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Good Morning Chairman McGovern, Ranking Member Cole, and members of the House Rules Committee. Thank you for the opportunity to participate in this hearing on Article I: Constitutional Perspectives on the Responsibility and Authority of the Legislative Branch. For this adopted son of America, it is a distinct honor to be here today, particularly because I sense a sincere bipartisan yearning to right a ship of state that continuously leans towards a muscular presidency.

Though I am a Professor of Law and Miller Center Senior Fellow at the University of Virginia, my testimony reflects no one's views, save my own. I also wish to emphasize that I don't come here as a Republican or Democrat. Nor do I come today as a supporter or opponent of the incumbent President. Rather I come as an American, a lawyer, and a legal scholar with an abiding interest in Congress's foundational role in our constitutional system.

I have spent my career studying the Constitution's separation of powers. I have authored a book, *Imperial from the Beginning*, one that describes a powerful office coupled with a host of express and implied constraints on presidential power. I have a forthcoming book, *The Living Presidency: An Originalist Argument Against its Ever-Expanding Powers*, that will be available in April from Harvard Press. Much of my testimony draws on lessons I absorbed in the course of writing these books, particularly the second book.

The place to begin is with the perceptive advice of Abraham Lincoln: "If we could first know where we are, and whither we are tending, we could better judge what to do, and how to do it." So, my testimony has four parts. I will discuss where we are, how we got here, whither we are tending, and what you, the Congress, ought to do.

Where we are: We have a mutating presidency, one whose boundaries and authorities regularly expand. In the well-known case of *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Felix Frankfurter endorsed the idea of repeated practices placing a “gloss on the executive power,” meaning amending the preexisting sense and scope of presidential power. The modern executive branch, particularly its lawyers, applauds this theory. Exploiting this self-serving formula, the executive branch shows no hesitation in concluding that presidential powers have expanded as a result of actions that transgressed earlier, narrower conceptions of executive authority. In other words, the executive cites earlier presidential usurpations as the building blocks for new vistas of presidential power. While ordinary Americans face sharp consequences for violating the law, it seems that presidents can amend the Constitution by repeatedly violating it.

Think of war powers and the modern claim that Commanders in Chief, by their successive actions across decades, have acquired a power to wage war against other nations. Pardon the pun, but this claim is at war with the Founders’ Constitution. No one at the Founding supposed that presidents could wage war on their own say-so. And to my knowledge, no sensible person thought this before the Korean War. Harry Truman’s war—one he fatuously called a police action—was followed by other significant uses of force, each building on (and citing) previous presidential wars. Recall Grenada, Kosovo, Libya, and Syria.

Or consider the role that presidents play in lawmaking. Most of our laws come from agencies controlled by presidential appointees, meaning that presidential law has largely supplanted your laws, if not always in importance, certainly in volume. Relatedly, presidents elected on a platform of radically reforming existing legislation (Dreamers, Build a Wall, and

Medicare for All) are increasingly willing to read existing laws—your laws—in extremely creative ways that enable them to claim that they kept their election promises. Judging by what many Americans read and hear, they can be forgiven for supposing that presidents may lawfully change your law by the stroke of a pen. Relatedly more and more Americans may rightfully wonder what the point of a Congress is.

More examples are not wanting. But the point is sufficiently obvious to most knowledgeable observers. The executive seems forever on the march, staking claim to new territory, most often at your expense.

*How did we arrive at this point:* Over the course of centuries, the presidency has been radically transformed, both conceptually and practically. First, we conceive of the presidency in ways that were mostly unfathomable at the founding and these changes have had profound consequences for presidential power. For instance, we think of presidents as legislative reformers. For the first several decades of the Republic, however, presidential candidates never ran on a policy platform, much less made promises. Nor did they conceive themselves as the representative of the entire American people. They had duties coupled with a dose of discretion. Their principle job was to *execute your laws*. In contrast, modern candidates promise dozens of reforms, some incredibly substantial. Once in office, presidents claim an electoral mandate to implement their agendas and expect Congress to enact them or get out of the way. Modern presidents cast about for ways to keep their promises, supposing that they must fulfill them, by hook or by crook. After all, the route to presidential greatness is strewn with actual reforms, not shattered promises.

