source—CRS is a great example. GAO, historically, has been a great example. As our world becomes technically increasingly complicated, a congressional agen-

cy, like OTA—it doesn't have to be the Office of Technology Assessment; it can be a new and better version of the Office of Technology Assessment, but something that enables Congress to have at its own bipartisan disposal its own agreed-upon set of facts and understandings about how social media might be effectively regulated, why the problem of emerging infectious diseases gets worse, what we can anticipate for growing healthcare costs as the population ages over years.

These are all problems that require not only the ability to meet together across bipartisan spaces and times but also having an agreed-upon set of information. And we are, as a society, at a point where even that is becoming difficult.

Congress is in a wonderful position to recreate some of those spaces. And while one might be limited to one-third of the Federal budget, that is an enormous amount of money. OTA, when it was zeroed out, had an annual budget of, what, \$20 million, \$30 million a year, right? That is a lot of money to me, but I don't think it is all that much money to you guys.

So I guess I would—I talked about some of this in my written testimony. I think those organizations are important and useful, not only because they serve an educational and information-generating function but because they also make it possible for you to begin to remember or regenerate those muscles of working together institutionally that have atrophied over recent decades.

Mr. SPALDING. No, I agree with the concern you have raised. And I guess I would premise it by saying, it is often the case, among others who have suggested reforms in the past, we are always looking for technical fixes. People always want to find the silver bullet. And I guess if there is a theme here, my theme is, no, it is actually the hard work of governing that needs to be reestablished.

And the fact that two-thirds of spending is automatic, there is still a third. But, you know, it really is the principle of the matter. You guys are the legislative branch, and that is your responsibility.

I don't disagree with Congressman Hastings' point. My point was not to neglect using the courts. The courts are there for a purpose. It is just that, I am more interested in seeing Congress assert itself as an institution as opposed to running to the courts. It's the same thing I told the Republican Congress when they wanted to do that when they had the majority. You want to be institutionally stronger, it seems to me, and relying on the courts makes you weaker.

And the other general point I would make is that I am struck by how important commissions are, but the question is, how do you structure them? I think one of the most successful ones that solved a difficult problem was the BRAC Commission. Congress needed to shut down a bunch of bases, and no one wanted to do this because it was in their District. So you ask the commission to do it, and Congress, as a whole, does it together. Maybe there is something like this here.

I am not sure it is a particular piece of legislation. You are going into an election where it is not clear who is going to win, but you are also in an election cycle. You need to do something where you figure out what the pieces are. There are going to be tradeoffs. We are going to reduce this power—that might be what the Republicans want—and, in exchange, we are going to reduce this power

that the Democrats want to reduce. There will have to be some sort of compromise. But then you could have it not go in to effect until after, not this election, but maybe the one after that. It would be put farther in the future.

It has to be a bipartisan reform. I think it has to start by reestablishing the premise of the general matter as we have been discussing it. I don't believe you can't bite it all off at once because it would be politically suicidal, in most cases.

But, I mean, take the two-thirds of the budget that are automatic. Well, you might keep that going, but at least if you take a vote on it in a regular budget you get into the habit of voting for budgets. And those kinds of things, I think, are actually quite useful.

Ms. BELMONTE. I think that, in addition to the tone, the context all of this is happening in really matters a lot as well. You know, for millions of people in the United States, the promises of globalization just haven't worked out—you know, the decline of American manufacturing, the winnowing out of many communities that had a local employer on which many people depended that is no longer there, the opioid crisis. And we are watching our country shift dramatically—an aging population, the decline of a college-age portion of our population. There are so many things converging, and it just amplifies that sense of helplessness and hoping that you will make those hard decisions on that 70 percent of the budget that is mandatory spending.

As we watch income inequality just continue to exacerbate, we have a distressingly large number of Americans who can't handle an unexpected \$400 expense. And so a sense of desperation rises in diseases of despair.

I just hope that we can make those hard decisions, because the fate of our country is hinging on what 535 people in this body do.

Dr. BURGESS. I just have one further observation, Chairman.

I am fortunate to serve on the Committee on Energy and Commerce. We, over the past 5, 7 years, have passed several landmark bills: the track-and-trace bill to secure the safety of our pharmaceuticals in this country. Certainly 21st Century Cures was one of those big bills. A year ago, we passed something dealing with opiates called the SUPPORT Act. Several years before that, we repealed the sustainable growth rate formula and the follow-on from that.

The one thing I have learned from passing those large, landmark pieces of legislation is it doesn't end at the signing ceremony. You have to watch it like a hawk over at the agency. If you don't do—I would even hesitate to call them "oversight hearings"; they are implementation hearings. Has it been implemented according to congressional direction, or has there been some interpretation?

And I could cite you numerous examples, but I won't. But it is a constant feature of our—at least our job when we write those authorization bills in the other committee that I am fortunate enough to be on.

When we write those legislative treatises, we need to have the courage to follow them through. We all have busy schedules. There is never enough time in the calendar. There are never enough hear-

ing rooms. But we need to make it a priority and make sure that we do it.

With that, I will yield back.

The CHAIRMAN. Thank you.

Mr. Perlmutter.

Mr. PERLMUTTER. Thank you.

Just a lot of thoughts, starting with ambition. And I think each of you mentioned Madison and ambition and that that would be sort of a limiting factor to the loss of power. The other, sort of, contrary philosophy out there is the path of least resistance. And of those two, path of least resistance has been winning. And, honestly, I want to thank Mr. McGovern and Mr. Cole, because I think today is going to be the last day that the path of least resistance wins automatically.

I will give a quick story. There are a lot of people that have questions.

But my backyard—I have two backyard neighbors, one a very conservative family, another pretty liberal. And a few years ago, I am cleaning up in the backyard, and the gal, pretty conservative gal, comes up to me, and she goes, “I can’t believe Obama has 212 emergency actions.” I went, “What? What are you talking about?” “He has brought forward 212 rules or something based on emergencies.” I said, “Well, that can’t be true.” So I kind of, like, stepped back and—you know, he had done a lot of emergency things, starting with DACA and a bunch of other stuff.

Well, about 3 months ago, I am in the backyard. The other side, the liberal guy, he says, “That Trump, everything he does is based on an emergency. There aren’t that many emergencies.” And, you know, that is sort of what has been going on here. We have allowed the power to move to the executive branch.

And, Dr. Spalding, you know, I couldn’t agree with you more. The administrative branch just keeps growing. And your comments about policy reformers—I went back, I was looking at everybody’s slogan, you know, “Make America Great Again” or “Obama for Change” or, you know, whatever it might be. I mean, back long ago, it was “The buck stops here” or “I like Ike.” But now it is about some sort of change in policy, and people look at it that way.

So I think—and Mr. Cole kind of let his hair down. I mean, part of the problem here is we have to be intentional in resisting this, you know, “Let’s let them do it.” You know, we will give them really broad discretion and just let it go. You know, we will move on. We have to be intentional. And we have to have some intestinal fortitude, because there will be some prices to pay.

So I guess I would just like to ask the panel: We are dealing with coronavirus right now. Emergency setting. And I think that is one we could all agree is an emergency setting, how far it spreads and how quickly it continues to spread. Obviously, we need to address it.

So, as our appropriators, Mr. Cole and Ms. DeLauro and others, are putting this piece of legislation together, how, as historians and constitutional experts, should we limit this so that we don’t, again, just give something away like we gave away earmarks or we gave away the emergency powers?

How in that context would you help us—as quick as you can, because I want to turn it over to everybody else—you know, kind of limit this legislation we have before us as a turning point where, okay, we recognize the emergency, but we are not going to just give you the keys to the car for the rest of time?

Professor.

Mr. PRAKASH. Well, Congressman, that is a very tough question. I don't really know anything about coronavirus other than what I have read——

Mr. PERLMUTTER. But from just a legal drafting standpoint, I guess, is what I am asking you.

Mr. PRAKASH. Let me just throw out some ideas.

I mean, it is possible that you pass an appropriation but you don't make it large enough—or you make it small enough that they have to come back in a month and update you with what is going on. And maybe that is how you keep the keys to the kingdom.

You know, my sense of appropriations is there are lump sums and then the authorizers are supposed to tell them what to do with it. I don't know if that is happening here or what is going on. But if you have a sense that they are giving away the keys to the kingdom, there is clearly something wrong with the bill that is before you.

Mr. PERLMUTTER. Okay.

Ms. PEARLSTEIN. I am, you know, like any good lawyer, really reluctant to comment on legislation I haven't seen.

Mr. PERLMUTTER. Just from a legal writing standpoint.

Ms. PEARLSTEIN. So let me say three things, very broadly, about how Congress should think about its role as legislators, right? Every bill, you have three moments of asserting your views and regulating effectively. One is in directing the Executive or whoever it is—HHS, CDC, whoever, right—directing them specifically what you want to do. You want to, say, regulate in emergencies? Fine. What do you mean, “emergency”? Do you mean something that happens every day or that is likely to recur repeatedly, or do you mean something, for example, that is time-limited, right, something that a reasonable scientist or officer of the CDC would expect would not recur or would last for a limit period of time, right?

So there is a lot to be done with drafting. You can condition funding. If condition X doesn't occur, right, then these funds aren't available. If condition X occurs, then these funds become available.

So that is just at the direction stage. Then you have options, when legislating in the first place, for imposing monitoring. And that can be, come and testify, but it can also be, you shall every 15 days or 30 days——

Mr. PERLMUTTER. Report.

Ms. PEARLSTEIN [continuing]. Or whatever it is report, and that report shall be detailed, and that report shall include the guidance of whichever relevant experts you want to hear from, and that report shall, for example, be certified by Dr. Fauci or whoever else you want to make sure is engaged in that process.

And you can have, you know, requirements of consultation with Congress, requirements of consultation—you can build in monitoring in lots of different ways, right?

And the third kind of thing you should look at every piece of legislation to make sure it has is some sort of termination or calendar, by which I don't mean, "These funds run out on May 1," necessarily, right, but which leaves Congress holding the key to say, this runs out after—pick your date, right—90 days, after which time Congress must reauthorize, or after which time whatever.

Mr. PERLMUTTER. Okay.

Ms. PEARLSTEIN. So all three of those things are options for ways that Congress can keep holding the keys.

Mr. PERLMUTTER. Perfect.

Dr. Spalding.

Mr. SPALDING. Yeah. I—

Mr. PERLMUTTER. And I wanted to say one thing to you. I mean, I think you are absolutely right. The power of the purse is the ultimate—

Mr. SPALDING. Right.

Mr. PERLMUTTER [continuing]. Power. This committee, last year, when we were in shutdown, we would meet about every 2 days, hoping that there would be some compromise that would allow us to open the government again. I mean, that is a blunderbuss, big-time hammer to use, and not one that we want to use very often.

But to my question.

Mr. SPALDING. So I don't at all disagree with the points that were made. Those were well-said. And I will actually make a non-budgetary answer, partially—

Mr. PERLMUTTER. Okay.

Mr. SPALDING [continuing]. Which is, look, the authority here is you are going to use your power of the purse. And the President is in a position where he needs you to use the power of the purse, which means you have what we call leverage.

Congress should declare a national emergency. Who says only the Executive can declare a national emergency?

Mr. PERLMUTTER. You hear that, Mr. Cole?

Mr. SPALDING. And you—

Mr. PERLMUTTER. You might put that in the bill as you guys draft it today.

Mr. SPALDING. So if you object to the Executive having that power, why don't you do it and preempt him?

Mr. PERLMUTTER. I mean, he is drafting this bill today, so that is why I am—

Mr. SPALDING. And then all of a sudden you have both branches defining what national emergencies are—

Mr. PERLMUTTER. Thank you.

Mr. SPALDING [continuing]. And then you have a conversation and you have leverage because it is a must-sign piece of legislation because it has budgetary authority behind it.

Mr. PERLMUTTER. Thank you.

Mr. SPALDING. That is an example of exerting the spending power.

Mr. PERLMUTTER. Thank you very much.

Ms. BELMONTE. I have nothing to add.

Mr. PERLMUTTER. All right. Thank you.

And I yield back.

The CHAIRMAN. Thank you.



Mr. Woodall.

Mr. WOODALL. Thank you, Mr. Chairman, and thank you for holding the hearing.

Thank you all for being here.

I am trying to think about that pathway back from here. We talk a lot about small ball versus big ball here. And I think a lot of our challenge is just bad habits.

I am thinking about the list of things that you just gave Mr. Perlmutter, for example, those oversight-related items. Well, I put all sorts of conditions in bills, but very rarely do I come back and enforce those conditions as Congress. If anything, I am going to go file suit and I am going to ask Article III to enforce those conditions.

And so there are many things that we could do that will not only accentuate the feckless Congress of today but will further weaken us tomorrow. So what do you see as the pathway back, those incremental steps?

You mentioned it, Professor Prakash, that we should play to our strengths, right? There are those things that are not naturally divisive but we have just gotten into bad habits. Appropriations bills, right? It used to be unthinkable that you could get to September 30 and have not worked on the appropriations bills. Now it is probably more unthinkable that you are really going to make time to work on the appropriations bills at all. You will just pass an omnibus on September 30. And that just took two decades to take hold.

So help me with those beginning steps back. I know you are not behavioral specialists; you are constitutional specialists. But because you have seen the pendulum swing over the decades, help me with that.

Mr. PRAKASH. Congressman, I think that is a wonderful question, and as you said, we are not the—I am certainly not a behavioralist. I wonder if Members of Congress are conscious of the time they spent doing various activities, and then thinking about how they ought to reallocate it in a way that makes it more possible for them to conduct legislative business as opposed to the myriad of other things they have to do.

And I think, you don't do that, you don't have a sense of what you are doing with your day. I think—and speaking for myself, I sometimes get a message on my phone: You were on the phone, you know, an extra 5 hours this week or something, or you played this game for an hour, and those things add up.

And so maybe that is the small-ball reform that would conserve your time to do things that you think are more important like legislation.

Mr. WOODALL. I serve on the Modernization Committee that is looking at some of those items, and what we found is the best way to do that is to get folks to focus on things. I just had to come from another hearing to be in this hearing. But guess what, that was transportation, and I don't want to give up the Transportation Committee, and I don't want to give up the Budget Committee. And I don't want to give up the Modernization Committee or the Rules Committee either. And so here we are. My bosses back home encouraged me to do more things less well instead of a single thing

well, but I appreciate that the targeting is absolutely something that we are trying to sort through.

Does anybody else have any wisdom on the steps back?

Mr. SPALDING. Thank you. No, I think you are right in terms of thinking that, through broad state, it is probably impossible to identify them in particular ways. But I would say there are at least three phases—again, putting it in broad terms. The first phase is having the will to do it. You know, Congress speaks as an institution through its legislative function, and I believe it is actually the most powerful of the three branches. But it needs to talk that way and act that way. So I think part of it is just establishing the will. So that is my psychological answer, I suppose.

Second, Congress should play to its strength. The place to start is where you are strong, which is why I have emphasized the budget power. And then, once you reestablish that strength, third, you want to use that strength to exert yourself in other areas.

Now, that is not to say you don't fight those other fights if they come along, as you may choose, but you should have that in mind, which means you are really taking the steps to rebuild your core strength, and there I think you are right to do so. Budgeting is the key power. I have always wondered, for instance, why there are a certain number of appropriations committees, or why you have to do appropriations in a particular order. These are all political questions. And the number of committees is based on the number of divisions within the budget that comes from the President.

You could do your ordering of your appropriations differently. You could get the easy things off the table or save the things you want to have your most leverage over until later. I mean, just think strategically about where your strength is and how to use that as powerfully as you possibly can. And I would start there, and then engage the other questions as they come up.

If you need to have a fight over a particular authorization, I am not opposed to that. But I think this is a long-term problem, and part of the long-term solution is rebuilding your core budgetary strength.

Mr. WOODALL. Dean.

Ms. BELMONTE. Yeah. I would echo a lot of that. I thought a few times this morning about the famous warning in Dwight Eisenhower's farewell address in 1960 about the military-industrial complex, and that has happened to decreased your power as well. There are a lot of special interests that are continually bombarding the government, and maybe considering how some of that might be reined in would be really beneficial here.

Others have mentioned increasing your staff. They, they are facing a whole host of actors that are trying to make government work on their behalf and as well as the administrative state; empowering and growing the Congressional Research Service, which used to really provide an excellent source of impartial information. And we are in an age where we have more information at our disposal than ever and probably know less than ever as a result of it because it has gotten so difficult to discern what is or is not credible.

There are some proposals about increasing the size of the House itself so people can be more responsive to their constituents. The ratio of representatives to constituents has changed dramatically.

Thinking through inefficiencies in government, the cert process, the length of time people wait for clearance, inefficiencies in procurement that leave government behind private industry and the type of technology it can use, the purchasing process.

And then I would repeat the suggestion of an Office of Legal Counsel within the legislative branch.

Mr. WOODALL. Well, we certainly did that with the Budget Act and CBO, right? We were tired of getting pushed around by OMB. So we created CBO and did a pretty good job. Now I would say the American people don't rely on OMB for their budget information. They trust CBO instead, and we achieved exactly the goal that we desired.

Mr. Spalding.

Mr. SPALDING. I actually agree with the notion that Congress needs to beef up its ability to do things. One of the mistakes of the Contract with America—and if you ask Newt Gingrich, he probably would agree with you—is he took steps—since he was in favor of cutting government—to cut congressional staff and reduce our size. And that was a big mistake if Congress wants to compete with executive. So I would agree with the sentiment.

Mr. WOODALL. Well, and of course that hammered the House even more than it hammered the Senate because we were driving that train. Whether it was 1994 or 2010, when I was elected, those were our two big Article I budget cutting years and particularly House budget-cutting that year.

So let me ask that question pointedly to you, since it is not a partisan panel. We all want to serve our bosses well, and generally serving the Constitution trumps every other concern that my constituency has. If I was to paraphrase you, Dr. Spalding, I would say that you are telling me that I am betraying, rather than serving, my constitutional responsibilities by shrinking Article I spending relative to Article II spending. Is it that simplistic, that you believe that our constitutional obligations are being subjugated to our budget concerns?

Mr. SPALDING. I think your obligations—first of all, your first obligation is to the Constitution to which you swear allegiance. But you are a Congressman and your obligation is to this institution and its powers in Article I. You think that you have powers. You have no specific constitutional powers individually. You only have powers as a body.

You have those obligations to not only exercise those powers but also to keep an eye on and monitor the powers you have been given responsibility over. So let me answer it this way. One of the tendencies that has happened over time—again, like the policies or not—is that Congress has given more and more responsibility to experts or bureaucrats or administrators—use positive or negative connotative language—but this transference of responsibility to the fact of the matter.

In an odd way, I am actually advocating more politics, not less. That is the Madisonian solution. The Madisonian solution is that the branches need to compete with each other and be strong

enough to engage each other. The problem is that a lot of the expertise that makes the kinds of decisions Congress ought to have responsibility over has been sent elsewhere. And having done that, you have weakened yourself institutionally in the separation of powers back-and-forth. That is the mistake.

