Law Day 'Separation of Powers' Speech
"Executive Overreaching v. Congressional Underperformance"
By Rep. Jim Cooper
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Introduction

Thank you for the honor of allowing me to speak on Law Day. I am grateful to President Sheree Wright, Judge Carol McCoy and the members of the Nashville Bar for this privilege and, much more important, for your individual pursuit of justice. The more I learn about the legal systems of other states, the prouder I am of the quality and fairness that seem to characterize the Tennessee bar.

This year's Law Day theme of 'Separation of Powers' is not only timely, but urgent. After having served in Congress, off and on, for almost 24 years, I can testify that we are in grave danger of damaging beyond repair the constitutional structure that our Founders gave us. Despite my legislative background, I am an advocate for a strong executive because I believe the President, as the leader of the world's only superpower in the information age, needs the speed and agility which Congress simply cannot provide. But I believe also that President George W. Bush has been far too aggressive in claiming the powers of other branches of government.

Because I am a Democrat, you are probably thinking that I am about to condemn the White House for a multitude of sins. And I am.

But I urge you to hear also the main part of my message, which condemns congressional underperformance on a bipartisan basis. I believe that White House overreaching would not be possible without congressional complicity and negligence. In fact, the void created by a compliant and incompetent Congress draws the executive branch into the legislative sphere, just as nature abhors a vacuum. Finally, I believe that true reform begins at home. As tempting as it is to blame your neighbor for your problems, the truth is that the two houses of Congress are in need of serious repair. Today's congressional duplex is not an asset to the constitutional neighborhood.

That may sound alarmist, even shrill, but let's begin the analysis. Too few Americans realize that we live in the only democracy in the world with what the Founders intended to be a truly independent legislative branch. Scholars ranging from Daniel Patrick Moynihan to James Q. Wilson agree on that point.[1]

Other democracies are parliamentary; there the prime minister must give at least his or her tacit consent before the legislative body can vote or conduct a hearing. America has always been different, at least until recently. Now with one-Party control of the executive, legislative, and judicial branches we are behaving in a distressingly parliamentary manner. Isn't it ironic that while we are exporting democracy around the world, we are not nurturing our own distinctive variety?

As Robert Remini writes in his just-published history of the House of Representatives,

> "With one-party rule, the legislative and executive branches usually operate in lockstep. Such a setup invariably results in the dominance of the executive. Congress surrenders a great deal of its power and authority, and submits to the direction of the President."[2]

A small but telling example of executive dominance over the legislative branch is the threatened firing of the Library of Congress' leading expert on Separation of Powers. Louis Fisher, the author of the indispensable book, "The Politics of Shared Power: Congress and the Executive,"[3] is a legislative branch employee whose authoritative views on legislative branch have so angered the White House that its minions in the House and Senate have been looking for pretexts for his termination.[4] I owe Louis Fisher and the arm of the LOC, the Congressional Research Service, my gratitude for providing many of the research materials for this address.

The tensions that you and I may feel between the executive and legislative branches are usually unnoticed in a society that values results over process. For many citizens, even some law students, doctrines like Separation of Powers seem confusing and inefficient. Popular culture favors Larry, the Cable Guy, who simply says, "Git 'er done!" I, too, like to get the job done, but I also like it to be done well. History tells us the best way to assure sustainable quality is to pay attention to procedure, particularly constitutional procedure. The Founders knew that checks and balances are essential to good government and must be preserved. Surprisingly, checks and balances can even be efficient.[5] The attitude that the policy end justifies abusing the constitutional means is dangerous to the strength of the nation.

I. Problems with Executive Branch Overreaching

The novelist Tom Wolfe wrote the classic definition of a liberal: a conservative who has been arrested.[6] As more and more Americans are shocked by White House overreaching, even die-hard conservatives are discovering that enforced constitutional safeguards are necessary to preserve our fundamental freedoms and our structure of government.

A. Domestic Powers

The theory of the 'unitary executive' first gained credibility during the Reagan and Bush I Administrations, quieted during the Clinton years, but has returned with a vengeance during the Bush II Administration. The theory is that the President, as the only nationally elected official, has broad supervisory powers under Article II, Section 2, to "Take Care" that the laws Congress passes are "faithfully executed." You've heard of substantive due process; welcome to the substantive Take Care clause.

Dicta from the 1926 U.S. Supreme Court case of *Myers v. United States* are credited with originating this theory, which reached a judicial high point as an alternative holding in the 1986 case of *Synar v. United States*. Conservatives who dislike activist judges, court-created rights, penumbras, and broad holdings should take note. Fortunately, since 1986, the Supreme Court seems to be backing off of its support for greater presidential powers,[7] although the residents of the White House have not.

Simply put, according to the theory of the 'unitary executive,' the executive branch becomes first among equals, the dominant force in government. In practice, this theory is used to justify the hundreds of signing statements that presidents since Reagan have been issuing in order to selectively enforce the laws that Congress passes, and also to, in a sense, create their own legislative history. President Bush has issued more than 111 signing statements, 84% of which contained constitutional objections to over 650 provisions of law. Although President Bush has never vetoed a bill – the longest serving president since Thomas Jefferson to have failed to do so – he apparently believes he doesn't have to, if he can find a constitutional objection to the provisions he dislikes. The President gets another chance to defeat congressional intent with his tightening review over agency rulemaking. This, too, is an important development in administrative law that is often overlooked by practitioners. Together these twin changes produce an unprecedented aggrandizement of presidential power.