Second, our presidents are the undisputed leaders of political parties, making it very difficult for their co-partisans to criticize them, much less oppose them. Lincoln warned that a house divided against itself cannot stand. And the same must be said of you. A House of Representatives divided by partisanship will find it very difficult to stand up to usurping presidents, whatever their party. President Obama knew that there would be a phalanx of Democrats behind him for almost any of his policies, and even greater support for those policies especially favored by the Democratic base. President Trump knows the same with respect to his co-partisans in Congress. Any perceived illegality is an embarrassment to be gotten over, minimized, or rubbished. One cannot overestimate the leeway that comes from knowing that a cohort of co-partisans stand ready to praise your reforms and defend you from attacks.

Third, presidents deftly exploit the executive bureaucracy supplied by Congress to advance their interests. A vast presidential staff of almost 2000 gives presidents the practical ability to do much of consequence because these aides act as a force multiplier. There is little doubt that the modern presidency would be a shadow of its familiar self were it not for the congressional funding of personnel within the Executive Office of the Presidency. Similarly, Congress also funds elite executive lawyers who defend the presidency, both the institution and its periodic occupants. On questions of presidential power, these lawyers perhaps think of themselves not as expanding executive power but instead as merely illuminating its reach. Yet because these lawyers labor in the executive branch, it is hardly surprising that their opinions often endorse expansive readings of presidential power. Over time, new opinions advance the arguments found in previous opinions, resulting in presidential creep. Even when the law seems to stand in the way, these attorneys attempt to find a workaround that allows presidents to at least partially advance their agendas.

A fourth element behind the rise of presidential power is the ascendancy of living constitutionalism. Living constitutionalism posits that the meaning of the Constitution can and should change over time. The idea has its greatest appeal with respect to individual rights, where many believe that following outdated conceptions would mean abandoning several rights that Americans have come to cherish. Once one embraces the idea of living constitutionalism, however, the door swings open to living presidentialism. Because changes in the living constitution arise through changes in conceptions and practices, presidents are extremely well positioned to effect those changes. Presidents are certainly best equipped to create new conceptions and practices that advance the presidency's institutional interests and the particular policies of the incumbent. It is no exaggeration to say that presidents collectively have the greatest influence on the future contours of constitutional law, particularly the presidency.

Whither we are a tending: The future is unknown. But if the past is prologue, the only thing that one can confidently predict is that the presidency of tomorrow will be different from today's presidency in the same way that today's presidency is rather different from versions in yesteryears. Saying that some presidential acts are unconstitutional or illegal today in no way implies that they will be in the future. Change is the only constant.

We perhaps cannot see this change just as it happens. We are too close to it and too focused on the political disputes that surround it. But decades later, the change becomes apparent. Are presidents going to become secondary legislators, on par with Congress? They are not there yet but who can say what tomorrow will bring. Are presidents going to reach parity with

the Supreme Court when it comes to constitutional interpretation? I would guess not. But nothing is beyond the realm of the possible.

Consider a concrete example: impeachment. I believe that one way of understanding the Clinton *and* Trump Impeachment episodes is that hundreds of members of Congress supposed that it should be harder to remove presidents. For judges, Congress is apt to ask whether something is a high crime and misdemeanor and not spend much time wondering whether the punishment fits the crime. Either the judge committed the impeachable offense, or she did not.

For presidents, whether the “crime” warrants removal is paramount. Because presidents are so singular and special, members of Congress are apt to ask the question “should we remove him from office,” which is a rather different question than whether a president committed high crimes and misdemeanors. For President Bill Clinton, enough Democrats supposed that obstructing justice and lying under oath was not worthy of removal, a judgment that many Americans supported. For President Donald Trump, enough Republicans supposed that what he was accused of—obstructing Congress and abuse of power—was not worthy of ouster. These were contextual judgments based on a host of fact and factors. But the end result is that the impeachment standard may now be said to be rather different for presidents. If that is so, it vividly demonstrates that there are no limits to how presidential power may expand over time.

*What Congress ought to do:*

If Congress does not act, it risks becoming more and more irrelevant. The first branch may become the proverbial potted plant: a thing of beauty that is ornamental rather than

consequential. It may become a byzantine debating society, full of motions, restricted amendment trees, and occasionally meekly and belatedly reacting to laws crafted in the White House.

Congress has the means to push back. History supplies examples of Congress pushing back against executive overreach. During Reconstruction, Congress mistrusted Andrew Johnson because they perceived him as too soft towards the South. To bring him to heel, Congress passed laws to weaken the presidency and render officers independent of his will. Whether constitutional or not, these laws represent a successful counterreaction. Over his impeachment and near conviction also helped to humble Johnson.

