

# Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay

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## I. INTRODUCTION

Senator Schumer identifies a “sustained and systematic assault” from Congress’s sister branches as the primary cause of weakening Congressional power in recent years.<sup>1</sup> He provides a masterful account of the presidential strategy of bypassing consultation with Congress, resisting oversight of executive operations, and reinterpreting the laws Congress passes. Somewhat less convincingly, he finds a threat “no less nefarious” in recent Supreme Court doctrines that, in his view, usurp Congressional fact-finding powers in order to declare laws unconstitutional. It is, according to Senator Schumer, the “unprecedented combination of these two threats” that portends a troubling imbalance in the separation of powers and checks and balances structure of our Constitution.<sup>2</sup> Given the strength of these assaults, the Senator worries that, unless counteracted soon, they will prove “difficult to dismantle” and “impossible to undo.”<sup>3</sup> He acknowledges that Congress itself has been largely supine in fighting back, and he puts forth some useful ideas for reforms in the way the war on terror might be conducted by joint action of the two political branches and how Congress might more effectively pursue its “advise and consent” function with regard to judicial nominees.<sup>4</sup>

We agree with much of Senator Schumer’s critique of the current administration’s relentless advance of the “unitary executive” and resistance to cooperation with Congress. But we are also of the view that Congress’s problems go much deeper. Over several decades, Congress has allowed the manner in which it functions to deteriorate to the point that it cannot muster the institutional cohesion to stand up to an overbearing executive, even if it possesses the desire to do so. Our forefathers, after

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<sup>1</sup> Charles E. Schumer, *Under Attack: Congressional Power in the Twenty-First Century*, 1 HARV. L. & POL’Y REV. 3 (2007).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.* at 35–39.

all, envisioned separation of powers as a vehicle that would pit the institutional interests of each branch against those of the others. They relied on each branch to use its unique powers to constrain the ambitions of the others. The ensuing tension was meant to be a dynamic one that would result in thoughtful and heavily scrutinized products from all three branches. A pliant sibling that will not protect its own role in the constitutional triad threatens the entire structure of government, the ultimate goal of which is the welfare and liberty of people who elect it. The concern is greater today than before; the problems that government must solve are more complex; and the challenges to its integrity from private special interests are more formidable. A strong, self-confident, independent legislative body is indispensable if the constitutional edifice is to stand.

We also differ to some degree with Senator Schumer's assessment of the "nefarious" influence of the Supreme Court on congressional power. While its recent spate of federalism cases may deserve the widespread criticism it has received, we tend to be more optimistic than Senator Schumer on the real effect of those cases. We also see cause for optimism in the Court's insistence that the other two branches engage each other in the war on terror. We do subscribe to his desires for a much more robust partnership in the nomination and confirmation of judicial candidates, including discrete inquiries into their general judicial philosophies and ideologies. The President certainly looks at ideology when he nominates; why should it be off-base to the Senate when it confirms? In the end, we need a watchful and independent Judiciary, but one that is also sensitive to the rightful domains of the other branches. Our assessment of how the Court is fulfilling that function is somewhat more affirmative than the Senator's.

But there is no doubt we have common ground with Senator Schumer in our view of the erosion of congressional effectiveness in the face of a resolute President's systematic pursuit of preclusive power in areas where the Constitution meant that power to be shared. Our Article will first survey how this sorry state came to be, identify some of its myriad causes, and review proposals for internal reform that thoughtful commentators and Congressmembers have offered to reverse the course.

## II. A COMPLICIT CONGRESS?

Senator Schumer presents a comprehensive and provocative account of the ways in which this President has acted to make it difficult, if not impossible, for Congress to fulfill its constitutional functions of informed legislating and oversight of the executive branch. But Congress has also been complicit in its own marginalization. The President's resolute pursuit of his vision of a "unitary executive" with near exclusive powers in the realm of foreign affairs and national security, as well as bureaucratic control of the implementation of domestic laws, does not by itself explain or excuse Congress's abject failure to fulfill its intended role as a co-equal

branch. We intend now to inquire into some of the causes for this default. A few are the accidents of history; others the byproducts of institutional lethargy and individual obsessions with power.

When the Framers wrote the Constitution, although they were certainly aware of what James Madison termed “factions,” there were no political parties important enough to merit serious concern. The Framers relied upon the constitutional structure itself to fend off tyranny: three branches of government and two Houses of Congress at the federal level, plus retention of state governments as part of the overall federal scheme. John Adams’s “deepest political conviction [was] that there is safety in complexity: only checks and balances prevent one class or party from tyrannizing everyone.”<sup>5</sup> Madison elaborated in the *Federalist Papers* that each of the three branches would zealously guard its own interests from the intrusions of the other two and the Constitution would provide them with tools to do so.<sup>6</sup> Implicit in both men’s confidence in the structural solution was the notion that those serving in the branches would identify with and bestow their greatest loyalty on the branch in which they served. With the advent of national political parties as early as the end of the eighteenth century, that kind of devotion—to whatever extent it ever existed—dissipated. The President became the symbolic and functional head of his party with influence that infiltrated every district from which the legislators were elected. Presidents needed and expected support and loyalty from their party members in Congress in order to accomplish their programs and the party’s platform.<sup>7</sup> Members hedged their bets when conflicts occurred between congressional prerogatives and presidential powers—at least when their own man was in office.

But checks and balances still counted for something, certainly, so long as one branch or even one House was controlled by a different party. Indeed, in earlier times, impasse, rather than complicity with the Executive, was the dreaded outcome when a Congress dominated by one party refused to compromise with the President of another party. One only has to recall Harry Truman’s vitriolic outpourings against the “do nothing Congress” in 1948. There were, of course, also thirty interludes (sixty years) in the twentieth century during which a single party held sway over both the White House and Congress for all or part of a Presidential term: Democrats during the Wilson, Franklin Roosevelt, Kennedy, Carter, and Clinton Presidencies and Republicans during the Teddy Roosevelt, Taft, Harding, Hoover, and Eisenhower Presidencies. Nonetheless, the one-party “capture” of Congress and the Presidency that began when President George W. Bush took office in 2001—interrupted briefly by Senator James Jeffords’s switch

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<sup>5</sup> Richard Brookhiser, *John Adams Talks to His Books*, N.Y. TIMES BOOK REV., Sept. 3, 2006, at 23.

<sup>6</sup> See THE FEDERALIST NO. 51 (James Madison).

<sup>7</sup> See THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH 24–25, 28–33 (2006).

in party affiliation in May of that year—has prompted the most forceful outpourings in memory on the precipitous decline of Congress in holding up its part of the constitutional bargain. David Broder of the *Washington Post* recently lamented “this dismal session” just past, citing “so little agreement between the two Republican-controlled chambers and so little trust among the members that they would rather disagree and delay than compromise.”<sup>8</sup> Thomas Mann and Norman Ornstein document “[t]hree-hour votes, thousand-page-plus bills sprung on the floor with no notice, conference reports changed in the dead of night, [and] self-executing rules that suppress debate along with an explosion of closed rules, are just a few of the practices that have become common and that are a distortion of the regular order.”<sup>9</sup>

There is no dearth of important subjects left unaddressed by the last Congress.<sup>10</sup> Robert Kaiser, associate editor of the *Washington Post*, has written about “[c]itizens baffled by the House of Representatives’ allocation of its time in July—spent mostly on flag burning, stem-cell research, gay marriage, the Pledge of Allegiance, religion, and gun control” while the elephantine specters of immigration, wireless surveillance of American citizens, and Iraqi disintegration languished on the sidelines.<sup>11</sup> Kenneth Anderson, not a Bush-basher by any means, titled his critique “It’s Congress’s War, Too” and cited an impressive list of topics that, at a minimum, Congress must legislate on to create the kind of comprehensive national terrorism policy that does not “exist merely at the discretionary whim of some future President.”<sup>12</sup> Among those tasks are: defining NSA surveillance limits; setting the criteria and processes for detention and “rendition” of uncharged detainees; monitoring the FBI’s performance of its new job of domestic intelligence to decide whether, as some advocate, we need a wholly new agency like the British MI5 to do an adequate job; validating the techniques that are permissible in interrogating terrorism suspects; and overhauling the rapacious classification system as dozens of expert reports have recommended.

Congress’s most thoughtful critics, however, go back well before the current President to cite the beginnings of disastrous changes in Congress’s internal workings that led to its present sad state. In their recent book *The Broken Branch*, Mann and Ornstein have delved deeply and convincingly into the historical roots of congressional deterioration. Internal structural problems have led them to worry that regardless of which party controls

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<sup>8</sup> David S. Broder, *Fixing a Broken Congress*, WASH. POST, Sept. 3, 2006, at B7.

<sup>9</sup> MANN & ORNSTEIN, *supra* note 7, at 236.

<sup>10</sup> Conservative media agree. See, e.g., Editorial, *The GOP Record*, WALL ST. J., Oct. 2, 2006, at A10 (“The 109th Congress has gone home to fight for re-election, and the best testament to its accomplishments is that very few Republicans are running on them.”).

<sup>11</sup> Robert G. Kaiser, *House of Ill Repute*, WASH. POST BOOK WORLD, Aug. 13, 2006, at 7.

<sup>12</sup> Kenneth Anderson, *It’s Congress’s War, Too*, N.Y. TIMES MAG., Sept. 3, 2006, at 20.

Congress, its members will be “tempted to bend the rules and norms to their will as well.”<sup>13</sup>

Although political parties have been a determinative part of Congress’s makeup for the past two centuries, in the past two decades not only has partisanship in Congress become more pronounced—Kaiser calls it “poisonous”<sup>14</sup>—but it has led to a destructive arrogance on the part of majority leaders toward their minority counterparts, an arrogance that began with Democrats in the 1980s, accelerated with the Newt Gingrich takeover of the House in 1994, and peaked with the post-2000 Republican majorities in both Houses. Members of the minority, according to Mann and Ornstein, have been ruthlessly cut off from important conference committee deliberations and markups, as well as decisions on which bills or amendments will be brought to a vote.<sup>15</sup> Rarely is the minority consulted on the bills that are pushed to the head of the line; deliberation, assumed by the Framers to be Congress’s forte, has suffered badly from the absence of open-mindedness, debate, and compromise. Committee chairs are chosen by the majority leaders, thereby cementing party ties. Most bills get little or no debate and are passed under closed rules not allowing amendment, while major revisions are made in conference committees to which the minority may not have access. Votes are held open until the required number of majority “yeas” come in. The majority sees itself “more as a group of foot soldiers in the president’s army than as members of an independent branch of government,”<sup>16</sup> and thus has little incentive to foster a truly deliberative legislative process.