If he were selectively enforcing laws passed by a Democratic Congress that would be one thing, but President Bush has enjoyed Republican control of Congress for almost his entire Presidency. This is not a partisan dispute; this is a conflict between branches, with the executive branch winning decisively. It will be interesting to see how the courts interpret these new-found presidential powers because, as Richard Fallon, writes, "the Constitution provides very specifically for the process by which bills become law and by which presidential vetoes may occur – before a bill becomes law, not after."[8] For a president who refuses to veto legislation to rely so heavily on back-door "vetoes" of particular provisions will have to be tested in the courts.[9]

Another practical effect of the theory of the 'unitary executive' is the increased ability to withhold information from Congress, and not just by means of claims of executive privilege. Passage of the Medicare Modernization Act in 2003 – which one conservative economist has called the worst law ever passed by Congress[10] -- would not have been possible if the Chief Actuary of CMS (Centers for Medicare & Medicaid Services) had not been ordered to hide his estimates from Congress.[11] In addition, the nation's top auditor, the Government Accountability Office, is increasingly hampered when auditing federal agencies because the White House considers it to be a creature of the legislative branch. This is troublesome because no other auditor has the expertise and experience of the GAO. The current view is that "an affirmative statement of support from at least one full committee with jurisdiction"[12] is necessary before GAO can dig into executive branch books. With one-Party control of the White House and Congress, this committee majority requirement means the GAO is toothless.

The conclusion of most scholars is that "the theory of the unitary executive has no substantial basis in either our nation's administrative history or constitutional jurisprudence and subverts our delicately balanced scheme of separated but shared powers."[13] Historian Sean Wilentz of Princeton even claims that, "History may ultimately hold Bush in the greatest contempt for expanding the powers of the presidency beyond the limits laid down by the U.S. Constitution."[14] Yet the theory of near-absolute presidential authority has surprising force in today's Washington.

B. National Security Powers

Expansion of presidential power in the domestic sphere, as broad as it is, pales in comparison to its expansion in the military and foreign policy realm. Presidential powers have traditionally expanded during wartime, but never has the nation faced the prospect of a permanent war against such hard-to-define and hard-to-locate enemies. Should a president in these circumstances want the

powers of a Lincoln, Wilson, or Roosevelt permanently, or should he ask for fewer powers in clearer fashion in order to quiet disputes about their constitutionality? After all, the U.S. Supreme Court declared in *Hamdi v. Rumsfeld* in 2004 that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." It is interesting to note that if Congress explicitly agrees with a president's policies during war, then the president may, in fact, receive a blank check.[15] Constitutional questions arise if, and only if, Congress disagrees with presidential decisions.

Who would have thought that President Bush would claim powers beyond those exercised by Lincoln, Wilson, or Roosevelt, while stiff-arming congressional support for his actions? One of the broadest views of presidential power originated with law professor John C. Yoo, Bush's former deputy assistant attorney general, who wrote in a Sept. 2001 memo, that Congress could not

> "place any limits on the president's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the president alone to make."

Not surprisingly, this view is very popular in the White House despite the fact that Article 1, Section 8, of the Constitution explicitly gives Congress the power to declare war, raise and support armies, regulate the military, and pass all laws that are "necessary and proper" for our war-fighting capabilities.

Lest you think that Yoo gave staff-level advice that was moderated by his superiors, consider Sean Wilentz' appraisal:

> "Armed with legal findings by his attorney general (and personal lawyer) Alberto Gonzales, the Bush White House has declared that the president's powers as commander in chief are limitless. No previous wartime president has come close to making so grandiose a claim."[16]

How you feel about a president who believes that he alone has indefinite authority to:

- tap your telephone or email without a warrant,
- establish detention camps in places like Guantanamo, Cuba, which the Bush Administration believed to be under U.S. control but beyond the reach of U.S. or local courts,[17]
- define torture in a way that violates the Geneva Convention, [18]
- detain U.S. citizens over three years without charges,[19]
- detain citizens of our wartime allies indefinitely without charges,

- detain 'enemy combatants' indefinitely without charges,[20] and
- move detainees (under a process called "rendition") to countries which will almost certainly torture them in order to obtain information for us?[21]

From a legal standpoint, the easiest of these cases to argue is the issue of domestic surveillance. The Congress in 1978 in the Foreign Intelligence Surveillance Act (FISA) tried to establish procedures for legal wiretapping. The White House admitted, once the existence of it program had leaked, that it had in many instances deliberately failed to follow such procedures. What is the proper analysis in such disputes between branches on national security matters? In his concurring opinion in the 1952 *Steel Seizure Case*,[22] Justice Robert Jackson defined when presidential power is at its maximum, in twilight, or at its lowest ebb. Justice Jackson warned us:

> "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting on the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established in our constitutional system."

