

Statement of  
Laura A. Belmonte  
Dean, College of Liberal Arts and Human Sciences  
Professor of History  
Virginia Polytechnic Institute and State University

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Good Morning Chairman McGovern, Ranking Member Cole, and members of the Rules Committee. Thank you for the opportunity to participate in this hearing on how Congress might reassert its constitutional authority and the current state of the relationship between the Executive and Legislative Branches.

Although I am the Dean of the College of Liberal Arts and Human Sciences at Virginia Tech, I wish to emphasize that my testimony reflects my own personal views, not those of my employer. I do not appear before this august body as a Republican or a Democrat. Rather I come as a former member of a government advisory committee that closely monitors declassification, records retention, and access to public documents. I am here as a scholar who has studied the history of the United States for over thirty years, particularly the history of U.S. foreign relations. I have a deep interest in the evolution of the balance of power both within the U.S. government and among the United States and other nations internationally.

I have spent my career studying the diplomatic and political history of the United States and explaining how and why the role of the U.S. government has shifted over time. In my academic work and public-facing scholarly activities, I have tried to present dispassionate explanations of the machinery of government, the actors who affect public policy change, and the context in which certain events and individuals arise. In my experience, many Americans are desperately seeking venues that impart neutral, factually grounded information that helps them understand the historic events that have shaped our country and the reasons our nation is currently in such an intensely polarized state.

Recent Gallup polls offer dispiriting snapshots of popular views of government and Congress. Last fall, near-record high numbers of Americans cited poor government and poor political leadership as the most pressing problem facing the United States, supplanting economic

issues. (“Mentions of Government as Top U.S. Problem Near Record High, October 21, 2019, news.gallup.com). While the political landscape is bleak, you have the power to restore the separation of powers and by extension, to break the gridlock that has eroded popular support for Congress and faith in our system of government.

My key aims today are to situate the current state of affairs into historic context and to stress that the present imbalance between the Executive and Legislative branches is the result of a decades-long shift, not a recent turn of events.

We remember the Declaration of Independence for its stirring preamble, its proclamation that “all men are created equal.” But let us not forget that the majority of the text is an enumeration of the colonists’ complaints about George III’s “history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.”

This history directly informed the Founders’ fears of concentrated power and their initial decision to form a loose form of centralized government—the Articles of Confederation. The Articles had no independent executive and did not include the power to veto. Passage of legislation required the unanimous consent of all states. Congress had no power to levy taxes. Upon recognition that this framework of government did not work well (particularly during a time of war), lawmakers made the decision first to revise and then, to abandon the Articles.

The framers of the Constitution brought their established fears of concentrated power into their deliberations of how best to restructure the U.S. government. Accordingly, they created three branches of government with specific roles. The Legislative branch makes laws through a bicameral Congress. The Executive branch enforces laws through a president, vice-president, and executive departments. The Judicial branch interprets law.

To ensure that one branch does not accumulate too much power, the Constitution includes several checks and balances. For example, the President can veto a law passed by Congress (which in turn can override a presidential veto). The Supreme Court can strike down actions taken by both the Executive and Legislative branches, but the President nominates Supreme Court justices who must be confirmed by the Senate. As James Madison wrote in Federalist No. 51, “In framing a government which is to be administered by men over men [because men aren’t angels], the great difficulty lies in this: You must first enable the government to control the governed, and in the next place, oblige it to control itself.”

A passionate belief in civic virtue undergirded the Framers’ deliberations on how to create a government that would not permit the rise of tyranny. However imperfectly the concept has been implemented over the course of U.S. history, I believe it is critical to remember that our republican form of government was radical in its time. The notion that people would wield power on behalf of a larger whole, not for self-interested purposes, but for the good of the nation, was a stark departure from monarchy. The Framers did not place many constraints on Executive power in the Constitution largely because of their fervent belief that presidents would put the interests of the nation over their own and would consult and compromise with other branches of the government.

Maintaining this delicate balance was easier when the federal government was small. The original federal bureaucracy consisted only of the Departments of Treasury, State, and War. At first, presidents did not have staff and performed many of the office’s correspondence and administrative duties themselves. They received no federal funding to pay whatever staff they had until 1857. Through the 19<sup>th</sup> century, the postal service was the largest part of the federal government.

