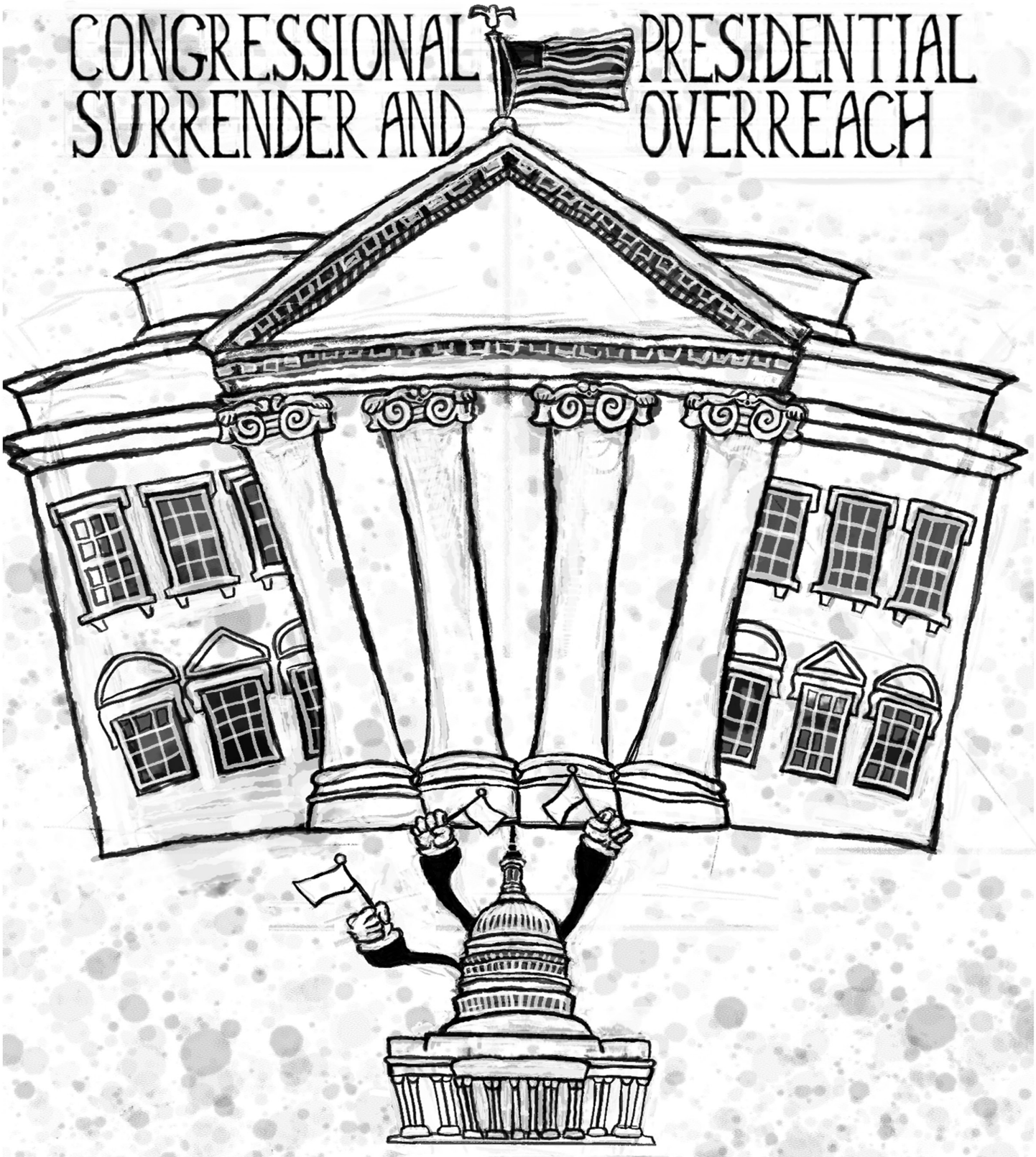
CONGRESSIONAL SURRENDER AND PRESIDENTIAL OVERREACH



BY BRUCE FEIN

Center for Study of Responsive Law

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CENTER FOR STUDY OF RESPONSIVE LAW
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PREFACE

by Congressman Jamie Raskin

Contrary to what most high school Social Studies teachers impart to their students, we do not have in our constitutional system "three co-equal branches of government." Even if "co-equal" were a word one could utter without smiling (what value is added to the word "equal" by inserting the redundant prefix?), the history, structure and language of our Constitution cannot support the essential thesis, which always reminds me of a soccer team where all of the kids get a trophy for being the Most Valuable Player.

The American Revolution and our Constitution overthrew monarchy and hereditary rule, titles of nobility, theocracy and established churches—all the vestiges of monarchical feudalism, with the central exception, of course, of slavery and white supremacy. But the basic governmental transformation consisted of replacing a King, his court, his established church and his dynastic power and hegemony with elective rule by "We, the People" and our representatives in the House and the Senate. Our muscular Preamble to the Constitution setting forth all the purposes of the national project is followed immediately by the words in Article I: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I lays out in impressive detail all of the vast powers of Congress: from federal taxation and borrowing and spending to regulation of commerce among the states and with foreign nations to coining money and establishing a post office and postal roads to establishing federal courts to raising armies and maintaining a navy to declaring war and calling forth the Militia to suppress insurrections and, then indeed, to making all additional laws "necessary and proper" for carrying into execution all the other powers.

Article II for the Executive branch is nothing like this. The Articles of Confederation created no presidency at all; the position was added in Article II of the Constitution for purposes of improving the efficiency and energy of administration of the laws adopted by Congress. It is true that the President is Commander in Chief of the Army and Navy of the United States and nominates judges and executive branch officers—subject to the advice and consent of the Senate, but his or her central job is to "take Care that the Laws be faithfully executed." Article II is relatively short and compressed, and much of its substance deals with the mechanics of the Electoral College, the qualifications for office, the rules of succession in case of removal, compensation and the requirement of an Oath administered to "preserve,

protect and defend the Constitution of the United States." One of the four Sections in Article II takes pain to specify that the President (and other Executive branch officers) "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Congress has the power to impeach, try and convict the president, who has no corresponding power to impeach the Congress (no matter what Donald Trump thinks about that).

I do not need to belabor the point. As James Madison put it in the Federalist Papers, "In republican government, the legislative authority necessarily predominates." That is the structure, the function and the true spirit of our Constitution.

And yet the American people have grown conditioned to the recurring power grabs of an imperial presidency with boundless ambition and global reach, the insatiable demands of a military-industrial complex, the extralegal projects of an often lawless national security state and, most recently, the shocking dictates and corrupt conduct of an activist imperial judiciary hellbent on thwarting the democratic rights of the people.

The noted constitutional attorney Bruce Fein's trenchant and bracing analysis of our predicament—a polemic, in the best sense of the word—tells us how the Executive branch specifically has grown ravenous at the expense of Congressional power and leadership. Fein's vision is sweeping. It takes in presidential abuses of the Congressional power of the purse and growing contempt for Congressional oversight power. But he is most forceful and compelling when he examines runaway presidential usurpation of Congressional war powers.

The erosion of Congressional control over matters of war and peace reflects complex political dynamics and is, in no way, the simple story of a one-sided abusive relationship. Congress has been complicit in multiple presidential war power grabs and has far too often unilaterally surrendered its proper powers to the Executive. This can be chalked up to a lot of factors, not least of which is plain old political cowardice. By allowing the President to essentially declare, initiate and wage our wars, Members of Congress can have their cake and eat it too, taking credit for military successes and popular interventions when the spirit moves and blaming the President for failures or when anything goes wrong. But it is a short-sighted and dangerous abdication of institutional power and constitutional role. Like Lord Acton, our Framers knew that power corrupts, absolute power corrupts absolutely and incorrigible and maniacal absolute power in the Executive corrupts dangerously. As I said at Donald Trump's second impeachment trial, Donald Trump may not know a lot about the Founders, but the Founders knew a lot about him.

There is fundamental wisdom in the Framers' insistent allocation of war powers, spending powers and so much else to the representatives of the people in Congress. We have no Kings or Queens here, no nobles and no serfs, no czars and no slaves—just citizens pursuing democracy and happiness the best we can, a people ideally seeking to protect their rights under the clear blue sky and within the boundaries and powers fixed by the Constitution. Our Constitution is not perfect—rather, it calls upon us to seek a "more perfect Union"—but the proper way to amend it is by the people acting through the constitutional structure itself, not by bureaucratic and presidential actors simply usurping powers never allocated to them.

A natural-born political conservative and old-fashioned intellectual liberal for freedom, Bruce Fein has done America a patriotic favor by shining a light on how twisted and upside-down our institutional arrangements have grown, by illuminating how far we have strayed from the clarity of purpose embodied in the original and historically unfolding constitutional design. He has given us a powerful searchlight to study our current condition but also a working road map to find our way back home. We would be wise to take up his tools and use them.

The Ranking Democrat on the House Committee on Oversight and Accountability, JAMIE RASKIN led the House Managers in the second impeachment trial of Donald Trump for inciting violent insurrection against the Union, a trial that ended with a 57-43 bipartisan vote to convict (ten votes shy of the two-thirds required for conviction and removal). He was also a Member of the House Select Committee to Investigate the January 6 Attack on the United States Capitol. A former professor of constitutional law at American University's Washington College of Law, Raskin is the author of several books, including the *Washington Post* bestseller *Overruling Democracy: The Supreme Court versus the American People* and *Unthinkable: Trauma, Truth and the Trials of American Democracy*, a #1 *New York Times* bestseller.