If this "functionalist" approach sounds tough on White House ears today, consider the fact that the "formalist" holding in the *Steel Seizure Case*, written by Justice Hugo Black, flatly denied President Harry Truman the power to seize the steel mills. Justice Black believed that "a bright categorical divide exists between the lawmaking powers given to Congress and the law-executing powers given to the executive, with the content of both categories fixed by historical understanding."[23] There seems little doubt that Senator Russ Feingold's censure resolution regarding FISA[24] tracks the reasoning of Justice Black, and probably also that of Justice Jackson. Yet Senator Feingold's resolution has little political support despite its strong constitutional underpinnings.

Of course, the world and the court have changed since 1952 by becoming far more deferential to presidential power and presidential mistakes, even constitutional ones. As Fallon points out,[25] conservative Judge Richard Posner claims that "America's wartime record with civil liberties is actually quite good," adding that heightened judicial scrutiny is not only unnecessary, but positively dangerous to national security. Writing in 1998, Justice William Rehnquist was less sure of executive branch competence, but seemed hopeful that America

makes fewer mistakes with each succeeding conflict.[26] These views are much obviously more congenial to the White House that those of the *Steel Seizure Case*.

II. Problems with Legislative Branch Underperformance

By problems in the legislative branch I mean constitutional underperformance, not the usual scandals, arguments, and confusions of legislative life. Humorists would have a harder time earning a living without Congress. So would prosecutors. For example, Will Rogers said, "America has no criminal class.... except for congressmen."[27] Thomas Jefferson himself took jabs at Congress and his own profession when he wrote,

> "If the present Congress errs in too much talking, how can it be otherwise in a body to which the people send 150 lawyers, whose trade it is to question everything, yield nothing, & talk by the hour? That 150 lawyers should do business together ought not to be expected."[28]

It is also difficult to argue for greater power for the legislative branch when it is held in such low public esteem.[29] But, of course, Congress has seldom been popular as an institution. I believe that it can never improve its reputation unless it takes its constitutional responsibilities more seriously.

Sherlock Holmes' dog that did not bark gave him a valuable clue. The public should be noticing that Congress is failing to conduct even minimal oversight over the Bush Administration, primarily due to the one-Party control of the executive and legislative branches.[30] The Republican Party does not want to investigate the impact of its own policies. Did you know that all of the traditional oversight subcommittees in the House were abolished soon after President George W. Bush was elected in 2000. Today there is no one in the House whose job is to supervise executive agency performance. Although this may sound politically sensible in a one-Party system, this is a marked departure from past practice when, for example, during World War II, Democratic Senator Harry S Truman became famous investigating war profiteering under Democratic President Franklin D. Roosevelt.

Congress is not only afraid of oversight, but also afraid of overwork. The difficult job of compromising differences and writing clear laws that embody the compromise seems to be beyond many of today's members and their staffs. As Fallon notes, "as the number and scope of federal programs grew, Congress proved unable, and sometimes unwilling, to write statutes at the necessary level

of detail to guide their implementation."[31] The White House clearly benefits from this laziness and ineptitude. As Fallon again notes,

> "In delegating lawmaking authority to the executive branch, Congress sometimes acts for sound reasons, involving its own lack of technical expertise. But sometimes, too, Congress may find it politically more expedient to legislate in general terms and to transfer the responsibility for making some of the hardest, most contentious decisions to the executive branch. In either case, the executive branch grows more powerful, and the stakes of presidential elections increase."[32]

Sometimes Congress lacks technical expertise because it does not want such expertise. The Office of Technology Assessment, a resource for informing Congress on complex issues, was shuttered soon after the Republican takeover of the House in 1994.

Although executive branch overreaching began during the Reagan Administration, this time it is much different, and much worse. Why? This time Congress is not even resisting the incursions. "What is different today from the confrontations of the Reagan years is the almost total quiescence of Congress."[33] Now Congress is almost inviting presidential trespass.

A major example of congressional pliability is the extraordinarily wide discretion that Congress gave President Bush in 2001 when it passed the Authorization to Use Military Force (AUMF).[34] This resolution, much broader than the Gulf of Tonkin Resolution in the Vietnam War, was as close as Congress has come to declaring a War on Terror. But this law was so broadly written that it is subject to wildly varying interpretations. Congress hardly expected this law to be used to justify domestic surveillance of U.S. citizens without a warrant and contrary to the provisions of FISA.[35] Of course, the White House argues that, even without AUMF, President Bush has "inherent authority" as Commander-in-Chief to conduct such wiretapping. The White House seems to feel that seeking authorization from Congress was the courteous thing to do, but largely a waste of time.

The extraordinarily broad grant of presidential war-making power could be justified if Congress had undertaken a thorough debate on those powers prior to passage so that Congress and the nation could have understood the implications of its actions. But the 2001 debate is recognized as so short and shallow that it comprises one of the least distinguished chapters in congressional history. This stands in marked contrast to the long and thorough debate that Congress conducted prior to the first Iraq War in 1991 during the administration

of President Bush's father. The absence of congressional debate on the major issues of the day did not begin with George W. Bush; President Clinton declined to even ask for congressional authorization for the conflicts in Bosnia and Kosovo.

