

---

## ARTICLE

---

---

### CONGRESS'S CONSTITUTION

---

JOSH CHAFETZ<sup>†</sup>

*Congress has significantly more constitutional power than we are accustomed to seeing it exercise. By failing to make effective use of its power, Congress has invited the other branches to fill the vacuum, resulting in a constitutional imbalance. This Article considers a number of constitutional tools that individual houses—and even individual members—of Congress, acting alone, can deploy in interbranch conflicts. Although the congressional powers discussed in this Article are clearly contemplated in constitutional text, history, and structure, many of them have received only scant treatment in isolation. More importantly, they have never before been considered in concert as a set of tools in an ongoing interbranch power struggle. This holistic perspective is necessary because these powers in combination are much greater than the sum of their parts.*

*Borrowing terminology from international relations scholarship, this Article groups the congressional powers under discussion into “hard” and “soft” varieties. Congressional hard powers are tangible and coercive; the hard powers discussed in this Article are the power of the purse and the contempt power. Congressional soft powers are intangible and persuasive; soft powers considered by this Article include Congress’s freedom of speech and debate, the houses’ disciplinary power over their own members, and their power to determine the rules of their proceedings. Each of these powers presents opportunities for Congress to enhance its standing with the public, and thereby enhance its power. This Ar-*

---

<sup>†</sup> Associate Professor of Law, Cornell Law School. Thanks to Will Baude, Joseph Blocher, Curt Bradley, Sam Buell, Jessica Bulman-Pozen, Mike Dorf, Oona Hathaway, Marin Levy, David Pozen, Jeff Rachlinski, Aziz Rana, Catherine Roach, Michael Stern, Hanah Volokh, Mariah Zeisberg, and the participants in the Duke Law School Legal Theory Colloquium for helpful and thought-provoking comments on earlier drafts. Ava Jacobi provided outstanding research assistance. Any remaining errors or infelicities are, of course, my own.

ticle aims to demonstrate both the ways in which these powers are mutually supporting and reinforcing and the ways in which Congress underutilizes them. In doing so, the Article examines a number of examples of congressional use of, and failure to use, these powers, including the release of the Pentagon Papers, the 1995–1996 government shutdowns and 2011 near-shutdown, the 2007–2009 contempt-of-Congress proceedings against White House officials, and the use of the filibuster, among others.

The Article concludes by arguing that Congress should make a more vigorous use of these powers and by considering their implications for the separation of powers more generally.

- INTRODUCTION.....716
- I. HARD POWER.....725
  - A. *The Power of the Purse*.....725
  - B. *Contempt*.....735
- II. SOFT POWER .....742
  - A. *The Freedom of Speech or Debate*.....742
  - B. *Internal Discipline* .....754
  - C. *Cameral Rules* .....761
- III. THE SEPARATION OF POWERS AND CONGRESS’S PROPER PLACE ....768
  - A. *The Desirability of Congressional Self-Assertion*.....768
  - B. *The Possibility of Congressional Self-Assertion*.....774
- CONCLUSION.....778

INTRODUCTION

It is commonplace to hear commentators (often, but not always, of the conservative persuasion) decry the growth in power of the judiciary over the course of the twentieth- and early-twenty-first centuries.<sup>1</sup>

---

<sup>1</sup> See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 457-63 (2d ed. 1997) (concluding that federal judges have impermissibly expanded the scope of the Fourteenth Amendment); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 130 (1990) (“The pace of judicial revision of the Constitution has accelerated over the Court’s history, as has the exertion of judicial power . . . .”); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 174-76 (1999) (proposing a constitutional amendment that would eliminate judicial review); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 224 (1994) (“By far, the greater problem today is not the too-forceful exercise of presidential power to interpret law, but the too-feeble acquiescence of the executive branch in the courts’ assertion of dominant interpretive power.”); John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld, 2005–2006 CATO SUP. CT. REV.* 83, 110-11 (“*Hamdan* portends much more than whether the administration can subject ten or twenty al Qaeda suspects to military commission trial. It clearly announces that the imperial judiciary respects few limits on how far it is willing to extend its powers of judicial review.”).

It is also commonplace to hear commentators (often, but not always, of the liberal persuasion) decry the growth in presidential power over that same period.<sup>2</sup> And there has been no shortage of suggested means for curbing the power of these purportedly bloated branches. Advocates of limiting judicial power have suggested everything from jurisdiction stripping<sup>3</sup> to minimalist or highly constrained interpretive methods<sup>4</sup> to eliminating judicial review entirely.<sup>5</sup> Advocates of limiting executive power have suggested everything from inculcating

---

<sup>2</sup> See, e.g., MAJORITY STAFF OF H.R. COMM. ON THE JUDICIARY, 111TH CONG., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH (Comm. Print 2009) (arguing that executive authority was misused during the Bush Administration and recommending steps to prevent future misuse); BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 1-41 (2010) (expressing alarm over the increasing lawlessness of the presidency); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007) (examining ways in which presidential power expanded during the Bush Administration); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 377 (1973) (decrying the “expansion and abuse of Presidential power” under Nixon); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1812 (2010) (“The modern President is far more powerful, and has far more resources at his disposal, than the Framers could possibly have imagined.”); James P. Pfiffner, *Constraining Executive Power: George W. Bush and the Constitution*, 38 PRESIDENTIAL STUD. Q. 123, 139 (2008) (“Even if one posits that President Bush has not and would not abuse his executive power, his claim to be able to ignore the law, if allowed to stand, would constitute a dangerous precedent . . .”).

<sup>3</sup> See, e.g., Marriage Protection Act of 2007, H.R. 724, 110th Cong. § 2(a) (2007) (seeking to strip federal courts of jurisdiction over cases pertaining to the interpretation or constitutionality of the Defense of Marriage Act, 28 U.S.C. § 1738C (2006)); Pledge Protection Act of 2005, S. 1046, 109th Cong. § 2(a) (2005) (seeking to strip federal courts of jurisdiction over cases challenging the constitutionality of the Pledge of Allegiance or its recitation); John Yoo, *Congress to Courts: ‘Get Out of the War on Terror’*, WALL ST. J., Oct. 19, 2006, at A18 (defending the jurisdiction-stripping provisions of the Military Commissions Act).

<sup>4</sup> See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111-98 (2d ed. 1986) (advocating judicial practice of the “passive virtues” to avoid deciding certain issues); BORK, *supra* note 1, at 146 (advocating for the use of an originalist interpretive method because it constrains judges and provides a neutral criterion for judgment); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-72 (1999) (arguing that the Court should use a minimalist approach and say no more than is necessary to justify the outcome in the case before it); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (advocating originalism as a means of avoiding “the main danger in judicial interpretation of the Constitution . . . that the judges will mistake their own predilections for the law”).

<sup>5</sup> See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1369-1401 (2006) (arguing that disagreements about rights ought to be settled by legislatures and not courts).

greater degrees of presidential virtue<sup>6</sup> to prosecuting executive branch officials for abuses of power<sup>7</sup> to rewriting Article II of the Constitution.<sup>8</sup> Reading these various proposals, one might be forgiven for lamenting the absence of a third branch, whose “[a]mbition [might] be made to counteract [the] ambition” of the other two.<sup>9</sup>

Of course, it wasn’t always thus. The colonial experience with overly powerful executives<sup>10</sup> and judges answerable only to a distant crown<sup>11</sup> led to the creation of almost unfettered legislatures in the early Republic.<sup>12</sup> After only a decade of experience with such legislatures,

<sup>6</sup> See, e.g., Cynthia R. Farina, *The Virtuous President: An Essay on Constitutional Culture and Conscience* 7-12 (unpublished manuscript) (on file with author) (“The President must possess . . . an active and sensitive constitutional conscience, which guides his choices when the law is debatable, and which may at times counsel him that certain ways of exercising power, even if not unlawful, are not right.”).

<sup>7</sup> See, e.g., Erwin Chemerinsky, *Civil Liberties and the War Terror, Seven Years After 9/11 History Repeating: Due Process, Torture and Privacy During the War on Terror*, 62 SMU L. REV. 3, 12 (2009) (“[T]his is a strong statement, but I believe that those responsible for the rendition camps and torture, especially Dick Cheney, David Addington, Jay Bybee, and John Yoo, are war criminals and that there should be an investigation and prosecution into their crimes. I do not choose that language lightly.”); Claire Finkelstein & Michael Lewis, Debate, *Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?*, 158 U. PA. L. REV. PENNUMBRA 195, 196-204, 215-19 (2010), <http://www.pennumbra.com/debates/pdfs/AuthorizingTorture.pdf> (Finkelstein, Opening and Closing Statements) (arguing that executive branch officials who knowingly encourage others to break the law ought to be held criminally liable); Milan Markovic, Essay, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 350 (2007) (“Yoo and Bybee—and perhaps other lawyers who have or will engage in similar activities—can and should be held criminally accountable.”); Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT’L L.J. 193, 196-215 (2010) (finding that the actions of the Bush Administration lawyers who drafted the “torture memos” were sufficient to establish the possibility of accomplice liability); Andrew Sullivan, *Obama’s First Problem is US War Crimes*, SUNDAY TIMES (London), Nov. 30, 2008, [http://www.timesonline.co.uk/tol/comment/columnists/andrew\\_sullivan/article5257597.ece](http://www.timesonline.co.uk/tol/comment/columnists/andrew_sullivan/article5257597.ece) (“[T]he evidence we now have, undisputed evidence, proves already that war crimes were indeed committed—by the president and vice-president on down. . . . There is, in the end, a simple and sobering truth: these people have to be brought to justice if the rule of law is to survive in America.”).

<sup>8</sup> See, e.g., Garrett Epps, *The Ill-Made Prince: A Modest Proposal for a New Article II*, at 5 (Aug. 7, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1445643> (suggesting that Article II be completely redrafted to “repair the dangerous gaps and mistakes” in the current version).

<sup>9</sup> THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

<sup>10</sup> See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 75, 105 (2005) (noting the absolute veto possessed by royal governors in the colonies).

<sup>11</sup> See *id.* at 218 (noting that royal governors, accountable only to the Crown, had appointed colonial judges); *id.* at 221 (noting that colonial judges were “subject to removal at the whim of the executive”). This undoubtedly explains why so many colonial judges sided with the mother country against the rebellious colonies. See *id.* at 207.

<sup>12</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 162-63 (1998) (noting that the revolutionary legislatures were “the heirs to most of

Madison, among many others, concluded that “[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”<sup>13</sup> And although fears of both an imperial President<sup>14</sup> and an overreaching judiciary<sup>15</sup> began early, there have been periods of American history in which the great constitutional fear was of an overly powerful *Congress*.<sup>16</sup> It is, however, safe to say that we are not currently living in such a period—nor have we been for some time, nor do we show any signs of moving in that direction.

If any proof of this fact is needed, consider the closing years of the George W. Bush Administration, from January 2007 to January 2009. (Indeed, pause first to consider what it means that we tend to tell political time by presidential administration, rather than by congressional term. For the record, the period under discussion is the 110th Congress.) In the 2006 midterm elections, the Democrats had wrested control of both houses from the Republicans, picking up thir-

---

the prerogative powers taken away from the governors by the Revolution” and that “[t]he American legislatures, in particular the lower houses of the assemblies, were no longer to be merely adjuncts or checks to magisterial power, but were in fact to be the government—a revolutionary transformation of political authority”).

<sup>13</sup> THE FEDERALIST NO. 48, *supra* note 9, at 309 (James Madison). Hamilton concurred. See THE FEDERALIST NO. 71, *supra* note 9, at 433 (Alexander Hamilton) (“The tendency of the legislative authority to absorb every other has been fully displayed and illustrated . . .”); THE FEDERALIST NO. 73, *supra* note 9, at 442 (Alexander Hamilton) (“The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments has been already more than once suggested.”).

<sup>14</sup> See, e.g., JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 196-98* (Vintage Books 2002) (2000) (discussing Jeffersonian efforts to portray John Adams as a quasi-monarchist); GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 74-76* (2007) (noting the 1840 Whig reaction to President Andrew Jackson’s expansive conception of executive power).

<sup>15</sup> See, e.g., WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 15-134* (1992) (discussing the impeachment and near-conviction of Justice Chase for his partisan rulings); Spencer Roane, *Roane’s “Hampden” Essays: Richmond Enquirer, June 11-22, 1819* (accusing the Marshall Court of arrogating itself too much power in *McCulloch*), reprinted in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 106, 106-54 (Gerald Gunther ed., 1969).

<sup>16</sup> In 1930, the eminent legal historian Charles Warren wrote:

There is a phase in the development of our Federal Constitution, which will not be found detailed in any law book or in any American history and which deserves the consideration of students of our Governmental workings—the sturdy struggle which the Executive of the United States has, throughout our National life, been forced to make against Congressional encroachment.

Charles Warren, *Presidential Declarations of Independence*, 10 B.U. L. REV. 1, 1 (1930).

ty House seats and six Senate seats.<sup>17</sup> What's more, they did so without losing a single seat that they controlled prior to the election, marking the first time in American history that a party successfully defended every one of its congressional seats.<sup>18</sup> President Bush himself characterized the results as "a thumpin'" for his Republican Party.<sup>19</sup> Between January 2007 and January 2009, every national opinion poll found a net disapproval rating for President Bush of between sixteen and fifty-six percent.<sup>20</sup> That is to say, the most positive poll from Bush's point of view over this two-year period found that 38% approved of the job he was doing and 54% disapproved;<sup>21</sup> the least positive poll found that a mere 22% approved, while 78% disapproved.<sup>22</sup> But while this period of extreme presidential unpopularity<sup>23</sup> coincided with increasing *judicial* confrontation with the Administration,<sup>24</sup> one is hard-pressed to think of ways in which *Congress* became increasingly confrontational. Indeed, as we shall see later, in the one minor confrontation between the executive and Congress during these two years, Congress declined to use many of the tools available to it.<sup>25</sup> In short, during a time in which the political conditions were maximally favorable to Congress and in which both houses were controlled by members of the party

<sup>17</sup> Gary C. Jacobson, *Referendum: The 2006 Midterm Congressional Elections*, 122 POL. SCI. Q. 1, 1 (2007).

<sup>18</sup> *Id.*

<sup>19</sup> Jill Zuckman, *Virginia Holds Key to Control of Senate: Democrat Leads with GOP Ouster on the Line*, CHI. TRIB., Nov. 9, 2006, at 1.

<sup>20</sup> See *President Bush—Overall Job Rating*, POLLINGREPORT.COM, <http://www.pollingreport.com/BushJob.htm> (last visited Dec. 15, 2011) (compiling and reporting national opinion polls measuring President Bush's job approval rating between September 7, 2005, and January 6, 2009).

<sup>21</sup> *Id.* (citing the FOX/Opinion Dynamics poll conducted on January 30–31, 2007).

<sup>22</sup> *Id.* (citing the Research 2000 poll conducted on July 25–27, 2008).

<sup>23</sup> See Richard A. Brody, *The American People and President George W. Bush: The Fall, the Rise and Fall Again*, 6 FORUM, no. 2, 2008, at 1, 15 ("President Bush has been unique in the weakness of his level of support. No other president for whom we have polling data has reached and sustained a level of public approval in the low thirties.").

<sup>24</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding, contrary to the position of the Bush Administration, that alien detainees at Guantanamo Bay possessed the constitutional right to petition for a writ of habeas corpus); *Munaf v. Geren*, 553 U.S. 674, 685–88 (2008) (rejecting the Government's argument that federal courts lacked the jurisdiction to hear a habeas petition from a U.S. citizen detained by American forces abroad); *Massachusetts v. EPA*, 549 U.S. 497, 528–32 (2007) (rejecting the arguments of the EPA that the Clean Air Act did not authorize the regulation of greenhouse gas emissions from new motor vehicles); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1194–227 (9th Cir. 2008) (finding NHTSA's regulations under the Energy Policy and Conservation Act inadequate and remanding to the Administration for new standards).

<sup>25</sup> See *infra* Section I.B.

that did not control the White House, Congress nevertheless played the constitutional shrinking violet.

At this point, the perceptive reader may be asking what, realistically, Congress could have done. After all, President Bush still had veto power over any legislation meant to check him, and it seems unlikely that his opponents in Congress could have mustered the votes to override a veto. But to cast congressional power entirely in terms of legislation is to significantly understate the scope of Congress's powers under the Constitution. This Article will highlight a number of ways in which individual houses, and even individual members, of Congress, acting alone, can begin to restore some measure of constitutional equipoise.

To borrow terminology from the international relations literature, we can think of these congressional powers as coming in both *hard* and *soft* varieties. Hard power is, quite simply, "the ability to coerce."<sup>26</sup> In the international arena, a nation's hard power is "usually associated with tangible resources like military and economic strength."<sup>27</sup> Soft power, by contrast, is "the ability to get what you want through attraction rather than coercion or payments."<sup>28</sup> In foreign affairs, it "arises from the attractiveness of a country's culture, political ideals, and policies. When our policies are seen as legitimate in the eyes of others, our soft power is enhanced."<sup>29</sup> A nation neglects its soft power resources at its own peril in the international sphere.<sup>30</sup>

An institution neglects its soft power resources in the domestic sphere at its own peril as well. In many cases, the American Constitution deliberately "leaves not simply the resolution of substantive issues, but also the resolution of the meta-question as to the proper site of

<sup>26</sup> Joseph S. Nye, Jr., *Soft Power and American Foreign Policy*, 119 POL. SCI. Q. 255, 256 (2004).

<sup>27</sup> JOSEPH S. NYE, JR., BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER 32 (1990).

<sup>28</sup> Nye, *supra* note 26, at 256.

<sup>29</sup> *Id.*; see also NYE, *supra* note 27, at 32 (associating soft power with "intangible power resources such as culture, ideology, and institutions").

<sup>30</sup> See Nye, *supra* note 26, at 257 ("It is not smart to discount soft power as just a question of image, public relations, and ephemeral popularity. . . . [I]t is a form of power . . . . When we discount the importance of our attractiveness to other countries, we pay a price."); see also Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1153 n.38 (2006) ("[W]e cannot accomplish our goals [in the War on Terror] without diplomacy and international law—soft power tools that were developed precisely so that countries would not have to rely exclusively on force all the time.").

resolution for those issues, to constitutional *politics*.<sup>31</sup> In doing so, it embodies a judgment that government will be better when the constitutional structure creates the opportunity for interbranch tension and conflict.<sup>32</sup> This space for conflict allows the branches to compete publicly for the affections of the people in a manner that increases representativeness, reduces the risk of one branch asserting tyrannical control over the nation, and promotes healthy deliberation as to the public good.<sup>33</sup> Part of that process of competition must involve a deliberative engagement with the citizenry—that is, each branch must make its case in the public sphere.<sup>34</sup> And this is where each branch’s soft power must come into play. A branch that consistently loses the public relations war will find itself consistently losing power.<sup>35</sup>

---

<sup>31</sup> Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1113 (2011) (book review).

<sup>32</sup> Cf. Mariah Zeisberg, *The Relational Conception of War Powers* (describing a “relational account” of the war powers that is “premised on the value of maintaining the branches in relationships of mutual review, even when that review leads to interbranch interpretive conflict”), in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 168, 169 (Jeffrey K. Tulis & Stephen Macedo eds., 2010).

<sup>33</sup> See Chafetz, *supra* note 31, at 1112-28.

<sup>34</sup> In this context, “making its case” involves more than simply pandering to current public opinion. In many situations, it requires an active attempt to persuade—to lead and shape public opinion. See DAVID R. MAYHEW, *AMERICA’S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH 14-19* (2000) (arguing that political preferences are largely endogenous to politics and that therefore political figures in the public sphere are involved in both opinion *expression* and opinion *formation*).

<sup>35</sup> See, e.g., Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 1999 (2011) (“[I]n a democracy public support for any public institution is necessary. Without it the institution may wither, perhaps die.”); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1006 (2008) (noting that, in an interbranch conflict, “through the mysterious process by which public opinion forms, the public will throw its weight behind one branch or the other, and the branch that receives public support will prevail”); Douglas Rivers & Nancy L. Rose, *Passing the President’s Program: Public Opinion and Presidential Influence in Congress*, 29 AM. J. POL. SCI. 183, 194 (1985) (finding that “public opinion is an important source of presidential influence in Congress”).

