

**Statement of  
Deborah N. Pearlstein**

**Prepared Testimony to the  
Committee on Rules  
United States House of Representatives  
March 3, 2020**

**Hearing on  
Article I: Constitutional Perspectives on the Responsibility and  
Authority of the Legislative Branch**

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**Introduction**

Chairman McGovern, Ranking Member Cole, members of the Committee, thank you for giving me the opportunity to participate in the Committee’s important consideration of ways for Congress to reassert its constitutional authority under Article I. It is hardly a coincidence that the Constitution’s very first command provides for the allocation of “[a]ll legislative powers” to the Congress of the United States.<sup>1</sup> A central goal of the Constitution was to correct for the failings of the weak Articles of Confederation government that had gone before, creating a vigorous legislature with powers enough not only to ensure the effective functioning of our republic, but also to resist excessive assertions of power by the other branches. It was through such interbranch competition for power, through “[a]mbition [being] made to counteract ambition,” Madison famously believed, that no one branch of government would be able to assert powers that threatened the democratic nature of government or the fundamental liberty of the people.<sup>2</sup>

As I argue below, it has been decades since Congress has effectively asserted its “ambition” to guard against the staggering accretion of power in the presidency. The reasons for this are many. Part I of this testimony highlights just three. First, Congress has delegated sweeping power, not just to administrative agencies, which are constrained by rules of process

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<sup>1</sup> U.S. Const., art. I, cl. 1.

<sup>2</sup> THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

and reliance on expertise, but directly to the President, who is subject to no such general statutory limits. Second, Congress has acquiesced to broad presidential assertions of authority to act without congressional authorization, an acquiescence that has strengthened the President's claims in influential Executive Branch legal opinions and in the courts to sweeping, independent constitutional authority. Third, Congress has allowed its own vast reserves of constitutional authority to address pressing national problems to go unused, hamstrung in key respects by partisan polarization that internal congressional processes have not been designed to combat.

All of these habits are longstanding, not the fault of any one individual or political party. Yet together, they have effectively undermined one of the Constitution's most important mechanisms for constraining the exercise of executive power. In Part II, this testimony thus offers several suggestions for how Congress might begin to address each.

## **I. How Congress Has Ceded Its Constitutional Authority**

### **Delegating Power to the President Alone**

While Congress has focused significant attention in recent years on the role of federal administrative agencies, among the most significant delegations of power to the Executive Branch are found in statutes that give authority to the President alone, triggered by factual or policy determinations made solely by the President himself. A few such statutes relate to war powers directly, most famously the 2001 Authorization for Use of Military Force ("AUMF"), authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."<sup>3</sup> But the vast majority of statutes of this type

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<sup>3</sup> Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note).

address other federal policies, from trade sanctions and domestic emergencies, to economic regulation and immigration. The 1976 National Emergency Act (“NEA”),<sup>4</sup> for example, authorizes the President in his discretion to declare the existence of a national emergency, and to thereby unlock the ability to invoke any of dozens of other federal statutes applicable in such events, including statutes empowering the President to shut down communications facilities, seize property, deploy troops abroad, or restrict travel.<sup>5</sup> Under the 1977 International Emergency Economic Powers Act (“IEEPA”), the President can regulate or prohibit any foreign exchange transactions and the import or export of currencies or securities, and nullify property holdings in the United States upon a similarly discretionary declaration of emergency relating to “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>6</sup> Trade sanctions laws equally base the authority to impose sanctions on presidential determinations, for example, that any person has “knowingly engage[d] in significant activities undermining cybersecurity against any person . . . or government on behalf of [Russia].”<sup>7</sup> Even broader are various immigration provisions, including the 1952 Immigration and Nationality Act (“INA”), which affords the President discretion to exclude any aliens from the United States whenever he finds their entry would be “detrimental to the interests of the United States.”<sup>8</sup>

Such statutes unquestionably address matters of grave public significance. But in leaving their operation almost entirely to the discretion of the President alone, Congress affords the President far greater control over federal policy than it does when it delegates similar authorities

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<sup>4</sup> National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).

