

Under Attack: Congressional Power in the Twenty-first Century

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I. INTRODUCTION

Every basic civics text recites that our government is divided into three branches and that these three branches are co-equal partners. But as true as that once was, this system of exquisite checks and balances is at risk of being made anachronistic by recent legal and political developments. The traditional functions of Congress as lawmaker and a check on other branches have come under sustained and systematic assault from both the judicial and executive branches.

The assault from the Executive began as a gradual diminution of congressional power after a post-Nixon-era zenith, but has accelerated most dramatically under President George W. Bush. The threat to Congress from the Judiciary comes in the form of rulings invalidating congressional enactments at an alarming pace over the past fifteen years, largely in service of a cramped interpretation of congressional authority under both the Commerce Clause and Section 5 of the Fourteenth Amendment. Together, these twin trends have undermined Congress's role as lawmaker and its role as a bulwark against overreaching by the other branches.

Although the trends in the two other branches of American government have developed separately, they are born of the same philosophy. Commentators and political actors have traditionally focused on just one or the other trend, but in my view it is the unprecedented combination of these two threats that poses a real danger to our democracy. There is much more at stake here than institutional pride and the collective egos of 535 elected legislators. The costs of an anemic Congress over the long term are considerable.

First, continued erosion of Congress's lawmaking power undermines democracy. Preemption of the legislative function by the President increases the concentration of power and the risk of abuse. It also decreases the transparency that accompanies a legislative process marked by open debate and

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compromise. Preemption of the legislative function by the Judiciary similarly diminishes democracy.

Second, in the absence of a prompt reassertion of Congress's power, its powerlessness risks becoming institutionalized. Unflexed, congressional muscles atrophy. Handicaps created by the Executive may be difficult to dismantle. Federalism precedents espoused by the Judiciary may be impossible to undo. Even if one believes that the current President has not taken executive power too far (though I do), the next president, from whichever party, will likely continue the trend if unchecked. A compliant Congress risks permanently undermining its credibility and its relevance. When Congress needs to rein in a future president, it may find that it lacks the institutional capacity to do so.

In sum, Congress does have a role equal to the other branches and must have this equal role. It is a role envisioned by the Framers, enshrined in the Constitution, and ennobled by the historical examples of our greatest legislators. A responsible and responsive Congress can solve many of the problems America confronts, improve respect for government by providing oversight and demanding accountability, and decrease partisan gridlock in Washington.¹

Undoubtedly, Congress is at something of an institutional disadvantage against the Executive. It has no agencies and bureaucracy to rival the Secretary of Defense or the Attorney General. Rather, Congress consists of 535 individual lawmakers divided between two parties and dedicated to unique and varying agendas. However, members of both parties ought to agree that our representative system demands—and the American people deserve—a Congress that is not just a rubber stamp for the Executive, but an independent, co-equal, and assertive branch of government. A Congress grown weak and compliant imperils democracy.

This Article addresses recent executive and judicial branch encroachment upon congressional power. Part II argues that, consistent with the Founders' vision, Congress must be assertive and strong, particularly with respect to its two preeminent functions—making laws and checking the Executive. Part III analyzes the threat from the executive branch. It describes the current administration's calculated efforts to expand its power at the expense of Congress, focusing on its conduct of the war on terror and its resistance to oversight in this area and others. Part IV examines the threat from the judicial branch, explaining that the New Federalism, pursuant to which numerous acts of Congress have been struck down, is a dangerous usurpation of Congressional authority. Finally, Part V presents

¹ The weakness of Congress and its abdication of responsibility on so many issues in recent years goes a long way in explaining its unpopularity during this time. See Lydia Saad, *The Gallup Org.*, *Congress Approval at 12-Year Low* (Apr. 17, 2006), <http://www.galluppoll.com/content/?ci=22435>.

several ways Congress can re-assert its powers and take firmer control over the nation's future.

II. THE NEED FOR A ROBUST AND ACTIVE CONGRESS

Divided government is the hallmark of American constitutional democracy. As James Madison wrote in *The Federalist No. 47*: “The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.”² The Founders, acutely sensitive to British political history and the American revolutionary experience, struck a careful and delicate balance that would forge a more effective government than was possible under the Articles of Confederation, while guarding against a slip back to tyranny. At the heart of this balance was a strong legislature. A simultaneously strong President and Congress are not mutually exclusive; rather, they are fundamental to freedom, security, and effective governance.³

The particular emphasis the Founders put on the vitality of Congress is evident in the structure of the Constitution itself, which sets forth the powers of Congress before turning to any other branch.⁴ Indeed, as Professor Akhil Amar has explained, Congress stands “as first among equals, with wide power to structure the second-mentioned executive and third-mentioned judicial branches.”⁵ As the branch closest to the people, Congress has the responsibility to protect the general welfare by making laws and providing a check on the Executive.

Congress's chief mandate, of course, is the making of laws. The first clause of the first section of the first article of the Constitution provides: “All legislative Powers herein granted shall be vested in a Congress of the United States.” That legislative authority includes, pursuant to Section 8 of Article I, the power to “lay and collect Taxes,” to “provide for the common Defence and general Welfare of the United States,” to “regulate Commerce with foreign Nations, and among the several States,” to “constitute Tribunals inferior to the supreme Court,” to “raise and support Armies,” and a host of other powers. To affect all of this, moreover, the Constitu-

² THE FEDERALIST NO. 47, at 244 (James Madison) (Buccaneer Books ed., 1992).

³ In a 1984 speech, President Reagan pointed to the limits of Congress's capacity to make foreign policy but at the same time recognized the importance of its role. “To meet the challenges of this decade,” he noted, “we need a strong President and a strong Congress.” This is no less true today. *Excerpts from President Reagan's Speech on Foreign Policy and Congress*, N.Y. TIMES, Apr. 7 1984, § 1, at 6.

⁴ Indeed, the founding generation considered popularly elected representatives more closely connected to the populace than other officials. At the Constitutional Convention of 1787, George Mason suggested that the House of Representatives “was to be the grand depository of the democratic principles of the government.” THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH* 19 (2006).

⁵ AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 110–11 (2005).

tion grants the legislature the authority to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”

Congress’s job of oversight—too often overlooked and underemphasized—is a critical element of its exercise of “necessary and proper” powers.⁶ Though the work of hearings and oversight is usually incremental, sometimes tedious, and occasionally conducive to political opportunism, it remains the backbone of a strong body politic. Indeed, in the context of America’s system of checks and balances, congressional oversight of the executive branch is, in the view of some, *equal* in importance to the legislative function. In his 1885 work *Congressional Government*, Woodrow Wilson famously noted that “[q]uite as important as legislation is vigilant oversight of administration.”⁷ More recently, one scholar has written: “[T]here is no substitute for congressional oversight in our democracy. Without it, our public life would be considerably impoverished.”⁸ The Supreme Court itself has recognized the necessary connection between Congress’s power to legislate and its power to investigate and oversee: “This Court has often noted that the power to investigate is inherent in the power to make laws because ‘[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.’”⁹ Thus, the Constitution’s broad grant of power to the preeminent branch has as its indispensable and logical corollary vigorous and vigilant oversight.

The oversight function, moreover, is the logical and necessary expression of the Founders’ vision of checks and balances. As Madison wrote in *The Federalist No. 51*, the Republic would function well only within such a competitive and oppositional system: “[I]n all the subordinate distributions of power, . . . the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other.”¹⁰ Fi-

⁶ See *id.* at 111 n.* (“Article I . . . implicitly gave each house of Congress broad powers of investigation and oversight—powers . . . that were necessary and proper adjuncts to Congress’s enumerated powers to enact legislation, appropriate funds, conduct impeachments, and propose constitutional amendments”); Frederick M. Kaiser, *Congressional Oversight and the Presidency*, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1988, at 75, 77 (noting that “[a]lthough the Constitution grants no formal, express authority to oversee or investigate the executive, oversight is implied in Congress’s authority to appropriate funds, enact laws, raise and support armies, provide for and maintain a navy, impeach and try the president and U.S. officers, and advise and consent on treaties and presidential nominations, among other powers.”).

⁷ WOODROW WILSON, CONGRESSIONAL GOVERNMENT 297 (1885).

⁸ Charles Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 ADMIN. L. REV. 199, 216 (1998).

⁹ *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)); see also *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (holding that some oversight is “incidental to the legislative function of Congress”); *Doe v. McMillan*, 412 U.S. 306, 313 (1973) (the “acts of authorizing an investigation pursuant to which . . . materials were gathered” is a central part of the legislative process); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (oversight authorized within the Constitution).

¹⁰ THE FEDERALIST NO. 51, at 263 (James Madison) (Buccaneer Books ed., 1992).

nally, the tools for oversight have been strengthened by specific legislation, such as the Legislative Reorganization Act of 1946.¹¹

Notwithstanding recent congressional obeisance and abdication, the legislature has a long and grand tradition of checking power, spotlighting abuse, preventing fraud, and preserving liberty. Historical examples of vital congressional checking abound, even in wartime. Twelve days after Pearl Harbor, for example, conservative Senator Robert Taft—known as “Mr. Republican”—emphasized the importance of debate and deliberation in the United States Senate and said, “as a matter of general principle, I believe there can be no doubt that criticism in time of war is essential to the maintenance of any kind of democratic government.”¹²

Criticism meant not only speeches from the floor of the United States Congress, but also organized investigation. Thus, in the 1940s, Senator Harry Truman provided aggressive oversight over the military and uncovered billions of dollars of wasteful spending. In the 1970s, the bipartisan Church Committee uncovered abuses and held officials to account at the FBI and CIA. In the 1980s, Congress investigated Iran-Contra through public hearings, which led President Reagan to establish the independent Tower Commission.

It is clear, then, that responsible oversight is Congress’s duty, and that it can effectively flex its muscles when it has the will.¹³ Lately, that will has been lacking. When President Bush assumed office, “[t]he institutional rivalry designed by the framers gave way to a relationship in which Congress assumed a position subordinate to the executive. Party trumped institution.”¹⁴

As the 110th Congress begins, both Congress’s legislative and oversight abilities have atrophied. Although Congressional clout has historically ebbed and flowed as a function of shifting international threats, domestic circumstances, and party dominance, there appears no doubt that Congressional power is at its lowest ebb in memory.

First, Congress’s sister branches have challenged, undermined, and usurped its legislative function to a significant degree. The Executive, for example, in recent years has relied unduly upon presidential signing state-

¹¹ 2 U.S.C. § 31 (2000); see Karla W. Simon, *Congress and Taxes: A Separation of Powers Analysis*, 45 U. MIAMI L. REV. 1005, 1027 n.81 (1991) (suggesting that the Act’s purpose was to reinvigorate congressional oversight of the executive branch).

¹² CLARENCE E. WUNDERLIN, ROBERT A. TAFT: IDEAS, TRADITION, AND PARTY IN U.S. FOREIGN POLICY 63–64 (2005).

¹³ Daryl Levinson and Richard Pildes have argued that the Madisonian conception of inter-branch competition has never accurately depicted American politics, and that inter-branch rivalry gave way to partisanship not long after the founding of the Republic. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313 (2006). Nonetheless, the Truman example—as well as the heavy oversight that existed from 1993 to 1994—demonstrates that single-party control of both branches has not always halted healthy inter-branch competition.