To take just one example, it is clearly the case that an unpopular President—that is, one who has been doing badly on the public relations front—will face more Senate opposition to his judicial nominations than a popular President. See GEORGE L. WATSON & JOHN A. STOOKEY, *SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS 88-89* (1995). That is to say, a President who has lost the support of the public cannot expect deference in this area; rather, the Senate will be more assertive in its demands to exercise power. And this can be true even when the same party controls both the Senate and the Presidency, as demonstrated by President Bush’s failed nomination of Harriet Miers to the Supreme Court in 2005. See JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL*

The remainder of this Article, then, will be devoted to tracing those powers—both hard and soft—that individual houses, and even individual members, can use in interbranch conflicts. Many of these powers have received only scant treatment in isolation; they have never before been grouped and conceptualized as a set of tools in an ongoing power struggle between the branches.<sup>36</sup> This is an essential point, for these powers taken together are more than the sum of their parts. If viewed in isolation, some will appear too weak; others will appear so strong that it is hard to imagine Congress resorting to them with any frequency; still others will appear easily evadable by the other branches. But if these powers are viewed as mutually reinforcing, then it becomes clear that Congress has a range of options from which to select the appropriate tools to deal with any separation-of-powers controversy. My claim, then, is not that I have unearthed a set of congressional powers of which we have previously been unaware. Although some of the powers discussed below will seem somewhat exotic, others are quite familiar. My thesis, rather, is that they have not adequately been viewed as pieces of an interlocking set of powers to be exercised by the First Branch in defense of its constitutional position. Clearly, not all of the powers below will be appropriate in any given circumstance, and my discussion should not be taken as an endorsement of their indiscriminate use. But I aim to show that they have been systematically underused or misused in a way that tends to diminish Congress's power vis-à-vis the other branches.

Part I will focus on two congressional “hard powers”: the power of the purse and the contempt power. There are, of course, other congressional hard powers—two examples that immediately spring to mind are the impeachment power (which admittedly requires the participation of both houses,<sup>37</sup> but not any other branch<sup>38</sup>) and the Sen-

---

OF THE UNITED STATES SUPREME COURT 263-84 (2007) (describing the controversy over the Miers nomination).

<sup>36</sup> Adrian Vermeule has considered a suite of congressional procedure issues in Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004). His focus, however, is not primarily on their separation-of-powers implications, but rather on comparing the rules laid out in the Constitution with those produced by a positive political theory of ideal institutional design. *See id.* at 363. Perhaps as a result of our distinct purposes, Vermeule also focuses on an almost completely different set of procedures than I do here.

<sup>37</sup> *See* U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); *id.* § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).

<sup>38</sup> In cases of presidential impeachment only, the Chief Justice presides over the Senate trial. *See id.* § 3, cl. 6. But the Chief Justice does not vote, and any rulings he

ate's power to advise on and consent to the appointment of federal judges and principal executive branch officers.<sup>39</sup> But hard powers tend to be more familiar than soft powers, so this Part will aim for economy in presentation. The analytic points made within this Part, however, should prove readily applicable to other congressional hard powers as well.

Part II will focus on the less familiar realm of congressional "soft powers"—that is, constitutional tools that enhance Congress's ability to compete for the affections of the public, thereby (if used wisely) enhancing its power vis-à-vis the other branches. Specifically, this Part will analyze the freedom of legislative speech and debate, the houses' disciplinary powers over their own members, and the houses' power to determine their own rules of proceedings.<sup>40</sup> These powers tend to receive very little attention, and my aim in this Part will be to demonstrate that their potential as a power source for Congress has been significantly underestimated and therefore squandered.

It is worth noting that all five of the powers discussed here are clearly contemplated in constitutional text, history, and structure. These are not powers that Congress has questionably arrogated to itself. Precisely the opposite, in fact—they are powers allocated to Congress by the Constitution that Congress has nevertheless systematically underutilized.

Part III will draw these themes together into a normative vision of Congress's place within the constitutional order.

---

makes from the chair can be overridden by a majority of Senators. See RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS, at R. VII, in COMM. ON RULES AND ADMIN., U.S. SENATE, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE U.S. SENATE, S. DOC. NO. 110-1, at 207, 208-09 (2008). The involvement of the judiciary in impeachments is thus de minimis.

<sup>39</sup> See U.S. CONST. art. II, § 2, cl. 2 ("[The President,] by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other [principal] Officers of the United States . . .").

<sup>40</sup> Again, this list is not meant to be exhaustive, and the analyses in this Part may fruitfully be applied to other congressional soft powers. For example, to the extent that congressional resolutions—either one-house or concurrent—make an argument to the public, they are exercises of congressional soft power. See, e.g., S. Res. 10, 111th Cong. (2009) (recognizing Israel's right "to defend itself against attacks from Gaza" and reaffirming American "support for Israel in its battle with Hamas"); H.R. Res. 32, 110th Cong. (2007) (denouncing various forms of gender-based persecution). These and other uses of congressional resolutions are discussed thoroughly in Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008). Accordingly, I have chosen to focus on other examples of soft power here.

## I. HARD POWER

A. *The Power of the Purse*

It may appear odd to begin by discussing the power of the purse, given my claim above that I will focus on mechanisms that are available to individual houses or members. After all, the power of the purse is exercised via legislation,<sup>41</sup> which requires both bicameralism and presentment.<sup>42</sup> But notice the converse of this fact: if *directing* money to be spent requires the concurrence of the House, the Senate, and the President (or sufficiently large House and Senate supermajorities<sup>43</sup>), then either the House or the Senate, acting alone, can *withhold* money. Of course, this is true of any bill—the House and Senate are each absolute vetogates to the passage of legislation.<sup>44</sup> But appropriations laws are different in that their passage is necessary to the continued functioning of the entire government. The annual budget process guarantees that, every year, each house of Congress has the opportunity to give meaningful voice to its priorities and its discontentments.

---

<sup>41</sup> See U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).

<sup>42</sup> See *id.* § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President . . .”).

<sup>43</sup> See *id.* (providing that a two-thirds vote in each house can override a presidential veto).

<sup>44</sup> I refer to them as *absolute* vetogates because Professor Eskridge, among others, has used the term “vetogates” somewhat more promiscuously. See William N. Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444-48 (2008) (including, inter alia, substantive congressional committees, the House Rules Committee, and conference committees on the list of vetogates). Although the “vetogates” on Eskridge’s expanded list are undoubtedly serious choke points for legislation, most of them can be—and occasionally are—evaded. For example, substantive committees can be circumvented in the House by discharge petitions and in the Senate by introducing legislation directly onto the floor or introducing it as a floor amendment to another bill. See CQ PRESS, *HOW CONGRESS WORKS* 86-87 (4th ed. 2008) (describing discharge petitions); *id.* at 108 (describing the use of nongermane amendments to “wrest bills out of reluctant committees” in the Senate); see also CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 132-35 (1985) (describing how the 1964 Civil Rights Act was introduced directly onto the Senate floor in order to avoid getting bogged down in the Judiciary Committee). Or consider the 2010 health care reform law, which avoided conference committee. See STAFF OF THE WASH. POST, *LANDMARK: THE INSIDE STORY OF AMERICA’S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL* 49-62 (2010) (describing the congressional maneuvering designed to avoid conference committee on the bill). Bicameralism, on the other hand, is a hard-wired constitutional requirement; I therefore refer to it as an “absolute vetogate.”

Annual legislative appropriations have their roots in English parliamentary practice, and specifically in the Glorious Revolution. Theretofore, it had been standard practice for Parliament, upon the ascension of a new Monarch, to grant him or her certain revenues for life; the combination of these revenues, the Monarch's own feudal dues, and the occasional resort to unconstitutional prerogative taxation allowed the Stuarts to rule without Parliament for long stretches of time.<sup>45</sup> A large part of Parliament's goal in stitching together the Revolution Settlement was to ensure that Monarchs would no longer feel free to rule without Parliament. Two elements of that settlement are worth noting here. First, in Trevelyan's words:

[T]he Commons took good care that after the Revolution the Crown should be altogether unable to pay its way without an annual meeting of Parliament. William had no large grant made him for life. Every year he and his Ministers had to come, cap in hand, to the House of Commons, and more often than not the Commons drove a bargain and exacted a *quid pro quo* in return for supply.<sup>46</sup>

That is to say, appropriations were made into an annual affair. And second, Parliament passed the Mutiny Act,<sup>47</sup> which created a criminal offense of mutiny from the army,<sup>48</sup> but provided that the penalties would sunset within a year.<sup>49</sup> The Monarchs would thus be forced to disband the standing army, to call an annual Parliament, or, if they did neither of those, to risk soldiers deserting without fear of consequence. If they chose either to disband the army or to call a Parliament, then they would be adequately constrained in their exercise of power. What both of these elements of the Revolution Settlement have in common is their creation of an annual baseline. They did not require the Monarch to call regular Parliaments, but they made it very difficult for the Monarch to exercise power without the aid of Parliament.

---

<sup>45</sup> See Doris M. Gill, *The Treasury, 1660–1714*, 46 ENG. HIST. REV. 600, 610 (1931) (“Charles II and James II were granted a revenue for life on their accession, so that it was only necessary for the king to apply to parliament to supply deficiencies in his income and to cover war expenses.”). On the tendency of the early Stuarts to resort to prerogative taxation, see Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1100-16 (2009).

<sup>46</sup> G.M. TREVELYAN, *THE ENGLISH REVOLUTION, 1688–1689*, at 96 (1977).

<sup>47</sup> 1689, 1 W. & M., c. 5 (Eng.).

<sup>48</sup> *Id.* § 2.

<sup>49</sup> See *id.* § 8 (providing that the Act would continue in effect until November 10, 1689, “and noe longer”).

The U.S. Constitution, of course, requires that Congress assemble at least once per year,<sup>50</sup> and it specifies that “no Appropriation of Money” for the purpose of “rais[ing] and support[ing] Armies . . . shall be for a longer Term than two Years,”<sup>51</sup> but it does not otherwise limit the duration of appropriations.<sup>52</sup> Nevertheless, the practice from the beginning of the Republic has been one of annual appropriations. The nation’s very first appropriations bill authorized the expenditure of sums not exceeding \$639,000 “for the service of the present year.”<sup>53</sup> Subsequent early appropriations bills followed suit.<sup>54</sup>

Annual appropriations serve the same function as sunset provisions in substantive legislation: both reset the legislative baseline.<sup>55</sup> Consider the following simple example: At time  $t_1$ , Congress passes a law delegating a certain amount of power to an administrative agency. If that law has no sunset provision, then, in order to take that power back at time  $t_2$ , Congress would need to pass a second law—which, of course, would require either presidential concurrence or two-thirds supermajorities in both chambers.<sup>56</sup> But the  $t_1$  law empowers executive branch actors (i.e., the administrative agency) and thereby empowers the President, so it is unlikely that the President would consent to giving that power back. Under this scenario, Congress is likely stuck with the  $t_1$  law. But now imagine that Congress had included a sunset provision, so that at  $t_2$ , the delegation ceases to have any legal force. Inac-

<sup>50</sup> See U.S. CONST. art. I, § 4, cl. 2; *id.* amend. XX, § 2.

<sup>51</sup> *Id.* art. I, § 8, cl. 12.

<sup>52</sup> It is worth noting that, like the English Mutiny Act, the American Constitution is concerned specifically with armies, not navies. Compare *id.* (placing a time limit on appropriations to “raise and support Armies”), with *id.* cl. 13 (placing no time limit on appropriations to “provide and maintain a Navy”). Indeed, so is the Third Amendment, which forbids the nonconsensual peacetime quartering of “Soldier[s],” not sailors. *Id.* amend. III. The reason is that standing armies were perceived as a threat to domestic liberties; an ambitious executive could use the army to oppress the people. In contrast, the navy was traditionally seen, in Blackstone’s words, as “the floating bulwark of the island . . . from which, however strong and powerful, no danger can ever be apprehended to liberty.” 1 WILLIAM BLACKSTONE, COMMENTARIES \*405. Strong legislative checks on the executive’s most dangerous tendencies is the common theme.

<sup>53</sup> Act of Sept. 29, 1789, ch. 23, 1 Stat. 95, 95.

<sup>54</sup> See, e.g., Act of Dec. 23, 1791, ch. 3, 1 Stat. 226, 226; Act of Feb. 11, 1791, ch. 6, 1 Stat. 190, 190; Act of Mar. 26, 1790, ch. 4, 1 Stat. 104, 104; Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95.

<sup>55</sup> Rebecca Kysar has recently attacked sunset provisions on a number of fronts. See Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1051-65 (2011). The merits of Kysar’s particular attacks are beyond the scope of this Article, but it should be noted that none of her arguments address the separation-of-powers implications of sunset provisions, which are my focus here.

<sup>56</sup> See U.S. CONST. art. I, § 7, cl. 2.

tion now favors congressional power; only if the House, Senate, and President once again agree to delegate the power will the executive be able to exercise it at  $t_2$ . This, of course, is precisely why Parliament in 1689 included a sunset clause in the Mutiny Act,<sup>57</sup> and it is why Congress in 2001 included a sunset provision in the PATRIOT Act.<sup>58</sup> (It also explains why the Bush Administration opposed the PATRIOT Act's sunset provision.<sup>59</sup>)

An appropriations provision is simply a delegation of spending authority. A long-term or indefinite appropriation significantly increases executive power. So long as the President is happy with the appropriation, he need only veto any attempt to change it. An annual appropriation, however, resets to zero in the absence of congressional action and thereby forces the President to negotiate with Congress each year. Thus, the larger the percentage of the budget that is subject to annual appropriations, the more bargaining chips Congress has at its disposal.

It is, then, interesting to note that the percentage of the federal budget subject to annual appropriations has been steadily declining for some time. The federal budget consists of two essential components: mandatory spending and discretionary spending. Mandatory spending (also called "direct spending") "involves a binding legal obligation by the Federal Government to provide funding for an individual, program, or activity."<sup>60</sup> Once mandatory spending has been authorized, "eligible recipients have legal recourse to compel payment from the government if the obligation is not fulfilled."<sup>61</sup> Mandatory spending is precisely that spending that does not require annual appropriations. It is authorized in perpetuity, unless a new law is passed revoking it. The major elements of mandatory spending are entitlements<sup>62</sup> and interest payments on debt.<sup>63</sup> All other spending—

<sup>57</sup> See *supra* text accompanying notes 47-49.

<sup>58</sup> See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)*, Pub. L. No. 107-56, § 224(a), 115 Stat. 272, 295 (2001) ("[T]his title and the amendments made by this title . . . shall cease to have effect on December 31, 2005.").

<sup>59</sup> See Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145, 1172, 1178-79 (2004) (noting that the Bush Administration preferred a bill lacking a sunset clause).

<sup>60</sup> STAFF OF S. COMM. ON THE BUDGET, 105TH CONG., *THE CONGRESSIONAL BUDGET PROCESS: AN EXPLANATION* 5 (Comm. Print 1998); see also ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 57 (3d ed. 2007) ("Direct spending is not controlled by annual appropriations but by the legislation that establishes eligibility criteria and payment formulas, or otherwise obligates the government.").

<sup>61</sup> STAFF OF S. COMM. ON THE BUDGET, *supra* note 60, at 5.

<sup>62</sup> *Id.* at 5-6.

including the funding for all federal agencies—is discretionary<sup>64</sup> and requires annual appropriations. For the 2010 fiscal year, sixty-one percent of the federal budget consisted of mandatory spending,<sup>65</sup> reflecting a long-running trend of growth in the percentage of the federal budget devoted to mandatory spending.<sup>66</sup> In other words, for sixty-one percent of the federal budget, Congress has ceded the institutional advantage of annual appropriations<sup>67</sup> and surrendered the gains of 1689.

Moreover, even in the realm of discretionary spending, Congress has ceded the first-mover advantage to the President. Under the 1921 Budget and Accounting Act,<sup>68</sup> the President kicks off the annual appropriations process by submitting a budget proposal to Congress.<sup>69</sup> Of course, Congress can—and does—depart from the President's proposal in numerous ways, but it is nevertheless the President's proposal that serves as the starting point for negotiation, and therefore exerts a disproportionate impact on the subsequent process.<sup>70</sup>

Finally, Congress has shown itself unwilling to take full advantage of its power over discretionary spending. As Charles Black famously noted, “[B]y simple majorities, Congress could . . . reduce the president's staff to one secretary for answering social correspondence, and . . . , by two-thirds majorities, Congress could put the White

<sup>63</sup> See *id.* at 56 (listing “Social Security, Medicare, veterans’ pensions, rehabilitation services, Members’ pay, judges’ pay and the payment of interest of the public debt” as examples of mandatory spending).

<sup>64</sup> See *id.* at 6 (“Most of the actual operations of the Federal Government are funded by discretionary spending.”).

<sup>65</sup> See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2012: HISTORICAL TABLES, BUDGET OF THE U.S. GOVERNMENT 145 tbl.8.1 (2010) (recording that, for fiscal year 2010, total spending was \$3.5 trillion, of which \$2.1 trillion went to mandatory spending and net interest).

<sup>66</sup> See Robert C. Byrd, Policy Essay, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 314 (1998) (noting the considerable growth in mandatory spending since the 1960s).

<sup>67</sup> See Alan L. Feld, *The Shrunken Power of the Purse*, 89 B.U. L. REV. 487, 492 (2009) (noting that the prevalence of “permanent fiscal legislation limits Congress’s ability to review and change priorities through the appropriation process”).

<sup>68</sup> Pub. L. No. 67-13, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.).

<sup>69</sup> 31 U.S.C. § 1105(a) (2006) (“On or after the first Monday in January but not later than the first Monday in February of each year, the President shall submit a budget of the United States Government for the following fiscal year.”).

<sup>70</sup> See Gersen & Posner, *supra* note 40, at 589 (noting the “first-mover advantage [that] . . . accrues from the President’s ability to propose an initial budget”); see also SCHICK, *supra* note 60, at 14 (suggesting that the 1921 Budget and Accounting Act ushered in an era of “presidential dominance” of the budget process).

House up at auction.”<sup>71</sup> Along the same lines, Congress could presumably eliminate the salaries of judicial clerks and secretaries or even (most cruelly of all) cut the Supreme Court’s air conditioning budget.<sup>72</sup> Why do we so seldom see even more modest versions of this behavior? After all, refusing to pay the salaries of Crown officers and judges was a venerable tradition in the American colonies.<sup>73</sup> The President himself,<sup>74</sup> like federal judges,<sup>75</sup> is protected against salary diminution, but the Constitution provides no other government official such protection. And yet, even when Congress is willing to hold executive branch officers in contempt—as it did with Harriet Miers and Joshua Bolten during the Bush Administration<sup>76</sup>—it has not used its power of the purse as a means of indicating its disapproval.

Of course, perhaps Professor Black was wrong—perhaps simple majorities could not reduce the President’s staff to a single social secretary because the President would veto any such budget. There would be an element of perversity in that: by doing so, the President would shut down the government, thereby reducing his staff to zero.<sup>77</sup>

---

<sup>71</sup> Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 15 (1974).

<sup>72</sup> Mike Dorf, who suggested the air conditioning hypothetical in conversation, is also the source of the hypothetical about cutting the salaries of judicial staff. See Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 331 (2007). Dorf raises the possibility that such cuts would be an unconstitutional violation of a structural principle of judicial independence, but he does not take a position on the question. See *id.* at 331-32.

<sup>73</sup> See Chafetz, *supra* note 45, at 1122-23 (giving examples of colonial legislatures withholding the salaries of Crown officials in order to express dissatisfaction).

<sup>74</sup> See U.S. CONST. art. II, § 1, cl. 7 (“The President shall . . . receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected . . .”).

<sup>75</sup> See *id.* art. III, § 1 (“The Judges, both of the supreme and inferior Courts . . . shall . . . receive for the Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

<sup>76</sup> See Chafetz, *supra* note 45, at 1086-93 (discussing the contempt of Congress proceedings against Miers and Bolten).

