CONGRESSIONAL TESTIMONY

Congress,
Constitutional Government,
and the rise of
Executive-Bureaucratic Rule

Testimony before the

Task Force on Executive Overreach

Judiciary Committee

United States House of Representatives

March 1, 2016

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Thank you, Mr. Chairman. I commend the creation of a task force to investigate executive overreach and, as part of that effort, this hearing to consider the original understanding of Congress' role in our constitutional structure and how far we have drifted from that understanding. These two themes are not unrelated. It was Congress itself, by choosing to diminish its constitutional powers, which enabled the rise of the so-called imperial presidency and the increasing executive overreach of our day. Likewise, Congress has the power to stop the executive from overwhelming American self-government with bureaucratic rule, should it choose to reassert its constitutional authority as the lawmaking branch.

This transfer of lawmaking power away from Congress to an oligarchy of unelected experts who rule through executive decree and judicial edict over virtually every aspect of our daily lives, under the guise of merely implementing the technical details of law, constitutes nothing less than a revolution against our constitutional order. The significance of this revolution cannot be overstated. It threatens to undo the development of the rule of law and constitutional government, the most significant and influential accomplishment of the long history of human liberty.

This revolution has created an increasingly unbalanced structural relationship between an ever more powerful, aggressive and bureaucratic executive branch and a weakening legislative branch unwilling to exercise its atrophied constitutional muscles to check the executive or rein in a metastasizing bureaucracy. If the executive–bureaucratic rule now threatening to overwhelm American society becomes the undisputed norm — accepted not only among the academic and political elites, but also by the American people, as the defining characteristic of the modern state — it could well mark the end of our great experiment in self-government.

The Rule of Law

The general concept of the rule of law—that government as well as the governed are subject to the law as promulgated and that all are to be equally protected by the law—long predates the

founding of the United States. Its roots can be traced to classical antiquity where the most celebrated political philosophers sought to distinguish the rule of law from that of individual rulers or an oligarchic few. In the works of Plato and as developed in Aristotle's writings, the rule of law implies obedience to positive law as well as rudimentary checks on rulers and magistrates.

Throughout most of human history, the rules by which life was governed were usually determined by force or fraud: Those who had the power—whether military strength or political dominance—made the rules. The command of the absolute monarch or tyrannical despot *was* the rule, and had the *coercive* force of the law. Rulers made up false stories of inheritance and rationalizations such as "divine right" to convince their subjects to accept their rule without question. This is still the case in many parts of the world, where the arbitrary rulings of government are wrongly associated with the rule of law.

One need only read Shakespeare to see that Anglo-American history is replete with the often violent back and forth between despotic rule and the slowly developing concept of the rule of law. Impatient English kings regularly sought to evade the rudimentary process of law by exercising prerogative power and enforcing their commands through various institutions such as the King's Council, the Star Chamber, or the High Commission. It was Magna Carta in 1215 that first challenged this absolutism and forced the monarch to abide by the mechanisms of law. The idea that the law is superior to human rulers is the cornerstone of English constitutional thought as it developed over centuries and directly informed the American Constitution.

The Glorious Revolution of 1688 established legislative supremacy over the monarch, a crucial step in the development of political liberty. But when that supremacy came to mean complete parliamentary sovereignty in which the acts of parliament were synonymous with the rule of law itself, there was no longer any higher, fundamental law to which that legislature was subject and against which its legislation could be judged and held accountable. This became

more and more apparent in the decades leading up to the American Revolution. In the Declaratory Act of 1766, Parliament declared it "had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the Crown of Great Britain, *in all cases whatsoever*." That marked another break with the older principle that the rule of law is above any form of government and thus restrains legislatures just as much as monarchs.

The idea of the rule of law was transferred to the American colonies through numerous writers and jurists and can be seen expressed throughout colonial pamphlets and political writings. Thomas Paine reflected this dramatically in *Common Sense*:

> But where says some is the king of America? I'll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.

The classic American expression of the idea can be seen in the Massachusetts Constitution in 1780, written by John Adams, in which the powers of the commonwealth are divided in the document "to the end it may be a government of laws, not of men."