<sup>5</sup> See BRENNAN CENTER FOR JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE, Sept. 4, 2019, available at <https://www.brennancenter.org/analysis/emergency-powers> [hereinafter BRENNAN CENTER REPORT].

<sup>6</sup> 50 U.S.C. §§ 1701–1702 (2012).

<sup>7</sup> Countering America’s Adversaries Through Sanctions Act, Pub. L. No. 115–44 (codified at 22 U.S.C. § 9524(a)).

<sup>8</sup> 8 U.S.C. § 1182(f) (2012).

to federal agencies. In part, this is a function of statutory language itself. Such statutes generally contain scant substantive guidance that might itself cabin the President’s discretion, such as a definition or clear limiting rules about what Congress envisioned would count as a relevant “detriment,” “threat,” or “emergency.” Thus, notwithstanding the Constitution’s express grant of authority to Congress to, for example, “regulate Commerce with foreign Nations,”<sup>9</sup> it has been the President, acting under IEEPA, who has determined the shape of current U.S. economic policies toward governments or factions in North Korea, Venezuela, Iran, Iraq, Syria, Libya, Somalia, Yemen, Sudan, the Balkans, Zimbabwe, the Democratic Republic of the Congo, the Central African Republic, Burundi, Lebanon, Russia, Belarus, and Ukraine.<sup>10</sup> (Indeed, there is nothing in IEEPA that precludes a president from invoking these authorities against China, India, or any other country in the world.) Critically, unlike broad delegations to federal agencies, the President is not bound by the requirements of the Administrative Procedure Act (“APA”), which mandates, among other things, that agency policy-making follow an open, public process, with input from experts, and subjects it to meaningful judicial review to ensure decisions that are well-reasoned, supported by the facts, and in compliance with statutory requirements.<sup>11</sup> Presidents *may* decide to include such safeguards in their own decision-making, but the APA itself does not apply.<sup>12</sup>

Although many of these statutes were enacted in the 1970s as part of a wave of reform efforts designed to better constrain presidential authority – and to that end include some important checks on the President’s ability to invoke these powers, including reporting and

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<sup>9</sup> U.S. CONST., art. I, sec. 8, cl. 3.

<sup>10</sup> See Brennan Center for Justice, “Declared National Emergencies Under the National Emergencies Act,” available [https://www.brennancenter.org/sites/default/files/analysis/DeclaredNationalEmergenciesUndertheNationalEmergenciesAct\\_2.14.19.pdf](https://www.brennancenter.org/sites/default/files/analysis/DeclaredNationalEmergenciesUndertheNationalEmergenciesAct_2.14.19.pdf).

<sup>11</sup> See 5 U.S.C. §551 *et seq.*

<sup>12</sup> *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (“As the APA does not expressly allow review of the President’s actions, we must presume that his actions are not subject to its requirements.”).

consultation requirements with Congress – one of the most significant such checks has been disabled from functioning since 1983. The NEA, for example, requires Congress to consider voting to end any declared emergency every six months, a theoretically significant requirement designed to preclude emergencies (and associated exceptional powers) from dragging on indefinitely, as many have.<sup>13</sup> As originally designed, the Act would allow Congress to terminate any presidential emergency by concurrent resolution, that is, by a vote requiring a majority of both houses of Congress, but not the signature of the President.<sup>14</sup> But in 1983, within a decade of the Act’s passage, the Supreme Court ruled in *INS v. Chadha* that a legislative veto of executive action was a form of legislation, and so required passage in both houses and presentation to the President.<sup>15</sup> Under this rule, because the President retains the veto power, even a majority vote in both Houses of Congress would be insufficient to overcome presidential initiative. Put differently, current law requires the stroke of a presidential pen to declare an emergency, but a supermajority of Congress to end one. Statutes that depended upon the effectiveness of concurrent resolutions to limit the scope of power delegated to the President today require reinforcement to function even as originally intended.

### **Congress Acquiesced to Non-Delegated Assertions of Presidential Power**

Even when Congress has not expressly delegated power to the President, presidential practice standing alone can have a pivotal effect on how the courts, and often more practically significant, how Executive Branch legal counsel, interpret the scope of presidential power under the Constitution. The Supreme Court and the Justice Department Office of Legal Counsel

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<sup>13</sup> See BRENNAN CENTER REPORT, *supra* note 5.