The White House seems to view domestic spying powers during wartime as its exclusive prerogative, instead of as a shared prerogative – even when Congress is controlled by the Republican Party. As Louis Fisher and numerous others have noted, sharing power makes more sense in many cases than separating power, particularly during a war.[36]

> "Even assuming that the President's role as Commander in Chief of the Armed Forces is implicated in the field of electronic surveillance for the collection of foreign intelligence information within the United States, it should not be accepted as a foregone conclusion that Congress has no role to play."[37]

Perhaps it is not surprising that President Bush is aggressive in asserting his war powers while Congress is largely passive. Most adults remember the Vietnam War and the Nixon Administration as a time of the "Imperial Presidency." Finally, after more than 50,000 U.S. casualties in the War, and after the Watergate scandal weaken Nixon politically, Congress began reclaiming its rightful powers with the War Powers Resolution in 1973 and the Congressional Budget and Impoundment Control Act of 1974. Congress was even able to pass the War Powers Resolution over President Nixon's veto. But memories and appearances can be deceiving. Although the War Powers Resolution requires a congressional vote to sustain lengthy conflicts, and the Budget act restricted presidential impoundment authority, I agree with Louis Fisher that both laws represent "an abject surrender of legislative prerogatives to the president."[38] Even if you do not take such a harsh view, Fallon believes that the Resolution "has had little practical effect: Congress has typically acceded, however grudgingly, to presidential leadership in matters of war and peace."[39] Whatever the real results of the War Powers and Budget Acts, at least Congress thought that it was asserting itself. Many presidents agreed. Today Congress does not even bother to assert itself.

One of the greatest boosts to executive branch power results from congressional self-indulgence. Not only has Congress decreased its typical work week from four days to two,[40] Congress will meet fewer days this year than any time since 1948. The 1948 Congress, the one Harry Truman famously called the "do-nothing" Congress, met for 110 days. This year's Congress is supposed to meet for 90 days, but the likelihood is that we will meet for only about 60. How can you do less than the "do-nothing" Congress? We're about to find out.

Not only is Congress now part-time, it is also largely absentee. With the shortened work week and the ease of air travel, members spend will spend almost ten months this year back home. That may be good for their popularity but it also means that there is less time to study the issues, and each other. Congress used to be a debating society composed of friends, acquaintances, and adversaries; now it is a C-SPAN talk-fest of sometimes hostile strangers.[41]

The congressional expert, Norm Ornstein, writes that the "Tuesday-Thursday Club" in Congress was for members whose districts were in Virginia or Maryland, or who didn't want to work very hard.[42] Today, almost everyone in Congress belongs, flying in from their district Tuesday afternoon and flying back on Thursday afternoon. Former Congressman Robert Livingston, Republican of Louisiana, says, "Congress should be a full-time Congress.... if you want to be a local politician, run for local office. If you want to run this country, you've got to be here. You've got to be here five days a week."[43]

With all of our nation's problems – two wars, Iran and North Korea obtaining nuclear weapons, rising gas prices, massive budget and trade deficits, and out-of-control entitlement spending – you would think that Congress would be holding hearings, having serious debates, and conducting investigations. The cost of even a one-year delay is addressing the nation's unfunded liabilities in its entitlement programs is roughly $3 trillion, an unimaginably large sum and a tragically large penalty for an election year.[44] But instead of trying to demonstrate activity and accomplishment, the House of Representatives is eerily inactive, almost silent. The Senate, due to the majority's inability to control its own members, is making more noise, but to little effect.

As bad as current congressional incompetence is, the trend is even scarier. If we can get paid full salary for 60 days of work a year, why not work even less? How about 40 days a year, or 20 days? If we can vote on complex bills without ever reading them, why not compress all the voting into a few days, whether the bills have been drafted or not? Why bother with hearings and debate if there is already a Party position? If we don't know our colleagues across the aisle and don't want to get along with them, then why go to Washington at all? With the internet, we could vote from home. We could then have the ultimate in minimal government: a one-day vote-a-rama from small cities all across America with no one in Washington at all! Then no one could be accused of being an inside-the-Beltway, big-government, Washington-insider. As the saying goes, "If the opposite of pro is con, then what is the opposite of progress? Congress."

Granted, this vision of congressional behavior is far-fetched, but it is not unthinkable. Forty years ago, much of today's congressional behavior would

have been unthinkable. Our unique American form of democracy must never be viewed as an inconvenience, or as an anachronism. Congress, with all of its foibles, is a necessary counterweight to the executive. Congress is already too light on substance for the national good; for it to become even lighter would be a tragedy.

III. Need for Judicial Intervention?

Is it time for courts to enter the "political thicket"?[45] Court involvement in the internal affairs of Congress goes against what we learned in law school, but, after *Bush v. Gore*, it is harder to pretend that the courts do not occasionally trespass into federal elections when they think it is in the best interests of the nation.

A better solution would be for voters nationwide, particularly self-proclaimed conservatives, to recognize the need to return to the Founders' vision of a competent, independent Congress. The Founders probably intended that the president be more of an administrator than the master of Congress. In modern times, we do need a stronger president than the Founders envisioned, but we also need a Congress that is sufficiently strong to be able to bridle that increased presidential power.

Candidates who believe in a strong Congress could run and get elected. Of course, they would have to dispense with the usual anti-Washington rhetoric that characterizes so many federal campaigns, even campaigns of presidents running for their second term. But courts may be needed to help create the opportunities in order for that to happen because today's Congress has so many bad habits and is so biased toward incumbency and Party-line voting.