And so what is your answer? Well, sometimes you do have to delegate, and modern lawmaking is complicated, and you want people that know particulars, and so you set up checks, mostly meaning here congressional oversight. You need to recognize what that means constitutionally and politically in terms of Congress carrying out its constitutional duties and responsibilities. And I think that, over time, the administrative state has become a real problem from the point of view of both political parties.

And you have also fueled the ability of the executive, who has nominal control over almost all of that, to figure out ways to creatively use all these regulatory authorities, sometimes poorly written laws, sometimes laws that contradict each other, in ways that allow them to essentially govern. And so, yes, I think that institutionally Congress is not upholding what I think is its primary constitutional obligations.

Mr. WOODALL. Professor Pearlstein.

Ms. PEARLSTEIN. Thank you. We agree on quite a bit and, indeed, exactly what I was thinking as you were asking your question was about Congress disabling its ability to compete effectively among the branches. Right? So, if the idea is ambition will counteract ambition, part of the ambition has to come from individual incentives, and that is a big problem. And we talked about politics and polarization a little bit earlier, but the other part of that is simply resources and capacity. And you are now completely beholden to and dependent on your supply chain for information, which comes almost entirely from the executive branch. So that is a—putting yourself in a place where you can effectively, institutionally compete is essential.

There was one other piece of this I wanted to point to, and that is, as you think about the separation of powers and your ability to compete across three branches—there are three branches, right? So it is not a two-way game, it is a three-way game. And one of the large problems that is contributing to the overwhelming effectiveness of the executive in winning this contest, so to speak, is that both of the other two branches are in one way or another, shirking. And that sounds like a bad word. I don't necessarily mean it that way, but right, Congress delegates its power to the executive, the executive acts, and the courts say: You know, we need to defer to the executive as well because that is the source of expertise or because, well, the executive knows more about foreign policy than we do, or because as a decision in this past week says, oh, I am not sure Members of Congress have standing to sue in courts to enforce, right, the powers that they are trying to enforce.

Now, obviously, you don't want to interfere with the exercise of Article III courts and their ability to exercise independent judicial judgment, but when Congress does things like legislate to create a cause of action, right, pass a statute that includes a right to sue. This sends to courts a message that says, in fact, we don't want you to shirk; we want you to be as engaged as we are. Right? And

the notion is, by adding powers, not just saying, "Well, you take the ball," right; by adding powers, you better empower both branches to fight the executive.

Mr. WOODALL. Let me follow up on something you were saying to Mr. Perlmutter of, again, some of those things we could do to hold folks accountable. I think our work here is a little like parenting. It is important to set boundaries, but the worst thing you can do is set boundaries that you are not going to pay any attention to. So, back when we used to do appropriations bills regularly, you would get to the end of the appropriations bill because we are reading it line by line, we start going through all the reports that are going to be required, and they are going to be—you are going to do a 7,000-page report on how to solve world peace and it will be due by next Thursday. Right? And there is no expectation that we are going to get that done. And they are going to ignore it, and we are not going to enforce it.

Thinking about that give-and-take, maybe it is hard for us to reclaim some of that power. It should be easier for us to stop giving away any more power. Tell me about the interplay between your encouragement to hold folks accountable versus the parliamentary system we have fallen into where folks don't want to embarrass their President, and in fact, my bosses back home don't want me to embarrass their President, depending on where those political winds are blowing.

Ms. PEARLSTEIN. Sure. So a lot of different things to say there, but let me maybe highlight one—or two. On the question of what do you do when the executive doesn't do what you told the executive to do, right, whether it is filing reports—the statement of legal theories as changed under the existing authorization for the use of AUMF, as required under the National Defense Authorization Act that was just passed, was due over the weekend or at latest, I suppose Monday, it has not been received. Right? So that is a big report. We haven't seen it yet, unless something has happened while we have been sitting here.

So there are a couple of ways to deal with situations like that. One is you create incentives in the individuals who serve in the executive branch. Now, the extreme way of doing that is by imposing particular kinds of liability. But Congress has done that before with its assertions, the Antideficiency Act and the Impoundment Control Act, right, trying to make sure that individuals within the executive branch have personal, professional incentives to do what Congress has said the law is and not to follow an executive who says otherwise, or write an order to follow Congress' priorities and not someone else's.

But I don't think you have to do—necessarily start with the nuclear option, that is, necessarily start with the individual liability for members of the executive branch option. I think that there are other steps that you can take short of that, including, you know, using the budgetary power, which I entirely support. The funding simply stops if this is not forthcoming. Congress has to exercise some judgment. Which are the reports that are really important? Which are the reports that aren't important? Right? Because, even within the executive, there are only so many hours in a day.

But there are, as with these other kinds of ways of drafting legislation, a menu of options. And rather than thinking about enforcement as an on-off switch, think about it as a continuum. The sort of heavy guns of enforcement are individual liabilities or fines, for example, if this doesn't happen. Less than that are simply a right to sue. Right? Less than that is something like a funding cutoff or a warning. Less than that is sort of the basic oversight functions: When this report is due, this official is required to come testify. So the official who is responsible for the report, the Secretary of Defense or whoever it is, right, has to show up and personally take responsibility to Congress if the report is not brought with him on the day of the testimony, right? So there is a menu of options, and Congress has all of those powers to sort of design them as it wishes.

It depends, you know, in emergency powers and emergency situations, you want to design that menu somewhat differently, but all of those tools are available and I think should be used more liberally than they have been—liberal with a little L.

Mr. WOODALL. Dr. Spalding.

Mr. SPALDING. One thing I would add to that is, look, one of the dilemmas I think both party faces is what you alluded to at the end: How do you carry out your responsibility when the person in the executive office is of your same party and you don't want to embarrass them and your constituents don't want to either? That is a problem.

Part of the answer is—I don't mean this in the simple sense but in the powerful sense—a rhetorical answer. As I said earlier about establishing the will to act as an institution and asserting your powers: Congress needs to talk that way more. So, for instance, you could say "I am sorry, Mr. President, but it is not that I am against you or what you are doing. But it is my obligation to make sure this is done correctly and responsibly and through the proper constitutional process.

Congress is timid when it comes to those things because we have gotten to a point where everyone assumes that, as soon as you draw a line, it means the nuclear option, or it is a red line. One of the reasons why I think we want to, from a constitutional point of view, push more and more authority back into the legislature is precisely because the legislature is the place where you can have deliberation and consensus and accommodation.

I am not opposed to going to the courts, but you generally don't like the courts in political questions because their decisions are binary. The reason it is a problem with the executive oftentimes is because it is a unitary decision. Congress is the body, the branch, in which you have to figure out how to come to some sort of accommodation on these questions.

But you need to explain that to the other branches in a way that defends this, despite your partisan affiliations, with or without the executive. Not every challenge of a President is partisan. They shouldn't be at a certain level. I am not naive and say that we are not going to have partisan challenges, but there are institutional challenges, and you want to be at the point where you can do that with either a Republican or a Democrat president, given the control of Congress being the other way around.

And today everything you do, every motion, every little gesture, is seen in partisan terms. Part of that, I think, is also learning how to better explain and argue those things in public terms, through legislation but also in terms of how you talk about these things.

Mr. WOODALL. Professor Prakash.

Mr. PRAKASH. I mean, I think the way I would try to explain it to a constituent is: It is not about this President. What we are doing is constraining the Presidency writ large, and it applies to this President or President Sanders or President Warren, or whoever might come down the line.

And so I think putting it that way makes it clear to people that, since their party doesn't have a monopoly on the Presidency, they can see the wisdom of the institutional constraint without regard to who is President. And you can even tell the President: It is not about you, right? Maybe this takes effect next year, right, or 3 or 4 years from now. And it is not as good as it taking effect now, but it certainly is better than no reform at all. Because people don't know who is going to be the next President or even the next President after that, I think it is easy to say it is not about any particular person.

Mr. WOODALL. Please.

Mr. SPALDING. Well, I mean, correct me if I am wrong, but I believe if Congress votes a pay raise, it doesn't take place until after the next election. So maybe that ought to be your model to make it very clear it has nothing to do with the current occupant of the White House.

Mr. WOODALL. Though to be—to the point of what we are talking about, that is exactly what the 27th Amendment says, and yet in the middle of every congressional session, we go to the law and we change the law that provides for that across-the-board cost-of-living increase for Federal employees and say this shall not apply to Congress. There is a constitutional amendment that says you can't change pay in the middle of a term, and yet we do it every single term. Strangely, there is no special interest group litigating that or trying to get that fixed.

Two quick questions, Mr. Chairman, with your indulgence. Sunset language doesn't exist. Very often when things do sunset, often times we don't go back and reauthorize anyway. From an institutional perspective, creating more sunset language strengthens us as Article I, or because of our habit of ignoring unauthorized programs and their expiration continues to weaken us as Article I? Is it obvious to you?

Mr. SPALDING. I think you hit on a possible dilemma. On the one hand, for a lot of things we are talking about, I actually like sunsets. Right? I mean, you have authorized a certain period of time, there is going to be an authorization for a military act. Having that sunset or defining it is a great idea. But like you said, this is an exercise in parenting. If you sunset laws, you have to enforce the sunsets. And there are plenty of programs that have long sunsetted, but you still appropriate money for, and there is all sorts of contradictions out there. So whatever you choose to do, I think one of the things that will play to your strength is being consistent.

Mr. WOODALL. Professor Prakash.

Mr. PRAKASH. Go ahead, Prof. Pearlstein.

Ms. PEARLSTEIN. So, with respect to sunsets, I think they are essential for use-of-force measures in particular and emergency authorities in particular because the way the legislation and authorities are currently designed, it requires a supermajority. It is a simple majority of Congress to flip the switch on to war or emergency authorities, but it requires a supermajority of Congress to turn it off. And that is because of Chadha, and you can't have a concurrent resolution. We talked about this a little bit earlier. It is in my testimony as well.

So there a sunset is, I think, indispensable. Beyond that, and beyond that context, I think the way to think about sunsets is not necessarily as does it increase or decrease power, but about what kind of incentives it gives you to vote or not. Sunsets are what I would call a democracy-forcing device, right? They don't empower or disempower. They just make you vote again if you want to take action.

So, if it is something that you think is essential for there to be repeated democratic consultation on, a sunset is a good thing because it will make you vote. If it is the kind of issue that you think nobody is going to want to vote on this ever again, then you want to be maybe more cautious about sunsets because you will come to the requirement of voting, and if your members, you think, are incapable of acting, for political reasons or whatever else, and it is something that is important, like CDC funding or whatever else, then you want to be more cautious.

Mr. WOODALL. Let me ask when the golden age of Article I empowerment was? You don't have time today to tell me everything that we need to do to get right, but I can go and read the history books and see what folks were doing right. One of my favorite quotes is that Jefferson letter to Rutledge in 1797, and he says to Mr. Rutledge: You and I have seen warm debate and high political passions, but gentlemen of different politics would speak to each other. It is not so now. Men who have been intimate all their lives cross the street to avoid meeting and turn their heads the other way, lest they should be obliged to touch their hat.

Right? This was 10 years in, and we had already gone to pot.

And presumptively those political passions in the Senate bled over into Article I, exercising oversight of Article II. So, if we had already come unglued 10 years in, when—what are you going to point me to as that era? Right? We have got more vetoes, I think in the few years of the Ford administration than any other Presidential administration, as America was reacting to executive power and a pretty high supermajority in the legislature.

But where is the—it is so easy to say today is bad. I want to know when it was good, and that will help me to plot a course.

Mr. SPALDING. Congressman, it was never good.

Mr. WOODALL. Okay.

Mr. SPALDING. I think the point of it is that, yeah, there was never intended to be a golden age, right? The whole point of the Constitution, the beauty of the Constitution, as seen in the Convention, the Federalist Papers, and other contemporary writings is a recognition that the nature of man is full of political passions and interests, but a lot of good too. But government's job is not to figure



a lot of that out, but to create a structure by which we can exercise the powers that need to be exercised, be able to have an executive that can do what we need for crises and necessity, and introduce the idea of an independent court system. They were never so naive to think that somehow this is a perfect system or that the actors in it would be perfect. What they recognized, which is why I think our obligation is to the Constitution, is precisely that all the actors in the government are going to have some political instincts. It is human nature. So, instead of forgetting that and ignoring that, which is one of the reasons why I am a little bit more nervous about political power being exercised by people not clearly under the legislative or the executive power is because they are political too. So instead let's give them a political interest in their institutions and then set the institutions against each other, through the separation of powers and checks and balances, that then give rise to a higher obligation to uphold the constitutional system.

The break, in my opinion, occurs once that system starts getting mucked around with. Over the course of time, it is hard to identify a particular point that defines the shifts towards this different way of thinking. But the progressive movement introduced arguments and policies about more administration, which fed the executive branch, and then once you centralize in the 1960s and 1970s—again, like it or not—that created the sheer amount of activity that I think makes it virtually impossible for Congress to exercise its true legislative powers. And they have, you know, gone to the method of least resistance, and the executive now can exercise more power because if you guys have not as much ambition, I can tell you, executives tend to have more and more ambition. And that is the root of our problem, I suppose.

Mr. WOODALL. Dr. Spalding tells me it has never been good. Surely someone can lift me up more than—

Mr. SPALDING. It has been better, though. It has been better, though.

Ms. BELMONTE. I am afraid I would agree with that. I mean, let's not forget that it was at this very building where Preston Brooks beat Charles Sumner with a gutta-percha cane senseless—

Mr. WOODALL. But that hasn't happened in a number of years. We are on the—

Ms. BELMONTE. They did ban weapons in the building shortly thereafter, so. But, no, I mean, in terms of discourse, I don't know if we have ever had any sort of honeymoon period. It certainly was very vicious in the 1790s as you mentioned. I do, though, think that in the mid-1970s you had a period where Congress was actively trying to reassert its power through things like the creation of the Federal Election Commission, the Freedom of Information Act. 1978 was really the last major reform of the Civil Service, creation of the inspector general office, and that is within a lot of us in this room's lifetime. It seems like it is far away but really isn't.

Mr. WOODALL. Professor Prakash.

Mr. PRAKASH. I mean, I guess there are two dimensions. One is partisanship, and one is congressional power. And in ages past, of course, Congress had more power than it does now, even if those were rather partisan times. And so I think if you can't have both bipartisanship and power, at least have the power. And so I think

it is a mistake to say that Congress has always been irrelevant or been a plaything of, you know, just a tagalong for the executive. That is just not true. There were very powerful committee chairs and Speakers that basically decided Federal policy in any number of ways. I believe this was true for most of our Nation's history, in fact. So there was golden age, where power was centered in this building for centuries.

Mr. WOODALL. Well, that being the case, and we are pointing to the mid-1970s as a resurgence in congressional power, when is the failure? Are you coming to the Carter years? Because that is going to hurt me as a Georgian if that is where the blame lies. If we can point to the 1970s as a resurgence and it used to be strong, when does the weakness begin in your view?

Mr. PRAKASH. I mean, I think it is gradual. I don't think it is any one decision? I think if you keep on delegating authority to the executive, it will naturally feel like it is the one who is tasked with making the laws. And then when you pass particular restrictions, it will then think it has discretion to reinterpret them. Right? So, even when you pass specific laws, it finds discretion where none was meant to be conveyed. And so I don't think—I wouldn't blame any particular President. I think they are all doing this, and they have incentives to do it. I don't think they are evil. I think they are running on a platform, and I think they want to implement it, and we can disagree with the platform or not, but I think they are just responding to the incentives they face. And I just don't think it is any one person. I think it is a mistake to personalize and say this or that President was the cause of all our problems.

Mr. WOODALL. Professor Pearlstein.

Ms. PEARLSTEIN. Yeah. So I guess pivoting off of that slightly, the partisanship and the power are really closely related. They are directly tied. What happened in the 1970s was a major effort in Congress to reassert power, coming off the Watergate years and Vietnam and so forth. But the 1970s is where the partisanship line, where the polarization line switches. So, if you look at the political science and they graph the sort of number of effectively party-line votes in Congress, what happens is, beginning in the 1970s, the line starts going like this. Right? Polarization starts going like this in the 1970s. And why is it that that happened? Beyond our pay grade here probably to describe those trends in society, but it is not that the scope of delegations changed in the 1970s. We were well into the administrative state by then.

What changed in the 1970s is the partisanship, and the partisanship affects the power because it makes it harder for you to legislate. It makes it harder for you to act. And as Congress has become increasingly divided, it makes it—you know, along party lines, closely divided, it makes it harder and harder for you to act. So it is not possible to divorce the partisanship from the power.

What is possible, at best, right, is for Congress to act in ways that try to diffuse rather than exacerbate the partisanship that exists.

Now, some of those are outside things, and they might have to do with campaign financing, and they might have to do with, say, amending the Communications Decency Act or sort of start to think more strategically about social media in a way that respects the

First Amendment but that still tries to minimize the polarizing effect of that. And part of that is, as we were talking about earlier, creating spaces within Congress. Once a week have a bipartisan lunch and bring in an outside speaker to give a little history lesson or a little instruction on how Facebook works or—take your pick. But right—the second Member of Congress—I have heard two Members of Congress in the last 6 days, say: Gosh, you know, I never see Members of the other party. We don't meet for lunch. We don't—you know, I've got to be back in my district, raising money. I have got to be at committee meetings. I have got to be whatever else.

That is an extraordinary state of affairs as a workspace for you, and it seems to me like that is a modest initial step that might begin to help Congress at least not exacerbate the partisanship that exists.

Mr. WOODALL. Mr. Chairman, I want to accept Professor Prakash's invitation that if we can't defeat the partisanship, let's at least take back the power. I hope that we are able to work on that. I trust you with that power. I yield back.

The CHAIRMAN. No, and I appreciate that, and I think that is—go ahead.

Mr. SPALDING. I just want to—

The CHAIRMAN. Yeah.

Mr. SPALDING. It is interesting that the partisanship came in the 1970s. I would agree with Sai's point about how there was—even though I don't think there was a golden age—there was this point at which Congress' powers were stronger relative to the way they are today, absolutely. There is an intellectual shift that begins in the early 20th century, and there is a new theory of governing about administration.

There are things that occur along the way, but the fact that a big shift occurs in the 1960s and especially in the 1970s, I think, is significant, and it is not merely a random rise in partisanship. It is, for the first time, you now have in place a fuller administrative state,—and for the first time, in the Nixon administration, there is a recognition that control of the administrative state is a dispute between the executive branch and the legislative branch.

And so from the 1970s forward, we have a situation where this administrative state mostly has been centralized in Washington; and, lo and behold, the partisanship is actually when you have an executive trying to assert their control over it and the other party in Congress not liking that, and trying to fight back. So now we have a partisan divide. I mean, in certain instances, that is what is happening today. We fought a similar battle in the 1980s. There are these back-and-forths that underscore the point that a lot of politics today actually turns on the administrative state. We have created this situation where it is in the interest of the executive to fight for the control of the bureaucratic system Congress has created. Congress needs to pull that back in order to restore institutional balance.