¹⁴ MANN & ORNSTEIN, *supra* note 4, at 139.

ments to undercut and reinterpret congressional enactments.¹⁵ Although signing statements have been used since early American history, and Presidents of both parties have issued them to articulate their interpretation of statutory provisions, President Bush has employed them far more aggressively than his predecessors. In the process, the President has dangerously infringed on the lawmaking role of Congress.

As a former Republican official has testified, “These [signing] statements, which have multiplied logarithmically under President George W. Bush, flout the Constitution’s checks and balances and separation of powers. They usurp legislative prerogatives and evade accountability.”¹⁶ A former Clinton official had this to say: “The Bush administration’s frequent and seemingly cavalier refusal to enforce laws, which is aggravated by its avoidance of judicial review and even public disclosure of its actions, places it at odds with these principles and with predecessors of both parties.”¹⁷ Critics also emphasize that, unlike earlier Presidents, President Bush has not balanced his use of signing statements with the presidential veto. During his six years in office, President Bush has vetoed only one law. In particular, the Administration’s track record of using signing statements to do everything from restricting oversight to blocking congressional involvement in the war on terror has raised a number of alarms; indeed, the President has taken issue with an unprecedented number of congressional enactments: over 750.¹⁸

The Executive has also undermined the legislative prerogative in a more fundamental way by repeatedly insisting on unilateral action with respect to the war on terror rather than cooperating with Congress to modify laws that might be in need of changes or updates. As set forth below, this is true both of the Administration’s secret implementation of a terrorist surveillance program (rather than working together with Congress to modify surveillance laws) and in its independent establishment of a military tribunal system (rather than working together with Congress to modify the Uniform Code of Military Justice). The Executive’s approach to both matters has drawn judicial rebuke and potentially slowed progress in the war on terror.

The Judiciary, meanwhile, has undermined the lawmaking authority of Congress with the Supreme Court’s New Federalism, reflecting a trend of diminishing judicial deference to Congress’s ability to find facts and enact appropriate laws. Thus, as Judge John Noonan wrote, “[t]he Court’s ef-

¹⁵ *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Charles J. Ogletree, Jr., Professor, Harvard Law School).

¹⁶ *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Bruce Fein, Partner, Fein & Fein).

¹⁷ Walter Dellinger, *A Slip of the Pen*, N.Y. TIMES, July 31, 2006, at A17.

¹⁸ Charlie Savage, *Bush Challenges Hundreds of Laws, President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1.

fort to give more power to the states has led at the same time to the accretion of power by the Court” and also to its striking down an unprecedented number of federal laws, as it substitutes its own judgment for that of Congress.¹⁹

Second, Congress’s oversight function is also on the wane. To fulfill its oversight function, Congress requires access to information from the executive branch. As early as 1792, President George Washington furnished documents so Congress could investigate military losses during Major General Arthur St. Clair’s 1791 campaign against Indian tribes in Ohio, and reserved only the right to withhold documents “the disclosure of which would injure the public.”²⁰ President Washington viewed executive privilege as a narrow tool to protect the national interest. In the years since, the executive branch has refused disclosure, preserving and expanding its own power. As a result, access to documents has provoked countless struggles between the executive and legislative branches throughout American history.²¹ Over the years, however, Congress has developed various forms of leverage to force compliance, including the power of the purse, the power to impeach, the use of congressional subpoenas, the holding of executive officials in contempt, GAO investigations, and the blockage of nominations.²² Unfortunately, Congress has demonstrated little interest in using any of these tools during the Bush era.

Two independent scholars have shown that Congress has quite dramatically fallen down on its job to act as a check on the executive branch during the Bush Administration, observing that after a notable decline following the Republican takeover of Congress under President Clinton “oversight has all but disappeared” under the Bush Administration.²³ Their observations are striking:

- In the House Government Reform Committee, there were 135 hearings described as “oversight” in the 1993–94 session of Congress; a decade later, there were only 37 such hearings.²⁴ By this objective measure, oversight in that committee fell 73%.

¹⁹ JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* 13 (2002).

²⁰ LOUIS FISHER, U.S. LIBRARY OF CONG., CONG. RESEARCH SERV., *CONGRESSIONAL ACCESS TO EXECUTIVE BRANCH INFORMATION: LEGISLATIVE TOOLS* 3 (2001).

²¹ The Bush Administration’s politicization of the bureaucracy has added an additional reason to withhold information about its deliberative processes. Understandably, the Administration prefers not to disclose information about its insular decisionmaking structures. Of course, while these structures give the Administration more reasons to keep its deliberations secret, they also give Congress more reasons to shed light on them.

²² See FISHER, *supra* note 20.

²³ See Norman J. Ornstein & Thomas E. Mann, *Congress Checks Out*, FOREIGN AFF., Nov.-Dec. 2006, at 67, 70 (citing Susan Milligan, *Congress Reduces Its Oversight Role: Since Clinton, A Change In Focus*, BOSTON GLOBE, Nov. 20, 2005, at A1).

²⁴ *Id.* at 71.

- The House Energy and Commerce Committee produced 117 pages of activity reports relating to oversight in the 1993–94 session; a decade later, it generated only 24 pages, a 79% drop.²⁵
- While Congress heard 140 hours of testimony on the subject of President Clinton’s alleged use of his Christmas mailing list to identify campaign donors in the mid-1990s, House Republicans heard only 12 hours of testimony on Abu Ghraib.²⁶
- Notwithstanding the tradition of wartime oversight, the Senate Armed Services Committee held no hearings specifically on operations in Afghanistan in 2003 and 2004.

The data only reflect what is painfully apparent even to Republican members of Congress—oversight has fallen precipitously during the past six years. Recently, even some Republicans have bemoaned the sorry state of oversight in Congress. One Representative acknowledged, “I don’t think we have been doing the job we should have been doing for several years on oversight.”²⁷ Another simultaneously acknowledged the fact of decreased oversight and candidly supplied a principal reason for the falloff: “Our party controls the levers of government. We’re not about to go out and look beneath a bunch of rocks to try to cause heartburn. Unless they really screw up, we’re not going to go after them.”²⁸

What has given rise to this state of affairs? In no small measure, it has been caused by an unfortunate congressional acquiescence. At bottom, congressional power wanes at the peril of the people. The dangers of a weak Congress are discussed at greater length below.

III. THE EXECUTIVE ASSAULT ON CONGRESSIONAL POWER

The Bush Administration’s arrogation of power, at the expense of the Congress, has been stunning. It has, moreover, been lamented at both ends of the political spectrum. In July 2006, my liberal colleague Barney Frank delivered a speech from the floor of the House of Representatives accusing the executive branch of undermining the system of checks and balances carefully constructed by the Founders:

We have talked, from the beginning of this country, in the debates over ratification of the Constitution, about the benefits of checks and balances. This is an administration which considers checks and balances to be a hindrance to effective governance. This is an administration that believes that democracy consists essentially of

²⁵ *Id.*

²⁶ *Id.*

²⁷ David Nather, *Congress as Watchdog: Asleep on the Job?*, 61 CQ WKLY. 1190, 1191 (2004) (quoting Republican Rep. Jim Kolbe).

²⁸ *Id.* at 1190 (quoting Republican Rep. Ray LaHood).

electing a President every four years and subsequently entrusting to that President almost all of the important decisions.²⁹

In the same year, the conservative Cato Institute issued a report asserting that “President Bush’s constitutional vision is, in short, sharply at odds with the text, history, and structure of our Constitution, which authorizes a government of limited powers.”³⁰

While wartime Presidents surely need significant power to protect Americans and their interests, the events of September 11, 2001, cannot alone justify or explain the Administration’s contemptuous attitude toward Congress. Indeed, senior officials in the Administration expressed their intent to expand executive power long before the terrorist attacks of 2001. Most notably, Vice President Cheney has long advocated a more powerful executive. As the ranking member of the House Select Committee investigating the Iran-Contra scandal, Cheney issued a minority report in 1986 condemning Congress for encroaching on perceived prerogatives of the executive. One writer has commented on the long-sought goal of power expansion:

A close look at the twenty-year collaboration between Cheney and [his Chief of Staff David] Addington suggests that in fact their ideology has not changed much. It seems clear that Addington was able to promote vast executive powers after September 11th in part because he and Cheney had been laying the political groundwork for years.³¹

Former Bush Deputy Assistant Attorney General John Yoo, a key player in the move to expand executive authority, has acknowledged that President Bush “has long intended to make reinvigorating the presidency a priority.”³²

The Administration’s expansion of power was not happenstance; there is a philosophical grounding behind its push for authority. Specifically, officials in the executive branch have embraced and acted upon the theory of a unitary executive. Under that theory, the President has complete power over officers and agencies in the executive branch, and Congress lacks the authority to intervene. Since the 1980s, the theory of a unitary

²⁹ 152 CONG. REC. H5212 (daily ed. July 13, 2006) (statement of Rep. Frank).

³⁰ GENE HEALY & TIMOTHY LYNCH, THE CATO INSTITUTE, POWER SURGE: THE CONSTITUTIONAL RECORD OF GEORGE W. BUSH 1 (2006), available at http://www.cato.org/pub_display.php?pub_id=6330.

³¹ Jane Mayer, *The Hidden Power*, NEW YORKER, July 3, 2006, at 46–47.

³² John Yoo, *How the Presidency Regained Its Balance*, N.Y. TIMES, Sept. 17, 2006, § 4, at 15 (Week-in-review). Moreover, the Administration has consolidated power in areas unrelated to national security, as this Article explores. Yoo himself notes that, with regard to executive power, “[t]he administration has also been energetic on the domestic front.” *Id.*

executive has become near and dear to the hearts of many conservative thinkers³³ and has served as the philosophical underpinning for radical attempts to diminish the power of Congress. Although the theory offers the promise of neatness and simplicity, the Founders never intended our system of government to be a neat or simple one. Rather, they envisioned a system with robust inter-branch competition and checks and balances that would allow Congress to provide oversight of the executive branch and, when necessary, demand the independence of certain government agencies.

*A. Congressional Involvement in National Security Issues,
While Necessarily Circumscribed, Is Vital*

Congress's domain does not end at the water's edge. While it is axiomatic that the President, as Commander-in-Chief, must have the authority and flexibility to conduct foreign affairs, particularly in times of war, the President is not an island unto himself. As Justice O'Connor wrote in in *Hamdi v. Rumsfeld*, "a state of war is not a blank check for the President Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."³⁴

Though Congress may not be best suited to take the immediate action or to chart the initial course after a military attack or international crisis,³⁵ it has a role in, among other things, maintaining accountability on the part of those directly responsible for waging war and conducting foreign policy. Accountability through congressional involvement, even on matters of national security and foreign affairs, has served the country well. Indeed, "[t]he making of sound U.S. foreign policy depends on a vigorous, deliberative, and often combative process that involves both the executive and legislative branches."³⁶ Whether it was the Congress during World War II (when Roosevelt was President) or the Cold War (when Reagan was President), Congress has always had an oversight role and put tough questions to the Executive—not in an effort to embarrass but in an effort to improve. Regardless of differing views over foreign policy and the war on terror, the Senate and the House, in service to their responsibilities, must conduct oversight. The safety of our men and women overseas, our national security, and our Constitution demand no less.

³³ See generally Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 24–32 (1994) (arguing for the unitary executive as intended by the Founders to ensure a unified and muscular foreign policy, easier democratic accountability, and a functional separation of powers).

³⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

³⁵ See ROBERT A. DAHL, CONGRESS AND FOREIGN POLICY 58 (1950) ("Perhaps the single most important fact about Congress and its role in foreign policy . . . is that it rarely provides the initiative.").