Although the Constitution did not include political parties, factions that hardened into formal parties soon arose. While promising only to hire qualified people for federal jobs, George Washington selected mostly members of his own Federalist Party. When Thomas Jefferson took office, he dismissed many of these bureaucrats and replaced them with members of his party, the Democratic Republicans. By the late 1820s, President Andrew Jackson celebrated this system of patronage as a “spoils system” that served the country well by ensuring a rotation of government employees and preventing entrenched corruption.

Through the 19<sup>th</sup> century, the size of the U.S. government grew as the nation’s population and geographic footprint expanded. But there remained a deep distrust of centralized power and the size of the federal government remained limited. Most functions of government were handled at the state and local level. There were no national systems for banking or taxation.

This changed dramatically during the Civil War. The conflict created the opportunity for Congress to fundamentally change the scope and functions of the U.S. government. No longer constrained by southern opposition to federal programs aimed at fostering diversified economic development and generating national revenue, Congress instituted protective tariffs and passed sweeping legislation including the Homestead Act, the Pacific Railway Act, the Morrill Land Grant Act, and the National Banking Act. Federal land grants to railway companies and independent farmers, the first national paper currency, new federal taxes on manufactured goods and income, and the first government bonds were among the ways Congress financed the Civil War and promoted economic modernization. These changes led to an expansion of the federal workforce.

In 1881, after a disappointed federal office seeker assassinated President James Garfield, popular concerns about the patronage system intensified and Congress passed the Pendleton Act.

The law instituted a merit-based federal civil service. In place of politically connected government employees who were usually replaced with changeovers in presidential administrations, the Pendleton Act created a class of long-term government bureaucrats who were assumed to be politically impartial and competent. Initially, only about 10 percent of federal employees were hired under the civil service system. Now, nearly 90 percent are.

Complaints about the system's inefficiencies have sparked repeated calls for civil service reform. Vowing to restore Americans' trust in government in the aftermath of Watergate, President Jimmy Carter promised his administration would institute changes that rewarded merit. The Civil Service Reform Act of 1978 reorganized the federal agencies administering the federal personnel system and incentivized merit while continuing to protect employees from unfair labor practices. It created the Office of Personnel Management as an independent executive branch agency and allowed federal employees to form unions and bargain collectively. Since Carter signed the legislation, presidents have continued efforts to increase government efficiency, but have largely failed in the face of strong union opposition and congressional inaction.

President Trump has repeatedly called for major changes to the federal personnel system. In his 2018 State of the Union address, President Trump called on Congress to help cabinet agencies "reward good workers and remove federal employees who undermine the public trust or fail the American people." Soon after, Trump signed three executive orders making it easier to dismiss federal workers who receive bad reviews and placing new restrictions on federal employee unions. The move sparked several legal challenges, but a federal injunction barring implementation of these orders expired in October 2019.

Irrespective of civil service reforms, the regulatory power of federal bureaucracy has grown consistently since the creation of the Interstate Commerce Commission in 1887 and the

passage of the Sherman Antitrust Act in 1890. This trend escalated through the Progressive Era, during which the Food and Drug Administration (1906), the Federal Reserve (1913), and the Federal Trade Commission (1914) were created and the 16<sup>th</sup> Amendment allowing an income tax was ratified.

The most rapid growth in the federal bureaucracy occurred between 1933 and 1945. The New Deal ushered in scores of new federal programs and agencies. U.S. entry into World War II led to an explosion of the federal workforce and the armed services. The number of federal employees rose from approximately 500,000 in 1933 to over 3.5 million in 1945, the highest number in U.S. history. In the postwar era, although the size of the federal bureaucracy is smaller, (fluctuating between 2.5 and 3 million), its influence has grown significantly.