It has been partisanized to some extent, and that is unfortunate, but it is a serious battle with serious constitutional implications that is not mere partisanship. It is a serious constitutional argument going on as to, where do these aspects of the modern state

rely? Who has the property authority over them? How are they going to exercise that authority, consistent with the broad parameters of constitutional government?

Mr. WOODALL. Thank you, Mr. Chairman.

The CHAIRMAN. I yield to our constitutional expert, Mr. Raskin.

Mr. RASKIN. Mr. Chairman, thank you, and I want to thank Mr. Cole as well for your vision in bringing us together in this hearing, and it is indeed refreshing and exciting for us not to be here in the unusual partisan camps of 9–4 but 13 to zero on the side of the constitutional order and Congress and the people that we represent.

When I read through everybody's testimony, I find that there is at least one overarching value and principle that has been vindicated by the presentations today. And I think about it sometimes when—whenever the President, any President, violates constitutional boundaries or rights, and a Member of Congress will get up and say, "Mr. President, please stop treating us like this; we are a coequal branch of government," beseeching the President to be good to us. And what I take from everything you are saying is that we are not a coequal branch of government.

First of all, "coequal" is not even a word. Okay. That is like "extremely unique" or something like that. We are not an equal branch of government. We are the people's branch of government. We are the representative branch of government. We are the law-making branch of government, under a constitutional Republican framework.

And the Preamble of the Constitution, it is that one action-packed sentence that gives us all of the purposes of government: We, the people, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and preserve to ourselves and our posterity the blessings of liberty, do hereby ordain and establish the Constitution of the United States.

And then—that is all in one sentence—and the very next sentence is Article I, stating that all legislative power is vested in the Congress of the United States, the Senate and the House, meaning that the sovereign power of the people to create the Constitution, to launch the Nation, to design the government, flows immediately to Congress.

And then you get 37 or 38 paragraphs spelling out all the powers of Congress as you have discussed them: the power to regulate commerce internationally and domestically, the power to declare war, the power to set up a post office, the power to exercise exclusive legislation over the seat of government, the power over piracy, and on and on and on, and in Article I, section 8, clause 18, and all other powers necessary and proper to the execution of the foregoing powers.

And then, after all of that, you get to Article II, which reposes the executive power in the President. And there are just four short sections, and the fourth section is all about impeachment and how you can impeach a President for committing treason, bribery, or other high crimes and misdemeanors.

And then the rest of it is essentially saying that the President is the Commander in Chief of the Army and the Navy and the

State militias when called up in times of actual insurrection and conflict. And what is the President's core job? To take care that the laws are faithfully executed, to implement and execute the laws that have been adopted by the people's Representatives.

So I want to thank you for restoring that essential constitutional vision, which has been so lost over the decades. Whether you trace it to the rise of an administrative state, as Professor Spalding does—and I definitely want to ask him about that thesis—or I think another rival and perhaps, to my mind, a more compelling proposition, which is the rise of a national security state in the wake of World War II and the development of a massive military apparatus underneath Presidential power and control.

But I wanted to say a word about something that Mr. Cole said, because I think that he is right, and I think he was picking up on one of Dr. Spalding's points about Madison Federalist 10, about how the design of competing and counteracting ambitions requires those of us who aspire and attain a public office to identify our own political ambitions with those of our institutions and to fight for our institutions and the institutional interests and principles that emerge. And when that happens, that really is kind of a beautiful thing to behold.

I remember when I was reading Robert Caro's book about Lyndon Johnson, of course, who was a famously great and effective Senate majority leader, but when he got elected Vice President, he had the idea that he would be not only Vice President, but he would stay on as Senate majority leader because he said: Hey, I am the President of the Senate under the Constitution, and I should just stay the head of the Democratic Caucus.

And he expected that these Senators, who usually yielded to his will, would just go along with it, but when he went into the room to announce that this was his intention, there was an absolute insurrection because all of the Democratic Senators said: You now belong to the other branch of government, and we have to stand up for the legislative branch and for the Senate. That is who we identify with.

I think, more recently, we have seen it a couple of times. We saw bipartisan majorities in both the House and the Senate stand up during the Obama administration for the legislation that would make Saudi Arabia liable for lawsuits by our constituents relating to 9/11 over the President's veto. And we were not distracted by the partisanship of the matter.

Just like, more recently, under the leadership of, you know, our chair and the ranking member, I think we have also stood up for the war powers of Congress with respect to Iran. We also did it with respect to Yemen. And so there are times when we exercise that political, institutional muscle memory, and we are willing to stand up for the powers that have been reposed to us by the Founders of the Constitution.

But I want to ask a couple questions, and one is about the courts. Is there anybody here—I mean, this could even be yes or no—is there anybody who thinks that the courts can save us here, or has any interest in saving us here? You know, I see a Supreme Court that has been increasingly filled with people who have made their careers as executive branch lawyers advancing a strong exec-

utive view of the Constitution, and that view has come to sway a lot of the Supreme Court decisions. And I am not seeing that the Supreme Court has been in any mood to rein in executive power. So I just want to know, is there anybody out there who thinks the courts can save us? And you can answer with your silence or—Professor Prakash.

Mr. PRAKASH. I mean, I think your general sense is right. I don't think the courts can be counted upon to save you or, put another way, sort of do the work that you should be doing for yourselves. I think the only Justice who has had any legislative branch experience, off the top of my head, is Breyer. I think he worked for Senator Kennedy for a while; I don't know how long. But I think you are right, that if Senators paid attention to this, we could have more Justices who actually have served in legislatures or served in Congress, which wasn't uncommon in the past.

And so, you know, I think that is certainly possible that you could ask Presidents to think more about appointing Members of Congress or former Members to the courts.

Mr. RASKIN. Great.

Yes.

Ms. PEARLSTEIN. My own view is, the courts should be more aggressive in checking executive power, but not even Justice Jackson thought the courts could preserve for Congress power that Congress didn't assert for itself. So—

Mr. RASKIN. So the bottom line is we have got to do it ourselves.

Ms. PEARLSTEIN. Yes.

Mr. RASKIN. In other words, we have to exercise the powers of legislative self-help in order to defend the proper powers and prerogatives of Congress.

So, let's see, Dr. Spalding, I wanted to come to you. I agreed with almost everything you said, but I detected a sneaking attack on the administrative state, and I certainly heard the same thing from Steve Bannon when he came into office. I think he declared his overarching purpose was to deconstruct, I think was the word, the administrative state. And forgive me or my parochialism here, but I represent Maryland's Eighth District, which is right near Washington, D.C., and I represent tens of thousands of people who work in what people are slurring today as the so-called administrative state. They work at the Department of Agriculture. They work at NOAA, which is in my district. They work at the NIH, trying to fight and research the killer diseases. They work at the Center for Disease Control, trying to prevent the viruses and bacteria that are coming to get us. I am sorry, but I don't think that the 435 or the 535 Members of Congress can do all of that stuff ourselves. I think that it is completely within the legislative prerogative to set up these agencies, which will be under the executive branch of government, to go out and to implement of will of the people in a very complicated, modern society. And that doesn't mean that we have to give away our overarching legislative power and legislative supremacy within the system.

Now, I am totally with you, if we write our laws in such a way that there is a very broad and overly vague or standardless delegation to the executive branch, that should be struck down under the nondelegation doctrine. We should make sure that we are dele-

gating laws with specific enough direction that rules can be developed. But is the administrative state itself really a problem? And I thought I would give you at least a second to say something, and then maybe I could ask one of your colleagues to answer. Is the administrative state the heart of the problem, or is the problem that we do have executive usurpation and legislative surrender of powers that properly belong with the representatives of the people?

Mr. SPALDING. Well, just, you know on your last point, those two things aren't necessarily incompatible. And so I agree with your last point. But in general, I think the administrative state is a problem, but let me clarify what I mean by that. I know it has become a popular term and politicized in a certain way, which I don't completely agree with, the notions of—whether it is deep state or whatever these terms are. I mean it in a more straightforward and simple sense, and I am just raising the general observation that, by its original plans, Woodrow Wilson and Teddy Roosevelt and people in both political parties were figuring out how to do more and more things through a kind of bureaucratic expertise outside of the political control of Congress. That was their very intention to a large extent.

And here we have gotten to a point where a lot of the things that your constituents normally think of as laws are not responsive to consent in the way they assumed for a long time, either through regular congressional elections or somehow through the executive. I think that is, at the level of principle, quite problematic.

Having said that, Congress actually does a lot of things and regulates a lot of things, and it has to, by the necessity of government. So I am not denying that it is extremes one way or the other. If we are thinking about the discussion here, it is problematic because there is now this huge array of government that Congress is trying to figure out how to, through its lawmaking power and oversight, how to keep an eye on. There is a lot of it. It is very complicated. It is a hard thing to do. And by virtue of that fact, you have a lot of it that now is occurring under the executive, who has more and more authority to shape a lot of those decisions through political appointees and other processes. I think if we are thinking about how to revive a robust separation of powers in a way that is ultimately politically responsible through consent, which is really the objective I think we all share in common, it is something I am comfortable with, but I am not saying that we want to go back 200 years and have that government—that is not going to happen, and that is not the objective. It would be imprudent to do that. But I think that we are beyond the point where Congress needs to really think hard about how to, when you create something, maintain control of it. It should be responsible. It should be responsible back to you. And if there are things going on in the bureaucratic state that you don't like or you want to check, you should be able to call those things back and to check them.

And I think that the less you do that, the more the executive will. Hence we have the situation which we find ourselves. And that is not to say there are other factors here as well. It is just—looking at it from my historical point of view, that seems to be a major factor here that tracks very nicely historically with the rise of the problem we are looking at.

Mr. RASKIN. All right. Good. And Let me——

The CHAIRMAN. Mr. Raskin, will you just yield to me 1 second?

Mr. RASKIN. Yeah.

The CHAIRMAN. Yeah, I just want to, I have to excuse myself to go to the floor. I have a bill on the floor, but I am going to turn the gavel over to Mr. Cole. I didn't want anyone to have a breakdown on our side, but I mean, this hearing again is a——

Mr. COLE. It is like you are dad giving the keys to the car——

The CHAIRMAN. Yeah.

Mr. MORELLE. Should we appeal the ruling of the chair?

Mr. COLE. I think you got the votes.

Mr. RASKIN. All right. As I said, two final questions. Professor Prakash, let me ask you, one of the other themes that has emerged strongly here is that Congress has the power to declare war, but it also has a duty to declare war, that is, we can't abdicate that or surrender that just because it is a politically difficult position for us. And I wonder if you would just generalize that proposition in terms of all legislative action here.

Mr. PRAKASH. I think so, Congressman Raskin. I think this goes back to what Congressman Woodall was saying. I think the Constitution gives you authority, and you are supposed to exercise it. And that is true for war powers. I would say it is equally true for the other things that are granted to Congress, the regular legislative powers. And I—you are quite right that you don't have the expertise that agencies have, but—I mean, I think you can harness their expertise without fully delegating your legislative powers to them, as has happened.

And I think it is sort of interesting and emblematic that the President last year or the year before, said: We are going to dismantle ObamaCare administratively.

And I think that is an incredible statement to make. But it is actually possible that the statute does give him so much discretion that he can do that. And I think that is a consequence of a habit of just saying: Look, we in Congress do the broad outlines; you, the executive, do the details.

But that has consequences for how the executive branch perceives itself. And, of course, it is then impossible—it is virtually impossible for you to change that statute.

Mr. RASKIN. Okay. And my final question—and perhaps Professor Pearlstein and Dean Belmonte, you would address this—one of the reasons why the executive branch, I think, has grown in power, vis-à-vis Congress, is the executive branch has one person at the top of it, and that person can speak for the entire executive branch, and it communicates a sense of authority and command that you don't get from 535.

I mean, when I read the Founders, I think one of the things they loved about Congress was that people would come and they would debate and fight and talk, and yet it is very easy to run against an institution that just talks, that is just debating and deliberating. And all of those trends have been pronounced and exacerbated by the rise of modern technology, TV, internet, Twitter, and so on and so forth.



So I just wonder if you would reflect on, symbolically, and in terms of communication, how to rectify the imbalance between the branches that has grown.

Ms. PEARLSTEIN. You want to?

Ms. BELMONTE. You can go.

Ms. PEARLSTEIN. Okay. That is a great and interesting question to which I am not sure I have a very good answer. Theodore Lowi, a former professor of mine at Cornell, wrote about the personal Presidency, right, decades ago. And you can date it back to Teddy Roosevelt, right? So this is a radical change. One of the things that has been most interesting to see—and forgive me for mentioning the current Presidency for a moment, right—this is the first tweeting President. And I think that is factually accurate. And that of itself, right, empowers the executive dramatically as compared to any Member of Congress or even more.

There is—Congress has to be enormously cautious when it begins to think about regulating those privately owned platforms, but those privately owned platforms—Twitter and Facebook and Instagram and the whole pile of them—exercise an enormously concentrated degree of power that historically the United States has been uncomfortable in allowing to be held by any one body. Right? We don't—we separated powers in the Federal Government. We separated powers between the Federal Government and the States. We have antitrust laws that prevent the accumulation of powers in private industries, and we are at a moment when, in part because we don't understand this industry very well and we are still trying to follow it, where it is effectively further changing the balance of power even among the branches of government.

It is something that Congress has a duty to at least begin to get a grip on or understand and then to think creatively with members of private industry and academia and so forth, how we might begin to more effectively incorporate those kinds of institutions into our political life?

Ms. BELMONTE. I think that we have had a real evolution of how Presidents communicate with the public. You know, one could make the case that Twitter is the fireside chat of 2020. Some of the things that I think Congress could do—Professor Pearlstein mentioned the antitrust laws. I think there certainly is a case to be made that some of these companies now wield a tremendous amount of power. I think there are, like, six major companies that control most of the newspapers in the United States now. Possibly consideration of the reinstitution of the fairness doctrine might help right this picture a bit.

I also think that there are some things we can do to empower the people in the National Archives system who are working for records retention and openness, bolstering the staff of the people who implement the Freedom of Information Act. The National Archives in particular has really had its budget gutted, and with the flood of FOIA requests, people who could be doing things that are more productive than fielding these requests.

Mr. RASKIN. Yield back.

Mr. COLE [presiding]. Will the gentleman yield to me for just a moment?

Mr. RASKIN. By all means.

Mr. COLE. Thank you very much.

I just want to follow up on a point that you made, Professor Pearlstein.

We recently were at a Republican retreat, and somebody said: If you want to see who has got the louder voice, let's add up all of what you guys have on Twitter, literally every single Republican Member, and what the President has. It was a 10-to-1 differential. So, in terms of megaphone, really makes your point.

With that, the gentleman——

Mr. RASKIN. And I yield back to you, Mr. Chair.

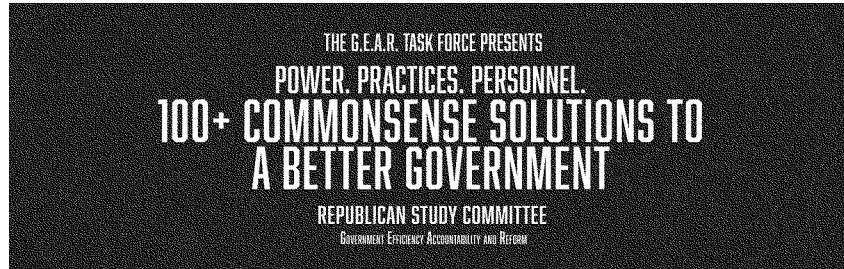
Mr. COLE. Thank you very much.

I yield to my good friend, the gentlelady from Arizona, Mrs. Lesko.

Mrs. LESKO. Thank you, Mr. Chairman. First, before I forget, I would like to ask unanimous consent to insert into the record a report for a practical vision on government efficiency, accountability, and reform that the Republican Study Committee, of which I am a member, produced. It offers over a hundred solutions, many of which include reasserting Congress' proper role in regulatory reform.

Mr. COLE. Without objection.

[The information follows:]



## GEAR TASK FORCE REPORT: POLICY RECOMMENDATION LIST

### REFORM GOVERNMENT POWER STRUCTURES

#### Restrain Executive Rulemaking Authority

1. Enact the REINS Act
2. Expand Usage of the Congressional Review Act (CRA)
3. Codify CRA Coverage of Regulatory Dark Matter
4. Enact the Article I Restoration Act
5. Cap National Emergencies Act Authority

#### Contain the Costs of Federal Regulations

6. Enact the Article I Regulatory Budget Act
7. Enact the Regulatory Accountability Act
8. Enact the Unfunded Mandates Information and Transparency Act

#### Increase Regulatory Transparency

9. Create Regulatory Report Cards for Agencies
10. Require Agency Data Disclosure in Support of New Proposed Rules
11. Require all Regulatory Submissions to be Made through OMB's Office of Information on Regulatory Affairs
12. Enact the ALERT Act
13. Enact the Providing Accountability Through Transparency Act
14. Require Independent Agencies to Comply with Existing Rulemaking Requirements
15. Enact the Guidance Out of Darkness (GOOD) Act
16. Reform the National Emergencies Act

THE GOVERNMENT, EFFICIENCY, ACCOUNTABILITY, AND REFORM TASK FORCE PRESENTS

# POWER, PRACTICES, PERSONNEL:

## 100+ COMMONSENSE SOLUTIONS TO A BETTER GOVERNMENT

### EXECUTIVE SUMMARY

#### STEP 1: REFORM GOVERNMENT POWER STRUCTURES

Restore the American people's control over the unchecked bureaucracy by restoring constitutional balance between the branches of government.

- **Restraining Executive Rulemaking Authority:** Increase Congressional review of regulatory actions taken by federal agencies and sunset costly outdated government policies.
- **Contain the Costs of Federal Regulations:** Enact policies that account for the costs of federal regulation including regulatory budgeting.
- **Increase Regulatory Transparency:** Require agencies to release more regulatory information and data, including "regulatory dark matter," for Congressional oversight and public scrutiny.
- **Regulatory Reform through Litigation and the Judiciary:** Rein in Chevron Deference, sue-and-settle, and other harmful practices agencies use in courts while emboldening the judiciary to review regulatory data.

#### STEP 2: REFORM GOVERNMENT PRACTICES

Streamline federal practices to promote efficiency, consolidate the size of government, and account for wasteful programs.

