THE ORIGINAL UNDERSTANDING OF THE ROLE OF CONGRESS AND HOW FAR WE'VE DRIFTED FROM IT

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Executive Overreach Task Force

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Chairman King, Ranking Member Cohen, and distinguished members of the Task Force:

Thank you for inviting me to testify today on such a timely and important topic. Few structural relationships are more important in our constitutional system than the interplay between Congress and the Executive Branch, and I do not think there can be any doubt that there are reasons to fear for the contemporary and future health of this vital dynamic.

Where I suspect that I part company from my fellow witnesses, and from many Members of this Task Force, however, is in my assessment of the *causes* of the current breakdown in this relationship. Whereas many have been quick to place the blame on President Obama and the allegedly unfettered executive power he has repeatedly sought to wield throughout his Administration,[1] my own view is that the disease that currently plagues the separation of powers is far more attributable to legislative torpor — an unwillingness on the part of Congress aggressively to police the authority previously delegated to the Executive Branch through substantive legislation.

In *Federalist 51,* James Madison famously explained that, for our system of separated powers to function, "Ambition must be made to counteract ambition."[2] I couldn't agree more. But to date, the 114th Congress has enacted **126** Public Laws[3] — fewer than half the total of the most unproductive Congress in American history, the 112th (which passed **283**).[4] By contrast, the 80th Congress (which President Truman famously derided as the "Do-Nothing Congress") enacted ***906*** public bills.[5] And beyond this quantitative assessment, the legislation that this Congress *has* enacted has said virtually nothing about health care, immigration, environmental regulation, or the war powers — some of the substantive policy areas in which the criticisms of the current Administration have been the loudest.

Reasonable minds can and will surely disagree about the *merits* of President Obama's policy ambitions in these areas (and others). What cannot be gainsaid is that this Congress has been uniquely reluctant to counteract or otherwise mitigate those ambitions through the conventional vehicle of substantive legislation. Thus, any contemporary drift from the original understanding, in my view, has been at least as

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1. *See, e.g.*, DAVID E. BERNSTEIN, LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW (2015).

2. THE FEDERALIST No. 51, at 321–22 (Clinton Rossiter ed., 1961) (James Madison).

3. *See* Public Laws, CONGRESS.GOV, https://www.congress.gov/public-laws/114th-congress (last visited Feb. 26, 2016).

4. *See* Statistics and Historical Comparison, GOVTRACK.US, https://www.govtrack.us/congress/bills/statistics (last visited Feb. 26, 2016).

5. *See* Résumé of Congressional Activity, Eightieth Congress, http://www.senate.gov/reference/resources/pdf/80res.pdf (last visited Feb. 26, 2016).

much a result of congressional passivity as it has been a result of presidential aggressiveness.

The reason why this matters, as I explain in my testimony this morning, is because of the subtle but crucial distinction between two different types of executive power: ***Indefeasible*** (or "preclusive") power, pursuant to which the President claims the authority to ignore statutory constraints on his authority, and ***defeasible*** power, pursuant to which the President claims the authority to act unilaterally only in the face of congressional silence, and does ***not*** assert the authority to defy statutory prohibitions.

An overwhelming majority of the criticisms of the Obama administration of which I am aware fall into this latter category. Indeed, on a host of topics, the Administration has all-but disavowed any inclination to defy statutory constraints, such as the restrictions on the transfers of Guantánamo detainees into the United States.[6] Contrast that with, for example, the Bush administration, which repeatedly made claims of *indefeasible* power — the authority to ignore statutes that, among other things, prohibited torture;[7] limited the government's power to conduct warrantless surveillance;[8] required statutory authorization for the detention of U.S. citizens as "enemy combatants";[9] and so on.[10] A common refrain during the Bush administration was that statutes Congress enacted to limit the President's power were unconstitutional insofar as they succeeded in doing so. We've heard far less of that argument from the White House over the past seven years.

