Prepared Testimony of

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Before the Executive Overreach Task Force
U.S. House of Representatives, 114th Congress

Tuesday, March 1, 2016
Hearing on "The Original Understanding of the Role of Congress
And How Far We've Drifted From It"

Mr. Chairman and members of this subcommittee, I am grateful for the invitation to present testimony on the original understanding of Congress's role in our political system, and how far we have drifted from that understanding.

I have been asked to address two questions: how and why Congress in its early decades refrained from delegating legislative power to administrative officials, and how Congress structured itself to ensure that it maintained control of the legislative and policy agenda rather than ceding control to the executive. On both of these issues there are important lessons we can learn from the experience of our early congresses.

Nondelegation in the Early Congress

Throughout the first century of its existence, Congress wrote the laws rather than delegating that power to the executive. In their view, both the text of the Constitution and the basic principles of republican government forbade them from relinquishing the legislative power that the people had placed in their hands.

Constitutional Text and Republican Principles

Article I opens with this simple but critical sentence: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Those words very clearly establish as a legal requirement that the legislative powers of the Constitution must remain in the hands of the House and the Senate. Even the most ardent defenders of legislative delegations to the administrative state admit that the Constitution forbids Congress from relinquishing this power.[1]

The Framers of the Constitution placed this requirement at the beginning of Article I for two important reasons. First, since all political power is derived from the people, it must remain in the hands in which the people have placed it. This argument, often referred to as the Social Compact theory, proclaimed that the people were the only rightful source, or fountain of power. Only the people, therefore, could transfer or delegate that power to an agent to act on their behalf. Those to whom authority is delegated, by contrast, never actually possess that power. They merely act as the agents of those who do possess political authority. Since those who do not possess political power may not delegate it, the representatives of the people – the agents – may not further delegate that power.

As John Locke argued in his famous *Two Treatises of Government*, "The power of the *Legislative*" is "derived from the people by a positive voluntary Grant and Institution." And "it can be no other, than what that positive Grant conveyed." Therefore, he concluded, "the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands."

Alexander Hamilton made the same argument in *Federalist 84*. Hamilton claimed that the Constitution did not need a bill of rights, because the people never granted the government the power to infringe basic rights such as freedom of the press in the first place. Bills of rights, he argued, "have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain everything, they have no need of particular reservations."[2] The people, in Hamilton's formulation, never "surrender" their powers to the government. They merely entrust or delegate the use of that power to "immediate representatives and servants" who have no authority of their own, such as authority to further delegate legislative power, outside of the positive grant of the people.

Social Compact theory, in other words, does not treat political power as a gift given by the people to the government, with which the government can do what it wishes. Rather, it understands political power to be unalienable by the people, who are always the sovereign authority. They do not give political power away to the government, but merely delegate it. Since the government never actually owns the power granted, it cannot give it away or delegate it to other bodies.[3]

In addition to the argument derived from Social Compact theory, the Founders emphasized that republican government demands that laws are made by representatives elected by the people. In *Federalist 10* Madison defined a republic as "a government in which the scheme of representation takes place." In the previous essay Hamilton wrote that one of America's great "improvements" to the science of politics was "the representation of the people in the legislature, by deputies of their own election." And in *Federalist 39* Madison explained that a republic is "a government which derives all its powers directly or indirectly from the great body of the people." "It is *sufficient* for such a government," he continued, "that the persons administering it be appointed, either directly or indirectly, by the people." In these definitions

republican government is connected with the principle of representation through elections, particularly in the legislative branch.

In addition to this argument, the Framers made a very practical argument for why legislative power must remain in the hands of the people's representatives. As James Madison argued in *Federalist 52*: "As it is essential to liberty, that the government in general should have a common interest with the people; so it is particularly essential, that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy, by which this dependence and sympathy can be effectually secured." In short, the Framers believed that those who write the laws must be elected by the people, so that they will make the laws on their behalf. Without that connection between the people and their representatives in the legislature, the government will not have a sympathy for the people and a common interest with them. This will lead the government to make laws that are not in the best interests of the people as a whole.

In sum, the Framers made both a principled and a practical case against delegating the legislative power to administrative officials. It would not only violate the idea that the people alone are the legitimate source of political power, it would also break the connection between the people and their representatives that is central to the definition of a republican form of government.