<sup>77</sup> Not entirely. “Essential” government personnel continue to report for work, even during government “shut downs,” although they cannot be paid until the government reopens. See Auth. for the Continuance of Gov’t Functions During a Temp. Lapse in Appropriations, 5 Op. O.L.C. 1, 11-12 (1981) (noting that, even during a shutdown, the executive branch possesses “leeway to perform essential functions and make the government ‘workable’”). But this leeway is rather tightly constrained. See Anti-Deficiency Act, 31 U.S.C. § 1342 (2006) (“An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.”); Auth. to Employ the Servs. of White House Office Emps. During an Appropria-

But he would be banking on winning the ensuing public relations struggle, thereby forcing Congress (eventually) to back down and restore his full staff. Perhaps a President would even be willing to veto an appropriations bill simply because it zeroed-out the salary of one of his favored subordinates. After all, in 1995 and 1996, the federal government shut down twice—once for less than a week and then again for three weeks—when President Clinton and the Republican-controlled Congress (led by Speaker Newt Gingrich) were unable to agree on a budget.<sup>78</sup> While Congress was the clear institutional loser in the 1995–1996 government shutdowns,<sup>79</sup> it would be a mistake to infer from this single example that Congress inevitably loses out in government shutdowns.<sup>80</sup> The lesson of 1995–1996 was, rather, that a government shutdown throws interbranch conflict into sharp relief, increasing the public salience—and therefore the political stakes—of the fight. This dynamic presents both opportunities and pitfalls for Congress and the President alike. As one historian of the 1995–1996 shutdowns wrote, “It was a high-risk gamble for both sides. No one really knew how the public would react.”<sup>81</sup> Indeed, news accounts during the shutdowns made it clear that the President was at risk both of losing in the public arena and of losing enough Democratic votes in

---

tions Lapse, 19 Op. O.L.C. 235, 235 (1995) (discussing the limits of “emergencies involving an imminent threat to the safety of human life or the protection of property”).

<sup>78</sup> See generally ELIZABETH DREW, SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE 330–41, 355–67 (1996) (describing the shutdowns); SHARON S. GRESSLE, CONG. RESEARCH SERV., 98-844GOV, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, EFFECTS, AND PROCESS 2-3 (2001) (same).

<sup>79</sup> See Richard S. Conley, *President Clinton and the Republican Congress, 1995–2000: Political and Policy Dimensions of Veto Politics in Divided Government*, 31 CONGRESS & PRESIDENCY 133, 151 (2004) (“By early January 1996 it became clear that the public was beginning to ascribe far greater blame to the Congress than to the president for the policy confrontation and stalemate.”).

<sup>80</sup> It would, nevertheless, be a common mistake. See, e.g., Chris McGreal, *Midterms 2010: Lessons of 1994*, GUARDIAN (London), Nov. 4, 2010, at 13 (suggesting, based on the evidence of the 1995 shutdown alone and without regard to context, that the President enjoys a significant advantage in a budget shutdown); Steve Benen, *Norquist Thinks the GOP Will Win from Another Shutdown*, WASH. MONTHLY POL. ANIMAL BLOG (Nov. 19, 2010, 11:30 AM), [http://www.washingtonmonthly.com/archives/individual/2010\\_11/026718.php](http://www.washingtonmonthly.com/archives/individual/2010_11/026718.php) (noting that some Republicans “seriously believe that the public would credit Republicans for shutting down the government” and asking “whether Republican leaders are crazy enough to think this is a good idea”); Joseph Lazzaro, *The Looming Springtime Shutdown of the U.S. Government*, DAILYFINANCE (Feb. 20, 2011, 9:00 AM), <http://www.dailyfinance.com/2011/02/20/looming-springtime-governmentsshutdown> (suggesting that “history” teaches that Congress will lose the public opinion battle over a government shutdown).

<sup>81</sup> STEVEN M. GILLON, THE PACT: BILL CLINTON, NEWT GINGRICH, AND THE RIVALRY THAT DEFINED A GENERATION 159 (2008).

Congress that his veto could no longer be sustained.<sup>82</sup> But, as several commentators have noted, Gingrich made both tactical mistakes—such as personalizing the fight and thereby appearing petty<sup>83</sup>—and strategic ones—such as overreading his mandate to press for conservative fiscal policy.<sup>84</sup> Had he been more skilled, or had Clinton been less so, we might well remember the 1995–1996 budget showdown as the moment at which the separation-of-powers pendulum began swinging back toward Congress. But to the extent that Congress internalizes the narrative that it is bound to lose any budget showdown with the White House, it correspondingly lessens its bargaining power.

Indeed, the House of Representatives' behavior in the days and hours leading up to a near-shutdown in 2011 reveals something more of the full extent of each house's power of the purse. The 2010 election had been a good one for the Republican Party, giving it control of the House by a comfortable margin and significantly narrowing the margin in the Senate.<sup>85</sup> In an echo of President Bush's admission that the 2006 elections were a "thumpin'" for Republicans,<sup>86</sup> President Obama called the 2010 elections a "shellacking" for Democrats.<sup>87</sup>

---

<sup>82</sup> See Ann Devroy & Eric Pianin, *Talks on 7-Year Balanced Budget 'Goal' Collapse*, WASH. POST, Nov. 18, 1995, at A1 (discussing the President's slipping public approval ratings and the mounting pressure from House Democrats who "urg[ed] passage of a new continuing resolution and instruct[ed] the President to work with Congress to develop a seven-year balanced budget 'without preconditions'"); Todd S. Purdum, *President and G.O.P. Agree to End Federal Shutdown and to Negotiate a Budget*, N.Y. TIMES, Nov. 20, 1995, at A1 (stating that, "[w]hile early public opinion polls" favored the President, "[t]he consensus on Capitol Hill was that Mr. Clinton would have had a hard time sustaining a veto if Democrats were given another chance to vote on" "a stopgap spending measure . . . that . . . included the goal of balancing the budget in seven years").

<sup>83</sup> During the shutdown, Gingrich publicly complained about the seating arrangements for a flight on Air Force One. GILLON, *supra* note 81, at 160. As Gillon notes, "Gingrich's childish verbal tirade was a public relations disaster for the Republicans. Coming in the second day of the shutdown when public opinion was still malleable, it made the Republicans seem petulant and stubborn . . ." *Id.*

<sup>84</sup> See *id.* at 170 ("Gingrich could have declared victory at a number of points [during budget negotiations] . . . [But] Gingrich misinterpreted the results of the 1994 election and oversold the revolution."); Conley, *supra* note 79, at 151 ("[T]he Republican leadership had *overestimated* support for the Contract [with America] following the 1994 elections . . .").

<sup>85</sup> See Carl Hulse, *Taking Control, G.O.P. Overhauls Rules in House*, N.Y. TIMES, Jan. 6, 2011, at A1 (noting that sixty-three House seats switched from Democratic to Republican control, giving the Republicans a 242-to-193 edge, and that six Senate seats shifted from Democratic to Republican control, leaving the Democrats with a slim 53-to-47 margin in that chamber).

<sup>86</sup> See *supra* text accompanying note 19.

<sup>87</sup> Peter Baker & Carl Hulse, *The Great Divide: Obama and G.O.P.*, N.Y. TIMES, Nov. 4, 2010, at A1.

House Republicans, led by Speaker John Boehner, claimed a mandate for a decidedly more conservative agenda than had predominated over the previous two years.<sup>88</sup> Because no budget for Fiscal Year 2011 had ever been completed, the government was being funded by a series of short-term continuing resolutions.<sup>89</sup> This meant that the new Republican House majority had an early crack at the budget.

By credibly threatening to allow the government to shut down, the House Republican leadership was able to bargain for a great deal of what it wanted.<sup>90</sup> Not only did House Republicans successfully negotiate for over \$38 billion in spending cuts that were opposed by the White House,<sup>91</sup> they also used their budget power as leverage to achieve changes they sought in areas as diverse as environmental law,<sup>92</sup> education policy,<sup>93</sup> and abortion access.<sup>94</sup> They even took the opportunity to intervene in a separation-of-powers controversy, prohibiting the expenditure of funds for certain White House “czars.”<sup>95</sup> Whether or not one agrees with all (or, indeed, any) of these policy positions, it

<sup>88</sup> See Peter Baker, *Washington Worries About Its New Power Couple*, N.Y. TIMES, Nov. 10, 2010, at A24.

<sup>89</sup> See Further Additional Continuing Appropriations Amendments, 2011, Pub. L. No. 112-8, 125 Stat. 34; Additional Continuing Appropriations Amendments, 2011, Pub. L. No. 112-6, 125 Stat. 23; Further Continuing Appropriations Amendments, 2011, Pub. L. No. 112-4, 125 Stat. 6; Continuing Appropriations and Surface Transportation Extension Act, 2011, Pub. L. No. 111-322, 124 Stat. 3518 (2010); Act of Dec. 18, 2010, Pub. L. No. 111-317, 124 Stat. 3454; Act of Dec. 4, 2010, Pub. L. No. 111-290, 124 Stat. 3063; Continuing Appropriations Act, 2011, Pub. L. No. 111-242, 124 Stat. 2607 (2010).

<sup>90</sup> The final budget deal is embodied in Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38.

<sup>91</sup> Jennifer Steinhauer, *2011 Budget Bill with Cuts Is Approved by Congress*, N.Y. TIMES, Apr. 15, 2011, at A1.

<sup>92</sup> See Felicity Barringer & John M. Broder, *Congress, in a First, Removes an Animal from the Endangered Species List*, N.Y. TIMES, Apr. 13, 2011, at A16 (“A rider to the Congressional budget measure . . . dictates that wolves in Montana and Idaho be taken off the endangered species list . . . . The rider is the first known instance of Congress’ directly intervening in the list.”).

<sup>93</sup> See Trip Gabriel, *Budget Deal Fuels Revival of School Vouchers*, N.Y. TIMES, Apr. 15, 2011, at A18 (noting that the budget deal included a provision financing school vouchers in Washington, D.C.).

<sup>94</sup> See Editorial, *The Crisis Next Time*, N.Y. TIMES, Apr. 11, 2011, at A24 (noting that a provision in the budget deal prohibits the District of Columbia from spending any public money on abortion provision).

<sup>95</sup> See James Risen, *Obama Takes on Congress over Policy Czar Positions*, N.Y. TIMES, Apr. 17, 2011, at A17. In a signing statement, President Obama suggested that this provision of the budget law may be an unconstitutional infringement of his inherent Article II powers. See Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 2011 DAILY COMP. PRES. DOC. 263 (Apr. 15, 2011). On the separation-of-powers tussle over “policy czars,” see generally Kevin Sholette, Note, *The American Czars*, 20 CORNELL J.L. & PUB. POL’Y 219 (2010).

is clear that the House in this instance used its power of the purse as a potent weapon in interbranch struggle.

My aim in this Section is not to advocate a rush to shut down the government—or even to threaten to do so—over every interbranch spat. Nor do I advocate a slashing of entitlement spending or a profligate zeroing-out of executive branch salaries. Each of these, of course, comes with significant costs, and Congress would undermine rather than enhance its power if it used them irresponsibly. But to the extent that Congress is *unwilling* to return to a budget process in which annual appropriations predominate,<sup>96</sup> to threaten the livelihood of executive officials, or to shut down the government, then it must recognize that it has ceded significant power to the executive branch.<sup>97</sup> Conversely, to the extent that it is willing to do these things, it can regain some portion of that power. As the 2011 budget negotiations have shown, a credible willingness to use these tools need not lead to their frequent use—but it does mean that interbranch conflicts are negotiated in their shadow.<sup>98</sup> Moreover, as the 2011 budget negotiations showed, a Congress inclined to use the power of the purse robustly would use the appropriations power as leverage in substantive matters other than appropriations,<sup>99</sup> much as the post-Revolution Parliament exacted concessions in exchange for granting

---

<sup>96</sup> Indeed, some have even proposed moving to a biennial cycle for discretionary spending. See Marcus K. Garner, *Isakson Pitches Biennial Budget*, ATLANTA J.-CONST., Apr. 16, 2011, at A4 (“Isakson, Democratic co-sponsor Sen. Jeanne Shaheen of New Hampshire and a growing list of co-sponsors want Congress to pass a budget every two years, rather than every year. Despite a long history of indifference, the idea appears to be gaining support in key committees.”). Needless to say, this would further reduce Congress’s ability to use the power of the purse in pursuit of its goals.

<sup>97</sup> Kate Stith has even suggested that such a hands-off approach to the budget on the part of Congress may be unconstitutional. See Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1345-46 (1988) (“Congress abdicates, rather than exercises, its power of the purse if it creates permanent or other open-ended spending authority that effectively escapes periodic legislative review and limitation. Accordingly, I propose that not every legislative grant of spending authority necessarily qualifies as an ‘Appropriation[] made by Law’ under the Constitution.” (alteration in original)). Whether such congressional abdication is unconstitutional or not, it clearly does represent a less-than-emphatic use of Congress’s constitutional powers.

<sup>98</sup> Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69 (1979) (noting that law serves largely to structure bargaining that takes place outside of the courtroom).

<sup>99</sup> See, e.g., Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 510 (2011) (arguing that Congress should vigorously employ its power of the purse to check presidential unilateralism in warmaking).

supply to the Crown.<sup>100</sup> Few actions would give teeth to a congressional demand, a congressional desire for action, or even a congressional finding of contempt quite like a credible threat to withhold funds.

### B. Contempt

This brings us to our second congressional hard power: a contempt of Congress citation. Although there is no explicit textual grounding for holding nonmembers in contempt, each house of Congress has been understood to possess this power since the earliest days of the Republic.<sup>101</sup> Indeed, the contempt power has a long pedigree in English constitutional practice,<sup>102</sup> and has long been understood as an important guarantor of the ability of the legislature to serve its constitutional functions.<sup>103</sup>

---

<sup>100</sup> See *supra* note 46 and accompanying text.

<sup>101</sup> See JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 212-14, 222-34 (2007) (describing the theory and history of the houses' power to punish nonmembers for contempt); see also MORTON ROSENBERG & TODD B. TATELMAN, *CONG. RESEARCH SERV.*, RL34097, *CONGRESS'S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE* 2-4 (2008) (noting that a congressional contempt power "has been deemed implicit in the Constitution's grant to Congress of all legislative powers" by the Supreme Court); 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 842, at 305 (Fred B. Rothman & Co. 1991) (1833) ("[I]t is obvious, that, unless such a power [to punish nonmembers for contempt], to some extent, exists by implication, it is utterly impossible for either house to perform its constitutional functions."); C.S. Potts, *Power of Legislative Bodies to Punish for Contempt* (pt. 2), 74 U. PA. L. REV. 780, 780 (1926) ("[C]ourts in this country and in England have practically without exception recognized the existence of the right of legislative bodies to protect their rightful privileges and to remove obstructions to the proper performance of their functions, by use of their contempt powers against offenders . . . [T]he right has been justified by courts on both sides of the Atlantic . . . on the ground of necessity.").

<sup>102</sup> See CHAFETZ, *supra* note 101, at 193-206 (tracing this power in English constitutional history).

<sup>103</sup> For Congress to perform any of its functions, it must have access to information. See J.W. Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951) ("The power to investigate is one of the most important attributes of the Congress. It is perhaps also the most necessary of all the powers underlying the legislative function."); James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 209 (1926) ("To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness."). And in order for it to have reliable access to information, it must have the contempt power. See Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189, 189 (1967) ("In practical terms, the inquisitorial authority of the Congress ends at the point where a witness will be excused . . . for refusing to obey a congressional summons to appear or to produce papers, or for refusing to answer questions posed by a member or committee of Congress.").

Because holding contempt hearings took a great deal of congressional time and energy, Congress in 1857 passed a statute providing for criminal prosecution of anyone who refused to obey a congressional subpoena,<sup>104</sup> and a slightly modified version of that statutory regime remains in place today.<sup>105</sup> However, it is clear that the statutory regime cannot have displaced the houses' inherent contempt power. Even assuming, arguendo, that Congress *could* have surrendered this power entirely, there is no evidence that it intended to deliver its ability to enforce its demands for information wholly into the hands of executive prosecutorial discretion.<sup>106</sup> Indeed, doing so would have insulated executive branch officers from any consequences for disobeying a congressional subpoena, at least so long as their refusal was pursuant to administration policy.<sup>107</sup> Given the importance of Congress's role in overseeing the executive branch, it is clear that it must have some means of forcing information from that branch.<sup>108</sup>

Moreover, each house of Congress has the institutional wherewithal to investigate, adjudicate, and punish contempts against itself. The houses' sergeants-at-arms can arrest and bring before the houses any alleged contemnors who refuse to appear<sup>109</sup>—and, indeed, the House has twice used this power against executive branch officers.<sup>110</sup> The same committee structures that allow the houses to conduct investigations into substantive matters also allow them to conduct investigations into refusals to cooperate with those substantive investigations.<sup>111</sup> Having conducted those investigations, the houses of Congress can use the same decisionmaking procedures by which they settle other issues to make final determinations as to whether or not contempt has

<sup>104</sup> Act of Jan. 24, 1857, ch. 19, § 1, 11 Stat. 155, 155-56.

<sup>105</sup> 2 U.S.C. §§ 192-194 (2006).

<sup>106</sup> See ROSENBERG & TATELMAN, *supra* note 101, at 21 ("It is clear from the floor debates and the subsequent practice of both Houses that the legislation was intended as an *alternative* to the inherent contempt procedure, not as a substitute for it.").

<sup>107</sup> See Chafetz, *supra* note 45, at 1131-32.

<sup>108</sup> See *id.*

<sup>109</sup> See CHAFETZ, *supra* note 101, at 222-23 (noting that the House sent its sergeant-at-arms to arrest nonmembers in a contempt proceeding for the first time in the Fourth Congress).

<sup>110</sup> See Chafetz, *supra* note 45, at 1135-39 (discussing the contempt proceedings against George Seward, Minister to China, and H. Snowden Marshall, federal District Attorney for the Southern District of New York).

<sup>111</sup> See ROSENBERG & TATELMAN, *supra* note 101, at 15-20 (describing the procedures the houses have used in exercising their inherent contempt power); see also Michael A. Zuckerman, *The Court of Congressional Contempt*, 25 J.L. & POL. 41, 68-80 (2009) (recommending certain procedural innovations in how the houses handle contempt proceedings).

been proven.<sup>112</sup> When the contempt is committed by a private individual, the punishments available to the houses are limited to reprimand and imprisonment.<sup>113</sup> Although one could imagine situations in which the executive branch might refuse to prosecute a private citizen who had been held in contempt by one of the houses, such situations would be rare,<sup>114</sup> and one can therefore assume that most cases of contempt of Congress by private citizens will be tried and punished by Article III courts under the statutory regime described above.<sup>115</sup>

The situation changes, however, when the alleged contemnor is not a private citizen but rather a member of the executive branch. As noted above, in such cases, the fact of prosecutorial discretion makes the houses' own inherent contempt power essential;<sup>116</sup> equally importantly, when the alleged contemnor is a member of the executive branch, the punishment options available to the houses broaden significantly. Of course, the option of arrest still remains potent—Congress has the capacity to arrest and imprison contemnors without the aid of the executive branch.<sup>117</sup> And the fact that Congress has twice arrested and held on its own authority executive branch officers<sup>118</sup> should put to rest any claim that it is categorically unwilling to or

<sup>112</sup> See ROSENBERG & TATELMAN, *supra* note 101, at 15-20 (discussing the history of contempt adjudications in congressional committees).

<sup>113</sup> The Supreme Court has insisted that the congressional power to punish is limited to “the least possible power adequate to the end proposed;” which is the power of imprisonment.” Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821). The houses have also made use of reprimands. See, e.g., 2 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 1616–1619, at 1083-89 (1907) (describing the House’s reprimand of Samuel Houston, then a private citizen, for assaulting a member of Congress because of the member’s remarks during a debate).

<sup>114</sup> Indeed, I am not aware of any. The closest situation of which I am aware is one in which the Department of Justice sought a court order enjoining a private party from complying with a congressional subpoena. See United States v. AT&T, 551 F.2d 384, 385 (D.C. Cir. 1976). The Department’s attempt to enjoin compliance with the subpoena likely implies that, had the House found the private party in contempt for refusing to comply with the subpoena, the Department would have declined to prosecute. Ultimately, however, the matter was settled by negotiation, so the issue of contempt never arose. See Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 745-46 (2002) (describing the appellate court’s role in fostering a negotiated settlement).

<sup>115</sup> See *supra* text accompanying notes 104-05.

<sup>116</sup> See *supra* text accompanying notes 106-08.

<sup>117</sup> See Chafetz, *supra* note 45, at 1152 (“[E]ach house has a sergeant-at-arms, and the Capitol building has its own jail. The sergeant can be sent to arrest contemnors and, if necessary, hold them in his custody until either their contempt is purged or the congressional session ends.”).

<sup>118</sup> See *supra* note 110 and accompanying text.

incapable of doing so. Still, the power of arrest may be somewhat *too* potent—a blunderbuss in a situation in which a rifle may be more apt. Here is where it again becomes important to view congressional power holistically. In a dispute over executive branch defiance of a subpoena, the houses of Congress have a number of tools to enforce compliance. They can turn to the power of the purse, zeroing-out the salary of the officer who has defied the subpoena or cutting funds for her department.<sup>119</sup> The House can open an impeachment inquiry into the contemnor's conduct. The Senate can refuse to confirm the administration's nominees to executive branch offices until the Executive's officer complies with the subpoena. And either house can simply decide that it will not turn to legislative matters in which the executive is invested until its demands are satisfied. Each of these mechanisms is a form of leverage by which a single house of Congress, acting alone, can respond to executive branch contempt of Congress. Of course, they fall along a continuum of disruptiveness—the bigger weapons may be more effective, but they may also cause more collateral damage that harms the house politically. A wise house would be careful in using any of them. But at the point at which a house has gotten as far as holding a member of the executive branch in contempt, some response is surely called for, and the menu above provides a wide range of options.