Once more, though, it is not my goal today to re-litigate the merits of the Bush administration's claims to indefeasible power. Rather, the relevant point for present purposes is that, when the Executive Branch claims indefeasible power, it is the courts that are in the best position to stop it. But when the Executive Branch claims only *defeasible* power, that power can (and historically has been) meaningfully circumscribed by Congress — through statutes imposing limits on such authority. Thus, at the end of the day, the best solution to the contemporary perception, valid or otherwise, that the President is overreaching through claims of defeasible executive power is, quite simply, new legislation more precisely delimiting his authority.

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6. *See* Marty Lederman, *The Insoluble Guantánamo Problem*, JUST SECURITY, Nov. 13, 2015, https://www.justsecurity.org/27563/guantanamo-problem-remains-insoluble-part-three-executive-disregard-gtmo-restrictions-solution/.

7. *See* 18 U.S.C. §§ 2340–2340A (2006).

8. *See id.* § 2511(2)(f).

9. *See id.* § 4001(a).

10. For links to the Administration's legal arguments on this front, see Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After* Hamdan, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 937 n.22 (2007). For an exhaustive rebuttal of such claims, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb* (pts. 1–2), 121 HARV. L. REV. 689, 941 (2008).

I

As Justice Robert Jackson famously explained in his concurrence in the *Steel Seizure* case,

> 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 be disabling the Congress from acting upon 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 by our constitutional system.[11]

But where no statute specifically limits the President's authority, in contrast, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[12]

Although Justice Jackson's concurrence is often celebrated as a canonical articulation of how we ought to assess the merits of separation-of-powers disputes between the political branches, one can find the very same understanding in one of the Supreme Court's first separation-of-powers cases, *Little* v. *Barreme*.[13] Because I believe it is reflective of the Founding-era understandings of the difference between defeasible and indefeasible executive power, it's worth laying out the decision's background in some detail:[14]

In response to escalating tension between the U.S. and French governments, largely a result of the 1794 Jay Treaty[15] with Great Britain and the "XYZ Affair,"[16] Congress in 1798 rescinded a series of 1778 treaties with France.[17] During the same session, it enacted the controversial Alien[18] and Sedition[19] Acts and the oft-neglected but still extant Alien Enemy Act.[20] The Fifth Congress also enacted statutes suspending commerce with France and otherwise providing for reprisals against French shipping for

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11. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

12. *Id.* at 637.

13. 6 U.S. (2 Cranch) 170 (1804).

14. Much of the discussion that follows is derived from Vladeck, *supra* note 10, at 941–43.

15. Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116.

16. *See* ALBERT BOWMAN, THE STRUGGLE FOR NEUTRALITY: FRANCO-AMERICAN DIPLOMACY DURING THE FEDERALIST ERA 306-33 (1974).

17. Act of July 7, 1798, ch. 67, 1 Stat. 578 .

18. Act of June 25, 1798, ch. 58, 1 Stat. 570 (expired 1800).

19. Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

20. Act of July 6, 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21-24 (2000)).

offenses against U.S. merchant ships.[21] President Adams did not request, nor did Congress provide, a declaration of war.[22] Thus, the Quasi-War was America's first experience with the concept of "undeclared" or "imperfect" war, where the scope of the conflict depended far more directly on the specific terms of the underlying statutory authorizations.[23]

Consequently, in the first Supreme Court case arising out of the conflict, *Bas* v. *Tingy*,[24] the issue was whether France was an "enemy" within the meaning of a 1799 Non-Intercourse Act[25] at the time that the cargo ship *Eliza* was captured by the *Ganges*, an armed U.S. vessel, notwithstanding the absence of a formal declaration of war by the United States Congress.[26] In seriatim opinions,[27] the Court concluded that France was in fact an "enemy," triggering the recovery provided for by the 1799 statute.

