

## Declining the “Invitation to Struggle”

*Congressional Complicity in the Rise of the Imperial Presidency*

---

**ABSTRACT** Congress has abdicated its role at the center of U.S. political life. As a result, the constitutional powers that should be exercised by Congress in both domestic and foreign policy have been progressively appropriated by the executive branch. At times, presidents have seized those powers through exigent circumstances or congressional desuetude and ineffectiveness. Just as frequently, however, Congress has been willing—if not eager—to cede those prerogatives to the president whether for the sake of expediency, emergency, efficiency, electoral maneuvering, or in a deliberate effort to deflect political consequences. This has made the country less democratic, more authoritarian, and decreasingly likely to solve complex problems that require a broad range of perspectives and thoughtful deliberation. The article explores how this abdication has occurred throughout U.S. history in a variety of areas, including U.S. foreign relations, the constitutional war powers, national emergencies, and delegations of power. This article is a revised and expanded version of the author’s presidential address at 2019 annual meeting of the Pacific Coast Branch of the American Historical Association, delivered August 1, 2019, at the University of Nevada, Las Vegas. **KEYWORDS** Congress, presidency, Constitution, war powers, U.S. foreign relations

---

During a speech to young conservative activists on 23 July 2019, Donald Trump railed (yet again) against Democrats for their “witch hunt” against him. At one point, he asserted that he has “an Article II where I have the right to do whatever I want as President.”<sup>1</sup> Trump’s comment is reminiscent of Richard Nixon’s infamous claim to journalist David Frost in 1977 that “if the president does it, it is not illegal.”<sup>2</sup> The constitutional illiteracy of the two presidents aside, the notion that the president of the United States has nearly unlimited power seems to be a disappointingly common position in contemporary politics. In April 2019, Senator Kamala Harris (D-CA) said that, if elected, she would sign an executive order mandating background checks for gun purchases, creating more stringent regulation of gun manufacturers, and

1. *Washington Post*, 24 July 2019.

2. For a transcript of the televised interview, see *New York Times*, 5 May 1977.

preventing some domestic abusers from purchasing guns.<sup>3</sup> Not to be outdone, both Senator Cory Booker (D-NJ) and former Representative Robert “Beto” O’Rourke (D-TX) each announced that, as president, they would each use executive authority to unilaterally institute changes to U.S. immigration policy.<sup>4</sup> And a quick glance at campaign rhetoric reveals that dealing with urgent political issues through executive decree rather than working with Congress has been proposed by most of the twenty-five other candidates in the 2020 Democratic primaries.

Presidential primaries are notorious for the deluge of expansive promises that candidates make in an effort to win their party’s nomination. These proposals are inclined to be less practical than aspirational, tend to be short on detail, and usually have little grounding in stark political or fiscal realities. More troubling, however, is the assumption on the part of most politicians seeking the Oval Office that the powers of the presidency are a panacea for all of the country’s problems. Given that most of the 2020 Democratic hopefuls currently serve in or have been members of Congress, it is telling—not to mention alarming—that their first instinct is to bypass Congress to enact their proposed agenda in the White House.

But perhaps we should not be shocked at their lack of faith in Congress or their embrace of executive power. The failure of the Republican-controlled Congress to enact its agenda during Trump’s first two years in office—after having spent eight years during the Barack Obama presidency decrying its inability to repeal the Affordable Care Act and accomplish other legislative priorities—is a clear indication of how anemic and inept that branch of government has become. Opinion polls show how strongly the public feels about congressional inadequacy. A Gallup poll in June 2019 revealed that only 19 percent of Americans approved of the way Congress handles its responsibilities. Amazingly, this assessment does not represent the lowest point for Congress; the country’s legislative branch achieved (if that is the right word) a dubious 9 percent approval rating in November 2013.<sup>5</sup> Gallup’s findings tracked with an even more damning Public Policy Polling report from October 2013 that exposed Congress as being only slightly more

3. *New York Times*, 22 April 2019.

4. *New York Times*, 2 July 2019, 12 June 2019. Kamala Harris also released a plan to create a roadmap to citizenship for “Deamers”—immigrants brought to the United States illegally as children—exclusively through executive action. See *New York Times*, 29 May 2019.

5. Gallup Poll data, “Congress and the Public: Congressional Job Approval, April 1974–June 2019,” <https://news.gallup.com/poll/1600/congress-public.aspx>, accessed 15 July 2019.

popular than Ebola, twerking, and the Kardashians. Let's face it: when an institution has lower approval ratings than colonoscopies, root canals, and cockroaches, there is a serious problem.<sup>6</sup>

What accounts for such disdain for Congress? Scholars and pundits have proposed a wide array of explanations, including the sharp rise in partisanship; the pervasive failure to adequately address the country's daunting political, economic, social, and diplomatic problems; the influence of the hyper-partisan and segmented media that exacerbates political divisions and undermines congressional effectiveness; and the widespread belief that nothing that the public says or does makes a difference to those who are supposedly serving their interests in Washington, D.C. But the most frequently cited reason for the vitriol toward Congress is the perception that its members are simply not doing what they were elected to do because of the gridlock and political obstructionism that is endemic on Capitol Hill. As commentator Kevin Williamson wryly noted, "Congress always has been full of grifters, bush-league demagogues, and mediocrities who were too slow-witted to practice law and too lazy to sell real estate, but there was a time when it did its job, too."<sup>7</sup>

I would argue, however, that the failure of Congress to perform its constitutional obligations extends far beyond cozying up to lobbyists and donors, pandering to Twitter mobs, preening vacuously in the media, and ignoring the unconscionable lack of progress it has made with the Brobdingnagian problems facing the country. In fact, it is patently obvious that Congress has abdicated its role at the center of U.S. political life. As a result, the constitutional powers, authority, and prerogatives that should be exercised by Congress have been progressively appropriated by the occupants of the White House, both directly and indirectly. This phenomenon, in turn, has made the country less democratic, more authoritarian, and decreasingly likely to solve complex problems that require a broad range of perspectives and thoughtful deliberation. Moreover, this takeover has created an added burden on an already impossibly complicated presidency, setting up the executive and the country for failure as Congress looks on from Capitol Hill, increasingly impotent and irrelevant.

6. *Washington Post*, 20 June 2014. The full results of the poll can be found at [https://www.publicpolicypolling.com/wp-content/uploads/2017/09/PPP\\_Release\\_Natl\\_010813\\_.pdf](https://www.publicpolicypolling.com/wp-content/uploads/2017/09/PPP_Release_Natl_010813_.pdf), accessed 26 July 2019.

7. Kevin D. Williamson, "Inching Back toward the Rule of Law," *National Review Online*, 23 June 2019, <https://www.nationalreview.com/2019/06/government-bureaucracy-congress-constitutional-role/>, accessed 30 July 2019.

How did this come to pass? A constellation of forces has come together to create this troubling situation. The founders intentionally designed the U.S. political system to put Congress and the president in competition, including the idea that, as James Madison put it, “Ambition must be made to counteract ambition” in order to safeguard liberty.<sup>8</sup> Unfortunately, in both foreign affairs and domestic policy—and especially at the nexus of the “intermestic”—we have witnessed a combination of presidential encroachment, congressional deference to the president, institutional passivity in Congress, an inclination on the part of the Supreme Court to uphold presidential overreach, and active delegation of legislative powers and prerogatives to the presidency lead to an expansion of executive power.<sup>9</sup>

In his classic study of the presidency, political scientist Edward Corwin noted that the U.S. Constitution was “an invitation to struggle for the privilege of directing American foreign policy.”<sup>10</sup> Indeed, it has been so ever since the eighteenth century. George Washington’s complaints about Senate interference with Jay’s Treaty; William McKinley’s clashes with Congress over the timing of the war with Spain; and Woodrow Wilson’s brawl with Henry Cabot Lodge over the Versailles Treaty are only a few of the myriad of examples of this contest for control. Yet since the end of World War II, Congress has conceded virtually total control over foreign relations and the war powers to the president. On the rare occasions when it has intervened, Congress has typically ratified executive initiatives with little more than token discussion or dissent.

It is not only in foreign policy where this competition often fails to occur. Corwin’s invitation to struggle has been rejected in domestic affairs as well. The president and Congress grapple over political issues such as the budget, immigration, health care, internet regulation, the environment, drug

8. *Federalist* 51, in Alexander Hamilton, John Jay, and James Madison, Jr., *The Federalist: A Collection of Essays Written in Favor of the Constitution of the United States, as Agreed Upon by the Federal Convention, September 17, 1787*, ed. by Michael Loyd Chadwick (Washington, D.C.: Global Affairs Publishing Company, 1987), 281.

9. Campbell Craig and Fredrik Logevall discuss the concept of the “intermestic” dimension of U.S. policy (the confluence of the international and domestic, whereby the two are dynamically intertwined in policy areas like immigration and border security) in Campbell Craig and Fredrik Logevall, *America’s Cold War: The Politics of Insecurity* (Cambridge, Mass: Belknap Press, 2009).

10. Quoted in Cecil V. Crabb, Jr. and Pat M. Holt, *Invitation to Struggle: Congress, the President, and Foreign Policy*, 4th ed. (Washington, D.C.: CQ Press, 1992), ix. For an overview of the relationship between the executive and legislative branches, see Louis Fisher, *Constitutional Conflicts Between Congress and the President*, 4th ed., revised (Lawrence: University Press of Kansas, 1997).

legalization, and the census. As with foreign relations, the institutional clash for domestic political primacy has been dominated by the White House since the Progressive Era, and that advantage should be seen as a major contributing factor to the emergence of what historian and former presidential adviser Arthur Schlesinger, Jr., characterized as “the imperial presidency.”<sup>11</sup>

Yet it would be a mistake to consider the imperial presidency as merely a product of the whims of the executive. In fact, as political scientist Thomas Cronin has suggested, “the imperial Presidency was at least as much the product of an unassertive Congress as it was of power-hungry Presidents.”<sup>12</sup> Surprisingly, however, much of the literature on the evolution of the modern presidency neglects or underestimates congressional complicity in its loss of influence, focusing instead on how presidents have acted aggressively to accumulate power to meet contemporary needs. The reality, as we shall see, is much more complex. More concerning is that our understanding of the problem is undermined by the steady decline in scholarly research focusing on the historical evolution of the legislative branch’s role in both domestic and foreign policy.