- **Government Wide Practices:** Institute reforms to reduce obvious inefficiencies, including overhauling federal metrics, no longer paying dead people and streamlining an overly cumbersome permitting process.
- **Overhaul Federal Technology Practices:** Modernize federal policies concerning technology while providing better accountability and consolidation of data across all agencies.
- **Efficient Practices for National Security:** Optimize government practices when issuing security clearances for federal employees, while better protecting state secrets.
- **Enact Fundamental Reform to Federal Judicial Practices:** Streamline judicial practices to better ensure that Americans maintain their rights and resolve legal conflicts in a timely and responsive manner.
- **Consolidation & Restructuring of Government:** Merge government offices or agencies to improve efficiency, shrink the size and scope of government, and better deliver promised results for the American people.
- **Account for Wasteful Programs:** Create a federal inventory of all programs so policy makers can responsibly weigh the efficiency and accountability of federal spending on individual programs.

#### STEP 3: REFORM GOVERNMENT PERSONNEL POLICIES

Transition government personnel policies towards a merit-based system that has increased parity with the private sector.

- **Reform Hiring and Removal of Federal Employees:** Create parity with private sector management practices by enhancing individual manager authority and accountability. Reduce barriers to removing bad employees and ensure faster replacement hiring.
- **Pay and Benefits:** Reform federal pay and benefits to eliminate the disparity between public and private sector compensation packages and inject merit-based decision-making.

Mrs. LESKO. Thank you. I think this has been an interesting discussion. We will see if anything comes of it. One of the things—I have a question for Mr. Spalding. I think one of the things that I heard going in and out between different committee hearings that I am in is that there is a suggestion to beef up the staff, and so have kind of a nonpartisan alternative to the Office of Legal Counsel in the Congress. And what are your thoughts on that, Mr. Spalding?

Mr. SPALDING. Well, I was speaking in general terms, first, which is that I think that Congress shouldn't unilaterally disarm in the kind of back-and-forth with the executive branch or the judiciary for that matter. It should have the strength it needs to do its work. Beyond that, it is a prudential question as to what exactly you need. You created the Congressional Budget Office. You will know what is it that would help you best fight those battles. I think that is just a practical question.

In terms of having some sort of Office of Legal Counsel, I don't see that necessarily as a problem. Why wouldn't you? I was going to tell Mr. Raskin I am going to blatantly use his wonderful phrase "legislative self-help"—I like that by the way; that is great—but I am not in agreement overall. Congress is the first branch, first among equals, but each branch has a separate vesting and must take that vesting seriously, and so it needs to have the tools to carry out its responsibility. If Congress deems that it has need of these things for that purpose, I think that is a perfectly legitimate reason to do so.

Mrs. LESKO. And I would like you to expand—I know the power of the purse is probably our biggest leverage that we have, dealing with the executive branch. And this was a case—I was in the Arizona State legislature for 9 years. This same struggle happens between Governor and legislative branch. You know, the Governor wants to take all the power. The legislative branch, you know, usually gives it to him.

And so you had brought up something about—could you expand more on the budget subcommittees and maybe, if I heard it right, changing them up so they are not really in line with the Presidential budget but some kind of strategic—

Mr. SPALDING. I was just making a general point. And my guess is you guys know all the stuff better than I do. I am not a budget expert. But I am looking at it from a political point of view. And I think it is the case that the control of the budget in the modern era determines the control of government. And that power has shifted a lot to the executive branch. This is one reason why you might need more people to help you do that.

But, also, then you start thinking practically about, how should Congress exert its power? And I have told this to previous Congresses as well. You know, the Congress waits and waits and waits, and you get into these omnibus situations. And, lo and behold, those almost inevitably get won by the Executive, right?

Your power is actually doing the old-fashioned work of committee work and budgeting and authorizations and the back-and-forth. Because if you do that, number one, it is more likely you are going to have a pretty strong agreement about where you are in the budget and the particulars. And there is no reason why you can't

pass them in—why do you have to pass them in a particular order? You could break them up into different pieces. You could pass 100 little budgets, as far as I can tell, right?

My point is, you should think strategically about what is the best way to do budgeting not merely as a budgeting exercise but as a political exercise, in terms of how do you best exert your constitutional powers as an institution vis-à-vis the Executive. And I think it is your strongest power, on the one hand, and you should go to your strength.

But, number two, you should think creatively about how to use that power. And I think there are a lot of ways. That was just an example, and I could be wrong about it, but that is an example. You should think strategically about how to exert that power that gives you more leverage so, when it does come down later in the budget process, you are not caught in a position where they are going to win. You have already done the things and you have under your belt the things you want to get, right?

Just think strategically. That is my point.

Mrs. LESKO. Well, thank you.

And I yield back.

Mr. COLE. Before we go to the gentlelady from Pennsylvania, just quickly, as a reminder to everybody, we are supposed to vote around 1:30, so just wanted you to be aware of that.

The gentlelady from Pennsylvania, Ms. Scanlon.

Ms. SCANLON. Okay. Thank you.

I want to thank the chair and ranking member for arranging this. It is a really interesting, as you have noted, bipartisan hearing to address something that Congress appears to have allowed to happen on a bipartisan basis over many, many years.

I wanted to focus a little bit on the National Emergencies Act. We actually had a similar hearing in Judiciary about a year ago which also involved high-level constitutional discussions on a very bipartisan basis.

The Congressional Research Service tells us that, since that act was passed in the 1970s, 56 national emergencies have been declared by 7 different Presidents and that 60 percent of them are still in effect.

So a couple of you mentioned some possible fixes there, and I wanted to look at them.

Professor Pearlstein, I think you talked in your remarks a little bit about maybe narrowing the delegation of power. Can you speak to that a bit?

Ms. PEARLSTEIN. Sure. And thank you. And, in fact, I think there are a number of bills that are in the drafting stage that might effectively amend the National Emergencies Act. Let me mention three ways. First, the way—or three potential approaches you might take.

The first is narrowing or, indeed, defining at all what an emergency is, which the current tact doesn't do. And you can come up with some definition of "emergency" that doesn't unduly constrain the Executive, right? The point of emergencies is to have some more flexibility than the Executive might otherwise have to respond to contingencies that are unanticipated.

But, at the same time, countries around the world have adopted, either in their constitutions or as statutory authorities, emergency provisions that say things like, this has to be something that, for example, threatens the life or the economy of the nation, or this has to be something that is reasonably anticipated to be a limited duration, right? This is not an ordinary tool of, say, economic sanctions or the way we conduct foreign policy every day, right?

So actually defining “emergency” I think might be a useful first step.

I think it is critical to flip the switch of authorization, by which I mean: Currently it takes, in effect, a supermajority of Congress to terminate any emergency, because it has to be a joint resolution, right? I think emergencies should terminate automatically after a certain period of time unless Congress acts affirmatively by a simple majority vote to reauthorize them, and, again, for a certain limited period of time, I think, is essential.

One other point I will just mention here—and I think I might have mentioned others in my testimony, but I am happy to talk about it further. There is no current provision in the National Emergencies Act legislation that requires—so, once the President declares an emergency, it triggers access to 130-something different statutory authorities that might be used. There is no current provision in the National Emergencies Act authority that says, you may only use those statutory authorities that are relevant to solving the emergency that you have identified, right?

So we could, under the existing statutory scheme, be in a situation in which the President declares—or, actually, the health emergencies work differently, but just to use the coronavirus example—in which an emergency, a public health emergency, is declared, and for that reason we take additional funds to do military construction on the border, right?

So I don’t mean to be partisan; I am choosing these examples from current history. But the point is the President doesn’t need every emergency authority in every emergency. And it is entirely possible to draft the statute through minor amendment that would make the President only able to use those statutory authorities that the President determines are necessary to address the emergency as identified.

Ms. SCANLON. Okay.

Professor Prakash, I think in your comments you talked about maybe a 6-week sunset provision. Can you speak to that a little bit?

Mr. PRAKASH. Well, I mean, I agree with much of what Professor Pearlstein has said. I think a definition of “emergency” would be good in statutes. But I think the timeframe is crucial, right? Because it is sort of embarrassing that Presidents are basically saying we have been in a state of emergency for 60 years, because it just sort of drains the word of any meaning.

So I think saying that sometimes when Congress is not in session, the executive needs to act to handle crises. Fine. The emergency the executive has declared and the authorities it is exercising will expire 6 weeks after Congress returns or 3 weeks after Congress returns.

The Constitution itself has such a provision. It deals with recess appointments. It is supposed to end at the end of the next session of the Senate.

I don't think you need to give the President a yearlong emergency. I think a couple of weeks should be sufficient. And then Members of Congress can just decide, is this really an emergency? Or even if it is not, do we agree with the policy such that we want to implement it statutorily?

Ms. SCANLON. Okay.

I was struck by, both in your conversations and in the comments you submitted, the number of recommendations that overlap with the other committee that I serve on with Representative Woodall, the Select Committee to Modernize Congress, where we have talked quite a bit about ways in which we can develop more room for discussion, for legislating, for bipartisan discussions. And these include calendar adjustments to increase the time in D.C., longer workweeks, restoration of earmarks, and staff resources.

I think, Dr. Prakash, you had talked about Congress needing to bulk up on its staffing.

Would any of you care to address that?

Ms. PEARLSTEIN. I completely share the recommendation that Congress is understaffed, significantly understaffed. And so, both within individual offices and as an institution, Congress has the capacity to create—Congress has the power to create all kinds of additional capacity that it needs.

What happens sometimes now is that Members of Congress and offices that are short-staffed or require expertise pull from different agencies of the executive branch, who have wonderful experts in them, but it should be possible for Congress to maintain and pay the kind of expert staff that it needs right here in-house.

Ms. SCANLON. Yeah. I think that has been, kind of, one of the frustrations as a new Member. I think I disagree a little bit—and maybe it is because two out of the three committees I serve on are aggressively bipartisan—about not having the opportunity to speak with or break bread with other Members that frequently. But the pace of our time in D.C., with kind of a very compressed 4-day schedule where Members have to step in and out just to get to the hearings and such, I think is problematic, and I am hoping that we can make some movement in terms of the calendar system here.

And, with that, I would yield back.

The CHAIRMAN [presiding]. Thank you.

Mr. Morelle.

Mr. MORELLE. Thank you.

First of all, I just want to comment on how much I appreciate this forum. I appreciate all of you being here and your thoughtful testimony, which I had the chance to, like Mr. Cole, spend time over the weekend reviewing.

I also want to thank the chair and ranking member, who I think have done just a great service not only to us on the committee but to the country by having this discussion.

I, like my colleagues Ms. Scanlon and Secretary Shalala, are new to the Congress. I served in the State legislature in New York for more than two decades. So trying to get acclimated to the Congress and how we work.



But as I was thinking about this over the weekend, I had, sort of, three things, I think, generally that came to mind.

The first was how to restore the balance that the Founders intended, which is what all of your testimony was about and the background material.

And I want to also thank the staff, because I think they did just a terrific job in pulling materials together, and the Congressional Research Service. So thank you for that.

But how to restore that balance. And spent a fair amount of time reading through the material and sort of thinking about it, recalling times we all read through "The Federalist Papers" in college.

The second was if—the question of restoring the balance is obviously a critical one, the point here. But then, also, secondarily, does what the Framers intended, does that still work in the modern world? So is that balance possible to restore, and then is that the right form of government in a modern world?

And I think about it under, sort of, two, sort of, general ideas. One is feasibility, with the issues that we have to deal with now, you know, how quickly things develop, and you compare that to the 18th century, where things moved at a relatively modest pace compared to today.

So, today, within just a few weeks, we are talking about a virus that a month ago few Americans had paid any attention to, and now it is dominating just about every news cycle, and obviously there is concern about how quickly we react to it.

We talked at length today about military action and, again, just the ability to be able to engage in military action compared to just two centuries ago and the complete difference in the ability to reach enemies, and now with air power and missiles, et cetera, it is momentary rather than taking weeks, if not months, to sort of engage.

And I think about even feasibility. Our appropriations process, which I had the privilege of, now, I guess, working through two, but the last one, we finished our appropriations process in December for a fiscal year that starts October 1. So, I mean, our ability to, sort of, come together and deal with it. So that is one thing.

The second was—and I think Mr. Cole and Mr. Raskin touched on this, in particular—sort of, the practicality. Given where the media is—and I don't mean just the traditional media—social media, just the ability now for people to share information and to hold us accountable in ways that, frankly, we never have been held accountable.

I go into meetings in my office in the Federal building, a meeting with constituents, and they will say, why aren't you a cosponsor of this bill, which I have never even heard of. And it is almost as though it is weaponized now if you don't know every—I don't know how many thousands of bills are introduced. But it is amazing, the degree to which people not just hold you accountable in, sort of, broad-brush, you know, themes about your philosophy of government but in very pointed ways about the issues that they care about. And if you haven't sponsored or cosponsored a bill, if you haven't signed on to a letter, honestly the volume that comes at us—and I don't know that I am any different—I am sure the senior

Members get much more attention, but it makes it nearly impossible to manage all of that.

So I wonder about the practicality of some of the things that we have talked about.

And then I think the final thought that occurred to me was—I was reminded of, I think it was Walt Kelly, who was an old cartoonist, who modified an old phrase, that “we have met the enemy, and he is us,” which is, Congress can act. I mean, we talk about a lot of ways of, sort of, forcing us to do what is our job under Article I.

And so I do think about that. I mean, it is almost like we are creating a Rube Goldberg sort of machine to get us to do what is our constitutional authority and which we have the ability to do.

I did note, in looking at this—I was trying to remember an old Thomas Jefferson letter, which my staff put their hands on—thankful to them—that he wrote to James Madison. He was in Paris at the time—wrote in September of 1789.

He said, “On similar ground, it may be proved that no society can make a perpetual constitution or even a perpetual law.” And he sort of gets into the conversation, with himself, of the question of repeal versus what we would call today a sunset provision.

He said, “Every constitution, then, and every law naturally expires at the end of 19 years.” Don’t ask me where he came up with 19 years. It is sort of an interesting—I guess that is a generation in that era.

And then he sort of concludes with, “A law of limited duration is much more manageable than one which needs repeal.” And his argument being you would have to have a majority and you would have to have a President to sign a repeal or to agree to a change. Better to have a sunset.

And so I think some of what we talk about sort of falls along the lines that many people have opined on here, that sunsets may be the best way to sort of address this, because it is so much more, I think—it is just so much easier for us to periodically—and I don’t know whether, depending on the bill and depending on what we are dealing with, whether that is every 5 years, every 10 years, or even lesser timeframes.

I did want to ask you a question that I don’t know that anybody has asked. And I had to step out, so it may have gotten covered. Since I am not burdened by a legal education, I don’t know the answer to all the questions I ask. I know lawyers are supposed to know the answer, but I don’t know the answer to this.

But I am just sort of curious about Executive orders and whether or not in any—if any of the panelists wanted to just make any observations about the proper role of the Executive order and whether in the modern era they have now begun to expand into what are sort of legislative prerogatives and whether or not we ought to be doing anything from a statutory point of view in terms of putting limitations on Executive orders.

Any thoughts on that?

Mr. PRAKASH. I think it is a wonderful question, Congressman.

I tell my class that it is not the vehicle that matters, it is what is said in the order. Because you can call it something else and, you know, do the same thing. An Executive order is legal or not de-

pending on whether the President has constitutional or statutory authority. And so those are the underlying questions that really matter.

I think Presidents have issued directives, they have a bunch of documents, and they used to issue proclamations. They don't have them as much anymore. But I don't think focusing on the form matters. I think it is more helpful to think about whether they have authority to lay down whatever rules are found in the order, directive, etc?

And whether they do it or the agency does it, that is not the ultimate question. Because sometimes Presidents tell the agencies what to do, and then the agency does it, but it is really a Presidential initiative. It is not coming from the agency.

Mr. MORELLE. So—yeah. Go ahead. Thank you. I am sorry.

Ms. PEARLSTEIN. So the most important thing that Congress can do with respect to Executive orders that it doesn't like or doesn't agree with is override them by legislation, right? It is the simplest fix in the world, the simplest—

Mr. MORELLE. Well—

Ms. PEARLSTEIN [continuing]. Constitutional fix in the world.

Mr. MORELLE. Well, I guess what I was curious is whether you observed that there has been an expansion not only with the use of Executive orders but whether Executive orders are becoming bulkier and starting to really press into us.

And I acknowledge that the Congress could always repeal, but I assume you would have to do it by statute and you would have to require the signature of the President who had signed the Executive order in the first place.

Ms. PEARLSTEIN. That is true, right, so it becomes difficult. And there are also ways—and the way it usually works these days is that they are challenged in court, right? And the courts move faster than Congress tends to move on these things. But—

Mr. MORELLE. Potentially.

Ms. PEARLSTEIN. Yeah. Right. So, in many circumstances with respect to, sort of, long-term Executive orders.

But I don't know—and I am sure there is political science on this, and I don't know—Executive orders have been with us for a long time. We may get them more frequently now than we used to, but we have had very broad Executive orders, and they were indisputably important in the mid- and early 20th century as well, certainly surrounding the wars that we fought. So Executive orders have been around for a long time. It is that Congress acts—

Mr. MORELLE. Yeah. I think President Washington—

Ms. PEARLSTEIN. It is not necessarily that the Executive is acting so much more through Executive order or something. It is that Congress is acting less.

Mr. MORELLE. Any other observations?

Ms. BELMONTE. I would echo that. I think that the sheer volume of them has vacillated over time, but I think in the current legislative landscape they are being used in the absence of legislation to address some very contentious issues. Probably the best example of late would be immigration. We haven't had substantive national immigration legislation since 1986. And LGBT rights is another area.

And by doing a lot of this through Executive order, it is putting the courts in the place of trying to interpret how to implement these orders and trying to guess what Congress' intent might have been had it acted, but not having the legislation to have a clear affirmation of that.

Mr. MORELLE. Yeah.

Mr. SPALDING. I actually find myself—I agree with everything that has been said here. I think you are going to get the increase in the amount of Executive orders when the Executive has more things over which they are responsible. And they use this mechanism, whether it is an order or some other declaration, to give instruction to those who are going to execute the law. That is, they are actually carrying out their obligations to do so.

But to the extent that there are discrepancies or things that need to be interpreted or areas where there is some discretion, right, they can use those mechanisms as ways to shape the meaning of the law, at the very least, if not do something contrary to what Congress wants if Congress fails to act.

So I don't think they are necessarily a new and different problem in and of themselves. I think they are really part and parcel of everything we have been discussing here.

Mr. MORELLE. Yeah.

And I won't go on much longer. I just want to—I do think the points made about specificity in legislation are important. When I was in the State legislature, I chaired the insurance committee for a while. And I noted, every bill that would be proposed by the Governor would give all these basically unlimited powers to our superintendent of insurance, which I would immediately take out before we would enact anything. Because I do think it is important for legislators, if you are writing laws, not to simply delegate the details. Now, some of it, you are going to have to, obviously, by rule. But I think we would be better served to have much more specificity in what the Congress' will is and give less latitude to the executive branch to do that.