INTRODUCTION

CONGRESSIONAL UNILATERAL SURRENDER TO AN EXTRACONSTITUTIONAL LIMITLESS EXECUTIVE

by Bruce Fein*

This booklet is specifically intended for members of Congress and staff and more generally for the public saddled with a duty to ensure its elected officials honor their oaths to support and defend the Constitution without mental reservation. President Grover Cleveland's First Inaugural Address amplified:

> "Your every voter, as surely as your Chief Magistrate, under the same high sanction, though in a different sphere, exercises a public trust. Nor is this all. Every citizen owes to the country a vigilant watch and close scrutiny of its public servants and a fair and reasonable estimate of their fidelity and usefulness. Thus is the people's will impressed upon the whole framework of our civil polity--municipal, State, and Federal; and this is the price of our liberty and the inspiration of our faith in the Republic."

This booklet was born from my own experiences on Capitol Hill beginning in 1969, including more than 200 appearances as a witness in congressional hearings. At that time, compared to the present, members of Congress were seasoned giants, staff were credentialed professionals with institutional memories. Congress largely held its own and more in battles with the executive branch. House Ways and Means Committee Chairman Wilbur Mills (D-AR) was a formidable legend. Judges Clement Haynsworth and G. Harold Carswell were defeated as Supreme Court nominees. The Senate Watergate Committee and the House Judiciary Committee forced the resignation of President Richard Nixon over the Watergate scandal and President Nixon's defiance of congressional subpoenas. Senator Mike Gravel (D-AK), protected by the Constitution's Speech or Debate Clause, read the classified Pentagon Papers showing chronic government deceit over the Vietnam War into the Congressional Record. The Church Committee exposed industrial scale constitutional lawlessness in the intelligence community. Congress initiated and persuaded the president to sign landmark consumer, environmental, and Freedom of Information Act laws.

I have personally witnessed the shriveling of Congress to a constitutional ink blot over the past 54 years caused largely by an epidemic of constitutional illiteracy and loss of institutional

memory. Meanwhile, the executive branch has mushroomed, treading like a colossus over the legislative and judicial branches. Pause over President Donald Trump's monarch-like boast on July 23, 2019: "Then I have Article 2, where I have the right to do anything I want as president."

Chronic, stupendous executive branch blunders, undeclared wars, and unconstitutional usurpations have yet to awaken Congress to the severity of its diminishment and the urgency of charting a path back to regular constitutional observance featuring separation of powers and checks and balances. This booklet hopes to be the first step in that long journey. One giant second step would be the establishment of a congressional university devoted to constitutional education of members and staff, about which more anon.

* * *

The United States Constitution endows Congress, not the executive branch, with overriding responsibility for both foreign and domestic policy. Congress has unilaterally surrendered its constitutional primacy to the presidency on the installment plan for more than a century.

The Constitution, of course, was not written in stone. Its authors recognized their own fallibility. They provided for constitutional amendments in Article V to correct errors or miscalculations. But Congress has not proposed constitutional amendments to hand over its responsibilities to the executive branch and accept accountability for their handiwork. Instead, it has unconstitutionally crowned the president with limitless power undreamed of by British King George III by industrial scale abdications. Members have escaped responsibility for their lawlessness by an uninformed and somnolent media and citizenry. I would hazard that if put to a vote in Congress and state legislatures as prescribed by Article V, the vast powers that Congress has surrendered to the White House would never have been approved.

Article I, section 1 of the United States Constitution provides, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article I, section 8 enumerates 17 powers of Congress in 17 discrete clauses. Those powers are supplemented by clause 18, the Necessary and Proper Clause, which endows Congress with authority, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Office thereof." Chief Justice John Marshall elaborated in *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."

The Constitution contemplates Congress as *primus inter pares* among the three branches of government, not a caboose with the president as a locomotive. Indeed, presidential authorities are sharply limited in Article II. The president appoints principal officers of the United States conditioned on the advice and consent of the Senate. The president possesses a qualified veto over legislation, subject to an override by two-thirds majorities in the House and Senate. The

president concludes treaties subject to ratification by a two-thirds Senate majority. The president also receives ambassadors, may pardon federal offenses, takes care that the laws be faithfully executed, and serves as commander in chief of the armed forces. As to the latter, Alexander Hamilton explained its insignificance in Federalist 69:

> "The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.[1] The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy. But the constitutions of several of the States expressly declare their governors to be commanders-in-chief, as well of the army as navy; and it may well be a question, whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a President of the United States."

The Constitution prefers Congress as an institution over the executive for multiple reasons. It is transparent while the executive is secretive. Transparency deters abuse or arbitrariness and corrects error. Secrecy promotes lawlessness and prevents the correction or avoidance of blunders. Louis D. Brandies, later appointed to the Supreme Court, observed in a 1913 *Harper's Weekly* article "What Publicity Can Do," that, "Sunshine is said to be the best of disinfectants; the electric lamp the most efficient policeman."

Further, Congress must reconcile a wide variety of viewpoints and perspectives to reach a consensus—which pushes it towards an Aristotelian mean. The executive, in contrast, typically entertains but one view—the president's—and all others are publicly suppressed to create the appearance of presidential infallibility. Undersecretary of State George Ball's chronic internal critiques of the Vietnam War during the Johnson administration were never voiced publicly. The consequences of executive secrecy are chronic, catastrophic, misjudgments or misadventures. Think of Iran in 1953, Guatemala in 1954, Cuba in 1961, the Vietnam War, the 2003 war of aggression against Iraq, Black Hawk down in Somalia, the Libya invasion of 2011, and the $2 trillion squandered during a 20-year war in Afghanistan, among many other examples.

Moreover, the executive branch prefers action, no matter how ill-advised, over masterly inactivity to create an appearance that the president has things under control. The idea of a cure being worse than the disease is unimaginable. Congress, in contrast, when properly functioning, is more deliberative and measured, traits necessary to assemble a majority consensus. Congress deliberated 17 days before declaring war on Great Britain in 1812. The Gulf of Tonkin Resolution

ushering in the Vietnam War debacle commanded less than nine hours of congressional debate after Congress had shrunk from a constitutional elephant to a flea and congressional leadership turned rank-and-file members into movie extras.

The counterrevolution against the Constitution to elevate the presidency to a monarchy was born to create an American Empire (initially under the banner of "Manifest Destiny") to replace the American Republic ordained by the Constitution's makers. The glory of the Republic was liberty, the opportunity to march to your own drummer. The glory of Empire is the armored knight and raw power for the sake of power racing abroad in search of monsters to destroy. An Empire requires a Caesar featuring secrecy, energy, and unity of command, a "decider" in the words of President George W. Bush. The deliberation, debate, caution, transparency, and compromises that earmark a robust Congress have no role.

According to author Niall Ferguson, "Much of what we call history consists of the deeds of the 50 to 70 empires that once ruled multiple peoples across large chunks of the globe." All have crumbled like the Roman Colosseum from self-ruination. The American version is crumbling. It can be reversed only if Congress restores liberty and justice as the mainstays of our constitutional dispensation by walking back its spineless abdications. The Dark Ages of unilateral congressional surrender must end.

Signs of the impending collapse of the American Empire include perpetual unconstitutional presidential wars. According to Brown University's Cost of War Project, the United States expended more than $300 million per day for 20 successive years on a fool's errand in Afghanistan that returned a second edition of the Taliban more tyrannical than the first. Aggregate expenditures on unconstitutional presidential wars since 9/11 approximate a stunning $8 trillion.

The United States currently spends $1.5 trillion annually on national security that swallows the lion's share of all discretionary expenditures. That sum includes a defense budget of $860 billion, an intelligence community budget of $100 billion, a veteran's affairs budget of $300 billion, an energy department budget of $5 billion for nuclear weapons upgrades, and, hundreds of billions in interest on the portion of the national debt incurred in fighting wars.

We sport military bases or special forces in most of the countries in the world. In 1981, the national debt was $1 trillion. It now exceeds $31 trillion and is climbing. Trillion-dollar annual budget deficits are the norm. Inflation and interest rates are jumping. Academic achievement and civic literacy are plunging.

Our national genius has migrated from production answering consumer wants to proficiency in killing for a warfare state. The surveillance state has annihilated individual privacy, the most cherished right among civilized people. Secret government veiled by extra-constitutional claims of state secrets or executive privilege has displaced transparency. Legislation has been eclipsed by executive orders and agency rules. Treaties have been displaced by executive agreements. Due process and separation of powers—arguably the greatest ideas in the history of civilization, are trampled. The president, for instance, plays prosecutor, judge, jury, and executioner to kill any person on the planet based on unsubstantiated speculation that the victims might threaten national security—the very definition of tyranny according to James Madison in *Federalist 47*.

As elaborated in this study, the Constitution clearly empowers Congress to redress the multiple constitutional excrescences of the president that are leading the nation over a cliff. All that has been lacking in Congress has been constitutional education and political will.

Members of Congress are saddled with but one constitutional oath: to "support" the Constitution as prescribed in Article VI. They are under no other constitutional obligation. Loyalty to the Democratic or Republican parties are subordinate. A member of Congress who idles in the face of institutionalized, extra-constitutional, limitless executive power violates his or her oath of office and invites the odium of the living and those yet to be born.

The need for congressional education is underscored by former North Carolina Congressman David Price's book *The Congressional Experience.* The Democratic Congressman served 17 terms, from 1987-2021. He served in Democratic leadership posts, including Chairman of a Subcommittee of the House Appropriations Committee. Mr. Price was a professor of political science at Duke University, and student of government. In 1975, he published *The Commerce Committees: A Study of the House and Senate Commerce Committees.* He served in Congress while its powers were daily diminished or hijacked by the executive branch in plain view. Yet his book barely glances at this staggering attack on the Constitution's separation of powers and congressional prerogatives. His anemic protests are as fleeting as Rosencrantz and Guildenstern in *Hamlet.* But at least Congressman Price flagged the issue. His colleagues with rare exceptions have been quiet as a mouse—even when confronted with the alarming pronouncement of Secretary of Treasury Henry Paulson during the 2008 financial crisis earmarked by the $700 billion Troubled Asset Relief Program (TARP): "Even if you don't have the authorities—frankly I didn't have authority for anything—if you take charge people will follow." (*Washington Post,* November 19, 2008, "A Skeptical Outsider Becomes Bush's 'Wartime General.'")