For two centuries congressmembers have been affiliated with parties; so why the steep incline in partisanship now that threatens the integrity of our foremost legislative body? Some trace the heavy-handedness of majority party tactics in Congress to an increased ideological polarization of the parties themselves, a trend that grew out of the Vietnam War and the rise of the counterculture in the 1960s, the civil rights movement’s unintended effect of creating a “safe Republican South,” the vigorously political antiabortion movement *Roe v. Wade* engendered, as well as the political rise of religious conservatism.<sup>17</sup> All of these events may have contributed to an “ideological sorting” by the parties, such that their “platforms grew more distinctive.” Geographical mobility enabled voters to go “where their own kind” lived and voted, thereby creating solid one-party enclaves.<sup>18</sup> Those elected to Congress from one-party dominated areas tended to be ideologically purer than their predecessors. Conformity to the

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<sup>13</sup> MANN & ORNSTEIN, *supra* note 7, at xii, 11, 241.

<sup>14</sup> Kaiser, *supra* note 11.

<sup>15</sup> See MANN & ORNSTEIN, *supra* note 7, at 124, 145–46, 171–75.

<sup>16</sup> *Id.* at xi.

<sup>17</sup> See generally *id.* at 47–95 (discussing the incendiary political trends from 1969 to 1994).

<sup>18</sup> *Id.* at 225.

party base became the price of party support. Party leaders took gerrymandering to new heights as a way to reward the faithful, punish the occasional dissident, and ensure continued supremacy.<sup>19</sup>

The increasing influence of lobbyists, especially former members of Congress, who are permitted access to legislators on the floor and who can implicitly if not explicitly offer political action committee support and money for legislators' fidelity, is a related but separate cause of congressional decline. "Lobbying has grown massively in just the past few years," achieving "a quantum leap in clout."<sup>20</sup> There are now twice as many registered lobbyists (30,000) as there were six years ago, and spending on federal lobbying has nearly doubled from \$116 million per month in 1999 to \$200 million per month in 2005. Not surprisingly, the number of "earmarks" for special projects has also tripled to almost 16,000 in 2005 from 4000 in 1994. Periodic attempts to rein in lobbyists predictably fail, and the most recent try has been described as a "sliver of an already weak lobby-reform bill" that "[discards] anything that would limit [Congress's] contact with lobbyists."<sup>21</sup> The partisan polarization and the dramatic expansion of lobbyist influence have corrupted the internal working mode in Congress. Congressmen have come to see their jobs as something to endure, not savor.<sup>22</sup>

The Rules of the House have enabled this mode of operation. In making scheduling decisions on which bills go in what order to the floor, the Speaker consults only with majority party leaders and "selected Representatives." According to a Congressional Research Service report, "the scheduling of legislation for House floor action is the fundamental prerogative of the Speaker. Individual Representatives cannot easily circumvent, influence, or reverse leadership decisions about which measures should come to the floor."<sup>23</sup> Controversial measures are debated under "special rules" passed by the majority that specify whether any amendments can be made and, if so, to which provisions, as well as the time for debate and for voting. The special rules may thus waive points of order and establish time restrictions that make it difficult for individual members to get in debate time—usually only a few minutes.<sup>24</sup>

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<sup>19</sup> *Id.* at 229–31.

<sup>20</sup> Jeffrey H. Birnbaum, *Washington's Once and Future Lobby*, WASH. POST, Sept. 10, 2006, at B1.

<sup>21</sup> *Id.*

<sup>22</sup> MANN & ORNSTEIN, *supra* note 7, at 148.

<sup>23</sup> JUDY SCHNEIDER, CONGRESSIONAL RECORD SERV. REPORT FOR CONGRESS, HOUSE AND SENATE RULES OF PROCEDURE: A COMPARISON 3 (2005).

<sup>24</sup> In the Senate, rules promote more bipartisan cooperation: while the Majority leader has the authority to take bills to the floor, he consults with the Minority Leader and relevant committee chairs before doing so. Any senator can place a "hold" on bringing up measures if he notifies the chair and sponsor. Unanimous consent agreements in the Senate, which do the same thing as special rules in the House, negotiated between the majority and minority leaders. Likewise, in the Senate, debate time is more generous and flexible. *See id.* at 3–5.

This is not to say that there have not been abuses of majority power in the past: for thirty-seven years a coalition of Southern Democrats and breakaway Republicans ruled the Senate. A revolt of the rank-and-file members in the 1970s produced some changes, but the threat of majority oppression has in recent years again come to the fore.<sup>25</sup> The notoriously misnamed Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 exemplifies the latest breakdown in Congress. The Act's journey through Congress is described by Mann and Ornstein as follows:

Working off an industry-created draft that was eight years old—and based on a far-different financial services world—blocking any significant input from those engaged in the bankruptcy process, denying even perfecting or corrective amendments, even when it was clear that they eased flaws or gaps in the bill, and actively seeking to prevent any deliberative process, the leaders of the House and Senate obtained a law—but one that was filled with holes and problems . . . and that could bring substantial upheaval and injustice to large numbers of Americans.

The bankruptcy bill is in some ways a special case, but it highlights a pattern—the eschewal of the regular order, the abandonment of deliberation . . . [and] the lack of concern about legislative craftsmanship—that results in the production of poor laws and flawed policy.<sup>26</sup>

This dysfunctional mode has not only produced ill-conceived litigation, but has also played into the hands of an executive intent upon enhancing its own constitutional powers rather than seeking ways to govern jointly with Congress. Despite urgings from bipartisan bodies like the 9/11 Commission and the Commission on Weapons of Mass Destruction that oversight reform is vitally needed in the area of intelligence activities,<sup>27</sup> virtually nothing has been done. The decline in oversight generally, however, had begun much earlier. Oversight hearings in the House of Representatives went from 782 in the first six months of 1983 to 287 in the first six months of 1997. In the Senate, the number of hearings dropped from 429 to 175 in the same period.<sup>28</sup> Timid and unsteady oversight encourages executive expansionism; so does the hopelessly overlapping committee and subcommittee jurisdiction that has plagued Congress for many decades—the Department of Homeland Security reports to eighty-eight com-

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<sup>25</sup> See MANN & ORNSTEIN, *supra* note 7, at 52–64.

<sup>26</sup> *Id.* at 146.

<sup>27</sup> See THE 9/11 COMMISSION REPORT 419 (2004) (“Of all our recommendations, strengthening Congressional oversight may be among the most difficult and important.”); COMM’N ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 20 (2005).

<sup>28</sup> MANN & ORNSTEIN, *supra* note 7, at 157.

mittees and subcommittees.<sup>29</sup> While the Senate Intelligence Committee did excellent work exploring the reasoning underlying the flawed National Intelligence Estimate of 2002, which preceded Congress's authorization of military action against Iraq, the second phase of the Committee's inquiry regarding how administration officials used the intelligence given to them in their public addresses has languished. Only a threatened minority shutdown of the Senate jumpstarted the process and produced a timetable for the completion of this second phase of the Committee's work. By September 2006, however, only two of the five parts had been released, with the most controversial part on use of WMD intelligence by policy-makers left until after the midterm election. The minority members of the committee complained loudly that the reports suffered from the majority's refusal to go after critical information on the complicity of high officials and from blatant over-classification of material that does not appear in the public version.<sup>30</sup> Senator Schumer complains that the President has made oversight impossible by withholding access to key information, but one must ask: How often has Congress tried to force his hand and subpoena the information it needs to perform its constitutional role? Is every committee in Congress so party-bound that it would not be worth a try? Will a new Congress assert itself to do so?

Another significant effect of irregular internal practices and rejection of minority input has been Congress's reluctance to subject the Executive's proposed legislation to any rigorous scrutiny or amendment. In only a few instances, such as the McCain Amendment banning torture and cruel, inhuman, and degrading treatment of prisoners in U.S. custody,<sup>31</sup> did Congress take an active part in steering legislation away from the Executive's initial position.

Even then, the President had another chip to play. In a signing statement issued when the President signed into law the legislation containing the McCain Amendment, the President announced that as Commander-in-Chief he would reserve the right to waive the amendment if he deemed it necessary to prevent a terrorist attack. Moreover, the President stated that he would construe the restriction on interrogation "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief consistent with the constitutional limitations on the judicial power."<sup>32</sup>

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<sup>29</sup> *Id.* at 153.

<sup>30</sup> Jonathan Weisman, *Panel Set to Release Just Part of Report on Run-Up to War*, WASH. POST, Sept. 7, 2006, at A11.

<sup>31</sup> Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

<sup>32</sup> Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 41 WKLY. COMP. PRES. DOC. 1918 (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

Amazingly, no recent Congress had sought to legally challenge or even to publicly chastise the President's use of signing statements to dilute or negate its work product until a reporter broke the story about the extent and frequency of the use of such statements.<sup>33</sup> Possible congressional responses to this misuse of signing statements are discussed below.<sup>34</sup>

However, for a brief interlude last year, the process that unfolded regarding the Administration's draft legislation on military commissions for trial of enemy combatants accused of war crimes gave some cause for hope that a small core of independent-minded legislators could reassert Congress's role in formulating crucial policy. The Administration bill basically repeated the President's directives creating the military commissions, even though the Court had found some of the practices not in accord with the law of war.<sup>35</sup> A few leading Republican Senators drafted an alternative bill, which the *Washington Post* said "balance[d] profound and difficult interests thoughtfully and with considerable respect both for the uniqueness of the current conflict and for the American tradition of fair trials and due process" and was "in almost all respects, superior to the president's proposal."<sup>36</sup> Whether this initiative reflected the President's low poll ratings at the time or the dawning of a new sense of institutional pride, it deserved applause and many hoped it was perhaps a harbinger of better things to come. Sadly, however, the rebel version, though voted out of the Armed Services Committee, was rejected on the Senate floor in favor of the Administration bill. In effect, the Administration was able to recover virtually all of its original provisions intact on the floor, including a drastic limitation on the availability of habeas corpus. A key issue then became whether the rebels would vote for the final bill—and they did. Only one Republican Senator did not.<sup>37</sup> Breaking party ranks still happens occasionally,<sup>38</sup> but it is a disappearing phenomenon. There appear to be fewer and fewer middle-of-the-roaders who can form coalitions to support responsible legislation.

Another area in which Congress has tolerated the Executive's enervation of its capacity to make meaningful contributions to the formation of national policy involves access to information. New classification of documents continues at an excessive level: 14 million in 2005.<sup>39</sup> Reclassification of formerly unclassified documents has also increased under the

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<sup>33</sup> See Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1.