To be sure, throughout U.S. history presidents have consistently acted unilaterally and beyond the scope of their enumerated powers. George Washington’s Neutrality Proclamation, the Louisiana Purchase, Thomas Jefferson’s retaliation against the Barbary pirates, James Madison’s seizure of West Florida, Andrew Jackson’s fight over the Bank of the United States, the Emancipation Proclamation, the desegregation of the U.S. military, the initiation of affirmative action, Deferred Action for Childhood Arrivals—these are just a few notable examples. Presidents have taken advantage of opportunities to fill gaps in leadership and power, pushing until they meet congressional resistance or public disapproval; that is natural in politics.

As U.S. global commitments expanded and domestic programs proliferated in the twentieth century, the scope of presidential powers grew commensurate with these obligations, and any skepticism about the expanded

11. Arthur M. Schlesinger, Jr., *The Imperial Presidency*, rev. ed. (Boston: Houghton Mifflin Harcourt, 2004). The original edition appeared in 1973.

12. Thomas E. Cronin, “The Imperial Presidency Reexamined,” in *The Presidency and the Congress: A Shifting Balance of Power*, ed. William S. Livingston, Lawrence C. Dodd, and Richard L. Schott (Austin: University of Texas Press, 1979), 38. Arthur Schlesinger, Jr. agreed, arguing that the evolution of the imperial presidency “was as much a matter of congressional abdication as of presidential usurpation.” Schlesinger, *The Imperial Presidency*, xxvii.

power of the presidency seemingly vaporized in light of the requirements of the so-called “American century.”<sup>13</sup> At times, presidents have seized those powers through exigent circumstances or congressional desuetude and ineffectiveness. Just as frequently, however, Congress has been willing—if not eager—to cede those prerogatives to the occupant of the White House whether for the sake of expediency, emergency, efficiency, electoral maneuvering, or in a deliberate effort to deflect political consequences.

Further, although not a central focus of my argument, it should be noted that the judicial branch does make an important contribution to these transitions of power. Even a cursory review of the relevant Supreme Court decisions demonstrates that the Court has helped to create a framework for an almost unbound presidential authority in cases dating to the early nineteenth century. Thus, this is not simply an account of congressional abdication, although that does play a crucial role. Nor is it solely about the development of the modern presidency. It is instead a complex tale of the struggle for power and influence in the U.S. constitutional context that transcends any particular era. The story takes place primarily during the past hundred years, but the roots of the invitation to struggle are found in the summer of 1787.

The founders laid the groundwork for expansive presidential power when they jettisoned the Articles of Confederation and fashioned the Constitution in its wake. A pivotal factor in the decision first to revise and then to replace the Articles was the lack of a robust executive. The architects of the Constitution devoted significant attention to the question of the executive power. Their discussions represent a key component of both the deliberations at Philadelphia and the subsequent ratification debates. But even with the recognition of the deficiencies of the executive power under the Articles, many of the convention delegates clung to their instinctive and experiential fear of the threat posed by executive authority. This led Madison to express his concern over the prospect of legislative dominance under the new constitution. In *Federalist* 49, Madison observed, “we have seen that the tendency of republican governments is to an aggrandizement of the legislative, at the expense of the other departments.” He argued that “the weakness of the executive may require . . . that it should be fortified” to “resist encroachments”

13. Godfrey Hodgson, *America in Our Time* (New York: Doubleday & Company, 1976), 104. Henry Luce, publisher of *Time*, coined the phrase “American century” in an editorial in *Life* magazine on 17 February 1941.

on its responsibilities by the more powerful Congress.<sup>14</sup> In the same vein, Alexis de Tocqueville wrote in *Democracy in America* that since Congress is “free to make the laws, it is to be feared lest they should gradually appropriate to themselves a portion” of executive authority. He considered this “dependence” to be “one of the defects inherent” in the Constitution, and argued that the “struggle between President and legislature is bound to be unequal, for the latter, if it sticks to its plan, is always able to overcome any resistance he can put up.”<sup>15</sup>

History has proven Madison and Tocqueville wrong. What has evolved instead was predicted in 1833 by Senator Henry Clay (Whig-KY) when he warned, “the executive will become a great vortex that must end in swallowing up all the rest.” While Clay’s immediate concerns focused on the overreaching actions of Andrew Jackson, his admonition against executive power applied more generally: “The pervading principle of our system of government . . . is not merely the possibility, but the absolute certainty of infidelity and treachery” by a president seeking ever more power and authority.<sup>16</sup> Clay’s fears—while perhaps overwrought due to his intense hatred of Jackson—would be largely realized over the next two hundred years, although it would take decades before the process began in earnest.

For the majority of the nineteenth century, the most important political figures in the United States served in Congress. Even in the realm of foreign relations, where the executive possesses distinct constitutional advantages, presidents had to contend with congressional influence on—and frequently power over—U.S. foreign policy initiatives. The failed efforts of Secretary of State William Seward to acquire strategic possessions beyond Alaska are a perfect example, as Congress blocked the acquisition of Haiti, Hawai‘i, Greenland, Cuba, and other territories for a variety of domestic political reasons. Congress also refused to ratify any treaties negotiated by the executive branch between 1871 and 1898.<sup>17</sup> Representative Thaddeus Stevens

14. *Federalist* 49, in Hamilton, Jay, and Madison, *The Federalist*, 274. In contrast, Saikrishna Bangalore Prakash suggests that the president has been powerful from the beginning and that the delegates in Philadelphia intended to create a dynamic executive—and succeeded. See Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* (New Haven: Yale University Press, 2015).

15. Alexis de Tocqueville, *Democracy in America*, vol. 1 (New York: Vintage, 1990), 121–22.

16. Henry Clay, *The Life and Speeches of Henry Clay, of Kentucky*, volume 2 (Philadelphia: Leary & Getz, 1855), 190, 200–202.

17. James T. Patterson, “The Rise of Presidential Power Before World War II,” *Law and Contemporary Problems* 40, no. 2 (Spring 1976): 48.

(R-PA) summed up the contemporary sentiment: “Though the President is Commander-in-Chief, Congress is his commander; and, God willing, he shall obey.”<sup>18</sup> Even granting the narrow focus and reactive nature of U.S. foreign policy during Reconstruction and much of the Gilded Age, it is astonishing that the presidency was so marginalized in the conduct of foreign relations, especially in the wake of Abraham Lincoln’s vast expansion of presidential power during the Civil War.

So what happened? Congress certainly did not lose its power; one need only consult the Constitution to see that it is still there in Article I. As journalist Godfrey Hodgson has observed, “The recurrent crises of the nineteenth century showed that the nation needed to be led. And the experience of Congressional government in the generation after the Civil War only confirmed . . . that only the President could lead.”<sup>19</sup> A key turning point would be the decision to embrace imperialism and extend the country’s focus overseas at the turn of the century. As U.S. economic and diplomatic interests expanded globally, the need for a stronger presidency became a priority for influential figures like Theodore Roosevelt, Alfred Thayer Mahan, John Hay, Elihu Root, and Henry Cabot Lodge. They agreed with Woodrow Wilson, then a professor of political science at Princeton University, who wrote in 1900, “When foreign affairs play a prominent part in the politics and policy of a nation, its Executive must of necessity be its guide.”<sup>20</sup>

The idea of a more powerful executive was buttressed by a landmark Supreme Court decision. In 1890, the Court ruled *In re Neagle* that presidential duties were not limited to executing treaties and enforcing congressional acts but instead rested on broad implied powers: “the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.” With that decision, the Court “recognized immense and

18. Quoted in Antony Jay, *The Oxford Dictionary of Political Quotations* (New York: Oxford University Press, 1996), 349.

19. Hodgson, *America in Our Time*, 105.

20. Quoted in Warren Zimmerman, *The First Great Triumph: How Five Americans Made Their Country a World Power* (New York: Farrar, Straus and Giroux, 2002), 499. Wilson’s support of a more robust presidency represents a quantum shift in his political thought. Previously, he had argued for a parliamentary system as a more effective framework for U.S. governance. See John M. Mulder, *Woodrow Wilson: The Years of Preparation* (Princeton: Princeton University Press, 1978), 61; and A.J. Wann, “The Development of Woodrow Wilson’s Theory of the Presidency: Continuity and Change,” in *The Philosophy and Politics of Woodrow Wilson*, ed. Earl Latham (Chicago: University of Chicago Press, 1958), 47–48.

indefinite presidential power.”<sup>21</sup> *Neagle* would be a crucial pillar of support for Roosevelt’s “stewardship” theory—his “insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers”—that informed his actions during his tenure in the White House.<sup>22</sup> These changing attitudes combined with the proliferation of U.S. interests abroad and the frenetic pace of change in terms of the scope and complexity of the state at home to demonstrate the need for enhanced presidential authority.

Wilson’s two terms witnessed additional accumulations of executive power, particularly with the changes wrought by World War I and Wilson’s expansive conception of the president as the embodiment of the national will and as head of the administrative state.<sup>23</sup> In the 1920s, the three GOP presidents may not have been quite as active in drawing power from Congress, but they did foster important relationships with private bankers to facilitate foreign policy initiatives like the Dawes Plan in 1924 that obviated the need for consultations with Capitol Hill. Despite being hamstrung by the Neutrality Acts foisted upon the administration by an isolationist Congress throughout the mid-1930s, Franklin Delano Roosevelt used every means at his disposal to prepare the country for war as the situations in Europe and the Pacific deteriorated. While FDR did work with Congress to pass the Lend-Lease Act in 1941, more often he acted unilaterally to further his international relations agenda, as with the 1940 destroyers-for-bases deal or his secret order to provide U.S. naval protection for British convoys across the Atlantic in 1941. Even when faced with recalcitrance on Capitol Hill, presidents have created solutions to bypass the legislative branch, expanding executive powers at the expense of Congress. The lack of congressional reaction to these innovative efforts has consistently resulted in greater institutional imbalance.