<sup>14</sup> See also War Powers Resolution, H.R. REP. NO. 93-1305 (1974).

<sup>15</sup> *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

(“OLC”) have both long relied on presidential practice to illuminate the meaning of the largely spare provisions of the Constitution’s Article II.<sup>16</sup> As Justice Frankfurter explained in grappling with whether President Truman had the power to seize and operate privately owned steel mills in the United States, “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, ... may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”<sup>17</sup> This basic formula – presidential practice, coupled with congressional acquiescence – has since come to support a vast range of constitutional powers in the presidency, powers otherwise unspecified in the Constitution. The “gloss” of presidential practice today justifies the President’s power to conclude agreements with foreign countries without Senate approval or other congressional engagement,<sup>18</sup> and his power unilaterally to use force abroad.<sup>19</sup> Practice – with congressional acquiescence – has likewise proven central to constitutional interpretations of the scope of the President’s pardon power and his ability to invoke executive privilege.<sup>20</sup>

At the same time, Congress’s non-acquiescence – either through subsequent legislation or other express condemnation – can change the constitutional calculus substantially. As the

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<sup>16</sup> See, e.g., Bradley and Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417-24 (2012) (canvassing examples of cases relying on executive practice).

<sup>17</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring); see also *id.*, at 635 (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”); see also, e.g., Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel to the Att’y Gen., Authority to Use Military Force in Libya 7, 14 (Apr. 1, 2011) (“historical practice is an important indication of constitutional meaning, because it reflects the two political branches’ practical understanding, developed since the founding of the Republic, of their respective roles and responsibilities with respect to national defense.”) [hereinafter 2011 OLC Memo].

<sup>18</sup> See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (while “[p]ast practice does not, by itself, create power, ... ‘long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent...’”).

<sup>19</sup> 2011 OLC Memo, *supra* note 17, at 8 (arguing that, with respect to the “limited” presidential use of force abroad, the “pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, ‘evidences the existence of broad constitutional power’”).

<sup>20</sup> See, e.g., *Ex parte Grossman*, 267 U.S. 87, 118-19 (1925) (on the scope of the pardon power); JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW* 10-19 (2007) (on the scope of executive privilege).

Supreme Court has long recognized: “Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress.”<sup>21</sup> While the President’s power is at its constitutional maximum when he acts pursuant to express congressional authorization, and constitutionally plausible in the face of congressional silence or acquiescence, presidential power is “at its lowest ebb” when the President takes steps “incompatible with the expressed or implied will of Congress.”<sup>22</sup> Indeed, it is because of just such non-acquiescence to presidential initiatives that Congress has thus far managed to preserve its most fundamental Article I powers, from appropriating and imposing conditions on the expenditure of funds,<sup>23</sup> to making rules for the government and regulation of the armed forces.<sup>24</sup>

But not every presidential initiative is as visible or as readily legislated against as the executive actions that gave rise to the enactment of the Anti-Deficiency Act or the Impoundment Control Act, just cited. Indeed, some of the most consequential understandings of the President’s constitutional power may be found in Executive Branch legal opinions from offices like the OLC, which produces public (and non-public) opinions addressing issues from war powers to executive privilege that are rarely if ever tested in federal court. For this reason, Congress must explore ways to engage with Executive Branch legal opinions – making public statements of disagreement where warranted – in order to assert its power of non-acquiescence effectively.

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<sup>21</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

<sup>22</sup> *Id.*, at 637-638.

<sup>23</sup> *See, e.g.*, U.S. CONST., art. I, sec. 9 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”); *see also* Anti-Deficiency Act, 31 U.S.C. § 1341 (government may not “make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation”); Impoundment Control Act, 2 U.S.C. § 684 (restricting Executive’s ability to refused to release congressionally appropriated funds).

<sup>24</sup> *See* U.S. CONST., art. I, sec. 8; *see also, e.g.*, Military Commissions Act of 2009, H.R. REP. NO. 2647 (providing rules for the conduct of trials by military commission); War Powers Resolution of 1974, H.R. REP. NO. 93-1305, §4 (requiring the submission of War Powers Reports to Congress for any introduction of U.S. forces into hostilities).