But recently, Congress has opted for something weaker than any of them. Following what appeared to be the politically motivated dismissal of nine U.S. Attorneys in 2006,<sup>120</sup> the House and Senate Judiciary Committees sought testimony from various executive branch officials, who promptly asserted executive privilege.<sup>121</sup> Negotiations broke down; the House Judiciary Committee issued subpoenas; and the executive branch defied those subpoenas.<sup>122</sup> Eventually, the House found White House Chief of Staff Joshua Bolten and former White House Counsel Harriet Miers in contempt.<sup>123</sup> When the House in-

---

<sup>119</sup> See *supra* Section I.A.

<sup>120</sup> For just a sampling of the literature on the U.S. Attorney controversy, see OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008), available at <http://www.justice.gov/opr/us-att-firings-rpt092308.pdf>; John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265, 267-92 (2008); Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the U.S. Attorneys Firings*, 38 PRESIDENTIAL STUD. Q. 315, 319-24 (2008); David C. Weiss, Note, *Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretextual Justification in the U.S. Attorney Removals*, 107 MICH. L. REV. 317, 322-32 (2008).

<sup>121</sup> Chafetz, *supra* note 45, at 1087.

<sup>122</sup> *Id.* at 1087-88.

<sup>123</sup> *Id.* at 1088.

voked the statutory contempt mechanism, the Attorney General notified the Speaker that the Department of Justice would not prosecute Miers or Bolten.<sup>124</sup> Rather than make use of any of the tools discussed above, the House filed suit in federal court, seeking a declaratory judgment that Miers and Bolten were in contempt and an injunction ordering them to comply with the congressional subpoenas.<sup>125</sup>

Miers and Bolten argued that the suit should be dismissed on standing and nonjusticiability grounds and because there was no proper cause of action; the district court rejected these arguments<sup>126</sup> as well as their claims of absolute executive privilege.<sup>127</sup> It did, however, hold that they could return to court with specific privilege claims against specific demands by the committee.<sup>128</sup> The court of appeals granted Miers's and Bolten's motion for a stay of the district court judgment pending appeal.<sup>129</sup> It also noted, in dicta, that the case could well become moot upon the expiration of the Congress in which the contempt finding was made.<sup>130</sup> Finally, in March 2009, a compromise was reached in which some of the material subpoenaed would be turned over and Miers and Karl Rove would testify under oath, but in closed proceedings.<sup>131</sup>

By choosing to bring the courts in, the House underplayed its constitutional hand and undercut its own aims in a number of ways. First, and most immediately, the House allowed its inquiry into the Bush Administration to be frustrated and its oversight role to be correspondingly reduced. Not only did the settlement result in the House's getting less than it had determined that it was due, but the timing here was also crucial. The U.S. Attorney firings occurred in late 2006; the congressional subpoenas were issued in mid-2007; the House held Miers and Bolten in contempt in early 2008; and yet the

<sup>124</sup> See *id.* at 1086-89 (describing these events in more detail).

<sup>125</sup> Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 55, 63-64 (D.D.C. 2008).

<sup>126</sup> *Id.* at 65-99.

<sup>127</sup> *Id.* at 99-107.

<sup>128</sup> *Id.* at 106.

<sup>129</sup> Comm. on the Judiciary v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam), *appeal dismissed per stipulation*, No. 08-5357, 2009 WL 3568649 (D.C. Cir. Oct. 14, 2009).

<sup>130</sup> *Id.* Judge Tatel rejected this possibility. See *id.* at 912 (Tatel, J., concurring).

<sup>131</sup> See Carrie Johnson, *Deal Clears Rove, Miers to Discuss Prosecutor Firings*, WASH. POST, Mar. 5, 2009, at A8 (noting that the interviews would be transcribed and without cameras and that certain matters would be off-limits); see also Comm. on the Judiciary v. Miers, No. 08-5357, 2009 WL 3568649, at \*1 (D.C. Cir. Oct. 14, 2009) (dismissing the case pursuant to the settlement).

House did not get any information at all until mid-2009.<sup>132</sup> Or, to put it differently, the subpoenaed information was not handed over to Congress until after the Bush Administration was safely out of office, the Congress that had issued the subpoenas had expired, and the U.S. Attorney controversy was long out of the news. Moreover, there can be no doubt that the Administration could have dragged the matter out significantly longer, had it needed to. First, it could have waited for a final ruling from the court of appeals. Quite possibly, that ruling would have come after the expiration of the Congress that had issued the subpoenas, and the court suggested that could well have mooted the case.<sup>133</sup> If so, then the whole process would have had to start over in early 2009. Even if the court of appeals had affirmed the district court's ruling, the Administration could still have petitioned for rehearing en banc<sup>134</sup> and then a writ of certiorari.<sup>135</sup> Even if these were both denied relatively expeditiously, the district court's ruling made it clear that Miers and Bolten could then have argued executive privilege in response to each individual question asked or document requested.<sup>136</sup> And then, of course, those specific claims would have had to be adjudicated. In short, once Congress turns to the courts to enforce its contempt finding, an administration can likely keep the House or Senate tied up in litigation until that administration is out of office, regardless of how early in the administration's tenure the issue arises. And if the administration is lucky, intervening congressional elections will usher in legislators more inclined simply to let the matter drop. To put it succinctly, Congress cannot win in court—even if the courts ultimately side with it over the executive branch, the Administration can ensure that those final rulings come far too late to allow Congress effectively to oversee executive branch operations.<sup>137</sup>

But Congress's self-inflicted wound may well go even deeper. In seeking the aid of the judiciary, the House was announcing to the world its belief in its own impotence. The House had already declared that Miers and Bolten were in contempt; it then asked a district court judge to issue a declaratory judgment that Miers and Bolten

---

<sup>132</sup> See Chafetz, *supra* note 45, at 1086-93 (describing the events in more detail).

<sup>133</sup> See *Miers*, 542 F.3d at 911.

<sup>134</sup> See FED. R. APP. P. 35 (laying out the procedure for rehearing en banc).

<sup>135</sup> See SUP. CT. R. 10-16 (describing the certiorari process).

<sup>136</sup> Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 106 (D.D.C. 2008).

<sup>137</sup> See Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71, 81, 84 (1986) (noting the effect of delay in hindering congressional oversight).

were in contempt—in essence, suggesting that, while the executive may not listen to a house of Congress, *of course* it would listen to a federal district judge. This point was thoroughly internalized by the district court itself, which wrote that

imprisoning current (and even former) senior presidential advisors and prosecuting them before the House would only exacerbate the acrimony between the two branches and would present a grave risk of precipitating a constitutional crisis. Indeed, one can easily imagine a stand-off between the Sergeant-at-Arms and executive branch law enforcement officials concerning taking Mr. Bolten into custody and detaining him. Such unseemly, provocative clashes should be avoided, and there is no need to run the risk of such mischief when a civil action can resolve the same issues in an orderly fashion.<sup>138</sup>

It seemed literally unimaginable to the court that the executive branch might resist a court order as readily as it would resist an order from the House. And the House, in choosing to invoke the court's authority rather than its own, played right into this perception. It reinforced the idea that the judiciary is the domain of reasoned, principled judgments that must be respected, while congressional action in defense of its powers is "unseemly."<sup>139</sup> As David Mayhew has noted, congressional action does not simply reflect public opinion; it shapes it as well.<sup>140</sup> To the extent, then, that even the houses of Congress themselves publicly subscribe to the notion that congressional self-assertion is degraded, debased, or unseemly, how can that not lessen their power? In contrast, in recent years, one would be hard pressed to find the executive branch<sup>141</sup> or the judiciary<sup>142</sup> making such self-effacing claims.

---

<sup>138</sup> *Miers*, 558 F. Supp. 2d at 92 (citation omitted).

<sup>139</sup> *Id.*

<sup>140</sup> See MAYHEW, *supra* note 34, at 18, 96, 202-03, 239-40.

<sup>141</sup> See, e.g., Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 387-88 (2011) (book review) (describing the Bush Administration's "assertions of [executive] constitutional preeminence" and Bush Administration official John Yoo's attempt to provide scholarly justification for these assertions). *But cf.* Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 810-28 (2011) (suggesting that, at least twice in recent decades, the executive branch has voluntarily and unilaterally limited its own discretion).

<sup>142</sup> See, e.g., Chafetz, *supra* note 45, at 1153-54 (discussing the judiciary's recent habit of referring to itself as the "ultimate arbiter" of constitutional issues).

## II. SOFT POWER

Contempt of Congress is an apt bridge between congressional hard powers and congressional soft powers. While the authority to hold nonmembers in contempt falls within the category of hard powers, Congress's reluctance to fully assert itself in this area has the effect of diminishing its soft power. Recall that, in separation-of-powers conflicts—as in international conflicts—soft powers are those that are exercised in an attempt to win the hearts and minds of the civilian population.<sup>143</sup> When the houses of Congress take public stands that (explicitly or implicitly) denigrate their own ability to act in principled, public-interested ways, they diminish their own soft power. In turning to the courts in an attempt to enforce its contempt citation, the House of Representatives was inattentive to soft power concerns.

Indeed, this inattentiveness marks much of Congress's relationship to its soft power tools generally, as we shall see in this Part.

### A. *The Freedom of Speech or Debate*

The Constitution guarantees that, “for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.”<sup>144</sup> The legislative privilege of freedom of speech and debate is an ancient one; the House of Commons is known to have asserted the privilege as early as 1397.<sup>145</sup> By the middle of the sixteenth century, the Speaker's petition to the Monarch, delivered at the beginning of every new session of the House of Commons, formally claimed it as one of the ancient privileges of Parliament.<sup>146</sup> Of course, as with so many constitutional principles, the Stuart monarchs honored it more in the breach than the observance,<sup>147</sup> and it was therefore formalized as part of the Revolution Settlement in 1689. Article 9 of

---

<sup>143</sup> See *supra* text accompanying notes 26-35.

<sup>144</sup> U.S. CONST. art. I, § 6, cl. 1.

<sup>145</sup> See CHAFETZ, *supra* note 101, at 69 (discussing the *Haxey* case); HENRY ELSYNCE, *THE MANNER OF HOLDING PARLIAMENTS IN ENGLAND 179-81* (London, Richardson & Clark 1768) (same); F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 241 (H.A.L. Fisher ed., 1908) (same); CARL WITTKÉ, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 23-24 (Da Capo Press 1970) (1921) (same).

<sup>146</sup> See, e.g., 1 H.C. JOUR. 37 (1554) (noting that the Speaker petitioned Queen Mary for “free Speech in the House” and that the Queen granted the petition). For the history of the Speaker's petition generally, see J.E. Neale, *The Commons' Privilege of Free Speech in Parliament*, in 2 *HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT 1399-1603*, at 147, 157-59 (E.B. Fryde & Edward Miller eds., 1970).

<sup>147</sup> See CHAFETZ, *supra* note 101, at 72-74 (chronicling conflicts between the Stuarts and Parliament over the speech privilege).

the Bill of Rights expressly provides that “the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.”<sup>148</sup>

At the time of the American founding, four states explicitly protected legislative speech and debate in their state constitutions,<sup>149</sup> and two more had general provisions protecting legislative privilege, which seems to have included protecting legislative speech and debate.<sup>150</sup> Indeed, given the extent to which the American colonial and early state legislatures looked to Parliament for an understanding of their privileges and procedures,<sup>151</sup> it would be surprising if the privilege were not understood to exist by structural necessity in the other states as well. The Articles of Confederation,<sup>152</sup> as well as the Constitution,<sup>153</sup> contained a speech or debate clause.

Although there are, of course, debates about the outer limits of the speech or debate privilege, its core is clear enough: members of Congress cannot be held criminally or civilly liable for speech acts (speaking, debating, introducing legislation, voting, etc.) performed

<sup>148</sup> An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c. 2, § 9. On this provision in the Bill of Rights, see generally S.A. de Smith, *Parliamentary Privilege and the Bill of Rights*, 21 MOD. L. REV. 465, 468-75 (1958); Geoffrey Lock, *The 1689 Bill of Rights*, 37 POL. STUD. 540, 552-54 (1989).

<sup>149</sup> See MD. CONST. of 1776, Declaration of Rights, art. VIII, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1686, 1687 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE]; MASS. CONST. of 1780, pt. I, art. XXI, *reprinted in* 3 THORPE, *supra*, at 1888, 1892; N.H. CONST. of 1784, pt. I, art. XXX, *reprinted in* 4 THORPE, *supra*, at 2453, 2457; N.C. CONST. of 1776, Form of Government, art. XLV, *reprinted in* 5 THORPE, *supra*, at 2787, 2794.

<sup>150</sup> See N.Y. CONST. of 1777, art. IX (providing that the state legislature would “enjoy the same privileges . . . as the assemblies of the colony of New York of right formerly did”), *reprinted in* 5 THORPE, *supra* note 149, at 2623, 2631; S.C. CONST. of 1778, art. XVI (providing that the state legislature “shall enjoy all other privileges which have at any time been claimed or exercised by the commons house of assembly”), *reprinted in* 6 THORPE, *supra* note 149, at 3248, 3252; S.C. CONST. of 1776, art. VII (same), *reprinted in* 6 THORPE, *supra* note 149, at 3241, 3244. In South Carolina, at least, those privileges clearly included freedom of speech and debate. See MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 94 (1943) (noting a claim of the speech or debate privilege in the South Carolina colonial legislature as early as 1701).

<sup>151</sup> See JACK P. GREENE, *NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY* 189-99 (1994) (discussing the extent to which New World legislatures borrowed Old World privileges).

<sup>152</sup> ARTICLES OF CONFEDERATION of 1781, art. V, para. 5.

<sup>153</sup> U.S. CONST. art I, § 6, cl. 1.

in Congress.<sup>154</sup> In a political system in which the legislature debates and discusses openly and publicly,<sup>155</sup> speech acts performed in Congress are directed not only toward other members of Congress, but toward the public as well. The Speech or Debate Clause thus protects members' ability to communicate with their constituents, as well as

---

<sup>154</sup> As the Supreme Court put it in 1880,

It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.

Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).

<sup>155</sup> The House of Representatives has always met publicly, as a general rule, although it can go into secret session under certain specified conditions. See RULES OF THE HOUSE OF REPRESENTATIVES R. XVII, § 9, H.R. DOC. NO. 110-162, at 760-62 (2009). The Senate met secretly for its first five years. See 1 ANNALS OF CONG. 15 (Joseph Gales ed., 1834) (editor's note). This secrecy, however, was criticized on the grounds that it was inconsistent with popular sovereignty, and the Senate eventually bowed to public pressure and opened its proceedings to the public. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 10 (1997). As with the House, the Senate retains the ability to go into secret session under certain specified conditions. See STANDING RULES OF THE SENATE R. XXI, in COMM. ON RULES AND ADMIN., U.S. SENATE, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE U.S. SENATE, S. DOC. NO. 110-1, at 1, 20 (2008). It should be noted that the ability to meet in secret is very seldom used. See Eric Lane et al., *Too Big a Canon in the President's Arsenal: Another Look at United States v. Nixon*, 17 GEO. MASON L. REV. 737, 758 (2010) (noting that the House met secretly only six times between 1825 and 2008 and that the Senate met secretly only fifty-four times between 1925 and 2010).

Moreover, the Constitution itself, through the Journals Clause, requires a certain level of openness. See U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same . . ."). As David Currie has noted, "[N]either chamber interpreted the journal provision to require a verbatim transcript of its proceedings." CURRIE, *supra*, at 10. However, newspapers carried extensive coverage of debates in the House from the beginning, and they covered Senate debates with the same level of detail once the Senate opened its galleries. Indeed, *The Annals of Congress*, published by Gales and Seaton between 1834 and 1836, is simply a compilation of such newspaper accounts for the Congresses meeting between 1789 and 1824. See Seth Barrett Tillman, *The Annals of Congress, the Original Public Meaning of the Succession Clause, and the Problem of Constitutional Memory* 8-10 (June 30, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1524008> (describing the *Annals*). It is thus clear that American political and constitutional norms have long required that legislative proceedings be open, except in sharply limited circumstances. This norm has, of course, only strengthened with the advent of televised congressional proceedings.

with one another.<sup>156</sup> In doing so, it gives them a potent weapon in interbranch struggles.

Consider the *Pentagon Papers* case. No, the *other Pentagon Papers* case. For most of us, the name conjures *New York Times v. United States*,<sup>157</sup> in which the heroic Court stood up for freedom of the press against a secrecy-obsessed executive branch.<sup>158</sup> And it is certainly not my intention here to denigrate *New York Times v. United States*, which I agree is an important defense of a free press. But what often gets lost in the discussion is that, before the Supreme Court ruled, far more of the *Pentagon Papers*<sup>159</sup> than the newspapers would ever publish<sup>160</sup> had already irretrievably entered the public record.

<sup>156</sup> This, indeed, was the theme of a petition that Thomas Jefferson wrote to the Virginia House of Delegates in 1797 on the subject of the speech or debate privilege. See Thomas Jefferson, Petition to Virginia House of Delegates (asserting that the privilege exists to ensure that representatives “in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any”), in 8 THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES 322, 322 (Paul Leicester Ford ed., 1904). See generally CHAFETZ, *supra* note 101, at 88-89 (discussing Jefferson’s comments); *id.* at 90-93 (discussing the importance of constituent communication in understanding the scope of the Speech or Debate Clause).

<sup>157</sup> *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam).

<sup>158</sup> Lionization of *New York Times v. United States* is widespread. See, e.g., CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 73 (2001) (listing it as one of the Court’s four “greatest moments” in the second half of the twentieth century); William R. Glendon, *The Pentagon Papers—Victory for a Free Press*, 19 CARDOZO L. REV. 1295, 1306 (1998) (arguing that the importance of the case “cannot be overstated”); Gordon Silverstein & John Hanley, *The Supreme Court and Public Opinion in Times of War and Crisis*, 61 HASTINGS L.J. 1453, 1479 (2010) (“Most casual readers think of the *Pentagon Papers* case as a great victory for the freedom of the press. And it was. But it was at least equally significant as a statement on the separation of powers and executive power in wartime.” (footnotes omitted)); see also J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 974 n.43 (1998) (listing *New York Times v. United States* as one of only eighteen “truly canonical” American constitutional law cases (citing Jerry Goldman, *Is There a Canon of Constitutional Law?*, AM. POL. SCI. ASS’N NEWSL. (Law and Courts Section of the Am. Political Sci. Ass’n), Spring 1993, at 2-4)).

<sup>159</sup> The *Pentagon Papers* is the popular name for the top secret Pentagon study prepared between 1967 and 1969 and officially titled “History of U.S. Decision Making Process on Vietnam Policy.” The complete study was over seven thousand pages long and was bound in forty-seven volumes. Only parts of it were leaked. See DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 2, 27 (1996).

<sup>160</sup> Three editions of the *Pentagon Papers* were eventually published in book form. The first, published by Bantam, consisted of the *New York Times*’s edition of the Papers, as well as various supplementary material by the *Times*. NEIL SHEEHAN ET AL., THE PENTAGON PAPERS AS PUBLISHED BY THE NEW YORK TIMES (1971). It is the shortest of the three. The other two—the Gravel edition, THE PENTAGON PAPERS: THE SENATOR GRAVEL EDITION (1972) (in five volumes) [hereinafter GRAVEL EDITION], and the gov-

The *New York Times* published its first three articles on the Pentagon Papers on June 13, 14, and 15, 1971.<sup>161</sup> On June 15, the United States District Court for the Southern District of New York granted a temporary restraining order barring further publication while the court adjudicated the government's motion for an injunction.<sup>162</sup> On June 18, the *Washington Post* ran its first story on the Papers,<sup>163</sup> and on June 19, a district court issued a temporary restraining order against the *Post*.<sup>164</sup> The same day, the Southern District of New York ruled for the *Times*, denying the government's motion for a preliminary injunction;<sup>165</sup> the Second Circuit immediately stayed the decision, thus keeping the temporary restraining order in effect, and on June 23, it remanded for further proceedings in the district court with the temporary restraining order still in place.<sup>166</sup> Also on June 23, the D.C. Circuit denied the government's motion for an injunction, but stayed its order until June 25.<sup>167</sup> On June 25, the Supreme Court granted certiorari in both cases, consolidated them, and set oral arguments for the next day;<sup>168</sup> on June 30, the Court handed down its celebrated decision.<sup>169</sup> Only then did the *Times* and *Post* resume publication.<sup>170</sup>

---

ernment's own edition, U.S. DEP'T OF DEFENSE, UNITED STATES-VIETNAM RELATIONS, 1945-1967 (1971) (in twelve volumes)—are both significantly longer. Each of these contains material that the others lack, but even combined they do not comprise the entirety of the Pentagon Papers. In 2011, the government finally released the entirety of the Papers. See Michael Cooper & Sam Roberts, *After 40 Years, the Complete Pentagon Papers*, N.Y. TIMES, June 8, 2011, at A12.