The rule of law has four key components. First, the rule of law means a formal, regular process of law enforcement and adjudication. What we really mean by "a government of laws, not of men" is the rule of men bound by law, not subject to the arbitrary will of others. The rule of law means general rules of law that bind all people and are promulgated and enforced by a system of courts and law enforcement, not by mere discretionary authority. As James Madison writes in *Federalist* 62, speaking of Congress: "It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so

incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow." In order to secure equal rights to all citizens, government must apply law fairly and equally through this legal process. Notice, hearings, indictment, trial by jury, legal counsel, the right against self-incrimination—these are all part of a fair and equitable "due process of law" that provides regular procedural protections and safeguards against abuse by government authority. Among the complaints lodged against the king in the Declaration of Independence was that he had "obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers," and was "depriving us in many cases, of the benefits of trial by jury."

Second, the rule of law means that these rules must be binding on rulers and the ruled alike. If the American people, Madison writes in *Federalist* 57, "shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty." As all are subject to the law, so all—government and citizens, indeed all persons—are equal before the law, and equally subject to the legal system and its decisions. No one is above the law in respect to enforcement; no one is privileged to ignore the law, just as no one is outside the law in terms of its protection. As the phrase goes, all are presumed innocent until *proven* guilty. We see this equal application of equal laws reflected in the Constitution's references to "citizens" and "persons" rather than race, class, or some other group distinction, as in the Fifth Amendment's language that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." It appears again in the Fourteenth Amendment's guarantee that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The rights of all are dependent on the rights of each being defended and protected. In this sense, the rule of law is an expression of—indeed, is a requirement of—the idea of each person possessing equal rights.

Third, the rule of law implies that there are certain unwritten rules or generally understood standards to which specific laws and lawmaking must conform. There are some things that no

government legitimately based on the rule of law can do. Many of these particulars were developed over the course of the history of British constitutionalism, but they may be said to stem logically from the nature of law itself. Several examples can be seen in the clauses of the U.S. Constitution. There can be no "ex post facto" laws—that is, laws that classify an act as a crime leading to punishment after the act occurs. Nor can there be "bills of attainder," which are laws that punish individuals or groups without a judicial trial. We have already mentioned the requirement of "due process," but consider also the great writ of "habeas corpus" (no person may be imprisoned without legal cause) and the rule against "double jeopardy" (no person can be tried or punished twice for the same crime.) Strictly speaking, none of these rules are formal laws but follow from the nature of the rule of law. "Bills of attainder, ex-post facto laws and laws impairing the obligation of contracts," Madison writes in *Federalist* 44, "are contrary to the first principles of the social compact, and to every principle of sound legislation."

Lastly, even though much of its operation is the work of courts and judges, the rule of law is based on the absolute centrality of *lawmaking*. "The great end of men's entering into society, being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society," writes John Locke in his *Second Treatise on Government*, "the first and fundamental positive law of all commonwealths is the establishing of the legislative power." Locke continues:

> This legislative is not only the supreme power of the common-wealth, but sacred and unalterable in the hands where the community have once placed it; nor can any edict of any body else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law, which has not its sanction from that legislative which the public has chosen and appointed: for without this the law could not have that, which is absolutely necessary to its being a law, the consent of the society, over whom no body can have a power to make laws, but by their own consent, and by authority received from them. (Sec. 134)

Locke concludes that the bounds set upon the legislative power in all forms of government, stemming from consent and "the law of God and nature" are to govern by promulgated,

established laws, not to raise taxes in particular without the consent of the people (recall the American rallying cry of 'no taxation without representation'), that laws are to be designed for no other end but the good of the people, and that the legislature "neither must nor can transfer the Power of making Laws to any body else, or place it anywhere but where the people have." Locke makes this last point clear:

> The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the common-wealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands. (Sec. 141)

Lawmaking and the American Founding

The full implications of the constitutional development of the rule of law first appear in the principles and institutions of the American Founding. Virtually every government at the time was based on a claim to rule without popular consent. But the American Founders sought to break free of the old despotisms, characterized by the arbitrary will of the stronger, and to establish the rule of law and limited constitutional government based on consent. They held that man, though fallible and full of passions, is capable of governing himself and that none was so much better than another as to rule him without his consent.