The second Supreme Court case stemming from the Quasi-War was *Talbot* v. *Seeman*,[28] which concerned the authority of the U.S. Navy to capture *neutral* vessels that the Navy had probable cause to believe were in fact French ships.[29] Although no Act of Congress expressly authorized such captures, Chief Justice Marshall, in his first published opinion, traced implicit authority for the capture to the language of several of the Fifth Congress's non-intercourse statutes, suggesting that such authority must come from congressional statutes, as opposed to inherent executive power.[30]

But by far the most important of the Quasi-War cases, at least for present purposes, was the last[31] of the trilogy—*Little*.[32] At issue in *Little* was the scope of a congressional non-intercourse statute, enacted on February 9, 1799, which empowered the President to authorize "the commanders of the public armed ships of the United

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21. *See, e.g.*, Act of June 13, 1798, ch. 53, 1 Stat. 565; Act of June 25, 1798, ch. 60, 1 Stat. 572; Act of June 28, 1798, ch. 62, 1 Stat. 574; Act of July 9, 1798, ch. 68, 1 Stat. 578; Act of July 16, 1798, ch. 88, 1 Stat. 611.

22. *See* J. Gregory Sidak, *The Quasi-War Cases—and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 481 (2005).

23. *See id.*

24. Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

25. *See* Act of Mar. 2, 1799, ch. 24, § 7, 1 Stat. 709, 716 (repealed 1800).

26. *See Bas,* 4 U.S. at 37. For a summary of the background of this case, see Sidak, *supra* note 22, at 483-86.

27. In *Bas*, separate opinions (reaching the same result) were filed by Justices Moore, Washington, Chase, and Paterson. *See id.* at 39-40 (Moore, J.); *id.* at 40-43 (Washington, J.); *id.* at 43-45 (Chase, J.); *id.* at 45-46 (Paterson, J.).

28. Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801).

29. *See* Sidak, *supra* note 22, at 487-90 (summarizing the background to *Talbot*).

30. *See Talbot*, 5 U.S. at 28.

31. One curiosity concerning *Little* is the lengthy and heretofore unexplained (and unexplored) delay between when the case was argued—December 16 and 19, 1801—and when it was decided, February 27, 1804. Although the Supreme Court did not sit in 1802 per the terms of the 1802 Judiciary Act, *Little*, the only case argued at the December 1801 Term not decided during the same Term, was not handed down during the February 1803 Term (the Court's next sitting), either. *See* SUPREME COURT OF THE U.S., DATES OF SUPREME COURT DECISIONS AND ARGUMENTS: U.S. REPORTS, VOLUMES 2-107 (1791-1882), at 3-4 (2006), http://www.supremecourtus.gov/opinions/datesofdecisions.pdf.

32. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

States" to stop and search ships suspected of carrying French goods and to seize any such ship "bound or sailing *to* any port or place within the territory of the French Republic."[33] President Adams, through the Secretary of the Navy, subsequently issued instructions authorizing seizures of vessels "bound to *or* from" French ports.[34] As Professor Sidak has summarized:

> Captain George Little commanded the U.S. frigate *Boston*. On December 2, 1799, the *Boston* captured *The Flying-Fish*, a Danish ship carrying Danish and neutral cargo, as it sailed from Jeremie to the Danish port of St. Thomas in the Virgin Islands. Little was acting under executive orders in enforcing the non-intercourse law that prohibited American vessels from journeying to French ports, a statute that Little suspected *The Flying-Fish* of violating. The district court ordered restoration of the ship and cargo, but declined to award damages for capture and detention. The circuit court reversed and awarded damages, on the rationale that the capture would have been unlawful even if *The Flying-Fish* had been an American vessel.[35]

Writing for a unanimous Court, Chief Justice Marshall affirmed, and held that Captain Little was liable for damages.[36] What commentators tend to overlook about Chief Justice Marshall's short but forceful opinion in *Little* is the extent to which he clearly understood the distinction between unilateral presidential power in the absence of congressional action and the scope of such authority in the face of countervailing congressional limitations, even — as in *Little* — potentially illogical ones.[37] That is, Marshall plainly suggested that the issue might be different had Congress not interposed ***any*** limits on the Navy's authority to capture suspected French ships, but that the existence of a limit rendered unlawful any seizures in violation thereof.[38] In his words,

> It is by no means clear that the president of the United States whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit

33. Act of Feb. 9, 1799, ch. 2, § 5, 1 Stat. 613, 615 (expired 1800) (emphasis added).

34. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1394 (2001) (discussing *Little*).