And, again, I looked at the—something like 25 percent of the American public follows President Trump's tweets. Roughly a little bit higher percentage follows President Obama's tweets. And I forget who made the point here, but individual Members of Congress don't have the ability—the nature of what we do now has dramatically shifted, and the nature of communications, where a President, you know, probably up until relatively recent history, would have to go through what was traditional media. I mean, when I was a kid growing up, you watched Walter Cronkite every night, and whatever you saw on CBS News or the other networks was really the way that was communicated from the Executive of the White House and, by the way, from Congress to the American public.

But now it is so much different, that the President's ability—and I don't think—I mean, the Founders really thought Congress would be the voice of the people, right? One of these talked about how each branch, from Article I to Article III, each branch was less, sort of, of the people. We were the branch that was to be chosen by the people; the executive by the electoral college, which would be the will of the people in the individual States; and then the Supreme

Court, obviously, through the President's nomination and ratification by the Senate.

But now it has really changed, in that the ability to go directly to the people is much more enhanced by the White House and by the President, any President, than it is by individual Members of the House and even of the Senate. And that has had a dramatic impact on the way that we do our work. And I am not sure we can ever put that genie back. I doubt we can.

Ms. BELMONTE. But it has also injected a whole new level of ambiguity. Is a tweet a policy statement? And that has created endemic confusion on more than one occasion, both within our country and among foreign countries. And it may be an area that Congress asserting itself could add some clarity as to what constitutes an official action of the U.S. Government.

Mr. MORELLE. Well, I think that is a great question. And, obviously, I don't think this President is going to be the last one to use Twitter or other ways of communicating directly with the American public. I mean, I think that is just the way it is going to be, and I think you raise an important point.

So, anyway, I will conclude. I have many more questions, but I am not sure they would in any way add to the debate here. But I do want to again thank the chair and the ranking member for, I think, a really, really important conversation.

The CHAIRMAN. Thank you.

Ms. Shalala.

Ms. SHALALA. Thank you. I share my colleague's view in thanking both of you for a really important discussion.

I have been on the other side, on the executive side, and now on the legislative side. I have not been on the judicial side, but I understand, and I want to point out to my colleague from New York, that the Supreme Court does not require a law degree—

Mr. MORELLE. That is true.

Ms. SHALALA [continuing]. For appointments.

Mr. MORELLE. I don't think I will be a candidate, though, anytime soon.

Ms. SHALALA. So one way the Congress delegates authority to the executive branch is also by badly drafted legislation—and as someone that sat on the other side, we would somehow celebrate a badly drafted piece of legislation because we could drive a car through it and do whatever we thought was best—or by delegating your responsibility directly to the executive branch when they didn't want to make the decision.

And my example there is, when Congress did not want to decide whether individuals should be able to import drugs from another country, they said to the Secretary of HHS, okay, you can do it as long as you are willing to say it is safe and that it is cost-effective to do those two, which put the Secretary in the bind as opposed to Congress in the bind.

And I could go through numerous examples, including HIPAA, where the Congress could not agree on Kennedy-Kassebaum. They agreed on the legislation but not on how it should be drafted and what the guidelines ought to be. So it was sent over to the Secretary of HHS to do those kinds of things.

The only point I want to make on that is about staffing. We are totally dependent in the legislature on the Executive telling us whether something actually can be implemented or on special interest groups. Because we don't have the level of staffing to talk about what the implications are or what the impact of various policies would do.

Now, that suggests not only do we need additional staffing but we need a certain kind of staffing. It does me no good to have a conversation with young staff people who have some policy chops, they think, but not necessarily can think through what the implementation challenges are and who ought to implement it and what their level of expertise needs to be done.

I was once taught by a very smart secretary early in my career that we should stop writing regulations for people that have graduated with honors from Harvard as opposed to smart people who didn't that needed to be able to implement those kinds of regulations. And I just wanted to make that point.

And my final point before I ask a question is about the coronavirus. With all due respect to my distinguished colleague from Colorado, I actually don't think it should be an emergency anymore. I think we are going to see these viruses all along, and what we have to talk about is readiness and whether the government is permanently funded for readiness to be able to have the flexibility to be able to deal with each of these viruses as they come along.

Now, we do have some experience in that, and I want to ask Professor Pearlstein about that.

The Stafford Act, which was written actually for the creation of FEMA, actually has real limitations when an emergency is declared by the President. So it is possible to release flexible funding, both resources as well as personnel, in a limited emergency act, which we could use as a backup to permanently funding on something like the coronavirus. And I wanted to ask your comments on that possibility as opposed to just these never-ending emergency situations.

Ms. PEARLSTEIN. Thank you.

So I mentioned that other countries had drafted emergency legislation and in other constitutions as well. Congress has drafted other emergency legislation that remains on the books that is vastly more specific and, I think, effective in constraining the exercise of executive power than the National Emergencies Act as such.

You mentioned the Stafford Act, for example; the Public Health Emergencies Act—I forget the acronym exactly. But some of these are vastly more specific in delegating power to particular officials, requiring the exercise of particular expertise, defining terms like “emergency” or “necessity,” and limiting the kinds of power that are going to be exercised. So we have models that are at our fingertips, literally, and I think we would be foolish not to rely on them.

The trick with the National Emergencies Act and IEEPA, the International Economic Emergency—whatever it stands for—is that these have become, instead of tools for dealing with actual emergencies, dealing with chronic, longstanding, ordinary exercises of government power. When and under what circumstances are we

going to impose economic sanctions or trade sanctions or travel restrictions on countries that are doing things that we disagree with?

And it is entirely possible and, indeed, I quite agree with you, necessary to do both at the same time, to have emergency powers that exist for certain limited periods of time as we deal with a particular crisis and at the same time make sure that we are funding and maintaining not only the institutes that enable us to deal with emerging infectious diseases, which happen all the time and have always happened and are likely to get worse, but it enables us to deal with global public health surveillance and other things that we might want to be able to do all the time, not just in emergencies. Both are necessary, but, at the moment, we do a lot of our ordinary policymaking through these emergency authorities.

Ms. SHALALA. Now that I have admitted that one way Congress delegates authority to the Executive is by badly drafted legislation—also by making legislation more complex.

And I wanted to ask you all about Chevron, because it gives the Executive tremendous powers, it seems to me. And now that I am on the other side, I would like to find a way in which we could reverse that and at least get more balance in the system. But that also means that we have to stop drafting bad—not bad legislation, but badly drafted legislation and making legislation more complex, like the Medicare Act, by adding layers to it that actually gives the Executive more control.

So could you comment on that, any of you?

Mr. PRAKASH. I agree with you, Representative Shalala. I think if Congress wants to delegate, it can do so. Chevron is basically a presumption of delegation to the Executive. And I think Congress can easily change that by just saying, “We only mean to delegate when we say the following words—‘we delegate’ or when we say we are delegating. Chevron is just a rule of construction that the courts came up with, and we hereby repudiate it.” And I don’t think any court would continue applying it.

The effect would be that the courts themselves would decide the best interpretation of the good and messy statutes, and not the Executive, which would yield more stability and prevent this sort of attempt to try to make a mess of a statute.

I think executive branch lawyers now strive to find ambiguity in a statute so they can then say, “Look, there is a mess here, and we are basically trying to fix it through interpretation.”

Ms. PEARLSTEIN. I don’t disagree with any of that.

My former boss, Justice Stevens, who I had the honor of clerking for, is the author of Chevron and often said during his life that he never imagined or intended that it would become this new rule of construction and deference to the Executive. Rather, he thought he was restating the rule that preexisted Chevron, which was, look, if the interpretation is reasonable, then courts are in a position to endorse that interpretation, but where interpretations are unreasonable, we won’t endorse them.

And what makes reasonableness in executive branch interpretation is, for example, reference to record evidence and deference to expertise. And where those things are lacking, then the interpretation is much less persuasive.

This is an unusual time to begin reversing major decisions of the Supreme Court. I am a believer in stare decisis. But I am equally a believer that deference is warranted where deference is deserved. And where you lack an internal executive branch process that came up with the interpretation or where you lack an internal executive branch reference to expertise or basis in expertise that actually supports that interpretation, then it makes much less sense.

Ms. SHALALA. I yield back.

The CHAIRMAN. Thank you.

I think that is it with the questions, but I want to yield to Mr. Cole if he has any closing remarks.

Mr. COLE. Yeah. Just quickly—and I want to pick up on something my good friend from Florida said, just so you are aware of this, and for the panel. I mean, sometimes Congress actually does what it is supposed to do. For 5 years in a row, NIH funding is up almost 40 percent; CDC, 24 percent; strategic stockpile, 35 percent; new infectious disease—and I say that simply because that was a conscious congressional policy that, no matter what President Obama asked for or President Trump asked for, we were going to be prepared in these areas for exactly what is happening today.

Now, we can debate execution, but you really can't debate resources. And that is Congress deciding. As a matter of fact, I can just tell you, I had this discussion when now-Chief of Staff Mulvaney was at OMB, and I said, this is going to—I was chairman at the time—this is going to happen. Now, your budget can reflect it, in which case you can take credit for it, or you can be really stupid and propose a cut, in which case you are going to get beat up for it—I will leave you to decide which one he did—but it is going to happen.

And for those of you that worry about how the budget wars go—and, with all due respect, the appropriations wars, to be more accurate—we win a lot more than we lose. Just go look at the Presidential budget at the beginning of the year, which I will tell you, having helped draft executive budgets before, is never a real budget. It is a statement, a political gimmick anyway. But nothing like that emerges at the other end. And it doesn't matter if it is President Obama or if it is—you know, we make them submit a budget so we can change it and, sort of, we get the last word on that.

So there is a lot of assertion of congressional power that actually goes on here, and so it is not quite as atrophied as you think. Our biggest problem is when we abdicate and we don't do things like immigration or when we don't do things like entitlement reform that we all know need to get done and we don't arrive at a compromise. So we can do that.

But I want to get more to the point. Just, number one, thank all of you. You clearly put in a lot of work, thinking through the papers. The testimony has just been excellent. We really appreciate the commitment of your time and your expertise and your thoughts. It is incredibly valuable.

I think you have noticed just from the participation of members how much they have enjoyed thinking about being Members, thinking about the institutions, wondering, again, how we could do our job better in a bipartisan sense even when we have disagreements,



wondering how we could restore the appropriate constitutional balance.

I think a lot of you have tremendous suggestions in that, which I hope, Mr. Chairman, we sit down seriously. You know, everything from, you know, actually putting time limits on emergencies to some of these other things, I don't see that those should be partisan things that we can't do together.

And, finally, Mr. Chairman, I just want to thank you. I mean, this discussion doesn't happen if you don't convene it.

This is, for the panel, way outside what we normally do on the Rules Committee. I mean, this is the Speaker's committee for a reason. Everybody up here is either appointed by the Speaker or the minority leader. We don't go through the normal confirmation process. Our job is really to shape the legislation for the majority so it can move it and for the minority just to offer the first line of defense and the first argument back.

So for us to undertake something like this is a very, very unusual thing. And it would not have happened were it not for our chairman and his concern, long-term concern, about the institution, the appropriate balance, and be willing to use this as one of the appropriate instruments to bring it up.

So, Jim, I am very proud of you, very proud to be on this committee as your colleague, and very much thank you for what you have done here. I think it is a real contribution.

The CHAIRMAN. Well, I want to thank the gentleman from Oklahoma, my friend, for his comments.

And I want to thank everybody on this committee, because, as you can see—I mean, maybe because we are on the Rules Committee and we meet more than any other committee and we see every piece of legislation that comes to the floor—good, bad, and ugly—that I think we are especially committed to this institution.

And, you know, on this committee, there is the range of political ideologies from left to right and everything in between, and there are lots of policy differences that we have, but I think we all believe that, over the years, we have given up some of our constitutional authority in a way that is not good for the people we represent. I think it is not in keeping with the Constitution. It is just not good for the country. And there are many reasons for that; we talked about a lot of that today.

But the Rules Committee is also a committee that deals with issues of procedures and processes. And so, to the extent that there are tweaks or changes in how we approach some of these issues, this is actually the right committee to be talking about all this stuff. And I look forward, in the coming days and weeks, to work with Mr. Cole and others to determine what the next steps are. Some might, you know, be low-hanging fruit, and we might be able to move more expeditiously on those, and our subcommittees can delve more in detail on some of these subjects.

The whole point of this is not just to have an intellectual discussion. It is to figure out whether we can actually take some next steps, actually change things for the better.

The final thing I would say to all of you is to thank you so much. As you have probably have noticed, because I am sure you have

testified before other committees before, other committees have time limits. But you have been here, like——

Mr. COLE. Not here.

The CHAIRMAN. Not here. Not here.

And I want to be very honest. You just have to keep this to yourself. But we sometimes have very, very long hearings here, and sometimes, oftentimes, it is Members of Congress who are sitting where you are, testifying, and they go on and on and on and on. And I am going to tell you this, just between us, that sometimes, when it goes on forever, I look at the chandelier, and I daydream and say, "Please fall," you know?

It has never happened, but I want you to know—and I mean this as a compliment—not for a second did I think that during this hearing today. That is the highest compliment I can pay to all of you. And I really mean it. This has been very helpful. And we look forward to working with you as we flesh out some of these ideas that Mr. Cole alluded to, because——

Mr. COLE. I don't think I will ever look at that chandelier the same.

The CHAIRMAN. Yeah. But just keep it in this room, will you? Okay.

With that, the committee is adjourned. Thank you.

[Whereupon, at 1:40 p.m., the committee was adjourned.]

**Laura A. Belmonte**

Laura A. Belmonte is Dean of the College of Liberal Arts and Human Sciences and Professor of History at Virginia Polytechnic Institute and State University. She received her A.B. in History and Political Science from the University of Georgia and her M.A. and Ph.D. in History from the University of Virginia. She is co-author of *Global Americans: A Transnational U.S. History*, author of *Selling the American Way: U.S. Propaganda and the Cold War*, and editor of *Speaking of America: Readings in U.S. History*. Her next book, *The International LGBT Rights Movement: A History* will be published later this year by Bloomsbury. She served on the U.S. Department of State's Advisory Committee on Historical Diplomatic Documentation from 2009 to 2019.

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Hearing Date: March 3, 2020

Hearing Title :

Article One: Exploring Ways for Congress to Reassert its Constitutional Authority

Witness Name: Laura A. Belmonte

Position/Title: Dean, College of Liberal Arts and Human Sciences, Virginia Polytechnic Institute and State University

Witness Type: ☐ Governmental ☒ Non-governmental

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(5)(A) Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof.

(B) In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of any Federal grants or contracts, or contracts or payments originating with a foreign government, received during the current calendar year or either of the two previous calendar years by the witness or by an entity represented by the witness and related to the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B) shall include—

- (i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and
- (ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.

**Matthew Spalding, Ph.D.**

Kirby Professor in Constitutional Government  
 Dean of the Van Andel Graduate School of Government  
 Vice President of Washington Operations  
 Hillsdale College

Matthew Spalding is the Kirby Professor in Constitutional Government at Hillsdale College and the Dean of the Van Andel Graduate School of Government at Hillsdale College's Washington, D.C. campus. As Vice President for Washington Operations, he also oversees the Allan P. Kirby Jr. Center for Constitutional Studies and Citizenship and the academic and educational programs of Hillsdale in the nation's capital.

He is the best-selling author of *We Still Hold These Truths: Rediscovering Our Principles, Reclaiming Our Future*, and is also executive editor of *The Heritage Guide to the Constitution*, a line-by-line analysis of each clause of the U.S. Constitution. His other books include *A Sacred Union of Citizens: Washington's Farewell Address and the American Character*; *Patriot Sage: George Washington and the American Political Tradition*; and *The Founders' Almanac: A Practical Guide to the Notable Events, Greatest Leaders & Most Eloquent Words of the American Founding*.

Prior to joining Hillsdale, Dr. Spalding was vice president of American Studies at The Heritage Foundation and founding director of its B. Kenneth Simon Center for Principles and Politics. He is a Fellow at the Claremont Institute for the Study of Statesmanship and Political Philosophy, and serves on the board of the Steamboat Institute and the Philadelphia Society.

He received his B.A. from Claremont McKenna College and his M.A. and Ph.D. in government from the Claremont Graduate School. In addition to teaching at Hillsdale, he has taught at George Mason University, the Catholic University of America, and Claremont McKenna College. He and his wife Elizabeth, a Hillsdale alumna, reside with their two children in Arlington, Virginia.

### Truth in Testimony Disclosure Form

In accordance with Rule XI, clause 2(g)(5)\*, of the *Rules of the House of Representatives*, witnesses are asked to disclose the following information. Please complete this form electronically by filling in the provided blanks.

**Committee:** The House Committee on Rules

**Subcommittee:**

**Hearing Date:** March 3, 2020

**Hearing Title :**

Article One: Exploring Ways for Congress to Reassert its Constitutional Authority

**Witness Name:** Matthew Spalding

**Position/Title:** Dean, Van Andel Graduate School of Government, Hillsdale College

**Witness Type:** ☐ Governmental ☒ Non-governmental

**Are you representing yourself or an organization?** ☒ Self ☐ Organization

**If you are representing an organization, please list what entity or entities you are representing:**

**If you are a non-governmental witness, please list any federal grants or contracts (including subgrants or subcontracts) related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current calendar year and previous two calendar years. Include the source and amount of each grant or contract. *If necessary, attach additional sheet(s) to provide more information.***

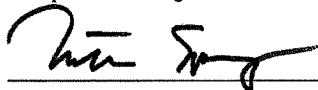
none

**If you are a non-governmental witness, please list any contracts or payments originating with a foreign government and related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current year and previous two calendar years. Include the amount and country of origin of each contract or payment. *If necessary, attach additional sheet(s) to provide more information.***

none

**False Statements Certification**

Knowingly providing material false information to this committee/subcommittee, or knowingly concealing material information from this committee/subcommittee, is a crime (18 U.S.C. § 1001). This form will be made part of the hearing record.



Witness signature

2/25/20  
Date

Please attach, when applicable, the following documents to this disclosure. Check the box(es) to acknowledge that you have done so.

- ☒ Written statement of proposed testimony
- ☒ Curriculum vitae or biography

\*Rule XI, clause 2(g)(5), of the U.S. House of Representatives provides:

(5)(A) Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof.

(B) In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of any Federal grants or contracts, or contracts or payments originating with a foreign government, received during the current calendar year or either of the two previous calendar years by the witness or by an entity represented by the witness and related to the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B) shall include—

(i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and

(ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.