<sup>34</sup> See *infra* Part III.

<sup>35</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759–60 (2006).

<sup>36</sup> Editorial, *A Solution for Trials*, WASH. POST, Sept. 9, 2006, at A16.

<sup>37</sup> Senator Lincoln Chafee of Rhode Island joined thirty-three Democrats in opposing the bill. See 152 CONG. REC. 10, 420 (daily ed. Sept. 28, 2006) (reporting results of senate vote 259).

<sup>38</sup> Consider, for instance, former Majority Leader Bill Frist's votes on stem-cell research.

<sup>39</sup> Elizabeth Wilson, *Keeping Secrets*, WASH. POST, Sept. 13, 2006, at A15.

Bush Administration.<sup>40</sup> The criteria for release of government information under the Freedom of Information Act's ("FOIA") liberal provisions was changed from favoring release unless there was a foreseeable risk of harm to discouraging release unless there was no "sound legal basis" for withholding.<sup>41</sup> The Administration has vigorously resisted disclosing information to the public even when FOIA or the Federal Advisory Committee Act ("FACA") would seem to require it.<sup>42</sup> Congress has acceded to these demands for increased secrecy, legislating exceptions to the FACA for homeland security, Social Security, Medicare prescription drug legislation—even for the 9/11 Commission.<sup>43</sup> Even when classified information is shared with Congress, such releases are conducted under conditions that reduce their efficacy in keeping Congress informed. Security briefings to members of Congress are considered by many members as a "complete waste of time."<sup>44</sup> Congress has docilely accepted the "rules" for such briefings, which often include: drastic limitations on access to the "gang of four" (Senate and House intelligence committee chairs and ranking members), no sharing of materials with staff, no taking of notes, and no reviewing of the basic documents underlying oral presentations. The sad result is that Congress, on the rare occasions when it has asserted itself under public pressure or in response to judicial instruction to legislate in the national security area, finds itself without the full knowledge to do so sensibly.

Similarly, attempts by Congress to obtain information directly from executive officials for either oversight or legislation have been regularly refused as being beyond such officials' authority absent pre-approval from the President. Examples include not just security matters but ordinary domestic policies. Thus, the President has said he would not permit his subordinates to make reports to Congress on the diversion of money from enacted appropriations to covert operations; the use of Patriot Act authorities to secretly search homes and seize private papers; and the uncensored findings of government scientists. The farthest Congress ever got in this stalemate was passage of a law requiring the Attorney General to report to it about any policy or instance of the Department of Justice refraining from enforcing a federal statute. This too provoked a signing statement that the President had a right to withhold any information the disclosure of which he deemed a risk to national security or foreign relations, the deliberative processes of the Executive, or the performance of executive constitutional duties.<sup>45</sup> Again, as Senator Schumer recognizes, Congress

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<sup>40</sup> See Francis Fukuyama, *The American Way of Secrecy*, N.Y. TIMES BOOK REV., Oct. 8, 2006, at 39 (providing as an example the reclassification after September 11 of 1970 statistics on American nuclear weapons formerly made public).

<sup>41</sup> MANN & ORNSTEIN, *supra* note 7, at 160.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 159.

<sup>44</sup> *Id.* at 161.

<sup>45</sup> See ABA TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, TASK FORCE REPORT WITH RECOMMENDATIONS 15–17 (2006),

has “tools”—the power of the purse, subpoenas, GAO investigations, contempt power, holdups on legislation and nominations the President wants—to negotiate for the information it needs in the form it needs it. Thus far, it has not had the will to use them.

In this part of our Article, we have explored the deplorable state of Congress’s impotence in facing down the President and claiming its share of lawmaking and oversight authority. We have seen that Congress’s own method of doing business has contributed mightily to its inability to bring equality of arms to the contest. Its extreme partisanship has deprived it of the best talent and input of representatives from both parties in crafting responsible and fair legislation; in the process, it has managed to lose credibility with the people and even steady supporters of the majority party. Even with changing parties, serious critics fear that ingrained partisanship will resurface. Polarization of parties may be a fact and preclusive presidential power has and will again present itself, but at some point Congress as the first branch must look inward and reassert itself as a body dedicated to the public interest—a forum where deliberation and exchange of views can take place and where loyalties will not be taken to dysfunctional ends. We can only hope that this process will begin soon.

There are some constitutional historians who are dubious that any such reformation is likely.<sup>46</sup> Daryl Levinson and Richard Pildes point out that Madison’s notion that personal ambitions should be channeled into branch loyalties became highly unrealistic once political parties grew in size and importance. Political parties have changed the national relationship of President to Congress from competitive to cooperative; it is mainly in times of divided government when Congress asserts itself against a President from the opposite party. Political scientists discovered this long ago, but lawyers and judges cling still to the Madisonian mirage that the branches will instill nonparty protectionist feelings in their members. Levinson and Pildes point out that although divided government was the norm in the second half of the twentieth century, overall unity in the political affiliation of the two branches has been the predominant status since the 1830s. The two parties today are more polarized than ever, with few signs of any change in the winds.

Levinson and Pildes agree as well that internal rule changes in recent years have accentuated that polarization. What was in the 1800s a barony setup with committee chairs in charge of assignments became a more centralized system with the Speaker of the House, who was also the party leader, in charge of committee assignments, scheduling, and the rules under which debate would be conducted. When there is divided government, the

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available at [http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendations-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendations-report_7-24-06.pdf) [hereinafter ABA TASK FORCE REPORT].

<sup>46</sup> See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). The next two paragraphs are a summary of that article.

absence of a centrist bloc willing to cross party lines will make impasse more likely, but when there is a unified government, any Madisonian check will dissipate. Unified government has some advantages—more “significant” legislation gets passed. But, the authors admit, since 1990 lawmaking has become more partisan and more enactments are passed by narrow party-line votes. Levinson and Pildes believe that the Madisonian ideal is a mirage and that rather than continuing to urge fidelity to a myth, solutions to the excesses of partisanship should be found in European models where the opposition party is given certain guaranteed prerogatives, such as to initiate investigations, to obtain information from the government, even to control oversight requirements for supermajorities for some essential legislative decisions, such as confirmation of judges and suspension of liberties for prolonged periods in times of national crisis. They support control of redistricting by independent commissions. In the end, however, their prognosis is that when strong parties combine with unified government, the challenges to the Madisonian structure may be too great to overcome. Minimal solutions must, however, continue to be sought despite the relentless pull of party pressures in relationship between the branches.<sup>47</sup>

On balance, we find substantial agreement even among these skeptics that things have gotten more polarized and less conducive to good legislating in recent years and that political party domination of Congress is a root cause. We differ perhaps in the degree to which we are ready to acknowledge that this is a *fait accompli* and that it cannot be changed by a conscious determination to do so. Accordingly, we turn now to explore how that change might come about.

### III. RESTORING THE BALANCE

#### A. *Signing Statement Reform*

One of the more notorious current affronts to the balance of power between the President and Congress is frequently discussed under the heading of signing statements. This heading refers to the practice whereby the President signs a bill into law despite constitutional reservations about one or more of its provisions. The President then issues a signing statement accompanying the new law in which he expresses his constitutional objection. Controversy arises when this expression includes an indication that the President will refuse to enforce the objectionable provisions of the new law.<sup>48</sup>

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<sup>47</sup> Cf. Gary Rosen, *The Time of the Presidents*, N.Y. TIMES MAG., July 16, 2006, at 21 (last century has witnessed ascendancy of strong Presidents in democratic as well as autocratic states due to technology, growth of armies, and intelligence operations and that “perils of presidentialism” may militate towards parliamentary systems (quoting Juan Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51 (1990))).

<sup>48</sup> There is also some controversy surrounding a separate practice of using signing

These non-enforcement signing statements can operate to undermine Congress's role in the legislative process. For example, the Bush Administration threatened to veto any legislation containing language that would prohibit "cruel, inhuman and degrading" treatment of detainees. Congress passed the McCain Amendment nonetheless. Publicly, President Bush acquiesced to Congress, but when he signed the bill into law, the signing statement included a constitutional objection to the McCain Amendment. In such a circumstance, a signing statement can have a practical effect that is quite similar to that of a veto, but is not subject to any of the checks that normally constrain the President's veto power.<sup>49</sup> Congress's real power to legislate is thus diminished and the President's is correspondingly increased.

The practice of issuing such non-enforcement signing statements has been especially problematic in the Bush Administration. Previous Administrations have issued such statements, but in numbers dwarfed by the current Administration.<sup>50</sup> These statements are also qualitatively different because they do not directly express an intention not to enforce a new law. Rather, they direct the executive branch to interpret the new law to avoid the Administration's constitutional objection. While other Presidents have issued signing statements asserting an intention to interpret the new law in a particular way, President Bush's signing statements typically do not elaborate beyond identifying the general grounds of the constitutional objection. In the case of the McCain Amendment, for example, the signing statement asserted that the provision would be interpreted consistent with the President's power as commander in chief and as head of the unitary executive branch.<sup>51</sup> The statement neither noted how the McCain Amendment might be inconsistent with those powers nor described how the McCain Amendment would be re-interpreted.

These vague and general statements raise two additional problems. First, they do not allow Congress an opportunity to respond effectively. If Congress were alerted to the precise constitutional objection, it might agree with the President's interpretation and amend the law accordingly. In the alternative, it might disagree and make its meaning clear. Such a clear statement would prevent the President from validly invoking the avoidance canon. As applied in courts, this canon directs a judge who is confronted with an ambiguous statute that could reasonably be interpreted in several ways to prefer the reasonable interpretation that avoids a constitu-

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statements to shape subsequent judicial interpretation of the statute by creating a presidential legislative history. We do not address this separate controversy here.

<sup>49</sup> One important check is that the President is constitutionally authorized to veto a bill in its entirety or not at all. Another is that a constitutional veto is subject to congressional override.

<sup>50</sup> See Neil Kinkopf & Peter M. Shane, Index of Signing Statements by President George W. Bush (unpublished manuscript, on file with authors); see also Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 520–22 (2005).

<sup>51</sup> Statement on Signing, *supra* note 32.

tional problem over a reasonable interpretation that implicates a constitutional problem.<sup>52</sup> By eliminating any ambiguity, the predicate for the avoidance canon is not satisfied, and the clear meaning must be followed or set-aside as unconstitutional.