³⁶ Ornstein & Mann, *supra* note 23, at 67.

Regrettably, the Administration's unilateral approach has undermined the confidence of the American people, reduced trust between branches, weakened accountability, increased politicization, and potentially set back the war on terror. The Administration has not only cut Congress out of policymaking, but has also subverted Congress's efforts to provide oversight and demand accountability. In particular, the President has made oversight virtually impossible by shrouding so many counterterrorism activities in secrecy, even from the Intelligence Committees of Congress. The Republican leadership has seldom fought back, but even Congressman Peter Hoekstra, a Bush ally and the Republican Chairman of the House Intelligence Committee, has criticized the Administration for withholding too much information about its counterterrorism programs.³⁷ In some cases, the Administration has even used the classification system directly to block oversight and investigations. According to Attorney General Gonzales, President Bush *personally* decided to block the Office of Professional Responsibility ("OPR") at the Department of Justice from examining the role of government lawyers in approving the NSA surveillance program by denying OPR access to necessary classified information.³⁸ While the war on terror undeniably requires the secrecy of certain information, Congress cannot perform its oversight duties when the Administration withholds even the most basic information about its programs and refuses to adequately brief and involve Congress.

In a number of areas relating to the war in Iraq and the war on terror, the early and meaningful involvement of Congress would have helped to depoliticize many issues, avoid judicial rebuke, and promote national security.

Certainly, the President has the first and preeminent role in protecting our nation's security and fighting the war on terror. No one challenges

³⁷ Representative Hoekstra wrote that the Administration's failure to brief Congress on a particular program may "represent a breach of responsibility by the Administration, a violation of law, and, just as importantly, a direct affront to me and members of the committee . . . Congress simply should not have to play 'Twenty Questions' to get the information that it deserves under our Constitution." He further noted, "I wanted to reinforce to the president and to the executive branch and the intelligence community how important, and by law the requirement, that they keep the legislative branch informed of what they are doing." Letter from Representative Peter Hoekstra to President George W. Bush (May 18, 2006) (on file with author). The Administration has abused the classification system in other ways as well. It has resisted procedures to punish Administration officials, such as Karl Rove, for improperly disclosing classified information, while condemning and seeking criminal sanctions for leaks that appear opposed to the political interests of the Administration.

³⁸ Neil Lewis, *Bush Blocked Ethics Inquiry, Official Says*, N.Y. TIMES, July 19, 2006 at A14. The ethical propriety of Administration lawyers in the months following September 11 has provoked considerable attention and debate. George Harris has noted that "circumstantial evidence suggests that a combination of factors—including pressure from the client to be forward-leaning, the personal views of a key OLC lawyer, a lack of intra-branch (let alone public) vetting, and a climate that stifled dissenting points of view—hindered OLC lawyers from fulfilling their professional responsibilities." George Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SEC. L. & POL'Y 409, 452 (2005).

his authority to make tactical decisions pursuing the enemy on the battlefield as Commander-in-Chief. Some aspects of the war on terror, however, necessarily implicate the constitutional duties of Congress, such as controlling military spending,³⁹ and the establishment of, and creation of rules for, the court system.⁴⁰ In these cases, Congress has an important role in helping to strike the correct balance between security and liberty. Nonetheless, President Bush has turned to Congress on matters of national security only as a last resort and often only after judicial rebuke. One need not be a strong advocate of Congress's war powers to recognize that the Administration's unilateral approach to the war on terror is inconsistent with the wisdom and foresight of the Founders, has continuously backfired on the President, and has potentially done harm to our foreign policy and national security.⁴¹

In matters of war and the war on terror, Congress's role—properly understood—has two key features. Its role requires legislation on issues involving long-term decisions about individual liberty in order to achieve the optimal balance of liberty and security. It also requires vigorous oversight of the executive branch in order to ensure that the massive executive bureaucracy is functioning in the best way possible at this vital time—a time when American lives are at risk and individual freedom is at stake. The war on terror renders such oversight more, not less, important. As set forth below, Congress has, for the most part, been absent in overseeing the conduct of war, and has not adequately assisted the war on terror. The country has suffered from Congress's absence.

1. The Importance of Congressional Oversight, Especially During Times of War

First, although Congress has frequently served in a critical oversight role in the conduct of military affairs, it has largely failed to oversee the war effort in Iraq and Afghanistan.

The Truman Committee, however, stands as perhaps the best and most compelling example of the worthy role Congress can play in overseeing a war effort—even when the first and second branches of government are ruled by the same party, as was the case during World War II. Established

³⁹ U.S. CONST. art. I, § 8, cl. 11, 12 (giving Congress the power to “make Rules concerning Captures on Land and Water” and to “raise and support Armies”).

⁴⁰ U.S. CONST. art. I, § 8, cl. 9 (giving Congress the power “to constitute Tribunals inferior to the supreme Court”).

⁴¹ Neil Kinkopf has rightly noted that the Administration's view of executive power is not new. In a 1989 legal opinion titled “Attempts to Restrict the President's Foreign Affairs Powers,” Assistant Attorney General William Barr asserted, “only by consistently and forcefully resisting such congressional incursions can Executive prerogatives be preserved.” Neil Kinkopf, *Furious George*, LEGAL AFF., Sept.–Oct. 2005, at 28. Nonetheless, the President has more aggressively and consistently advanced its view of executive power than his predecessors.

in March 1941, the Senate Special Committee to Investigate the National Defense Program (commonly known as the Truman Committee) was instituted to oversee war mobilization and defense production. Then-Senator Harry Truman's initiative created the panel shortly after his reelection to a second term and focused on whether or not defense contracts were being "fairly allocated within the country."⁴²

The Truman Committee toiled for seven years, from 1941 to 1948, and the resolution creating it authorized nearly unlimited authority to review the war effort—covering "almost all aspects of the war program except strategy and tactics."⁴³ Indeed, the Committee had broad authority to (1) examine the continuing problems of war mobilization; (2) investigate shortages of critical materials and create specific programs to remedy them; (3) investigate programs related to the supply of equipment and facilities; and (4) investigate "war frauds" including fraudulent activities of war contractors and government officials.⁴⁴

The Committee's accomplishments included "trouble-shooting" the war effort by securing effective coordination. Its mediation of disputes between agencies played a large role in creating a functional mobilization program. The Committee also served as a major source of information about the war program.⁴⁵ Wartime officials divulged little information about the conduct of the war to the public—partly out of security concerns and partly out of a desire to use the war as a manipulative tool, as secrecy was used to protect officials from criticism and to cover up mistakes and blunders. The Committee exerted considerable pressure on President Roosevelt to divulge "maximum information" about the conduct of the war and forced the government to justify withholding information. Meanwhile, the Committee generally avoided scapegoating or examining the motives of executive branch actors and usually provided them with advance copies of critical reports to avoid media sensationalism.⁴⁶

The Truman Committee was astonishing in both its output and its impact. During its tenure, the Committee issued more than 50 reports, conducted 432 public hearings, and held 300 executive sessions.⁴⁷ Thus, the Truman Committee serves as an exemplar for congressional investigations—even though Democrats controlled the Presidency and both houses of Congress during its time.

The important historical lesson is this: the aggressive work of the Truman Committee did not imperil the Presidency, upset the separation

⁴² HAROLD RELYEA, *INFORMING CONGRESS: THE ROLE OF THE EXECUTIVE IN TIMES OF WAR* 5 (2003).

⁴³ DONALD H. RIDDLE, *THE TRUMAN COMMITTEE: A STUDY IN CONGRESSIONAL RESPONSIBILITY* 141–42 (1964).

⁴⁴ *Id.* at 142.

⁴⁵ *Id.* at 154–56.

⁴⁶ *Id.*

⁴⁷ See Gail Russell Chaddock, *Senate Target: Bush's War Powers*, *CHRISTIAN SCI. MONITOR*, Feb. 1, 2006, at USA1.

of powers, or undermine the war effort. Rather, it provided constructive criticism, benefited the treasury, and built public confidence in the military apparatus. And, it bears repeating, a Democratic Senator led this Committee to do work critical of a President belonging to *his own party*. Indeed, after three years of vigorously investigating the executive branch, Senator Truman was invited to join the Executive as Vice President.

The lesson of the Truman Committee is sorely in need of relearning today. As of this writing, the Iraq war will have been ongoing for close to four years (almost as long as the second World War). Nonetheless, nothing even close to the Truman Committee has taken root in this Congress. To the contrary, a bipartisan proposal in the House to create a modern-day Truman Committee in the wake of reports of scandal and abuse in Iraq was “blocked from consideration by GOP leaders for more than a year.”⁴⁸ The effort has fared no better in the Senate.⁴⁹ My colleague Senator Byron Dorgan’s parallel proposal, which specifically invoked the precedent of the Truman Committee and noted Congress’s “constitutional responsibility to ensure comprehensive oversight of the expenditure of United States Government funds,” was—unsurprisingly in the 109th Congress—the victim of an almost pure party-line vote.⁵⁰ As Senator Dorgan observed, “there’s never been a time in our country’s history when we’ve shoved so much money out the door with so little oversight.”⁵¹ The lack of wartime oversight, moreover, is not a partisan straw man; Congress’s abdication has been widely recognized and roundly criticized.⁵²

While a host of matters relating to the Iraq war are ripe for responsible oversight, there is one bright light of accountability in place—Special Inspector General for Iraq Reconstruction, Stuart W. Bowen, Jr. But his

⁴⁸ Bryan Bender, *GOP to Cosponsor War Cost Oversight Panel*, BOSTON GLOBE, Apr. 6, 2006, at A2.

⁴⁹ See 152 CONG. REC. S6105 (daily ed. June 20, 2006).

⁵⁰ 152 CONG. REC. S5990 (daily ed. June 16, 2006) (statement of Sen. Dorgan); see S. Amd. 4292 to S. 2766, 109th Cong. (2006) (Only Senator Lincoln Chafee broke from Republican ranks to vote for the oversight committee proposed by Senator Dorgan).

⁵¹ Griff Witte, *Contractors Rarely Held Responsible for Misdeeds in Iraq*, WASH. POST, Nov. 4, 2006, at A12.

⁵² See, e.g., Editorial, *There’s Still a Chance to Get it Right in Iraq, but Time is Running Out*, MIAMI HERALD, Oct. 10, 2006, at A16 (“Legislative oversight has definitely not been the strong suit of Congress for the last few years, and the Bush White House has been happy to have it that way. The results in Iraq indicate that Congress’s abdication of its oversight responsibility has not served the country well.”); Editorial, *An Iraq Debate*, WASH. POST, June 17, 2006, at A18 (“The stakes in Iraq are immense, and Congress should have involved itself more from the beginning. When Democrats complain of insufficient congressional oversight of administration policies in the war, they are absolutely right.”); Ronald Brownstein, *Washington Outlook*, L.A. TIMES, Oct. 8, 2006, at A18 (“Does anyone doubt that the Bush administration would be better off today if the Republican-led Congress had conducted more genuine oversight in 2003 about the plans (or lack thereof) to rebuild and stabilize Iraq after overthrowing Saddam Hussein?”); Harry Rosenfeld, *Skepticism is a Healthy Virtue*, ALBANY TIMES UNION, Jan. 1, 2006, at B5 (“Taking account of the administration’s well-known shortfalls in the war on terror, including Iraq, cries out for oversight by the courts and Congress.”).

job is set to be extinguished in October 2007 because the 109th Congress slipped a sunset provision into must-pass defense legislation. Inspector Bowen has nearly sixty auditors and investigators based in Iraq, and has won bipartisan praise for conducting investigations leading to bribery convictions and audits that have saved the government more than \$400 million.⁵³ Rather than sending Inspector Bowen packing in a few months, Congress should—in the tradition of the Truman Committee—be extending his term, supporting his efforts, and supplementing those efforts with its own.