**DEBORAH N. PEARLSTEIN**

Benjamin N. Cardozo School of Law  
 Yeshiva University · 55 Fifth Avenue, Room 938 · New York, NY 10003  
 Phone 212.790.0276 · Fax 212.790.0805 · Email [dpearlst@yu.edu](mailto:dpearlst@yu.edu)

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**ACADEMIC APPOINTMENTS**

**Benjamin N. Cardozo School of Law, Yeshiva University** **New York, NY**  
 Professor of Law and Co-Director, Floersheimer Center for Constitutional Democracy 2017 - present  
 Associate Professor 2014 – 2017  
 Assistant Professor 2011 – 2014  
 Courses: Constitutional Law I; International Law; Law of War; Presidential Power

**Princeton University, Woodrow Wilson School of Public and International Affairs** **Princeton, NJ**  
 Associate Research Scholar, Law and Public Affairs Program, 2007-2011  
 Courses: International Human Rights in the United States

**University of Pennsylvania Law School** **Philadelphia, PA**  
 Visiting Faculty Fellow, Fall 2009, 2010  
 Courses: Public International Law; Human Rights and National Security

**Georgetown University Law Center** **Washington, DC**  
 Visiting Associate Professor, Spring 2010  
 Courses: Public International Law

**Stanford Law School** **Palo Alto, CA**  
 Visiting Fellow, Center for Democracy, Development and the Rule of Law 2003-04  
 Courses: Human Rights and National Security Law Clinic

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**JUDICIAL CLERKSHIPS**

**Justice John Paul Stevens, U.S. Supreme Court** **Washington, DC**  
 Law Clerk, 1999-2000

**Judge Michael Boudin, U.S. Court of Appeals for the First Circuit** **Boston, MA**  
 Law Clerk, 1998-1999

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**EDUCATION**

**Harvard Law School** **Cambridge, MA**  
 J.D. *magna cum laude*, 1998  
 Activities: Articles Editor, *Harvard Law Review*; Teaching Fellow, Harvard Law School (LLM Introduction to American Law); Teaching Fellow, Harvard College (Children and Their Social Worlds)

**Cornell University** **Ithaca, NY**  
 A.B. *cum laude*, 1993 (Cornell College Scholar in Literature, Politics, and Social Change)  
 Honors: Distinction in All Subjects; Phi Beta Kappa; Rhodes Scholar Finalist.

**Université de Paris** **Paris, FR**  
 Studies in comparative American and French literature, 1992

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**SCHOLARLY PUBLICATIONS**

- Getting Past the Imperial Presidency*, 10 HARV. NAT'L SEC. J. 368 (2019)
- Armed Conflict at the Threshold*, 58 VA. J. INT'L L. 369 (2018).
- "How Everything Became War," 111 AM. J. INT'L L. 792 (2017).
- Before Privacy, Power: The Structural Constitution and the Challenge of Mass Surveillance*, 9 J. NAT'L SECURITY L. & POL'Y 159 (2017).
- Law at the End of War*, 99 MINN. L. REV. 143 (2014).
- How Wartime Detention Ends*, 36 CARDOZO L. REV. 625 (2014).
- Enhancing Due Process in Targeting*, ADVANCE: JOURNAL OF THE AMERICAN CONSTITUTION SOCIETY (Fall 2013).
- The Soldier, the State, and the Separation of Powers*, 90 TEXAS L. REV. 797 (2012).
- Detention Debates*, 110 MICH. L. REV. 1045 (2012).
- After Deference: Formalizing the Judicial Power in Foreign Relations Law*, 159 U. PENN. L. REV. 783 (2011).
- Justice Stevens and the Expert Executive*, 99 GEORGETOWN L.J. 1301 (2011).
- Ratcheting Back: International Law as a Constraint on Executive Power*, 26 CONST. COMMENT. 523 (2010).
- A Measure of Deference: Justice Stevens From Chevron to Hamdan*, 43 U.C. DAVIS L. REV. 1063 (2010) (symposium remarks).
- Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549 (2009).
- Contemporary Lessons from the Age-Old Prize Cases: A Comment on The Civil War in U.S. Foreign Relations Law*, 53 ST. LOUIS U. L.J. 73 (2009) (symposium contribution).
- We're All Experts Now: A Security Case Against Security Detention*, 40 CASE WESTERN RESERVE INT'L L. J. 577 (2009).
- National Intelligence and the Rule of Law*, 2 ADVANCE: JOURNAL OF THE AMERICAN CONSTITUTION SOCIETY 11 (Fall 2008).
- Avoiding an International Law Fix*, 41 CREIGHTON L. REV. 663 (2008) (invited lecture).
- American Torture*, INT'L AFFAIRS, Jan. 2008, at 147.
- The Constitution and Executive Competence in the Post-Cold War World*, 38 COLUM. HUMAN RTS. L. REV. 547 (2007).

*Finding Effective Constraints on Executive Power: Interrogation, Detention and Torture*, 81 IND. U. L. J. 1255 (2006).

*Saying What the Law Is*, 1 HARV. L. & POL'Y REV. (Online) (Nov. 6, 2006).

*Reconciling Torture with Democracy*, in THE TORTURE DEBATE IN AMERICA (Greenberg, ed., Cambridge University Press 2005).

*Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans With Disabilities Act*, 111 HARV. L. REV. 1560 (1998).

*The Supreme Court 1996 Term, Leading Cases – Right to Appeal Termination of Parental Rights: M.L.B. v. S.L.J.*, 111 HARV. L. REV. 249 (1997).

*Transracial Adoption: Congress Forbids Use of Race as a Factor in Adoptive Placement Decisions*, 110 HARV. L. REV. 1352 (1997).

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#### CONGRESSIONAL AND AGENCY TESTIMONY

House Committee on Foreign Affairs, “Prohibiting Unauthorized Military Action in Venezuela Act,” March 13, 2019, available at <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=109113>.

Senate Judiciary Committee, Subcommittee on Terrorism and Homeland Security, “Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond,” July 28, 2009, available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4002>.

House Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Civil Liberties, “Legal Issues Surrounding the Military Commissions System,” July 8, 2009, available at [http://judiciary.house.gov/hearings/hear\\_090708.html](http://judiciary.house.gov/hearings/hear_090708.html).

House Judiciary Committee, “Administration Lawyers and Interrogation Rules,” July 15, 2008, [http://www.cspanarchives.org/library/index.php?main\\_page=product\\_video\\_info&products\\_id=206401-1](http://www.cspanarchives.org/library/index.php?main_page=product_video_info&products_id=206401-1).

House Judiciary Committee, “Patriot Act Reauthorization,” June 10, 2005, [http://www.cspanarchives.org/library/index.php?main\\_page=product\\_video\\_info&products\\_id=187142-1&highlight=Deborah%20Pearlstein](http://www.cspanarchives.org/library/index.php?main_page=product_video_info&products_id=187142-1&highlight=Deborah%20Pearlstein).

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#### SELECTED ADDITIONAL PUBLICATIONS

*Foreign Policy Isn't Just Up to Trump*, THE ATLANTIC (Nov. 23, 2019).

*How Trump's DOJ Is Justifying Reversing Itself on the Legality of Indefinite Family Detention*, SLATE (July 6, 2018).

*How the Supreme Court Became a Political Prize, Long Before Kavanaugh*, WASH. POST (Oct. 12, 2018).

*How International Law Influences the Nature of War*, WASH. POST (Sept. 22, 2017).

*The Long Struggle Over the Legal Bounds of Terrorism*, WASH. POST (May 24, 2016).

*Guantanamo Diary*, WASH. POST (Jan. 20, 2015).

*Who Gets to Decide When We Go to War?* THE DAILY BEAST (Sept. 21, 2014).

*Exchange – Reply to David Cole on Targeted Killing*, THE NATION (Apr. 8, 2013).

*The Appeal of the Courts*, FOREIGN POLICY (March 25, 2013).

*Targeted Killings Can Be Legal*, SLATE (Feb. 8, 2013),

[http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/02/white\\_paper\\_on\\_drones\\_targeted\\_killings\\_can\\_be\\_legal\\_but\\_the\\_obama\\_administration.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/02/white_paper_on_drones_targeted_killings_can_be_legal_but_the_obama_administration.html).

*International Law in the U.S. Courts*, in THE JOURNALIST'S GUIDE TO NATIONAL SECURITY LAW (2012).

*Guantanamo, 10 Years Later*, N.Y. TIMES Opinion-Editorial (Jan. 9, 2012).

Blogs for *Balkinization*, at <http://balkin.blogspot.com/>, and *Opinio Juris*, at <http://opiniojuris.org/author/deborah-pearlstein/> (2009-16).

*My Boss, Justice Stevens*, N.Y. TIMES Opinion-Editorial (Apr. 9, 2010).

Columns for “Convictions,” *Slate Magazine’s* Blog on Legal Issues, available at <http://www.slate.com/blogs/search/searchresults.aspx?u=2148> (2008).

Columns for *The American Prospect*, available at <http://www.prospect.org/cs/search?keyword=Deborah+Pearlstein> (2004-2007).

*Detained at the Whim of the President*, International Herald Tribune Opinion-Editorial (December 10, 2003).

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## INVESTIGATIVE REPORTS

COMMAND’S RESPONSIBILITY, HUMAN RIGHTS FIRST; New York (February 2006).

GETTING TO GROUND TRUTH, HUMAN RIGHTS FIRST; New York (August 2004).

ENDING SECRET DETENTIONS, HUMAN RIGHTS FIRST; New York (June 2004).

ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES, THE LAWYERS COMMITTEE FOR HUMAN RIGHTS; New York (2003).

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**LAW SCHOOL SERVICE**

Committee Memberships and Service: Co-Director, Floersheimer Center for Constitutional Democracy (2018-20); Faculty and Clinical Appointments (2015-19); Faculty Advisor, Moot Court Honor Society (2016-17); Academic Standards Committee (2016); Alumni Affairs Working Group (2015-2016); Pro Bono Scholars Working Group (Spring 2015); Faculty Advisor, Journal of Conflict Resolution (2014-2015); Educational Policy (2013-2015); Clerkship and Placements (2011-2014); Faculty Development (2012-13); LLM, Graduate and International Programs (2011-13).

Selected events organized or co-organized: Conference on Civil Liberties with Justices Breyer, et al. (March 2019); Revisiting the Role of International Law in National Security: A Papers Workshop (May 2016) (with CLIHHR, the Floersheimer Center, and Stanford Law School); Prospects for Justice at Guantanamo (with CLIHHR) (Oct. 2015); "Privacy, Security and Secrecy After Snowden" (with the Floersheimer Center) (April 2014); Cardozo Law Review Symposium, "The Future of the Authorization for Use of Military Force" (Oct. 2013); "Zero Dark Thirty: Law, Film, and the Hunt for Bin Laden" (with the Floersheimer Center) (Feb. 13, 2012).

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**PROFESSIONAL HONORS AND SERVICE**

Editorial Board Member, Journal of National Security Law and Policy (peer reviewed journal hosted by Georgetown and Syracuse Law Schools) (2015 – present).

Chair, AALS Section on National Security Law (2015-16).

Member, ABA Standing Committee on Law and National Security, Advisory Committee (2008-2015).

Member, Liberty and Security Committee, The Constitution Project (bipartisan blue-ribbon committee convened by leading independent think tank) (2008-present).

Voting Rights Award, ACLU Foundation of Southern California (for work in election systems reform litigation in California) (2002).

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**SELECTED PRESENTATIONS**

Presenter, Feb. 22, 2019, Stanford University Workshop on Revisiting the Laws on Nuclear Weapons: Proportionality, Reprisal, and Launch Authority, "Can Law Really Constrain the U.S. Recourse to Force? Constitutional Law, International Law, and the Way States Work," Palo Alto, CA.

Presenter, National Conference of Constitutional Law Scholars, University of Arizona School of Law, "Executive Noncompliance and the Effectiveness of Legal Constraint," Phoenix, AZ, March 16, 2018.

Presenter, Emory Law School Colloquium, "Measuring International Legal Constraint," Emory Law School, Atlanta, GA, Feb. 21, 2018.

Presenter, American Society of International Law Annual Research Forum, "Measuring International Legal Constraint," Washington University School of Law, St. Louis, MO, Oct. 27, 2017.

Panelist, University of Virginia School of Law, “Middle East Conflicts and the International Legal Bases for U.S. Coalition Involvement,” Charlottesville, VA, March 2, 2017.

Presenter, Loyola University (Chicago) Law School Seventh Annual Constitutional Law Colloquium, “Before Privacy, Power: The Structural Constitution and the Challenge of Mass Surveillance,” Chicago, IL, Nov. 4-5, 2016.

Panelist, UCLA School of Law, “Obama’s Drone Legacy,” Los Angeles, CA, Oct. 21, 2016.

Presenter, University of Notre Dame Law School, Fifteen Years After 9/11 Conference, “Presidential Power and the Changing Nature of War,” South Bend, IN, Sept. 22, 2016.

Moderator, NYU Brennan Center for Justice, Briefing for Congressional Staff, “Overseas Surveillance in an Interconnected World,” Washington, D.C., March 17, 2016.

Debate with Michael Mukasey, cosponsored by the National Constitution Center, the American Constitution Society and the Federalist Society, “Resolved: The NSA’s Mass Phone Data Collection Violates the Fourth Amendment,” New York, NY, June 16, 2015.

Discussant, Columbia Human Rights Law Review and Columbia Law School Human Rights Institute Workshop on “The Forever War,” “The End of Armed Conflict, the End of Participation in an Armed Conflict, and the End of Hostilities: Definitions and Implications for Continued Detention and Targeting Operations,” New York, NY, Dec. 4, 2015.

Presenter, NYU School of Law Hauser Colloquium, “Illegal But Legitimate Uses of Force: A Case for Permissive Imminence in Self-Defense?” New York, NY, Nov. 12, 2015.

Presenter, American Academy of Arts and Sciences Conference on New Dilemmas in Ethics, Technology and War, “Human Rights and Warfare Today,” West Point, NY, Nov. 4, 2015.

Discussant, Columbia Law School National Security Law Summer Workshop, “Extraterritorial Criminal Jurisdiction,” New York, NY, July 10, 2015.

Panelist, Cardozo School of Law Conference, Constitutional Conflicts and the Judicial Role in Comparative Perspective, “Judicial Oversight of National Security and Intelligence Gathering,” New York, NY, May 17-18, 2015.

Debater, Intelligence Squared Debates, cosponsored by the Columbia University Richman Center and the National Constitution Center (NPR Podcast), “The President Has Exceeded His Constitutional Power by Waging War Without Congressional Authorization,” Mar. 31, 2015.

Panelist, 23rd Annual Review of the Field of National Security Law, cosponsored by UVA School of Law, Duke University School of Law, Georgetown University Law Center, and the American Bar Association, “Do We Need a New AUMF?” Washington, D.C., Oct. 31, 2013.

Organizer, Discussant and Panelist, Cardozo Law Review Symposium, “Law at the End of War: Fighting Terrorism After Afghanistan,” New York, NY, Oct. 14, 2013.

Presenter, St. John’s International Law Colloquium, “Law at the End of War,” NY, NY, Nov. 4, 2013.

Presenter, Sixth Annual National Security Law Faculty Workshop, co-sponsored by the University of Texas School of Law, the International Committee of the Red Cross, U.S. Army Judge Advocate General Legal Center and School, "Law at the End of War," Houston, TX, May 17, 2013.

Panelist, Annual Review of the Field of National Security Law, co-sponsored by the University of Virginia Law School, Duke University Law School, and the American Bar Association, "Role of the Courts in National Security Law," Washington, D.C., November 29, 2012.

Presenter, Duke School of Law, "National Security Judicial Deference," Durham, NC, April 13, 2012.

Panelist, Cardozo School of Law, ACLU in American Life, New York, NY, April 3, 2012.

Moderator, Cardozo School of Law Conference on Constitutionalism, Ancient and Modern, "Modern Constitutionalism: Institutions and Theory," New York, NY, April 2, 2012.

Panelist, American Society of International Law Annual Meeting, "Teaching International Law While Confronting Current Events," Washington, D.C., March 30, 2012.

Discussant, Vanderbilt Law School, "National Security Federalism and the War on Terror," Nashville, TN, Sept. 23, 2011.

Panelist, Harvard Law School, "Presidency in the Post-9/11 World," Cambridge, MA, Sept. 16, 2011.

Panelist, University of Pennsylvania Law School, "Is Targeted Killing Permissible?," Philadelphia, PA, April 15, 2011.

Panelist, American University, Washington College of Law, "Guantanamo Detainees: What Next?," Washington, D.C., Feb. 18, 2011.

Panelist, ABA Standing Committee on Law and Security, National Defense University Workshop, "Teaching National Security Law," Washington, D.C., Oct. 2, 2010.

Presenter, Georgetown University Law Center, Faculty Workshop, "After Deference: Formalizing the Judicial Power for Foreign Relations Law," Washington, D.C., May 25, 2010.

Panelist, National Constitution Center, "Leaving a Legacy: The Departure & Replacement of Justice John Paul Stevens," Philadelphia, PA, May 6, 2010.

Panelist, Georgetown University Law Center – Freedom, Security, and Transatlantic Dialogue, "Investigating and Apprehending Terrorist Suspects," Washington, D.C., April 29, 2010.

Panelist, University of Pennsylvania Law School Conference on Foundations of International Law, "Jus Cogens and Legitimacy in International Law," Philadelphia, PA, April 24, 2010.

Panelist, Duke University School of Law, "Prosecuting Alleged Terrorists in Federal Courts and Military Commissions," Durham, NC, April 15, 2010.

Presenter, University of Pennsylvania Law School Faculty Seminar, "After Deference: Formalizing the Judicial Power in Foreign Relations Law," Philadelphia, PA, Nov. 30, 2009.

Presenter, Georgetown University Law School Foreign Relations Colloquium, "Form and Function in the National Security Constitution," Washington, D.C., Nov. 23, 2009.

Panelist, Annual Review of the Field Conference of National Security Law, co-sponsored by the University of Virginia Law School, Duke University Law School, and the American Bar Association, "Revised Military Commissions: Lingerin Questions," Washington, D.C., November 13, 2009.

Panelist, Princeton University Constitution Day Lecture, "How Small Emergencies Undermine Big Constitutional Principles," Princeton, NJ, Sept. 21, 2009.

Panelist, American Society of International Law Annual Meeting, "Closing Guantanamo," Washington, D.C., March 26, 2009.

Panelist, Georgetown University Center on National Security and the Law, "Bringing Detainees to Justice and Justice to Detainees: Remaining Questions about Detention and Trials after Obama's Executive Orders," Washington, D.C., March 20, 2009.

Presenter, NYU Law School Law and Security Colloquium, "Form and Function in the National Security Constitution," New York, NY, Oct. 27, 2008.

Panelist, American Bar Association Annual Meeting, "After Boumediene v. Bush: Habeas, Detainees, and Military Commissions," New York, NY, Aug. 9, 2008.

Panelist, American Constitution Society 2007-08 Supreme Court Review, National Press Club, Washington, D.C., July 1, 2008.

Keynote Speaker, University of Virginia Law School, the Judge Advocates General Legal Center and School, the International Committee of the Red Cross, "Applying International Humanitarian Law to Today's Conflicts," Charlottesville, VA, May 30, 2008.

Panelist, Georgetown University Law Center, Inauguration of the Center on National Security and the Law, "Toward a New International Law for 21st Century Conflicts," Washington, D.C., April 10, 2008.