Second, vague and general signing statements leave opaque the real constitutional basis for the President's objection. Insofar as these objections are based on well-settled constitutional principles and Supreme Court holdings, the threat to congressional power is minimized. Where, for example, the President objects to a legislative veto, there is no doubt that the objection is well-taken and little basis for concern that the President is expanding his power at the expense of Congress.<sup>53</sup> But where the objection is grounded in a highly contested theory of the Constitution's meaning, then the President might use signing statement objections to augment his own power. President Bush has frequently referred in signing statements to the unitary executive theory of presidential power—eighty-two times in his first term alone.<sup>54</sup> While this theory has at best slim support in Supreme Court precedent,<sup>55</sup> it continues to provide the legal justification for many of the Bush Administration's programs.<sup>56</sup> If the President combines such an expansive and contested reading of the Constitution with the avoidance canon, the President will easily find objectionable provisions and just as easily

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<sup>52</sup> The canon has also been employed by the executive branch, but that usage is itself controversial. See H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006).

<sup>53</sup> See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>54</sup> ABA TASK FORCE REPORT, *supra* note 45, at 15–16.

<sup>55</sup> See, e.g., *Myers v. United States*, 272 U.S. 52 (1926). But see *Morrison v. Olson*, 487 U.S. 654 (1988); *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). The phrase “unitary executive” was initially used to refer to a theory of presidential power that regards the Constitution as requiring that the President have control over all operations of the executive branch, including the operations of independent agencies that do not fall within the legislative or judicial branches. See generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994). But see Cass Sunstein & Lawrence Lessig, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994). The use of the phrase in President Bush's signing statements, however, appears to have an application much broader than its original “chain of command” signification. It now evidently stands for the proposition that the Constitution disables Congress from enacting regulations that constrain the President's discretion as to how to enforce the laws even though they have no effect on the executive chain of command. See, e.g., Statement on Signing the Department of Homeland Security Appropriations Act, 2005, 40 WKLY. COMP. PRES. DOC. 2453 (Oct. 18, 2004) (objecting to a provision of the Department of Homeland Security Appropriations Act of 2005 that would require Border Patrol agents to relocate tactical checkpoints an average of once every fourteen days).

<sup>56</sup> See U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006) [hereinafter NSA WHITE PAPER]; Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, 2002 OLC LEXIS 19 (Aug. 1, 2002) [hereinafter 2001 Memorandum], available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf>; The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 2001 OLC Lexis 35 (Sept. 25, 2001), available at <http://www.usdoj.gov/olc/warpowers925.htm>.

find the grounds to “fix” those problems through interpretation. By drafting the signing statement in a general and vague way, the President avoids scrutiny of the underlying legal theory. This poses a serious threat to the ability of Congress to retain its primary role in the legislative process.

The threat to Congress’s constitutional role can be diminished by making public the legal theories that support the President’s vague and general signing statements. At present, such statements are protected from disclosure by the deliberative process exception to the Freedom of Information Act.<sup>57</sup> Congress can, and should, respond to this signing statement problem in one of several different ways. One way would be by enacting legislation making legal memoranda that describe constitutional objections found in signing statements subject to mandatory disclosure upon request—not only by Congress but by the public at large.

Alternatively, Congress can mandate that such legal memoranda be disclosed to Congress upon the issuance of the signing statement. We believe that the best way to accomplish this reform would be to amend FOIA’s exemption five, which provides an exemption from disclosure for deliberative process documents and for attorney work product. None of the rationales for protecting attorney work product applies to the legal memos produced in advance of a signing statement.<sup>58</sup> Moreover, as long as mandatory disclosure is limited to those memos or parts of memos that provide the actual basis for a signing statement that is actually issued, none of the con-

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<sup>57</sup> See 5 U.S.C. § 552(b)(5) (2000 & Supp. IV 2004) .

<sup>58</sup> The justification for this exemption rests on concerns for litigation strategy, which are not relevant to the issuance of a signing statement. See U.S. DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE (2004), <http://www.usdoj.gov/oip/exemption5.htm>. The deliberative process privilege encompasses concern for the chilling effect that disclosure might have on advice given the President. It is valuable to maintain a safe harbor within which government attorneys can explore novel legal theories. Often enough such theories will provide a vehicle for internal deliberation but will be too preliminary or speculative to provide a basis for advice. Still, the deliberative process privilege is, and should remain, available to allow administration lawyers to engage in exploration without fearing that their musings might later be made a public source of controversy. That concern does not apply to reasoning behind language that is actually adopted in a signing statement. Once the advice is actually relied upon and becomes the basis of the Administration’s objection, the transparency values embodied in the FOIA are fully implicated and concerns for protecting an internal forum in which administration lawyers can engage in speculative theorizing have passed. We thus would not advocate amending FOIA to allow disclosure of legal advice that is not accepted or does not form the actual justification for legal objections contained in presidential signing statements.

In this respect, the deliberative process privilege mirrors executive privilege. The Supreme Court has recognized that advice prepared for the President is presumptively covered by executive privilege on the ground that it is important to protect the President’s ability to receive honest, if unpopular, advice. See *United States v. Nixon*, 418 U.S. 683 (1974). The privilege is qualified and may be overcome if, on balance, the need for disclosure outweighs the potential for chilling effect. See *id.*; *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998); *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997). Where a signing statement indicates that a newly enacted law contains a potential constitutional defect, it is important for Congress and the public generally to know what the defect is.

cerns for chilling effects that support the deliberative process exemption will apply. The additional benefit of proceeding by amendment to FOIA's exemption five is that this approach will leave available the other categories of exemption. Thus, for example, the Administration would still be able to withhold legal memos or portions thereof that deal with classified national security information.<sup>59</sup>

### B. *Internal Executive Branch Checks*

The executive branch has long been structured to create internal checks against presidential overreaching.<sup>60</sup> Senator Schumer's paper appropriately highlights some of these internal restraints and the ways in which the Bush Administration has politicized them.<sup>61</sup> We wish to highlight an additional internal check: the Office of Legal Counsel ("OLC") within the Department of Justice. That office is charged with the tasks of resolving legal conflicts between agencies of the executive branch and of giving typically binding legal advice to President and the agencies of the executive branch. In these capacities, OLC promotes adherence to the rule of law, which in turn serves as a constraint on executive branch action. OLC has played this role in administrations of both political parties.<sup>62</sup>

Sometimes, however, the role of OLC has shifted to one in which that office tends to act as an advocate for the most expansive vision of executive power.<sup>63</sup> At its worst, this model of proceeding devolves into providing flimsy legal rationalizations for an Administration's preferred course of action. The most notorious example of this is the so-called OLC "Torture Memo,"<sup>64</sup> which Anthony Lewis has aptly described as most closely akin to "the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison."<sup>65</sup>

This dispute has spawned a rich literature on the proper role of OLC and of government lawyers more generally. The major disagreement is over

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<sup>59</sup> See 5 U.S.C. § 552(b)(1).

<sup>60</sup> See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (discussing the role of bureaucracy in creating checks and balances within the executive branch in the foreign affairs area).

<sup>61</sup> See Schumer, *supra* note 1, at 22. To Senator Schumer's catalog, we would add the troubling episode in which the White House undermined the Office of Professional Responsibility's investigation of OLC conduct in producing the so-called "torture memo." See Nat Hentoff, *Black Site for Justice*, VILLAGE VOICE, June 7, 2006, at 26.

<sup>62</sup> See DOUGLAS W. KMIEC, *THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT* (1992); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000).

<sup>63</sup> This view was recently defended in Eric Posner & Adrian Vermuele, A "Torture" Memo and its Tortuous Critics, WALL ST. J., July 6, 2004, at A22. See also John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 420-35 (1993) (analyzing the operations of the OLC).

<sup>64</sup> See 2001 Memorandum, *supra* note 56.

<sup>65</sup> Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004, at 4.

whether OLC should play an advocate's role or a more detached role that follows a judicial model.<sup>66</sup> We strongly support the latter view.<sup>67</sup> Under a judicial model, OLC would assume the role of assessing the legality of proposed courses of action. As a result, OLC would occasionally be forced to tell the Administration that its preferred course of conduct was impermissible. By comparison, if OLC performs an advocate's role—as practiced in connection with the advice given in the so-called Torture Memo—it would simply provide a legal justification for whatever course of action an administration wished to take.<sup>68</sup>

Certainly, the Constitution imposes upon the President the duty to “take Care that the Laws be faithfully executed.”<sup>69</sup> OLC can and should play a central role in ensuring that the President fulfills this duty. When OLC takes on an advocate's role, however, it tends—as the Torture Memo so vividly demonstrates—to weaken the forces restraining the President to fulfill his “take care” obligation.

There is no simple formulation that can guarantee that OLC will perform its role properly. Nevertheless, there are commitments that the office can undertake that will buttress its mission. In this connection, we advocate adoption of the “Principles to Guide the Office of Legal Counsel” that have been urged by a group of former lawyers in that office.<sup>70</sup> These guidelines are unavoidably capacious, too much to be an appropriate subject for legislation. Nevertheless, Congress can and should play a role in enforcing them. First, the Senate should demand that anyone nominated to head OLC commit to following the principles. This demand should also be made of future Attorneys General. Second, the House and Senate Judiciary Committees should conduct oversight to make sure that OLC lives up to the guidelines and promotes the rule of law within the executive branch. Such oversight should be conducted in such a way as to avoid improper interference in specific, ongoing matters. Congress has in the past engaged in oversight of OLC's conduct.<sup>71</sup> Thus, it is appropriate for Congress to determine whether OLC is being politicized or to seek examples of whether

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<sup>66</sup> See McGinnis, *supra* note 63, at 420–35.

<sup>67</sup> There are many variations on this model, and we do not here take a position on any of them.

<sup>68</sup> The Justice Department white paper justifying the NSA's domestic surveillance program is another example of the advocate model. Rather than an honest assessment of the legality of a proposed program, it is an after-the-fact justification of a decision already taken. See NSA WHITE PAPER, *supra* note 56. Under the advocate model, OLC does not serve the function of hewing executive action to the contours of the law. Rather, it actually serves to loosen legal constraints.

<sup>69</sup> U.S. CONST. art. II, § 3.

<sup>70</sup> See Walter Dellinger et al., Principles to Guide the Office of Legal Counsel (Dec. 21, 2004), <http://www.acslaw.org/node/391>.

<sup>71</sup> See, e.g., *What's Essential During Government Shutdowns: Hearing Before the Subcomm. on Civil Serv. of the H. Comm. on Government Reform and Oversight*, 104th Cong. (1995) (statement of Christopher Schroeder, Deputy Att'y Gen., Office of Legal Counsel, Department of Justice), 1995 WL 722364.

and how it is conforming to the guidelines. Were Congress, in the guise of conducting oversight, to seek to insert itself into the advice-giving process for ongoing matters, however, it would cross a line with serious constitutional implications.