<sup>161</sup> Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. TIMES, June 13, 1971, at A1; Neil Sheehan, *Vietnam Archive: A Consensus to Bomb Developed Before '64 Election, Study Says*, N.Y. TIMES, June 14, 1971, at A1; Neil Sheehan, *Vietnam Archive: Study Tells How Johnson Secretly Opened Way to Ground Combat*, N.Y. TIMES, June 15, 1971, at A1.

<sup>162</sup> *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 325 (S.D.N.Y. 1971).

<sup>163</sup> See Chalmers M. Roberts, *Documents Reveal U.S. Effort in '54 to Delay Viet Election*, WASH. POST, June 18, 1971, at A1.

<sup>164</sup> See *United States v. Wash. Post Co.*, 446 F.2d 1322, 1323 (D.C. Cir. 1971) (per curiam).

<sup>165</sup> *N.Y. Times*, 328 F. Supp. at 331.

<sup>166</sup> *United States v. N.Y. Times Co.*, 444 F.2d 544, 544 (2d Cir. 1971) (en banc) (per curiam).

<sup>167</sup> *United States v. Wash. Post Co.*, 446 F.2d 1327, 1329 (D.C. Cir. 1971) (en banc) (per curiam).

<sup>168</sup> *United States v. Wash. Post Co.*, 403 U.S. 943 (1971); *N.Y. Times Co. v. United States*, 403 U.S. 942 (1971).

<sup>169</sup> *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam).

<sup>170</sup> See Sanford J. Ungar & George Lardner, Jr., *War File Articles Resumed*, WASH. POST, July 1, 1971, at A1 ("Newspapers throughout the nation, expressing satisfaction

The night before, however, Mike Gravel, a first-term senator from Alaska, had placed 4100 pages of the Pentagon Papers into the public record. Daniel Ellsberg, the same RAND Corporation analyst who had leaked the Papers to the press, had given them to Gravel as well.<sup>171</sup> After an attempt to read them on the floor of the Senate failed due to lack of a quorum,<sup>172</sup> Gravel convened a 9:45 p.m. meeting of the Buildings and Grounds Subcommittee of the Senate's Environment and Public Works Committee.<sup>173</sup> Gravel, the subcommittee chair, was the only Senator in attendance; an anti-war House member was rounded up to serve as the "witness" whose "testimony" would provide the impetus for Gravel's reading the Papers into the record.<sup>174</sup> Gravel read aloud from the Papers until approximately 1:00 a.m. the next morning, at which point he broke down in tears.<sup>175</sup> He then entered the remaining pages into the subcommittee record.<sup>176</sup> By the time he returned to his office, his staff was already photocopying the "subcommittee record" and handing it out to reporters.<sup>177</sup> By the time the Court ruled, roughly twelve hours later,<sup>178</sup> the Papers could not have been removed from the public sphere.

Even after the Court's ruling, Gravel came to the conclusion that some combination of the threat of criminal prosecution<sup>179</sup> and news-

---

over the Supreme Court decision, rushed into print last night with articles based on the once-secret Pentagon papers on Vietnam.").

<sup>171</sup> Daniel Ellsberg, *Foreword* to MIKE GRAVEL & JOE LAURIA, A POLITICAL ODYSSEY: THE RISE OF AMERICAN MILITARISM AND ONE MAN'S FIGHT TO STOP IT 9, 9-10 (2008).

<sup>172</sup> GRAVEL & LAURIA, *supra* note 171, at 27-29.

<sup>173</sup> *Id.* at 30.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 35-36.

<sup>176</sup> *Id.* at 38.

<sup>177</sup> *Id.*

<sup>178</sup> *See* N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713 (1971) (per curiam); *see also* RUDENSTINE, *supra* note 159, at 302 (noting that the Court announced its judgment at 2:30 PM on June 30).

<sup>179</sup> The Supreme Court majority held simply that the government's requested injunction would constitute an impermissible prior restraint. 403 U.S. at 714. But three Justices dissented, *id.* at 748 (Burger, C.J., dissenting); *id.* at 752 (Harlan, J., joined by Burger, C.J., and Blackmun, J., dissenting), and two Justices in the majority explicitly held open the possibility of post-publication criminal sanction, *id.* at 730 (Stewart, J., concurring); *id.* at 733, 740 (White, J., concurring). It was thus perfectly plausible that the newspapers, their reporters, and their editors might still be criminally prosecuted for publishing the Papers, and, indeed, the Justice Department briefly pursued such prosecutions before ultimately abandoning them. *See* RUDENSTINE, *supra* note 159, at 339-43 (describing the unsuccessful prosecutions of Daniel Ellsberg and Anthony Russo and considering why no further criminal charges were brought in connection with the Papers).

room cowardice led the newspapers to publish too little of the Papers.<sup>180</sup> He accordingly arranged to have the entire “4,100-page subcommittee record” published by Beacon Press.<sup>181</sup> Subsequently, in the course of the grand jury investigation into the leaking of the Papers, Gravel’s aide, Leonard Rodberg, was subpoenaed, as was the director of the MIT Press, where Gravel had tried to publish his edition of the Papers.<sup>182</sup> Gravel intervened with a motion to quash the subpoenas on Speech or Debate Clause grounds.<sup>183</sup> The case eventually reached the Supreme Court, which found it “incontrovertible” that Gravel himself would be privileged against “questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record.”<sup>184</sup> And given that Gravel was privileged, Rodberg must have been, too, because

it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; . . . the day-to-day work of such aides is so critical to the Members’ performance that they must be treated as the latter’s alter egos; and . . . if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.<sup>185</sup>

The Court went on to hold, however, that Gravel’s agreement to publish the Papers was not privileged, on the grounds that “private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence.”<sup>186</sup> *Gravel’s* second holding seems difficult to defend: not only does it suggest that communication with constituents—with “We the People”—is not an essential part of legislative activity, but it also draws an arbitrary line between placing something in the public record and

---

<sup>180</sup> See GRAVEL & LAURIA, *supra* note 171, at 49-50 (suggesting that the newspapers stopped publishing portions of the Papers in response to legal pressure).

<sup>181</sup> *Id.* at 50-51; see also 5 GRAVEL EDITION, *supra* note 160, at 314-15 (describing the text of the Gravel edition).

<sup>182</sup> RUDENSTINE, *supra* note 159, at 340-41.

<sup>183</sup> See *Gravel v. United States*, 408 U.S. 606, 608-09 (1972).

<sup>184</sup> *Id.* at 615.

<sup>185</sup> *Id.* at 616-17 (citation omitted).

<sup>186</sup> *Id.* at 625.

arranging for easier public access to it through private publication.<sup>187</sup> The arbitrariness of the Court's line also points to its unworkability. So long as putting matters into the public sphere in the context of floor debates or committee hearings is protected—and the Court properly ruled that it is—then that material can be picked up, reported upon, and read by the public.

And it's a good thing, too. Today, we rightly consider the release of the Pentagon Papers to be an important milestone in the checking of an imperial presidency at war.<sup>188</sup> While some amount of secret keeping is undoubtedly necessary for effective governmental operations, it is well understood that the executive branch has a tendency to keep too many secrets and to withhold information that merely embarrasses it or undermines its public standing.<sup>189</sup> Moreover, to the extent that the executive branch prefers secrecy to disclosure, it has a special incentive to maintain “deep secrets”—that is, secrets whose existence, and not just content, is unknown to outsiders.<sup>190</sup> After all, no one can make pesky demands to know the contents of a secret if the

<sup>187</sup> For criticism of *Gravel's* second holding, see CHAFETZ, *supra* note 101, at 99-100; Sam J. Ervin, Jr., *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175, 184-88 (1973).

<sup>188</sup> See INSIDE THE PENTAGON PAPERS 183 (John Prados & Margaret Pratt Porter eds., 2004) (“[T]he Pentagon Papers revelation ‘lent credibility to and finally crystallized the growing consensus that the Vietnam War was wrong and legitimized the radical critique of the war.’ The leak also began a period of militancy on the part of the press.”); Heidi Kitrosser, *What If Daniel Ellsberg Hadn't Bothered?*, 45 IND. L. REV. 89, 93 (2011) (“[T]he leak . . . is invoked in judicial opinions and in public debates alike for the proposition that it is dangerous to defer heavily to executive branch judgments, including executive claims that certain information is too dangerous to release. It is highly plausible that this social learning effect imposes practical constraints on the executive's ability to take legal action against classified information leaks and publications.”); *id.* at 100 (“The Papers thus helped to disrupt the momentum of the national security state and the imperial presidency. It forced a crisis in the culture of deference and trust on which those phenomena relied.”).

<sup>189</sup> See, e.g., *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) (noting the “unfortunate tendency of government officials to over-classify information”); Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 401-07 (2009) (summarizing the literature on overclassification); Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1085 (1973) (noting that “substantial overclassification is inevitable given the variety of inducements to official secrecy”).

<sup>190</sup> See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 260 (2010) (explaining that secrets are deep when “we do not know [that] we do not know” some relevant fact); see also *id.* at 274 (offering a more formal definition of a “deep” secret as one where “a small group of similarly situated officials conceals its existence from the public and from other officials, such that the outsiders' ignorance precludes them from learning about, checking, or influencing the keepers' use of the information”).

very existence of the secret is unknown. And yet, as David Pozen has convincingly demonstrated, the deeper a secret is, the more troubling it is on utilitarian, democratic, and constitutional grounds.<sup>191</sup>

Members of Congress, using their Speech or Debate Clause immunity, can go a long way toward mitigating the most damaging types of executive branch secrecy. To the extent that deep secrecy is unjustified (for example, the existence of a program of warrantless wiretapping<sup>192</sup>), members of Congress can reveal the existence of the secrets. To the extent that shallow secrecy is justified (for example, the names of covert operatives), members of Congress can act as democratically accountable checks on the executive, reassuring the public that the executive's assertion of the need for secrecy really is valid.<sup>193</sup> But this is only the case if members of Congress are willing, as Senator Gravel was, to make their own judgments about the need for secrecy, giving a respectful hearing but not absolute deference to the executive branch.

Consider another, more recent, example: the 2011 reauthorization of portions of the PATRIOT Act.<sup>194</sup> During floor debate, Senators Ron Wyden and Mark Udall argued that the Obama Administration had adopted an implausible and disturbing secret legal interpretation of portions of the PATRIOT Act.<sup>195</sup> Senator Wyden insisted that “[w]hen the American people find out how their government has secretly interpreted the PATRIOT Act, they are going to be stunned and they are going to be angry.”<sup>196</sup> In making these claims, the Senators took what had been a deep secret and made it shallow: the public is now aware of the existence, but not the content, of this secret legal in-

<sup>191</sup> See *id.* at 275-323.

<sup>192</sup> See Heidi Kitrosser, *It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401, 1406-07 (2010) (describing the Terrorist Surveillance Program, whose existence was kept secret from 2001 to 2005).

<sup>193</sup> See Pozen, *supra* note 190, at 330 (arguing that “[m]embers of Congress . . . are ideally positioned to serve as the people’s proxy in vetting and checking otherwise deep presidential secrets”).

<sup>194</sup> Patriot Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (to be codified at 50 U.S.C. §§ 1805, 1861, 1862).

<sup>195</sup> See Charlie Savage, *Senators Say Patriot Act Is Being Misinterpreted*, N.Y. TIMES, May 27, 2011, at A17 (“During the debate, Senator Ron Wyden . . . said that the executive branch had come up with a secret legal theory about what it could collect under a provision of the Patriot Act that did not seem to dovetail with a plain reading of the text. . . . Senator Mark Udall, Democrat of Colorado, backed Mr. Wyden’s account.”).

<sup>196</sup> 157 CONG. REC. S3386 (daily ed. May 26, 2011) (statement of Sen. Ron Wyden); see also *id.* at S3389 (statement of Sen. Mark Udall) (“Americans would be alarmed if they knew how this law is being carried out.”).

terpretation. Perhaps the Senators did not go far enough—we should be deeply skeptical of secret laws, as opposed to secret facts.<sup>197</sup> Perhaps they should have disclosed the content of the interpretation. But at least now the public is able to debate whether the interpretation should be released—and it is able to do so because these Senators made use of their privilege of free congressional speech.

Of course, Speech or Debate Clause immunity can be abused. Members of Congress can release information that truly ought to be kept secret. And the executive, fearing release by Congress, may choose to withhold such sensitive information from Congress. But these concerns are frequently overblown. First, although one often hears “the standard executive claim that Congress leaks like a sieve,”<sup>198</sup> one seldom sees any evidence for that claim.<sup>199</sup> The executive branch, of course, has a strong incentive to make that claim, as it would prefer to withhold as much information from Congress as possible. We should be wary, then, of taking such executive branch claims at face value. Indeed, consider again the Pentagon Papers, which the government claimed were so damaging that it sought a court order enjoining their publication. Recall that Senator Gravel did not release the Papers in their entirety—rather, he released approximately 4100 out of a total of 7800 pages.<sup>200</sup> Moreover, before he released those pages into the public record, he excised those names that he judged should continue to receive shallow secrecy.<sup>201</sup> And despite the Nixon Administration’s hyperventilation over the Papers’ release, their release did not harm American national interests (as distinct from the interests of the Nixon Administration). Indeed, Erwin Griswold, Nixon’s Solicitor General who argued the *Pentagon Papers* case for the

---

<sup>197</sup> See generally Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1724-30 (2011) (reviewing ACKERMAN, *supra* note 2) (arguing that the work of the Office of Legal Counsel should be disclosed); Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 601-29 (2009) (same).

<sup>198</sup> Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 885 (2007).

<sup>199</sup> See Pozen, *supra* note 190, at 331 (“[T]o my knowledge no one inside or outside the [second Bush] administration ever marshaled any evidence, even anecdotal evidence, to justify” the claim that Congress is especially leak prone); see also Kathleen Clark, *Congress’s Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915, 936-51 (describing the institutional features that allow Congress to keep secrets).

<sup>200</sup> 5 GRAVEL EDITION, *supra* note 160, at 314.

<sup>201</sup> See GRAVEL & LAURIA, *supra* note 171, at 34-35 (recounting how Senator Gravel and his staff spent five nearly sleepless days making context-based decisions about which names to remove).

government, repeatedly said as much,<sup>202</sup> and the preeminent historian of the Papers concurs.<sup>203</sup> There is simply no reason to think that Congress cannot be every bit as careful with information as the executive branch.

Indeed, Congress's record might well be better than that of the executive branch. Consider that the 2010–2011 disclosures to WikiLeaks—which have been called “the most radical form of unauthorized disclosure since the leak of the Pentagon Papers”<sup>204</sup>—seem to have come from executive branch sources.<sup>205</sup> And for sheer spitefulness, it is hard to imagine a congressional leak as bad as the outing of Valerie Plame as a covert CIA agent by Vice President Cheney's Chief of Staff, I. Lewis “Scooter” Libby.<sup>206</sup> From the point of view of the public, there simply does not seem to be a lot of evidence that the Speech or Debate Clause privilege results in a large number of harmful disclosures. Congress can be trusted—at least as much as the executive branch can—to keep those secrets that need to be kept. And, as the Pentagon Papers show, Congress can also be trusted, at least sometimes, to bring to light secrets that the executive would rather keep, but that the nation would rather know.

But what about from the point of view of the executive branch? After all, what will Congress have to release if the executive branch refuses to give it any information? Again, concerns about access to in-

<sup>202</sup> See ERWIN N. GRISWOLD, *OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER* 310 (1992) (“As far as I know, . . . none of the material which was ‘objectionable’ from my point of view was ever published by anyone, including the newspapers, until several years later.”); Erwin N. Griswold, *No Harm Was Done*, N.Y. TIMES, June 30, 1991, at E15 (“In hindsight, it is clear to me that no harm was done by publication of the Pentagon Papers.”); Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25 (“I have never seen any trace of a threat to the national security from the publication. Indeed, I have never seen it even suggested that there was such an actual threat.”).

<sup>203</sup> See RUDENSTINE, *supra* note 159, at 327-28 (noting that neither Nixon nor Kissinger claimed any damages from the Papers' publication in their memoirs and concluding that “[t]here is no evidence” that the release of the Papers “harmed the U.S. military, defense, intelligence, or international affairs interests”).

<sup>204</sup> Mark Fenster, *Disclosure's Effects: WikiLeaks and Transparency*, 97 IOWA L. REV. (forthcoming 2012) (manuscript at 4-5) (italics omitted), available at <http://ssrn.com/abstract=1797945>.

<sup>205</sup> For a discussion of WikiLeaks and its disclosures, see generally Yochai Benkler, *A Free Irresponsible Press: WikiLeaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 315-51 (2011); Fenster, *supra* note 204 (manuscript at 4-16).

<sup>206</sup> For the details of the Plame affair, see generally Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795–2005*, 43 SAN DIEGO L. REV. 425, 464-65 (2006).

formation drying up, while important, tend to be overblown. First, the executive, like Congress, is a “they,” not an “it.”<sup>207</sup> There may frequently be those in the executive branch with access to secret information who want that information brought to light—much like Daniel Ellsberg did with the Pentagon Papers and Bradley Manning did with some of the documents posted on WikiLeaks. Indeed, to the extent that members of Congress are perceived as democratically legitimate and responsible in a way that news outlets or website operators are not, executive branch employees may feel more comfortable leaking material to them. To encourage such disclosure, Congress may want to consider providing enhanced whistleblower protection to executive branch employees who leak to Congress instead of to the press.<sup>208</sup>

Equally important, Congress need not rely on the executive branch's good will to extract information from it. Here, again, it is important to think of congressional powers as a mutually reinforcing set. As we have seen, a house of Congress can subpoena information that the executive branch does not wish to surrender, and it can begin contempt proceedings if the executive defies the subpoena.<sup>209</sup> It can also use its power of the purse, refusing to fund programs about which it is given inadequate information. None of these mechanisms, of course, will get Congress everything it might want, but they are all tools that it can use against a hostile executive branch.

And they are very much tools that are meant to be used in the public sphere. When Congress responsibly releases to the public information that the public wants, it enhances its own prestige and, hence, its power. It simultaneously knocks the President down a peg by showing the American people what he sought to withhold from them. The power to reveal information is, ultimately, a soft power. As such, its potency depends entirely on how well the member of Congress using it gauges public sentiment. A member releasing, say, the names of covert operatives would likely find his public standing diminished, not bolstered. But, as the aftermath of the release of the Pentagon Papers shows, a member who uses the power properly can enhance his own, and his branch's, stature, especially in relation to an executive branch that appears to be fighting to keep its own failures and misdeeds out of the public eye.

---

<sup>207</sup> Cf. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992) (“[T]here is not a single legislative intent, but rather many legislators' intents. Congress is a ‘they’, not an ‘it.’”).

<sup>208</sup> See Pozen, *supra* note 190, at 332 n.287 (raising this possibility).

<sup>209</sup> See *supra* Section I.B.