As the United States assumed a global mantle of leadership after World War II, the executive-legislative relationship evolved further. The embrace

21. Walter LaFeber, “The Constitution and United States Foreign Policy: An Interpretation,” *Journal of American History* 74, no. 3 (December 1987): 702–3; and *In re David Neagle*, 135 U.S. 1 (1890), <http://cdn.loc.gov/service/ll/usrep/usrep135/usrep135001/usrep135001.pdf>, accessed 16 July 2019.

22. Quoted in LaFeber, “The Constitution and United States Foreign Policy,” 707.

23. See, for example, Scot J. Zenter, “Liberalism & Executive Power: Woodrow Wilson & the American Founders,” *Polity* 26, no. 4 (Summer 1994): 579–99.

of containment in the 1940s led Walter Lippmann to assert that any attempt to contain communism worldwide would wreck the Constitution by creating an all-powerful president as commander-in-chief.<sup>24</sup> Lippmann's prescient comment did not anticipate that Congress would aid and abet the process. In the early Cold War, the Atomic Energy Act of 1946 gave the president the final decision-making authority on the "development, manufacture, use and storage of [atomic] bombs."<sup>25</sup> Congress also passed the National Security Act of 1947, which centralized control over foreign policy, the military, and intelligence capabilities (including covert activities) in the president's hands by creating the National Security Council (NSC), the Joint Chiefs of Staff, and the Central Intelligence Agency (CIA). More generally, congressional deference to the president and lack of oversight on these issues became the hallmark of the Cold War, at least for its first two decades.<sup>26</sup>

Observers frequently consider the Vietnam conflict as the apex of the imperial presidency and a catalyst for Congress to reassert its constitutional prerogatives. But it should also be recognized as being demonstrative of the point regarding congressional complicity in its own political demise. When responsibility for the Vietnam War is apportioned, Congress should be held accountable for facilitating—both directly and indirectly—the escalation and duration of the conflict. Historian Fredrik Logevall has argued that the dominant attitude on Capitol Hill was permissive. Most members of Congress were more than happy to allow the administration to take the lead and thereby assume the lion's share of the political and electoral risk. Yet to merely describe this context as "permissive" is inadequate. The word misjudges the political situation and underestimates congressional disengagement on the trajectory of U.S. policy. Congress did not merely "permit" successive administrations to launch, escalate, and continue a ruinous war in Southeast Asia. Rather, Congress actively fostered the environment that led to these

24. Walter Lippman, "The Cold War," *Foreign Affairs* 65, no. 4 (Spring 1987): 869–84.

25. Public Law 79-585, ch. 724, 60 Stat. 755, 1 August 1946. The Atomic Energy Act is occasionally referred to as the McMahon Act.

26. For the National Security Act of 1947, see Public Law 80-253, 61 Stat. 495, codified at 50 U.S.C. ch. 15 §401, 26 July 1947. The global impact of this transfer of power to the executive, particularly in the realm of covert action by the CIA that largely avoided congressional oversight for decades, has been seriously underestimated by scholars. On congressional deference to the presidency on foreign policy during the Cold War, see for example Robert David Johnson, *Congress and the Cold War* (New York: Cambridge University Press, 2012); and Stephen R. Weissman, *A Culture of Deference: Congress's Failure of Leadership in Foreign Policy* (New York: Basic Books, 1995).

decisions, such as approving the Tonkin Gulf resolution by an overwhelming margin, continually authorizing massive military expenditures, and implicitly sanctioning a presidential war by failing to exercise its own prerogatives that could have altered the course of the conflict. Complicity, rather than passivity, seems the appropriate label for Congress in this period.<sup>27</sup>

Conventional wisdom also suggests that in the wake of the Vietnam debacle and the Watergate scandal, the period from 1973 to 1980 represents the most engaged Congress has been in U.S. foreign relations since the 1930s. To be sure, Congress enacted significant legislation that resulted in the accentuation of its spending prerogatives, reassertion of its role in making decisions for war, the establishment of oversight over the U.S. intelligence community after the Church Committee and Pike Committee investigations, the reorientation of U.S. foreign affairs toward human rights concerns, and an array of domestic reforms. Yet this period should only be considered an exception, a temporary resurgence that quickly receded. Despite the avalanche of laws aimed at restraining the imperial presidency, many of the reforms failed to produce lasting change due to the fact that Congress could not oversee them with the same vigor that it devoted to their passage. As Cronin has argued, “It is one thing to enact new curbs; it is quite another to put them into practice and enforce them rigorously. Moreover, it is not clear that the presidential powers are really constrained very much by what has happened since 1973.”<sup>28</sup>

This remark brings up an interesting point regarding the structural limitations of the Constitution. What power does Congress possess to enforce its will? To be sure, the power of the purse is a formidable political instrument. Late in the Vietnam conflict, Congress finally pushed back against the executive by utilizing the most effective weapon at its disposal: appropriations. As one legal scholar has argued, “the source of almost all congressional power—the spine and bite of legislative authority—lies in Congress’s control over the nation’s purse. If ever Congress loosens its hold on this source of power or if ever the President wrests it away, then, to quote the late Senator Frank

27. On the “permissive context” in Congress, see Fredrik Logevall, *Choosing War: The Lost Chance for Peace and the Escalation of War in Vietnam* (Berkeley: University of California Press, 1999). The argument for congressional complicity is made in Andrew L. Johns, *Vietnam’s Second Front: Domestic Politics, the Republican Party, and the War* (Lexington: University Press of Kentucky, 2010).

28. Cronin, “The Imperial Presidency Reexamined,” 16. This holds true not only for congressional efforts to engage with the president on foreign policy, but also on domestic policy issues, as will be addressed later in the article.

Church, ‘the American Republic will go the way of Rome.’”<sup>29</sup> But even that power has been abridged by executive encroachment and does not always create insurmountable obstacles for a determined president. Nixon’s extensive use of impoundment, Lieutenant Colonel Oliver North’s creative fundraising during the Iran-*contra* affair, and Trump’s efforts to redirect funds to build a border wall—upheld by the Supreme Court in a 5-4 decision on 26 July 2019—are prime examples. Thus Congress can legislate all it wants, but it is dependent on the executive to implement those laws and policies according to congressional intent.

The post-Watergate congressional revival was short-lived. Ronald Reagan and George H.W. Bush led the country past the trauma of those events and effectively restored (and expanded) the imperial presidency with little opposition during the denouement of the Cold War and the onset of the “new world order.” For example, the 1982 Boland Amendment, intended to restrict the administration’s activities in Central America, did not end Reagan’s efforts to support the *contras* even if it did represent an uncharacteristic congressional effort to influence U.S. foreign policy. In fact, the entire Iran-*contra* scandal resulted from the president ignoring Congress and relying on his National Security Council to achieve his policy goals. There is no functional constitutional remedy—short of impeachment and removal—for Congress to restrain a president willing to bypass the legislative branch in inventive or creative ways. Later, in the wake of the 9/11 attacks, Congress created the Department of Homeland Security, passed the Patriot Act, and extended to the executive sweeping authority that transformed the constitutional power structure in the United States. As a result, U.S. foreign relations has become almost exclusively the purview of the executive branch; Congress at best offers advice from the sidelines.

We see a similar pattern when considering the Constitution’s war powers. Presidents acting without congressional sanction or under the authority of vague congressional resolutions have become commonplace, and these actions have many historical antecedents. In 1817, for example, James Monroe unilaterally sent General Andrew Jackson into Florida to battle the Seminoles, nearly provoking a war with Spain. When James K. Polk fomented a war of conquest with Mexico, Abraham Lincoln—then a young Whig congressman—warned that Polk’s aggressive actions toward Mexico would have dire

29. Abner J. Mikva, “The Congress, the Purse, the Purpose, and the Power,” *Georgia Law Review* 21, no. 1 (1986): 5.

consequences: “see if you can fix any limit to his power in this respect,” the future president stated, because without congressional authority to declare war, Polk had committed “the most oppressive of all Kingly oppressions” feared by the founders.<sup>30</sup>

An incident in 1854 is instructive. On 13 July 1854, the U.S.S. *Cyane* bombarded and U.S. Marines torched the town of Greytown in present-day Nicaragua. This action was done in response to attacks on U.S. property and attempts by the British government to charge duties on ships that were using the port to access the proposed Vanderbilt rail route to California. The instructions provided to the *Cyane*’s captain, Commander George H. Hollins, are significant. Given the contemporary technological limitations, it would have been impractical to coordinate actions with Washington, let alone to seek out advance congressional authorization for each use of force. Therefore, presidents drafted naval orders to give commanders like Hollins substantial discretion (within broad parameters) in operating militarily and diplomatically when out of contact. A lawsuit stemming from the *Cyane*’s actions led to the *Durand v. Hollins* decision in 1860, a case that has had long-lasting ramifications for presidential war powers.<sup>31</sup> A district court in New York exonerated Hollins and ruled that the president possessed broad discretionary powers when protecting U.S. citizens and property overseas through military action. Franklin Pierce would defend Hollins in the president’s annual message to Congress in December 1854. While a small group of House members accused Pierce of infringing on congressional war powers, ultimately Congress did not formally rebuke the president.<sup>32</sup>

30. Quoted in LaFeber, “The Constitution and United States Foreign Policy,” 700. Elbridge Gerry noted at the Constitutional Convention in 1787 that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” See James Madison, *Notes of Debates in the Federal Convention of 1787, Reported by James Madison* (New York: W.W. Norton, 1987), 476.

31. *Durand v. Hollins*, 8 Fed. Cas. III, no. 4186, Circuit Court for the Southern District of New York, (1860), <https://law.resource.org/pub/us/case/reporter/F.Cas/0008.f.cas/0008.f.cas.0111.2.pdf>, accessed 20 July 2019. *Durand*, despite being a lower court ruling, has been used frequently by the U.S. Department of Justice and scholars to support broad presidential war powers. For example, the Office of Legal Counsel (OLC) under William Rehnquist used the case to justify incursions into Cambodia during the Vietnam War, and in 2014 the OLC acted similarly to justify strikes against the Islamic State.