The key turn in constitutional thinking came with the formal recognition that the inalienable rights belonging to each person by "the Laws of Nature and Nature's God" form the moral ground of government. For well over a century prior to the revolution, Americans had developed and become accustomed to the idea that governments are legitimately created only

through fundamental agreement authorized by popular consent. The concept can be seen in the Massachusetts Constitution of 1780, which declares: “The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people.” But it is summarized very simply in the words of the Declaration of Independence, which posits as a self-evident truth “that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”

In addition to the initial formation of government, consent also gives guidance concerning the processes by which legitimate government operates. Among the charges lodged against the king in the Declaration of Independence is that he assented to Parliament’s “imposing Taxes on us without our Consent” and “has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.” Indeed, the first six charges against the king address interference with local legislation and legislatures, violating “the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.” Consent does not necessarily mean pure democratic rule, but it does require a process of popular agreement to lawmaking and governance. In America, this was understood to mean a popular form of representative government. Only a government that derived its power from “the great body of the people,” according to *Federalist* 39, was compatible with the “genius of the American people,” “the fundamental principles of the revolution,” and a determination to “rest all our political experiments on the capacity of mankind for self-government.”

The Importance of Article I

The Constitution establishes three branches of government of equal rank in relation to each other. These branches are separated in accordance with the distinct powers, duties, and responsibilities stemming from the primary functions of governing: to make laws, to execute and enforce the laws, and to uphold (judge or adjudicate) the rule of those laws by applying them to particular individuals or cases. No branch is higher or lower than any other, and no

branch controls the others. Each is vested with independent authority and unique powers that cannot be given away or delegated to others.

The order in which these branches are treated in the Constitution– legislature, executive, judiciary – is itself important. It moves from the most to the least "democratic" and from the most to the least directly chosen by the people. The members of the legislature "are distributed and dwell among the people at large," writes Madison in *Federalist* 50. "Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people." The Constitution lodges the basic power of government in the legislature not only because it is the branch most directly representative of popular consent but also because the very essence of governing according to the rule of law is centered on the legitimate authority to make laws.

Article I begins: "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." This language implies that while there might be other legislative powers, Congress is granted all those "herein" recognized, meaning listed in various clauses of the Constitution. The legislative power includes seventeen topics listed in Article I, Section 8: taxing and borrowing, interstate and foreign commerce, naturalization and bankruptcy, currency and counterfeiting, post offices and post roads, patents and copyrights, federal courts, piracy, the military, and the governance of the national capitol and certain federal enclaves. All told, the powers are not extensive, but they are vital. Apart from some relatively minor matters, the Constitution added to the authority already granted in the Articles of Confederation only the powers to regulate foreign and interstate commerce and to apportion "direct" taxes among the states according to population.

The diverse powers granted to Congress might at first seem rather disorganized, ranging from the clearly momentous (to declare war) to the seemingly minute (to fix weights and measures). But upon reflection, an underlying pattern emerges based on the distinction between key functions assigned to the national government and those left to the state governments. The two most important functions concern the nation's security (such as the powers to maintain national defense) and the national economy (such as the power to tax or to regulate interstate commerce). And as might be expected, many of the powers complement each other in supporting those functions: The power to regulate interstate commerce, for instance, is consistent with the power to control currency, which is supported in turn by the power to punish counterfeiting and to establish standards for weights and measures.

Of utmost significance is Congress' "power of the purse." The source of Congress's power to spend derives from Article I, Section 8, Clause 1. The Appropriations Clause, though, makes Congress the final arbiter of the use of public funds and gives it a mechanism to control or to limit spending by the federal government. The language here is of limitation, not authorization (No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law…) and it is placed in Section 9 of Article I, along with other restrictions on governmental actions to limit, most notably, executive action.

While the federal government's powers are limited, the powers granted to it are complete. The Founders sought to create an energetic government with all powers needed to do the jobs assigned to it. Consequently, the enumerated powers of the federal government are supported by the auxiliary authority needed to carry out these functions. The central example of this is the "necessary and proper" clause, which empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." While this language suggests a wide sweep of "implied" powers, it is not a grant to do anything and everything, but only to make those additional laws that are necessary and proper for execution of the powers expressed in the Constitution.

To further limit the expansion of legislative power and to prevent the legislature from intruding upon the powers of the other branches, Article I divides Congress into two chambers (bicameralism) chosen by two different political constituencies and with different terms of office: the House of Representatives, each member being elected by districts every two years, and the Senate, with members (originally) appointed by state legislatures to serve staggered terms of six years each. The House is based on popular representation, and the Senate on equal representation of all of the states. Unlike the House, which is intended to be responsive to the ebb and flow of popular opinion (which is why revenue bills originate in the House), the Senate—with its longer terms of office and a larger and distinct constituency—was to be more stable, deliberative, and oriented toward long-term state and national concerns. It is because of the nature of the Senate that the chamber is given unique responsibilities concerning the approval of executive appointments (for judges, ambassadors, and all other officers of the United States) and treaties with other countries.