## Congress Sacrificed Legislative Power to Partisanship

Perhaps no greater threat has emerged to the maintenance of Congress's constitutional authority in recent years than the stark partisan polarization that has compromised Congress's ability to exercise its most basic power: enacting legislation to address pressing matters of public concern. While Madison may fairly be faulted for having failed to anticipate the significance of political party affiliation in the willingness of one branch of government to check the overreaching of another,<sup>25</sup> partisan polarization worsened dramatically beginning in the 1970s.<sup>26</sup> As political scientists have extensively demonstrated, differences between Republican and Democratic voting records reveal a Congress significantly more polarized today than at any time since before World War I.<sup>27</sup> Attributable largely to the decline in the number of moderate members of political parties, the effects of this polarization are apparent: a significant decrease in congressional productivity (measured by, among other indicators, number of bills passed), and a corresponding decline in Congress's power compared to that of other branches.<sup>28</sup> Put differently, Congress's failure to address major national problems has led presidents to step into the breach.

Consider, for example, national policy on immigration. Informed by the findings of the bipartisan Commission on Immigration Reform, and introduced by bipartisan members of both chambers, the last significant piece of comprehensive immigration legislation passed Congress in 1986.<sup>29</sup> Since then, Congress has established just one other bipartisan commission of experts on

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<sup>25</sup> Levinson & Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

<sup>26</sup> See, e.g., NOLAN MCCARTY, *POLARIZATION* (2019).

<sup>27</sup> See, e.g., *id.*, at 25.

<sup>28</sup> See, e.g., Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in *SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* 15, 42 (Nathaniel Persily ed., 2015); Carmines & Folwer, *The Temptation of Executive Authority*, 24 IND. J. GLOBAL LEGAL STUD. 369 (2017).

<sup>29</sup> Michael Barber and Nolan McCarty, *Causes and Consequences of Polarization*, in *NEGOTIATING AGREEMENT IN POLITICS: TASK FORCE REPORT OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION* 39 (Mansbridge & Martin, eds. 2013) (citing The Immigration Reform and Control Act, Pub. L. No. 99-603 (1986)).

immigration to examine the problems independently, and based on research and analysis, develop recommendations for reform.<sup>30</sup> While there have been multiple efforts to enact immigration reform legislation since then, including significant bills in 2005, 2006, 2010, and 2013 that garnered bipartisan sponsorship, the bills ultimately foundered in the face of objections from non-moderates in either the House or Senate chamber.<sup>31</sup>

Yet despite Congress's relative inaction on immigration, the result of this gridlock has not meant immigration issues have gone entirely unaddressed. Rather, presidents throughout this era have taken significant steps to address immigration issues through executive action alone, including, among others, the Obama Administration's Deferred Action on Childhood Arrivals program, and the Trump Administration's series of executive orders restricting the entry of nationals from certain countries.<sup>32</sup> Beyond generating multiple challenges in the federal courts, such programs have generated renewed debate about the growing sweep of executive authority. The absence of comprehensive reform has, likewise, ensured that immigration remains a vigorous subject of public division and debate.

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<sup>30</sup> The Jordan Commission was established in 1990 and concluded its work by 1997. Commission on Legal Immigration Reform, P.L. 101-649, 104 Stat. 5001, November 29, 1990.

<sup>31</sup> *See id.*, at 39-40, *see also* Carmines & Folwer, *supra* note 28 (describing various legislative initiatives).

<sup>32</sup> *See, e.g.*, Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977 (2017) (blocking the entry of nationals from certain foreign countries into the United States); Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to León Rodriguez, Director for U.S. Citizenship and Immigration Services, et al. (June 15, 2012), available at [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) (announcing Deferred Action for Childhood Arrivals policy).

## **II. Recommendations for Reclaiming Power**

The range of problems just outlined will require an equally broad range of remedies to correct, many of which must be tailored to specific statutory schemes. For present purposes, it is perhaps most helpful to identify several categories of reform that may aid in addressing each of the causes for the decline in congressional power discussed.