32. Matthew Waxman, “Remembering the Bombardment of Greytown,” Lawfare blog, 13 July 2019, <https://www.lawfareblog.com/remembering-bombardment-greytown>, accessed 17 July 2019. Transcript, “Second Annual Message,” 4 December 1854, <https://millercenter.org/the-presidency/presidential-speeches/december-4-1854-second-annual-message>; accessed 20 July 2019.

Interestingly, Pierce's successor, James Buchanan, took a much narrower view of the executive's war powers. On several occasions during his presidency, Buchanan sought legislative authorizations of force in advance to protect U.S. interests in Latin America. These resolutions look quite similar to recent grants of authority. Yet for a variety of partisan and strategic reasons, Congress declined to provide these mandates to Buchanan, and even questioned whether it could delegate authority in advance or in the absence of a specific provocation. Among those who opposed the requests was Senator William Seward (R-NY), who wondered, "Could anything be more strange and preposterous than the idea of the president of the United States making hypothetical wars, conditional wars, without any designation of the nation against which war is to be declared: where the time, or place, or manner, or circumstance of the duration of it, the beginning or the end . . . No, sir."<sup>33</sup>

Buchanan's experience would prove to be an anomaly. His twentieth and twenty-first century successors demonstrated little reluctance to exploit and exceed the presidency's constitutional war powers. McKinley unilaterally sent five thousand U.S. troops to China to help put down the Boxer Rebellion. Roosevelt and Wilson deployed troops throughout the Caribbean, Central America, and Mexico on dozens of occasions. Truman committed the United States to the Korean "police action" under the auspices of a United Nations resolution rather than any action by Congress. In fact, while Truman "consulted repeatedly" with the joint leadership and even provided a draft resolution authorizing military action for Congress to consider, "at every turn, he was advised by congressional leaders of both parties to 'stay away' from Congress and assured he had adequate powers to do what he was doing in Korea."<sup>34</sup> And, of course, Eisenhower, Kennedy, Johnson, and Nixon sent over five hundred thousand U.S. troops to Vietnam with only the vague authority of the SEATO treaty and the Tonkin Gulf Resolution.<sup>35</sup>

33. Waxman, "Remembering the Bombardment of Greytown." See also Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law*, 2nd ed. (Chicago: University of Illinois Press, 1989), 81–86, 204–7.

34. Paul Starobin, "Imperial Presidency Has a Long History," *Government Executive*, 22 February 2006, <https://www.govexec.com/federal-news/2006/02/imperial-presidency-has-long-history/21214/>, accessed 5 June 2019. See also Arnold A. Offner, *Hubert Humphrey: The Conscience of the Country* (New Haven: Yale University Press, 2018), 109; Mary L. Dudziak, "The Toxic Legacy of the Korean War," *Washington Post*, 1 March 2019, [https://www.washingtonpost.com/outlook/2019/03/01/toxic-legacy-korean-war-/?noredirect+on&utm\\_term=.ab360ddac390](https://www.washingtonpost.com/outlook/2019/03/01/toxic-legacy-korean-war-/?noredirect+on&utm_term=.ab360ddac390), accessed 5 May 2019.

35. For the Tonkin Gulf Resolution, see Public Law 88-408, 78 Stat. 384, 10 August 1964.

Vietnam proved to be the limit for Congress. After doing little beyond rhetorically rebuking the White House for a decade, Congress passed the War Powers Act over Richard Nixon's veto.<sup>36</sup> At the time, it was viewed as a vigorous reassertion of congressional prerogatives vis-à-vis the constitutionally defined war powers. Yet the War Powers Act has been violated in letter and in spirit repeatedly since 1973 without challenge from Congress, and some legal scholars questioned the Act's efficacy soon after its passage.<sup>37</sup> Even Senator Robert Byrd (D-WV), who served in Congress for fifty-seven years, admitted, "Frankly, if I were president, I would thumb my nose at this legislation."<sup>38</sup> Presidents may honor the law out of political necessity, but Nixon and each of his successors have asserted that the War Powers Act represents an unconstitutional abrogation of presidential authority. Supporting the presidential position, John Yoo, the architect of the George W. Bush administration's legal scaffolding in the conduct of the enduring war on terror, has opined that Article I gives Congress power to declare war, but that is more of a legal certification that a state of war exists between the United States and a foreign enemy. Therefore, Yoo makes the argument that, "the practice of unilateral presidential war-making falls within the permissible bounds of discretion granted to the political branches."<sup>39</sup> Such serpentine legal reasoning eviscerates the intent of the War Powers Act.

Another factor militating against congressional involvement with U.S. combat decisions is the compression of time and space on the battlefield. While the nineteenth century required latitude for commanders due to the distances involved and lack of rapid communication—as the *Cyane* incident demonstrated—contemporary warfare occurs and can be monitored in real time, with satellite coverage, drones, and other advanced technologies revolutionizing the conduct of combat. This situation leads by necessity to accelerated decision-making chains and requires greater flexibility than anticipated by the founders. Critics of the War Powers Act have used this logic to challenge its utility, and while there has been no Supreme Court challenge to the law, there have been several calls to repeal it. For example, Gerald Ford pursued repeal during his

36. Public Law 93-148, 87 Stat. 555, 7 November 1973.

37. Jeffrey K. Tulis, "On Congress and Constitutional Responsibility," *Boston University Law Review* 89, no. 515 (2009), 516–17. On early questions regarding the utility of the War Powers Act, see for example William B. Spong, Jr., "The War Powers Resolution Revisited: Historic Accomplishment or Surrender," *William & Mary Law Review* 16, no. 4 (1975), especially 856, 859.

38. Quoted in Starobin, "Imperial Presidency Has a Long History."

39. *Ibid.*

abbreviated presidency, asserting that “When a crisis breaks out, it is impossible to draw the Congress into the decisionmaking process in an effective way.” Among the factors Ford cited were that members of Congress had “too many other concerns to be abreast of foreign policy situations,” the lack of consensus among congressional leaders, and that “waiting for consultation could risk penalties for the President ‘as severe as impeachment.’”<sup>40</sup>

The lack of congressional insistence on exercising its role in the use of constitutional war powers continues to be an issue today. The 2001 Authorization for Use of Military Force (AUMF) was intended to cover combat in Afghanistan after the 9/11 attacks. Yet it is arguably the most significant legislation ever passed by Congress in terms of handing power to the executive. Moreover, it has been used as a tenuous justification by successive administrations for military action around the globe with scant congressional disapproval.<sup>41</sup> The Iraq War resolution passed by Congress in October 2002 exemplifies the congressional reluctance to accept responsibility for decisions involving the Constitution’s war powers. The key clause in the resolution reads: “The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”<sup>42</sup> That broad grant of authority compares favorably—from a presidential perspective—to that of the Tonkin Gulf Resolution, which stated that “Congress approves and supports the determination of the President . . . to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.” In both cases, as pundit Gene Healy has argued, “it was easier for Congress to dodge the issue than to take responsibility.”<sup>43</sup>

Barack Obama waged war in Libya without a declaration and funded the entire operation with billions of dollars in undedicated funds. When

40. *Washington Post*, 12 April 1977. Former Senate Majority Leader Harry Reid (D-NV) criticized the War Powers Act during the plenary session at the 2019 Pacific Coast Branch of the American Historical Association conference in Las Vegas, Nevada, using a similar rationale to Gerald Ford’s.

41. Public Law 107-40, 115 Stat. 224, 14 September 2001. U.S. forces have officially deployed to over forty countries worldwide under the authority granted by the 2001 AUMF.

42. *New York Times*, 12 October 2002. For the Authorization for Use of Military Force Against Iraq Resolution of 2002, see Public Law 107-243, 116 Stat. 1498, 16 October 2002.

43. *New York Times*, 8 August 1964; Gene Healy, “Congressional Abdication and the Cult of the Presidency,” *White House Studies* 10, no. 2 (2010): 93.

Obama “asserted (wrongly) that the Constitution gives him the power to act without legislative assent” in going to war in Libya, “the silence on Capitol Hill spoke volumes about the ignorance or cowardice” of Congress. The fault, according to Mickey Edwards in *The Atlantic*, “is not with the President but with the Congress, an institution that has lost all sense of its obligations and responsibilities.”<sup>44</sup> In discussing a potential “opaque and uncontrollable” U.S. intervention in Syria, commentator George Will noted that congressional powers have “atrophied from a disuse amounting to institutional malfeasance as Congress has forfeited its role in national-security policymaking. . . . Imperial presidents and invertebrate legislators of both parties have produced . . . ‘a breakdown of our constitutional process.’”<sup>45</sup> Sounding similar themes, author Stephen R. Weissman has written that “Congress is simply incapable of playing a constructive role in matters of war and peace. Paralyzed by gridlock, the hyperpartisan body regularly betrays its constitutional responsibility to act as a serious check on the executive branch, often preferring instead to launch ideological crusades aimed at scoring political points.” Congress, he observed, “has spent thousands of hours on deeply partisan investigations of the murders of four U.S. officials and contractors in Benghazi, Libya, but refrained from making any decision on the military intervention that brought them to that chaotic city in the first place.”<sup>46</sup>

The fact of the matter is that Congress has declared war a mere eleven times under the formal procedures put in place by the framers of the Constitution, from the War of 1812 to the declarations associated with World War II in 1941 and 1942. According to the Congressional Research Service, however, U.S. armed forces have been *officially* deployed abroad nearly five hundred times from 1798 to 2018. That does not include the covert operations that have proliferated exponentially during the past three decades, nor does it factor in other deployments for peacekeeping operations, training missions, or forces permanently stationed at hundreds of U.S. military bases

44. Mickey Edwards, “Congress: Missing in Action,” *The Atlantic*, 23 April 2011, <https://www.theatlantic.com/politics/archive/2011/04/congress-missing-in-action/237775>, accessed 7 June 2019. See also Ryan C. Hendrickson, *Obama at War: Congress and the Imperial Presidency* (Lexington: University Press of Kentucky, 2015).