I.

RECLAIMING THE WAR POWER

Article I, section 8, clause 11 of the Constitution endows Congress with exclusive power to "declare War," leaving the executive with authority to respond to sudden attacks which had already broken the peace. In other words, only Congress can fully take the nation from peace to war.

That was a universal understanding. Not even Alexander Hamilton, the most vocal champion of a strong executive, disagreed with that fundamental principle.

As President George Washington instructed, "The Constitution vests the power of declaring War with Congress; therefore, no offensive expedition of importance can be undertaken until they have deliberated upon the subject, and authorized such a measure."

James Wilson, delegate to the constitutional convention and future Justice of the United States Supreme Court, offered this fundamental point, "This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large." James Madison, father of the Constitution, elaborated in *Helvidius* No. 4:

> "In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department . . . [T]he trust and the temptation would be too great for any one man . . . War is in fact the true nurse of executive aggrandizement . . . The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace."

President Thomas Jefferson, in his First Annual Message to Congress in response to a declaration of war against the United States by the Bey of Tripoli, explained that offensive action beyond the line of defense requires congressional authority:

> "Unauthorized by the constitution, without the sanction of Congress, to go beyond the line of defense, the [Tripolitan cruiser] being disabled from committing further hostilities, was liberated with its crew [ending self-defense as a justification for force]. The legislature will doubtless consider whether, by authorizing measures of offense, also, they will place our forces on an equal footing with that of its adversaries."

In response, Congress passed the "Act for Protection of Commerce and Seamen of the United States against the Tripolitan Corsairs" in 1802. This authorized an expanded force to "subdue, seize and make prize of all vessels, goods and effects, belonging to the Bey of Tripoli, or to his subjects."

President James Madison obtained a congressional declaration of war to fight the War of 1812 against the British. President James K. Polk similarly secured a congressional declaration of war to fight the 1846-1848 Mexican-American War (although predicated on a presidential falsehood that an American soldier had been killed by a Mexican counterpart on American soil). Then-Congressman Abraham Lincoln elaborated in an 1848 letter to his law partner William Henry Herndon his opposition to the Mexican-American War triggered by presidential deceit:

> "The provision of the Constitution giving the war-making powers to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our [Constitutional] Convention understood to be the most oppressive of all Kingly oppressions and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us."

The Constitution's text confirms the primacy of Congress over the president in national security and foreign policy:

> *"The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States."*
> *—U.S. Constitution, Article I, section 8, clause 1*

> *"The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;*
> *"To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;*
> *"To provide and maintain a Navy;*
> *"To make Rules for the Government and Regulation of the land and naval Forces;*
> *"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;*
> *"To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"*
> *—U.S. Constitution, Article I, section 8, clauses 11–16*

Congressional power over foreign commerce conferred by Article I, section 8, clause 3, fortifies congressional predominance in international relations. The United States Supreme Court acknowledged the exclusive war power of Congress in *Little v. Barreme,* 6 U.S. 170 (1804).

Alexander Hamilton explained in *Federalist 75* that the president would be an untrustworthy steward of the treaty power if unchecked by the Senate. Hamilton explained that the president would be tempted to betray the nation for personal aggrandizement. He may have had in mind the Treaty of Dover of 1670 in which British King Charles II agreed to join France in a war against the Dutch in exchange for a 300,000-pound annual subsidy from King Louis XIV to free Charles II from a dependence on Parliament.

Congress was made the sole steward of the war power not because members were more virtuous or patriotic than the president, but because they have no motive to race abroad in search of monsters to destroy. War tends to diminish Congress to a rubber stamp. Then-Congressman Abraham Lincoln's 1847 "Spot Resolutions" demanding that President James K. Polk identify the spot on American soil where an American soldier was professedly killed by a Mexican soldier to justify the Mexican-American War never passed Congress. In contrast, war expands presidential power by orders of magnitude. As Marcus Cicero noted, "In times of war the law falls silent."

As the Constitution's authors anticipated, Congress has declared war in but five conflicts in more than two centuries. In each case, Congress acted only after foreign aggression had already broken the peace (the War of 1812, World War II), or after the president through deceit had duped Congress and the American people into believing that foreign aggression had occurred (the Mexican-American War, the Spanish-American War, and World War I).

James Madison amplified on the multiple evils of war in *Political Observations,* April 20, 1795:

> "Of all the enemies to public liberty war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies; from these proceed debts and taxes; and armies, and debts, and taxes are the known instruments for bringing the many under the domination of the few. In war, too, the discretionary power of the Executive is extended; its influence in dealing out offices, honors, and emoluments is multiplied; and all the means of seducing the minds, are added to those of subduing the force, of the people. . . . [There is also an] inequality of fortunes, and the opportunities of fraud, growing out of a state of war, and . . . degeneracy of manners and of morals. . . . No nation could preserve its freedom in the midst of continual warfare."

At the constitutional convention, Mr. Madison presciently warned:

> "A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence against foreign danger have been always the instruments of tyranny at home."

The Philippine-American War (1899-1902), coming on the heels of the Spanish-American War, featured United States forces engaged in waterboarding, torture, and mass extermination. General Jacob H. Smith enjoined his main subordinate Marine Major Littleton W.T. Walker:

> "I want no prisoners. I wish you to kill and burn; the more you kill and burn the better it will please me. . . . I want all persons killed who are capable of bearing arms in actual hostilities against the United States . . . Kill everyone over ten."

The Spanish-American War itself was born of a false hysteria that Spain was responsible for a mine that allegedly exploded the USS Maine in Havana harbor. Media mogul William Randolph Hearst famously exhorted illustrator Frederick Remington then in Cuba, "You furnish the pictures, I'll furnish the war." A 1976 study commissioned by Admiral Hyman Rickover found that an internal fire likely caused the destruction of the navy vessel.

World War I ushered in massive violations of free speech and *de facto* censorship, including the Committee on Public Information, a propaganda arm of President Woodrow Wilson headed by George Creel. Among other things, labor leader Eugene Debs was sentenced to eight years in prison for peacefully protesting United States participation in World War I.

World War II witnessed President Franklin D. Roosevelt's odious concentration camps for 120,000 innocent Japanese Americans. The Civil Liberties Act of 1988 declared:

> "The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation."

Although apologies had been forthcoming previously by Congress and several presidents, the Supreme Court had constitutionally blessed the racist internment camps in *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944). The two defendants were belatedly vindicated through writs of *coram nobis* in the 1980s after information surfaced revealing that the Department of Justice had falsely represented that military necessity as opposed to placating anti-Japanese prejudice had motivated the race-based internments.

(*Hirabayashi v. United States*, 828 F. 2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).) It took the Supreme Court *seventy-four years* to acknowledge the error of *Korematsu* in *Trump v. Hawaii*, 585 U.S. ___(2018). Chief Justice John Roberts emphasized the precedent "was gravely wrong the day it was decided." And the Court left *Hirabayashi* undisturbed. We cannot expect our deliverance from limitless executive power to come from the judicial branch.

Napalm Girl, Phan Thi Kim Phuc, running down a road naked near Tang Bang and the My Lai massacre in Vietnam symbolized the grisly atrocities that war begets. Indeed, the history of warfare proves the truth of Union General William Tecumseh Sherman's sober reflection: "War is hell." That is why the Constitution's authors empowered Congress alone (which institutionally profits nothing from war), earmarked by public hearings and varied voices, to decide whether to cast the nation into the abyss of war. They knew the war power in the presidency would be the death knell of the Republic.

The United States, nevertheless, without debate, embraced permanent, extra-constitutional presidential wars after 9/11. The attacks were provoked by our gratuitous projection of military force in the Middle East, especially in Saudi Arabia where United States troops lingered after the 1991 Gulf War against Iraq's Saddam Hussein near the two holiest places in Islam—Mecca and Medina.

President George W. Bush unconstitutionally declared war against international terrorism with the political acquiescence of Congress in the 2001 Authorization for Use of Military Force. To be clear, the Declare War Clause cannot be constitutionally delegated by Congress to the president without defeating its purpose: denying the president the war power because of the temptation to concoct excuses for belligerency to aggrandize the chief executive, for example, Saddam Hussein's phantom weapons of mass destruction to justify President Bush's 2003 war of aggression against Iraq. Even line-item veto power cannot be delegated to the President, according to the Supreme Court in *Clinton v. New York*, 542 U.S. 417 (1988).

Terrorism is a tactic that cannot be forced to surrender, in contrast to a nation, a non-state actor, or an individual. After 9/11, liberty was sacrificed on a bogus cross of national security.

Limitless, warrantless, dragnet surveillance of the entire American population ensued eviscerating the constitutional right of privacy. All digital communications are fair game for the ballooning National Security Agency (NSA), which now hosts an estimated 40,000 employees. Former NSA Director Michael Hayden has written of the challenges of surveilling the "not-yet-guilty" in *Playing to the Edge: American Intelligence in the Age of Terror,* taking a page from George Orwell's *1984*. President Bush's Terrorist Surveillance Program and Edward Snowden's disclosures revealed the executive branch's unconstitutional war against citizen privacy and the Fourth Amendment. Judicial redress has proven futile because of ill-considered applications of the doctrines of standing and state secrets to conceal wrongdoing, *Clapper v. Amnesty International*, 568 U.S. 398 (2013); *FBI v. Fazaga*, (March 4, 2022), coupled with the United States Supreme Court's anachronistic "third party doctrine" that denies Fourth Amendment protection to any communication shared with another rooted in decisions that antedated the

digital age. *United States v. Miller*, 424 U.S. 435 (1976); *Smith v. Maryland*, 442 U.S. 735 (1979). At present, omnipresent electronic communications require sharing the content with a service vendor, which automatically terminates the right of privacy.