Early Congresses Avoided Delegating Legislative Power

In the early decades of American history Congress did not shirk its constitutional responsibilities. On the contrary, the laws it passed were highly detailed and limited the discretion of executive officials who carried the laws into effect. As the preeminent scholar of America's administrative history writes, "The priority of the legislative power was…acknowledged on all sides, and the jealousy with which Congress guarded its position was amply illustrated during the Federalist era" of the 1790s.[4]

With regard to tariff laws and post roads, Congress was vigilant in retaining the power to make the law. Louis Jaffe notes that "Congress for many years wrote every detail of the tariff laws." In the tariff acts from 1789 to 1816, for example, Congress not only specified which products would be taxed, but also the rate at which they would be taxed.[5]

In addition, during the Second Congress a debate emerged over the detail Congress is required to include in statutes mapping out the route of post offices and post roads. Theodore Sedgwick, a prominent Massachusetts Federalist, believed that a general act giving the executive the authority to designate the specific route of post roads was not a delegation of legislative power. He admitted that "it was impossible precisely to define a boundary line between the business of Legislative and Executive," but "he was induced to believe, that as a general rule, the establishment of principles was the peculiar province of the former, and the execution of them, that of the latter."[6] Madison echoed this distinction in a later debate, where he distinguished "between the deliberative functions of the House and the ministerial functions of the Executive powers…The fundamental principles of any measure, he was of opinion, should be decided in the House, perhaps even before a reference to a select committee."[7] Madison admitted that he "saw some difficulty in drawing the exact line between subjects of legislative and ministerial deliberations, *but still such a line most certainly existed.*"[8]

Both Sedgwick and Madison, two prominent figures in the early Congress, affirmed the principle that the Congress may not lawfully delegate its power to the executive. During Congress's early years the debate was not over the legitimacy of the nondelegation principle but over its application to specific cases. Sedgwick and Madison both believed that a meaningful distinction could be drawn between the "deliberative" function of the "establishment of principles" and the "ministerial" function of the "execution" of principles.

On the question of post roads, Congress erred on the side of specificity in the statue versus delegating power to the executive to fill in the details. "[O]n five successive occasions," one historian writes, "the Federalists tried…to vest the power in the executive [to define the route of the post road] but without success."[9] As a result the law specified in almost comic detail the route of the road.[10]

Some members in the early years of Congress sought to apply the principle so stringently that they objected to any reliance upon information or reports from the executive as a delegation of legislative authority. Many statutes during these early years referred matters to the various heads of departments for a report on a policy question. This is one way in which Alexander Hamilton gained influence over early congressional debates. Many of these references were challenged on nondelegation grounds. Responding to a proposal to refer a petition asking for the repeal of

duties on distilled spirits to the Secretary of the Treasury, Representative William Branch Giles of Virginia protested that the matter was "cognizable by the House only."[11] His argument was that referring the petition to an outside actor would be an abdication of the House's responsibility, even if the House would ultimately vote on the matter. Giles's view prevailed and the proposal was defeated.

As the practice of referring policy matters to executive branch officials for reports and advice became more widespread, the clamor against the practice increased. Early in 1792, Representative John F. Mercer of Maryland proclaimed, "I have long remarked in this House that the executive, or rather the Treasury Department, was really *the efficient Legislature of the country*…"[12] Later that year, Representative Abraham Baldwin of Georgia argued that "The laws should be framed by the Legislature." The Treasury Act, he asserted, was "couched in such general language as to afford a latitude for the introduction of new systems, such as were never expected by the Legislature."[13] Mercer further remarked that "the power of the House to originate plans of finance" was "incommunicable" to the Secretary.[14] In March of 1792, James Madison weighed in, submitting that "a reference to the Secretary of the Treasury on subjects of loans, taxes, and provision for loans, &c., was, in fact, a delegation of the authority of the Legislature, although it would admit of much sophistical argument to the contrary."[15] Just a few years into the new government, the nondelegation doctrine was proving to be a central principle in many legislative debates. Even Madison came to the conclusion that referring these matters to executive agents violated the nondelegation principle.