The Separation of Powers

"In framing a government which is to be administered by men over men, the great difficulty lies in this," Madison writes in *Federalist* 51. "You must first enable the government to control the governed; and in the next place oblige it to controul itself." That meant that, in addition to performing its proper constitutional functions (lawmaking, executing and adjudicating the law), there needed to be an internal check to further limit the powers of government. Rather than create another coercive authority for that purpose (a dubious proposition to say the least), the Founders not only divided power but also set it against itself. This separation of powers, along with the further provisions for checks and balances, is the defining structural mechanism of the Constitution and creates a dynamism within the workings of government that uses the interests and incentives of those in government to enforce constitutional limits beyond their mere statement. It divides the powers of government among three branches and vests each with independent powers and responsibilities. Each has its own basis of authority and serves

different terms of office. No member of one branch can at the same time serve in another branch.

Preserving the separation of powers was hardly a trifling concern for the Founders. Keeping the powers of government divided among distinct branches is "admitted on all hands to be essential to the preservation of liberty," Madison notes in *Federalist* 47. Here the founders were following the writings of Montesquieu, who made a strong case for such a division. "The accumulation of all powers," Madison continues, "legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." For this reason, each branch has only those powers granted to it, and can do only what its particular grant of power authorizes it to do.

But it was not enough merely to define the powers of each branch and hope that they remained nicely confined within the written barriers of the Constitution. The Founders were acutely aware that each branch of government would be tempted to encroach upon the powers of the other. This was especially the case with the legislature: The "parchment barriers" of early state constitutions had proven an inadequate defense against a legislative proclivity toward "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." (*Federalist* 48) It is with this proclivity in mind that the Founders sought to grant each branch of government the means to preserve its rightful powers from encroachments by the others.

The solution is found in structuring government such that "its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places," as Madison explaines in *Federalist* 51. In other words, government is structured so that each branch has an interest in keeping an eye on the others, checking powers while jealously protecting its own. By giving each department an incentive to check the other—with overlapping functions and contending ambitions—the Founders devised a system that recognized and took advantage of

man's natural political motivations to both use power for the common good and to keep power within constitutional boundaries. Or as Madison put it, the "interest of the man [becomes] connected with the constitutional rights of the place."

To this end, each branch of government shares overlapping powers with the others. Before it becomes law, for instance, congressional legislation must be approved by the executive—who also has a check against Congress in the form of the qualified veto, which the legislature in turn can override by two-thirds votes in the House and the Senate. The president is commander in chief but the House has the power to declare war, and it is up to Congress to fund executive activities, including war-making. Treaties and judicial appointments are made by the executive but only with the advice and consent of the Senate. The Supreme Court can strike down executive or legislative actions that come up in cases before it as unconstitutional, but Congress has the power to reenact or modify overturned laws, strip the court's jurisdiction in many cases, and impeach federal judges. As Joseph Story writes in his *Commentaries on the Constitution of the United States*, because power is of "an encroaching nature" it ought to be effectually restrained from passing the limits assigned to it so that while sharing power none should have an "overruling influence" in the operation of another branch's powers.

The separation of powers and the introduction of legislative balances and checks, according to Hamilton in *Federalist* 9, are "means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided." They discourage the concentration of power and frustrate tyranny. At the same time, they require the branches of government to collaborate and cooperate in doing their work, limiting conflict and strengthening consensus. But these means also have the powerful effect of focusing individual actors on protecting their constitutional powers and carrying out their constitutional duties and functions—and that fact transforms the separation of powers from a mere negative concept to a positive and important contributor to limited government and constitutional fidelity.

Today, the separation of powers is often faulted for encouraging "gridlock." The Founders, however, understood the need for the good administration of government — an important aspect of their "improved science of politics." But they also understood that the administration of things was subordinate to the laws of Congress, and thus responsible to the people through election. As Alexander Hamilton points out in *Federalist* 68, it is a "heresy" to suggest that of all forms of government "that which is best administered is best." In the end, liberty is assured not by the anarchy of no government, on the one hand, or the arbitrary rule of unlimited government, on the other, but through a carefully designed and maintained structure of government to secure rights and prevent tyranny through the rule of law.