The state secrets doctrine, which the Supreme Court invented out of thin air in *United States v. Reynolds*, 345 U.S. 1 (1953) and its progeny, denies redress for victims of the government's constitutional violations—including kidnapping, torture, rape, or assassination—if the executive branch declares that evidence relevant to the litigation might compromise national security. The doctrine is a monstrous engine of injustice. It was applied by the Supreme Court in *United States v. Zubaydah*, (March 23, 2022). to protect the location of a torture site in Poland operated by the CIA in collaboration with Polish security in the aftermath of 9/11.

Reynolds was a major judicial blunder. The history of the state secrets privilege is a history of false claims by the executive branch accepted by the Supreme Court without independent review and analysis. At issue in *Reynolds* was the crash of a military aircraft leading to the deaths of military officials on board and several civilians. The widows of three civilians filed a lawsuit accusing the Air Force of negligence and requesting a copy of the accident report. The district judge asked the government for the report to be reviewed *in camera*, promising not to share it with the widows and their attorneys. The government balked. The court entered judgments in favor of the widows, awarding $225,000 in damages. The United States Court of Appeals for the Third Circuit affirmed upholding judicial independence from the executive branch and the rights of the widows to seek justice.

The Supreme Court, without examining the accident report for military secrets, held for the government. Years later, when the report was publicly released, it was obvious the government had deceived the courts. There were no state secrets. Only evidence that permitting the plane to fly was actionable negligence. The newly discovered facts strongly supported the lawsuit brought by the widows. Any government sanction for its intentional falsehoods? No. When the three widows petitioned the Supreme Court for relief, they were told to start in district court. They lost there and in the court of appeals. The Supreme Court denied further review. *Reynolds* underscores that executive officials are free to deceive federal courts, Congress, and the public under the banner of "state secrets" without paying a price.

President Barack Obama has characterized the NSA (created unilaterally by President Harry Truman in 1952 with no congressional charter in a classified memorandum to the Department of Defense) as a descendant of Paul Revere, forgetting that the latter was spying on the enemy (Great Britain) whereas the NSA engages in suspicionless surveillance of the entire civilian United States population, i.e., "the not-yet-guilty," in the Orwellian words of Michael Hayden

Presidential assassinations cloaked in national security garb make a mockery of due process of law. There is no accountability to the American people, to Congress, or to the judicial branch. They are shielded from scrutiny by the state secrets doctrine. It authorizes the president to withhold evidence from the judicial branch which is said by the executive branch to compromise national security even when the evidence implicates the government in extrajudicial killings

or torture. The number of presidential assassinations can only be guessed at through leaks of classified information. Secretary of State and national security advisor Henry Kissinger provided a window into the mindset of the executive branch when he groused to President Gerald Ford in 1975: "[I]t is an act of insanity and national humiliation to have a law prohibiting the President from ordering assassination," as reported by independent scholar and prolific author about the CIA, John Prados. Presidential assassinations are irreconcilable with the presidential Executive Order 12333. It provides in relevant part: "No person employed or acting on behalf of the United States shall engage in, or conspire to engage in, assassination."

Another due process violation is the indefinite imprisonments of alleged enemy combatants at Guantánamo Bay without accusation or trial. Ordinarily an arrestee must be formally charged with crime fortified by probable cause demonstrated to a neutral magistrate within 48 hours or be released. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Many unaccused Guantánamo Bay inmates have been held for more than twenty (20) years with no end in sight. Most were detained arbitrarily in the aftermath of 9/11 based on unverified accusations by bounty hunters paid $3,000 to $25,000 for each alleged terrorist.

Since 2007, the FBI has compiled a secret No-Fly List of suspected terrorists without notice or an opportunity for a hearing before prohibited from flying. In 2016, Senator Diane Feinstein (D-CA) stated 81,000 persons were listed. This list was recently leaked, showing 250,000 "selectees" and over 1.5 million names.

The Espionage Act has been brandished to punish free speech and exposure of government crimes. James Risen of *The New York Times* wrote in 2016:

> "If Donald J. Trump decides as president to throw a whistle-blower in jail for trying to talk to a reporter, or gets the F.B.I. to spy on a journalist, he will have one man to thank for bequeathing him such expansive power: Barack Obama . . . Over the past eight years, the administration has prosecuted nine cases involving whistle-blowers and leakers, compared with only three by all previous administrations combined. It has repeatedly used the Espionage Act, a relic of World War I-era red-baiting, not to prosecute spies but to go after government officials who talked to journalists."

At least since the 1950 Korean War, Democratic and Republican presidents alike have unconstitutionally seized the war power from Congress (which includes any offensive use of the military) without encountering legislative resistance. The Korean War, which every president since has insisted was constitutional, involved 6.8 million American military personnel, 34,000 American battlefield deaths, and $20 billion in appropriated funds. It also involved 2.3 million Chinese soldiers fighting against the United States and risked the use of nuclear weapons. Korean deaths approximated a frightening 4 million. Yet Congress never declared war against the Democratic People's Republic of Korea or the People's Republic of China.

President Harry Truman declined to seek a declaration because he knew House and Senate majorities could not be persuaded. He thus single-handedly downgraded the war to a "police

action" under the United Nations, insisting, "[w]e are not at war," during a press conference on June 29, 1950. President Truman reneged on his pledge to Senator Kenneth McKellar in a cable from Potsdam on July 27, 1945, regarding the use of the United States Armed Forces under United Nations auspices: "When any such agreement or agreements are negotiated, it is my purpose to ask Congress for appropriate legislation to approve them."

Korea was no existential threat to the United States. The Republic of Korea was then governed by kleptocratic dictator Syngman Rhee. Let us suppose that without United States intervention, the North had conquered South Korea. Remember Vietnam became a semi-friend of the United States after the North conquered the South to defend against Chinese hegemony or aggression. (Indeed, China attacked Vietnam in 1979). A unified Korea might have sought similar assistance from the United States to prevent domination by China.

The United States remains in a state of war with Korea seventy-three years after President Truman's "police action" began. (The Panmunjom Declaration in 2018 promised an end that was not achieved.) Now, South Korea is again flirting with acquiring nuclear weapons to oppose North Korea, which would endanger the 25,000 United States military personnel still stationed there.

Congressional funding is not a constitutional substitute for a congressional war declaration. If it were, the Declare War Clause would be superfluous. Moreover, the president can veto legislation terminating funding for wars. A veto can be overridden only by two-thirds majorities in both chambers, which means a president can continue a war with only one-third support from either the House or Senate. Additionally, it is politically prohibitive for a member to vote to cease funding armed forces already engaged in active hostilities by order of the president because it would invite the demagogic accusation of "abandoning the troops."

Presidents would eagerly seek congressional declarations before using the armed forces offensively if they believed Congress would approve. Declarations diminish a President's political risk by saddling Congress with responsibility if the war goes south. Presidential wars inherently lack institutional support, which is why they chronically shipwreck.

In 1958, President Dwight D. Eisenhower unilaterally dispatched marines to Beirut, Lebanon, to prop up the tottering Presidency of Camille Chamoun threatened by a Christian-Muslim civil war. Its outcome was irrelevant to the national security of the United States, which is why Congress did not authorize President Eisenhower's military adventure.

President John F. Kennedy imposed a virtual blockade of Cuba in 1962 (euphemistically styled a "quarantine"), resulting in an act of war without a congressional declaration. During the Cuban Missile Crisis, Soviet naval officer, Vasili Arkipov, at the eleventh hour, stopped the inadvertent firing of a nuclear torpedo with the explosive strength of Hiroshima aimed against United States anti-submarine forces. The United States at that time had deployed Jupiter Missiles in Turkey with nuclear warheads which could have reached Moscow in minutes. The United States also sported a naval base at Cuba's Guantánamo Bay which we demanded in Cuba's first constitution. The Vietnam War was fought as a presidential war without a congressional declaration. The 1964 Gulf of Tonkin Resolution, fueled by a lie about a North

Vietnamese torpedo attack on the USS Turner Joy, shifted the war power to the executive. The war continued even after the resolution was repealed in 1971. Parallel to the Vietnam War, secret presidential wars were initiated against Laos and Cambodia for a decade.

Over 58,000 Americans were killed in the Vietnam War, 150,000 were injured, $1 trillion was squandered, and the United States continues to pay $22 billion annually in war compensation to veterans and their families. Children in Laos continue to be injured or killed by unexploded American ordnance. From 1964 to 1973, the U.S. dropped more than 2.5 million tons of ordnance on Laos during 580,000 bombing sorties – equal to a planeload of bombs every eight minutes, 24 hours a day, for nine years – making Laos the most heavily bombed country per capita in history, according to Legacies of War. (See: www.legaciesofwar.org/legacies-library).

Without a declaration of war, in 1991, President George H.W. Bush initiated war against Iraq over President Saddam Hussein's occupation of Kuwait. The president obtained congressional political support, but not a constitutionally required declaration. S. J. Res. 2, (102nd Cong., 1st Sess. 1991), "Authorization for Use of Military Force Against Iraq Resolution," empowered the President on his say-so to initiate war for the professed reason of securing compliance with United Nations Security Council Resolutions. Even without the AUMF or Resolutions, President Bush emphasized he would have commenced war, nonetheless. Mr. Bush boasted in a speech to the Texas State Republican Convention, "I didn't have to get permission from some old goat in Congress to kick Saddam Hussein out of Kuwait."

President William Jefferson Clinton initiated war against Yugoslavia after Congress voted against a declaration of war in 1999. The conflict between Serbs and Kosovars that gave birth to President Clinton's war was irrelevant to the United States national security. Serbian massacres of Kosovar Albanians were indeed crimes against humanity. President Clinton should have continued to advocate for a congressional declaration of war and to rally the American people behind him rather than stab the Constitution in the back and entrench a pernicious principle that invites presidential abuse. The United States remains today, more than twenty years after the war concluded, embroiled in parochial Serbian-Kosovar disputes that we are incapable of resolving or ameliorating. Kosovo has asked the United States to locate a military base there to deter Serbian adventurism knowing of the president's eagerness to project United States military power everywhere. The jury is still out on the request.