45. *Washington Post*, 27 March 2013.

46. Stephen R. Weissman, “How the House and the Senate Can Reclaim Their Role,” *Foreign Affairs*, 12 December 2016, <https://www.foreignaffairs.com/articles/usa/2016-12-12/congress-and-war>, accessed 7 June 2019.

around the world.<sup>47</sup> While congressional resolutions have become *de facto* declarations of war, they remain an extra-constitutional mechanism that betrays the intent of the separation of powers. Suffice it to say that the founders would be stunned by the way that the war powers have evolved since the Philadelphia convention.

By allowing presidents to avoid oversight and to act without advice, consent, and cooperation, Congress has abdicated its authority in other areas of foreign policy as well. While Article II, Section 2 of the Constitution mandates the Senate ratify treaties negotiated by the president, the use of executive agreements to circumvent congressional scrutiny dates to the early nineteenth century. James Monroe concluded the Rush-Bagot Pact in 1817, bypassing the need for ratification of the agreement that demilitarized the U.S.-Canadian border. Theodore Roosevelt used executive agreements frequently during his presidency to deal with issues on which he wanted to avoid clashing with the Senate, including his actions to protect the Dominican Republic from possible invasion by European creditors (Dillingham-Sanchez protocol in 1905), the immigration dispute with Japan (Gentlemen's Agreement of 1907), and the growing tensions with the Japanese in Asia and the Pacific (Root-Takahira Agreement in 1908).<sup>48</sup>

In *United States v. Belmont* (1937), the Supreme Court formally acknowledged the constitutionality of executive agreements. Justice George Sutherland wrote the majority opinion in both *Belmont* and the more famous *United States v. Curtiss-Wright Export Corp.* decision the previous year. Taken together, these cases raised "a serious question whether the Congress can constitutionally limit the President's powers" in foreign relations.<sup>49</sup> Indeed, the *Curtiss-Wright* decision recognized that the president had "plenary" powers in foreign affairs that were not dependent on congressional delegation.<sup>50</sup> These cases, buttressed by a legal opinion by Attorney General

47. Congressional Research Service, "Instances of Use of United States Armed Forces Abroad, 1798–2018," updated 28 December 2018, <https://fas.org/sgp/crs/natsec/R42738.pdf>, accessed 17 July 2019.

48. On Roosevelt's use of executive agreements, see Ronald F. Reter, "President Theodore Roosevelt and the Senate's 'Advice and Consent' to Treaties," *The Historian* 44, no. 4 (August 1982): 483–504.

49. Quoted in LaFeber, "The Constitution and United States Foreign Policy," 715. See also *United States v. Belmont, et. al., Executors*, 301 U.S. 324 (1937), <http://cdn.loc.gov/service/ll/usrep/usrep301/usrep301324/usrep301324.pdf>, accessed 10 July 2019.

50. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), <http://cdn.loc.gov/service/ll/usrep/usrep299/usrep299304/usrep299304.pdf>, accessed 20 July 2019.

Robert Jackson, would provide the authority on which FDR would rely for the June 1940 executive agreement with Canada to create the Permanent Joint Board on Defense (Ogdensburg Agreement)—which secretly moved the United States from neutrality to semi-belligerency against the Axis powers—and the destroyers-for-bases deal in September 1940 (Hull-Lothian Agreement). Ironically, it would be Jackson as Chief Justice of the Supreme Court who would strike down Truman’s seizure of the steel mills as unconstitutional in the infamous *Youngstown v. Sawyer* case in 1952.<sup>51</sup>

Over the past eighty years, the exponential increase in the use of executive agreements instead of treaties is startling. In 1930, the United States concluded 25 treaties and 9 executive agreements. By 1972, however, it had signed 947 treaties and 4,359 executive agreements, and from 1939 to 1993, executive agreements comprised 90 percent of U.S. international agreements.<sup>52</sup> The Iran nuclear deal concluded by the Obama administration in 2015—from which the Trump administration withdrew in May 2018—is a notable recent example of this phenomenon. Unfortunately, utilizing executive agreements undermines the ability of foreign governments to rely on Washington to keep its word given that Senate ratification is not required and agreements can be abrogated at the president’s discretion. Further, it short-circuits the ability of Congress to advise and consent on commitments made by the executive branch that will often have serious ramifications for the United States both at home and abroad.

The dominance of the presidency in U.S. foreign relations has become ubiquitous. What may be more disconcerting is that Congress has consistently allowed its domestic political prerogatives to atrophy, both actively and passively, as a result of its delegation of powers to the executive. Legally, delegation of powers refers to the transfer of authority from one political entity to another. This practice dates to the early republic. In 1791, for

51. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), <http://cdn.loc.gov/service/ll/usrep/usrep343/usrep343579/usrep343579.pdf>, accessed 20 July 2019. Robert Jackson noted in his decision, which established a tripartite framework of presidential power that would influence the assessment of executive authority in the future, “only Congress itself can prevent power from slipping through its fingers.” For a detailed explanation of the reasoning in *Youngstown*, see Harold Hongju Koh and John Choon Yoo, “Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law,” *The International Lawyer* 26, no. 3 (1992): 732–35.

52. LaFeber, “The Constitution and United States Foreign Policy,” 715; Legal Information Institute, “International Agreements Without Senate Approval,” Cornell Law School, <https://www.law.cornell.edu/constitution-conan/article-2/section-2/clause-2/international-agreements-without-senate-approval>, accessed 17 July 2019.

example, Congress debated a bill regarding the establishment of post offices, a power clearly delegated to the legislative branch in Article I, Section 8 of the Constitution. The discussion centered on whether Congress could delegate this authority to the president. More broadly, it countered what Madison wrote in *Federalist* 48. Madison worried about Congress “extending the sphere of its activity and drawing all power into its impetuous vortex.”<sup>53</sup> Yet what has happened in reality is the exact opposite: Congress has allowed its powers to be siphoned off by the president through delegations of power, a trend that has been amplified significantly over the past eight decades.

Noted congressional and constitutional scholar Louis Fisher argues that delegation of legislative power in domestic policy areas is not as bad as the abdication by Congress in foreign affairs and the spending power.<sup>54</sup> I disagree; delegation should be considered an equally egregious failure on Congress’s part to live up to its constitutional responsibilities. As Healy has written, “in both domestic affairs and foreign policy, delegation holds distinct advantages for individual members of Congress, allowing them to position themselves on both sides of any given issue. . . . Delegation is a ‘political shell game’ that allows them ‘to take credit if [things go] well, and blame the president if things go badly.’” This “shell game” works because “the public, conditioned by the media’s relentless focus on presidential action, views the president as ‘our perennial main character, occupying center stage during almost all dramas in national political life.’”<sup>55</sup>

The country’s tariff policy is a prime example of congressional delegation. In *J.W. Hampton, Jr., & Company v. United States* (1928), the Supreme Court ruled that Congress had not delegated its powers in Article I, Section 8 because it provided the president with clear instructions on when and how to adjust tariff rates. Writing for the majority, Chief Justice (and former president) William Howard Taft argued that so long as Congress lays down an “intelligible principle” to guide executive or agency action, then the act does not constitute an unconstitutional delegation.<sup>56</sup> For a century, U.S. tariff

53. *Federalist* 48, in Hamilton, Jay, and Madison, *The Federalist*, 268.

54. Louis Fisher, *Congressional Abdication on War & Spending* (College Station: Texas A&M University Press, 2000), xiv.

55. Healy, “Congressional Abdication and the Cult of the Presidency,” 98.

56. *J.W. Hampton, Jr., & Company v. United States*, 276 U.S. 394 (1928), <http://cdn.loc.gov/service/ll/usrep/usrep276/usrep276394/usrep276394.pdf>, accessed 11 July 2019. For an overview of the nondelegation doctrine, see for example Thomas W. Merrill, “Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation,” *Columbia Law Review* 104, no. 8 (December 2004): 2097–2181.

policy was directed primarily by Congress and the end result was generally negative. The nadir occurred shortly after the *Hampton* decision with the Smoot-Hawley Tariff Act in 1930, which exacerbated the Great Depression.<sup>57</sup> In the aftermath, successive Congresses gave the president power over tariff policy to avoid responsibility for the economic and electoral consequences that would follow negative policy outcomes.

In section 232 of the Trade Expansion Act of 1962 (TEA), for example, Congress delegated to the president the authority to set tariffs in order to achieve the Act's goal to "stimulate the economic growth of the United States and maintain and enlarge foreign markets . . . to strengthen economic relations with foreign countries . . . [and] to prevent Communist economic penetration."<sup>58</sup> Although rarely used—at least until the Trump administration—section 232 represents an unprecedented delegation of congressional prerogatives to the executive. In the wake of Trump's imposition of tariffs on steel and aluminum in March 2018, industry groups filed a lawsuit that argues that the TEA violates the Constitution's doctrine of separation of powers and the non-delegation doctrine. The plaintiffs contend that the TEA fails the *Hampton* standard established in Taft's opinion because "it lacks any 'intelligible principle' to limit the discretion of the president."<sup>59</sup> Yet given the subsequent rulings by the Supreme Court, not to mention just how much power Congress has relinquished to the executive in other areas, it is unclear whether this legal challenge will succeed.

Another area in which Congress delegates power to the executive is through the declaration of national emergencies. Crises facilitate the aggregation of power to the president. Lincoln leveraged the crisis of 1861 to act without congressional sanction, arguing that he "felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation." His actions during the Civil War—suspending *habeus corpus*, creating a national army, freeing the slaves—"revealed the essential inability of

57. Public Law 71-361, ch. 497, 46 Stat. 590, codified at 19 U.S.C. ch. 4, 17 June 1930.

58. Public Law 87-794, 76 Stat. 872, codified at 19 U.S.C. ch. 7, 11 October 1962. Section 232 allows the president to impose tariffs based on a recommendation from the Secretary of Commerce based on national security considerations.