Panelist, Harvard Law School Conference, A Celebration of Public Interest, "Separation of Powers," Cambridge, MA, March 14, 2008.

Presenter, St. Louis University Law School Conference on the Use and Misuse of History in U.S. Foreign Relations Law, "The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Twentieth Century Transformations," St. Louis, MO, March 7, 2008.

Panelist, St. John's University Law School National Security Constitution Conference honoring Harold H. Koh, "Trying Terrorists: Courts, Tribunals or Commissions?" New York, NY, Feb. 29, 2008.

Presenter, London School of Economics Centre for the Study of Human Rights, Conference on Human Rights and Counterterrorism: Reframing the Debate, "Comparative Counterterrorism: What Can We Learn?" London, UK, Oct. 5, 2007.

Presenter, Paul H. Nitze School of Advanced International Studies at Johns Hopkins University, Conference on Shaping a Sensible Strategy to Ensure America's National Security, "Societal Values, The Rule of Law & National Security Strategy," Washington, D.C., June 14-15, 2007.



Presenter, Princeton University Woodrow Wilson School Conference on A World of Legal Conflicts: Multiple Norms in the International System, "Transnational Movement of Peoples: Adoption, Immigration, Trafficking, Renditions," Princeton, NJ, May 31, 2007.

Presenter, Duke Law School Conference on Confronting Terrorism Here and Abroad: Which Way Forward? "Detaining Terrorists: Habeas Corpus Concerns," Durham, NC, April 12-13, 2007.

Panelist, Texas Law School International Law Journal Symposium on the Military Commissions Act, "Interrogation," Austin, TX, April 10-11, 2007.

Panelist, Harvard Law School Dean's Forum, "Executive Power, Detentions, Interrogations, and Military Commissions," Cambridge, MA, November 9, 2005.

Presenter, Indiana University School of Law, "War, Terrorism, and Torture: Limits on Presidential Power in the 21st Century," Bloomington, IN, October 7, 2005.

Panelist, American Bar Association's Standing Committee on Law and National Security's Annual Review of the Field Conference, "Dangerous Speech?" Washington, D.C., November 4, 2005.

Keynote Speaker, New Century Address to the Stanford University Center for International Security & Cooperation, "The Rule of Law in the 'War on Terror,'" Palo Alto, CA, May 3, 2005.

Panelist, Princeton Colloquium on Public and International Affairs "Rethinking the War on Terror," "Fighting Fire with Fire?: Assessing the Ethics of Torture and Detention," Princeton, NJ, April 9, 2005.

Panelist, University of Chicago Law School Conference, "Coercive Interrogation and the Rule of Law," Chicago, IL, October 22, 2004.

Presenter, Aspen Institute Seminar for Judges, International Human Rights and Humanitarian Law: Its Application in National Jurisprudence, "Military Commissions at Guantanamo Bay," Wye, MD, October 14-17, 2004.

Presenter, 54th Pugwash Conference on Science and International Affairs, "Human Rights Consequences of the 'War on Terror,'" Seoul, SOUTH KOREA, October 4-9, 2004.

Panelist, Princeton University Colloquium on International Affairs, "Who Watches the Watchdogs? Regulation & Accountability in the NGO Sector," Princeton, NJ, April 24, 2004.

Presenter, Sixtieth Session of the United Nations Commission on Human Rights, "Human Rights Defenders in the U.S. Supreme Court: U.S. Law and Security Post-September 11," Geneva, SWITZERLAND, April 16, 2004.

Presenter, Second Pugwash Workshop on Terrorism: Consequences of the War on Terrorism, "Assessing the New Normal: Liberty and Security for the Post-September 11 United States," Como, ITALY, October 10, 2003.

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**SELECTED MEDIA APPEARANCES**

ABCNews Live, Impeachment Coverage, Jan. 23-24, 2020.

BBC World Service News Hour, Impeachment Developments, Dec. 18, 2019.

Mattathias Schwartz, "Is Obama Serious About Closing Guantanamo?" THE NEW YORKER, Jan. 22, 2016.

Intelligence Squared Debates, "The President Has Exceeded His Constitutional Power," NPR, March 13, 2015, <http://intelligencesquaredus.org/debates/past-debates/item/1253-the-president-has-exceeded-his-constitutional-authority-by-waging-war-without-congressional-authorization>.

Jose Diaz-Balart, MSNBC, Aug. 14, 2014, <http://www.msnbc.com/jos--d-az-balart/watch/should-us-meet-terrorists--ransom-demands--321783363682>,

All in with Chris Hayes, MSNBC, Sept. 4, 2013, <http://video.msnbc.msn.com/all-in-/51362794#52921011>.

Nina Totenberg, "How Will Supreme Court Rule on Health Care Law?" NPR, Feb. 2, 2011, <http://www.npr.org/2011/02/02/133416600/how-will-supreme-court-rule-on-health-care-law>.

Jeffrey Toobin, "After Stevens," THE NEW YORKER, March 22, 2010.

Jess Bravin, "Justice Stevens Renders an Opinion, WALL ST. J., April 18, 2009.

Joan Biskupic, "Paradox Marks Supreme Court Term," USA TODAY, June 27, 2008.

Ari Shapiro, "Gonzales Leaves the President's Power Circle," NPR Morning Edition, Aug. 28, 2007, <http://www.npr.org/templates/story/story.php?storyId=8958148>.

Nina Totenberg, "Guantanamo Decision Puts President in Difficult Spot," NPR Morning Edition, June 30, 2006, <http://www.npr.org/templates/story/story.php?storyId=5523742>.

Congressional Testimony, "Act Two," THE DAILY SHOW WITH JON STEWART, June 16, 2005, <http://www.thedailyshow.com/video/index.jhtml?videoId=113553&title=headlines-act-two>.

Linda Greenhouse, "Supreme Court Rejects Cubans' Detention," N.Y. TIMES, Jan. 13, 2005.

Interview Guest, The NewsHour with Jim Lehrer, PBS, June 28, 2004, available at [http://www.pbs.org/newshour/bb/law/jn-june04/detainee\\_6-28.html](http://www.pbs.org/newshour/bb/law/jn-june04/detainee_6-28.html).

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**PROFESSIONAL EXPERIENCE****Human Rights First****New York, NY**

Director, U.S. Law and Security Program, 2003-2007

Directed 8-member staff in research, litigation and advocacy on the human rights consequences of U.S. counterterrorism and national security policy. Named member of first team of independent human rights monitors to visit Guantanamo Bay military commissions; drafted and/or organized multiple briefs amicus curiae for various signatories to U.S. Supreme Court, three of which briefs were cited in Court opinions; prepared successful proposals for \$4 million in multi-year foundation grants to support program activities.

**Munger, Tolles & Olson LLP****San Francisco, CA**

Associate Attorney, 2001-2003

Litigated constitutional and public law matters; shared ACLU of Southern California Voting Rights Award for successful litigation to secure the reform of election systems in California.

**The White House****Washington, D.C.**

Senior Editor and Speechwriter, 1993-1995

Wrote and edited Presidential statements, speeches, and letters, working closely with policy officials. Supervised 6-member writing staff.

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**PROFESSIONAL MEMBERSHIPS AND BAR ADMISSIONS****Memberships:** American Society of International Law, American Constitution Society**Admissions:** California State Bar; Washington, D.C. Bar; U.S. Supreme Court Bar

### Truth in Testimony Disclosure Form

In accordance with Rule XI, clause 2(g)(5)\*, of the *Rules of the House of Representatives*, witnesses are asked to disclose the following information. Please complete this form electronically by filling in the provided blanks.

Committee: The House Committee on Rules

Subcommittee: \_\_\_\_\_

Hearing Date: March 3, 2020

Hearing Title :

Article One: Exploring Ways for Congress to Reassert its Constitutional Authority

Witness Name: Deborah Pearlstein

Position/Title: Professor of Law and Co-Director, Floersheimer Center for Constitutional Democracy

Witness Type: ☒ Governmental ☐ Non-governmental

Are you representing yourself or an organization? ☐ Self ☒ Organization

If you are representing an organization, please list what entity or entities you are representing:

If you are a non-governmental witness, please list any federal grants or contracts (including subgrants or subcontracts) related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current calendar year and previous two calendar years. Include the source and amount of each grant or contract. *If necessary, attach additional sheet(s) to provide more information.*

If you are a non-governmental witness, please list any contracts or payments originating with a foreign government and related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current year and previous two calendar years. Include the amount and country of origin of each contract or payment. *If necessary, attach additional sheet(s) to provide more information.*

**False Statements Certification**

Knowingly providing material false information to this committee/subcommittee, or knowingly concealing material information from this committee/subcommittee, is a crime (18 U.S.C. § 1001). This form will be made part of the hearing record.

*Deborah N. Pearlstein*

Witness signature

2/26/20

Date

**Please attach, when applicable, the following documents to this disclosure. Check the box(es) to acknowledge that you have done so.**

- ☒ Written statement of proposed testimony
- ☒ Curriculum vitae or biography

\*Rule XI, clause 2(g)(5), of the U.S. House of Representatives provides:

(5)(A) Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof.

(B) In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of any Federal grants or contracts, or contracts or payments originating with a foreign government, received during the current calendar year or either of the two previous calendar years by the witness or by an entity represented by the witness and related to the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B) shall include—

(i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and

(ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.

SAIKRISHNA BANGALORE PRAKASH  
580 Massie Road, Charlottesville, VA 22901  
[sprakash10@gmail.com](mailto:sprakash10@gmail.com)  
434-243-8539

EMPLOYMENT

UNIVERSITY OF VIRGINIA SCHOOL OF LAW, 2009 to present  
Currently James Monroe Distinguished Professor of Law &  
Paul G. Mahoney Research Professor of Law  
Senior Fellow, Miller Center of Public Affairs

UNIVERSITY OF CHICAGO LAW SCHOOL, Visiting Professor of Law, 2012

UNIVERSITY OF SAN DIEGO SCHOOL OF LAW, Herzog Research Professor of Law, 2004 to 2009;  
Professor of Law, 2002 to 2009; Associate Professor of Law, 1999-2002

PRINCETON UNIVERSITY, James Madison Fellow, James Madison Program, Fall 2008

UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Visiting Professor of Law, Spring 2008

HOOVER INSTITUTION, Stanford University, Visiting Research Fellow, March 2007

NORTHWESTERN UNIVERSITY LAW SCHOOL, Visiting Professor of Law, Spring 2004

OFFICE OF MANAGEMENT AND BUDGET, Executive Office of the President, Assoc. Gen. Counsel, 2001

BOSTON UNIVERSITY SCHOOL OF LAW, Associate Professor of Law, 1998-1999

UNIVERSITY OF ILLINOIS COLLEGE OF LAW, Visiting Assistant Professor, 1997-1998

SIMPSON THACHER & BARTLETT, Associate, 1995-1997

U.S. SUPREME COURT, Clerk to Justice Clarence Thomas, 1994-1995

COURT OF APPEALS FOR THE D.C. CIRCUIT, Clerk to the Judge Laurence H. Silberman, 1993-1994

EDUCATION

YALE LAW SCHOOL, J.D. 1993

Awards: Finalist in Thurman Arnold Moot Court Competition  
John M. Olin Fellow in Law, Economics, and Public Policy  
Activities: Senior Editor, YALE LAW JOURNAL

STANFORD UNIVERSITY, B.A. Economics and Political Science 1990

Honors: *Phi Beta Kappa*, departmental honors in Economics and Political Science  
Activities: Research Assistant for Senior Fellows Alex Inkeles & John Cogan, Hoover Institution

AWARDS & HONORS

Honorable Mention, "Best [book-length] Work of Legal Scholarship," The American Society of Legal Writers—*IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE*, 2016

Inaugural Speaker, Rosenkranz Originalism Conference, Yale Law School, 2019

Stranahan Lecture, University of Toledo Law School, Toledo University, 2018

Elected to American Law Institute, 2017

Walter F. Murphy Lecture on Constitutional Law, Princeton University, 2015

Roger Traynor Faculty Achievement Award, University of Virginia School of Law, 2015

James Gould Cutler Lecture on Constitutional Law at the William & Mary School of Law, 2008

Paul M. Bator Award, awarded annually by the Federalist Society to a young scholar (under 40) for excellence in legal scholarship and teaching, 2008

BOOK and BOOK CONTRIBUTIONS

*THE LIVING PRESIDENCY: AN ORIGINALIST CASE AGAINST ITS EVER-EXPANDING POWERS*  
(forthcoming Belknap, Harvard University Press 2020)

*IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE*  
(Yale University Press 2015)

*Resolved, The Unitary Executive is a Myth: Con*, in *DEBATING THE PRESIDENCY: CONFLICTING PERSPECTIVES ON THE EXECUTIVE* (Richard J. Ellis & Michael Nelson, eds., 2017, 2014)

"Note on the Separation of Powers", "Executive Vesting Clause" & "Take Care Clause" in *THE HERITAGE GUIDE TO THE CONSTITUTION* (David Forte, ed., 2014, 2005)

"The Story of Myers and its Wayward Successors: Going Postal on the Removal Power" in *PRESIDENTIAL POWER STORIES* (Curtis Bradley & Christopher Schroeder, eds., 2008)

LAW REVIEW PUBLICATIONS

*Of Synchronicity and Supreme Law*, 132 HARV. L. REV. 1220 (2019)

*Speaking with a Different Voice: Why the Military Trial of Civilians and the Enemy is Constitutional*, 107 CALIF. L. REV. 1021 (2019)

*Double Duty Across the Magisterial Branches* 44 J. SUP. CT. HIS. 26 (2019)

*Congress as Elephant*, 104 VA. L. REV. 797 (2018)

*Text over Intent and the Demise of Legislative History* (panel remarks), 43 DAYTON L. REV. 1 (2018)

*The Past, Present, and Future of Presidential Power*, 14 U. ST. THOMAS L.J. 627 (2018)

*Military Force and Violence, but neither War nor Hostilities*, 64 DRAKE L. REV. 995 (2016) (symposium on war powers during Obama Administration at Drake Law School)

*Congress & the Reconstruction of Foreign Affairs Federalism*, 115 MICH. L. REV. 47 (2016) (with Ryan Baasch)

*People v. Legislature*, 39 HARV. J. L. & PUB. POL. 341 (2016) (with John Yoo)

*Zivotofsky & the Separation of Powers*, 2015 SUP. CT. REV. 1

*50 States, 50 Attorneys General, and 50 Approaches to the Duty to Defend*, 124 YALE L. J. 2100 (2015) (with Neal Devins)

*The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337 (2015)

*The Boundless Treaty Power Within a Bounded Constitution*, 90 NOTRE DAME L. REV. 1499 (2015) (symposium on *Bond v. United States*)

*Book Review of The Wartime President: Executive Influence and the Nationalizing Politics of Threat*, 101 J. AM. HIST. 979 (2014)

*Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859 (2013) (with Neal Devins)

*The Appointment and Removal of William J. Marbury and When an Office Vests*, 89 NOTRE DAME L. REV. 199 (2013)

*The Imbecilic Executive*, 99 VA. L. REV. 1361 (2013)

*Guru Dakshina*, 2013 U. ILL. L. REV. 1787 (symposium on Akhil Amar's UNWRITTEN CONSTITUTION)

*Missing Links in the President's Evolution on Same-Sex Marriage*, 81 FORDHAM L. REV. 553 (2012)



*The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012) (with Neal Devins)

LAW REVIEW PUBLICATIONS (continued)

*The Goldilocks Executive*, 90 TEX. L. REV. 973 (2012) (book review of EXECUTIVE UNBOUND by Eric Posner and Adrian Vermeule) (with Michael Ramsey)

*The Causes of Progressive Stagnation*, 72 OHIO ST. L. J. 1277 (2011)

*The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 ALB. GOVT. L. REV. 575 (2010)

*Why the Incompatibility Clause Applies to the Office of the President*,  
4 DUKE J. OF CONST. L. & PUB. POL. 107 (2009)

*Fragmented Features of the Constitution's Unitary Executive*, 45 WILLAMETTE L. REV. 701 (2009)

*The Executive's Duty to Disregard Unconstitutional Laws*, 95 GEO. L. J. 1613 (2008)

*Imperial and Imperiled: The Curious State of the Executive*, 50 WM. & MARY L. REV. 1021 (2008)  
(James Gould Cutler Lecture on Constitutional Law at William and Mary School of Law)

*The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008)

*Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89 (2008)

*Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1 (2008) (with Larry Alexander)

*A Taxonomy of Presidential Powers*, 88 B.U. L. REV. 327 (2008)

*The Misunderstood Relationship between Originalism and Popular Sovereignty*,  
31 HARV. J. OF L. & PUB. POL. 485 (2008)

*Unleashing the Dogs of War: What the Constitution Means by "Declare War,"*  
93 CORNELL L. REV. 45 (2007)

*A Two Front War*, 93 CORNELL L. REV. 197 (2007) (sur-reply to Robert Delahunty & John Yoo, *Making War* by 93 CORNELL L. REV. 123 (2007) and Michael Ramsey, *The President's Power to Respond to Attacks*, 93 CORNELL L. REV. 169 (2007))

*Why the President Must Veto Unconstitutional Bills*, 16 W. & M. BILL OF RIGHTS J. 81 (2007)

*Delegation Really Running Riot*, 93 VA. L. REV. 1035 (2007) (with Larry Alexander)

*More Democracy, Less Constitution*, 55 DRAKE L. REV. 899 (2007) (symposium issue on SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006))

*How to Remove a Federal Judge*, 116 YALE L. J. 72 (2006) (with Steve Smith)

LAW REVIEW PUBLICATIONS (continued)

(Mis)Understanding "Good Behavior" Tenure, 116 YALE L. J. 139 (2006) (with Steve Smith) (sur-reply to Professor Martin Redish, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139 (2006))

*Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors are Wrong for America*, 106 COLUM. L. REV. 2207 (2006) (book review of CASS SUNSTEIN, *RADICALS IN ROBES* (2005))

*Removal and Tenure in Office*, 92 VA. L. REV. 1779 (2006)

*How the Constitution Makes Subtraction Easy*, 92 VA. L. REV. 1871 (2006) (sur-reply to John Harrison, *Addition by Subtraction*, 92 VA. L. REV. 1853 (2006))

*New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006)

*Regulating the Commander in Chief: Some Theories*, 81 IND. L.J. 1319 (2006)

*The Constitutional Status of Customary International Law*, 30 HARV. J. OF L. & PUB. POL. 65 (2006)

*Against Interpretive Supremacy*, 103 MICH. L. REV. 1539 (2005) (with John Yoo) (review of Larry Kramer's *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW*)

*The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005)

*Regulating Presidential Power*, 91 CORNELL L. REV. 215 (2005) (review of HAROLD KRENT, *PRESIDENTIAL POWERS* (2005))

*Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591 (2005) (with Michael D. Ramsey)

"Is that English You're Speaking?" *Why Intention-Free Interpretation is an Impossibility*, 41 U.S.D. L. REV. 967 (2004) (with Larry Alexander) (50th anniversary issue)

*Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004)

*The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299 (2004)

*Mother May I: Imposing Mandatory, Prospective Rules of Statutory Interpretation*, 20 CONST. COMM. 97 (2004) (with Larry Alexander)

*Questions for the Critics of Judicial Review*, 72 GEO. WASH. L. REV. 354 (2003) (with John Yoo)

*Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (with Larry Alexander)

LAW REVIEW PUBLICATIONS (continued)

- Branches Behaving Badly: The Predictable and often Desirable Consequences of the Separation of Powers*,  
12 CORNELL J. L. & PUB. POL. 543 (2003)
- The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003) (with John Yoo)
- Overcoming the Constitution*, 91 GEO. L. J. 407 (2003) (review of RICHARD FALLON,  
IMPLEMENTING THE CONSTITUTION (2001))
- Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*,  
55 ARK. L. REV. 1149 (2003)
- The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701
- Are the Judicial Safeguards of Federalism the Ultimate Form of Conservative Judicial Activism?*  
55 U. COLO. L. REV. 1363 (2002)
- The Executive Power over Foreign Affairs*, 111 YALE L. J. 231 (2001) (with Michael Ramsey)
- The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001)  
(with John Yoo)
- America's Aristocracy*, 109 YALE L. J. 541 (1999) (review of MARK TUSHNET,  
TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999))
- Our Dysfunctional Insider Trading Regime*, 99 COLUM. L. REV. 1491 (1999)
- A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143 (1999)
- Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1 (1998)
- A Comment on Congressional Enforcement*, 32 IND. L. REV. 193 (1998)
- Unoriginalism's Law Without Meaning*, 15 CONST. COMM. 329 (1998) (review of JACK RAKOVE,  
ORIGINAL MEANINGS (1998))
- General United States Tax Considerations Pertaining to the Creation, Acquisition and Disposition of Trademarks*  
in ADVANCED SEMINAR ON TRADEMARK LAW 403 (1996) (with Peter Riley)
- The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994) (with Steven Calabresi)
- Field Office Federalism*, 79 VA. L. REV. 1957 (1993)
- Hail to the Chief Administrator: The Framers and the President's Administrative Powers*,  
102 YALE L.J. 991 (1993) (Student Note)

SELECT INTERNET PUBLICATIONS

Article II, Section 1, National Constitution Center, found at <http://constitutioncenter.org/interactive-constitution/articles/article-ii/the-vesting-clause-common-interpretation/clause/35> (with Christopher Schroeder)

Executive Power Clause, National Constitution Center, found at <http://constitutioncenter.org/interactive-constitution/articles/article-ii/executive-power-clause/clause/35>

"A Fool for the Original Constitution," 130 HARV. L. REV. F. 24 (2016).