It was characteristic of President Clinton to bypass Congress in favor of United Nations or NATO resolutions to conduct war without using the word. But when military operations concluded, Mr. Clinton would acknowledge the "war" was over and it was "a terrible war." To borrow from Shakespeare, a war by any other name still requires a congressional declaration. Semantic jugglery is no constitutional substitute.

President George W. Bush initiated war against Al-Qaeda and international terrorism generally on the heels of 9/11 without a congressional declaration of war or an equivalent decision to employ military force against a non-state actor. Like the ill-starred Gulf of Tonkin Resolution, the 2001 Authorization for Use of Military Force unconstitutionally endowed the president with limitless discretion to secretly identify and exterminate any alleged international

terrorist and to invade the sovereignty of any country without accountability to Congress, the American people, or the United States Supreme Court. Such unbounded power calls to mind Juvenal's famous rhetorical question, "who will guard the guardians?" We may never know the number of innocent persons assassinated by U.S. presidents under the 2001 AUMF (which remains undisturbed more than two decades later) such as the United States citizen and teenage son of Anwar al-Awlaki killed having dinner with a friend in Yemen. The identities of the assassinated are ordinarily concealed by the state secrets doctrine.

As previously recounted, the 2001 AUMF gave birth to a twenty-year, unconstitutional, presidential war in Afghanistan costing more than $2 trillion (or $300 million per day) culminating in the return of a second edition of the Taliban.

President George W. Bush also initiated an unconstitutional, criminal, presidential war of aggression against Iraq in 2003 to overthrow Iraqi tyrant Saddam Hussein—a violent conflict that continues today nearly two decades later. Weapons of mass destruction were the public justification for the war, but none were found before or after the invasion. After his capture, the Iraqi dictator explained that he had falsely boasted of possessing WMD to deter arch-enemy Iran. Another intelligence community blunder.

According to President Bush's first Secretary of Treasury Paul O'Neill, Mr. Bush began planning an invasion of Iraq within days after first entering the White House as recounted in the book *The Price of Loyalty: George W. Bush, the White House, and the Education of Paul O'Neill* by Ron Suskind.

The truth was that the American Empire fights purposeless wars in ways that enrich a multi-trillion-dollar military-industrial-security complex. Congress enacted a 2002 authorization supporting military action in Iraq, leaving the decision to the president. Mr. Bush, "the decider." He decided on a catastrophic continuing military misadventure squandering more than $2 trillion, turning Iraq into a satellite of radical, theocratic Iran, spawning the violent international group ISIS, unleashing chronic ethnic and sectarian killings and political instability in Iraq itself, and poisoning the Iraqi people and American soldiers with contractor-operated toxic burn pits.

In 2007, President Bush unconstitutionally commenced war against Somalia and the foreign terrorist organization Al-Shabaab, another war that endures with no end in sight. Al-Shabaab emerged from the 2006 United States sponsored invasion of Somalia by Ethiopia.

Following Muhammar Gaddafi's abandonment of weapons of mass destruction, President Barack Obama, initiated an unconstitutional presidential war against Libya in 2011, which turned the country into a chaotic, hellish, wilderness. At no time did President Obama seek authority from Congress for his military actions. Instead, he sought support from a United Nations Security Council Resolution (which was withheld) and several NATO allies, egged on by Secretary of State Hillary Clinton. President Obama did not spend funds specifically appropriated by Congress to conduct war against Libya. Instead, he tapped into a war slush fund Congress established to further distance it from accountability, i.e., the "Overseas Contingency Operations/Global War on Terrorism."

Terrorists looted Gaddafi's conventional weapons, which created havoc in North Africa. ISIS gained a foothold in Libya. Human trafficking and slavery flourished along the Mediterranean coast. Millions of immigrants crossed the Mediterranean Sea causing political upheavals in Europe, the rise of right-wing extremism, and the continuing drownings of thousands of refugees that Gaddafi previously had blocked.

In 2016, President Obama stated that his "worst mistake" was "probably failing to plan for the day after what I think was the right thing to do in intervening in Libya." The statement underscores the folly of presuming the executive branch is superior to Congress in national security matters, including deciding on war. Overthrowing Gaddafi (which led to his grisly murder) signaled to North Korea and Iran that to renounce nuclear weapons would be to invite an attack by the United States. It also encouraged non-nuclear adversaries of the United States to develop or acquire nuclear weapons as the optimal deterrent to a United States invasion. President Obama assembled no post-Gaddafi plan for Libya that might have saved it from warlords and persistent violent convulsions that have spilled over into neighboring African countries. Libya illustrates the congressional folly of presuming executive branch wisdom or shrewdness in national security affairs.

President Obama sought a congressional declaration of war against Syria in 2013, which was denied. Mr. Obama initiated an unconstitutional, presidential, pointless war against Syria, nonetheless, that persists to this day. United States military forces have accomplished nothing beneficial to the security of the United States. Dictator Bashar al-Assad remains in power.

President Donald Trump continued the multiple extra-constitutional presidential wars he inherited from President Obama, and boastfully proclaimed, "Then I have Article 2, where I have the right to do anything I want as president," including the right to "totally destroy North Korea." President Joe Biden pulled ground troops out of Afghanistan, but the war has not ended. Killings by drones or bombing remain authorized.

President Biden, notwithstanding his having taught separation of powers at Delaware law school and serving as Chairman of the Senate Judiciary and Foreign Relations Committees, has repeatedly affirmed his commitment to unconstitutional presidential war powers. Among other things, Mr. Biden has threatened to defend Taiwan if attacked by China and to defend any NATO member, including Montenegro or North Macedonia, against foreign aggression without congressional declarations of war.

NATO is no substitute for the Constitution's Declare War Clause. In *Reid v. Covert,* 347 U.S. 1 (1957), the Supreme Court declared that a treaty cannot run afoul of constitutional rights or powers. In any event, Article 11 of NATO requires a congressional declaration of war before the president may use the armed forces to defend a NATO member from foreign aggression. It provides in relevant part: "This Treaty shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes." Secretary of State Dean Acheson elaborated to the Senate Foreign Relations Committee: "[The treaty] does not mean that the United States would be automatically at war if one of the nations covered by the pact is subjected to armed attack. Under our Constitution, the Congress alone has the power to declare war."

As for Taiwan, section 3 (c) of the 1979 Taiwan Relations Act, which then Senator Biden approved, provides that if the security of Taiwan is threatened, "[t]he President and Congress shall determine in accordance with constitutional processes, appropriate action by the United States in response to any such danger."

The War Powers Resolution of 1973, enacted over President Richard Nixon's veto, has done nothing to return the usurped war power to Congress. No president has accepted its constitutionality. The Resolution itself, 50 U.S.C. 1547 (d), states that it leaves the Declare War power of Congress undisturbed: "Nothing in this chapter—is intended to alter the constitutional authority of the Congress or of the President. . . ."

Yet presidents have continued to initiate unconstitutional presidential wars without congressional resistance. Even President Jimmy Carter, a relative war skeptic, belligerently proclaimed in his 1980 State of the Union Address that he unilaterally would commence war if needed to keep oil flowing from the Persian Gulf: "Let our position be absolutely clear: An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force."

The United States Supreme Court errantly celebrated vast inherent presidential national security powers in *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936). The decision ignored that the history of presidential supremacy in foreign affairs is a history of chronic blunders, war crimes, and the crucifixion of liberty and the rule of law on a national security cross. The Court reasoned: "[The president], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries . . . He has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials." True enough. But the president also habitually lies to Congress and the American people about what he knows (or does not know) to further personal political and partisan ambitions. Moreover, the executive branch has never exhibited discernment despite its voluminous access to intelligence in anticipating foreign policy developments, for example, Pearl Harbor, Chinese intervention in the Korean War, the fall of the Berlin Wall, the dissolution of the Soviet Union, Iraq after Saddam Hussein, or Libya after Muammar Gaddafi. In sum, the executive branch displays no institutional superiority to Congress in international affairs.

In *Curtiss-Wright*, Justice George Sutherland held that Congress had properly delegated to the president authority to block the shipment of military items to a region in South America. But the Court gratuitously indulged many claims to support presidential authority, not only extraneous but erroneous. It announced, for example, that the president was the "sole organ" in external affairs, relying on a speech that then Congressman John Marshall presented to the House Chamber in 1800. In his address, Marshall never argued for inherent or limitless presidential power in external affairs (which he opposed as Chief Justice of the United States). Instead, he defended President John Adams' decision to transfer a British citizen charged with murder to England for trial. Detractors of President Adams incorrectly believed the accused was an American citizen.

President Adams impliedly disclaimed inherent presidential power. Instead, as Marshall explained, Adams relied on the Jay Treaty's text, endowing the president with both the authority and the duty to transfer to England any British citizen in the United States charged with serious crimes. In relying on Marshall's speech for his "sole organ" theory, Justice Sutherland, and other members of the majority, misapprehended Marshall's reasoning.

Justice Sutherland also stumbled in *Curtiss-Wright* in claiming that the president has exclusive authority to negotiate treaties to the exclusion of members of Congress. The Justice ignored a book he had authored as a U.S. Senator entitled *Constitutional Power and World Affairs* explaining how Senators routinely were involved in treaty negotiations by presidents to help build support for Senate ratification. The Supreme Court has never corrected Justice Sutherland's error.