59. Quoted in Madeline Osburn, "Trump's Trade Policy Revives Interest in the Non-Delegation Doctrine," *The Federalist*, 15 February 2019, <https://thefederalist.com/2019/02/15/trumps-trade-policy-revives-interest-non-delegation-doctrine/>, accessed 5 July 2019.

Congress to curb or even to oversee a dynamic president bent on acting decisively in times of emergency.”<sup>60</sup>

We see similar logic in FDR’s inaugural address, where he compared the Great Depression to a war against the United States that warranted extraordinary countermeasures. “It is hoped that the normal balance of Executive and legislative authority may be wholly adequate to meet the unprecedented task before us,” the new president told the country, “But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure.” He went on to say, “I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.”<sup>61</sup> Two days later, FDR issued an emergency proclamation declaring a bank holiday and halting all financial transactions under the questionable authority of the Trading with the Enemy Act of 1917. Although Congress passed the Emergency Banking Act three days later, this exercise of presidential emergency power followed by congressional acquiescence or *ex post facto* ratification would set a pattern that continues to be repeated to the present day.<sup>62</sup>

Emergency declarations proliferated after the outbreak of World War II, with Japanese internment and Nixon’s imposition of wage and price controls in 1971 representing only two of many examples. In the wake of Watergate, Congress hoped to place obstacles in the path of a president who might feel tempted to abuse his power by declaring the existence of an emergency. The National Emergencies Act (NEA), passed in 1976, was the result of a special congressional committee investigation that discovered rampant overuse of exigent power by presidents in both parties that had resulted in a virtually

60. Patterson, “The Rise of Presidential Power Before World War II,” 46. See also Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1987).

61. Franklin D. Roosevelt, “Inaugural Address,” 4 March 1933, *Public Papers of the Presidents* <https://www.presidency.ucsb.edu/documents/inaugural-address-8>, accessed 11 July 2019. See also Jill Lepore, *These Truths: A History of the United States* (New York: W.W. Norton, 2018), 462.

62. For example, in October 2006, Congress responded to the Supreme Court’s decision in June 2006—which struck down President George W. Bush’s military tribunals order—with legislation reinstating most of the powers he had claimed. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), <https://www.supremecourt.gov/opinions/05pdf/05-184.pdf>, accessed 20 July 2019. The Supreme Court allowed much of the early New Deal legislation to stand, with Chief Justice Charles Evans Hughes arguing, “While an emergency does not create power, an emergency may furnish the occasion for the exercise of power.” Quoted in Lepore, *These Truths*, 463.

continual state of emergency since the mid-1930s.<sup>63</sup> While it does give the president extensive unilateral discretion, the NEA requires the president to publish a national emergency proclamation in the Federal Register explaining what authorities he is using to deal with the crisis. All national emergencies would end in a year unless the president extended them, and Congress could terminate the emergency at any time through a vote. As Senator Abraham Ribicoff (D-CT) told the Senate Committee on Government Operations during deliberations on the bill, “Reliance on emergency authority, intended for use in crisis situations would no longer be available in non-crisis situations. At a time when governments throughout the world are turning with increasing desperation to an all-powerful executive,” Ribicoff concluded, “this legislation is designed to insure that the United States travels a road marked by carefully constructed legal safeguards.”<sup>64</sup>

Yet in the subsequent four decades, congressional enforcement of the NEA has been utterly pathetic, leaving the presidency with effectively unfettered power to declare and deal with national emergencies. Moreover, the law clearly indicates that Congress is supposed to review national emergencies every six months to determine whether they are, in fact, emergencies. Not once has this occurred, providing yet another example of the ongoing abdication of congressional power to the president. Trump’s efforts to build a border wall under this flimsy authority raised the ire of some members of Congress, but the protest never advanced beyond highly charged rhetoric. As a result, despite the NEA’s intentions, the country has faced a never-ending series of emergencies and crises that have allowed the executive to acquire more extensive powers from a complicit Congress.<sup>65</sup>

The National Emergency Act and the resulting aggregation of presidential power provide a unique perspective on the argument made by legal historian Mary Dudziak regarding the phenomenon of “war time.” The idea that law and politics differ during wartime (or, for our purposes, a declared emergency) has an extensive history. During a war, restraints on civil liberties are more readily accepted and Congress exercises less oversight on presidents, leading to an expansion of executive power. That holds true whether for a period of actual military combat like World War I and Vietnam, or during

63. Public Law 94-412, 90 Stat. 1255, codified at 50 U.S.C. §1601 *et seq.*, 14 September 1976.

64. Quoted in Cronin, “A Resurgent Congress and the Imperial Presidency,” 218.

65. Since the NEA went into effect, presidents have declared sixty-one national emergencies. For a running list, see <https://www.brennancenter.org/analysis/declared-national-emergencies-under-national-emergencies-act>.

non-traditional conflicts like the Cold War and the war on terror. As Dudziak notes, “The assumption of temporariness becomes an argument for exceptional policies,” yet those policies end up becoming institutionalized and “the legal consequences bled out beyond these iconic moments,” resulting in a permanent change to the balance of powers.<sup>66</sup> Thus, presidential power increases during times of emergency or crisis but never returns to the *status quo ante*. This is particularly relevant in an era of unending wars, constant anti-terrorism operations, and a succession of real or manufactured domestic political crises.

There are many other ways Congress has ceded ground to the presidency, although time does not permit us to fully consider each of them. The use of policy “czars,” for instance, became far more common during the Bush 43 and Obama administrations, but they also featured prominently during the presidencies of Wilson and FDR. These executive positions provide presidents with the ability to go outside formal channels and find solutions to intractable problems that the government cannot manage—all while avoiding congressional scrutiny. One study characterizes czars as “a constitutional aberration, a practice that violates the core principles of a balanced governing system based on democratic controls” and “a function of the growing powers of the presidency and the failure of Congress sufficiently to act to protect its own institutional prerogatives.”<sup>67</sup>

Presidential signing statements have become a tool used by presidents to frame the legislation Congress passes and even to modify the meaning and enforcement of statutes. The American Bar Association has criticized the practice—which dates to the nineteenth century but became increasingly prevalent starting with Reagan—claiming that it serves to “undermine the rule of law and our constitutional system of separation of powers.”<sup>68</sup> A notable example occurred after Congress passed the Detainee Treatment Act of 2005 that prohibited torture during the interrogation of suspected terrorists. In response, George W. Bush issued a signing statement asserting

66. Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* (New York: Oxford University Press, 2012), 4, 6.

67. Mitchel A. Sollenberger and Mark J. Rozell, *The President's Czars: Undermining Congress and the Constitution* (Lawrence: University Press of Kansas, 2012); quotes from x, 163.

68. Press release, American Bar Association, 24 July 2006, <https://web.archive.org/web/20120615163547/http://www.abanow.org/2006/07/blue-ribbon-task-force-finds-president-bush-signing-statements-undermine-separation-of-powers/>, accessed 22 July 2019; A. Christopher Bryant, “Presidential Signing Statements and Congressional Oversight,” *William & Mary Bill of Rights Journal* 16, no. 169 (2007): 169–82.

he was not bound by the legislatively imposed restrictions.<sup>69</sup> The executive has also assumed significant economic powers—such as with the Employment Act of 1946 that centralized economic planning through the creation of the president’s Council of Economic Advisers—that have made inroads on congressional authority over the federal budget and spending practices.<sup>70</sup> To illustrate this point, George W. Bush gained extraordinary economic prerogatives through the \$700 billion Troubled Assets Relief Program in the wake of the 2008 financial meltdown.

In addition, the Supreme Court has traditionally granted the executive a significant amount of deference in matters of national security, and its decisions have consistently facilitated the aggregation of authority to the executive in both domestic and foreign policy, as we have seen. Presidents from both parties have used executive orders to bypass congressional involvement with specific issues. While effective and widely used—there have been nearly fourteen thousand executive orders issued since Washington’s presidency, with the Progressive Era presidents and FDR relying most frequently on these instruments—executive orders can cause instability and unpredictability. For example, Trump abandoned the Trans-Pacific Partnership, which Obama had strongly supported during his presidency, via executive order shortly after taking office.<sup>71</sup> And the exponential expansion of the Executive Office of the President, most of which has occurred in non-confirmable positions, has reduced the need for the White House to rely on Congress. Interestingly, as the size of the presidential staff has increased over time, the size of congressional staffs has declined.<sup>72</sup> This shift dovetails with the expansion of the country’s reliance on executive branch agencies, which has been abetted by the ongoing delegation of powers from Congress to these bureaucracies and represents another significant consequence of congressional abdication.

Legal scholar Jonathan Turley has written that Congress has “put itself on the path to institutional irrelevancy” as a result of its decades-long tendency to give presidents “unchecked authority and undedicated money.”<sup>73</sup> So why

69. *Boston Globe*, 4 January 2006.

70. Public Law 79-304, ch. 33, section 2, 60 Stat. 23, codified at 15 U.S.C. §1021, 20 February 1946. See also Fisher, *Congressional Abdication on War & Spending*.

71. *New York Times*, 23 January 2017.

72. Table 5-1, Brookings Institution report, *Vital Statistics on Congress*, (2019), <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/>, accessed 25 July 2019.

73. Jonathan Turley, “Why Trump Will Win the Wall Fight,” *The Hill*, 16 February 2019, <https://thehill.com/opinion/judiciary/430335-why-trump-will-win-the-wall-fight>, accessed 20 June 2019.

has Congress allowed itself to become marginalized through its actions and passivity? What has precipitated its political feebleness in a constitutional system that was designed with the legislative branch at the center and bulwarked with checks and balances against encroachment by the executive and judiciary? Let me suggest four reasons that have helped to shape the current constitutionally dysfunctional relationship between the presidency and Congress in both domestic policy and foreign relations.