The U.S. Supreme Court already seems closer to involving itself in non-racial congressional redistricting cases now that it has agreed to review the Texas map influenced heavily by the recently-resigned former House Majority Leader, Tom Delay. Although the high court declined to alter Pennsylvania's redistricting in an earlier case, the court was closely divided. That could well change with the four Texas cases. Computer-aided gerrymandering has so changed politics that it is hardly an exaggeration to say the voters don't elect politicians anymore, politicians get to choose their voters.

Beyond redistricting, it may be time for the judicial branch to exercise restraint on other congressional activities.

Litigation has already been filed to challenge the constitutionality of the 2006 Deficit Reduction Act[46] because the President signed the Senate version of the bill, which was never reconciled with the House version. This may well be a violation of the Presentation Clause of the Constitution. Although the White House claimed that the difference was a clerical error, the difference has a large practical effect because it involved $2 billion and could, for example, cost 15 Tennessee hospitals up to $100 million. Congress failed to pass the same bill in the House and Senate because the margin of victory was so slender that Republican leadership was afraid to revisit the issue. If Congress were to make a practice of not reconciling its bills in conference committee, the White House would have a field day of pitting the House against the Senate, dividing Congress against itself and further weakening the institution. The bodies have long harbored a deep antagonism for each other. The House operates much like a factory, run by strict majority control and with five-minute limits on speeches. The Senate is similar to an artists' studio, where each Senator's work is equally beautiful and time stands still.

The courts have been loathe to oversee internal congressional procedures, only intervening when Congress blatantly contravened explicit constitutional provisions, such as requiring a two-thirds vote for the expulsion of former Rep. Adam Clayton Powell.[47] But the time may be near for closer judicial scrutiny.

Here are four categories of legislative problems that prevent Congress from performing its proper constitutional role, and which could be ripe for court intervention:

A. Trespass on Other Branches' Prerogatives

How should courts react when the Constitution explicitly says that Congress shall have the power to "make Rules concerning Captures on Land and Water," but the executive branch sets detainee and enemy combatant policy, often without even notifying Congress? It would be impossible for the courts to compel Congress to act, but invalidating the White House's wartime detention policies due to their unconstitutional origin would light a fire under Congress.

Congress has almost completely abdicated its authority concerning detainees even when they are U.S. citizens. The Supreme Court in *Padilla v. Rumsfeld* affirmed the president's power to detain a U.S. citizen as an "enemy combatant" for more than three years despite an earlier statute that provided that no U.S. citizen could be detained except pursuant to an act of Congress.[48] Formal charges were finally brought against the defendant in order to allay fears

of indefinite detention without charges, but the constitutional issue could easily arise again, either in this or a similar case.

Long ago, during World War II, Congress stretched its powers to delegate authority to the limit, effectively giving executive branch and independent agencies the power to make laws under the broad guidelines of statute. After *Yakus v. United States* in 1944, it has been easy for Congress to duck hard problems by giving them to the executive or judicial branches for resolution, and then complaining about their work. Early in the Bush II Administration, energy lobbyists were accused of not only drafting, but authoring legislation, that Congress subsequently passed into law. Although there is a constitutional doctrine of "nondelegation" of core congressional responsibilities,[49] it is probably more accurate to use a verb in the past tense. Perhaps it is time for judges to stop Congress from passing the buck?

As weak as Congress is, sometimes it takes its anger out on judges. More and more often the judicial branch needs to defend itself from Congress because Congress has begun routinely overturning federal court decisions, voting for laws that are certain to be declared unconstitutional by both Republican and Democratic judges, and denying jurisdiction to federal courts by means of "court-stripping" legislation.[50] When Congress can't compete with executive branch in power, it seems more likely to resort to judge bashing.

B. Lack of Legislative Due Process

This is a more difficult topic to understand because you are effectively asking, "When is a law passed by Congress not a law?" This is not a trick question or a Zen koan. Sadly, it is a question that more and more informed voters should be asking.

For example, what if you could prove that not a single congressman or senator knew what they were doing when they cast a vote? There are some legislative problems that even the cathartic power of a majority cannot cleanse. There are numerous ways this could happen: a mistaken bill number on the voting board, a vote on a bill without a written text or whose text is subsequently altered, or passage of a complex bill on which no hearings have been held or immediately after release from the conference committee. Unfortunately, this last situation happens more and more frequently. Waiver of the usual three-day rule for considering bills before voting is commonplace.[51]

Often giant bills are voted on with only a few hours' opportunity to read hundreds or thousands of pages.[52]

2005	Length	Total Time for Consideration
Defense Appropriations	533 pages	5 hours
Defense Authorization	937 pages	4 hours
Budget Reconciliation	367 pages	5 hours
2004		
Omnibus Appropriations	1,645 pages	16 hours
2003		
Defense Authorization	898 pages	6 hours
Energy Bill	571 pages	11 hours
Medicare Drug Bill	852 pages	29 hours

Another type of legislative problem which is growing but not urgent is the number of near-contractual promises that candidates make while seeking office. Interest groups make every effort to get candidates to sign away all their discretion in advance of holding office. This practice prevents many officeholders from acting on the knowledge they acquire in hearings because they are already committed to vote a certain way. Taken to the extreme, some officeholders are hardly able to serve as legislators when their decision-making power has been delegated to outside interest groups.