This is not to suggest that five hundred hearings are necessary in connection with the war in Iraq. However, given the flood of allegations that pre-war intelligence was deeply flawed, that many troops have lacked necessary life-saving equipment, that thousands of dangerous weapons are unaccounted for, that military contractors have defrauded the government, that contracts have been awarded unfairly and without competition, and that infrastructure development has lagged, it is clear that this wartime Congress has been far from vigilant.

2. The Importance of Congressional Legislative Involvement: Warrantless Wiretapping Case Study

In the war on terror, as with the wars in Iraq and Afghanistan, Congress also has a vital role to play. The Administration's conduct of the National Security Agency's warrantless surveillance program exemplifies its reluctance to seek Congress's help in adjusting laws to new realities. Debate has raged over the propriety and legality of the program: Some believe that it violates provisions of the Foreign Intelligence Surveillance Act (FISA), but the President has claimed the program falls within the umbrella of his authority under the Commander-in-Chief powers and the Authorization to Use Military Force ("AUMF").⁵⁴ Many legal scholars⁵⁵ and

⁵³ On October 28, 2006, the Inspector Bowen released an audit reporting that thousands of weapons the United States has provided to Iraqi Security Forces appear to have gone missing. The audit also found that spare parts and repair manuals are not available for many weapons. \$133 million was used to purchase more than 370,000 weapons, many of which are not accounted for. James Glanz, *The Reach of War; U.S. is Said To Fail in Tracking Arms Shipped to Iraqis*, N.Y. TIMES, Oct. 30, 2006, at A1.

⁵⁴ The Administration's argument was articulated fully in a white paper released by the Department of Justice in January 2006. U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), available at <http://permanent.access.gpo.gov/lps66493/White%20Paper%20on%20NSA%20Legal%20Authorities.pdf>.

⁵⁵ Letter from Curtis A. Bradley, Professor, Duke Law School, et al. to Senator Bill Frist, et al. (July 14, 2006), available at <http://cdt.org/security/20060109legalexpertsanalysis.pdf>. More recently, John Cary Sims argued that, "it would be extraordinary if the precisely-crafted FISA framework, which has been explicitly amended by Congress five times since September 11, could silently be altered in the way that the Administration contends, particularly since the AUMF was adopted without there being any reference to NSA, to its mission, to the targeted interception of international communications of United States persons

even a former member of the Administration⁵⁶ began to criticize the legal underpinning for the program almost immediately after its disclosure. Those critics contend that the Administration's legal claims became even more tenuous in the wake of *Hamdan v. Rumsfeld*, in which a conservative Supreme Court explicitly denied the Administration's expansive reading of AUMF in the context of military commissions.⁵⁷

Regardless of whether one believes the surveillance program is legally justified, the deleterious effect of the Administration's deliberate circumvention of Congress should be beyond debate. The Administration manifested its disrespect for Congress in innumerable ways. First, the Executive failed properly to brief members of Congress on the details of the surveillance program. Although the Administration has repeatedly claimed that it adequately briefed appropriate members of Congress, the evidence shows that, on this matter and on others, the President has been averse to including Congress in activities that require its input and expertise. In fact, Representative Jane Harman has suggested that the failure to brief members beyond the heads of the House and Senate Intelligence Committees (the so-called "Gang of Eight") was a violation of the National Security Act of 1947.⁵⁸

within the United States, or to any aspect of FISA." John Cary Sims, *What NSA Is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L. Q. 105, 132 (2006).

⁵⁶ Memorandum by David Kris, former Assoc. Deputy Attorney Gen., Department of Justice (Jan. 25, 2006), available at <http://balkin.blogspot.com/kris.fisa.pdf>; see also *NSA III: War Time Executive Power and the FISA Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 789 (2006) (statement of David Kris).

⁵⁷ In concurrence, Justice Breyer noted, "[t]he Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check' Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (Breyer, J. concurring). In a letter to me responding to my inquiries shortly after the decision, the Justice Department argued that "the Court's opinion does not affect our analysis of the Terrorist Surveillance Program for several reasons." Letter from William E. Moschella, Assistant Attorney Gen. of the United States, to author (July 10, 2006) (on file with author). Shortly thereafter, a collection of thirteen constitutional law scholars quickly responded to that letter, arguing that "in our view, not only does *Hamdan* 'affect' the analysis, it significantly weakens the Administration's legal footing. Bradley, et al., *supra* note 55. Moreover, in June last year, a district court judge ruled the warrantless surveillance program unconstitutional and threatened to suspend it, causing further obstacle and delay. Ultimately, the courts should have the final say over the legality of the program. That is why I proposed a bill in the 109th Congress—S. 2468—that would expedite judicial review so that the Supreme Court could determine the constitutionality of the program and put an end to the debate over its legality.

⁵⁸ See Letter from Representative Jane Harman to President George W. Bush (Jan. 4, 2006) (on file with author) ("Gang of Eight briefings do not provide for effective oversight. Members of the Gang of Eight cannot take notes, seek the advice of their counsel, or even discuss the issues raised with their committee colleagues. It is precisely for this reason that the law requires briefings for the full committee."); see also Suzanne E. Spaulding, *Power Play*, WASH. POST, Dec. 25, 2005, at B1 (arguing that secret briefings to intelligence committee leaders alone—without staff input or possibility for analysis—leave little chance for meaningful congressional oversight).

Moreover, the briefings that *were* conducted appear to have been so inadequate and cursory that the leading Democrat on the Senate Intelligence Committee was compelled to hand-write a secret letter to the Vice President setting forth his grave concerns about the surveillance program and Congress's lack of involvement in the issue, stating that the intelligence "activities we discussed raise profound oversight issues."⁵⁹ As mentioned above, the Administration's unwillingness to involve Congress in vital matters forced one of its own allies, Representative Hoekstra, to send a scathing letter to President Bush: "It is not optional for this president or any president or people in the executive community to not keep the intelligence committees fully informed of what they are doing."⁶⁰

The second manifestation of the Administration's disrespect for Congress is its failure to ask Congress to modify FISA in a way that might have clearly authorized necessary surveillance. This is particularly troubling given that FISA was amended at least five times between September 11, 2001, and December 16, 2005, when the surveillance program was finally disclosed.⁶¹ In the wake of September 11, members of both parties would undoubtedly have been prepared to support any necessary changes to FISA or any other statute in order to provide the tools necessary to intercept terrorist communications. By engaging in an end run around Congress, however, the executive branch only fostered an atmosphere of distrust and recrimination.

Third, even after the program was disclosed, Administration officials have repeatedly refused to answer basic questions about the program, its efficacy, and its necessity, preferring instead to use the issue as a political bludgeon. This attitude was encapsulated in the glib testimony of the acting head of DOJ's Office of Legal Counsel, who stated—perhaps somewhat in jest—that the "president is always right."⁶² In addition to refusing to answer questions, the Administration has refused to provide underlying documents and legal justifications for its surveillance program. In response, the former Chairman of the Senate Committee on the Judiciary, Senator Arlen Specter refused to issue any such subpoenas, stating that calling former officials would be useless because they would assert executive privilege; with respect to having Attorney General Gonzales return to

⁵⁹ Letter from Senator Jay Rockefeller to Vice President Richard Cheney (July 17, 2003) (on file with author). Senator Rockefeller also wrote, "without more information and the ability to draw on any independent legal or technical expertise, I simply cannot satisfy lingering concerns raised by the briefing we received." *Id.*

⁶⁰ Letter from Representative Peter Hoekstra to President George W. Bush (May 18, 2006) (on file with author).

⁶¹ See Sims, *supra* note 55, at 132.

⁶² Hamdan v. Rumsfeld: *Establishing a Constitutional Process*, 109th Cong. 96 (2006) [Hereinafter *Hamdan Hearings*] (statement of Steven Bradbury, Acting Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice).

the Judiciary Committee (as he promised he would during his February 6, 2006, appearance), the Chairman similarly stated that it would be futile.⁶³

Congress, for its part, also abdicated responsibility in a number of ways. Notwithstanding the intransigence of the Administration, Congress itself has displayed surprising timidity in exercising its legislative and oversight duties. Indeed, Senators could have (and should have) been more aggressive in questioning the Administration's refusal to cooperate with Congress's attempts at oversight.

The costs of such arrogant unilateralism are real. Whether or not one believes that the President transgressed the law, the Administration could have avoided a fractious and polarizing debate by seeking congressional involvement at the outset. By circumventing Congress, the Administration only fueled bickering and politicization. More seriously, as Republican Senator Lindsey Graham has persuasively argued, the Bush Administration has undermined future Presidents through its tenuous AUMF claim, ensuring that "the next president will have great difficulty getting a force resolution."⁶⁴

Moreover, with the legality of the program unsettled, lawsuits and motions in criminal cases are wending their way through the courts, threatening yet another judicial rebuke and another setback in the war on terror.⁶⁵

3. Importance of Congressional Legislative Involvement: Hamdan Case Study

The Administration's policy over the detainment of prisoners similarly exposes the ultimate inefficacy of a stubbornly unilateral approach to the war on terror. Time and again after September 11, the Administration rejected opportunities to work with Congress to create a constitutionally sound mechanism for the trial of captured terrorists. In February, 2002 for example, Senator Specter and Senator Durbin introduced the bipartisan Military Commission Procedures Act of 2002, which would have given any military commission established by the President the right to try non-U.S. citizens if there was reason to believe the suspect was a member of al-Qaeda or had conspired to commit an act of terrorism. Also, in early 2002 Democratic Senator Leahy introduced legislation authorizing the President to establish military tribunals to try non-U.S. citizens suspected to be members of al-Qaeda or terrorist conspirators. In January 2003, Senator Daschle, also a Democrat, introduced the Justice Enhancement and Domestic Security Act of 2003, which would have authorized the President to establish military tribunals to try suspected terrorists. Neither the Presi-

⁶³ 152 CONG. REC. S5324 (daily ed. May 26, 2006) (statement of Sen. Specter).

⁶⁴ Chaddock, *supra* note 47.

⁶⁵ See Dan Eggen & Dafna Linzer, *Judge Rules Against Wiretaps; NSA Program Called Unconstitutional*, WASH. POST, Aug. 18, 2006, at A1.

dent nor the Republican-led Congress deigned to take up any of these measures.