Over the long run, congressional judgments are vastly superior to the executive in foreign affairs because it is unadulterated by a motive to concoct dangers to aggrandize power, congressional proceedings are ordinarily public and feature diverse views, and committee reports explain congressional reasoning. It was Congress, not the president, that rebuffed Greek importuning for United States military support in the Greek War of Independence against the Ottoman Empire in 1821. Congressman John Randolph admonished: "Let us say to those seven millions of Greeks, 'We were but three millions against a Power, in comparison to which the Turk is but as a lamb. Go and do thou likewise.'" Senator Henry Clay similarly balked at Hungary's plea through Lajos Kossuth for United States military intervention in its 1848-1849 struggle for independence against Russian and Austrian forces:

"Far better is it for ourselves, for Hungary, and for the cause of liberty, that, adhering to our wise, pacific system and avoiding the distant wars of Europe, we should keep our lamp burning bright on this western shore as a light to all nations, than to hazard its utter extinction amid the ruins of fallen or falling republics in Europe."

Congress is endowed with a spectrum of powers to regain its constitutional authority from the president to decide on the initiation of war under Article I, section 8, clause 11. George Mason underscored at the constitutional convention that "attempts to subvert the Constitution" would be impeachable high crimes and misdemeanors within the meaning of Article II, section 4. For the multiple reasons amplified above, presidential wars subvert the exclusive power of Congress to declare war and are thus impeachable offenses. House Resolutions that would define presidential wars as impeachable have been introduced in prior Congresses: H. Res. 411 (116th Cong., 1st Sess. 2019), and H. Res. 922. (115th Cong., 2nd Sess. 2018). They are worthy of reintroduction and enactment. The effective date of such a resolution and all companion remedial legislation should be after the next presidential election. Otherwise, the measures will be confounded or distracted by allegations of partisan political antagonism against the incumbent president.

To defend its constitutionally exclusive power over war, Congress should also enact a statute that automatically terminates the tenure of any officer in the Department of Defense, the National Security Agency, the National Security Council, the Central Intelligence Agency, or

the United States Armed Forces who directly or indirectly participates in an unconstitutional presidential war after a finding to that effect by a simple majority in either the House or Senate. The Senate should adopt a rule that prohibits confirmation of any national security nominee who refuses to state under oath an irrevocable commitment to eschew direct or indirect participation in presidential wars according to a finding by a simple majority in either the House or Senate. In further defense of the Declare War Clause, Congress should enact a statute providing: "No monies of the United States may be expended to support the offensive use of the United States Armed Forces except pursuant to a declaration of war by Congress."

The provision would be no novelty. Section 307 of the Second Supplemental Appropriations Act for Fiscal Year 1973, P.L. 93-50 (1973) stated: "None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purpose." Section 108 of the Continuing Appropriations Resolution for Fiscal Year 1974, P.L. 93-52 (1973), provided that, "Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia." A year later, Congress passed an authorizing statute, Section 38(f)(1) of the Foreign Assistance Act of 1974, P.L. 93-559 (1974), which set a total ceiling of U.S. civilian and military personnel in Vietnam of 4,000 six months after enactment and a total ceiling of 3,000 within one year of enactment.

A provision of an authorization act, Section 404 of the International Security Assistance and Arms Export Control Act of 1976, P.L. 94-329 (1976), comprehensively prohibited using funds for military and paramilitary operations in Angola. It stated that: "Notwithstanding any other provision of law, no assistance of any kind may be provided for the purpose, or which would have the effect, of promoting, augmenting, directly or indirectly, the capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola, unless and until Congress expressly authorizes such assistance by law enacted after the date of enactment of this section." The statute added that if the president determined that the prohibited assistance to Angola should be furnished, he should submit to the Speaker of the House and the Senate Committee on Foreign Relations a report describing recommended amounts and categories of assistance to be provided and identities of proposed aid recipients. This report would also include a certification of the president's determination that furnishing such assistance was important to U.S. national security interests and an unclassified detailed statement of reasons supporting it. Section 109 of the Foreign Assistance and Related Programs Appropriations Act for Fiscal Year 1976, P.L. 94-330 (1976), signed the same day as P.L. 94-329, provided: "None of the funds appropriated or made available pursuant to this act shall be obligated to finance directly or indirectly any type of military assistance to Angola."

To additionally fortify the Declare War Clause, Congress should provide that no member of the United States Armed Forces may be deployed outside the territory of the United States

except as expressly and specifically authorized by Congress. Section 3 (e) of the Selective Training and Service Act of 1940 similarly provided: "Persons inducted into the land forces of the United States under this Act shall not be employed beyond the limits of the Western Hemisphere except in territories and possessions of the United States including the Philippine Islands."

Finally, the Constitution establishes a foreign policy of neutrality that can be displaced only by an Act or Joint Resolution by Congress declaring the United States a belligerent or co-belligerent under the Declare War Clause. Co-belligerency is defined under international law as the systematic provision of support to a belligerent strengthening its military capabilities. Congress should enact an implementing statute prohibiting the expenditures of any monies of the United States for actions inconsistent with the obligations of neutrals in foreign conflicts unless authorized by an Act or Joint Resolution of Congress.

Congress should not expect the United States Supreme Court to arrest unconstitutional presidential wars. The Court has shied from addressing the issue for more than two centuries and shows no signs of changing its reticence. (See e.g., *Massachusetts v. Laird*, 400 U.S. 886 (1970) denying motion of Massachusetts to file a bill of complaint in the Supreme Court challenging the constitutionality of the Vietnam War.)

Finally, Congress should set specific metes and bounds for presidential declarations of National Emergencies to suspend various laws under the National Emergencies Act of 1976. Emergency powers lend themselves to abuse by frightening the people into believing the law must be set aside for national survival.

II.

REVIVING CONGRESSIONAL OVERSIGHT

Congressional power to oversee the executive branch is even more important than its law-making function, according to Woodrow Wilson in *Congressional Government*. J. William Fulbright, famed Chairman of the United States Senate Foreign Relations Committee, opined that the power of investigation is "perhaps the most necessary of all the powers underlying the legislative function."

Congressional powers of oversight and investigation are vast. The Supreme Court amplified in *Barenblatt v. United States*, 360 U.S. 109, 111 (1959):

> "The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact [legislation] and appropriate under the Constitution."

This sweeping investigative power, however, is no license for McCarthyism, i.e., exposing private thoughts or associations for the purpose of ostracism or vilification. The Supreme Court admonished in *Watkins v. United States,* 354 U.S. 178 (1957): "We have no doubt that there is no congressional power to expose for the sake of exposure."

Transparency is the coin of our constitutional realm. It is required for government by the consent of the governed. In an August 4, 1822, letter to W.T. Barry, Mr. Madison instructed that, "Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power which knowledge gives." In *A Dissertation on the Canon and Feudal Law*, No. 3 (1765), John Adams underscored that the people "…have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean of the character and conduct of their rulers" Among other things, Congress in the past employed its investigatory-oversight powers to expose the Teapot Dome corruption, the folly of the Vietnam War, Watergate abuses, and vast national security lawlessness and executive branch assassinations.

Integral to the congressional power of inquiry is the inherent contempt power of Congress

to compel obedience to subpoenas for documents or testimony. The Supreme Court declared in *McGrain v. Daugherty*, 273 U.S. 135 (1927), and its progeny that the congressional contempt power of the House or Senate is coextensive with the inherent judicial power of contempt. It includes the imposition of fines or detention to compel compliance with a congressional subpoena. But the power is not limitless. A detainee, for instance, can challenge the legality of detention in habeas corpus proceedings by demonstrating the lack of any legitimate legislative or oversight purpose or a purpose to discriminate based on race, ethnicity, gender, religion, or free speech and association. The Fifth Amendment privilege against compulsory self-incrimination would also be available as a defense to contempt for refusal to surrender a subpoenaed document or to answer a particular question.

Invocation of Congress' inherent contempt power is indispensable to oversight. Inherent contempt is mercury-footed, i.e., immediate. It secures access to information in a politically relevant time frame. Seeking a court order to enforce a congressional subpoena is lead-footed. Crowded court dockets and the glacial-speed characteristic of the judicial process make it impossible to obtain a court judgment enforcing a congressional subpoena until the information sought has become politically stale or the issue has become moot. Congressional subpoenas expire after the conclusion of each biennial Congress, long before a case can be litigated to finality up to the Supreme Court.

Without seeking court orders, the House Judiciary Committee in 1974 passed an article of impeachment against President Richard Nixon for defying four subpoenas. Mr. Nixon's resignation shortly thereafter mooted any arguable constitutional issue.

Criminal prosecutions are no substitute for inherent congressional contempt both because imprisonment does not yield information and the obvious resistance of the president to prosecuting members of his team. The Republican controlled House of Representatives in 2012 made a criminal referral of President Obama's then Attorney General Eric Holder for disobeying a congressional subpoena. The referral was predictably DOA.

Congress' unilateral abandonment of its inherent contempt power has fueled executive branch defiance of subpoenas and the substitution of secret government for transparency. President Trump alone defied over 100 congressional subpoenas, and major players in the January 6th insurrection like Chief of Staff Mark Meadows likewise ignored them.

If Congress continues to refrain from using its inherent contempt power to oversee the executive branch to promote transparency, alternate sanctions or legislative strategies would be available. The House should pass a resolution declaring executive branch defiance of congressional subpoenas impeachable high crimes and misdemeanors warranting a Senate trial and removal from office. Additionally, Congress should prohibit the executive branch from expending any monies of the United States to collect, store, or analyze information in any format that is not shared with members of Congress upon written request. Further, Congress should enact a statute that automatically terminates the tenure of any unelected executive officer who disobeys a congressional subpoena. Such a statute would not constitute a bill of attainder because the purpose is remedial, i.e., to secure compliance, not punitive.

Proponents of executive branch secrecy maintain that Congress is unable to keep secrets. But congressional leaks are a rarity, while the executive branch is a sieve. Just read Bob Woodward's books, the *New York Times*, the *Washington Post*, and the *Wall Street Journal* — they are brimming with leaked classified information from the intelligence community. Moreover, government in the sunshine has never caused material damage to the United States. For example, no credible evidence has surfaced to substantiate any injury caused by Edward Snowden's disclosures of dragnet surveillance by the NSA of every American or by the WikiLeaks disclosures of Julian Assange. The 47 volume classified Pentagon Papers were published with no impact on the Vietnam War or peace negotiations. Solicitor General Erwin Griswold, who argued in favor of partial secrecy in the Supreme Court in *New York Times v. United States,* 403 U.S. 713 (1971), later acknowledged:

> "I have never seen any trace of a threat to the national security from the publication. Indeed, I have never seen it even suggested that there was such an actual threat . . . It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."