### C. *Reform Within Congress*

Restoring Congress as a full-fledged partner in constitutional governance may require concerted action on three fronts: internal reform by Congress in its own practices, periodic arousal of the public to “throw the rascals out,” and a culture of mutual restraint that includes the President as well as Congress. “There is no quick fix for a dysfunctional institution.”<sup>72</sup> But there have been occasions in the past when reform-minded members successfully rebelled against majority party abuse of the legislative process—and it could happen again, especially now that critical numbers of new members have entered Congress. “A sense of fair play, of balanced rules that cover everybody, and of concern for the very integrity of the institution would go a long way” toward energizing a genuine reform movement within Congress.<sup>73</sup>

One simple aid to genuine deliberations would be for Congress to adopt an ordinary work week—Monday to Friday—for a specified number of weeks per year, rather than the frenzied late Tuesday to midday-Thursday schedule currently in place.<sup>74</sup> The current schedule reduces to a minimum time for interaction and development of personal relationships and time for debate and deliberation. In 2006, only seventy-one days were scheduled for votes in the House; all told, only ninety-seven calendar days saw votes, the lowest number in sixty years.<sup>75</sup> Additionally, there were less than half the number of committee meetings held in the 2000s as in the 1960s, and Congress was in session only 250 days per two-year Congress compared to 323 days in the 1960s and 1970s.<sup>76</sup> The 109th Congress was in session only 100 days, “the fewest number . . . in our lifetimes.”<sup>77</sup> There should be set periods of at least a few days between the time a bill is reported and debate on it begins, so there is some chance for members to read it. However, as it is now, in the feverish close-of-session days, “must-pass” legislation that has languished for months, including essential authorization and appropriation bills, are rushed to the floor with last-minute provisions of all kinds attached. Bills are consolidated into omnibus tomes of thousands of pages with undiscoverable riches for particular lawmaker

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<sup>72</sup> MANN & ORNSTEIN, *supra* note 7, at 226.

<sup>73</sup> *Id.* at 232.

<sup>74</sup> *Id.* at 232–33.

<sup>75</sup> *Id.* at 169–70.

<sup>76</sup> *Id.* at 170.

<sup>77</sup> Thomas Mann & Norman Ornstein, *Our Pathetic Congress*, L.A. TIMES, Sept. 27, 2006.

interests tucked covertly into their folds. At one point in last year's session, the Speaker of the House threatened to kill the defense authorization bill unless a court security and an anti-immigrant bill were tacked on. Many last-minute tack-on measures have not had hearings or prior debate at all.<sup>78</sup>

In 2005, several House members—Representatives David Obey, Barney Frank, David Price, and Tom Allen—proposed a reform package that would end the practices of “huge bills, with nefarious special interest riders attached, rushed to the floor after midnight so Members and the people can't read them.”<sup>79</sup> Under the proposed reform, printed copies of legislation must be available to House members for twenty-four hours ahead of floor consideration unless two-thirds of the House votes to waive that requirement. The reform package also contained a prohibition on the House adjourning a session if it has not conducted twenty or more weeks with at least one recorded vote or quorum call on four of the five work days.<sup>80</sup>

The horror stories of unread legislation are legion. In 2004, the House approved a double-sided, 1600-page, \$388 billion “omnibus” spending bill within hours after it was made available to members, with a clause in it permitting the House Appropriation chair and staff to read citizens' private tax returns.<sup>81</sup> Notably, the House already has a three-day waiting period, but the Rules Committee can and does waive the requirement if a majority agrees; waivers were passed forty-four times in two years.<sup>82</sup> Waiting periods have been reduced to three hours for a 1200-page defense authorization bill and eight hours for an 816-page energy bill.<sup>83</sup> In the 108th Congress, the Medicare prescription drug, energy, and defense authorization bills, totaling nearly 3000 pages and costing potentially \$1 trillion, were passed after a collective total of forty-eight hours before they went to the floor.<sup>84</sup>

A number of other simple procedural rules could be established to ensure that the minority is included in deliberations and that outside influences on member voting are limited. Pre-established times for voting should be honored, not extended at will to bring about a predetermined conclusion. Conference committees should not exclude any opposition members, and items not previously discussed in either House should not be added in conference. Earmarks for individual pet projects should be sharply curtailed. A recent rule change in the House requiring members to disclose

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<sup>78</sup> *Id.*

<sup>79</sup> Press Release, Rep. Barney Frank, Cleaning (the) House (Dec. 4, 2005), available at <http://www.house.gov/frank/cleaninghouse.html>.

<sup>80</sup> *Id.*

<sup>81</sup> Jeff Kosseff, *Legislators Want More Time to Read Bills*, SEATTLE TIMES, NOV. 25, 2004, at A7.

<sup>82</sup> *Id.*; see also Brian Baird, *We Need to Read the Bills*, WASH. POST, NOV. 27, 2004, at A31.

<sup>83</sup> Baird, *supra* note 82.

<sup>84</sup> *Id.*

their sponsorship of such earmarks is a pallid improvement. Members' receipt of favors from lobbyists and other special interest groups should be restricted and subject to heightened disclosure requirements. These sound like simple reforms, but they could create a climate and atmosphere far more conducive to consultation and deliberation than exists at present.<sup>85</sup>

Such changes may be hard to come by even in a new Congress. The disclosure requirements for identifying sponsorship of earmarks "ended the prospect for a more sweeping overhaul of federal lobbying laws this year" that would have limited contacts with and perks from lobbyists.<sup>86</sup> The earmark disclosure rule was widely viewed as a "passable way to address voter unrest over the scandals" that permeated the session, and a leading majority member disparaged it as a "trivial pursuit."<sup>87</sup> In a biting critique of the new rule, the *Washington Post* queried:

How modest—pathetic would be a more appropriate term—is the House change? Henceforth members will be required to disclose their separate sponsorship of certain earmarks, and by no means all of them. Beyond this limited disclosure: nothing. No provision for an up-or-down vote on such spending. No prohibition on earmarks to benefit lawmakers' relatives. No limitation on last-minute additions that offer no opportunity for scrutiny or debate.<sup>88</sup>

Despite the front-page scandals involving members and lobbyists, the Republican House leadership has resisted efforts by its own Ethics Committee to conduct serious inquiries. In response to the Committee's admonishment of former majority leader Tom DeLay, the leadership changed the Republican caucus rules so he could continue as leader even under indictment and also fired the Committee's chair and replaced several of its members and staffers. The "gutted" committee retreated quietly into oblivion, and lobbying reform was ultimately put back into its "partisan straightjacket."<sup>89</sup>

There is, however, some cause for hope. Even before the election, Democrats had announced plans—if in control—to revise House Rules to allow the opposition party to offer amendments and to sit on conference committees from which they have up to now been systematically excluded, as well as to ban lobbyist financed gifts and trips.<sup>90</sup>

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<sup>85</sup> See MANN & ORNSTEIN, *supra* note 7, at 214; Frank, *supra* note 79; Press Release, Rep. Nancy Pelosi, Pelosi Prepares Minority Bill of Rights (June 24, 2005), available at <http://democraticleader.house.gov/press/releases.cfm?pressReleaseID=622>.

<sup>86</sup> Jeffrey H. Birnbaum, *House Votes to Disclose Earmarks*, WASH. POST, Sept. 15, 2006, at A1.

<sup>87</sup> *Id.*

<sup>88</sup> Editorial, *Transparency Inadequate*, WASH. POST, Sept. 19, 2006, at A20.

<sup>89</sup> David Ignatius, *How the Democrats Can Step Up*, WASH. POST, Oct. 6, 2006, at A23.

<sup>90</sup> Harold Myerson, *What Democrats Would Do*, WASH. POST, Oct. 18, 2006, at A21.

The Obey-Frank “reform package” noted earlier would, *inter alia*, stop any recorded vote from staying open for more than twenty minutes without the consent of both majority and minority floor managers and leaders. It would prevent “special rules” from changing the text of a committee-reported bill without opportunity for amendment back to the original and would require a formal open meeting of a committee on all differences between the two Houses—and a formal vote on those difference—before a conference committee report could be considered. No conference report could contain items materially different from those voted upon in the open committee session.

Then-Minority Leader Nancy Pelosi has also proposed a Minority Bill of Rights for a “bipartisan administration of the House and for the regular democratic order for legislation,” which mandates regular consultation among both parties’ leaders on scheduling of bills and regular meetings between Chairs and ranking members of committees.<sup>91</sup> The minority party would have control of one-third of committee budgets and office space. On the floor, bills would be subject to a full amendment process to permit substitutes. Floor votes would be limited to fifteen minutes. The document states that “[n]o vote would be held open in order to manipulate the outcome.” Conference committee members would be given advance notice of meetings far enough in advance to permit their attendance. Additionally, Pelosi has signaled she intends to propose new House Rules to bar members from accepting gifts and trips from lobbyists and to deny floor privileges to former members turned lobbyists.<sup>92</sup>

There are, however, those who believe reform will only come when American voters rise up and demand better of their representatives by rejecting at the polls those who fall short.<sup>93</sup> It should be an upbeat observation in a democracy that citizens at the polls are the most likely agent of change. It remains to be seen whether the recent midterm elections reflecting the unpopularity of the Iraq war, the Katrina fiasco, and ethical lapses have shaken up parties and candidates and trimmed “ideological sails.” Have voters in fact sent a message that they want deliberative Congresspersons who spend enough time in Washington to get policy right and who treasure their own independence in vital matters? According to David Broder: “We need an infusion of men and women committed to Congress as an institution to engage with each other seriously enough to search out and find areas of agreement and to join hands with each other to insist on the rights and prerogatives of the nation’s legislature, not make it simply an echo chamber of presidential politics.”<sup>94</sup>

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<sup>91</sup> See Pelosi, *supra* note 85.

<sup>92</sup> See Jeffrey H. Birnbaum, *Lobbyists Won’t Like What Pelosi Has in Mind*, WASH. POST, Oct. 30, 2006, at D1.

<sup>93</sup> See MANN & ORNSTEIN, *supra* note 7, at 227–28.