In the aftermath of World War II, as the United States confronted the rise of communism and became a global superpower, the executive branch increased its power. In 1947, passage of the National Security Act led to a reorganization of the nation's military and foreign policy establishments. The legislation created the National Security Council (NSC) and the Central Intelligence Agency (CIA), both of which became epicenters of increasing executive authority. The statute defines the members of the NSC as the President, Vice-President, and the Secretaries of State, Defense, and Treasury. The chair of the Joint Chiefs of Staff and the director of national intelligence are included in NSC meetings in an advisory capacity. Presidents have enlisted the NSC in different ways. Where Dwight Eisenhower made key foreign policy decisions during NSC meetings, Richard Nixon and Henry Kissinger convened NSC meetings infrequently and instead relied on the NSC for drafting hundreds of policy guidance memoranda. While serving as George H.W. Bush's National Security Advisor, Brett Scowcroft used the NSC as a neutral

forum for mediating the often-disparate views of the Department of State, the Pentagon, the Treasury Department, and the intelligence community.

Throughout its existence, the size of the staff supporting the National Security Council has varied markedly. Harry Truman had approximately twelve NSC staff members, all of whom were simultaneously holding other positions in the White House. Eisenhower added an additional 37 staffers. In keeping with his more intimate leadership style, John F. Kennedy reduced the NSC staff to 20. Although the NSC staff doubled to 40 during the Nixon and Ford administrations, it did not balloon significantly until the Cold War ended in the early 1990s. Bill Clinton increased its size to almost 100 and began to use it as a tool for consolidating foreign policymaking within the White House. In the aftermath of 9/11, George W. Bush expanded the NSC staff to 136. At its peak under the Obama administration, the NSC staff swelled to nearly 200 people, most of whom were temporarily detailed from primary assignments elsewhere in the federal bureaucracy. Obama charged them with the “management of the inter-agency process.” The Trump administration is currently slashing the size of the NSC staff to approximately 115 people.

As the Executive branch has accrued more power, the Legislative branch has become more reluctant to exercise its authority. This is particularly notable in the realms of military and foreign policy. Although Congress continues to shape U.S. military power through oversight and appropriations, it has not issued a formal declaration of war since June 1942, when it passed unanimous resolutions declaring war on Bulgaria, Hungary, and Romania as part of the larger war effort to defeat Nazi Germany and Japan (on both of whom Congress declared war in December 1941). When North Korea invaded South Korea in June 1950, President Truman only consulted with a few members of Congress and he did not seek a congressional declaration of



war. Instead, he obtained authorization for military intervention from the United Nations Security Council. The Korean War set a precedent for unilateral presidential action.

Since then, Congress has authorized the use of military force in conflicts as wide-ranging as the Vietnam War and war in Afghanistan using a combination of resolutions and authorizations falling short of formal war declarations. Perhaps the best-known example is the Gulf of Tonkin Resolution, swept unanimously through the House of Representatives and by a vote of 88-2 in the Senate in the aftermath of two reported North Vietnamese attacks on U.S. destroyers patrolling the Gulf of Tonkin. Without fully investigating the actual circumstances of the two attacks (later found to deviate from the Johnson administration's initial explanations) and with no hearings, Congress authorized virtually unlimited power to wage war in Southeast Asia. When two senators opposed the measure because it surrendered congressional powers to declare war and committed the United States to an open-ended conflict, they drew widespread condemnation in the media and popular opinion. Although J. William Fulbright, the Arkansas senator who shepherded the resolution through the Senate, later convened a notable series of hearings eliciting staunch criticism of the conflict, Congress continued financially supporting the war even after it became evident that U.S. officials had repeatedly misrepresented the success and geographic scope of the American effort to defeat communism in the region.

Despite long-standing concerns about the expense, power, and size of the federal bureaucracy, neither Congress nor the Executive branch has been terribly successful in reigning in the administrative state. In 1939, Congress passed the Hatch Act barring federal employees from many political activities including running for public office or raising money for a party or candidate. But in the early 1990s, Congress weakened the Hatch Act, maintaining the prohibition on federal employees seeking public office, but permitting them to be active in partisan political

activities. Civil service employees continue to possess robust job protections. Government regulations and procedures remain opaque and cumbersome. Nearly a dozen presidential efforts to reform government operations have been launched in the modern era, but none has yielded enduring, major change. Both the Executive and Legislative branches have used the federal bureaucracy as a potent tool for restricting the power of the other, especially in times of divided government. Recent refusals to increase the federal workforce have led to increased reliance on private contractors and even greater decentralization. Passage of enormous, vague legislation forces regulatory agencies and courts to interpret its terms.