Thomas Jefferson opined in a 1787 letter to Edward Carrington, his delegate at the Continental Congress, "[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. . . ."

III.

CONGRESSIONAL CREATION OF REMEDIES FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS

Chief Justice John Marshall explained in *Marbury v. Madison*, 5 U.S. 137 (1803) that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," and instructed that a government cannot be called a "government of laws, and not of men . . . if the laws furnish no remedy for the violation of a vested legal right." That understanding was the wellspring of the Supreme Court's decision in *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), recognizing a private right of action for damages against federal officials in their individual capacities for violations of the Fourth Amendment. Such claims derive from the *raison d'etre* of a written Constitution. It anticipates that the legislative and executive branches will be inclined to shortchange civil liberties and the rights of political minorities. Justice Robert Jackson elaborated in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943):

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Moreover, arguing in favor of a Bill of Rights in the First Congress, James Madison praised the judicial branch as a staunch defender of civil liberties from attack by the legislature or executive:

> "If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."

Rights are embedded in the Constitution because it is thought Congress might ignore or trample them if left to its own devices. Independent federal judges are conceived as the most trustworthy defender and enforcer of constitutional rights against the majoritarian political processes of Congress. The United States Supreme Court committed stupendous error in virtually overruling *Bivens* and surrendering to Congress exclusive power to decide whether constitutional violations should be deterred and compensated by damage remedies for victims against the offending federal officers in *Egbert v. Boule*, (2022) and *Ziglar v. Abbasi*, 582 U.S. (2017).

Even before *Egbert* and *Ziglar*, the Supreme Court had erected virtually insurmountable barriers to civil damage actions for constitutional violations. It invented a qualified immunity defense and state secrets doctrine to conceal constitutional wrongdoing, including torture or extrajudicial killings, universal crimes against mankind. Qualified immunity permits a federal constitutional tortfeasor to avoid liability for violations that were not categorically and precisely prohibited by one or more Supreme Court precedents. Since two cases are seldom if ever exactly alike, qualified immunity is a *de facto* get out of jail free card for federal officials who violate constitutional rights.

Mr. Madison found no contradiction in trusting Congress with the war power but distrusting Congress (and the executive) with individual liberty. Congress has no political or partisan incentive to commence war irresponsibly. But the congressional incentive to encroach on civil liberties for political advantage is overwhelming illustrated by repugnant Jim Crow laws or the criminalization of peaceful dissent in World War I.

To deter constitutional violations by the executive branch, Congress should enact legislation expressly creating private damage actions for victims, including compensatory and punitive damages and attorney's fees; prohibit any qualified immunity defense; and proscribe invocation of the state secrets doctrine to defeat a constitutional claim or at least require *in camera* review of the claimed government privilege. The government can always accept a default judgment if it believes putative state secrets in question are paramount to protect all Americans.

IV.

TREATY RATIFICATION, REVOCATION, AND EXECUTIVE AGREEMENTS

Article II, section 2, clause 2 (Treaty Clause) provides that the president "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senate present concur. . . ." A treaty is an international written agreement among sovereign states according to the Vienna Convention on the Law of Treaties. Alexander Hamilton in *Federalist 75* explained: "[Treaties] are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislature nor to the executive."

Hamilton continued that Senate ratification of treaties was necessary to prevent presidents from betraying the country for personal aggrandizement: "[I]t would be utterly unsafe and improper to entrust that [treaty] power to an elective magistrate of four years' duration . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be the President of the United States."

Nothing in the text or subtext of the Treaty Clause sanctions presidential evasion via executive agreements with other sovereigns—even for such minor issues as migratory birds addressed in the 1916 Migratory Bird Treaty with Great Britain. Indeed, executive agreements are an atextual manufactured addition to the enumerated powers of the president in Article 2.

The Treaty Clause is silent as to the constitutional process for withdrawing from treaties. The text is open to at least four non-exclusive options: the president alone; the president with the advice and consent of a two-thirds Senate majority; a statute enacted by Congress; or a concurrent resolution passed by Congress without the involvement of the president.

The Supreme Court upheld the constitutionality of executive agreements without involvement of Congress when concluded as auxiliaries to the president's constitutional authority to recognize foreign governments in *United States v. Belmont*, 301 U.S. 324 (1937) and *United States v. Pink*, 315 U.S. 203 (1942). In those cases, at issue was President Franklin D. Roosevelt's authority to negotiate a settlement of claims and counterclaims between the United States and the Soviet Union without congressional involvement as part of an agreement by President Roosevelt to recognize the USSR.

In contrast, presidents after FDR have concluded executive agreements far beyond that limited realm of recognizing foreign powers. President Obama's executive agreement styled the 2015 Joint Comprehensive Plan of Action (JCPOA), was a multilateral agreement to arrest Iran's nuclear ambitions unrelated to recognizing a foreign state. Every previous nuclear arms control agreement in history had been ratified by the Senate as a treaty—beginning with the Kennedy-Khrushchev 1963 Limited Nuclear Test Ban agreement. Indeed, the 2011 New Start Treaty scaling back the nuclear arsenals of the United States and Russia was ratified by a 71-26 vote in the Senate.

The JCPOA was unarguably a treaty. It was negotiated as an executive agreement for a single reason: President Obama did not think he could persuade a two-thirds Senate majority to vote in favor of ratification. That contempt for constitutional process is indistinguishable from a president declaring war against a foreign nation because Congress could not be persuaded, or a president's resort to an executive order to do the work of a statute that Congress could not be convinced to enact.

Secretary of State John Kerry, who had taken an oath to support the Constitution, insisted that executive agreements in lieu of treaties had become constitutional because obtaining a two-thirds Senate majority for ratification had become too challenging. In a hearing before the House Foreign Affairs Committee, Representative Reid Ribble (R-WI), asked the Secretary of State why the administration did not consider the JCPOA a treaty. Secretary Kerry's Orwellian answer:

"Well Congressman, I spent quite a few years trying to get a lot of treaties through the United States Senate, and it has become [politically] impossible. That's why. Because you can't pass a treaty anymore. It has become impossible to schedule, to pass, and I sat there leading the charge on the Disabilities Treaty which fell to basically ideology and politics. So I think that is the reason why."

Had Mr. Kerry forgotten that only a few years earlier as a Senator he had successfully championed ratification of the New Start Treaty by a comfortable 71-26 margin, a precedent that defeated his counterfactual assertion that "you can't pass a treaty anymore"? In any event, the constitutional remedy for defeated treaties is to advance superior arguments to the Senate or to negotiate terms more favorable to the United States, not to trash the Constitution.

The JCPOA was no novel presidential assault on the Treaty Clause. Spain was excluded from the North Atlantic Treaty Organization in 1949. Spanish dictator Francisco Franco was in disrepute in the West over his informal alliance with Hitler and Mussolini in the Spanish Civil War and his subterranean support for the Third Reich during World War II. President Dwight D. Eisenhower thus resorted to three executive agreements in the Pact of Madrid in 1953 to make Spain a *de facto* member of NATO. Among other things, the United States pledged to furnish economic and military aid to Spain in exchange for the construction and utilization of air and naval bases on Spanish territory (Rota Naval Station and Moron, Torrejón, and Zaragoza Air Bases). The constitutional issue became moot in 1982 when Spain joined NATO with an amendment to the treaty ratified by a two-thirds Senate majority after Franco's death and Spain's embrace of democracy.

Congress can and should prevent presidential end runs around the Treaty Clause with executive agreements by enacting a statute prohibiting the expenditure of any funds of the United States to negotiate or enforce any binding agreement with a foreign state except as a treaty requiring a two-thirds Senate majority for ratification. Congress by statute voided the United States Defense Treaty with France in 1798. Thomas Jefferson declared only Congress is endowed with power to rescind treaties.[1]

Senator Henry Cabot Lodge's proposed Reservation One to the Versailles Treaty, which ultimately was denied ratification by the Senate, would have empowered Congress by concurrent resolution to withdraw from the treaty: "The United States so understands and construes Article I [of the treaty] that in case of notice of withdrawal from the League of Nations, as provided in said article, the United States shall be the sole judge as to whether all its international obligations and all its obligations under the said covenant have been fulfilled, and notice of withdrawal by the United States may be given by a concurrent resolution of the Congress of the United States."

Congress, however, has unilaterally surrendered any role in treaty revocation or withdrawal for a century. The president has become the sole decider. Thus, President George W. Bush unilaterally terminated the ABM Treaty with Russia. President Donald Trump similarly unilaterally withdrew from the Intermediate-Range Nuclear Forces Treaty and the Open Skies Treaty with Russia.

There is no reason in the Constitution or public policy for presidential supremacy in treaty revocation. The Supreme Court will not fix the constitutional overreach because of the political question doctrine announced in *Goldwater v. Carter*, 444 U.S. 996 (1979).

In any future treaty, the Senate should insist on an exit provision authorizing withdrawal by concurrent resolution like Lodge Reservation One to the Versailles Treaty.

Finally, Congress is empowered by statute to supersede any treaty obligations. It is not bound by what the president and Senate agree to. The Supreme Court declared in *Edye v. Robertson*, 112 U.S. 550 (1884), that "[W]e are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal."

The United Sates is a party to several treaties like NATO purporting to commit it to defending other nations from aggression, which would be unconstitutional without a congressional declaration of war or co-belligerency, i.e., systematically providing military assistance to a belligerent that makes the United States a legitimate target of attack. (See U.S.-Japan Defense Treaty of 1960; U.S.-South Korea Defense Treaty of 1953.) To avoid any confusion or misunderstanding with parties to these treaties, Congress should enact a statute declaring the United States shall remain neutral in any foreign conflict irrespective of any treaty unless and until Congress abandons neutrality by an Act or Joint Resolution declaring war against one of the belligerents or declaring the United States a co-belligerent. The latter would authorize the president to systematically assist the military operations of the favored belligerent.