Thus, the Administration repeatedly scuttled efforts in Congress to provide a considered trial process for detainees, instead claiming authority to set policy under the Constitution's Commander-in-Chief clause and the AUMF. The Administration stubbornly proceeded with its view that it could detain enemy combatants indefinitely without providing them due process until the Supreme Court intervened in *Rasul v. Bush*.⁶⁶ In that 2004 decision, the Court rejected the theory that a state of war provides the President an unlimited ability to detain suspected terrorists and held that enemy combatants are entitled to habeas corpus review in federal court. Rather than working with Congress to develop a system that would have passed constitutional muster, the Administration again proceeded unilaterally in developing procedures for military commissions. The result was a second, stinging rebuke from the Supreme Court in *Hamdan v. Rumsfeld*, in which the Court held that the Administration had violated the Uniform Code of Military Justice by failing to provide detainees with protections under Article 3 of the Geneva Conventions.⁶⁷ Only after *Hamdan* did the Administration decide it ought to consult Congress.⁶⁸

Department of Justice official Steven Bradbury suggested in July 2006 that "It is always better for the branches to be working together, and the war effort is one that requires the work of certainly both political branches working together."⁶⁹ He also suggested that the "Administration stands ready to work with Congress."⁷⁰ These comments were somewhat astonishing given the Administration's track record of ignoring Congress. Unfortunately, its prior approach of unilateralism has failed to result in a single trial or conviction over the past five years. Indeed, the reality has differed considerably from the Administration's early rhetoric that military commissions would "dispense justice swiftly, close to where our forces may be fighting, without years of pretrial proceedings or post-trial appeals."⁷¹

In short, if the Administration had chosen to work *with* Congress, rather than in spite of it and behind its back, we could have developed a system that passed constitutional muster and made significant progress in fighting the war on terror.

⁶⁶ 542 U.S. 466 (2004).

⁶⁷ 126 S. Ct. 2749 (2006).

⁶⁸ At the time of this writing, Congress had just passed the Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. Again, though, this effort—negotiated largely among Republicans with little Democratic input—risks being struck down by the Supreme Court. See Kate Zernike & Carl Hulse, *Security and War Take Center Stage as Campaign Break Nears*, N.Y. TIMES, Sept. 26, 2006, at A16 (quoting Chairman Specter on the bill: "If it comes back to the Supreme Court, the Supreme Court will teach Congress another lesson.").

⁶⁹ *Hamdan Hearings*, *supra* note 62, at 72.

⁷⁰ *Id.*

⁷¹ Alberto Gonzales, Op-Ed, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

B. Congress Should Reassert Its Traditional Robust Role in Domestic Oversight

Apart from national security, the Congress also must be muscular and involved in domestic policy. Never has there been more reason for Congress to be scrupulously vigilant in its oversight of executive agencies than in an Administration in which loyalty is rewarded over independence and politics trumps professionalism. Congressional oversight is especially necessary given the Executive branch's purge of internal checks and the over-politicization of institutions like the Department of Justice.

Throughout his two terms in office, President Bush has evaded, ignored, and destroyed internal checks within the Executive branch designed to prevent the implementation of bad policy. Officials have bypassed mechanisms that ensure the accuracy of intelligence, the legality of decisions, and the sufficient consideration of potential policy consequences. The Administration's selective use of intelligence in the lead-up to the Iraq War, circumvention of traditional procedure at the Food and Drug Administration to limit access to Plan B contraception, and poor treatment of scientists with differing opinions on global warming demonstrate the demise of internal, deliberative checks. The politicization of every aspect of the federal government's business—even normally non-political decisions—has only increased the need for strong oversight.⁷²

The politicization of an entity that is ideally apolitical is especially visible in the Department of Justice. I have sat on the Senate Judiciary Committee for eight years, and before that I sat on the House Judiciary Committee for eighteen years. During those twenty-six years of overseeing the Department of Justice, through seven presidential terms, including three different Republican presidents, I have never seen the Department more politicized and pushed further away from its mission as an apolitical arbiter of law. An examination of the trajectory of the Department of Justice illustrates how Congress has failed to assert itself and has been marginalized by the Executive branch.

From the outset of the Bush presidency, the politicization of the Department led to hiring based on political affiliation,⁷³ failure to follow the

⁷² Cornelia Pillard has suggested that the Executive Branch can foster healthy "dissent" internally in four primary ways: allowing for more transparency so that outside entities can offer input; increasing intra-branch consultation to allow for healthy debate within the Administration; consulting more frequently with career civil service employees; and charging boards, commissions, and officers with "taking an arms length view to help forestall and respond to any executive action that might be unwise, unlawful, or even corrupt." Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 *IND. L.J.* 1297, 1301 (2006). Unfortunately, the Administration has demonstrated little interest in any of these approaches.

⁷³ A 2005 article suggests that nearly all top lawyers at the Department under Attorney General John Ashcroft were overwhelmingly male and had one or more of the following credentials: Membership in the Federalist Society; prior employment with Kenneth Starr's former law firm, Kirkland & Ellis; Supreme Court clerkship with Justice Scalia or

recommendations of career attorneys in enforcement decisions,⁷⁴ promotion of political agendas,⁷⁵ and changes in position or strategy in ongoing litigation.⁷⁶ The politicization of the Department has taken an especially heavy toll on the Civil Rights Division, which has been negligent in pursuing new cases on behalf of victims of discrimination,⁷⁷ and has suffered a mass exodus of talented career attorneys as a result.⁷⁸ Similar examples of politicization exist throughout the Department.⁷⁹

Attorneys General Ashcroft and Gonzales have complemented their aggressive strategies within the department with their contempt toward Congress and resistance of oversight. General Ashcroft's repeated refusal to answer questions, or even to offer explanations for that refusal, provoked Senator Biden to assert, "Well, General, that means you may be in contempt of Congress then. You got to have a reason not to answer our questions."⁸⁰

Justice Thomas; Federal appellate court clerkship with a known right-wing judge, such as Judge Michael Luttig of the Fourth Circuit or Judge Laurence Silberman of the D.C. Circuit; or graduation from the University of Chicago or other conservative law school. Vanessa Blum, *How to Get A Job At Justice*, LEGAL TIMES, Apr. 25, 2005, at 1, 14.

⁷⁴ In 2003, the Department declined to pursue a price-fixing antitrust case against Mercedes-Benz dealers from New York, New Jersey, and Connecticut despite the recommendation to pursue indictment from federal prosecutors following a three year investigation. See Eric Lichtblau & Stephen Labaton, *U.S. Will Not Pursue Price-Fixing Case Against Mercedes Dealers*, N.Y. TIMES, Dec. 25, 2003, at C1.

⁷⁵ In a letter to the National Rifle Association, Ashcroft declared that the Second Amendment protects the right of individuals to own guns, reversing the Department's longstanding position that the Amendment confers only a collective right to own guns through militias. See Fox Butterfield, *Broad View of Gun Rights is Supported by Ashcroft*, N.Y. TIMES, May 24, 2001, at A19.

⁷⁶ Ashcroft reversed a 1998 decision by Attorney General Reno for the purpose of undermining Oregon's assisted suicide law for terminally ill patients when he threatened doctors who administered the lethal drugs with federal prosecution under the Controlled Substance Act. See *Suicide Law in Oregon Wins Round In U.S. Court*, N.Y. TIMES, Nov. 21, 2001, at A14.

⁷⁷ According to a 2004 study conducted by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, enforcement of criminal civil rights cases declined by nearly 50% between 1999 and 2003, even though the number of complaints remained the same. Civil Rights Enforcement By Bush Administration Lags, TRAC, Oct. 11, 2005, <http://trac.syr.edu/tracreports/civright/106/>. In 2005, the *Washington Post* reported a 40% decline in the prosecution of racial and gender discrimination crimes during the first five years of the current administration. Dan Eggen, *Civil Rights Focus Shift Roils Staff at Justice: Veterans Exit Division as Traditional Cases Decline*, WASH. POST, Nov. 13, 2005, at A1.

⁷⁸ In 2005 alone, the Division lost nearly twenty percent of its lawyers. See Eggen, *supra* note 77, at A1.

⁷⁹ Perhaps the politicization of DOJ during President Bush's second term should not be surprising given the Attorney General's lack of independence. I joined thirty-five colleagues in opposing Attorney General Gonzales's confirmation because I questioned his independence given his close relationship with the President and previous role as White House Counsel. At that time, I said, "Even a cursory review of his answers reveals strict adherence to the White House line and barely a drop of independence When you're the chief law enforcement officer of the land, when you're asked to rule on sensitive questions that balance liberty and security, you can't just do what the President wants all the time or you're not serving your country or serving the job." 151 CONG. REC. S707 (daily ed. Feb. 1, 2005) (statement of Sen. Schumer).

⁸⁰ *DOJ Oversight: Terrorism and Other Topics: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 23 (2004) (statement of Sen. Joseph Biden).

Attorney General Gonzales has similarly demonstrated his contempt for oversight. After his appearance before the Judiciary Committee in February 2005 to testify about the warrantless wiretapping program, Gonzales took *five and a half months* to respond to written follow-up questions from members of the Committee. Of course, the five and a half month lag was not arbitrary, but represented the exact length of time that separated Gonzales's appearances before the Committee. One wonders if he would have answered the questions at all if not for the media attention surrounding his next appearance. Representative Frank has noted that the process of democracy and oversight "is not always neat, but we have not before this had an executive branch that considered it to be more of a nuisance than anything else."⁸¹ This impotence, too, has long-term, institutional consequences because "executive agencies that once viewed Congress with at least some trepidation now regard it with contempt."⁸²

Despite occasional tough words from Republican Senators, the majority has done little to force the Department to provide information or answer questions, and the result has been an increasingly dysfunctional department. Members of both parties ought to remember that it is not the job of the Senate to make life easier and more convenient for individual administration officials. It is the job of the Senate to make our government more effective and responsive to the American people. The result of less than that has been devastating: the politicization of DOJ and its failure to the "ensure fair and impartial administration of justice for all Americans"⁸³ that is its promise and duty.

My colleague Lindsey Graham once suggested that, "When a President gets out of bounds and doesn't do as he or she should do constitutionally . . . it is up to us to put them [sic] back in bounds."⁸⁴ Unfortunately, Congress has been less a victim than an enabler over the past six years. It is time for that behavior to end.

IV. THE JUDICIAL ASSAULT ON CONGRESSIONAL POWER

Separate and apart from the Executive's assault on Congress, the Judiciary has also been usurping the authority of the legislative branch in important ways. Over the past fifteen years or so, there has been a federalism revolution in American jurisprudence, one that has abrogated Congress's powers and undermined its vital legislative function. Though the scope and permanence of the revolution is the subject of debate, the existence of the jurisprudential shift is beyond doubt.⁸⁵

⁸¹ 152 CONG. REC. H5212 (daily ed. July 13, 2006) (statement of Rep. Frank).

⁸² See Ornstein & Mann, *supra* note 23, at 75.

⁸³ U.S. Dep't. of Justice, Mission Statement, <http://www.usdoj.gov/02organizations/> (last visited Nov. 14, 2006).

⁸⁴ 145 CONG. REC. S281 (daily ed. Jan. 16, 1999) (statement of Rep. Graham).

⁸⁵ See, e.g., David J. Barron, *Fighting Federalism with Federalism: If It's Not Just a*

The Constitution sets up a delicate balance of power not only between Congress and the Executive, but also between Congress and the courts. Under that arrangement, Congress has the power and responsibility to make the laws, and the courts, through judicial review, check the legislature when it exceeds its constitutional boundaries. In recent years, we have seen a finger on the scale that is subtly but surely altering this balance to favor judicial over legislative determination. Specifically, there has been a dangerous trend of diminishing judicial deference to Congress's ability to find facts and then legislate pursuant to those findings. Of course, the courts must be able to assess—with total independence—when and where Congress has exceeded its constitutionally authorized powers. Beginning with the landmark case of *Marbury v. Madison*,⁸⁶ it has been an accepted principle that the Judiciary has the responsibility of interpreting the Constitution and declaring congressional enactments that violate the Constitution null and void. The check provided by the Judiciary is one of the principal reasons our judicial system is worthy of respect and reverence. Certainly, the courts should not abdicate that essential responsibility.