The New Science of Politics

The concept of the modern state and its "new science of politics" can be traced to the likes of the French philosophes and continental utopians of the 18th century who were deeply enamored with the endless promises of reason and modern science to solve all aspects of the human condition. Just as science brought technological changes and new methods of study to the physical world, so it would bring great change and continuous improvement to society and man. The late-19th-century, so-called "Progressives" took this argument, combined it with ideas from German idealism and historicism, and Americanized it to reshape the old constitutional rule of law model—which was seen as obsolete, inefficient, and designed to stifle change—into a new, more efficient form of democratic government. Their view of scientific rationalism questioned the very idea of self-governing citizenship: Liberty, they asserted, is not, as understood by the Founders, a condition consistent with human nature and the exercise of God-given natural rights, but an evolving concept to be socially constructed.

While seeming to advocate more democracy, the first progressives — under a Republican president, Theodore Roosevelt, and then a Democratic one, Woodrow Wilson — pursued the opposite when it came to government action. "All that progressives ask or desire," Wilson wrote in 1912, "is permission — in an era when 'development,' 'evolution,' is the scientific

word — to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine." To encourage democratic change while directing and controlling it, progressives posited a sharp distinction between politics and what they called "administration." Politics would remain the realm of expressing opinions – hence the continued relevance of Congress to provide rough guidelines – but the real decisions and details of governing would be handled by administrators, separate and supposedly immune from the influence of politics.

These administrators would be in charge of running a new form of government, designed to keep up with the ever-expanding aims of government, called "the administrative state." Where the Founders went to great lengths to preserve consent and limit government through republican institutions and the separation of powers, the progressives held that the barriers erected by the Founders had to be removed or circumvented so as to unify and expand the powers of government and to direct its actions toward achieving more and more progress and social change.

The particulars of accomplishing the broad objectives of reform—the details of regulation and many rule-making functions previously left to legislatures—were to be given over to a new class of professionals who would reside in the recesses of agencies like the FCC (Federal Communications Commission), the SEC (Securities and Exchange Commission), the CPSC (Consumer Product Safety Commission), or OSHA (Occupational Safety and Health Administration). As "objective" and "neutral" experts, so the theory went, these administrators would act above petty partisanship and faction, making decisions mostly unseen and beyond public scrutiny to accomplish the broad objectives of policy reform. The term "bureaucracy" comes from the French for desk, and the Greek for rule. The word was originally satirical, but for the progressives, the rule of clerks is a noble endeavor — they are the true "agents of democracy," as the progressive writer Herbert Croly put it.

The constantly changing structure of the administrative state requires dynamic management to keep it moving forward, of course, and so the new thinkers developed their own concept of "leadership" to complete their theory of government. If the times are constantly changing, and if the constitutional system must always evolve to adapt to that change, there must be a role for those who have the foresight and ability to lead the nation in the new directions of history, keeping ahead of popular opinion and always pointing the nation toward its future development. This clarity of vision and unity of direction—of rhetorical inspiration combined with strong political management—is to be provided especially by vigorous presidential leadership. In this new conception of the state, government is administrative and bureaucratic, subject only to the perceived wants of the popular will, under the forward-looking guidance of progressive leadership. In this view, government must always evolve and expand, and be ever more actively involved in day-to-day American life. Given the unlimited goal, government by definition must itself be unlimited. How could there be any limit? "It is denied that any limit can be set to governmental activity," wrote the progressive political scientist Charles Merriam.

> The exigencies of modern industrial and urban life have forced the state to intervene at so many points where an immediate individual interest is difficult to show, that the old doctrine has been given up for the theory that the state acts for the general welfare. It is not admitted that there are no limits to the action of the state, but on the other hand it is fully conceded that there are no natural rights which bar the way. The question is now one of expediency rather than of principle.

There was no longer any principle—whether natural rights or constitutional government derived from those rights—that limited the action of the state.