<sup>94</sup> Broder, *supra* note 8; see also Charles Babington, *Elections May Bring New Accord in Senate*, WASH. POST, Oct. 29, 2006, at A4 (noting then-Minority Leader Reid and then-

In the end, of course, it takes two to do the constitutional tango. Despite the currents in their favor, American Presidents should be as devoted as Congress to the constitutional schemata and to reaching out to Congress to develop mutually satisfactory solutions to incredibly complex problems.<sup>95</sup> A recent example, perhaps borne out of necessity, but worthy nonetheless, is the manner in which President Clinton cooperated with a Republican Congress after 1996 to pass welfare reform, access to health care, and a balanced budget. A President who sincerely declares as part of his campaign for office that he desires to work with Congress in solving the big agenda that awaits him—and acts accordingly—has vast potential to alter the present unsatisfactory dynamics of separation of powers.<sup>96</sup>

The constitutional liability of a dispirited and rancorous Congress in the current world is far greater than in earlier times. Congress's responsibilities have ballooned to encompass virtually every aspect of citizens' lives, as well as life or death decisions about the survival of the nation as a whole. Congress's role as the First Branch means that if it fails to function fairly and efficiently and to work cooperatively with the President, the future of the nation will teeter. The past years have not been augers of confidence in that relationship. One can only hope that the dire nature of current complaints and past failures will energize reform on all three fronts.

#### IV. THE JUDICIARY

Senator Schumer's article aptly recognizes the central role the judiciary plays in the story of how the President is seeking to expand his power.<sup>97</sup> But we think Senator Schumer errs in casting the Court as a full-time villain.<sup>98</sup> Instead, we think the judiciary has, in some areas, played an active and positive role in upholding the Constitution's structure, and that it should be encouraged to continue to do so.

##### *A. The Implications of the Rehnquist Court's Federalism Jurisprudence for Separation of Powers*

Senator Schumer faults the Court for undermining congressional power.<sup>99</sup> In doing so, his argument continues, the Court impairs Congress in terms of its ability to act as a counterbalance to presidential power. He

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Majority Whip McConnell are "consummate dealmakers where top priority is legislative achievement.").

<sup>95</sup> See MANN & ORNSTEIN, *supra* note 7, at 229.

<sup>96</sup> See David Broder, *Can Bush Cross the Aisle?*, WASH. POST, Oct. 27, 2006, at B7.

<sup>97</sup> See Schumer, *supra* note 1, at 24–27.

<sup>98</sup> Here, of course, we refer to Senator Schumer's description of what the Court has done, mainly in the context of its federalism jurisprudence. We take him to agree with us that the Court can and should play a more heroic role, although his script might call for more deference than ours would.

<sup>99</sup> See Schumer, *supra* note 1, at 26–33.

relies on the federalism decisions that the Supreme Court has issued over the dozen years since its decision in *United States v. Lopez*.<sup>100</sup> Because these cases scale back congressional power under the Commerce Clause and Section 5 of the Fourteenth Amendment, Schumer claims that Congress is a less powerful institution and less capable of constraining the expansion of presidential power.<sup>101</sup>

There are two problems with this argument. First, the federalism revolution that *Lopez* ushered in is still in progress. At this point, it is impossible to say where the doctrine as to congressional power will settle. On the cases that have been decided, it is clear that Congress retains a great deal of authority. Perhaps most significantly, the Court has steadfastly refused to limit Congress's power under the Spending Clause.<sup>102</sup> Thus, Congress may continue to make state eligibility to receive federal funds—which have become absolutely vital to the functioning of state government—conditional upon compliance with federal mandates. Moreover, Congress's substantive regulatory power under the Commerce Clause and Fourteenth Amendment remain extensive. After *Lopez* was decided, Congress amended the Gun-Free School Zones Act to add a jurisdictional hook that, as a practical matter, leaves the law co-extensive with the statute invalidated in *Lopez*.<sup>103</sup> Similarly, after the Supreme Court's decision in *City of Boerne v. Flores*,<sup>104</sup> Congress enacted the Religious Land Use and Institutionalized Person Act,<sup>105</sup> which applies heightened religious protections to a virtually identical spectrum of activities as had the unconstitutional Religious Freedom Restoration Act.<sup>106</sup> While we agree with the doctrinal criticisms of these Supreme Court decisions found in Senator Schumer's piece,<sup>107</sup> it is too early to tell how much of a practical limit these decisions will impose on federal power.<sup>108</sup> In this connection, it is noteworthy that the more recent trend has been to uphold power as the Court has retreated from *Lopez*, *Boerne*, and *United States v. Morrison*<sup>109</sup> in cases such as *Gonzales v.*

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<sup>100</sup> 514 U.S. 549 (1995).

<sup>101</sup> See Schumer, *supra* note 1, at 29–33.

<sup>102</sup> See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>103</sup> See 18 U.S.C.A. § 922(q) (West 2000 & Supp. 2006).

<sup>104</sup> 521 U.S. 507 (1997).

<sup>105</sup> Pub. L. No. 106-274, § 3, 114 Stat. 803, 804 (codified at 42 U.S.C. § 2000cc-1 (2000)).

<sup>106</sup> The new Act covers the most common contexts in which the Religious Freedom Restoration Act itself applied—as a vehicle for religious institutions to challenge land use restrictions and for inmates to vindicate their religious exercise interests.

<sup>107</sup> See also William P. Marshall, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355 (2004); Robert Post & Reva Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 YALE L.J. 441 (2000); Peter Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000).

<sup>108</sup> Our greatest concern is for the scope of congressional power to enforce civil rights protections through Section 5 of the Fourteenth Amendment. See Post & Siegel, *supra* note 107.

<sup>109</sup> 529 U.S. 598 (2000).

*Raich*,<sup>110</sup> *Nevada Department of Human Resources v. Hibbs*,<sup>111</sup> *Tennessee v. Lane*,<sup>112</sup> *United States v. Georgia*,<sup>113</sup> and *Central Virginia Community College v. Katz*.<sup>114</sup>

Second, and more fundamentally, the federalism cases do not implicate the balance of power between the President and Congress in the way we have been discussing. It is tempting to conclude that, because the Constitution poises Congress and the President as rivals for power, federalism decisions that weaken Congress necessarily must strengthen the Executive. This conceptualization of the federalism cases, however, may not always be descriptively accurate. Rather, in those cases, the Court limited not only the power of Congress, but the power of the federal government as a whole. It is true that Congress may not legislate the Gun-Free School Zones Act,<sup>115</sup> for example. But it is also true that the President may not enforce the Act. Thus, the ambit of Congress's legislative power is limited, but the ambit of the President's corresponding prosecutorial and investigative powers are correspondingly limited.

The series of cases invalidating the New Deal may provide a better example of this principle.<sup>116</sup> There, Congress's power to establish regulatory regimes in response to the Great Depression was curtailed, but those decisions also impacted presidential power in two important respects. First, some of the statutes delegated expansive authority to the President; thus, presidential power was severely limited as a consequence of decisions invalidating those statutes.<sup>117</sup> Second, the invalidated statutes were drafted by and identified heavily with the Roosevelt Administration itself. Invalidation of such statutes weakened the President's ability to execute his policy agenda. Presidents care deeply about their legislative agendas, and restrictions on the ability of the federal government to legislate may strike at the President in this capacity along with Congress. As Roosevelt's "court-packing" plan attests, such invalidations occasionally provoke serious constitutional confrontations between President and Court.

In the arena of separation of powers cases—those that actually implicate the balance of power between the President and Congress—we see the courts as playing on the whole a positive role, although their record is mixed. As we discuss, the courts have recently stood up to the President

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<sup>110</sup> 545 U.S. 1 (2005).

<sup>111</sup> 538 U.S. 721 (2003).

<sup>112</sup> 541 U.S. 509 (2004).

<sup>113</sup> 546 U.S. 151 (2006).

<sup>114</sup> 126 S. Ct. 990 (2006).

<sup>115</sup> Pub. L. No. 101-647, 104 Stat. 4844 (1990), *invalidated by* *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>116</sup> *See, e.g., A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>117</sup> Indeed, these federalism decisions often expressly invoked both federalism limitations on national power and non-delegation doctrine limits on the ability of Congress to assign rulemaking power to the Executive. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

specifically to reinforce the role that Congress is meant to play in our constitutional structure. For this, they deserve a measure of acclaim.

*B. Rating the Court's Performance as a Constitutional Umpire*

In addition to Congress, the judiciary stands as an important check against the possibility of presidential abuse of power. Against this backdrop, calls for heightened judicial deference to the President on matters of foreign and military affairs are deeply troubling. Indeed, excessive deference has yielded some of the darkest chapters in the history of our judiciary. For example, in *Korematsu v. United States*,<sup>118</sup> the Supreme Court was far too willing to defer in its understanding of the requirements of Due Process and Equal Protection to the considered judgment of the President and military leaders. As a result, the Supreme Court upheld the internment of Japanese Americans based on what turns out to have been no more than the racist assumptions of the military commander charged with securing the West Coast during World War II.<sup>119</sup>

While *Korematsu* is the most notorious example of excessive deference, it is by no means unique. In *United States v. Reynolds*,<sup>120</sup> the Supreme Court upheld the government's assertion of a state secrets privilege to defeat a liability lawsuit against the Defense Department. The government asserted that complying with discovery in the case would require the disclosure of state secrets.<sup>121</sup> Because there was a reasonable likelihood that the material sought through discovery would contain such secrets, the Supreme Court deferred to the government's assertion without conducting *in camera* inspection or otherwise seeking to verify the assertion.<sup>122</sup> It turns out, now that the relevant documents have been declassified, that there were no state secrets in any of the material sought in discovery.<sup>123</sup> The Bush Administration has come to rely extensively on this precedent to assert state secrets immunity from all manner of challenges to its secret anti-terror programs.<sup>124</sup> So far the record is mixed: the Government in the lower courts has been able to block judicial accountability for executive actions with serious civil liberties implications in most cases involving wireless surveillance or even rendition. We believe that modern courts should treat these claims for total immunity more incredulously than did the *Reynolds* Court and energetically seek to preserve maximum room for judicial scrutiny where national security is not clearly at risk.

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<sup>118</sup> 323 U.S. 214 (1944).

<sup>119</sup> See *Korematsu v. United States*, 584 F. Supp. 1406, 1410 (N.D. Cal. 1984); PETER IRONS, *JUSTICE AT WAR: THE JAPANESE AMERICAN INTERNMENT CASES* (1983).

<sup>120</sup> 345 U.S. 1 (1953).

<sup>121</sup> *Id.* at 7–8.

<sup>122</sup> *Id.* at 10–11.

<sup>123</sup> See LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* (2006).

<sup>124</sup> See *ACLU v. NSA*, 438 F. Supp. 2d 754, 758–59 (E.D. Mich. 2006).