At the same time, however, courts must not exceed the bounds of that powerful responsibility. The power to interpret the law does not entitle the Judiciary to completely substitute its Constitutional judgment for that of the other branches of government.

Unfortunately, in recent years, that is precisely what it has done. While some of the federalism decisions in recent years have accurately noted Congress's failure to establish a nexus between legislation and a source of Congressional power, such as the Commerce Clause, several of the cases ignore serious, studied, and diligent efforts by Congress to make the necessary findings and establish a proper exercise of power. These decisions are particularly troubling in the context of the historical relationship between Congress and the courts. Though some may believe that the recent decision in *Gonzales v. Raich*⁸⁷ has signaled a pullback of the federalism revolution, the new federalism "is still very much alive."⁸⁸

Battle Between Federalists and Nationalists, What is It?, 74 *FORDHAM L. REV.* 2081 (2006) (tracing the "second federalism revival" beginning in 1992); Richard H. Fallon, Jr., *The "Conservative" Path of the Rehnquist Court's Federalism Decisions*, 69 *U. CHI. L. REV.* 429, 429 (2002) ("It seems agreed on all sides now that the Supreme Court has an agenda of promoting constitutional federalism."); M. Elizabeth Magill, *The Revolution That Wasn't*, 99 *NW. U. L. REV.* 47, 48 (2004) ("The Rehnquist Court has worked important changes in the doctrines relating to federalism.").

⁸⁶ 5 U.S. (1 Cranch) 137, 176–78 (1803).

⁸⁷ 545 U.S. 1 (2005).

⁸⁸ Barron, *supra* note 85, at 2094 (noting that more recent cases such as *Raich*, while seeming to cut back on *Lopez* and *Morrison*, did not overturn past precedents).

A. *The Supreme Court's Attack on Congress's Lawmaking Ability*

For decades, conservatives argued—sometimes convincingly—that elected officials, as opposed to unelected judges, should receive the benefit of the doubt with respect to policy judgments and that courts should not reach out to impose their will over that of elected legislatures. Many non-conservatives, myself included, have significant sympathy for that position. It is easy for judges to express their personal views in their opinions, but, while that might be appealing for some to do, it is not what the Founding Fathers intended. Ironically, this activism is being practiced by some of its self-proclaimed critics in the Judiciary.

The relationship between Congress and the Court changed dramatically under Chief Justice William H. Rehnquist, particularly when Justice Clarence Thomas was elevated to the Supreme Court. What has become known as the federalist revolution⁸⁹ did not begin until almost a decade into Rehnquist's term as Chief Justice, but once started, it quickly gained momentum. Under the leadership (and often the pen) of the Chief Justice, the Court attacked Congress's power to legislate under the Commerce Clause and under Section 5 of the Fourteenth Amendment. Perhaps most disturbingly, the Court made these changes with the rationale that it was better suited than Congress to make determinations about the extent of Congress's policymaking ability under the Constitution.

The Rehnquist Court has struck down an unprecedented number of federal laws. One recent survey found that in the eleven years during which the composition of the Court remained constant, 1994–2004, the Court invalidated thirty-one federal statutes on constitutional grounds.⁹⁰ By comparison, the Warren Court, often referred to as an “activist” court,⁹¹ voted to strike down only nineteen federal laws between 1953 and 1968; and almost half those decisions involved civil rights violations.⁹² The Rehnquist Court, however, has focused its legislation-invalidating energy on federalism and the First Amendment in particular.⁹³

Notably, it has been the most conservative judges on the Court who are most likely to strike down federal legislation. In Professor Ringhand's recent study of voting patterns on the static Rehnquist Court between 1994 and 2004, she found that Justice Clarence Thomas leads the pack in vot-

⁸⁹ See, e.g., Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002).

⁹⁰ See Lori A. Ringhand, *The Rehnquist Court: A “By the Numbers” Retrospective*, U. PA. J. CONST. L. (forthcoming Spring 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912507.

⁹¹ See Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236 (1983).

⁹² See Ringhand, *supra* note 90.

⁹³ See *id.*

ing against federal legislation, having declared a federal law unconstitutional in thirty-four cases.⁹⁴ He is followed closely by Justices Antonin Scalia and Anthony Kennedy, who each notched thirty-one votes against federal laws.⁹⁵ Chief Justice Rehnquist voted to strike down federal statutes twenty-six times, and Justice O'Connor had twenty-five votes against congressional legislation. The more liberal wing, composed of Justices Souter, Ginsburg, Stevens, and Breyer, came in at twenty-one, seventeen, seventeen, and fifteen votes against federal laws, respectively.⁹⁶ As the Court grows more conservative, we can therefore reasonably expect the assault on the powers of Congress to continue.

*B. The New Federalism's Assault on Congressional Power Is a
Departure from the Traditional Separation of Powers Between the
Judiciary and Congress*

The actions of the Rehnquist Court toward congressional legislation would be disturbing in a vacuum, but they are especially troubling against the historical backdrop of structural and institutional respect for Congress by the courts.

In *NLRB v. Jones & McLaughlin Steel Corp.*,⁹⁷ the Court articulated a broad definition of interstate commerce. The Court expressed several clear principles that guide any evaluation of the exercise of congressional power under the Commerce clause. First, the Commerce Clause provides the power to enact "all appropriate legislation,"⁹⁸ a broad term that echoes the "necessary and proper" clause of the Constitution. Second, Commerce Clause powers are "plenary" and allow congressional regulation of even some intrastate activities.⁹⁹ Subsequent cases adopted and augmented the reasoning in the *NLRB* case. In 1941, the Court upheld the Fair Labor Standards Act, stating:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the

⁹⁴ Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, CONST. COMMENT. (forthcoming Spring 2007) (manuscript at 7, on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=765445.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 301 U.S. 1 (1937)

⁹⁸ *Id.* at 37.

⁹⁹ *Id.*

exercise of the granted power of Congress to regulate interstate commerce.¹⁰⁰

Over the next sixty years, the Court upheld legislation that regulated the purely intrastate production of wheat for personal use because, in the aggregate, such activity would affect interstate commerce.¹⁰¹ The Court also upheld laws that prevented racial discrimination in interstate business¹⁰² and regulated loansharking.¹⁰³ The test the Court used became whether Congress had a “rational basis” to believe the regulated activity affected interstate commerce.¹⁰⁴

Accordingly, the Commerce Clause became the source of a significant bulk of congressional legislation. When the Congressional Research Service recently surveyed the United States Code, it found that more than 700 statutory provisions explicitly refer to either “interstate” or “foreign” commerce.¹⁰⁵ These statutes form the bedrock of our federal system of law and order.

Though the Commerce Clause is the framework for a great bulk of federal legislation, Congress also derives critical legislative authority from another provision: Section 5 of the Fourteenth Amendment.¹⁰⁶ Section 5 gives Congress “the power to enforce, by appropriate legislation,”¹⁰⁷ the constitutional guarantee found in the same amendment that “no State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁰⁸ The Supreme Court has recognized the Fourteenth Amendment as “the most significant structural provision adopted since the original framing,”¹⁰⁹ and the enforcement provision in Section 5 is what gives the

¹⁰⁰ *United States v. Darby*, 312 U.S. 100, 118 (1941).

¹⁰¹ *See Wickard v. Filburn*, 317 U.S. 111 (1942).

¹⁰² *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

¹⁰³ *See, e.g., Perez v. United States*, 402 U.S. 146 (1971).

¹⁰⁴ *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 276–80 (1981).

¹⁰⁵ KENNETH R. THOMAS & TODD B. TATELMAN, CONG. RESEARCH SERV., *THE POWER TO REGULATE COMMERCE: LIMITS ON CONGRESSIONAL POWER* (2005), available at <http://www.llsdc.org/coursebook/docs/CRL-RL32844.pdf>. The authors pointed to statutes that mention commerce in relation to the following extensive list of topics: “agriculture, banking, antitrust, securities, business regulation, energy regulation, hazardous substances, consumer credit, sports regulation, the internet, endangered species, civil rights, child support child pornography, abortion, criminal law, controlled substances, food, firearms control, terrorism, obscenity, gambling devices, labor, industrial safety, pensions, environmental law, fish and wildlife, medical products, water pollution, atomic energy, shipping, motor vehicle safety, airplanes, and tort litigation.” *Id.* at 2–3.

¹⁰⁶ *See generally* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943 (2003).

¹⁰⁷ U.S. CONST. amend. XIV, § 5

¹⁰⁸ U.S. CONST. amend. XIV, § 2.

¹⁰⁹ *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722, 2740 (2005).

Amendment its teeth.¹¹⁰ It is Section 5 that underlies much of the federal civil rights protections in existence today, including but not limited to Title IX,¹¹¹ the Equal Employment Opportunity Act,¹¹² the Age Discrimination in Employment Act,¹¹³ the Freedom of Access to Clinic Entrances Act,¹¹⁴ the Violence Against Women Act,¹¹⁵ the Family and Medical Leave Act,¹¹⁶ the Religious Land Use and Institutionalized Persons Act,¹¹⁷ and, of course, each iteration of the Civil Rights Act,¹¹⁸ and the Voting Rights Act.¹¹⁹

C. The Conservative Judicial Activist Attack on Congressional Legislative Authority

The most troubling of the Rehnquist Court's federalism decisions were those that cut back on Congress's power to legislate under the Commerce Clause and under Section 5 of the Fourteenth Amendment.

1. The Conservative Judicial Activist Attack on Congressional Legislative Authority Deriving from the Commerce Clause

In *United States v. Lopez*,¹²⁰ decided in 1995, the Supreme Court held for the first time in nearly sixty years that a federal law exceeded the bounds of Congress's Commerce Clause authority.

This federalism jurisprudential revolution began when a teenager brought a gun to his high school in San Antonio, Texas. Alfonso Lopez was a senior when he carried a concealed .38 caliber handgun and five bullets into his school on the morning of March 10, 1992. Lopez was arrested and charged with violating the federal Gun-Free School Zones Act of 1990, which made it a crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."¹²¹ He was found guilty, but appealed his conviction on the ground that the statute prohibiting the possession of guns in schools, § 922(q), was an unconstitutional intrusion by Congress into the public

¹¹⁰ See AMAR, *supra* note 5, at 361–63.

¹¹¹ 20 U.S.C. § 1681 (2000).

¹¹² 42 U.S.C. § 2000e (2000).

¹¹³ 29 U.S.C. §§ 621–634 (2000).

¹¹⁴ 18 U.S.C. § 248 (2000).

¹¹⁵ Pub. L. No. 103-122, tit. IV, 108 Stat 1796 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.). *But see* *United States v. Morrison*, 529 U.S. 598 (2000).

¹¹⁶ Pub. L. No. 109-279, 107 Stat. 6 (1993) (codified in scattered sections of 5, 29 U.S.C.).

¹¹⁷ 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

¹¹⁸ *E.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a to 2000h-6); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 2, 42 U.S.C.).

¹¹⁹ *E.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973).

¹²⁰ 514 U.S. 549 (1995).

¹²¹ 18 U.S.C. § 922(q)(1)(A) (1988, Supp. V).

schools. The Fifth Circuit Court of Appeals sided with Lopez and reversed his conviction.¹²² The Supreme Court agreed to hear the case.