The Rise of Central Administration

The United States has been moving down the path of administrative government in fits and starts for some time, from the initial Progressive Era reforms through the New Deal's interventions in the economy. But the most significant shift and expansion occurred more recently, under the Great Society and its progeny. Progressives had initially sought to regulate certain targeted commercial activity such as railroads, trucking, aviation, and banking. But when

the federal government assumed responsibility for the well-being of every American, it set about creating programs (and reforming old ones) to manage the whole range of socioeconomic policy, from employment, civil rights, welfare, and healthcare to the environment and elections. The expansion of regulatory activities on a society-wide scale in the 1960s and 1970s led to vast new centralizing authority in the federal government and a vast expansion of federal regulatory authority. This centralization of power brought with it what we conventionally mean by big government: huge workforces, massive expenditures, and extensive debt.

When administration is nationalized, though, it does not easily or naturally fall under the authority of one branch or another. As four decades of political history show, bureaucracy and its control created a new source of conflict between the executive and legislative branches. During the first part of our bureaucratic history, Congress had the upper hand, with presidents (at least since Richard Nixon) trying as they could to control the Fourth Branch. Congress, after all, had been creating these regulatory agencies to carry out its wishes and delegating its legislative powers to them in the form of broad regulatory authority. Congress was the first to adapt to the administrative state, continuously reorganizing itself since 1970 by committees and subcommittees to oversee and interact with the day-to-day operations of the bureaucratic apparatus. As the bureaucracy expanded, Congress sought to develop additional powers over the administrative state, the best-known of which was the legislative veto, held unconstitutional by the Supreme Court in 1983. Rather than control or diminish the bureaucracy through lawmaking or budget control, Congress has settled mostly on oversight of and providing "regulatory relief" from the bureaucracy.

Today, the primary function of modern government is to regulate. When Congress writes legislation, it uses very broad language that turns extensive power over to agencies, which are also given the authority of executing and usually adjudicating violations of their regulations in particular cases. The result is that most of the actual decisions of lawmaking and public policy—decisions previously the constitutional responsibility of elected legislators—are delegated to

bureaucrats whose “rules” there is no doubt have the full force and effect of laws passed by Congress. In 2014, Congress passed and the President signed about 220 pieces of legislation in to law, amounting to a little over 3,000 pages of law, while federal departments and agencies issued 79,066 pages of new and updated regulations. The modern Congress is almost exclusively a supervisory body exercising post-legislative oversight of administrative policymakers.

Modern administrative forms of governing consolidate the powers of government by exercising the lawmaking power, executing their own rules and then judging their application in administrative courts, binding individuals not through legislative law or judicial decision but through case-by-case rulemaking based on increasingly broad and undefined mandates, with more and more authority over an ever wider range of subjects, all the while less and less apparent and accountable to the political process and popular consent. The problem with such arbitrary, comprehensive, unchecked power is that it is not administration at all but rule outside of the law, outside of the Constitution and its checks and balances, and outside of (and thus not responsive to) our democratic institutions of government.

The consequences of the administrative state’s lack of accountability have been made much more severe by Congress’s current inclination to deal with every policy issue through comprehensive legislation. Congress has ceased to tackle distinct problems with simple laws that can be deliberated upon and then made known to the public. Instead, for everything from financial restructuring to environmental regulation to immigration reform, Congress proposes labyrinth bills that that extend to every corner of civil society and impose an ever more complicated and expansive administrative apparatus upon a public that increasingly has no time or means to understand the laws it will be held accountable for. The Affordable Care Act is a perfect example. This law passed by Congress transferred massive regulatory authority over one-sixth of the American economy, not to mention over most health-care decisionmaking, to a collection of more than 100 federal agencies, bureaus, and commissions, along with new federal programs and an unprecedented delegation of power to the Secretary of Health and

Human Services. Little or nothing will be allowed outside the new regulatory scheme — no alternative state programs, no individuals or businesses that choose not to participate, no truly private market alternatives. Likewise, the Dodd-Frank Wall Street Reform and Consumer Protection Act. Its 2,300 pages require administrative rule-makings reaching not only to every financial institution but well in to every corner of the American economy. Its new bureaucracies, like the Consumer Financial Protection Bureau and the Financial Stability Oversight Council, operate outside of the public eye and are subject to virtually none of the traditional checks. The CFPB is literally outside the rule of law: it has an independent source of revenue, insulation from legislative or executive oversight, and the broad latitude and discretion to determine and enforce its own rulings—as so define the limits of its own authority—based on vague terms left undefined.