Irrespective of the influence of the federal bureaucracy, Congress can still exert control over the Executive branch through appropriations, legislation, and nominations—provided it has the political will to use these checks and balances. Congress can refuse to approve funding for executive actions it finds objectionable. It can hold the president accountable for a failure to faithfully execute laws. Congress can confirm or reject presidential appointees. But these checks and balances do not work if Congress ignores Executive reallocation of congressionally approved appropriations in ways found to violate federal law; if the White House uses the power of Cabinet agencies to thwart its statutory obligations or disregards congressional efforts to exercise oversight through requesting documentary evidence and the opportunity to question witnesses; and if the use of acting appointments or a refusal of the Senate to exercise its powers to advise and consent on nominees upend the processes articulated in the Constitution for Senate consideration of presidential appointees to federal offices and the bench. An Executive refusal to nominate candidates for these posts at all presents an even more powerful demonstration of authority, one that simultaneously concentrates power within the White House and that undermines the entrenched federal bureaucracy. Leaving open these vacancies is a stark display

of distrust in an era where leaks from the Executive branch have been a strikingly common occurrence. These vacancies coexist with a spike in voluntary departures from federal jobs, a trend particularly notable among diplomats and scientists. Many of these individuals possess critical skills and institutional memory that is not easily replaceable. Applications to some federal agencies have also declined. Between October 2017 and October 2018, for example, the number of people taking the Foreign Service Officer Exam declined to 8,685, down from 21,039 in FY2013. It should, however, be noted that these applicants were competing for 300 available spots in the diplomatic corps.

In the recent past, the term “unprecedented” has been used so often, it has practically been rendered meaningless. It also does not apply when describing the current imbalance between the Executive and Legislative branches. To the contrary, history is replete with examples. In 1861, President Abraham Lincoln ignored the Supreme Court’s ruling in *Ex Parte Merryman* challenging his suspension of the writ of habeus corpus. In 1937, after the Supreme Court struck down some of his New Deal initiatives, Franklin Roosevelt introduced a plan to expand the size of the Court. The court packing scheme was castigated from across the political spectrum and Roosevelt abandoned it. Presidents have threatened to use Executive power to quash political upheavals. During a wave of post-WWII labor unrest, President Harry Truman, threatened to draft striking railroad workers into the army. In March 1947, in the early stages of the Cold War, Truman issued an executive order creating a loyalty program for federal employees aimed at preventing communist infiltration of the U.S. government. The federal program mushroomed into a Red Scare that affected much of the federal bureaucracy and that Congress abetted with its own investigations and legislation. Many state and local governments instituted similar measures. In 1953, Dwight Eisenhower issued an executive order that defined

gay and lesbian federal employees as national security risks, triggering a Lavender Scare that resulted in the resignations and dismissals of thousands of gay and lesbian Americans working for the U.S. government or serving in the U.S. armed forces.

Modern presidents have used surveillance to monitor subordinates and political opponents and to crush dissent. The FBI's COINTELPRO program surveilled civil rights activists. During the 1968 presidential campaign, after the Johnson administration learned of the Nixon campaign's secret efforts to use an intermediary to encourage South Vietnamese President Nguyen Thieu not to cooperate in peace talks, LBJ and his team opted not to reveal their discovery so as to avoid exposing their surveillance of the Nixon campaign. As President, Nixon later used surveillance, criminal break-ins, and threats of tax audits to damage perceived political enemies.

Both the Executive and Legislative branches have eroded norms. Although some Americans mistakenly believe that presidential candidates releasing their tax returns is a matter of law, the practice did not arise until December 1973, when Richard Nixon, then deeply engulfed in the Watergate scandal, released his tax returns to fend off allegations of improprieties. It turned out that he owed about \$475,000, the equivalent of \$2.5 million today. From 1974 to 2015, all presidential candidates followed suit, until Donald Trump opted not to. Presidential exemptions in federal ethics laws ensure that financial disclosures and disinvestment are optional. Keeping visitor logs and holding regular press briefings at the White House are merely customs.