### B. Internal Discipline

With power, of course, comes the imperative to exercise it responsibly.<sup>210</sup> Hence, the Speech or Debate Clause's prohibition on punishing members "in any other Place" for their congressional speech acts<sup>211</sup> must be read *in pari materia* with the provision that "[e]ach House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."<sup>212</sup> Congress has the primary responsibility for policing itself, and a member who irresponsibly releases information that should have remained secret can expect to face discipline from her own house. But the responsible exercise of power can itself be a source of power. After all, most people are more trusting of an institution that has proven itself a good steward of the powers that it already has than they are of one that has not. As Philip Pettit has argued,

Not only can the mechanisms of loyalty, virtue, and prudence make it sensible for me to believe in the motivating efficacy of manifesting reliance, and make it sensible for me to trust the person in question in a relevant domain. The mechanisms can also explain why trust builds on trust: why trust tends to grow with use, not diminish. For it should be clear that as I test and prove someone suitably loyal, suitably virtuous, or suitably prudent, I have reason to be reinforced in my disposition to put those mechanisms to the test in future acts of trust.<sup>213</sup>

In other words—and intuitively—evidence of an actor's trustworthiness makes it more likely that further trust will be placed in that actor. Survey evidence indicates both that this conception of trust extends to public institutions and that perceptions of ethics are directly tied to trust in public institutions.<sup>214</sup> And finally, the power of institutions is directly tied to the public's trust in them: trusted institutions have "more leeway to govern effectively and . . . a larger store of support."<sup>215</sup> In short, a Congress that proves itself trustworthy is, in the long run, a more powerful Congress. And a principal element of trustworthiness

---

<sup>210</sup> Or, as *Spider-Man* more pithily put it, "[W]ith great power there must also come—great responsibility!" STAN LEE, STEVE DITKO & ART SIMEK, AMAZING FANTASY NO. 15, at 11 (1962), *reprinted in* 1 THE ESSENTIAL SPIDER-MAN (2004).

<sup>211</sup> U.S. CONST. art. I, § 6, cl. 1.

<sup>212</sup> *Id.* art. I, § 5, cl. 2.

<sup>213</sup> Philip Pettit, *The Cunning of Trust*, 24 PHIL. & PUB. AFF. 202, 209-10 (1995).

<sup>214</sup> See Eran Vigoda-Gadot, *Citizens' Perceptions of Politics and Ethics in Public Administration: A Five-Year National Study of Their Relationship to Satisfaction with Services, Trust in Governance, and Voice Orientations*, 17 J. PUB. ADMIN. RES. & THEORY 285, 288-91, 301 (2007).

<sup>215</sup> Marc J. Hetherington, *The Political Relevance of Political Trust*, 92 AM. POL. SCI. REV. 791, 803 (1998).

is ethical behavior. In this regard, then, congressional ethics enforcement can be a significant source of soft power.

The power of legislative houses to discipline their members has a long history, and, like the power to punish nonmembers,<sup>216</sup> arises out of the need to “protect the integrity and dignity of the legislative institution and its proceedings.”<sup>217</sup> By the sixteenth century, the House of Commons had asserted the right to punish its members (often by imprisoning them in the Tower of London) for breaches of parliamentary privilege and contempts against the House.<sup>218</sup> And by the late-seventeenth century, one can find examples of expulsion for what we would today call violations of parliamentary ethics—for example, John Ashburnham was expelled from the House in 1667 for receiving money from “the *French Merchants*.”<sup>219</sup> Similarly, in 1695, Henry Guy was sent to the Tower of London “for taking a Bribe of Two hundred Guineas.”<sup>220</sup> Indeed, the British Parliament took its commitment to internal discipline so seriously for so long that it was not until 2010 that members of Parliament could be prosecuted in the courts for accepting bribes.<sup>221</sup> Prior to that point, *only* parliamentary discipline was available.<sup>222</sup> New World colonial assemblies, too, exercised disciplinary power over their members.<sup>223</sup> Indeed, the foremost historian of parliamentary procedure in the American colonies has written that, “when one sees [one of these assemblies] imposing almost precisely

<sup>216</sup> See *supra* Section I.B.

<sup>217</sup> JACK MASKELL, CONG. RESEARCH SERV., RL31382, EXPULSION, CENSURE, REPRIMAND, AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES 1 (2005).

<sup>218</sup> See CHAFETZ, *supra* note 101, at 194-95 (recounting the sixteenth-century precedents).

<sup>219</sup> 9 H.C. JOUR. 24 (1667).

<sup>220</sup> 11 H.C. JOUR. 236 (1695).

<sup>221</sup> See Bribery Act, 2010, c. 23, § 12(8). Roughly simultaneously, the United Kingdom Supreme Court ruled that parliamentary privilege did not protect members charged with submitting false claims for expense reimbursement. *R v. Chaytor*, [2010] UKSC 52 [89]-[93] (appeal taken from Eng.); see also Yvonne Tew, Case Note, *No Longer a Privileged Few: Expense Claims, Prosecution, and Parliamentary Privilege*, 70 CAMBRIDGE L.J. 282, 282-83 (2011) (discussing *Chaytor* and the narrow construction of the scope of parliamentary privilege that it adopted).

<sup>222</sup> See ERSKINE MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 134-35 (Sir William McKay et al. eds., 23d ed. 2004) (noting that, at the time of its publication, no member of Parliament had ever been convicted of bribery in a court of law); see also Dawn Oliver, *The Committee on Standards in Public Life: Regulating the Conduct of Members of Parliament*, 48 PARLIAMENTARY AFF. 590, 595-96 (1995) (noting the long history and theory behind exclusive parliamentary jurisdiction over matters of parliamentary ethics).

<sup>223</sup> See CLARKE, *supra* note 150, at 173-204.

the same punishments upon its own members [as it did upon outsiders], one naturally concludes that here was a body that took parliamentary government very seriously indeed."<sup>224</sup> Even from the vantage point of the historian, then, a commitment to legislative self-discipline redounded to the houses' credit.

The American states continued this tradition: three wrote an expulsion power into their post-Revolutionary constitutions,<sup>225</sup> and other states may have seen it as unnecessary given the short terms for which legislators were elected<sup>226</sup>—the voters could be responsible for any needed "expulsions." A number of the other state constitutions had general provisions protecting legislative privilege<sup>227</sup> or allowing the legislative houses to determine their own rules of proceedings,<sup>228</sup> which would have sufficed to justify disciplinary measures short of (and perhaps including) expulsion. And, as already noted, both a general disciplinary power ("Each House may . . . punish its Members for disorderly Behavior."<sup>229</sup>) and a supermajoritarian<sup>230</sup> expulsion power ("Each House

<sup>224</sup> *Id.* at 185.

<sup>225</sup> See DEL. CONST. of 1776, art. 5, reprinted in 1 THORPE, *supra* note 149, at 562, 563; MD. CONST. of 1776, art. X, reprinted in 3 THORPE, *supra* note 149, at 1686, 1687; PA. CONST. of 1776, ch. II, § 9, reprinted in 5 THORPE, *supra* note 149, at 3081, 3085.

<sup>226</sup> See AMAR, *supra* note 10, at 75 (noting that, under their Revolutionary constitutions, "[t]wo states held elections for the lower house twice a year, ten others ran annual elections, and only one—South Carolina—gave lower-house members two-year terms. Although several state upper houses featured multiyear terms, none exceeded five years."); see also WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 241-43 (Rita & Robert Kimber trans., Rowman & Littlefield Publishers, expanded ed. 2001) (1973) (describing the brief legislative terms in the Revolutionary state constitutions).

<sup>227</sup> See MASS. CONST. of 1780, ch. 1, § 3, art. XI, reprinted in 3 THORPE, *supra* note 149, at 1888, 1898; N.Y. CONST. of 1777, art. IX, reprinted in 5 THORPE, *supra* note 149, at 3248, 3252; S.C. CONST. of 1778, art. XVI, reprinted in 6 THORPE, *supra* note 149, at 3248, 3252; S.C. CONST. of 1776, art. VII, reprinted in 6 THORPE, *supra* note 149, at 3241, 3244.

<sup>228</sup> See GA. CONST. of 1777, art. VII, reprinted in 2 THORPE, *supra* note 149, at 777, 779; MASS. CONST. of 1780, ch. 1, § 2, art. VII, reprinted in 3 THORPE, *supra* note 149, at 1888, 1897; *id.* § 3, art. X, reprinted in 3 THORPE, *supra* note 149, at 1897; N.H. CONST. of 1784, pt. 2, Senate, para. 12, reprinted in 4 THORPE, *supra* note 149, at 2453, 2460-61; *id.* House of Representatives, para. 12, reprinted in 4 THORPE, *supra* note 149, at 2462; VA. CONST. of 1776, Form of Government, para. 27, reprinted in 7 THORPE, *supra* note 149, at 3812, 3816.

<sup>229</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>230</sup> The supermajority requirement was added at the urging of James Madison, who "observed that the right of expulsion . . . was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 254 (Max Farrand ed., rev. ed. 1966).

may . . . with the Concurrence of two thirds, expel a Member.”<sup>231</sup>) were explicitly written into the new national Constitution.

Beginning early in their histories, the congressional houses made significant use of their disciplinary powers. In July 1797, President Adams presented both houses of Congress with documentary evidence that Senator William Blount of Tennessee had proposed to work with the British and Indian tribes to seize Spanish Florida and Louisiana.<sup>232</sup> The Senate impaneled a select committee to investigate, and, upon its recommendation, Blount was expelled by a vote of twenty-five to one.<sup>233</sup> In other early incidents, the houses used their disciplinary powers over members in cases including assaulting a fellow member, insulting the dignity of the house, and fighting for the Confederacy.<sup>234</sup> Disciplinary proceedings were also frequently instituted against members accused of corruption or abuse of power.<sup>235</sup> The most frequent punishment has been censure or reprimand, although both expulsion and (increasingly in recent years) fines have been used as well.<sup>236</sup> And, of course, plenty of members have chosen to resign their seats rather than face discipline from their houses.<sup>237</sup>

Indeed, judicial involvement in congressional ethics came late—albeit not quite as late as judicial involvement in British parliamentary ethics.<sup>238</sup> As recently as 1966, the courts were deeply reluctant to probe into congressional ethics. Thomas Johnson, a former congressman from Maryland, was convicted of seven counts of violating the federal conflict-of-interest statute and one count of conspiring to defraud the United States.<sup>239</sup> Johnson had allegedly taken money

<sup>231</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>232</sup> RICHARD D. HUPMAN, SENATE LIBRARY, SENATE ELECTION, EXPULSION AND CENSURE CASES FROM 1793 TO 1972, S. DOC. NO. 92-7, at 3 (1972).

<sup>233</sup> *Id.*; see also CURRIE, *supra* note 155, at 275-76 (describing the Blount expulsion).

<sup>234</sup> See CHAFETZ, *supra* note 101, at 214-20 (describing cases falling within each of these categories).

<sup>235</sup> See *id.* at 220-22 (providing examples).

<sup>236</sup> See *id.*; see also MASKELL, *supra* note 217, at 13-14 (describing the use of fines and monetary assessments in the House of Representatives).

<sup>237</sup> *But cf.* Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 227-30 (2008) (arguing that the House of Representatives can and should refuse to allow resignations precisely in order to punish malfeasors); Eric Lipton & Eric Lichtblau, *Report Urges U.S. to Consider Changing Ensign*, N.Y. TIMES, May 13, 2011, at A13 (“The Senate Ethics Committee took the unusual step of releasing the results of its investigation into [former Senator John] Ensign, even though it no longer has the power to punish him.”).

<sup>238</sup> See *supra* text accompanying notes 221-22.

<sup>239</sup> *United States v. Johnson*, 383 U.S. 169, 170-71 (1966).

from a savings-and-loan company in exchange for delivering a favorable speech on the floor of the House, copies of which the company then distributed to potential depositors.<sup>240</sup> When the case reached the Supreme Court, it held that the Speech or Debate Clause barred the use of evidence as to “questions of who first decided that a speech was desirable, who prepared it, and what Johnson’s motives were for making it.”<sup>241</sup> The Court, moreover, noted the centrality of this evidence to the government’s case:

The conspiracy theory depended upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith, that is, that he did not prepare or deliver the speech in the way an ordinary Congressman prepares or delivers an ordinary speech. Johnson’s defense quite naturally was that his remarks were no different from the usual congressional speech, and to rebut the prosecution’s case he introduced speeches of several other Congressmen speaking to the same general subject, argued that his talk was occasioned by an unfair attack upon savings and loan associations in a Washington, D.C., newspaper, and asserted that the subject matter of the speech dealt with a topic of concern to his State and to his constituents. We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it.<sup>242</sup>

Note the breadth of this rationale: any evidence going to a member’s motives for undertaking a legislative act is off-limits. But many serious issues of congressional ethics are entirely about motive—after all, members are allowed to accept campaign contributions, and they are allowed to vote however they wish and make whatever floor speeches they wish. It is only bribery when they vote or speak *because* of the contribution. *Johnson* held that it is precisely evidence that goes to this causal linkage that is inadmissible. Thus, as late as 1966, it was clear that primary responsibility for enforcing serious ethical rules would have to lie with the houses themselves.

But a mere six years later, the Court took a very different tack in reviewing the bribery prosecution of Senator Daniel Brewster of Maryland.<sup>243</sup> In holding that the Speech or Debate Clause posed no bar to this prosecution, the Court asserted that “[t]aking a bribe is, obviously, no part of the legislative process or function; it is not a legislative

---

<sup>240</sup> *Id.* at 171-72.

<sup>241</sup> *Id.* at 184.

<sup>242</sup> *Id.* at 177.

<sup>243</sup> *United States v. Brewster*, 408 U.S. 501 (1972).

act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator."<sup>244</sup> Accordingly, evidence of bribe-taking was not evidence of the sort prohibited by the Speech or Debate Clause.<sup>245</sup> In dissent, Justice White asserted that this case was not distinguishable from *Johnson*.<sup>246</sup> More importantly for our purposes here, he resisted the Court's claim that this was a job for the judiciary: "The Speech or Debate Clause does not immunize corrupt Congressmen. It reserves the power to discipline in the Houses of Congress. I would insist that those Houses develop their own institutions and procedures for dealing with those in their midst who would prostitute the legislative process."<sup>247</sup>

*Brewster* has been subject to significant criticism,<sup>248</sup> and it is not my purpose to repeat that criticism here. But the fact that it was not until the 1970s that the judiciary took primary responsibility for enforcing congressional ethics—and thus that the executive took primary responsibility for investigating and prosecuting members for ethical violations—should suggest that it is neither an inevitable nor a necessary feature of our constitutional landscape. Moreover, the perfectly predictable result of *Brewster* has been to lessen any desire in the houses of Congress to investigate and punish ethical breaches themselves. After all, if the executive and judiciary will do it for them—and members can generally be expected to resign in shame when facing prosecution—then why should the houses engage in the distasteful task of punishing their colleagues themselves?<sup>249</sup> Thus, in 2002, the House of Representatives expelled James Traficant of Ohio only *after* he had been convicted on ten counts of bribery, racketeering, and corruption.<sup>250</sup>

---

<sup>244</sup> *Id.* at 526.

<sup>245</sup> *Id.* at 528-29.

<sup>246</sup> *Id.* at 553-55 (White, J., dissenting).

<sup>247</sup> *Id.* at 563.

<sup>248</sup> See, e.g., CHAFETZ, *supra* note 101, at 106-07 (arguing that meeting with constituents is an essential part of a legislator's duties and therefore that what transpires in such meetings is protected by the speech or debate privilege); Ervin, *supra* note 187, at 186-91 (characterizing the majority decision as betraying a "shocking lack of understanding of the essential elements of the legislative process and the representative role of the legislative branch").

<sup>249</sup> As Mike Dorf has noted, judicial enforcement of norms can "crowd out" enforcement of those same norms by other institutional actors. Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 69, 77 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

<sup>250</sup> Alison Mitchell, *House Votes, with Lone Dissent from Condit, to Expel Traficant from Ranks*, N.Y. TIMES, July 25, 2002, at A13. For an entertaining account of Traficant's life and crimes, see David Grann, *Crimetown USA*, NEW REPUBLIC, July 10 & 17, 2000, at 23.

Now consider the soft power implications of this shift. When congressional ethics violations are ceded to the normal criminal process, the executive branch and the courts get to play the heroes as they ferret out corruption by powerful actors in the name of the public interest. Meanwhile, when Congress punishes at all, it does so only for minor infractions that do not warrant criminal prosecution, or it does so long after the other branches have already acted. What is the public message? It is that Congress protects its own and hands out slaps on the wrist and that only the executive and the courts can be trusted to keep politics clean. And to the extent that this lesson is internalized by the public, it fosters a narrative that Congress is *institutionally* corrupt.<sup>251</sup> Some level of corruption is probably inevitable in political institutions, whether they are legislative, executive, or judicial.<sup>252</sup> But to the extent that only the executive and the judiciary act to root out corruption, the public will come to see them as trustworthy and Congress as untrustworthy. In refusing to clean up its own messes, then, Congress is sacrificing its soft power.

Were the houses of Congress inclined to reassume this power, they might well give some thought to Justice White's insistence that they "develop their own institutions and procedures for dealing with those in their midst who would prostitute the legislative process."<sup>253</sup> In 2008, the House of Representatives created the Office of Congressional Ethics, an internal entity charged with reviewing allegations of misconduct and recommending action to the House Ethics Committee.<sup>254</sup> There is some evidence that the Office has led the House to take a more active role in investigating ethical lapses.<sup>255</sup> Still, the Senate contains no comparable entity, and even the House Office is not

---

<sup>251</sup> See Shaun Bowler & Jeffrey A. Karp, *Politicians, Scandals, and Trust in Government*, 26 POL. BEHAV. 271 (2004) (arguing that scandals by individual members of Congress cause a decline in the public perception of Congress as an institution).

<sup>252</sup> Cf. Letter from John Emerich Edward Dalberg-Acton to Mandell Creighton (Apr. 5, 1887) ("Power tends to corrupt and absolute power corrupts absolutely."), in JOHN EMERICH EDWARD DALBERG-ACTON, *ESSAYS ON FREEDOM AND POWER* 358, 364 (Gertrude Himmelfarb ed., 1948).

<sup>253</sup> *United States v. Brewster*, 408 U.S. 501, 563 (1972) (White, J., dissenting); see also *supra* text accompanying note 247.

<sup>254</sup> See H.R. Res. 895, 110th Cong. § 1 (2007) (establishing the Office of Congressional Ethics).

<sup>255</sup> See, e.g., Eric Lipton, *House Ethics Office Gains, Dismissals Aside*, N.Y. TIMES, Mar. 23, 2010, at A18 ("Wielding the sheer power of political shame . . . , the Office of Congressional Ethics ha[s] helped spur worried party leaders to rein in abuses and make errant lawmakers pay a price.").

as vigorous as it could be.<sup>256</sup> To the extent that the houses wish to enhance their soft power vis-à-vis the other branches, demonstrating that they have the collective judgment and maturity to clean up their own messes is surely a step in the right direction.

### C. *Cameral Rules*

The House was able to create the Office of Congressional Ethics because of its constitutional power to “determine the Rules of its Proceedings.”<sup>257</sup> Each house has substantial authority to shape its internal procedural rules. But internal organization can have significant external consequences. Cameral rules can be used to reassure the public that the house is worthy of its trust—the creation of the Office is a step in this direction. But they can also be used in ways that harm the houses, giving the other branches a strong justification for poaching congressional power.

As an example of the latter, consider the filibuster. Although the filibuster’s origins lie in the Senate’s tradition of unlimited debate,<sup>258</sup> it no longer has much of anything to do with debate. Instead, the filibuster now operates as a standing supermajority requirement in the Senate for nearly all measures.<sup>259</sup> Recent years have seen significant debate over the constitutionality of the filibuster,<sup>260</sup> and it is not my

<sup>256</sup> See Josh Chafetz, Comment, *Cleaning House: Congressional Commissioners for Standards*, 117 YALE L.J. 165, 169-72 (2007) (suggesting what a model of a truly vigorous cameral ethics body, modeled on the British Parliamentary Commissioner for Standards, would look like).

<sup>257</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>258</sup> See FLOYD M. RIDDICK, SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 97-3, at 568 (1981) (noting that “[t]he Senate operates under the practice of unlimited debate”); Richard R. Beeman, *Unlimited Debate in the Senate: The First Phase*, 83 POL. SCI. Q. 419 (1968) (discussing the history of “unlimited debate” in the Senate).

<sup>259</sup> For a description of the modern filibuster, see Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1006-11 (2011). See also Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041, 1043-46 (2011) (discussing the effect of the supermajority requirement in the 111th Congress); David R. Mayhew, *Supermajority Rule in the U.S. Senate*, 36 PS: POL. SCI. & POL. 31, 31 (2003) (“Automatic failure for bills not reaching the 60 mark. That is the current Senate practice . . .”).

<sup>260</sup> See, e.g., GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE 39-42 (2010) (suggesting that the Constitution anticipates some measure of obstruction in Congress); GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 280-81 (2006) (arguing that the filibuster is constitutional but that a simple majority can change the Senate rules at any time); Chafetz, *supra* note 259, at 1011-16 (arguing that the contemporary filibuster is unconstitutional); Josh Chafetz & Michael J. Gerhardt, *Debate, Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245 (2010), <http://www.pennumbra.com/debates/pdfs/Filibuster.pdf> (debating the constitutionality of

purpose here to rehash those debates. Nor do I want to focus on whether there are good policy justifications for supermajority rules as an internal deliberative device. Rather, my focus here is on the effect of the filibuster on the separation of powers.