35. Sidak, *supra* note **Error! Bookmark not defined.**, at 490 (footnotes omitted).

36. *Little*, 6 U.S. (2 Cranch) 170.

37. *See id.* at 177-78.

38. *Id.*

> commerce. But when it is observed that . . . the 5th section [of the 1799 Non-Intercourse Act] gives a special authority to seize on the high seas, and ***limits*** that authority to the seizure of vessels bound or sailing ***to*** a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel ***not*** bound to a French port.[39]

In other words, whether or not President Adams could have issued the instructions at issue in the absence of a statutory constraint, the existence of the constraint settled the illegality of Captain Little's actions.

To be sure, I don't mean to make too much of *Little*. But (1) as the *Steel Seizure* case underscores, Marshall's original understanding of the distinction between defeasible and indefeasible presidential power has persisted in the Supreme Court's separation of powers jurisprudence; and (2) if anything, it was even more forcefully reiterated by the Supreme Court just a decade ago, when Justice Stevens emphasized that, "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not ***disregard limitations*** that Congress has, in proper exercise of its own war powers, placed on his powers."[40]

Of course, the President will still occasionally *prevail* in arguments that a substantive limitation imposed by Congress unconstitutionally interferes with his inherent constitutional authority; we need look no further than the Supreme Court's June 2015 decision in *Zivotofsky* v. *Kerry*[41] for evidence of that. And as noted above, the purpose of my testimony is not to rehash the well-joined debate over when Congress may and may not impose such restraints. My point today is far more modest: Until and unless Congress actually *does* impose such limits on the President's powers, any perceived separation-of-powers violation is, in my view, far less pernicious than in the context of an inappropriate claim of indefeasible power, where even the most unambiguous legislative mandates may go unenforced.

II

Lest my testimony today be taken as a defense of the Obama administration's actions on Article II grounds, however, let me also note another recurring feature of separation-of-powers debates that are portrayed in defeasibility terms: Oftentimes, the dispute is not, in fact, over whether the President has the inherent constitutional

39. *Id.* at 177–78 (emphases added; original emphases omitted).

40. Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006).

41. 135 S. Ct. 2076 (2015) (invalidating an Act of Congress that required the State Department to list "Jerusalem, Israel" as the place of birth on the passports of U.S. citizens born in Jerusalem, because it contravened the President's constitutional authority to take no position on whether Jerusalem is part of Israel).

authority to act in the face of congressional silence, but rather whether the President is acting in good faith *pursuant to* the relevant statutory authorities.

As a case in point, consider the current debate over the President's legal authority to use military force against the Islamic State in Iraq and the Levant (ISIL). The Obama administration has consistently maintained, since September 2014, that outside the specific context of self-defense, its general authority to use such force derives not from Article II of the Constitution, but from a statute, *i.e.*, the September 2001 Authorization for the Use of Military Force[42] — even though that Act (1) says nothing at all about ISIL; and (2) only authorizes force against groups that were responsible for, or assisted in, the attacks of September 11 (which occurred before ISIL even existed).

Some agree with the Obama administration's legal reasoning; others do not. (In my view, the validity of the argument almost certainly turns upon factual details — about the origins of ISIL and its relationship with al Qaeda — that remain classified.[43]) Regardless, even if the Obama administration is *incorrect* in its interpretation of the AUMF, all that conclusion would mean is that the Executive Branch is incorrectly interpreting a statute — not that it is willfully abusing its inherent constitutional authority. The same goes for the Administration's Clean Power Plan, its implementation of the Affordable Care Act, and its deferred action immigration program, among others; the disputes in all of these contexts reduce to whether or not the Executive Branch's interpretation of vague (and, at times, inconsistent) statutory delegations is permissible. You and I may answer those questions differently, but as with any question of statutory interpretation, the ultimate authority is Congress — which can always pass legislation clarifying the meaning of the original text, whether before, after, or in lieu of judicial interpretations thereof.