First, Congress should narrow the scope of power delegated to the President through generalized statutory authorities like the AUMF, NEA, INA, and IEEPA. Narrowed delegations can be accomplished in part by including definitions of terms to guide the exercise of discretion around broad concepts like “detriment,” “threat,” or “emergency.” But even without such specifications, Congress has the authority to include a wide range of restrictions on the exercise of any such authority, including requiring the President to consult with Congress or with relevant experts inside the Executive Branch before acting; requiring relevant Executive Branch officials to certify or demonstrate that statutory requirements are met; requiring the President to report to Congress regularly, to compile and submit a factual record supporting the determination to invoke the statute, to publish relevant findings in the Federal Register or through executive order or proclamation; or by imposing automatic termination or sunset restrictions. While some of the statutes above have some of these features, most have only a few. More, the pre-*Chadha* statutes (including the NEA and the War Powers Resolution) tended to rely heavily on the availability of concurrent resolutions to override Executive actions. For those statutes, automatic termination or sunset requirements are essential to correct the dilemma highlighted above – namely, the President’s ability to invoke delegated power with the stroke of a pen, and Congress’s inability to terminate those authorities in the absence of a supermajority of Congress.

Second, given the importance that both the courts and Executive Branch lawyers place on presidential practice in interpreting the scope of the President’s constitutional authority, Congress should develop a mechanism for regularly reviewing Executive Branch assertions of constitutional authority, and formally expressing its disagreement when the President asserts a form of authority that Congress believes extends beyond that the Constitution permits. Congress of course has multiple formal mechanisms for expressing non-acquiescence with Executive Branch actions as it stands, from impeachment and censure to the (more common) enactment of contrary legislation. But Congress lacks a legislative version of the OLC, that is, of an office that could review and monitor executive assertions of power, and produce public, constitutional opinions about the scope of constitutional authority properly available to the President. Such statements would be no more binding on the constitutional judgment of the federal courts than OLC opinions are today.<sup>33</sup> But they would provide a critical counterweight to claims that Congress has acquiesced to more the exercise of more presidential power than it really has.

Third, while the problem of partisan polarization has been driven by a variety of causes, some likely beyond the ability of Congress alone to address, Congress can certainly take steps to foster, rather than inhibit, bipartisan engagement among its own members, and to strengthen the prospect that *legislative*, rather than partisan, ambition might be made to counteract claims of the Executive Branch. Consider, for example, the use of congressional advisory commissions such as those in the immigration example mentioned above. Such commissions not only provide a forum for bipartisan engagement, they generate a source of independent, expert advice that enables Congress to develop its own understandings of policy needs without exclusive reliance

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<sup>33</sup> See *Comm. on Judiciary v. McGahn*, No. 19-CV-2379 (KBJ), 2019 WL 6312011 (D.D.C. Nov. 25, 2019) (noting that the “longevity” of views of executive power contained in OLC opinions “alone does not transform an unsupported notion into law”).

on analysis generated by the Executive Branch.<sup>34</sup> Likewise, congressional agencies, like the now-abandoned Office of Technology Assessment (“OTA”), provided a similar source of non-partisan expert policy advice that was not only capable of helping educate congressional Members, but critically available to provide a check against the judgments of Executive Branch agencies alone. If configured to produce guidance in a form and on a timescale that meets lawmakers’ needs, OTA-type agencies can help serve as an independent source of expert staff on which Members can draw – instead of pulling temporary experts from the Executive Branch – that further Congress’s ability to check Executive Branch positions.

Finally, opportunities for bipartisan interaction need not only arise through formal commissions or agencies. Bipartisan lunches, Committee hearings that allow time for dialogue among Members as well as with witnesses, informal opportunities for conversation outside party-based organizations – such modest changes can be essential first steps in helping Congress move away from its current position as an institution gripped by partisan paralysis, and toward one capable of counteracting the power of the President with constitutional ambition of its own.

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<sup>34</sup> See CONG. RESEARCH SERV., CONGRESSIONAL COMMISSIONS: OVERVIEW AND CONSIDERATIONS FOR CONGRESS (2019), <https://fas.org/sgp/crs/misc/R40076.pdf>.