Put simply, the filibuster results in the transfer of power from Congress to the other branches, and especially to the executive. Because the filibuster now operates as an absolute bar to the passage of measures that command the support of fewer than sixty Senators, many measures with broad and deep support will nonetheless fail to pass. This gives the President a strong rhetorical ploy: a matter of such importance, he can argue, deserves at the very least an up-or-down vote. Yet congressional “dysfunction” and “stalemate” have made this impossible. Strong executive action is therefore needed, he will argue.

This argument is not merely hypothetical. Consider the fate of recent legislative attempts to combat global warming. In 2009, after significant arm-twisting by Speaker Nancy Pelosi, the House of Representatives passed a bill by a vote of 219 to 212 that would have created a “cap-and-trade” system for greenhouse gases.<sup>261</sup> It never received a vote in the Senate. When Senator Rockefeller was asked about the Senate version of the bill (which was sponsored by Senators Kerry and Lieberman), he responded:

I think there is a dominant concern [which is] “What’s the point of doing anything without 60 votes?” . . . And I think that there’s some feeling that you don’t spend time on the floor trying to figure out if you have got 60 votes. You have to understand before you go to the floor that you have got 60 votes.<sup>262</sup>

---

the filibuster); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 224-52 (1997) (concluding that the filibuster is unconstitutional insofar as it entrenches itself but that an unentrenched filibuster would be constitutional); Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 450-70 (2004) (arguing that the filibuster is constitutional); Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205 (2004) (arguing that the filibuster is unconstitutional and discussing possible Senate maneuvering for eliminating it); John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505 (2004) (arguing that an entrenched filibuster is unconstitutional and therefore that the filibuster can be eliminated by majority vote); Virginia A. Seitz & Joseph R. Guerra, *A Constitutional Defense of “Entrenched” Senate Rules Governing Debate*, 20 J.L. & POL. 1 (2004) (defending the constitutionality of the filibuster).

<sup>261</sup> American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. §§ 721–728 (2009).

<sup>262</sup> Ben Geman, *Senate Turns Down Resolution to Block EPA Gas Regulations*, THE HILL, June 11, 2010, at 3 (first alteration in original).

When asked whether he thought Kerry's bill could get sixty votes, Rockefeller replied: "I don't think so. But I think John [Kerry] does."<sup>263</sup> Rockefeller was right and Kerry was wrong—the sixty votes never materialized, and the bill was never brought to the Senate floor.

But this did not spell the end of the government's attempt to combat global warming. The Supreme Court had ruled in 2007 that the Clean Air Act required the Environmental Protection Agency (EPA) to consider whether greenhouse gases constituted an air pollutant that endangered public health or welfare.<sup>264</sup> In the waning years of the Bush Administration, the EPA was in no hurry to complete this review,<sup>265</sup> but the Obama Administration issued an endangerment finding in late 2009.<sup>266</sup> The threat of EPA regulation was enough to convince some House members to vote for the cap-and-trade bill, in order to ensure that they had a say in environmental policy.<sup>267</sup> Some observers expected a similar dynamic to play out in the Senate.<sup>268</sup> But while that motivation was strong enough to secure a House majority, it was not strong enough to secure a Senate supermajority—that is, it was not strong enough to overcome the filibuster.

In May 2010, the EPA issued its first regulation pursuant to the endangerment finding, raising vehicle fuel economy standards.<sup>269</sup> The next month, the filibuster again protected executive power when fifty-three Senators supported a measure to strip the EPA's authority to

<sup>263</sup> *Id.* (alteration in original).

<sup>264</sup> *Massachusetts v. EPA*, 549 U.S. 497, 532-35 (2007).

<sup>265</sup> See Juliet Eilperin, *White House Tried to Silence EPA Proposal on Car Emissions*, WASH. POST, June 26, 2008, at A2 (describing the Bush Administration's stifling of greenhouse gas regulation in the wake of *Massachusetts v. EPA*).

<sup>266</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (Endangerment Finding).

<sup>267</sup> See Louis Peck, *A Veteran of the Climate Wars Reflects on U.S. Failure to Act*, YALE ENV'T 360 (Jan. 4, 2011), [http://e360.yale.edu/feature/a\\_veteran\\_of\\_the\\_climate\\_wars\\_reflects\\_on\\_us\\_failure\\_to\\_act/2356](http://e360.yale.edu/feature/a_veteran_of_the_climate_wars_reflects_on_us_failure_to_act/2356) (interview with former Representative Rick Boucher) (explaining that he supported the bill because "if Congress did not act, EPA would regulate").

<sup>268</sup> See, e.g., Bradford Plumer, *Does Obama Need Congress to Act on Climate Change?*, NEW REPUBLIC ONLINE (Dec. 4, 2008, 3:40 PM), <http://www.tnr.com/blog/the-vine/does-obama-need-congress-act-climate-change> ("Republicans may not be able to stymie carbon regulations for long, since the choice isn't between something or nothing; it's between Congress capping emissions or Obama doing it for them. As the saying goes, better to sit at the table than find yourself on the menu.")

<sup>269</sup> Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (codified at 40 C.F.R. pts. 85, 86, 600 (2011)).

regulate greenhouse gases.<sup>270</sup> Because this fell short of the sixty votes needed to end a filibuster, the measure failed,<sup>271</sup> and the EPA continues to set government policy on greenhouse gases.<sup>272</sup> And polls have consistently shown high levels of public support for greenhouse gas regulation by the EPA, even in the aftermath of a serious recession.<sup>273</sup>

Notice the effect of the filibuster here. By making it significantly more difficult to pass legislation, the filibuster simply shifted the locus of policymaking to the executive branch. Rather than have environmental policy made through the process of intra- and intercameral negotiation and deliberation, the policy is now made in its entirety by the EPA. Of course, the EPA has less leeway in regulating than Congress does in legislating, but so long as the EPA's regulations are reasonable interpretations of the governing statutory schemes, they will not be disturbed.<sup>274</sup>

Nor is this policy shift limited to legislation. In April 2010, President Obama nominated Donald Berwick as Administrator of the Centers for Medicare and Medicaid Services, a job with significant responsibilities for implementing substantial portions of the health care reform legislation passed in 2010.<sup>275</sup> When it became apparent that

<sup>270</sup> See Geman, *supra* note 262, at 3. Of course, even had the bill passed the Senate and the House, it would almost certainly have prompted a presidential veto.

<sup>271</sup> *Id.*

<sup>272</sup> See, e.g., Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011) (to be codified in scattered parts of 40 C.F.R.). For a discussion of some regulations that are currently in the works pursuant to the endangerment finding, as well as greenhouse gas regulations passed pursuant to other statutory sources of authority, see Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421, 428-44 (2011). For a brief statement of the EPA Administrator's planned timeline for greenhouse gas regulations, see Letter from Lisa Jackson, EPA Adm'r, to Senator Jay D. Rockefeller IV (Feb. 22, 2010), available at [http://epa.gov/oar/pdfs/LPJ\\_letter.pdf](http://epa.gov/oar/pdfs/LPJ_letter.pdf).

<sup>273</sup> See CNN & OPINION RESEARCH CORP., CNN OPINION RESEARCH POLL, APR. 9-10, 2011, at 6 (2011), available at <http://i2.cdn.turner.com/cnn/2011/images/04/11/rel6a.pdf> (finding that, in April 2011, seventy-one percent of respondents opposed stripping the EPA of the authority to regulate greenhouse gases); *Washington Post-ABC News Poll*, WASH. POST (June 8, 2010), [http://www.washingtonpost.com/wp-srv/politics/polls/postpoll\\_060810.html](http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_060810.html) (finding between sixty-five and seventy-five percent support for federal government regulation of greenhouse gases in four polls conducted between April 2009 and June 2010).

<sup>274</sup> See generally *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865-66 (1984) (holding that the courts must defer to reasonable agency interpretations of ambiguous statutory language).

<sup>275</sup> See Robert Pear, *President Nominates Professor to Health Job*, N.Y. TIMES, Apr. 20, 2010, at A13.

Berwick's nomination would be successfully filibustered, the President instead used a recess appointment to install him in the post.<sup>276</sup> Similarly, having determined that a nomination of Elizabeth Warren to head the newly created Consumer Financial Protection Bureau would "linger without Senate action for months,"<sup>277</sup> President Obama instead appointed her a Special Assistant to the President and Special Adviser to the Secretary of the Treasury.<sup>278</sup> In this capacity, she was in charge of setting up the new agency, but she did not have to face a Senate confirmation battle.<sup>279</sup> A number of Warren's supporters subsequently urged the President to use a recess appointment to put Warren into the directorship,<sup>280</sup> although he ultimately opted to nominate Richard Cordray.<sup>281</sup> He, too, was filibustered, and the Senate conducted pro forma sessions in December 2011 and January 2012 in an attempt to prevent a recess appointment.<sup>282</sup> President Obama, relying on an opinion from the Office of Legal Counsel,<sup>283</sup> then took the unprecedented step of declaring that a Senate recess existed, the pro forma sessions notwithstanding, and he installed Cordray in the directorship.<sup>284</sup> Again, note the dynamic here: because the filibuster makes it so much harder to get anything through the Senate, decisions shift to unilateral executive action. And the President's public case for uni-

---

<sup>276</sup> See Robert Pear, *Obama to Bypass Senate to Name Health Official*, N.Y. TIMES, July 7, 2010, at A11.

<sup>277</sup> Jim Kuhnhehn, *Obama Picks Consumer Advocate Warren, Opposed by Big Bankers, Will Build Financial Watchdog Agency*, HOUSTON CHRON., Sept. 18, 2010, at A3.

<sup>278</sup> Paul Wiseman, *Warren Gets a Lead Role in Consumer Protection: Harvard Professor to Help Set Up Watchdog Agency*, USA TODAY, Sept. 16, 2010, at 1B.

<sup>279</sup> *Id.*

<sup>280</sup> See Joseph Williams, *Liberals Push Elizabeth Warren Nomination*, POLITICO (May 28, 2011, 7:15 AM), <http://www.politico.com/news/stories/0511/55864.html> ("Liberal boosters for consumer advocate Elizabeth Warren are redoubling their pressure on President Barack Obama to pick her to lead a new financial watchdog agency—despite Republicans' all-out attempts to . . . block Obama from giving her the job over the Memorial Day recess.")

<sup>281</sup> See Binyamin Appelbaum, *Former Ohio Attorney General to Head New Consumer Agency*, N.Y. TIMES, July 18, 2011, at B1 (noting the nomination of Richard Cordray). It is worth noting that President Obama's decision not to recess appoint Warren seems to have had significantly more to do with the fact that "she never won the full support of the president or his senior advisors" than it did with any concern about the recess appointment mechanism. *Id.*

<sup>282</sup> Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1.

<sup>283</sup> See Memorandum from Virginia A. Seitz, Assistant Att'y Gen., Office of Legal Counsel, to Kathryn Ruemmler, Counsel to the President (Jan. 6, 2012), *available at* <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>.

<sup>284</sup> Cooper & Steinhauer, *supra* note 282.

lateral action can be built on the claim that his nominee would have enough support in the Senate, but for the countermajoritarian, obstructionist use of the filibuster. Thus, in urging the President to use a recess appointment for Warren, political commentator Katrina vanden Heuvel noted the threat of a filibuster and wrote that “[p]urblind Republican obstruction liberates the president to do the right thing.”<sup>285</sup> And defending Cordray’s recess appointment, Professor Laurence Tribe referred to the “transparent and intolerable burdens on [presidential] authority” created by the filibuster of nominees.<sup>286</sup> It would be politically very difficult for the President to recess appoint a nominee who had previously been defeated in the Senate.<sup>287</sup> But a filibustered nominee presents a different case—there, indeed, the President is “liberated” to act unilaterally.

In short, by structuring its internal rules the way that it has, the Senate has cost itself power vis-à-vis the executive.<sup>288</sup> But members of the Senate seem to have learned precisely the wrong lesson from this state of affairs. Rather than pursuing rules reform to curb or elimi-

---

<sup>285</sup> Katrina vanden Heuvel, *Why Obama Should Appoint Elizabeth Warren*, WASH. POST (May 24, 2011), [http://www.washingtonpost.com/opinions/why-obama-should-appoint-elizabeth-warren/2011/05/23/AFastWAH\\_story.html](http://www.washingtonpost.com/opinions/why-obama-should-appoint-elizabeth-warren/2011/05/23/AFastWAH_story.html); see also Editorial, *Nearly a Year After Dodd-Frank: President Obama Must Nominate—And Fight For—Top-Notch Financial Regulators*, N.Y. TIMES, June 14, 2011, at A24 (“Why go with a compromise candidate when Republicans have vowed to block any nominee? Mr. Obama and Senate Democrats should back Ms. Warren and expose to American voters just exactly whose interests the Republicans put first.”).

<sup>286</sup> Laurence H. Tribe, *Games and Gimmicks in the Senate*, N.Y. TIMES, Jan. 6, 2012, at A25.

<sup>287</sup> Moreover, Congress has used its power of the purse to ensure that such a nominee would have to serve without pay. See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. D, Title VII, § 709, 121 Stat. 1844, 2021 (2007) (codified at note preceding 5 U.S.C. § 5501) (“Hereafter, no part of any appropriation contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person.”); see also HENRY B. HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 5 (2010) (noting this provision, but also noting that, because of the filibuster, “[a]s a practical matter, nominations are rarely rejected by a vote of the full Senate”).

<sup>288</sup> This dynamic is hardly new—indeed, an early-twentieth-century observer of late-nineteenth-century British parliamentary obstructionism noted the same phenomenon:

A[n] . . . effect of obstructive tactics is that the business of making the laws of a nation tends to be centred in a small group of men. The English Cabinet is a case in point. This situation is a logical result of the diminution of the powers of the legislature. Misuse of functions by a large body inevitably transfers those functions to a smaller unit.

Geddes W. Rutherford, *Some Aspects of Parliamentary Obstruction*, 22 SEWANEE REV. 166, 177 (1914).

nate the filibuster, they have sought legislation to decrease the number of posts requiring Senate confirmation.<sup>289</sup> In other words, instead of altering cameral rules so as to reinforce their chamber's constitutional role as advisor and consenter to executive branch appointments,<sup>290</sup> these Senators wish to surrender still more of that role. A far better solution was recently suggested by Bruce Ackerman: the Senate should agree to a relatively expeditious up-or-down vote on all executive branch appointments in return for the White House agreeing to subject all leading staffers to Senate confirmation.<sup>291</sup> Even if the White House rejected this deal, the Senate could still stem the tide of recess appointments by unilaterally ceasing to filibuster nominees. And, of course, it could use its power of the purse to prevent the payment of salaries to top White House staffers who have not faced Senate confirmation,<sup>292</sup> thus pressuring the White House to accept Ackerman's grand bargain.

Although the executive branch is the most obvious beneficiary of the filibuster, the judiciary may stand to benefit as well. One of the standard defenses of "dynamic" or "updating" theories of judicial statutory interpretation is that legislative inertia prevents Congress from updating statutes itself.<sup>293</sup> Of course, some amount of legislative inertia is inevitable in any system, and a great deal more is hardwired into our constitutional structure through the mechanisms of bicameralism and presentment. But the filibuster adds yet another inertial obstacle to the mix—the status quo is insulated against change unless a pro-

---

<sup>289</sup> See Presidential Appointment Efficiency and Streamlining Act of 2011, S. 679, 112th Cong. (as passed by Senate, June 29, 2011); see also Carl Hulse, *Lawmakers Seek to Speed System of Confirmation*, N.Y. TIMES, Apr. 25, 2011, at A1 (noting that a proposal to "end Senate review of about 200 executive branch positions" has the support of both parties' leadership in the Senate).

<sup>290</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>291</sup> See ACKERMAN, *supra* note 2, at 152-55.

<sup>292</sup> See *supra* Section I.A (discussing Congress's power of the purse); see also *supra* note 95 and accompanying text (noting that the House of Representatives recently successfully negotiated for a rider in a budget bill preventing the President from using any funds to pay certain White House "czars"); *supra* note 287 (noting that Congress has used its power of the purse to prevent the disbursement of pay to any recess nominee who has previously been rejected on the Senate floor). We thus see once again the way that the various congressional hard and soft powers can work in concert to cement Congress's constitutional role.

<sup>293</sup> See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 120-21 (1982) ("[T]he courts in exercising the power to induce the updating of statutes should only deal in areas of legislative inertia."); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 156-61 (1994) (arguing that dynamic statutory interpretation can help counteract political dysfunction).

posal to alter it can garner the support of a supermajority of the Senate in addition to that of a majority of the House plus the President. To the extent that inertia justifies judicial updating, then more inertia will mean more updating, and Congress will have still less say in the operation of the law.

We can thus see how each house's authority over its own internal rules can either enhance or diminish its power vis-à-vis the other branches. When that authority is used to create or further a narrative of responsibility and trustworthiness—as the House did in creating the Office of Congressional Ethics—then it enhances the power of the branch. But when a house uses its power in a way that leads to a narrative of irresponsibility, gridlock, or dysfunction, then it provides a justification for the other branches to step in and poach congressional power. As we have seen, the other branches have been all too happy to do so.

### III. THE SEPARATION OF POWERS AND CONGRESS'S PROPER PLACE

The previous two Parts have discussed a number of powers that individual houses and members of Congress can wield. In isolation, many of them may appear to be inconsequential housekeeping provisions (e.g., each house's power over the rules of its own proceedings) or idiosyncratic, minor, and perhaps even archaic protections (e.g., the speech or debate privilege). But the aim of those Parts has been to demonstrate that, viewed as an interlocking whole, these powers are potent, indeed, allowing Congress to vigorously assert itself against the other two branches. In this Part, I would like briefly to consider the questions of *why* and *how* Congress should avail itself of these tools.

#### A. *The Desirability of Congressional Self-Assertion*

It will not have escaped notice that some of the powers discussed above can appear unseemly at best. This Article has discussed government shutdowns,<sup>294</sup> the use of congressional sergeants-at-arms to arrest members of the executive branch,<sup>295</sup> and the disclosure of classified information,<sup>296</sup> among other things. How can these add up to an argument in favor of congressional self-assertion?

---

<sup>294</sup> See *supra* Section I.A.

<sup>295</sup> See *supra* Section I.B.

<sup>296</sup> See *supra* Section II.A.

The answer to that question consists of two broad parts. First, although attention naturally focuses on the most extreme uses of these congressional powers, it is worth reiterating that many of them can be calibrated. After all, the houses of Congress have a number of budgetary tools well short of shutting down the government,<sup>297</sup> and these will almost always be the tools of first resort in interbranch conflicts. Indeed, the strongest version of a power is often useful primarily as an inducement to other actors to give in on some smaller point—or, to put it differently, the aim of possessing an especially potent weapon is often to *avoid* having to use it.<sup>298</sup> Instead, institutional settlements are negotiated in the shadow of each actor's powers,<sup>299</sup> or, more precisely, in the shadow of each actor's perceptions of both its own powers and those of the other actors. But a public acknowledgement that one will never use a certain power is the functional equivalent of not having that power in the first place. Deals will only be negotiated in the shadow of, say, a threat to shut down the government if it is actually credible that a house of Congress will follow through on that threat.<sup>300</sup>

Second, the fact that the Constitution allocates these powers to Congress highlights a too-seldom-appreciated feature of our separation of powers: American constitutional design intentionally fosters the conditions of interbranch tension and conflict as a means toward good governance. In many situations, the Constitution does not dictate a stable allocation of decisionmaking authority; rather, it fosters the ability of the branches to engage in continual contestation for that authority. Put differently, the conflicts that at first strike us as unseemly turn out to be, upon further reflection, constitutional features rather than bugs.

Yet much of contemporary constitutional theory is overly enamored of tidy institutional settlement<sup>301</sup> and overly timid of ongoing in-

---

<sup>297</sup> See *supra* Section I.A.

<sup>298</sup> This principle, of course, formed the basis of much of Cold War military doctrine. See Matthew Lund, Comment, *The Eighty Percent and Twenty Percent Solutions to Nuclear Proliferation*, 2009 BYU L. REV. 741, 743 ("During the Cold War, political efforts and the threat of mutually assured destruction prevented the use of nuclear weapons.").

<sup>299</sup> Cf. Mnookin & Kornhauser, *supra* note 98, at 968-69.