C. Lack of Transparency

Obviously, once laws are passed, there is a clear need for the public and their lawyers to be able to learn the law. How would you handle the following situations?

The 2005 Energy and Water Appropriations bill[53] contained two sentences which said that the accompanying Report would also have the force of law. The Report was almost 300 pages in length, contained many hundreds of earmarked projects, was not scored for cost, and was barely read by anyone, including committee staff. Normally, the Report is advisory only, to help agencies and courts understand the background and intentions behind the law. This time it was different. This time the Report trumped the law because the implementing agencies were likely to give the projects in the Report priority over those found in the statute because they realize that key members of Congress went to a lot of trouble to hide such spending. How is it even possible to look up the federal law unless the entire Report is included in the U.S. Code? Otherwise, you have to read the entire bill to find the two sentences that created worm-holes into an alternative universe of spending.

Another situation involves a widely acknowledged Capitol Hill expert on parliamentary procedure. That person suddenly discovers a whole body of law governing a key committee that had never been known to that parliamentary expert, or to his predecessors or colleagues.[54] Yet the law has been in place for over 20 years. That expert discloses the situation to me but insists on hiding his identity lest he be fired.

D. Corruption

The most obvious need for judicial intervention is when the legislative process is plainly corrupted, even under the lax standards of the laws that Congress has passed for itself. Bismarck was famous for saying that there are two things you never want to see being made: laws and sausages. I suggest that even a sausage factory needs to have some sanitation standards.

For example, what happens if a close vote is decided by the vote of congressmen who admits to being bribed? Sadly, this hypothetical is not far from reality. The 2003 Medicare drug bill passed at dawn one morning after an all-night session, and after the longest vote in American history (2 hours and 55 minutes). It passed by a margin of 5 votes, which meant that if three members had changed their minds the bill would have failed. Immediately after the vote, Congressman Nick Smith of Michigan claimed in a press conference that he had been the victim of attempted bribery by then House Majority Leader, Tom Delay. He later recanted his statement, but it raised serious questions about the propriety of the vote.[55]

What about earmark spending that secretly benefits an individual congressman? Congressman Duke Cunningham of California has already been convicted of crimes related to such abuse,[56] and the newspapers are full of stories about the earmark-related activities of Congressman Alan Mollohan of West Virginia.[57] The indicted lobbyist Jack Abramoff called Congress' ability to earmark "the congressional favor factory."

A much bigger case occurs when committee chairmanships are sold. Last year, three congressmen competed to be Chairman of the powerful House Appropriations Committee. The winner just happened to raise the most money -- $22 million -- for the Republican Party. The runners up only raised $19 million and $17 million.[58] Coincidence? Why are chairmen not selected on the grounds of ability, experience, seniority, or perhaps factors such as regional balance? Is fundraising ability even a legitimate criterion? What is the impact of fundraising quotas on smaller or poorer states, where it is harder to raise such large sums of

money? The winner in the Appropriations battle just happened to be from California? Coincidence? The first runner up was from Ohio. The last place finisher was from Kentucky.

E. Serious about Judicial Intervention?

All four categories of legislative problems -- and opportunities for judicial intervention -- arise, in part, because Congress has failed to have an internal mechanism for policing its members and rules. Most obvious are the many problems with today's ethics committee. Congress has also failed to support parliamentarians who are disciplined and neutral in the enforcement of House and Senate rules. When rulings from the chair are made, majorities in both houses think little of overruling the chair if the Party demands it. Many reformers have called for an outside ethics panel composed of retired federal judges to enforce House and Senate rules. This proposal is far from popular in Congress but may gain support if the current scandals multiply. It is not a big jump from retired judges supervising congressional behavior to active judges monitoring when we fail our constitutional responsibilities.

Courts have been understandably reluctant to referee fights between the executive and legislative branches, although in major cases like *Immigration and Naturalization Service v. Chadha* in 1983[59] and in the *Steel Seizure Case* they have intervened. In those cases the Supreme Court curbed overreaching by the legislative and executive branches; perhaps the Court could also be persuaded to curb under-reaching. When one branch is disabled, is it not appropriate for another branch to come to its rescue?

The obstacles to this strategy are many. Who would sue? Congressmen have frequently tried to litigate disputes with the executive branch only to find that they lack standing. Even when they have standing, courts are quick to find that political questions should be left to the elective branches, or that no true constitutional issues was raised.[60] But courts might be more willing to intervene if Congress, as a whole, invoked its institutional powers to confront the president and if an obvious constitutional principle were at stake.[61] Courts might be particularly likely to intervene to preserve the integrity of congressional voting and the right of Congress to be able to read the legislation prior to final passage.

IV. Conclusion

Because the Founders devoted Article I of the Constitution to Congress, the House and Senate are, in many ways, the bedrock of our government. The

inevitable tensions with the other branches should not cause Congress to shrink from its rightful role, nor should the temptations to stay home, raise money, be popular, and dodge tough issues. Congress has already diminished itself markedly in recent decades, although the change has occurred so slowly that they haven't noticed what a lightweight institution it has become. The nation needs a counterweight to the White House in order for our constitutional balance to be restored. The Senate fills this responsibility more often than the House due to the prerogatives of individual senators which, so far at least, cannot be denied. Even in the Senate, however, they have come closer to using the so-called "nuclear option" to eliminate the power of filibuster, for example, than ever before in our history.