In a closely divided opinion, the Court agreed with the Fifth Circuit, holding that § 922(q) “exceeds the authority of Congress.”¹²³ The majority opinion was written by Chief Justice William H. Rehnquist and joined by Justices Scalia, Thomas, O’Connor, and Kennedy. Distinguishing (but not overruling) every previous Commerce Clause case, the Court held that 922(q) had “nothing to do with ‘commerce’ or any sort of economic enterprise” and is “not an essential part of a larger regulation of economic activity.”¹²⁴ The Court also held that the statute had no jurisdictional hook that could sustain it by requiring a demonstration in each case that the firearm in question was used in interstate commerce.¹²⁵ Finally, the Court found that if it accepted the Government’s argument that the possession of firearms in public schools does indeed substantially affect interstate commerce, it would be “hard-pressed to posit any activity by an individual that Congress is without power to regulate.”¹²⁶ Accordingly, the Court struck down 922(q) and the conviction of Alfonso Lopez, over the vigorous dissent of Justices Breyer, Stevens, Souter and Ginsburg.

This case was disturbing to those who believe Congress has not only the power but the duty to protect public safety by keeping our schools and our society safe from gun violence. The Court’s narrow reading of the Commerce Clause was particularly perplexing given the evolving nature of commerce in the United States. Rehnquist himself acknowledged that the nature of commerce in the United States had changed dramatically since the founding of the country. Even as he wrote the opinion striking down Section 922(q), Rehnquist noted that the evolution of the Court’s Commerce Clause jurisprudence over the history of the United States “was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope.”¹²⁷ Nonetheless, the Court was not able to reconcile national economic realities with its rigid interpretation of the Constitution.

Though *Lopez* seemed to restrain Congress dramatically, a hope remained that it had in fact left the door open a crack for federal legislation: the Court suggested that it might have been able to sustain Section 922(q) had Congress included legislative findings when it passed the bill. Specifically, the majority said, “to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substan-

¹²² *United States v. Lopez*, 2 F.3d 1342 (9th Cir. 1993).

¹²³ *Lopez*, 514 U.S. at 551.

¹²⁴ *Id.* at 561.

¹²⁵ *Id.*

¹²⁶ *Id.* at 564.

¹²⁷ *Id.* at 556.

tial effect was visible to the naked eye, they are lacking here.”¹²⁸ Indeed, even the Government acknowledged that “[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.”¹²⁹ Optimistically, Congress viewed this point as a signal that our work would be upheld in the future if only we explained ourselves better.

These hopes were dashed five years later with a decision in the case of *United States v. Morrison*,¹³⁰ which struck down a provision of the Violence Against Women Act (VAWA) despite extensive congressional findings underlying the law.¹³¹ In *Morrison*, the Court held that a college freshman who was assaulted and repeatedly raped by two members of the football team could not sue her attackers in federal court as VAWA provided. The Court held that Congress lacked the power to enact the provision of VAWA that enabled the suit, 42 U.S.C. § 13981.

The Court rejected claims that the VAWA provision could be sustained under the Commerce Clause, even though Congress had explicitly found that gender-motivated violence has an effect on interstate commerce.¹³² Once again writing for a 5-4 Court, Chief Justice Rehnquist noted, “in contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families.”¹³³ Nonetheless, the Chief Justice wrote that “Congress’ findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution’s enumeration of powers.”¹³⁴ Even though Congress had found that gender-motivated violence did fall into the third Commerce Clause category identified in *Lopez*, the “substantially affects” category, the Court substituted its own judgment for that of Congress and struck down the law.

2. The Conservative Judicial Activist Attack on Congressional Legislative Authority Deriving from Section 5 of the Fourteenth Amendment

Not only did *Morrison* strike a major blow to Congress’s ability to legislate under the Commerce Clause, it also represented a continuing trend of Rehnquist Court assaults on congressional power under Section 5 of the Fourteenth Amendment. The Court, having rejected the argument that

¹²⁸ *Id.* at 563.

¹²⁹ Brief for the United States at 5–6, *United States v. Lopez*, No. 93-1260, (U.S. Jun. 2, 1994), 1994 WL 242541.

¹³⁰ 529 U.S. 598 (2000).

¹³¹ See, e.g., H.R. REP. NO. 103-711, at 385 (1994); S. REP. NO. 103-138, at 40 (1993); S. REP. NO. 101-545, at 33 (1990).

¹³² See *id.*

¹³³ *Morrison*, 529 U.S. at 614.

¹³⁴ *Id.* at 615.

the VAWA provision was acceptable under the Commerce Clause, could have sustained it as an exercise of Congress's power under the Fourteenth Amendment to protect the civil rights of American citizens. Instead, the Court chose to uphold the interpretation of Section 5 in the much-vilified *Civil Rights Cases*, finding that the only legislation permissible under Section 5 is "corrective" legislation aimed at impermissible state action.¹³⁵

The *Morrison* case was not the first or the only Rehnquist Court assault on Section 5, however. In 1997, the Court struck down the Religious Freedom Restoration Act¹³⁶ as beyond the bounds of Congress's power under Section 5. *City of Boerne v. Flores*¹³⁷ established a new test for evaluating the propriety of congressional action under Section 5. Under the *Boerne* test, congressional legislation would be upheld only if it showed "congruence and proportionality" to the substantive rights it was entitled to protect under the Fourteenth Amendment.¹³⁸

Perhaps most tellingly, in *Boerne* the Court declared itself to be the sole interpreter of what is constitutional. Writing for the majority, Justice Kennedy explained, "[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."¹³⁹ The latter power, it held, was reserved for the courts.

This rationale was echoed and upheld several years later when the Court held that civil suits against the states under the Americans with Disabilities Act exceeded the bounds of congressional authority under Section 5, in *Board of Trustees of the University of Alabama v. Garrett*.¹⁴⁰ Once again writing for the majority, Chief Justice Rehnquist explained "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."¹⁴¹ It was the determination of five members of the Court, in this case, that Congress did not provide enough evidence of unconstitutional discrimination and did not tailor the ADA narrowly enough to address unconstitutional discrimination.¹⁴² It found this despite what Justice Breyer's dissent described as "a vast legislative record documenting massive, society-wide discrimination against persons with disabilities."¹⁴³

The perspective of the Rehnquist Court on the superiority of judicial analysis to legislative analysis is deeply troubling to Americans on both sides of the aisle. Former Senator Mike DeWine, a Republican from Ohio, also remarked on this trend, saying, "in a number of recent cases, the Supreme Court of this country has restricted congressional power in a way that I think is not required by the Constitution To me, [*Garrett*] is a

¹³⁵ *Id.* at 4 (citing *The Civil Rights Cases*, 109 U.S. 3, 18 (1883)).

¹³⁶ Pub. L. No. 103-141, 107 Stat. 1488 (1993).

¹³⁷ 521 U.S. 507 (1997).

¹³⁸ *Id.* at 520.

¹³⁹ *Id.* at 519.

¹⁴⁰ 531 U.S. 356 (2001).

¹⁴¹ *Id.* at 365.

¹⁴² *Id.* at 374.

¹⁴³ *Id.* at 377 (Breyer, J., dissenting) (internal citations omitted).

best example of this recent trend. And it's not a good trend in my opinion."¹⁴⁴ He also noted, "In such a difficult case, where the Constitution does not clearly support the majority's decision, the proper response is not to strike down the law. In such a case, the Court should defer to the will of the people."¹⁴⁵ The former Republican chairman of the Senate Judiciary Committee, Senator Arlen Specter of Pennsylvania, has frequently expressed his frustration with the Court's jurisprudence in examining the propriety of congressional legislation.¹⁴⁶

In many ways, Congress is better suited to determine what is relevant to the exercise of its constitutional authority than are the courts. As Justice Breyer put it,

Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy Unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification. Unlike judges, Members of Congress can directly obtain information from constituents who have first-hand experience with discrimination and related issues. Moreover, unlike judges, Members of Congress are elected.¹⁴⁷

As Justice Breyer points out, Congress has an important role in making legal and constitutional determinations. The Rehnquist Court repeatedly undermined this role by overturning congressional enactments.

D. The Continuing Danger to Legislative Power

Though the Rehnquist revolution was profound, it was not absolute. In addition to the cases described above, the Court did occasionally sanction congressional enactments, even on the same subjects as the cases described above. Most significantly, at the end of Chief Justice Rehnquist's final term, the Court handed down a decision in *Gonzales v. Raich*,¹⁴⁸ upholding the enforcement of the federal Controlled Substances Act against

¹⁴⁴ *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 388 (2006) (statement of Sen. Mike DeWine).

¹⁴⁵ *Id.*

¹⁴⁶ *See, e.g., Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 3–4 (2005) (statement of Sen. Arlen Specter).

¹⁴⁷ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 384 (2001) (Breyer, J., dissenting) (internal citations omitted).

¹⁴⁸ 545 U.S. 1 (2005).

a California woman who, pursuant to California law, was growing marijuana for her personal, medical use in her own home. Over the vigorous dissents of the Chief Justice and Justices O'Connor and Thomas, the Court took a step back from its more recent Commerce Clause cases, finding that Congress could prohibit the purely intrastate possession of a controlled substance for personal use. The decision in *Raich* may seem to some like the end of the new federalism.

1. *Raich Provides Small Comfort*

For several reasons, however, *Raich* does not provide cause for relief. First, it may have just been a blip, an example of the Court taking one step forward before it takes two steps back.¹⁴⁹ Second, *Raich* does not erase the profound effects of *Lopez*, *Morrison*, and the like. Unlike the policies of an overreaching Executive, Supreme Court decisions are not put before the people every four years; their effect can outlast even the life tenure of the Justices who authored them as they remain on the books as good law and are difficult to overturn.¹⁵⁰ Furthermore, they already may have had an inhibitory effect on efforts by members of Congress to introduce and pass important, new legislation. The fear of having their work second-guessed and struck down by the courts makes the already challenging process of consensus-building and legislating in Congress all the more difficult.

Finally, the subject matter in *Raich*, the power of the federal government to regulate drug usage, is traditionally an area where conservatives advocate for greater government control. It may have simply been that the conservative Justices did not see *Raich* as the best vehicle to advance an assault on the Congress's legislative power because of the case's subject matter.

2. *The Future of the Supreme Court and the New Federalism*

Perhaps the most disturbing aspect of the judicial encroachment on legislative prerogatives is not the present attack, but the possibility of continued assault on the prerogatives of Congress in the future. Because Court personnel are subject to change, and given the long terms of service of many of the current Justices, the roster is likely to change again in the somewhat near future. Thus, we are unable to predict the future course of the new federalist assault on congressional powers. However, given who is nominating Justices to the Supreme Court, if this trend continues, we can

¹⁴⁹ Or, as another commentator put it, in *Raich* "the new federalism passed from youthful exuberance to middle-aged sobriety." Eric R. Claey's, *Raich and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 792 (2005).

¹⁵⁰ See Barron, *supra* note 85, at 2094.

only expect the judicial assault to expand. A quick look at the two most recent Justices added to the Court lends further credence to this prediction.

During the 109th Congress, the Supreme Court added two new, conservative members: Chief Justice John G. Roberts, Jr., and Associate Justice Samuel A. Alito, Jr. Though it is not clear whether they will adopt the federalism jurisprudence of their predecessors, we can reasonably guess where they will land based on their past record.