Article II, Section 3, National Constitution Center, found at <http://constitutioncenter.org/interactive-constitution/articles/article-ii/article-ii-section-3-by-bill-marshall-and-saikrishna-prakash/clause/38> (with William Marshall)

Presidential Duties, National Constitution Center, found at <http://constitutioncenter.org/interactive-constitution/articles/article-ii/article-ii-section-3-by-saikrishna-prakash/clause/38>

Revolt of the Attorneys General, L.A. Times (April 18, 2016), found at <http://www.latimes.com/opinion/op-ed/la-oe-0418-devinsprakash-attorneys-general-refusal-to-defend-20160418-story.html> (with Neal Devins)

Review of Untrodden Ground: How Presidents Interpret the Constitution (by Harold H. Bruff), found at <http://newramblerreview.com/book-reviews/law/executive-order>

Stop fighting it. America is a monarchy, and that's probably for the best, found at <https://www.washingtonpost.com/posteverything/wp/2015/06/23/stop-fighting-it-america-is-a-monarchy-and-thats-probably-for-the-best/>

The Statutory Nonenforcement Power, 91 TEXAS L. REV. SEE ALSO 115, found at [www.texaslrev.com/wp-content/uploads/Prakash.pdf](http://www.texaslrev.com/wp-content/uploads/Prakash.pdf)

Obama's Executive Orders Will Annoy Friends and Foes. NY Times, A Matter of Debate, found at <http://www.nytimes.com/roomfordebate/2014/01/29/presidential-power-vs-congressional-inertia/obamas-executive-orders-will-annoy-friends-and-foes>

The President May Attack Enemies Overseas, Even Americans. NY Times, A Matter of Debate, found at <http://www.nytimes.com/roomfordebate/2013/02/05/what-standards-must-be-met-for-the-us-to-kill-an-american-citizen/the-president-may-attack-enemies-overseas-even-americans/>

Limit Use of Presidential Perks? Yeah Right. NY Times, A Matter of Debate, found at <http://www.nytimes.com/roomfordebate/2012/09/20/when-the-white-house-speaks-on-the-campaign-trail/limit-use-of-presidential-perks-yeah-right>

SELECT INTERNET PUBLICATIONS (cont.)

*Removing Federal Judges Without Impeachment*, 116 YALE L.J. POCKET PART 95 (2006)  
(with Steve Smith), found at <http://thepocketpart.org/2006/10/18/prakashsmith.html>

The Domestic War, Yale L.J. (The Pocket Part), March 2006,  
<http://www.thepocketpart.org/2006/03/prakash.html>.

Should the Attorney General be Independent?, Debate Club, Legal Affairs (2/13/06)  
found at [http://www.legalaffairs.org/webexclusive/debateclub\\_indieAG0206.msp](http://www.legalaffairs.org/webexclusive/debateclub_indieAG0206.msp)

When Can Congress Remove Judges, Debate Club, Legal Affairs (12/26/05)  
found at [http://www.legalaffairs.org/webexclusive/debateclub\\_goodbehavior1205.msp](http://www.legalaffairs.org/webexclusive/debateclub_goodbehavior1205.msp)

SELECT PRESENTATIONS and PANELS

JRTI Conference, Seoul, South Korea, Speaker on separation of powers, Dec. 2019

UC Berkeley Law School, Jorde Lecture Commentator, Nov. 2019

UC Berkeley Public Law Workshop, Nov. 2019

Federalist Society Conference, Washington, DC, Nov. 2019

Yale Law School, Rosenkrantz Originalism Conference, Inaugural Speaker, Oct. 2019

University of San Diego, Summer Workshop, Aug. 2019

Stanford Law School Panel on Jonathan Gienapp's *THE SECOND CREATION*, Apr. 2019

North Carolina School of Law, Faculty Workshop at University of, Apr. 2019

NYU Brennan Center, Keynote Speaker on Emergencies, Jan. 2019

American Enterprise Institute, Panel on Independent Counsels, Sept. 2018

Miller Center Panel on Kavanaugh Nomination, Sept. 2018

Berkeley Law Review Symposium on Amanda Tyler's *HABEAS IN WARTIME*, May 2018

Originalism Boot Camp, Georgetown Law, May 2018

U. of Ill. Constitutional Law Colloquium, Paper on Synchronicity and Supreme Law, Apr. 2018

Duke-Yale Foreign Affairs Conference, Paper on Treaty Termination, Oct. 2017

Supreme Court Historical Society, Lecture on John Jay and John Marshall, Oct. 2017

PRESENTATIONS and PANELS (cont.)

Constitution Day Lecturer, Skidmore College, Oct. 2017

American Enterprise Institute, Panelist on Filibuster Reform, Sept. 2017

USD Faculty Workshop, Paper on Synchronicity and Supreme Law, July 2017

Originalist Boot Camp, Georgetown Law, May 2017

Stanford Constitutional Center Conference on Constitutional Amendments, Panelist, 2017

Miller Center, Lecture on the President's Power to Amend the Constitution, Apr. 2017

St. Thomas Law School's Conference on Executive Power, Keynote Speaker, April 2017

Article I, Initiative Conference, Paper on The Constitution of Congress, Mar. 2017

Justice Thomas Conference at Yale Law School, Panelist on Separation of Powers, Mar. 2017

USD Originalism Conference, Commentator on Michael McConnell's Paper, Feb. 2017

American Enterprise Institute, Panelist on The Imperial Presidency in the Age of Trump, Jan. 2017

Federalist Society Conference, Panelist on "Text over Legislative Intent," Nov. 2016

Emory Law School Faculty Workshop, Paper on Synchronicity and Supreme Law, Fall 2016

Georgia Law School Faculty Workshop, Paper on Synchronicity and Supreme Law, Fall 2016

ACS Conference, Panelist on the Obama Administration and the Imperial Presidency, June 2016

Originalism Boot Camp, Georgetown Law School, May 2016

Drake Law School Conference on War Powers, Paper on President Obama's wars, Apr. 2016

Princeton Univ., Walter F. Murphy Lectureship, Lecture on Imperial from the Beginning, Sept. 2015

Oxford Constitutional Law Workshop, Lecture on Imperial from the Beginning, June 2015

Stanford Constitutional Center Conference on the Administrative State. Panelist on Nondelegation, Complexity, and the Administrative State, Apr. 2015

Yale Law School, Yale L. J. Enrichment Lecture Series, Paper on state duties to defend, Nov. 2014

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Notre Dame Law School Conference on U.S. v. Borid, Paper on scope of treaty power, Oct. 2014

Virginia Law Workshop, Paper on Time and the Perfection of Federal Law, June 2014

PRESENTATIONS and PANELS (cont.)

Berkeley Law School, Public Law Workshop, Paper on Legislative Power in Emergencies, Mar. 2014

Stanford Constitutional Center Conference on The Role of History in Constitutional Law, Panelist on the future of history in constitutional law, Feb. 2014

Chicago Law School, Paper on Marbury and When an Office Vests, Nov. 2012

UIUC Conference on Akhil Amar's Unwritten Constitution, Presented Book Review, Oct. 2012

Northwestern University Con. Law Workshop, Paper on legislative power in emergencies, Oct. 2012

SEALS Conference, Panelist on Justice Thomas after 25 years, Aug. 2012

Fordham Symposium on DOMA, Paper on Duty to Defend, Apr. 2012

Duke Roundtable on Curtis Bradley's International Law in the US System, Mar. 2012

Washington University Faculty Workshop. Paper on When an Appointment Vests, Jan. 2011

Univ. of Virginia, Miller Center Conference on Presidents and Foreign Affairs, Oct. 2011

Univ. of Illinois Constitutional Law Colloquium. Paper on When an Appointment Vests, Sept. 2011

Harvard Law School, Bradley and Goldsmith Conference on War Powers and Practice, Sept. 2011

Harvard Law School, Harvard Law Review, Panel on Duty to Defend, Mar. 2011

Ohio State University School of Law, Conference on Progressive Constitutionalism, Mar. 2011

Univ. of San Diego, Conference on Originalism, Commented on pardon power paper, Jan. 2011

William and Mary School of Law, Lecture on presidential power, Oct. 2010

Federalist Society National Student Conference, Univ. of Penn. Panel on Originalism, Mar. 2010

Albany Law Conference on Lincoln's Legacy: Enduring Lessons of Executive Power, Paper on Lincoln's Habeas Suspensions, Oct. 2009

Albany Law School Federalist Chapter. Lecture on "Who holds the sword? The Initiation and Conduct of Warfare," Oct. 2009

Princeton University, James Madison Program, Paper on whether the President enjoys any immunities from suit or process and whether he enjoys any emergency powers, Mar. 2009

PRESENTATIONS and PANELS (cont.)

University of Pennsylvania Law School, Penn. J. Const. L. Conference on Calabresi & Yoo's Unitary Executive. Gave talk on presidential control of prosecutions, Feb. 2009

Willamette Law Review Conference on Executive Authority in the 21st Century. Gave paper on Fragmented Features of the Constitution's Unitary Executive, Sept. 2008

AALS Conference, Mid-Year Constitutional Law Meeting, Cleveland Ohio. Panelist on Executive Power under the Bush Administration, May 2008

Texas Law School Constitutional Colloquium, Paper paper on the Separation and Overlap of War and Military Powers, Apr. 2008

James Gould Cutler Lecture on Constitutional Law at the William & Mary School of Law. Lecture on a "Tale of Two Executives," Mar. 2008

Virginia Law School Faculty Workshop, Paper on the Separation and Overlap of War and Military Powers, Feb. 2008

AALS Conference, Workshop on the Federal Courts: Independence and Accountability, Panelist on topic "Federal Courts: Separation of Powers," Jan. 2008

Boston University Conference on the Presidency in the 21<sup>st</sup> Century, Paper on the grants of "executive power" in the revolutionary state constitutions, Oct. 2007

Federalist Society Conference, Lecture on the misunderstood relationship between Originalism and the Constitution, Aug. 2007

University of San Diego Faculty Workshop, Paper on the Separation of War Powers, June 2007

Cardozo Law School on the Domestic Commander in Chief, Paper on the limits of the Commander in Chief power, Apr. 2007

Drake Law School Symposium on Sanford Levinson's OUR UNDEMOCRATIC CONSTITUTION. Paper on "More Democracy, Less Constitution," Apr. 2007

Georgetown University Constitutional Law Colloquium. Paper entitled "The Executive's Duty to Disregard Unconstitutional Laws," Apr. 2007

University of San Diego Faculty Workshop, Paper entitled "The Executive's Duty to Disregard Unconstitutional Laws," Jan. 2007



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Ohio State University, Moritz College of Law, Debate on Congressional and Presidential Powers in Foreign Affairs (with Peter Shane), Oct. 2006

University of San Diego Faculty Workshop, Paper on meaning of "Declare War," July 2006.

PRESENTATIONS and PANELS (cont.)

Yale Law Journal Symposium on Executive Power, Moderator for Panel on "Rewriting Article II for the Modern Presidency," May 2006

Cornell Law School Faculty Workshop, Paper on good behavior tenure, Oct. 2005

University of San Diego Faculty Workshop, Paper on meaning of good behavior tenure, Oct. 2005

University of Indiana Conference on Terrorism, Paper on Commander in Chief power, Oct. 2005.

Berkeley School of Law Faculty Workshop, Paper on removal of federal officers, Sept. 2005

Appellate Judges Education Institute, Lecture on Intentionalism, Sept. 2005.

University of San Diego Faculty Workshop, Paper on executive control of prosecution, July 2004

Northwestern University Faculty Workshop, Paper on federal power over Indian tribes. Mar. 2004

Notre Dame Law Review Conference on the "Changing Laws of War," Paper on the Constitution as Suicide Pact, Dec. 2003

Northwestern University Faculty Workshop, Paper on the origins of judicial review, Apr. 2003

George Washington University Conference, Paper on the critics of judicial review, Apr. 2003

AALS Conference, Administrative Law Section, Panelist on executive power and congressional delegation, Jan. 2003

Cornell Journal of Law and Public Policy Conference on the "Intersection of Law and Politics." Paper on interbranch checks, Nov. 2002

University of Arkansas Conference on the Commerce Clause, Paper on "Our Three Commerce Clauses," Mar. 2001

Byron White Center American Constitutional Law Conference on "Conservative Judicial Activism," Paper on judicial review, Oct 2001

USD Faculty Workshop, Paper on President's power over foreign affairs, Jan. 2001

ABA Adlaw Conference, Panelist on the executive power during the Clinton years, Oct. 2000

USD Annual Faculty Retreat, Paper on the meaning of executive power, Jan. 2000

PRESENTATIONS and PANELS (cont.)

Boston University Faculty Workshop Series, Paper on executive privilege, Feb. 1999

USD Law School Faculty Workshop Series, Paper on "Deviant Executive Lawmaking," Nov. 1998

University of Minnesota School of Law's Symposium on "United States v Nixon,"  
Paper on Executive Privilege, Oct. 1998

Rutgers Law School faculty workshop, Paper on "Deviant Executive Lawmaking," Oct. 1998

Indiana University School of Law's Conference on "National Power and State  
Autonomy: Calibrating the New, New Federalism," Paper entitled,  
"A Comment on Congressional Enforcement," Apr. 1998

SERVICE

Member of Dean Search Committee, University of Virginia. 2015-16  
Member of Speakers and Lectureship Committee, University of Virginia. 2015-16  
Member of Graduation Awards Committee, University of Virginia. 2015  
Member of Faculty Appointments Committee, University of Virginia. 2013-14  
Member of Tenure Subcommittee, University of Virginia. 2013-14  
Member of Associate Deans Search Committee, University of Virginia. 2014  
Member of Workshop and Faculty Retreat Committee, University of Virginia. 2012-13  
Member of Student Disciplinary Committee, University of Virginia. 2011-2012  
Chair of Entry Level Appointment Committee, University of Virginia. 2010-11  
Member of Clerkship Placement Committee, University of Virginia. 2009-10, 2014-15  
Member of Tenure Committee, University of San Diego. 2007  
Member of Dean Search Committee, University of San Diego. 2006  
Member of Student Disciplinary Committee, University of San Diego. 2006  
Member of Tenure Committee, University of San Diego. 2005

BAR MEMBERSHIP

New York (1997-)

### Truth in Testimony Disclosure Form

In accordance with Rule XI, clause 2(g)(5)\*, of the *Rules of the House of Representatives*, witnesses are asked to disclose the following information. Please complete this form electronically by filling in the provided blanks.

Committee: The House Committee on Rules

Subcommittee: \_\_\_\_\_

Hearing Date: March 3, 2020

Hearing Title :

Article One: Exploring Ways for Congress to Reassert its Constitutional Authority

Witness Name: Saikrishna Prakash

Position/Title: James Monroe Distinguished Professor and Miller Center Fellow, University of Virginia

Witness Type: ☒ Governmental ☐ Non-governmental

Are you representing yourself or an organization? ☒ Self ☐ Organization

If you are representing an organization, please list what entity or entities you are representing:

If you are a non-governmental witness, please list any federal grants or contracts (including subgrants or subcontracts) related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current calendar year and previous two calendar years. Include the source and amount of each grant or contract. *If necessary, attach additional sheet(s) to provide more information.*

If you are a non-governmental witness, please list any contracts or payments originating with a foreign government and related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current year and previous two calendar years. Include the amount and country of origin of each contract or payment. *If necessary, attach additional sheet(s) to provide more information.*

**False Statements Certification**

Knowingly providing material false information to this committee/subcommittee, or knowingly concealing material information from this committee/subcommittee, is a crime (18 U.S.C. § 1001). This form will be made part of the hearing record.

*Saikrishna Prakash*

Witness signature

2/26/20

Date

**Please attach, when applicable, the following documents to this disclosure. Check the box(es) to acknowledge that you have done so.**

- ☒ Written statement of proposed testimony
- ☒ Curriculum vitae or biography

\*Rule XI, clause 2(g)(5), of the U.S. House of Representatives provides:

(5)(A) Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof.

(B) In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of any Federal grants or contracts, or contracts or payments originating with a foreign government, received during the current calendar year or either of the two previous calendar years by the witness or by an entity represented by the witness and related to the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B) shall include—

- (i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and
- (ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.