The rise of the new imperial presidency—acting by executive orders more than legislative direction—should come as no surprise given the overwhelming amount of authority that has been delegated to decision-making actors and bodies largely under executive control. As Congress has expanded the bureaucracy—creating innumerable agencies, delegating its lawmaking authority, neglecting control of the details of budgeting, and focusing on ex post facto checks—the executive has attained unprecedented levels of authority. Modern executives can command the bureaucracy to implement new policies without the cooperation of Congress by abusing executive discretion, by exploiting the vagaries of poorly written laws, and by willfully neglecting and disregarding even those laws which are clear and well-crafted. By acting unilaterally without or against the authority of Congress, the executive not only assumes a degree of legislative powers without legislative accountability but also avoids responsibility for executing the laws legitimately authorized by Congress. The next president—regardless of political party—will be sorely tempted and under significant pressure to achieve desired policy goals by following the precedent of prior administrations that ignored the will of Congress and the text of existing laws. Once it has been established that the president can govern by executive orders and regulations without Congress, and by extension the law itself, it

will prove difficult and perhaps impossible to prevent future executives from following this lawless path.

Rebuilding Congress

It may be a prudent option, especially in the face of today's pen-and-phone presidency, to assert checks and balances through litigation. There is, no doubt, something qualitatively different in how this president is using (and abusing) his powers, with and without congressional authorization. At the very least, a successful lawsuit could prevent things from getting worse. But this much is clear: the legislative branch going to the judicial branch to solve its disagreements with the executive branch is not going to solve the problem. If Congress' turning to litigation to assert its constitutional prerogative becomes the norm, it would have the perverse (and unintended) effect of further nullifying the institutional powers of Congress.

The only way to reverse the trend of a diminishing legislature and the continued expansion of the bureaucratic executive is for Congress to strengthen its constitutional muscles as a coequal branch of government in our separation of powers system. This is the solution envisioned by our Founders, and consistent with popular consent. A stronger legislative branch would go a long way toward making the role of government a proper political question, as it should be, subject to election rather than executive fiat or judicial decree.

The Constitution is grounded in the principle that governments derive their just powers from the consent of the governed. This means that laws must be made by the representatives elected by the people and not unelected bureaucrats. Thus the first step towards restoring the structural integrity of the Constitution is for Congress to reassert its legislative authority and, as much as possible, to cease delegating what amounts to the power to make laws to bureaucrats and administrative agencies. In any case where it allows administrators the discretion to create significant rules, Congress should assert its authority to approve or reject those rules.

Congress needs to relearn the art of lawmaking. It must regain legislative control over today's labyrinthine state, bringing consent and responsibility back to government through better lawmaking up front and, as a result, better oversight after the fact. Regular legislative order, especially the day-to-day back-and-forth of authorizing, appropriating and overseeing the operations of government, will do more than anything to restore the Article I powers of Congress and return legislative control over today's unlimited government.

And the one place where the power of Congress is not entirely lost—and where there is opportunity for gaining leverage over an unchecked executive – is Congress' power of the purse. Used well, it will also prevent Congress from continually getting cornered in time sensitive fights over messy and incomprehensible omnibus budgets at the end of every year, the settlement of which works to the advantage of the executive. Strategically controlling and using the budget process will turn the advantage back to Congress, forcing the executive to engage with the legislative branch and get back into the habit of executing the laws enacted by Congress—no more and no less.

If Congress does not act to correct the growing tilt toward executive-bureaucratic power, the structure of our government will be fundamentally, and perhaps permanently, altered. This imperils the constitutional design and great achievement of republican government. It is still possible for Congress to restore its legislative powers, and to correct this structural imbalance. But Congress needs to think strategically and act as a constitutional institution – indeed, the primary branch of constitutional government. And it must begin doing so now, forcefully stating its argument, putting down clear markers and drawing enforceable institutional lines before the inauguration of the next president—whoever they may be, and regardless of their political party.

Thank you.

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Founded in 1844, Hillsdale College is an independent, coeducational, residential, liberal arts college with a student body of about 1,400. Its four-year curriculum leads to the bachelor of arts or bachelor of science degree, and it is accredited by the Higher Learning Commission. Its doors are open to all, regardless of race or religion. It was the first college in Michigan, and the second in the United States, to admit women on par with men. Its student body is assembled from homes in 47 states and 8 foreign countries.

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