The Supreme Court has provided guidance as to the constitutional separation of powers between Congress and the President in the realm of foreign affairs and national security. There is nothing new about this role; some of the most important early Supreme Court decisions involved questions regarding the extent to which the President's use of the military was subject to legal constraint.<sup>125</sup> What is most striking to a modern reader is how little hesitation the Court had in reminding the President that he was subject to congressional restriction even in the conduct of war operations.<sup>126</sup> Since its landmark decision in the *Steel Seizure Case*,<sup>127</sup> the Supreme Court has adhered to the tripartite framework set forth in Justice Robert Jackson's concurring opinion.<sup>128</sup> Under that framework, the Court regards the President's power as "at its highest ebb" when the President acts pursuant to statutory authorization. At the opposite pole is the situation where the President in violation of an express statutory command, in which case the President's action may be upheld only if the constitution grants the President preclusive power to act in the area. That is, the President may disregard Congress only when the Constitution grants the President the exclusive power to act and withholds from Congress any authority to address the subject. The paradigmatic example is the use of the pardon power. Between these polar cases lies a "zone of twilight" wherein the President acts without express congressional approval or disapproval. Resolution of such cases depends upon "contemporary imponderables." Subsequent elaboration, as well as the treatment of the *Steel Seizure* controversy itself, has directed attention to the legislative context in which the President operates. Where that context evinces a "general tenor of . . . acceptance" of presidential action, the Court will be inclined to approve the President's action.<sup>129</sup> Where, however, the legislative context evinces a tenor of disapproval, the Court will be inclined to invalidate the President's action. The Jackson framework emphasizes the importance of executive-legislative coordination and evinces a deep skepticism of unilateral executive action.

Unfortunately, the current Administration's tendentious view of presidential authority—that the President holds expansive inherent powers and that these inherent powers are not subject to legal constraint—has become commonplace in recent discourse regarding presidential power.<sup>130</sup> In a sense, this should come as no surprise. Justice Jackson had observed this tendency among advocates of presidential power:

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<sup>125</sup> See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801).

<sup>126</sup> See cases cited *supra* note 125.

<sup>127</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>128</sup> See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

<sup>129</sup> *Id.*

<sup>130</sup> See, e.g., JOHN YOO, *THE POWER OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

Loose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers. “Inherent” powers, “implied” powers, “incidental” powers, “plenary” powers, “war” powers, and “emergency” powers are used, often interchangeably and without fixed or ascertainable meanings. . . . The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements . . . .<sup>131</sup>

Justice Jackson’s opinion goes on to reject this approach to the interpretation of presidential power—not because the President lacks powers not specifically mentioned in the Constitution’s text, but because it is too extravagant to claim that these powers are illimitable. Where Congress also has textually expressed power, the existence of a concurrent presidential power does not evict Congress from the field. To take a less freighted example, it is now well-established that the President enjoys an inherent power to remove executive branch officers. That power is not expressly granted by the Constitution’s text. Rather it is a power that inheres in the nature of the executive and finds further support from the President’s constitutional authority to make appointments.<sup>132</sup> Yet it is similarly well-established that Congress’s authority to create and define federal offices allows it to imbue executive branch officers with independence and, to this end, to severely limit the President’s inherent removal authority, even over some of the nation’s most consequential officers.<sup>133</sup> As Justice Jackson observed in *Steel Seizure*, it is not at all surprising that the Administration would seek to assert broad inherent powers, but the judiciary need not accept these assertions.

The Administration has not confined its arguments to political controversies. It has repeatedly offered its expansive view of inherent presidential powers to the Supreme Court. Following Justice Jackson, the Supreme Court has rejected the Administration’s claims of power. In *Hamdi v. Rumsfeld*,<sup>134</sup> for example, the Administration argued that the President held inherent authority to designate anyone, including a United States citizen, an enemy combatant and to hold such a designee indefinitely and incommunicado, subject to no judicial review of the President’s designa-

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<sup>131</sup> *Youngstown*, 343 U.S. at 646–47 (Jackson, J., concurring).

<sup>132</sup> *See, e.g.*, *Myers v. United States*, 272 U.S. 54 (1927).

<sup>133</sup> *See Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the validity of the independent counsel provisions of the Ethics in Government Act). It is worth noting that the Chairman of the Board of Governors of the Federal Reserve is insulated from the President’s at-will removal authority, as are the other members of the Board of Governors. Thus, one of the nation’s most important economic policy-making officers is independent of presidential supervision and control.

<sup>134</sup> 542 U.S. 507 (2004).

tion.<sup>135</sup> The Court rejected this claim. As Justice O'Connor wrote, citing *Steel Seizure*, "a state of war is not a blank check for the President."<sup>136</sup> Indeed, Justice O'Connor asserted that the judiciary would "play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."<sup>137</sup> The Court then went about describing in general terms the sort of process to which citizens are entitled, but left the important work of fashioning such a process to the Congress.<sup>138</sup> In essence, then, the Court regards itself as a check, but one that operates mainly by enforcing Congress's role in establishing the legal regime through which the President must operate.<sup>139</sup>

These issues returned to the Supreme Court last term in *Hamdan v. Rumsfeld*.<sup>140</sup> President Bush asserted inherent authority to establish military tribunals to try enemy combatants for violations of the laws of war. The Supreme Court found it unnecessary to decide whether the President has such authority. The Supreme Court held that treaty and statutes had made some provision for the use of military commissions, and that the President was bound to comply with those legal constraints. In other words, until Congress said otherwise, the military commissions must conform to the requirements of the Geneva Convention and the Uniform Code of Military Justice. The Court thus necessarily held that the President's power is subject to legal constraints.<sup>141</sup> The Court also emphasized the role that Congress plays in establishing the legal framework for the conduct of military commissions. Thus, again, the Court acted as a check on presidential power primarily by reinforcing the role of Congress.

Because the Court has continued to adhere to Justice Jackson's framework, it has continued to emphasize the role of Congress as a check on presidential power. The judiciary, then, will only be as effective a check on presidential power as is Congress itself. The detention of enemy combatants and the procedures of military commissions is a vivid illustration of this point. After *Hamdi* and *Hamdan*, Congress has enacted sweeping legislation that largely authorizes the President to do what he has been

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<sup>135</sup> See Brief of Respondent at 13, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 724020.

<sup>136</sup> *Hamdi*, 542 U.S. at 536 (plurality opinion).

<sup>137</sup> *Id.* at 536.

<sup>138</sup> See *id.* at 537-39.

<sup>139</sup> *Hamdi* was decided the same day as *Rasul v. Bush*, in which the Court similarly asserted its role as a check on executive power in the context of detention of non-citizens. 542 U.S. 466 (2004). In *Rasul*, the Court held on statutory grounds that it has habeas corpus jurisdiction over detentions at the U.S. military base at Guantanamo Bay, Cuba. *Id.* at 480-81.

<sup>140</sup> 126 S. Ct. 2749 (2006).

<sup>141</sup> As the Court put it, "The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the rules and precepts of the law of nations . . ." *Hamdan*, 126 S. Ct. at 2786 (quoting *Ex parte Quirin*, 317 U.S. 28 (1942)).

doing.<sup>142</sup> The legislation goes further to grant the executive branch broad insulation from judicial review and immunity for past actions.<sup>143</sup> If the content of our protections from presidential powers is to be supplied not by the courts but by Congress, all of the reasons set forth above to doubt Congress's fitness for this role will ultimately serve to undermine the judiciary as a check on presidential power as well.

### C. Congress and the Courts: A Mutually Dependent Relationship

Although Senator Schumer feels that the courts have been half of a one-two punch to the legislative branch, it should be noted that the courts too have taken the brunt of Presidential assertions of exclusive power, particularly in the "war on terror." In that area, Congress has partnered with the Executive to strip the courts of traditional powers to guard the liberty of those who seek their intervention. Congress does, of course, have constitutional power to define the jurisdiction of inferior courts and to regulate their procedures. In recent times, it has used that power to strip the federal courts of habeas corpus jurisdiction for any alien, inside or outside the United States, designated as an "unlawful enemy combatant" by an executive military tribunal in a hearing devoid of traditional due process protections.<sup>144</sup> Other jurisdiction-stripping bills on subjects like gay marriages and Pledge of Allegiance suits are still pending.<sup>145</sup> Congress has even gone so far as to tell federal judges they may not consult foreign or international sources in interpreting Common Article Three of the Geneva Convention in cases heard in civilian courts.<sup>146</sup> It has also banned the invocation of treaty rights by litigants in federal courts.<sup>147</sup> In the past, Congress and the courts have in most cases worked out a *modus vivendi* that was more comfortable. Congress has been admirably reticent, for instance, after the first century of coexistence, to use its impeachment power to punish judges for unpopular opinions.<sup>148</sup>

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<sup>142</sup> See Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3(a)(1), §§ 948a(1)(A), 948b(a)–(c), 120 Stat. 2600, 2601 (defining an unlawful enemy combatant, denoting the purpose of the military commissions and the President's authority to establish the same, and declaring that unlawful enemy combatants are subject to trial by military commission).

<sup>143</sup> *Id.* sec. 3(a)(1), §§ 948b(a)–(b), 950v(b)(12) (defining President's authority to utilize military commissions and defining "cruel or inhuman treatment"); *id.* sec. 6(a)(3), § 2441 (granting the President authority to interpret meaning and application of the Geneva Conventions); *id.* sec. 7(a), § 2241(e) (purporting to limit federal court jurisdiction over writs of habeas corpus filed by alien enemy combatants).

<sup>144</sup> *Id.* sec. 7.

<sup>145</sup> See, e.g., Pledge Protection Act of 2005, S. 1046, 109th Cong. (2005); S. Res. 1, 109th Cong. (2006) (proposing marriage amendment to Constitution).

<sup>146</sup> See Military Commissions Act sec. 6(a).

<sup>147</sup> See *id.* sec. 5.

<sup>148</sup> See CHARLES GEYH, COURTS AND CONGRESS COLLIDE 113–71 (2006).

Congress needs independent judges to preserve congressional power and to enforce demands for information from a recalcitrant executive. It is true, of course, that in the past the Courts have been understandably reluctant to decide disputes between the two political branches, in part because of their own vulnerability as the “least dangerous branch.” They have erected a series of barriers to taking such disputes to court in the form of standing requirements, bans against “political questions,” and ripeness standards. As Justice Powell has cautioned: “The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress” until the political branches reach a constitutional impasse—a term that remains undefined to this day.<sup>149</sup> But one must ask: why should a duly authorized oversight committee, when met with executive imperviousness to its demands, not issue a subpoena and ask the court to enforce it? To our knowledge this has been threatened only once in recent Congresses.<sup>150</sup> Although the Court’s doctrine on standing for Congress members to sue the Executive is stringent, standing doctrine is a creature of the Court, albeit with constitutional roots in the “case or controversy” requirement of Article III judicial power. It should be capable of adjustment to meet the genuine needs of another branch to perform its functions.<sup>151</sup>

Congress also needs an independent judiciary to interpret its laws as they were intended to be interpreted. Many of the problematic interpretations reflected in the numerous signing statements must ultimately be challenged in court if the laws’ original purposes are to be fulfilled. Congress and the courts are natural allies in this sense, and Congress’s power to affect the general welfare often depends upon the third branch.