Importantly, the Federalists defending these practices did not reject the principle of nondelegation. They merely affirmed the propriety of relying on information received from department heads as long as Congress had the last word in passing legislation in response to the information. Representative William Smith responded by reminding the House that "The ultimate decision…in no one point, is relinquished by such a reference. If such a reference was unconstitutional, he observed, much business had been conducted by the House in an unconstitutional manner, by repeated references to the Heads of Departments."[16] In other words, everyone in Congress agreed on the legitimacy of the nondelegation doctrine. Their dedication to that principle was so powerful that the argument was over whether allowing the executive to *influence* a vote in Congress was unconstitutional.

Historians note that, if anything, it could be argued that Congress entered too much into the details of administration. Rather than delegating its legislative powers routinely, it routinely settled matters of detail that could legitimately have been transferred to administrative officials. As Leonard White notes, "Congress itself decided upon the ports of entry and delivery rather than delegating this duty to the President or the Treasury," though "it allowed the President to establish excise districts." Congress also "specified what lighthouses were to be built."[17] One prominent defender of delegation concedes that in its early years Congress "micromanaged administration, particularly Treasury administration, through specific instructions. Many statutes laid out in excruciating detail the duties of officers and of private parties subject to the legislation." The statute establishing a tax on Whiskey in 1791 "specifie[d] everything from the brand of hydrometer to be used in testing proof to the exact lettering to be used on casks that have been inspected and the wording of signs to be used to identify revenue officers."[18] Perhaps Congress could have given the Treasury Department the discretion to establish regulations governing these matters without violating the nondelegation doctrine, but legislators erred on the side of caution.

The Framers of the Constitution and members of the early Congress believed that a republican form of government demanded that elected legislators, to whom the people have delegated the legislative power in their Constitution, wrote the laws. In addition, they had a very clear definition of what law is, and what distinguished it from execution of the laws. As James Madison proclaimed in *Federalist 62* "Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?" His chief collaborator in writing *The Federalist* Papers, Alexander Hamilton, offered a similar definition of law in *Federalist 75*: "The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of society." Both of these definitions affirmed that lawmaking power was the power to make rules that govern action, to promote the proper regulation of society. Executive officials might be legitimately given the power to enact regulations, but not rules that govern action. Based on their clear understanding of this distinction, legislators in the early Congress refused to give the executive the power to enact regulations that were legislative in nature.[19]

Deliberation and Control over the Legislative Agenda in the Early Congress

The Framers of the Constitution were afraid of the dangers that an unchecked legislative branch posed to individual rights and the separation of powers. Although they originally feared executive power and directed their grievances at King George III in the Declaration of Independence in 1776, by 1787 they understood the problems that arose from their unconditional trust in elected legislatures. Having learned from their experience, they divided legislative power internally to keep it in check. James Madison called legislative power an "impetuous vortex" in *Federalist 48* and explained that the Constitution's "remedy" for this "inconveniency" was to "divide the legislature into different branches; and to render them, by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit."[20] In short, the Founders designed Congress to be internally checked against itself, with the House and the Senate each accountable to different constituencies and operating under different principles, so that it would not unite and subdue the other branches of the government.

On top of this, the Framers divided legislative power by dividing it up into districts, so that individual representatives would provide a voice for local interests and opinions rather than reflecting the views of national majorities and interests. Rather than implementing the immediate will of the national majority, which might be a majority tyranny, they wanted representatives to reflect the views of their local constituencies. Even if faction could not be removed from the political process, it could be checked by the introduction of even more factions, given voice by different representatives bringing the views of their constituents to the capitol.[21]

This fragmented organization of the legislative branch produced important advantages. It prevented a temporary majority from pushing its will through the legislative branch, and it ensured that the legislative power would remain in check. To make laws, a majority would have to win both the House and the Senate, which means that it would have to be a more reasonable, permanent majority. However, the organization of Congress also presented many difficulties. It made the Congress more prone to gridlock by introducing collective action problems. Members of Congress must serve their local constituencies, but they also must act collectively to advance the interest of the nation as a whole.

Early Congresses: Deliberation, but Executive Influence

In the 1790s, the first decade of Congress's existence, few legislators were concerned about collective action problems. The small size of the House and the Senate allowed all of the members to deliberate collectively on measures. When a proposal was introduced, either through a petition, resolution, or a recommendation from the executive branch, the entire House would debate it. The rules governing debate were minimal – since the House had only 59 members in 1789, there was little need for restrictions.