<sup>300</sup> See *supra* text accompanying notes 85-95 (discussing the last-minute settlement averting a government shutdown in April 2011).

<sup>301</sup> See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371-81 (1997) (defending judicial supremacy in constitutional interpretation entirely on the grounds of the importance of law's settlement function).

stitutional tension and conflict.<sup>302</sup> This is nothing new—Machiavelli devoted a section of his *Discourses* to refuting “those who allege that the republic of Rome was so tumultuous and so full of confusion that, had not good fortune and military virtue counterbalanced these defects, its condition would have been worse than that of any other republic.”<sup>303</sup> Machiavelli, to the contrary, insisted that

those who condemn the quarrels between the nobles and the plebs, seem to be cavilling at the very things that were the primary cause of Rome’s retaining her freedom, and . . . they pay more attention to the noise and clamour resulting from such commotions than to what result- ed from them, i.e. to the good effects which they produced.<sup>304</sup>

Indeed, it was precisely the “clash” between the interests of the two classes that was responsible for “all legislation favourable to liberty.”<sup>305</sup> Or, in Jeremy Waldron’s perceptive summary, we should not be “fooled into thinking that calmness and solemnity are the mark of a good polity, and noise and conflict a symptom of political pathology.”<sup>306</sup> Conflict, tension, and tumult may be precisely what produces good government; easy, authoritative resolution may be the mark of dysfunction.

Why might this be? Machiavelli’s view was that the public good lay somewhere between the permanent interests of the nobles and those of the plebs; any answer arrived at without substantial “noise and clamour” suggested that one group was likely dominating the other and moving policy too far in its own favor. Likewise, in the modern context, we may well see virtue in the tumultuous clash between government officials, each seeking to convince the public, or some segment thereof, that she effectively represents its best interests. Or, to put it differently, insofar as the Constitution “proliferat[es] the modes of representation governing normal politics”<sup>307</sup> because of its judgment that “no legal form can transubstantiate any political institution of nor-

<sup>302</sup> See Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 716 (2004) (book review) (“Does not our Constitution deliberately prefer division, tension, uncertainty, and dynamic equilibrium over ‘authoritative’ resolution?”); see also Chafetz, *supra* note 31, at 1128 (noting that “concern for stability, predictability, and notice are at their weakest in the separation-of-powers context”).

<sup>303</sup> NICCOLÒ MACHIAVELLI, *THE DISCOURSES*, bk. 1, ch. 4, at 113 (Bernard Crick ed., Leslie J. Walker trans., Penguin Books 1998) (1531).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 34 (1999).

<sup>307</sup> Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1028 (1984).

mal politics into We the People of the United States,"<sup>308</sup> it also deliberately proliferates the points of tension and conflict, noise and clamor.

Different bodies, with different (but cross-cutting) constituencies, different terms of office, and different institutional structures and competencies are each given the capacity to fight with one another for the affections of the public. This conflict-enabling view of the separation of powers has several important benefits. First, it serves a tyranny-prevention function. If one branch seeks to exercise tyrannical power, the other two branches will have both the incentive, rooted in their desire to win over the people's affections, and the tools, such as those congressional powers described throughout this Article, to resist.<sup>309</sup> Second, it serves a representation-enhancing function. Precisely because the American governmental scheme recognizes that no public servant can ever perfectly represent "We the People" in all of our complexity, it multiplies the modes of representation.<sup>310</sup> Our short-term and local selves find representation in the House, while our long-term and more general selves are represented in the Senate. Our nationally-oriented selves find representation in the singular person of the President, while that part of ourselves that we have given over to law rather than politics finds its champion in the judiciary. Each of these is a part of our "true" collective self; it is therefore through deliberation and productive tension among them that our representation is representation at its truest. Once again, this requires that each of these institutional actors have the capacity and willingness to assert itself vigorously in the public sphere against the others. Third, just as adversarial proceedings in court are understood to be truth-promoting, so too vigorous interbranch contestation in the public sphere can help to "reveal the truth about the common

---

<sup>308</sup> *Id.* at 1026.

<sup>309</sup> An apt analogy here is to Hamilton's classic description of the tyranny-preventing function of federalism: "Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate." THE FEDERALIST NO. 28, *supra* note 9, at 181 (Alexander Hamilton); *see also* Chafetz, *supra* note 31, at 1121-22, 1125-26 (drawing the connection between Hamilton's discussion of federalism and a multiplicity-based theory of the separation of powers).

<sup>310</sup> *See* Ackerman, *supra* note 307, at 1027-31 ("Rather than allowing the House or Senate or the Presidency to beguile us with the claim that it, and it alone, speaks in the name of the People themselves, the constitutional separation of powers deconstructs all such naive synechdoches.").

good.”<sup>311</sup> Or, to put it differently, interbranch conflict can enhance democratic deliberation. What is more, it can help to reveal the extent to which messy public contestation produces good government,<sup>312</sup> thus creating a self-reinforcing virtuous cycle of republicanism.

This “multiplicity-based” view of the separation of powers<sup>313</sup> requires that the branches maintain the institutional *capacity* to assert themselves against one another. It does not require that they always assert themselves maximally; rather, it encourages them to assert themselves judiciously. Judiciousness, of course, is in the eye of the beholder, and here the relevant beholder is the public. A judicious use of power is one that inspires public trust and confidence in the institution wielding it. A multiplicity-based view of the separation of powers is thus fundamentally dynamic and discursive. The separation of powers creates the conditions for political contestation, and that contestation is carried out with an eye toward winning over the public. In recent work, Eric Posner and Adrian Vermeule have perceptively argued that “politics and public opinion” are central to the allocation of governmental authority.<sup>314</sup> But they err when they contrast politics and public opinion to “the separation-of-powers framework”<sup>315</sup> and to “Madisonian deliberation.”<sup>316</sup> Rather, the Madisonian framework—the very framework that gave us the congressional powers discussed in this Article—provides the field upon which public opinion battles are fought. Posner and Vermeule come close to recognizing this when they write that “oversight—by legislators, judges, or other actors—can affect public opinion, which can in turn constrain the president. Congress and other institutions are participants in the game of public opinion . . . .”<sup>317</sup> But Congress is not simply a participant like any other; it is a participant constituted and structured by the Constitution with certain powers that enable it to make an especially strong case for public trust. It can bring executive misconduct to light by releasing

---

<sup>311</sup> Mariah Zeisberg, *Constitutional Fidelity and Interbranch Conflict*, 13 GOOD SOC’Y, no. 3, 2004, at 24, 28.

<sup>312</sup> See *supra* text accompanying notes 303-06.

<sup>313</sup> So called because it focuses on multiple, overlapping claims of authority by different institutions. See Chafetz, *supra* note 31, at 1112-28.

<sup>314</sup> ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 4* (2010); see also *id.* at 113 (emphasizing the role played by “the system of elections, the party system, and American political culture” in the distribution of governmental authority).

<sup>315</sup> *Id.* at 4.

<sup>316</sup> *Id.* at 14.

<sup>317</sup> *Id.* at 25.

classified information, secure behind its speech or debate privilege.<sup>318</sup> It can compel the executive to produce information, using its contempt power if need be.<sup>319</sup> It can refuse to fund parts (or all) of the government, throwing policy disagreements into especially sharp relief for the public.<sup>320</sup> And it can burnish its own image by behaving in constitutionally responsible ways, including keeping its own houses clean<sup>321</sup> and adopting sensible internal rules.<sup>322</sup>

These are the Madisonian means *by which* the houses of Congress compete in the game of public opinion. And to compete successfully, they must use these means well. Releasing the Pentagon Papers enhanced congressional power vis-à-vis the executive;<sup>323</sup> outing secret agents likely would not. Budgetary brinksmanship can work when a house of Congress does not overplay its hand;<sup>324</sup> when that house overreaches, however, it loses authority.<sup>325</sup> And this is not simply a matter of accurately gauging public opinion—Congress is an active *shaper* of public opinion.<sup>326</sup> The content of the Pentagon Papers changed the terms of the debate over Vietnam in a way that favored Congress over the executive.<sup>327</sup> A decision by a house of Congress to be more vigorous in enforcing its ethics rules can lead to more public trust in the future.<sup>328</sup> And a decision by the Senate to eliminate the filibuster would also eliminate the President's rationale for doing so much via regulation, recess appointments, and White House czars.<sup>329</sup> Politics does not happen in a Habermasian ideal speech situation;<sup>330</sup> active participation in political discourse requires political power. And the Constitution creates and structures that power for Congress. A Congress that uses those powers vigorously but judiciously serves the public good by reducing the risk of tyranny by any one branch, en-

<sup>318</sup> See *supra* Section II.A.

<sup>319</sup> See *supra* Section I.B.

<sup>320</sup> See *supra* Section I.A.

<sup>321</sup> See *supra* Section II.B.

<sup>322</sup> See *supra* Section II.C.

<sup>323</sup> See *supra* note 188 and accompanying text.

<sup>324</sup> See *supra* text accompanying notes 90-95.

<sup>325</sup> See *supra* text accompanying notes 78-84.

<sup>326</sup> See MAYHEW, *supra* note 34, at 14-19, 96, 203, 239-40 (discussing congressional power to shape, as well as reflect, public opinion).

<sup>327</sup> See *supra* note 188 and accompanying text.

<sup>328</sup> See *supra* Section II.B.

<sup>329</sup> See *supra* Section II.C.

<sup>330</sup> See JÜRGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS 54-55 (Ciaran Cronin trans., 1993) (describing the conditions for ideal deliberation).

hancing the overall representativeness of our political institutions, and improving the quality of public deliberation.

### B. *The Possibility of Congressional Self-Assertion*

Of course, Congress must show itself *willing* to use the powers that the Constitution gives it. It is telling that Presidents have long pushed claims of executive privilege—which is nowhere mentioned in the Constitution<sup>331</sup>—to the maximum, while the various congressional powers surveyed in this Article have largely languished in recent years. There are a number of possible reasons for this. One possibility is ignorance: perhaps legislators simply do not realize the full extent of their powers or have not fully grasped the extent to which their choices, in the aggregate, strip their branch of power. Another possibility is that legislators do recognize that they possess these powers, but do not consider exercising them to be in their individual interests. This would stem from a disconnect between the institutional interest of Congress and the individual interests of its members—it may well be in Congress's interest to strengthen ethics enforcement,<sup>332</sup> for example, but individual members may balk, either because they find it distasteful to go after their colleagues or because they fear that their own ethical lapses will be discovered. Likewise, a risk-averse member may calculate that the potential risk to her reputation and electoral prospects from disclosing classified information is greater than she would like to bear, even if she honestly believes that the public interest would be served by disclosure.<sup>333</sup> A third, and related, possible explanation for congressional underutilization of its powers is that members of Congress are largely unconcerned with congressional power; their primary loyalty is to their party, not their branch.<sup>334</sup> On this view, we should expect to see vigorous interbranch contestation only when the branches are controlled by different parties. Each of these explanations has some explanatory force, and congressional passivity is undoubtedly a consequence of all three (and perhaps others as well).

But this does not mean that congressional passivity is inevitable. First, although it is easy (and fashionable) to be cynical about politi-

---

<sup>331</sup> See generally RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974).

<sup>332</sup> See *supra* Section II.B.

<sup>333</sup> See *supra* Section II.A.

<sup>334</sup> The canonical statement of this argument is Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

cians' motives, it is clear that there are always at least some legislators who act from a genuine desire to promote the public good.<sup>335</sup> Consider the recent example of Senators Wyden and Udall, who disclosed that the government had adopted a disturbing secret interpretation of provisions of the PATRIOT Act.<sup>336</sup> Both are Democrats, as is President Obama, so partisan motivations would have counseled silence, rather than disclosure. And there is no particular reason to think that the voters of their respective states (Oregon and Colorado) are unusually worked up about government data collection, nor is there any other reason to think that these particular senators stand to gain from this confrontation. Rather, the best interpretation of their actions is that they, like Senator Gravel,<sup>337</sup> disclosed the information because they believed that it was in the public interest to do so. So long as there are some members with this outlook on public office—and if there are not, the constitutional order is in significant danger<sup>338</sup>—there will be

---

<sup>335</sup> Richard Fenno has repeatedly stressed that members of Congress pursue good public policy as one of their primary goals. See RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 1 (1973) (listing “good public policy” as one of three “basic” goals of members); RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 157 (1978) (noting that at least some members cultivate support in their districts precisely in order to have leeway to pursue good policy in Washington); *id.* at 221-22 (noting that some members are willing to risk losing reelection in their pursuit of good policy). Indeed, even David Mayhew, whose work is often characterized as asserting that members single-mindedly pursue reelection, also notes that “[a]nyone can point to contemporary congressmen whose public activities are not obviously reducible to the electoral explanation.” DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 16 (2d ed. 2004). Quantitative work bears out Fenno’s thesis that good policy is often a driving force for members’ behavior. See James E. Campbell, *Cosponsoring Legislation in the U.S. Congress*, 7 *LEGIS. STUD. Q.* 415, 418-19 (1982) (finding that a member’s ideology is a significant factor in her decision of what bills to cosponsor); John E. Owens, *Good Public Policy Voting in the U.S. Congress: An Explanation of Financial Institutions Politics*, 43 *POL. STUD.* 66, 70 (1995) (“The existing literature on the House Banking Committee shows that most members are motivated more by good public policy goals than by reelection or influence in Washington.”); *id.* at 81 (discussing the results of his own study, which “appear to be consistent with the findings of the previous discussion that Banking members’ decision-making responses vary across issue areas, but when they decide on most of these issues their conceptions of good public policy are the most prominent influences”); see also DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 21 (1991) (noting that Fenno’s view that making good public policy is one significant goal of members is “[s]urely closer to reality” than views that attempt to reduce their motivations to solely self-interested factors).

<sup>336</sup> See *supra* text accompanying notes 194-97.

<sup>337</sup> See *supra* text accompanying notes 171-87.

<sup>338</sup> See Josh Chafetz, *The Political Animal and the Ethics of Constitutional Commitment*, 124 *HARV. L. REV. F.* 1 (2011), <http://www.harvardlawreview.org/media/pdf/chafetz.pdf> (arguing that a republican commitment to the public good explains in some measure why powerful actors accept political outcomes they do not like).

members with an incentive to make vigorous, but judicious, use of the congressional powers described in this Article.

Second, the strongest argument in support of the inevitability of congressional passivity, the argument from partisanship, can actually be marshaled to support rather than hinder congressional assertiveness. After all, partisan sentiment pushed in favor of a more vigorous use of the power of the purse in 2011.<sup>339</sup> True, this motivation will only come into play under divided government, but the very existence of divided government may be a good indication that the branches should each be more assertive and confrontational. Unified government means that the American people have, over the course of several election cycles and across wide swaths of the country, opted for the governing agenda of one party over another.<sup>340</sup> In other words, it suggests that one party is more effectively representing our collective self in all its complexity<sup>341</sup> than the other is. This does not mean that there will be no disagreements within that party, nor does it mean that there will not be issues that split both parties. But it does indicate a general, sustained preference for one party's agenda over the other's, and, in that context, it makes good democratic sense for there to be fewer checks on the implementation of that party's agenda. Divided government, by contrast, indicates that the American people have not seen fit to entrust the entirety of governmental operations to a single party. The multiplicity-based separation-of-powers framework provides institutional homes for both parties under such circumstances, and the Constitution provides them with ample powers to use from these institutional bases—as this Article has demonstrated in the case of Congress. To the extent, then, that partisanship is a significant motivating force, it does not indicate the inevitability of congressional passivity; rather, it is one factor that goes to the *judiciousness* of the exercise of congressional power. Whether or not a particular use of power is judicious is not a question to be answered in the abstract; it can be sensibly answered only with reference to particular disputes and their political contexts.

---

<sup>339</sup> See *supra* text accompanying notes 85-95.

<sup>340</sup> See Chafetz, *supra* note 31, at 1124 n.242 (arguing that unified and divided government are dependent variables and that the relevant independent variable is “the preferences of the American people”).

<sup>341</sup> See *supra* text accompanying notes 310-11 (describing the various overlapping components of our collective political self and their institutional manifestations in our constitutional order).

Indeed, the party structure can also help to overcome potential collective-action problems with congressional assertiveness. The problem, in brief, is this: to the extent that presidential assertiveness benefits the executive branch, the President captures nearly all of the benefit; by contrast, to the extent that congressional assertiveness benefits Congress, any individual member will capture only a small percentage of the benefit. We would thus expect to see congressional assertiveness undersupplied relative to presidential assertiveness.<sup>342</sup> But this assumes that all members of Congress capture a roughly equal share of the benefits. In fact, however, outsized benefits accrue to party leaders in the houses. Indeed, in moments of high-salience inter-branch conflict, the potential benefits to, say, the Speaker of the House may rival the potential benefits to the President. (Just ask Newt Gingrich or John Boehner.) And the party leaders will accordingly use what mechanisms of party discipline they possess to bring the rank-and-file along with them. We thus see again how the mechanisms of the party system can enable, rather than inhibit, congressional assertiveness.

Finally, it is worth emphasizing that party discipline in the United States is by no means absolute. There are familiar stories of members of Congress bucking a President of their own party. Recent examples in this vein include Senators Wyden and Udall on the PATRIOT Act,<sup>343</sup> Senate Republicans' refusal to confirm Harriet Miers to the Supreme Court,<sup>344</sup> and Senate Democrats' refusal to confirm Goodwin Liu to the Ninth Circuit or Dawn Johnsen to head the Office of Legal Counsel.<sup>345</sup> There are also familiar examples in the other direction—that is, cases in which Congress has failed to assert itself against a President of the opposite party. Indeed, this Article began with one such case study: the failure of the Democrat-controlled 110th Congress

---

<sup>342</sup> Of course, this problem will be mitigated to the extent that one believes that members of Congress pursue their vision of the public good, rather than solely serving their individual material interests. See *supra* notes 335-38 and accompanying text.

<sup>343</sup> See *supra* text accompanying note 194-97.

<sup>344</sup> See GREENBURG, *supra* note 35, at 263-84 (describing the controversy over President Bush's nomination of Miers, including substantial conservative resistance).

<sup>345</sup> See Charlie Savage, *Long After Nomination, an Obama Choice Withdraws*, N.Y. TIMES, Apr. 10, 2010, at A16 (noting that the Senate never held a floor vote on Johnsen); Carol J. Williams, *Political Logjam on Federal Judgeships*, L.A. TIMES, Aug. 31, 2010, at A4 (noting that Liu's appointment was blocked in the Senate). Although Democrats had a filibuster-proof majority for much of the time that the Johnsen and Liu nominations were pending, there was enough Democratic opposition to keep them from coming to the floor.

vigorously to confront President Bush.<sup>346</sup> It is in precisely such a situation that a more vigorous use of the powers described in this Article would be in both Congress's and the nation's interests.

Thus, in the end, the wisdom of any particular assertion of congressional power will be worked out in the discursive relationship between the houses and their members, on the one hand, and the publics they represent,<sup>347</sup> on the other. The members must listen to their voters, but they must also speak to them, shaping public opinion even as they reflect it. The constitutional mechanisms discussed in this Article provide the houses and members of Congress with potent tools to focus public attention, make arguments to the public, and represent the views of the public in dealing with the other branches. To the extent that we are concerned about the amassing of power by the other branches—and many constitutional and political observers clearly are<sup>348</sup>—we should be encouraging Congress to make better use of its constitutional powers.

#### CONCLUSION

Congress is our constitutional First Branch, and, although it was not meant to be an unchecked sovereign, neither was it meant to play third fiddle. The hard and soft powers discussed in this Article are not foreign to our constitutional order—indeed, I have discussed examples of the use of each of them in American history. Viewed as a group, as components of a larger scheme, they provide Congress with significant resources to be used in interbranch conflicts. The judicious use of this group of powers could go a long way toward restoring constitutional equipoise, toward allowing “[a]mbition . . . to counteract ambition”<sup>349</sup> as a means toward responsible constitutional self-government.

---

<sup>346</sup> See *supra* text accompanying notes 17-25.

<sup>347</sup> I use “publics” in the plural because, of course, different officeholders answer to different constituencies. To some extent, all members of Congress answer to the American people as a whole. But they also answer to their specific constituents, and a Representative from San Francisco will have a different constituency than a representative from Dallas, and the Senators from California and Texas will have still different constituencies, although, of course, the Representatives’ constituencies will be a subset of the Senators’ constituencies.

<sup>348</sup> See *supra* notes 1-2.

<sup>349</sup> THE FEDERALIST NO. 51, *supra* note 9, at 322 (James Madison).