Another instance of congressional pushback can be found in the post-Watergate years, where Congress enacted a slew of statutes designed to check the executive. With the Vietnam War, the firing of Archibald Cox, the destruction of Oval Office tapes, and the Watergate burglary still fresh memories, Congress reined in executive authority. Congress passed the Ethics in Government Act, with its Independent Counsel. It approved the Congressional Budget and Impoundment Control Act to limit refusals to expend appropriated funds. Congress regulated covert actions. And Congress passed the War Powers Resolution to rein in executive war making.

In my book, I offer thirteen suggestions for Congress, some easy, some bold. Today, I'll mention a handful.

### *1. Congress Must Bulk Up*

The size of congressional staff has declined precipitously since 1985. The size of personal staff of Representatives has declined 20%. Institutional staff (e.g., staff for the Sergeant at Arms) has declined by 83%. Committee staff has declined 50%. Though Senate declines are less drastic,



staff levels are lower. The two largest congressional agencies, the Governmental Accountability Office and the Congressional Research Service, have likewise faced severe cuts.

Congress must reverse this trend and expand its staff. Agency staff at the GAO and CRS should be massively boosted. Personal staff for members should be vastly increased to enable Representatives and Senators to better carry out their legislative and oversight functions. Committee staff should be augmented, particularly personnel tasked with oversight functions. Minority staff also should be enlarged, for legislators in the minority also assist with oversight and there is no reason for committee staff to be disproportionately apportioned as has long been the practice. The current system of committee staff turnover, where hundreds of experienced personnel are tossed out with a change in the chamber majority, discourages individuals from serving on committee staff. Finally, congressional staff should receive pay raises. These staff are undercompensated for the work they do, which predictably leads many to seek greener pastures.

Relatedly, Congress ought to consider creating new agencies. For instance, Congress should create an Office of Legal Counsel for each chamber. Each should be staffed with personnel proportional to the Office of Legal Counsel in the Department of Justice. Each should supply written and oral advice about the scope of Congress's constitutional authority, the constitutionality and meaning of bills and laws, and the legality of executive action.

## *2. Halt the Delegation of Legislative Power to the Executive*

Another reform would consist of curbing excessive delegations of legislative power. There are distinct policy reasons for doubting the wisdom of allowing executive and independent

agencies to write laws under the guise of writing rules. For our purposes, the delegations to executive branch institutions make the presidency rather powerful.

The best way to curtail these delegations would be to provide that the executive's rules will not be law unless Congress first approves them. This would preserve the executive's traditional authority—making legislative “recommendations” as the Constitution expressly authorizes. And it would leave Congress wholly possessed of the legislative power, for the executive could not make laws. Rather its rules would be mere proposals. If the executive's measures are wise, Congress can adopt them. If not, the nation is not saddled with executive lawmaking.

Moreover, when Congress chooses to actually delegate its legislative authority, it should provide that the delegation sunsets. In other words, delegations of lawmaking authority should expire after a set number of years, say two or three, with Congress forced to reconsider the wisdom of the delegation. If Congress believes the agency has done a poor job, it can do nothing and grant no renewed authority. Or it can curb or expand the delegation, tailoring it to new circumstances.

Finally, Congress should decree that agency rules sunset after a period of time. It is bad enough that many of Congress's laws do not come with an expiration date, thereby allowing laws from centuries ago to remain on the books with little reconsideration. But at least in those cases, the laws came from *Congress*, the entity with constitutional power to legislate. There is no sound reason why laws made by unelected bureaucrats should last for decades without some reconsideration by Congress, much less the agency that first enacted them.

### *3. Regulate Delegations of Emergency Powers*

One class of delegation is particularly troubling: delegations authorizing presidents to declare national emergencies. Embarrassingly, dozens of these emergency declarations have lasted for decades. Congress is helpless because presidents often wish to retain authority previously delegated. As a result of a possible veto, Congress can amend or overturn a presidential emergency only there is an overwhelming congressional majority in both chambers or when a president is willing to sign a bill that contains such modification or rescission.

By law, Congress ought to declare that every emergency declaration can last no longer than six weeks after Congress next meets. This would ensure that if emergency measures are to endure, Congress must decide. Any congressional extension of emergency measures ought likewise to have sunset periods, ones that ensure legislative reassessment of whether a crisis continues.

#### *4. End Executive Privilege*

In recent decades, we have witnessed an acceleration of the trend of the executive refusing to comply with congressional demands for information. This is often called “executive privilege” and is said to be grounded on the principle that presidents have a right to frank advice. No one will give them candid advice if Congress can pry into the inner recesses and workings of the presidency and reveal the advice being given.