Once the House had decided collectively on the basic principles of legislation, it would be referred to a select committee that would be formed, draft the legislation, and then dissolve. In the Third Congress alone over 350 select committees were formed for this purpose. There were no standing committees with stable membership and defined jurisdiction. Once the select committee had done its work the legislation was sent back to the floor for passage.

The Speaker's role was limited to those of a presiding officer: ruling on points of order, counting and announcing votes, and preserve decorum.[22] Decorum was not enforced strictly. William Maclay, a senator in the First Congress, wrote in his diary that the representatives in the House have "certainly greatly debased their dignity….Using base invective indecorous language," with "3 or 4 up at a time. Manifest signs of passion. The most disorderly Wandering, in their speeches, telling Stories, private anecdotes &c. &c."[23] In 1798 Matthew Lyon spat in the face of another member, Roger Griswold, on the floor of the House.[24] There were no powerful leaders in the House or Senate who could control debate or set the legislative agenda, and the early congresses were therefore prone to disorder.

Congress Develops Its Own Leadership

All things considered, the legislative process of the 1790s was chaotic and uncoordinated, but it gave all of the members an equal opportunity to participate in debating every measure that came before the House, as well as a forum for collective deliberation by the nation's representatives on important national policy questions.

One of the downsides, however, was the influence this chaotic legislative process gave to the executive branch. As described above, many Republicans in the Congress bitterly objected to the influence that Alexander Hamilton, the Secretary of the Treasury, had over like-minded

Federalists in the House. Because there were no centralized leadership structures or positions in the legislature, leadership came from outside the Congress. Even Thomas Jefferson, who strongly opposed the expansion of executive power, inserted himself routinely in the legislative process during his presidency to set the agenda for his Republican allies. Jefferson appointed floor leaders in the House, deposed political opponents from committee chairmanships, and even wrote legislation for Congress to pass on his behalf.[25] One scholar reports that "[v]irtually every important piece of legislation passed during Jefferson's tenure [as president] originated with the administration."[26] While Jefferson sought to conceal his interference in the legislative process, his Cabinet secretaries, particularly Treasury Secretary Albert Gallatin, publicly drafted legislation to be introduced in Congress, often at the behest of congressional committees.[27]

It was clear that in order to overcome their collective action problems and retain control of the legislative agenda, Congress had to set up its own rules and procedures, including central leadership structures. This is precisely what Congress did throughout the 19th Century.[28] Congress began by establishing standing committees to provide a place for deliberation and to allow members to gain expertise in specific policy areas. By 1825 the House had created 28 standing committees. The Senate set up its own committee structure around the same time. As the size of the House and Senate increased, making orderly debate more difficult, these committees became a place where discussion and debate could occur and the principles of legislation settled. It also allowed Congress "to free itself from dependence on executive leadership."[29]

However, committees could not by themselves provide an overarching legislative agenda. That larger vision had to be asserted from a position of leadership. Party leaders, particularly the Speaker of the House, needed both the authority to set that agenda and the tools to incentivize members to put that agenda ahead of their personal interests. It took a long time for Speakers to gain these tools. Prior to the Civil War most Speakers were compromise selections who did not come into the position with a loyal following and broad support. The exception was Henry Clay, who used his power as Speaker beginning in 1811 to reassert Congress's control over the policy agenda. Not coincidentally, Thomas Jefferson's successor, James Madison, who served while Clay consolidated power as Speaker of the House, was a modest executive who deferred to Congress and refused to insert himself into the business of the legislative branch.

While Clay's strong leadership was an anomaly in the pre-Civil War Congress, it showed that strong central leadership in the Congress was the best way for the legislative branch to unify itself and advance its own agenda rather than subjecting itself to executive interference. Eventually, after the Civil War, the era of strong Speakers arrived and the Congress's ability to manage its affairs improved dramatically.[30]

Conclusion

In this testimony I have sought to explain how Congress functioned in its early years, and why Congress eventually devised internal leadership in order to avoid ceding authority to the executive. I have also shown that Congress was dedicated to making the laws itself rather than delegating lawmaking authority to the executive branch.

Benjamin Franklin famously said that the Framers gave us "a republic, if you can keep it." Central to keeping our republic is the notion that our elected officials write the laws, rather than unelected officials in regulatory agencies. To ensure that we remain a republic, it is critical that Congress look at its own history to see how it can reclaim the power to make the laws and to fulfill its promises to the American people, who have delegated to Congress alone the authority to make the laws.