First, we have the constantly increasing complexity of the presidency and the relentless accumulation of responsibilities taken on both by the office and by the United States. The president has become, as historian Jeremi Suri has argued in *The Impossible Presidency*, the figure to whom the country looks to solve all of its problems.<sup>74</sup> This trend has been ongoing for some time; Clinton Rossiter wrote during the 1950s that “The strong presidency is the product of events that cannot be undone and of forces that continue to roll . . . this kind of presidency [is] a prerequisite for the effective conduct of our constitutional system.”<sup>75</sup> As the scope of the federal government has grown, local and state governments and Congress have “proved inadequately equipped for decisive action.” As a result, “the presidency became the focus of hopes and aspirations” for the public. Yet, as historian James Patterson has observed, “These rising expectations were often unrealistic, even absurd” and “hurt presidents, who were led to make exaggerated promises and then failed to deliver . . . and led also to a faith in charismatic leadership, as if presidential personality could conquer all.”<sup>76</sup> Sound familiar?

That, in turn, makes the president more willing to act and seek additional power while simultaneously making Congress more reluctant to act and seek to abdicate its responsibilities. Even if courageous and virtuous members of Congress existed—a highly questionable proposition—they would face a Sisyphean task in pushing back against the entrenched structural obstacles to a reassertion of Congress’s institutional prerogatives. Congress “certainly has the constitutional authority to intervene whenever it has the will to do so. But will it have the courage to resist being stampeded into granting power whenever a president waves the flag and says there is an urgent crisis?”<sup>77</sup>

The second reason is that the political polarization of the United States militates against congressional power and influence. Such polarization is not

74. Jeremi Suri, *The Impossible Presidency* (New York: Basic Books, 2017).

75. Quoted in Hodgson, *America in Our Time*, 100.

76. Patterson, “The Rise of Presidential Power Before World War II,” 50.

77. Cronin, “A Resurgent Congress and the Imperial Presidency,” 217.

new, of course. The 1790s saw vicious partisan battles between Federalists and Democratic-Republicans, and debate over slavery culminated with the Civil War. Yet as historians Kevin Kruse and Julian Zelizer argue, since 1974 Americans have increasingly abandoned the search for common ground in political and economic life. This change has led to an atmosphere of extreme partisan conflict, creating divisive centrifugal political forces to a degree nearly unprecedented in U.S. history.<sup>78</sup> As Obama noted in his farewell address, this hardening of partisan loyalties and the refusal to compromise with one's political opponents not only threatens to undermine U.S. institutions but also prevents the government from handling pressing issues.<sup>79</sup> Contributing to the polarization are the existence and influence of profoundly gerrymandered congressional districts; "primarying" tactics that shift the composition of Congress toward the extremes on both ends of the political spectrum, leaving a dearth of centrists interested in compromise and actually governing; and the shrill partisan media that refuses to compromise with its political adversaries.

Law professor Neal Devins notes that political polarization has played a "profound role" in defining today's Congress and that members of the House and Senate see "little personal gain in standing together to assert Congress's institutional prerogatives." He concludes that the contemporary Congress "has neither the will nor the way to check presidential initiatives . . . lawmakers have no incentive to stop presidential unilateralism simply because the President is expanding his powers *vis-à-vis* Congress."<sup>80</sup> This polarization is the reason that constitutional scholar Harold Koh suggests that the president almost always wins in foreign affairs. Especially in the first two decades after World War II, the executive branch took the initiative in foreign affairs and Congress usually acquiesced because of legislative myopia or "sheer lack of political will."<sup>81</sup>

More troubling is the fact that polarization has turned Congress into political theater, with showmanship trumping substance, virtue-signaling

78. Kevin M. Kruse and Julian E. Zelizer, *Fault Lines: A History of the United States since 1974* (New York: W.W. Norton, 2019).

79. *New York Times*, 10 January 2017.

80. Neal Devins, "Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives," *Willamette Law Review* 45, no. 395 (2009): 398–400. See also Neomi Rao, "Administrative Collusion: How Delegation Diminishes the Collective Congress," *New York University Law Review* 90, no. 5 (2015): 1463–1526.

81. Harold Hongju Koh, "Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair," *The Yale Law Journal* 97, no. 7 (June 1988): 1291; Schlesinger, *The Imperial Presidency*, 181.

obscuring practical solutions, and partisan allegiance overriding institutional concerns. Congressional engagement with the president needs to be about more than merely investigating the opposition, playing “gotcha,” and pushing political, electoral, and individual agendas. Again, the history of such efforts is not limited to the contemporary political climate. Senator Charles Sumner (R-MA), who had expected to be named secretary of state under Ulysses S. Grant, used his influence in the Senate to support a series of congressional investigations to embarrass the president after being passed over for the cabinet post. As one of Sumner’s Democratic colleagues noted, “The whole country must understand that the chief duty of the next Congress will be *investigation*.”<sup>82</sup> We have seen this dynamic repeatedly in recent years, from the Benghazi hearings to the Mueller probe into the 2016 election.

What results is political posturing without any real achievement or progress. As the legislative process has become more polarized, members of Congress default to their partisan fealties and stand together by party affiliation (ironic, given the devaluation of political parties in contemporary politics) to gain political advantage rather than working to protect congressional power. While bipartisanship can lead to Congress standing together as an institution—as it did briefly in the wake of the Watergate era—polarization has the exact opposite effect, making it increasingly difficult to get Congress to enact significant legislation.<sup>83</sup> This difficulty gives presidents “even more incentive to act unilaterally—since they cannot get Congress to enact their legislative agenda.”<sup>84</sup> Congress is unfortunately content to be reactive and avoid the cost of decisions while hoping to score transitory political victories over partisan rivals.

Third, the evolving relationship of Congress and the presidency with the American public enhances presidential power. It is often assumed that Congress is the most democratic and responsive branch of government. Yet in the contemporary world, the merit of that argument is questionable. Since 1900, there has been a quantum increase in the media and technological tools at the president’s disposal to connect with the public directly, from newspapers and

82. Quoted in Allen C. Guelzo, “Grant Gains Ground,” *National Review Online*, 25 February 2019, <https://www.nationalreview.com/magazine/2019/02/25/grant-gains-ground/>, accessed 27 June 2019 (emphasis in original).

83. For the steep decline in the number of bills enacted by Congress since the early 1970s, see Table 6-1, Brookings Institution, *Vital Statistics on Congress* (2019), <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/>, accessed 25 July 2019.

84. Devins, “Presidential Unilateralism and Political Polarization,” 410.

radio to television and the internet. These tools have created a presidency that has a closer relationship to the public than individual members of Congress have with their own districts, at least in terms of perception and familiarity. One need only consider TR's use of the "bully pulpit," FDR's fireside chats, Reagan's speeches designed to circumvent the "meddlesome committee of 535," and Trump's unfiltered use of Twitter during his extensive "executive time" to understand why presidents have become the focal point of U.S. government.<sup>85</sup>

Additionally, over the past century the public "began to demand positive government responses to pressing social problems and to hold the president—as the symbol and focus of national leadership—responsible for the successes and failures of government."<sup>86</sup> Presidents, like quarterbacks, tend to get more credit and more blame than they deserve. With heightened expectations and responsibilities as the presidency has evolved into the most prominent, visible, and important political office in the country, presidents have increasingly been "seen as embodying the aspirations and responding to the needs of the nation as a whole . . . he was more than their elected representative; he was their chosen symbol."<sup>87</sup> As Theodore White wrote after the 1960 election, the country now looks not to Congress but rather "the White House, on which an impatient world waited for miracles."<sup>88</sup>

The final, and probably most important, reason is the reality that parochial interests override institutional interests, particularly in terms of electoral considerations. Congress is made up of hundreds of members, "each a political entrepreneur in her own right, each dedicated to her own reelection and thus to serving her own district or state." Although members of Congress all theoretically have a common stake in the institutional power of Congress, this is "a collective good that . . . can only weakly motivate their behavior" since they are "trapped in a prisoners' dilemma: all might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong

85. See, for example, Andrew L. Johns, "Hail to the Salesman in Chief: Domestic Politics, Foreign Policy, and the Presidency," in *Selling War in a Media Age: The Presidency and Public Opinion in the American Century*, ed. Kenneth A. Osgood and Andrew K. Frank (Gainesville: University Press of Florida, 2010), 1–17.

86. Terry M. Moe and William G. Howell, "Unilateral Action and Presidential Power: A Theory," *Presidential Studies Quarterly* 29, no. 4 (December 1999): 854.

87. Hodgson, *America in Our Time*, 109–10.

88. Theodore H. White, *The Making of the President 1960* (New York: Atheneum Publishers, 1961), 382.

incentive to free ride in favor of the local constituency.”<sup>89</sup> Each representative or senator has an electoral motivation to place their own constituents—and themselves—before the needs of the institution of Congress or the country as a whole, even to the point that many candidates (even incumbents) will run against Congress as an outsider or a reformer. This phenomenon is known as Fenno’s Paradox.<sup>90</sup> As a result, the Madisonian design in which presidential ambition was to be checked by the ambition of the legislature has failed due largely to “the divergence between the interests of individual legislators and the interests of Congress as a whole in maintaining its constitutional prerogatives. ‘Congress’ is an abstraction. Congressmen are not, and their most basic interest is in getting reelected.”<sup>91</sup>

When Congress or individual members push back against presidential encroachment, it is usually—although, to be fair, not always—the result of parochial interests. Take Senator Chuck Grassley (R-IA), who announced his intention in June 2019 to introduce legislation to reassert congressional authority over U.S. trade policy by amending the Trade Expansion Act. In a conference call with reporters, Grassley stated, “It adds up to something pretty simple: Congress has delegated too much authority to the president of the United States. . . . The constitutional crisis comes from the elected representatives of the people over the last 80 years making a dictator out of the presidency. . . . let’s say making a kingship out of the presidency.” Why did Grassley take such an uncharacteristic step in challenging a president from his own party? Trump’s trade war with China has had serious consequences for Grassley’s largely agricultural constituency in Iowa.<sup>92</sup> Legal scholar Neomi Rao writes that this type of situation results in the diminishing of Congress because the “collective Congress” fractures under these parochial considerations, erodes the institutional operation of Congress, and undermines the separation of powers.<sup>93</sup>

89. Moe and Howell, “Unilateral Action and Presidential Power,” 861.

90. Noah Berlatsky, “Everybody Hates Congress. So Why Do Congressmen Almost Always Get Re-elected?,” 31 March 2016, <https://theweek.com/articles/615133/everybody-hates-congress-why-congressmen-almost-always-reelected>, accessed 15 July 2019; Richard Fenno, *Home Style: House Members in Their Districts* (Boston: Little, Brown, 1978).