Presidents need advice, of course. Indeed, there is a constitutional clause—the Opinions Clause—that (redundantly) ensures that they may secure advice. But whether they have a right to confidential advice is rather doubtful. The Opinions Clause speaks of “written opinions” presumably so that others may hold those opining responsible for bad advice. Moreover, despite the executive’s need for confidential advice, such briefings, opinions, and judgments do not

remain secret for long. Sometimes the New York Times or some other outlet reveals the confidential advice that a president received. Other times, tell-all books supply details about the terrible advice that others gave and the sagacious advice of the author. The general point is that no advice to the president has any promise of confidentiality anymore. Presidential advisers are naïve if they suppose that what they tell the president, will remain in confidence.

So why do we continue to have executive privilege? It seems to me that one of its principle roles is to stymie congressional investigations of the executive. That is precisely how Dwight Eisenhower—the inventor of the phrase—used the privilege. He wanted to thwart congressional investigations of his administration. Perhaps he had good reason for doing so. After all, he regarded Joseph McCarthy—the red-baiting Wisconsin Senator—as a cancer.

Yet as a matter of constitutional law, Congress has a right to gather information both to pass bills and to oversee, and potentially impeach and remove, federal officers. This power of oversight and impeachment extends to the highest office of the land, the presidency. Indeed, presidents have an express duty to provide Congress with information on the “state of the union,” information that would include the operations and functioning of the executive branch. Congress cannot lose its right to access information needed for legislation and oversight merely because Senator McCarthy abused the congressional power of investigation, any more than presidents can lose their veto because some renegade president vetoed too many bills.

Congress should openly declare its considered position that executive privilege does not apply to matters of congressional oversight. While keeping executive-branch communications confidential is undeniably desirable, the absolute need for congressional oversight of the executive

rests upon unassailable constitutional foundations. Our system of checks and balances requires a Congress able to check the executive, something impossible if the executive can block inquiries via invocations of executive privilege.

#### 5. *Utilize Bounty Hunters*

Congress can call upon the people to check the executive. In particular, it can enact “informer” laws that incentivize the public to help curb executive overreach. Such laws can impose fines payable to the Treasury for certain illegal or unconstitutional activity—say starting wars or spending federal funds without an appropriation. Executive officials guilty of the underlying offenses would pay these fines out of their own pockets. Citizens who brought suit against the executive officers, prevailed in court, and collected the fines would then get a portion of the fines, say a quarter or a third of the total amount. Essentially, Congress would pay a bounty to citizens who successfully prove that executive officials have violated federal law.

Such suits (and the underlying laws) are constitutional. These informer statutes date back to before the Revolution and early Congresses passed many such statutes, including ones that harnessed private avarice to ensure that executive officials complied with the law. The courts have made clear that they will hear such cases because the individuals bringing suit have a concrete interest in the outcome. Moreover, presidents have little reason to complain because if the

underlying acts are in fact legal, the officials will prevail. If the acts are illegal, however, then presidents should be grateful that the system is calculated to prevent official misconduct.

#### 6. *A Resolute War Powers Resolution*

Congress can put stronger teeth, with actual bite, in a renewed War Powers Resolution. It could declare that if a president attacks another nation without congressional authorization, the attack immediately triggers a reduction in the military budget by three quarters. Everyone agrees that Congress controls the purse strings and can decide how best to fund the armed forces and the wars they wage. The draconian cut in funding would incentivize presidents to secure congressional preapproval of wars, a process that the Constitution actually requires.

#### *Conclusion: There is No Better Time than the Present*

Because members of Congress are habituated to act like loyal party men and women, the best time for adopting any reforms is during the waning months of a presidential term but before a presidential election. Better yet is the same scenario coupled with widespread and deep uncertainty about the next occupant of the Oval Office. Even better still: if the two presidential candidates are polarizing, members of both parties have much to gain from trying to bind and constrain the executive because they might be risk averse and more willing to limit their upside in return for drastically limiting their worst-case scenarios. Nothing would stir the reformist passions of Democrats more than a tax-cutting, insular, politically incorrect Republican candidate. Nothing would more galvanize Republicans than a leftist, big-spending, “woke” Democrat.

Behind this useful veil of ignorance, federal legislators can be united in their fear and more systematically devoted to protecting congressional prerogatives and checking presidential power.

Something like this state of uncertainty exists every four years and legislators should exploit their dreads and horrors and temporarily unite to protect their institution and check the executive.