Unfortunately, the relationship of Congress and the courts at times manifests itself in self-destructive ways. In the views of some commentators, Congress has become “addicted to judicial review.”<sup>152</sup> When Congresspersons have tried unsuccessfully to change a bill so as to remove what they consider unconstitutional provisions, they end up voting for the bill anyway, proclaiming that “the court will clean it up.”<sup>153</sup> This use of courts as “[a] constitutional chambermaid . . . that exist[s] to clean up after Congress smashes the room” is an unremitting disaster for separation of powers where each branch has a duty to conform to the Constitution.<sup>154</sup> The notion that there is a judicial outfielder to catch the bad throws as well as to provide political cover for risky votes contributes to sloppy legislating.

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<sup>149</sup> *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (Powell, J., concurring).

<sup>150</sup> See MANN & ORNSTEIN, *supra* note 7, at 161–62.

<sup>151</sup> *But see* Laurence Tribe, Larry Tribe on the ABA Signing Statements Report, Balkanization (Aug. 6, 2006), <http://balkin.blogspot.com/2006/08/larry-tribe-on-aba-signing-statements.html> (arguing that grants of standing to Congress to challenge signing statements will likely fail in courts).

<sup>152</sup> Dahlia Lithwick & Richard Schragger, *Congress Behaving Badly*, WASH. POST, Oct. 9, 2006, at B02.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

Congress wants and deserves independent judges who will umpire constitutional disputes in a fair and sensitive manner, will interpret laws as Congress passed them, and will, as a last resort, aid Congress in asserting its constitutional prerogatives. And Congress, in fact, has a valid constitutional tool to help secure such judges: its “advise and consent” function, discussed at length by Senator Schumer. We agree that ideological tilts are legitimate areas for confirmation inquiries; we are indeed surprised that the extensive list of questions he posits rarely, if ever, gets asked. In truth, Democratic and Republican nominees alike have set a precedent that they will only answer such questions if they have already opined on them publicly. But that precedent does not merit indefinite tenure, and where no commitments or answers to specific future cases are asked for, Senator Schumer’s list is a good place to begin more targeted and forceful confirmation hearings.

This is an area in which the Senate has not heretofore distinguished itself.<sup>155</sup> Friends as well as critics noted the lack of coordination among Democrats on the Judiciary Committee and among the Senate leadership in their questioning of Samuel Alito and John Roberts. Indeed, there is consensus that the Republicans displayed far better coordination in these confirmations hearings. Unfocused and ad hoc questioning by members fails not only their own branch in protecting its prerogative, but also their duty to educate the watching public on the crucial issues at stake in the nomination.

The Framers fitted federal judges securely into their checks and balances regime. They would be nominated by the President, but they had to be confirmed by the Senate. Dubbed the weakest branch, dependent on Congress for grants of jurisdiction as well as money to operate, the federal judiciary has traditionally survived and flourished because of the kind of mutual restraint between it and Congress that we yearn to see between the President and Congress. Early attempts by Congress to impeach judges on the basis of disagreements with their rulings failed and have not been seriously pursued since.<sup>156</sup> Jurisdiction-stripping bills have been introduced from time to time, but only sometimes—as in the case of prisoner suits and, lately, detainee habeas corpus actions—have they succeeded. There are also the recurrent media attacks on judges, some instigated by congresspersons or presidential candidates, decrying “imperious” or “lawless” judges whose rulings do not please the speaker. Few if any of these measures in the past have presented real dangers to judges’ independence, although there is always the risk that if you throw around a libel long enough it may stick in the public perception.

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<sup>155</sup> See Herman Schwartz, *Legal Legacy*, THE NATION, Oct. 30, 2006, available at <http://www.thenation.com/doc/20061030/schwartz>.

<sup>156</sup> See GEYH, *supra* note 148, at 113–71.

In the past few years, however, a new threat has emerged in which Congress has allied itself with the President in cabining judicial power. The President has taken the tack of marginalizing the judiciary, trying to keep it away from reviewing significant executive actions, especially in the area of national security. The Court, as we have seen, has rebuffed several of those attempts in the *Hamdi*, *Hamdan*, and *Rasul* cases. But the fate of other attempts, such as the state secrets doctrine, remains unsettled. In the area of foreign affairs, the Bush Administration has argued strenuously and mostly successfully against courts' interpreting treaty provisions, such as the Geneva Conventions, as conferring a cause of action upon individual litigants. Congress, regretfully, has legislated away judicial review after Supreme Court decisions opened it up by denying detainees habeas corpus and other time-honored remedies. Thus, a key question in the future of separation of powers may well be the attitude of the judges toward the sharing of constitutional governance—whether they, like Congress, will accede passively to presidential assertions using the familiar doctrine of deference to the policymaking organs or whether they will assertively monitor the boundaries between the branches, continue to defend their own turf, and rise to the defense of civil liberties. So far the record is mixed, but somewhat positive.

Until the latter part of the last century, judges were nominated principally on the basis of political patronage, with some notable exceptions of bipartisan appointments to the Supreme Court made on the basis of intellectual excellence. Beginning at least as far back as the Carter Administration, however, not only Presidents but congresspersons, political operatives, and ideological groups began to realize that they needed the courts to ensure the long range success of their key policies. According to one study, policy activists have emerged as the main source of grassroots support for the parties and their candidates, and they have been vocal in their demands that judicial as well as legislative candidates meet their criteria.<sup>157</sup> Thus, the judges, too, like the legislators, have become more polarized as have their confirmation processes. Valid or not, there is no doubt that judicial selection is now a prominent and legitimate campaign issue in Presidential and Senatorial elections.

Some view Harriet Miers's case as indicative of another change in judicial politics—that the nominee need not only be within the acceptable ideological range of the party core but that she must display all the attributes of an intellectually respected professional with a thick résumé of accomplishment. Then-Senate Judiciary Committee ranking member Patrick Leahy recently said of a court of appeals nominee that she was what was called for, a “qualified consensus nominee,” but added: “The Senate

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<sup>157</sup> See Rorie Spill Solberg, *Joining Two Fields of Political Science*, 90 JUDICATURE 40, 41 (2006) (reviewing NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS (2005)).

must not rubberstamp judicial nominees who will fail to act as a constitutional check on the Administration's unprecedented power grab."<sup>158</sup>

Much study has been devoted to tracking what happens after nominees are confirmed, become judges, and confront cases involving issues near and dear to the hearts of their sponsors. Most of the evidence seems to support the notion that they vote predictably along the lines of their sponsors where they have discretion and are not bound by precedent.<sup>159</sup> There are also occasional surprises. However predictable judges may be, it still remains essential for the Senate to get better at probing nominees' attitudes and thoughts on presidential power and checks and balances.

Judicial review is most indispensable to separation of powers in times of strongly unified government, when Congress and the President are in sync and internal checks in both branches at their most dormant.<sup>160</sup> That, however, is also likely to be a time when the President and Congress have the most to say about the appointment of judges. Congress should always keep in mind that the same judges will sit in times of divided government, when Congress's own powers may be at stake. Thus, it should respect the constitutional necessity for a truly independent judiciary.

## V. CONCLUSION

In the Constitution that emerged at Philadelphia in 1787, the Framers made the structure of government power the document's central feature. Rather than rely on what James Madison derisively called "parchment barriers,"<sup>161</sup> the Constitution established a system of checks and balances to safeguard liberty. As the practice of politics has evolved, the capacity of that system to protect liberty has come under serious challenge.

In this Article, we have not sought to catalog those threats exhaustively, but rather to identify those with the most salience in contemporary debates. We have also offered a variety of proposals—most of them already the subject of public discourse—to make the system of checks and balances work more effectively. These proposals have no partisan coloring. Rather, they are meant to address the systemic workings of the government on a practical level. Our suggestions are intended to improve in various ways the government's openness and accountability, its capacity for deliberation, and its compliance with internal mechanisms designed to prevent abuse and illegal conduct. There is no particular reason to expect that any of these reforms would favor one party or the other over time.

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<sup>158</sup> Press Release, Sen. Patrick Leahy, On Judicial Nominations and National Priorities (Sept. 5, 2006), available at <http://leahy.senate.gov/press/200609/090506.html>.

<sup>159</sup> See Solberg, *supra* note 157.

<sup>160</sup> See Levinson & Pildes, *supra* note 46, at 2367–68.

<sup>161</sup> THE FEDERALIST No. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961).

From the standpoint of getting reforms adopted, we find reason for optimism in the most recent congressional elections. Voters across the country showed their discontent with the way politics is practiced in government generally, and in Congress particularly. According to national exit polls, “when asked which issue was extremely important to their vote, more voters said corruption and ethics in government than any other issue, including the war.”<sup>162</sup> In addition, the new majority in Congress campaigned on a pledge to pursue reform in the way the government operates.<sup>163</sup> Senator Schumer, of course, was an important architect of that campaign. We commend him for his pledge and will be watching to see if his colleagues follow through on their commitment. Just as the danger of presidential overreaching does not automatically disappear with a change of administration, so too must each Congress look inward at its own processes and practices to ensure that it presents a strong, vibrant and ethical presence to fulfill its unique functions in the checks-and-balances construct.<sup>164</sup> We are hopeful that this new Congress will do just that.

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<sup>162</sup> See *Corruption Named as Key Issue by Voters in Exit Polls*, CNN.COM, Nov. 17, 2006, <http://www.cnn.com/2006/POLITICS/11/07/election.exitpolls/index.html>.

<sup>163</sup> See, e.g., Jonathan Weisman, *Democrats Unveil Lobbying Curbs*, WASH. POST, Jan. 19, 2006, at A1 (“Congressional Democrats yesterday laid out a plan to change what they called a GOP ‘culture of corruption’ in Washington.”).

<sup>164</sup> See, e.g., David D. Kirkpatrick, *Democrats Split on How Far to Go with Ethics Law*, N.Y. TIMES, Sept. 19, 2006, at A1 (discussing split among democrats on whether to restrict earmarks as well as ban lobbyist perks and on creation of an independent ethics watchdog for Congress).