This is exactly why I, among others (including President Obama, who has submitted proposed legislation[44]), have repeatedly called upon this Congress to pass a new AUMF for ISIL[45] — not because I am convinced that the Obama administration is acting *unlawfully* in using force under the 2001 AUMF, but because, from a separation-of-powers perspective, "Congress's inaction in the face of a President's debatable claims

42. Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note).

43. *See* Steve Vladeck, *ISIL as al Qaeda: Three Reactions*, LAWFARE, Sept. 11, 2014, https://www.lawfareblog.com/isil-al-qaeda-three-reactions.

44. *See* Joint Resolution, *available at* https://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf (last visited Feb. 26, 2016).

45. *See, e.g.*, Jack Goldsmith, Ryan Goodman, and Steve Vladeck, *Five Principles That Should Govern Any U.S. Authorization of Force*, WASH. POST, Nov. 14, 2014, at A21.

to lawful use-of-force authority only invites *additional* unilateral presidential warmaking in the future."[46] Indeed, as I've written before,

> For Congress to be in session and to simply refuse to vote, one way or the other, on war powers the President is exercising (to a large degree openly), is for Congress to invite *future* presidents not just to engage in greater unilateral warmaking, but in greater unilateral action during wartime, writ large. It would be one thing if Congress wasn't acting because it was convinced the President would *veto* any legislation (thereby exposing Congress's institutional weakness). But here, the President has repeatedly suggested that he would welcome a bill, has drafted one of his own, and has supported drafts provided by various members.[47]

In those circumstances, I simply don't see the argument that the President is overreaching — or that, if he is, it isn't with Congress's knowing and willful acquiescence. And although my focus in my testimony today has been on how the war powers aspect of this conversation reflects my thesis, similar arguments can be made about the absence of legislation clarifying the scope of the President's authority in virtually all of the other substantive policy areas of contemporary controversy.

Finally, I realize that one response to my testimony today may be to simply suggest that President Obama would veto any legislation seeking to clarify or overturn his Administration's interpretations of existing authorities, which would render unrealistic any prospect of this Congress enacting such legislation. In my view, there are two separate — but equally compelling — rejoinders to such a response:

First, from a separation of powers perspective, legislation that the President vetoes over significantly substantial policy differences would be the system working exactly the way it's supposed to — and if the legislation were perceived as reasserting Congress's institutional role rather than simply staking out a partisan substantive policy position, there might well be sufficient votes to *override* such a veto. After all, American history is replete with presidential vetoes being overridden by bipartisan supermajorities in Congress. *Second*, and as importantly, as in the ISIL AUMF context, there is no guarantee that such a veto would be forthcoming. Indeed, during his tenure to date, President Obama has vetoed fewer bills (nine) than any two-term President since James Monroe.[48] That's hardly the mark of a President who refuses to acknowledge Congress's constitutional authority in cases in which it has actually been asserted.

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46. Steve Vladeck, *The Irresponsible Institutional Politics of an "Election Year,"* JUST SECURITY, Jan. 4, 2016, https://www.justsecurity.org/28629/irresponsible-institutional-politics-election-year/.

47. *Id.*

48. *See* Summary of Bills Vetoed, U.S. SENATE, http://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm (last visited Feb. 26, 2016).

If nothing else, more aggressive efforts from Congress to rein-in perceived excesses in executive power would present a far more conventional separation of powers debate than one in which Congress merely objects to such perceived excesses *without* doing anything to circumscribe them.

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Thank you again for the opportunity to testify before the Task Force this morning. I look forward to your questions.