Both Chief Justice Roberts and Justice Alito showed some hostility to congressional legislation during their tenures on the District of Columbia and Third Circuits, respectively. Chief Justice Roberts issued a dissenting opinion in which he held that the application of the Endangered Species Act to the protection of the arroyo toad in the particular case would exceed the powers of Congress under the Commerce Clause.¹⁵¹ Justice Alito voted in a way that was perhaps even more disturbing to those of us concerned about the power of Congress to protect American citizens. In *United States v. Rybar*, Justice Alito voted to strike down a federal statute regulating the sale and possession of machine guns on the grounds that it exceeded Congress's power under the Commerce Clause.¹⁵² These opinions suggest that the new Justices will be inclined to follow the path of the Justices, past and present, who have been unsympathetic to congressional legislation.

President Bush's lower court appointees appear to have similar attitudes. Perhaps most illustrative is the President's famous promise to nominate judges in the mold of Justices Scalia and Thomas, two of the Justices most hostile to Congressional power.

For all of these reasons, we cannot take much comfort in *Raich*. Of course, it is left to be seen where the Roberts Court will take the new federalism. In the meantime, Congress and the American people must not sit passively back and await congressional irrelevance. As Congress struggles to maintain its independence from the Executive, it is critical that we do not forget to vigilantly protect our legislative prerogatives from encroachment by the Judiciary.

V. A MUSCULAR CONGRESS

In November 2005, the Democratic leadership of the Senate invoked a parliamentary rule to force the body into closed session to discuss failures in oversight over the Iraq War, and the ineffectiveness of the Intelligence Committees concerning the run-up to war.¹⁵³ The move succeeded in bringing attention to Congress's failure to hold the Administration to ac-

¹⁵¹ *Rancho Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting).

¹⁵² *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (Alito, J., dissenting).

¹⁵³ Carl Hulse & David D. Kirkpatrick, *Partisan Quarrel Causes Senators to Bar the Doors in an Unusual Closed Session*, N.Y.TIMES, Nov. 2, 2005, at A22.

count, but it hardly solved the problem of Congress's weakened resolve. In the years ahead, Democratic and Republican members of Congress must join together, get tough, and fulfill their institutional responsibilities. Congress ought to start by providing more aggressive oversight over departments and agencies and taking a more assertive role in the war on terror. These are practical solutions, not partisan ones, and they are in the interests of all Americans, no matter which party controls the legislative branch.

A. *Congressional Oversight*

As described above, Congress has a rich tradition of oversight and meaningful involvement both in national security matters and in domestic affairs. To win the war on terror, America needs a strong President. As Commander-in-Chief, the President should have every tool necessary to fight and win the war on terror. While presidential power is vital, however, it is not infallible. As a result, Congress has an important role to play in providing oversight and demanding accountability. To fulfill that role, Congress must start by asserting its right to information and answers from the Executive branch more aggressively. The leadership of both parties ought to demand that the President fully brief members of the Intelligence Committees on its counterterrorism program and provide access to information about the Administration's war on terror.

Second, Congress needs to use that information to hold the Administration to account when it fails to conduct the war on terror effectively. Mistakes are inevitable in any war, but that does not mean we cannot learn from them and take actions to correct our course. When the President of the United States chooses to give Administration officials the Presidential Medal of Freedom for making mistakes rather than hold them accountable,¹⁵⁴ it is incumbent upon Congress to demand that missing accountability. America needs a smart, flexible, and effective war on terror—and Congress has a role to play in making that so.

Third, Congress should pass proposals already on the table to recreate the Truman Committee for the current wartime situation. The goal of this committee should be the same as Harry Truman's goal—to seek out corruption and waste for the betterment of the war effort as a whole. A bipartisan embrace of this committee's creation would go a long way toward restarting Congress's dormant oversight capacity.

Similarly, Congress must reassert its traditional domestic role. For example, the politicization of the Department of Justice and other agencies is not inevitable, and Congress has the power to step in. The Senate Judiciary Committee can start by conducting more frequent and meaningful oversight hearings. The Committee ought to be more vigilant in requiring

¹⁵⁴ President Bush awarded Gen. Tommy Franks, George Tenet, and Paul Bremer the Presidential Medal of Freedom on December 14, 2004.

Justice Department officials to answer its questions, and in demanding information. The Senate has a variety of tools to force compliance, and it should consider using them when appropriate and necessary. Congress needs to do more to ensure that the Justice Department once again becomes independent and responsive to the whole American public, not just one party.

These lessons are by no means limited to the Department of Justice. Every congressional committee should recommit itself to oversight. There should be a Congress-wide push for greater flow of information, and robust oversight hearings to ensure efficiency and hold officials accountable for their actions. Congress ought not to cede its power of oversight and allow itself to be marginalized.

Congress also ought to consider long-term, innovative solutions, such as adjusting its committee structure so it is more conducive to responsible, bipartisan oversight; working with other branches to create stronger institutions of checks and balances (such as inter-branch, bipartisan commissions that can provide a check through public reports when one branch exceeds its power); and making it easier to convene independent commissions in the vein of the 9/11 Commission and the Commission on Presidential Debates to transcend the partisan gridlock of Congress, identify problems, and propose solutions.

My goal in advocating increased oversight and congressional power is not a political one. The objective of congressional oversight should not be used to embarrass or to score political points. Instead, my goal is to fix an imbalance I believe is detrimental to American government no matter which party is in power. The robust balance of powers envisioned by our founders leads to more successful outcomes regardless of political affiliation.

B. Advise and Consent

Congress's relationship with the Executive and Judicial branches of government overlaps nowhere greater than in the judicial confirmation process. The Senate has both the opportunity and responsibility to help shape tomorrow's Judiciary by harnessing its powers of advise and consent today. Senators not only ought to demand that the Executive seeks real advice from members of Congress, but they ought to join together in bipartisan fashion to scrutinize a nominee's beliefs on issues pertaining to Congressional authority.

Senators have an obligation to scrutinize the character and philosophies of judicial nominees, and nominees have an obligation to cooperate.¹⁵⁵ This

¹⁵⁵ In a July 14, 2005, letter to Senators Specter and Leahy, 102 law professors encouraged the Judiciary Committee to ensure that nominees for the views of nominees for the Supreme Court "are within the constitutional mainstream." Specifically, they encouraged Senators to ask nominees about their judicial philosophy and views on substantive due process, the right to privacy, the Equal Protection Clause, the Commerce Clause, the Elev-

is especially when a nominee's ideology, judicial philosophy, and constitutional views are central considerations in the President's decision to nominate. There is an inherent illogic in preventing the Senate from considering the one factor—ideology—that is central to the President's own nomination decision. It is best for the Senate and the country when this scrutiny and debate occurs in an open and rational way.¹⁵⁶

In particular, Senators ought to make sure that nominees do not have a cramped view of the Commerce Clause by asking tough and specific questions and using the tools at their disposal to demand answers. Tough questions include: Do you think the trend toward striking down laws on this basis is desirable? What do you believe is the extent of Congress's authority to legislate under the Commerce Clause? Can Congress regulate local trade in a product that is used nationally? Can Congress regulate labor standards for states and cities under its Commerce Clause power? How closely connected must the regulated action be to interstate commerce for Congress to have the authority to legislate? Where would you look for evidence that Congress is properly legislating under its Commerce Clause authority? What is the extent of the limitations imposed on state regulation by the Commerce Clause? Do you agree that it is the Commerce Clause that allows Congress to prohibit racial discrimination in public accommodations, as the Court held in *Heart of Atlanta Hotel v. United States*?¹⁵⁷ Do you agree with the Court's decision in *United States v. Lopez* (1995), which struck down the Gun-Free School Zone Act because education is traditionally local? Is there any circumstance under which Congress could regulate activities in schools using its Commerce Clause authority? Questions about Congress's powers under the Commerce Clause are as numerous as they are important. However, fewer than half the Senators on the Judiciary Committees asked either Justice Roberts or Justice Alito questions about this issue.¹⁵⁸

Congress also ought to ask nominees more tough questions about when they believe courts can strike down federal laws. What amount of deference should the Court give to Congressional action? Should the Court err

enth Amendment, and the Commander-in-Chief power. Letter from William P. Marshall et al., to Senator Arlen Specter & Senator Patrick Leahy (July 14, 2005) (on file with author).

¹⁵⁶ As chairman of the Subcommittee on Administrative Oversight and the Courts, I chaired a hearing in 2001 about the role of ideology in the nomination process. At that hearing, I observed that, "in recent years, the unwillingness to openly examine ideology has sometimes led Senators who oppose a nominee to seek out non-ideological disqualifying factors, like small financial improprieties from long ago, to justify their opposition. This, in turn, has led to an escalating war of 'gotcha' politics that, in my judgment, has warped the Senate's confirmation process and harmed the Senate's reputation." *The Judicial Nomination and Confirmation Process: Hearing before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 108th Cong. 2 (2001) (statement of Sen. Schumer).

¹⁵⁷ 379 U.S. 241 (1964).

¹⁵⁸ Senators who did ask questions about the Commerce Clause included Cornyn, Feinstein, Graham, Hatch, Leahy, Sessions, Specter, and myself.

on the side of upholding a law? Do certain types of laws deserve greater deference than others? Regulatory laws? Criminal laws? How closely tied must a law be to an enumerated right of Congress under Article I for it to be upheld?

The Senate ought to be more vigilant in asking these questions¹⁵⁹ and, just as importantly, in demanding answers.¹⁶⁰ The sheer number of substantive areas of legitimate and important questioning that Senators can ask during judicial confirmation process is staggering. It underscores why the courts are so important, why the confirmation process is so central, and why questioning is so vital. And the answers to each and every one of these questions could have a profound effect on the daily lives of hundreds of thousands, if not millions, of people. That is why the confirmation process is not a whim or a political game, but the solemn obligation of the Senate to the country.

C. Conclusion

For years, President Bush has repeated a simple point when challenged about the aggressiveness of his Administration's policies: "I came to Washington to solve problems." Like the President, every member of Congress came to Washington to solve problems, and to make America stronger and safer. However, the power of Congress to satisfy its constitutional responsibilities and provide for the general welfare of the American people has diminished in recent years. The strength and influence of Congress is not a partisan issue, and its power should not ebb and flow depending on which party controls which levers of government. The American people deserve active and aggressive lawmakers—not *despite* the troubled times we live in, but *because* of the troubled times we live in.

EPILOGUE

The momentous election of November 7, 2006, sent a clear message that voters were looking for a change. Although there are many areas of possible change that the new Democratic majority looks forward to addressing in the coming Congress, accountability in government is among the first to be addressed. Voters were fed up with a Congress that failed to ask questions, investigate or probe into a costly and deadly war. Voters want a

¹⁵⁹ The Senate, moreover, ought to demand that the White House fully cooperate with the ABA Standing Committee on the Federal Judiciary during the confirmation process. For good reason, Senators place a heavy emphasis on the careful, non-partisan evaluations of the ABA. The President ought to make sure that nominees are willing to interview with the Committee, and if he fails to, the Senate ought to consider blocking that nomination from going forward.

¹⁶⁰ Chief Justice Roberts was especially resistant in answering these questions, but may have been unable to avoid answering questions with more persistence and steadfastness from members of the Committee.

Congress that stands up, instead of laying down and allowing the Executive and Judicial branches to roll right over it.

The preceding Article lays out why Congress must seize the initiative to reinstitute accountability in our federal government, and how it should begin to go about doing just that. By increasing oversight and working hard to reestablish the role of the Congress, we can transform the Congress from an obsequious follower into the strong, robust representative of the people that our founders envisioned . . . and that our current citizenry has demanded.