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[1] See, e.g., Eric Posner and Adrian Vermeule, "Interring the Nondelegation Doctrine," *University of Chicago Law Review* 69 (2002), 1723: "[W]e agree that the Constitution bars the 'delegation of legislative power.'"

[2] Alexander Hamilton, *The Federalist, no. 84*, in Alexander Hamilton et al., *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 445. Subsequent references to *The Federalist* are to the page numbers in this edition.

[3] As Philip Hamburger explains, since the people are the principal and the government is the agent "the question is not whether the principal can delegate the power, but whether the agent can subdelegate it." Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014), 377.

[4] Leonard D. White, *The Federalists: A Study in Administrative History, 1789-1801*, paperback ed. (New York: The Free Press, 1965), 53.

[5] See F.W. Taussig, *The Tariff History of the United States*, 6th ed. (New York and London: G.P. Putnam's Sons), 1914, pp. 1-108; in particular, for the 1789 Act see 14-15, and for later acts see 15-20.

[6] *Annals of Congress*, III, 239-40 (December 7, 1791).

[7] *Annals of Congress*, III, 698-99 (November 19, 1792).

[8] *Annals of Congress*, III, 700 (November 19, 1792). Emphasis added.

[9] Leonard White, *The Federalists*, 78.

[10] "From Wisscassett in the district of Maine, to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester, Springfield, Hartford, Middletown, New Haven, Stratford, Fairfield, Norwalk, Stamford, New York, Newark, Elizabethtown, Woodbridge, Brunswick, Princeton, Trenton, Bristol, Philadelphia, Chester, Wilmington, Elkton, Charlestown, Havre de Grace, Hartford, Baltimore,

Bladensburg, Georgetown, Alexandria, Colchester, Dumfries, Fredericksburg, Bowling Green, Hanover Court House, Richmond, Petersburg, Halifax, Tarborough, Smithfield, Fayetteville, Newbridge over Drowning creek, Cheraw Court House, Camden, Statesburg, Columbia, Cambridge and Augusta; and from thence to Savannah…." Act of Feb. 20, 1792, ch.7, §1, 1 Stat. 232, cited in Gary S. Lawson, "Nondelegation and Original Meaning," *Virginia Law Review* 88 (2002), 403.

[11] Cited in White, *The Federalists*, 69.

[12] *Annals*, III, 351 (January 27, 1792). Emphasis added.

[13] *Annals*, III, 703 (November 20, 1792).

[14] *Annals*, III, 696 (November 19, 1792).

[15] *Annals*, III, 722 (November 21, 1792).

[16] *Annals*, III, 697 (November 19, 1792).

[17] White, *The Federalists*, 77.

[18] Jerry Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012), 44.

[19] See Philip Hamburger, *Is Administrative Law Unlawful?*, 402: "Congress can authorize the other branches to make non-binding rules….But the power to bind, whether by legislation or by adjudication, was delegated by the people, respectively, to Congress and the courts, and Congress therefore cannot transfer any such power to anybody." This explains why Congress, in its first years, did delegate the power to make regulations in certain cases to the President. In these cases the power to make regulations did not include the power to create new binding rules of action, but merely rules to implement laws enacted by Congress.

[20] James Madison, *Federalist no. 48*, 257; Madison, *Federalist no. 51*, 269.

[21] See generally James Madison, *Federalist no. 10.*

[22] *Origins and Development of Congress*, 2d ed. (Washington, D.C.: CQ Press, 1982), 98.

[23] Quoted in Julian E. Zelizer, ed., *The American Congress: The Building of Democracy* (Boston: Houghton Mifflin, 2004), 33.

[24] A few weeks later, Griswold got his revenge, beating Lyon with a wooden cane on the House floor. Lyon eventually defended himself with the tongs sitting next to the fire pit.

[25] *Origins and Development of Congress*, 102.

[26] Richard J. Ellis, *The Development of the American Presidency* (New York: Routledge, 2012), 142.

[27] Ellis, *Development of the American Presidency*, 144.

[28] For further elaboration on this point see James Sundquist, *The Decline and Resurgence of Congress* (Washington, D.C.: Brookings Institution, 1981), 155-176.

[29] Sundquist, *Decline and Resurgence of Congress*, 22.

[30] James Sundquist described these trends succinctly in *The Decline and Resurgence of Congress*, 25-29.