The decline of congressional clout has not only allowed, but in fact encouraged, expansion of White House power, particularly with the aggressive nature of the Bush II Administration. The ebb and flow of influence between the branches is to be expected, but Congress has been at low tide for many years now. I think that we are dangerously close never again fulfilling the potential of the legislative branch, because it will be difficult for an already unpopular and indolent branch to recover from its failings. As former Congressman Mickey Edwards, Republican of Oklahoma, and now a Princeton lecturer, has said:

> "The consequences are monumental, and they're monumental because once one of the branches of government has essentially allowed a different branch to move into its territory and usurp some of its constitutional authority, it's very difficult to get it back."[62]

But there are signs of hope. More and more members of Congress are beginning to oppose the decline of their own institution. And this year's elections may well check presidential power by turning over the House or Senate to the Democratic Party, returning us to the divided government we had become so accustomed to. And certain congressmen and women may bring a constitutional suit to revitalize Congress, restoring it to its proper constitutional role.

# # #

[1] "Senator Daniel Patrick Moynihan was scarcely exaggerating when he said that the United States is the only democratic government with a legislative branch." James Q. Wilson, Bureaucracy:What Government Agencies Do and Why They Do It, Basic Books, 1989, p. 238.
[2] Robert Remini, The House: The History of the House of Representatives, Smithsonian Books, 2007, p. 502.
[3] Louis Fisher, The Politics of Shared Power: Congress and the Executive, Texas A & M University Press, 1998.
[4] See Yochi J. Dreazen, "Expert on Congress Claims He Was Muzzled for Faulting Bush," *Wall St Journal*, Feb. 9, 2006, p. A6.
[5] "Justice Louis Brandeis argued that the doctrine of separated powers was adopted 'not to promote efficiency but to preclude the exercise of arbitrary power.' That is a half-truth. The framers believed that a separation of powers would act in the interest of efficiency." Louis Fisher, The Politics of Shared Power, supra, page 14
[6] Tom Wolfe, Bonfire of the Vanities,
[7] Morton Rosenberg and T.J. Halstead, "Presidential Challenges to Congressional Oversight Prerogatives: An Emergent Unitary Executive?" April 14, 2005, American Law Division, Congressional Research Service, p. 5, citing *Morrison v. Olson*, 487 U.S. 464 (1988) and *Mistretta v. United States*, 488 U.S. 361 (1989).
[8] Richard Fallon, The Dynamic Constitution: An Introduction to Constitutional Law, Cambridge Univ. Press, 2004, p. 183.
[9] "Earlier presidents, including Jackson, raised hackles by offering their own view of the Constitution in order to justify vetoing congressional acts. Bush doesn't bother with that: He signs the legislation (eliminating the risk that Congress will overturn the veto), and then governs how he pleases." Sean Wilentz, "The Worst President in History: One of America's Leading Historians Assesses George W. Bush," *Rolling Stone*, April 21, 2006.
[10] Bruce Bartlett, Imposter: How George W. Bush Bankrupted America and Betrayed the Reagan Legacy, 2006.
[11] Under the Budget Resolution that year, no Medicare drug bill larger than $400 billion could be considered. Although the Congressional Budget Office estimated the bill to be slightly smaller than $400 billion, estimates from the agency which would actually administer the drug benefit would have been relevant and probably persuasive.
[12] Rosenberg and Halstead, supra, p 18.
[13] Rosenberg and Halstead, ibid.
[14] Wilentz, supra, p. 6.
[15] "I am not aware of any wartime emergency measure, voted by Congress and signed by the President, that the Supreme Court has ever found to lie beyond the national regulatory power." Fallon, *supra*, p. 243.
[16] Wilentz, *supra*, p. 6
[17] *Rasul v. United States*, 124 S.Ct. 2686 (2004).
[18] For a full treatment of the subject, see Jennifer K. Elsea, "Treatment of 'Battlefield Detainees' in the War on Terrorism," Library of Congress, Congressional Research Service Report for Congress, March 27, 2006.
[19] *Rumsfeld v. Padilla*, 542 U.S. ____ (2004). For an excellent summary of detainee issues relating to American citizens, see Jennifer K. Elsea, "Detention of American Citizens as Enemy Combatants," Library of Congress, Congressional Research Service Report for Congress, March 31, 2005.

[20] *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005); *In re Guantanamo Detainee Cases*, 355 F. Supp 2d 443 (D.D.C. 2005); *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), rev'd ___ F.3rd ___ (D.C. Cir. 2005)

[21] See Michael John Garcia, "Renditions: Constraints Imposed by Laws of Torture," Library of Congress, Congressional Research Service Report to Congress, April 5, 2006.

[22] Youngstown Sheet and Tube Co. v Sawyer, 343 U.S. 579 (1952).

[23] Fallon, *supra*, p. 175

[24] S.Res. 398, March 13, 2006.

[25] Fallon, *supra*, p. 246.

[26] Justice William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime, Vintage Books, 1998, p 224.