In the Senate, a body that has historically prided itself on traditions that allow for substantive deliberations and muted partisan divisions, norms have also been recently

abandoned. The most significant example is the suspension of the filibuster first on federal judicial nominees and then on Supreme Court nominees.

Since 9/11, a number of factors have converged that have intensified political divisions and popular suspicion of government. The gutting of the budget for the National Archives has resulted in significant staff reductions and pervasive demoralization that undercut its mission of retaining public records and making them accessible. An explosion of digital records and overclassification of many of these records compounds the challenge of managing records and meeting federal guidelines for open records. The decline of civics education in secondary schools has contributed to a decline in many Americans' understanding of our system of government. The abolition of the Fairness Doctrine in 1987; the rise of talk radio, cable news, the internet, and social media; the collapse of popular trust in media; and foreign disinformation campaigns designed to inflame partisan divisions have left millions of Americans unsure what information is credible or content to believe whatever information reflects their own personal worldview.

Changes in elections law and voting rights have exacerbated popular anxieties. Gerrymandering has created congressional districts where a representative's constituents do not feel heard if they are not members of the same political party. *Citizens United v. Federal Election Commission* (2010) has injected millions of dollars from undisclosed donors into campaigns, exacerbating voters' sense of confusion and frustration with the political process. *Shelby County v. Holder* (2013) and state-level policy changes have dramatically restricted voting rights and access across the country. Over the last twenty years, two national elections where the candidate winning the popular vote has not prevailed in the electoral vote have undermined many Americans' regard for the Electoral College.

These same years have been accompanied by ever-greater concentrations of Executive power. The PATRIOT Act created the massive Department of Homeland Security and granted domestic law enforcement agencies and foreign intelligence agencies sweeping new powers in surveillance. Passed on September 18, 2001, the Authorization for Use of Military Force (AUMF) against those responsible for the 9/11 attacks has been repeatedly used as the legal basis for interventions all over the world and attempts to repeal it have so far failed. A May 2016 report issued by the Congressional Research Service found 37 instances of the AUMF being cited as justification for U.S. military actions taken in 14 countries including Afghanistan, Cuba (Guantanamo Bay), Djibouti, Eritrea, Ethiopia, Georgia, Iraq, Kenya, Libya, Philippines, Somalia, Syria and Yemen. In the face of congressional gridlock, President Barack Obama used executive orders to reshape federal policies on immigration, LGBTQ and workers' rights, and environmental protections. Donald Trump has used executive orders to reverse many of Obama's actions.

While the challenges in doing so may seem daunting, you have it in your power to restore the balance between the Executive and Legislative branches. The Constitution grants Congress the ability to restrain the president on issues like trade and foreign relations. Congress can exercise its oversight powers by conducting hearings that generate visibility and debate on critical policy issues. By replacing the current top-down culture that gives leadership tremendous power over the selection and term lengths of committee chairs; passing campaign finance reforms that would reduce the amount of time representatives spend on fundraising; assigning representatives to fewer committees; more widely distributing assignments to significant committees; and spending more time in D.C. and less time in home districts, congressional leaders could recreate the conditions that enabled a previous generation of lawmakers to develop

serious expertise in key areas like foreign policy. The cultivation of such depth of knowledge and the time to deploy it is essential if Congress is to reassert its power. The restoration of earmarks, abolished in 2011, may offer a way to restore incentives for representatives to compromise. Congress could begin restoring regular order by giving representatives enough time to read complex legislation, ending brinksmanship on the measures necessary to fund the federal government, and permitting debate and bipartisan amendments on legislation. Congress could increase staff compensation, thus incentivizing brilliant people to devote their energies to its work and not succumb to the lure of better-paying opportunities in this very expensive city. Congress could also rebuild the staff resources needed to conduct its affairs and fend off Executive overreach and the formidable ranks of lobbyists trying to influence public policy. Congress could reinstitute norms of passing appropriations bills on time. Congress could stop passing vague legislation and letting the Executive and the courts figure out its intent.