91. Healy, “Congressional Abdication and the Cult of the Presidency,” 97. See also *Federalist* 51, *supra*.

92. Jack Crowe, “Grassley to Introduce Bill to Constrain Presidential Tariff Powers,” *National Review Online*, 11 June 2019, <https://www.nationalreview.com/news/chuck-grassley-to-introduce-bill-to-constrain-presidential-tariff-powers/>, accessed 15 June 2019.

93. Rao, “Administrative Collusion.”

All four of these reasons have contributed significantly to the rise of the imperial presidency. As a result, Congress has allowed itself to become almost an afterthought in the constitutional framework. Will Congress have an epiphany and begin to reverse its loss of power and influence? Probably not. But if it did, how might the constitutional balance be restored, particularly in the absence of Congress collectively growing a spine? What can be done? Pundit Yuval Levin wrote in the *New York Times* on 4 June 2019 that “Our constitutional system cannot function this way. To repair it, Congress will have to reclaim its place. This certainly means taking oversight seriously . . . . But,” he continued, “it is crucial that the reassertion of congressional power be at its core a reassertion of legislative power, not just oversight. . . . Whether driven by partisanship, misguided by perverse media and political incentives, or simply put off by the burdens of responsibility, members of both houses are now reluctant to really legislate.”<sup>94</sup>

There are occasional signs of hope that this constitutional abdication can be reversed or at least mitigated.<sup>95</sup> We have seen in recent years indications of what the late Charles Krauthammer called an “organic response of a constitutional system in which the traditional barriers to [executive] overreach have atrophied and a new check-and-balance emerges.”<sup>96</sup> State attorneys general and the courts have stepped into the breach to challenge the executive on issues ranging from Medicaid expansion to the Trump administration’s immigration ban. In *Gundy v. United States* earlier this year, Supreme Court Justices John Roberts, Clarence Thomas, and Neil Gorsuch signaled that at least some members of the Court would be interested in revisiting the nondelegation doctrine.<sup>97</sup> Yet ceding more power to the judiciary or expecting the courts to come riding to the rescue to rein in the presidency creates its own constitutional and practical problems. The reality is that these issues should be adjudicated by the elected representatives of the American people.

94. *New York Times*, 4 June 2019.

95. Numerous remedies have been proposed. See, for example, Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (New York: Oxford University Press, 1997), especially ch. 9.

96. Charles Krauthammer, “Congress Has its Duties, and Now the States are Stepping Up to Fight Executive Overreach. Good.,” *National Post*, 3 March 2017, <https://nationalpost.com/opinion/charles-krauthammer-congress-has-abdicated-its-duties-and-now-the-states-are-stepping-up-to-fight-executive-overreach-good>, accessed 8 July 2019.

97. *Gundy v. United States*, 588 U.S. \_ (2019), [https://www.supremecourt.gov/opinions/18pdf/17-6086\\_2b8e.pdf](https://www.supremecourt.gov/opinions/18pdf/17-6086_2b8e.pdf); accessed 22 July 2019.

A few members of Congress have introduced legislation to reclaim some of its institutional prerogatives. Senator Arlen Specter (R-PA) proposed a “Presidential Signing Statements Act” in both 2006 and 2007, which would have instructed all state and federal courts to ignore these statements.<sup>98</sup> In both instances, the bills languished and died in the Senate Judiciary Committee. In May 2019, Representative Barbara Lee (D-CA), who was the lone vote against the 2001 AUMF, supported an amendment to a defense policy bill “expressing the sense of Congress that the 2001 AUMF has been utilized well beyond the scope that Congress intended, that it has served as a blank check for any President to wage war at any time and any place.” The House adopted the measure by a vote of 237 to 183 largely along partisan lines, but it has stalled in the Senate.<sup>99</sup>

Representative Warren Davidson (R-OH) introduced House Resolution 330, the “Article One Restoration Act,” in May 2017. Under this proposal, the major House committees would develop recommendations about how to change federal statutes to cut back on the wide discretion the White House can have in executing laws. The intent of the legislation would have been to reinvigorate Congress and begin to take back some of its power.<sup>100</sup> The resolution never made it out of the House Committee on Rules. Similarly, Senator Mike Lee (R-UT) sponsored a bill that would have reformed the way that national emergencies are declared and terminated, requiring the president to receive congressional approval for an extension of the emergency after thirty days. But Lee’s measure failed to gain traction after Trump vowed to veto it. In the face of a presidential threat, Congress chose political convenience over reform. Better to blame the president when things go wrong than to actually fix the problem.

The checks and balances of the constitutional framework not only allow but demand that Congress accept the “invitation to struggle” to participate fully in governance—especially since the executive will not stop seeking additional power. Whether through the courts, through congressional

98. S.3731 (109th Congress), Presidential Signing Statements Act of 2006, introduced 26 July 2006, <https://www.congress.gov/bill/109th-congress/senate-bill/3731>, accessed 24 July 2019; and S.1747 (110th Congress), Presidential Signing Statements Act of 2007, introduced 29 June 2007, <https://www.govtrack.us/congress/bills/110/s1747>, accessed 24 July 2019.

99. *New York Times*, 22 May 2019.

100. Neil Siefring, “Congress Must Restore Its Authority and Give Power Back to the People,” *The Hill*, 8 June 2017, <https://thehill.com/blogs/pundits-blog/lawmaker-news/336916-congress-must-restore-its-authority-and-give-power-back-to>, accessed 10 June 2019.

complicity, or by finding different ways to maneuver around constitutional and legal limitations, presidents will push the envelope to acquire power—often resulting in institutional and systemic instability. Hodgson wrote in the wake of Watergate, “No single branch of government can mandate this reform. Instead, it must come about through a combination of presidential restraint, congressional reassertion of power, and judicial intervention into the balance of powers among the branches.”<sup>101</sup> This statement still rings true. Of course, the converse explains the rise of the imperial presidency; the combination of executive overreach, judicial intervention weighed toward the executive, and congressional complicity created this situation. The costs and consequences of congressional failure to respond should worry us all.

The United States faces staggering and seeming insurmountable problems—the immigration crisis, the national debt, a continuous state of undeclared global wars, violation of civil liberties such as privacy and free speech, and a rogue presidential administration—all of which could be addressed by Congress if only its members simply possessed the collective political will to do so. I am not suggesting a return to an ineffectual presidency similar to the administrations of Millard Fillmore, James Buchanan, or Benjamin Harrison, nor do I think that a congressional revival will magically remedy all of our dilemmas. But Congress should actively seek to restore the constitutional balance, because the Constitution cannot enforce itself and strong legislative leadership is required to alter the *status quo*. The founders bequeathed Congress with significant potential, and it should not be intimidated or fearful to exercise its powers in either domestic or foreign policy. Rather, Congress should chip away at the executive’s encroachments through stronger oversight, reclaiming its constitutionally mandated responsibilities, embracing centrist and less polarized politics, and demonstrating an affirmative assertion of congressional authority.<sup>102</sup>

So what does this argument mean for all of us as historians? Robert Putnam stated in his presidential address to the American Political Science Association in 2002, “I believe that attending to the concerns of our fellow citizens is not just an optional add-on for the profession of political science,”—and, I would suggest, history—“but an obligation as fundamental

101. Koh and Yoo, “Dollar Diplomacy/Dollar Defense,” 717.

102. See, for example, Oona A. Hathaway, “How to Revive Congress’s War Powers,” 1 August 2019, <https://ssrn.com/abstract+3436924>, accessed 16 August 2019.

as our pursuit of . . . truth.”<sup>103</sup> One need only consider recent comments by Trump and many members of Congress that reveal a shocking, woefully inadequate, and at times terrifying lack of historical and constitutional understanding to appreciate Putnam’s plea. In our current political moment, the significance of historical analysis on topics like Congress and the imperial presidency, or immigration, or the environment, or Brexit could not be more vital. It is incumbent upon each of us to use our expertise for the benefit of our students, our profession, and our countries.

During a Democratic presidential debate on 30 July 2019, Mayor Pete Buttigieg proposed that any future authorization for the use of military force by Congress should include a three-year sunset clause. He asserted that “if men and women in the military have the courage to serve, members of Congress have the courage to vote.”<sup>104</sup> It is certainly noteworthy that such a comment came from the candidate who not only has no congressional experience but who actually served in the military. If we are lucky, as the 2020 election approaches, members of Congress or maybe even another Democratic presidential candidate or two will follow in Buttigieg’s footsteps, take up the issue of restoring the constitutional framework of checks and balances, and encourage Congress to reclaim its rightful place in the governing structure of the country. Wishful thinking? Perhaps. But as Virginia Woolf wrote, “On the outskirts of every agony sits some observant fellow who points.”<sup>105</sup>

---

ANDREW L. JOHNS is associate professor of history at Brigham Young University and the David M. Kennedy Center for International Studies. He served as President of the Pacific Coast Branch of the American Historical Association in 2018–2019.

#### NOTE

This article is a revised and expanded version of my presidential address for the Pacific Coast Branch of the American Historical Association. I gratefully acknowledge my friends and colleagues who read early versions of this lecture, provided feedback, and discussed its ideas with me: Grant Madsen, Chris Nichols, Ken Osgood, Chester Pach, Jason Parker, David Schmitz, Kathryn Statler, and Neil York.

103. Quoted in Michael C. Desch, “How Political Science Became Irrelevant,” *Chronicle of Higher Education*, 27 February 2019, <https://chronicle.com/article/How-Political-Science-Became/245777>, accessed 28 February 2019.

104. *Washington Post*, 30 July 2019.

105. Virginia Woolf, *Selected Works of Virginia Woolf* (Hertfordshire, U.K.: Wordsworth Editions, Ltd., 2005), 756.