[27] Remini, *supra*, p. 503

[28] Thomas Jefferson, Autobiography, 1821, as quoted in Matthew Spalding, ed , The Founders' Almanac: A Practical Guide to the Notable Events, Greatest Leaders & Most Eloquent Words of the American Founding, The Heritage Foundation, 2002, p. 160

[29] "About 41 percent of those polled said that Congress has accomplished less than usual, compared with 27 percent who said so just before the mid-term elections in 2002, and 16 percent who believed it in 2000." Jonathan Weisman, "Lawmakers Plan Ambitious Agenda as Voter Anger Rises," *Washington Post*, April 21, 2006, p. A5.

[30] For details on what has not been investigated, but should have been, see U.S. House of Representatives, Committee on Government Reform – Minority Staff, Special Investigations Division, "Congressional Oversight of the Bush Administration," Jan. 17, 2006. See also their "Fact Sheet: Congress' Abdication of Oversight," Oct. 1, 2004.

[31] Fallon, *supra*, p. 178

[32] Ibid., p. 180.

[33] Rosenberg and Halstead, *supra*, p. 6.

[34] This Joint Resolution authorizes the President to

> "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." Pub L. 107-40, 115 Stat. 224 (2001)

[35] Ironically, the passage of the Intelligence Authorization Act, H R 5020, by the House on April 26, 2006, may offer retroactive, backhanded support for the White House broad view of the AUMF, because a Democratic motion stating that domestic surveillance was not intended was defeated. The vote occurred on a procedural motion that is almost always a Party-line vote, but the motion also had substantive content.

[36] See, e.g., Fisher, The Politics of Shared Power, *supra*, p. 3.

[37] Elizabeth B. Bazan and Jennifer K. Elsea, "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information," Congressional Research Service, Jan. 5, 2006, p. 43, quoting Justice Jackson,

> "There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly on 'war powers,' whatever they are. While Congress cannot deprive the President of command of the army and navy, only Congress can provide him an army or navy to command."

[38] Louis Fisher, Congressional Abdication on War and Spending, Texas A & M University Press, 2000, p. xiii

[39] Fallon, *supra*, p. 241.

[40] Remini, *supra*, p. 498.

[41] See ibid.

[42] Norm Ornstein, "Want to Fix Congress? Start by Getting Rid of Tuesday to Thursday," *Roll Call: The Newspaper of Capitol Hill Since 1955, Nov. 16, 2005.*
[43] As quoted in Remini, *supra*, p. 500
[44] Testimony of David Walker, Comptroller General of the United States, House Budget Committee, Feb. 15, 2006
[45] For more information on the Court's use of the term, originated by Justice Felix Frankfurter in the 1946 case, *Colgrove v. Green*, see http://althouse.blogspot.com/2004/06/its-political-thicket-out-there.html
[46] See news.corporate.findlaw.com/prnewswire/20060330/30mar20061156.html
[47] Amy Keller, "Members Misbehaving: Congress' Top Scandals," *Roll Call: The Newspaper of Capitol Hill Since 1955*, June 14, 2005, p. 1 and 22.
[48] Bazan and Elsea, *supra*, p. 33.
[49] Fallon, *supra*, p. 179.
[50] See Kenneth R. Thomas, "Limiting Court Jurisdiction Over Federal Constitutional Issues: 'Court-Stripping'," Library of Congress, Congressional Research Service Report for Congress, updated Jan. 24, 2005.
[51] A partisan but powerful report on the streamlining of congressional procedures to the point of limiting democracy is "Broken Promises: The Death of Deliberative Democracy: A Congressional Report on the Unprecedented Erosion of the Democratic Process in the 108th Congress," compiled by the House Rules Committee Minority Office, Hon. Louise Slaughter, Ranking Member.
[52] Rep. Brian Baird (D-WA), poster entitled, "The Record of the Rubber Stamp Congress."
[53] Energy & Water Development Appropriations Act FY2006, Pub. Law 109-103, November 19, 2005.
[54] The hidden regulations are contained in Office of the General Counsel, Government Accountability Office, Principles of Federal Appropriations Law, Third Edition, Jan. 2004.
[55] See, e.g., Associated Press, "Ethics Panel Raps DeLay for Arm-Twisting on Bill", *Wall Street Journal*, October 1, 2004, p. A4.
[56] See, e.g., Fred Barnes, "Fix Congress, Not the Lobbyists," *The Weekly Standard, January 30, 2006, vol. 11, issue 19.*
[57] See, e.g., Norman Ornstein, "House Members Have Allergic Reaction To Ethics Process," *Roll Call: The Newspaper of Capitol Hill Since 1955*, April 17, 2006.
[58] See, e.g., Richard E. Cohen, "Gavel Envy," *National Journal*, June 4, 2005.
[59] *INS v. Chadha*, 462 U.S. 919 (1983).
[60] See Walter Oleszeck, "Congress and the Courts: Current Policy Issues," Library of Congress, Congressional Research Service Report for Congress, Sept. 20, 2005.
[61] Louis Fisher, "The Law: Litigating the War Power with Campbell v. Clinton," Presidential Studies Quarterly, vol. 30 (Sept. 2000), p. 568, as quoted in Oleszeck, supra.
[62] Keith Perine, "Imbalance of Power in the War on Terror," *Congressional Quarterly*, Feb. 27, 2006, p. 542.