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1. *See Thomas Jefferson, A Manual of Parliamentary Practice 52,* Samuel Harrison Smith ed., 1801. Treaties being declared, equally with the laws of the U[nited] States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded. This was accordingly the process adopted in the case of France in 1798.

International trade agreements under the Constitution were initially and correctly conceived as treaties requiring a two-thirds Senate vote for ratification. Alexander Hamilton explained in *Federalist* 75 that treaties were agreements between sovereign nations. But the Senate has unilaterally surrendered its treaty prerogative by permitting presidents with limitless discretion to characterize treaties as executive-legislative agreements requiring only simple majorities in the House and Senate for approval as opposed to a two-thirds Senate majority required for treaty ratification. The 1995 World Trade Organization and the 1994 North America Free Trade Agreement were approved as simple legislation not ratified by the Senate as treaties despite their staggering economic, environmental, health and safety, and labor impacts. Earlier in 1916, the minor issue of migratory birds with Great Britain was addressed as a treaty. The decline in the Senate's treaty prerogative has been glaring.

V.

FAITHFUL EXECUTION OF THE LAWS

Article II, section 3, of the U.S. Constitution provides that the president "shall take care that the laws be faithfully executed." (Take Care Clause). Its ancestor was the English Bill of Rights of 1689. Among other things, it declared, "That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late [by King James II], is illegal."

The Take Care Clause does not make prosecutorial discretion unconstitutional. Resource limitations foreclose prosecution of all infractions. Crimes are not all equal. Murder or conspiracy to overthrow the government by force and violence are more dangerous and reprehensible than jaywalking. The former should be law enforcement priorities.

> But prosecutorial discretion is not boundless. It may not be brandished as a pretext to punish constitutionally protected rights or to practice invidious discrimination. It would be unconstitutional, for example, for the president to enforce the law against his political opponents but to give a pass to violations committed by his political supporters. The Supreme Court explained in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886): "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Kenneth Culp Davis, in his pioneering book *Discretionary Justice*, makes a strong case for insisting on rational prosecutorial explanations for discretionary decisions and opportunities for public input to prevent arbitrary enforcement. Lessening while not eliminating prosecutorial discretion would diminish the potential for prosecutorial abuses highlighted by Attorney General Robert Jackson, who later ascended to the Supreme Court:

> "If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Herein lies the most dangerous power of the prosecutor: that he will pick people that he thinks he should , rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor ,stands a fair chance of finding at least a technical violation of some law on the part of almost anyone.

> In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm in which the prosecutor picks some person whom he dislikes or desires to . embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself."

Proving an executive branch invidious or illicit motive for non-prosecution, however, is as challenging as Joseph interpreting Pharaoh's dreams. Yet the bright lamp of experience, teaches that the president is likely to wink at violations by his own administration. The president, for example, would confront an obvious conflict of interest in prosecuting his Secretary of State for criminal violations of the Hatch Act, 18 U.S.C. 610 which prohibits commandeering federal employees or resources to influence the outcome of a federal election.

President Nixon's firing of special prosecutor Archibald Cox to frustrate the Watergate investigation, which had him in the cross-hairs, prompted Congress to enact the Independent Counsel Act of 1978. It required the Attorney General to request a three-judge panel appointed by the United States Chief Justice to appoint an independent counsel when presented with credible evidence that a high-level executive or political party official had committed a federal offense. The Act was informed by the time-honored principle that law enforcement should be above suspicion. The Supreme Court upheld the constitutionality of the statute in *Morrison v. Olson*, 487 U.S. 654 (1988).

The Act fell into political disfavor fueled by independent counsel Kenneth Starr's $52 million "Monicagate" investigation of President William Jefferson Clinton and "Referral from the Independent Counsel Kenneth W. Starr in Conformity with the Requirement of Title 28, United States Code, Section 595 (c) to the House Judiciary Committee" to consider articles of impeachment. Congress permitted independent counsel authority to lapse in 1999.

The Independent Counsel statute, like all human institutions, was imperfect, but better than alternatives. During the last two decades, the United States Department of Justice has become vastly more partisan as the two major political parties have taken polarization to a new level. President Donald Trump attempted to turn federal law enforcement into an instrument for attacking political enemies and protecting political friends. As Mr. Trump's former national security advisor John Bolton wrote in his memoir, *The Room Where It Happened,* Trump chronically intervened in U.S. law enforcement and practiced "obstruction of justice as a way of life" at the White House.

Congress should recreate the office of independent counsel with a statute that addresses problems that surfaced with its antecedents. Individuals entrusted with great political power or who command great prominence are expected to be role models. The rule of law is strengthened when they are above suspicion and encouraged to turn square corners by independent counsels uncompromised by conflicts of interest.

VI.

SAFEGUARDING THE POWER OF THE PURSE

The congressional power of the purse is enshrined in Article I, section 9, clause 7: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." James Madison explained in *Federalist 58* that the power of the purse was the centerpiece of congressional checks on the executive: "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."

Presidents have attempted to cripple the power either by refusing to spend money appropriated by Congress for a particular purpose or by diverting funds appropriated for one purpose to further a different purpose. The Supreme Court held in *Train v. City of New York*, 420 U.S. 325 (1975), that the president is generally obligated to spend funds appropriated by Congress for a statutorily articulated objective. Permitting funds to remain idle would be tantamount to an absolute veto impliedly prohibited by the president's qualified veto authority subject to override by two-thirds majorities in both legislative chambers. Congress has attempted to fortify the power of the purse through the Impoundment Control Act and the Antideficiency Act. The latter prohibits officers or employees of the federal government from making or authorizing an expenditure exceeding an amount available in an appropriation. *But no civil or criminal penalties for violations have been sought under the Act for almost 120 years*. It is a paper tiger. The Impoundment Control Act permits the president to defer spending appropriated funds for non-policy reasons but not beyond the end of the current fiscal year.

Notwithstanding the Appropriations Clause, Antideficiency Act, and the Impoundment Control Act, presidents continue to expend monies that circumvent the congressional power of the purse. President Obama spent funds in violation of the Antideficiency Act and the Defense Appropriation Act of 2014 by transferring five Taliban commanders from Guantánamo Bay in exchange for U.S. Sgt. Bowe Bergdahl without 30 days prior notice to Congress mandated by the statute. Mr. Obama also spent money on health care subsidies not appropriated by Congress.[2] President Trump illegally diverted billions of dollars in military construction or drug interdiction funds to pay for a wall with Mexico.[3] Mr. Trump also illegally transferred

2. See *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016).
3. See *State of California v. Trump*, 963 F. 3d 926 (2020).

over $40 billion in funds appropriated for the Federal Emergency Management Agency to pay unemployment benefits.

To deter violations of the Appropriations Clause and Antideficiency Act, Congress should consider creating a *qui tam* action authorizing private citizens to sue federal officials in their individual capacities for violations to recover a portion of the misspent funds. The False Claims Act, which addresses false claims made to the federal government, provides a statutory template with awards ranging from 10-30 percent of the false claims proven. 31 U.S.C. 3729-3733. The Supreme Court upheld the constitutionality of *qui tam* actions in *Vermont Agency of Natural Resources v. United States ex rel Stevens,* 529 U.S. 765 (2000). Strict liability should be imposed for violations to encourage federal officials to seek statutory clarification if an expenditure is in a gray zone.

VII.

FORTIFYING THE SENATE CONFIRMATION POWER

The Appointments Clause of Article II, section 2 provides that the president "by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls . . . and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior offices as they think proper in the President alone, in the Courts of Law, or in the Heads of Departments."

The Appointments Clause provides a Senate check on wayward presidential nominees to positions of great authority. Alexander Hamilton amplified in *Federalist 76* that Senate confirmation "would be an excellent check upon a spirit of favoritism in the President and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."

The Office of the Presidency has grown from a tiny acorn into a giant oak in response to the imperatives of empire and unity of command. White House officials appointed solely by the president have come to exercise as much or more authority than Cabinet members. The national security advisor, for example, frequently exercises more power than the Secretary of State. Under President Nixon, Henry Kissinger had more influence over foreign policy than did Secretary of State William Rogers, and under President Jimmy Carter, Zbigniew Brzezinski was more influential in national security matters than Secretary of State Cyrus Vance. Think of this anomaly. Mr. John Bolton was denied Senate confirmation as the United States Ambassador to the United Nations when nominated by President George W. Bush in 2005. But Mr. Bolton was appointed to the vastly more important post of national security advisor by President Trump in 2018 without the advice and consent of the Senate.

The White House counsel, appointed solely by the president, at times excises more influence over the administration of justice than does the Attorney General whose appointment is subject to Senate confirmation. President George H.W. Bush's White House Counsel C. Boyden Gray was more influential in the appointment of judges and legal matters generally than were Mr. Bush's Attorneys General Richard Thornburgh and William Barr. The national security council staff has mushroomed in lock step with the soaring power of executive; the staff of *the national security advisor has ballooned to a staggering 300–400.*

Presidents have also resorted to unilateral appointments of White House "Czars" endowed with major policy making authority to avoid the check of Senate confirmation. Prominent examples include Energy and Climate Change Czar Carol Browner, Domestic Policy Czars Karl Rove and Joseph Califano, and Special Representative for Afghanistan and Pakistan Richard Holbrooke.

To fortify the Appointments Clause, Congress should enact a statute requiring Senate confirmation of the White House counsel, the National Security Adviser, or other principal officers who *de facto* or *de jure* exercise significant authority under the Constitution or laws of the United States.

VIII.

DEFINING IMPEACHABLE OFFENSES

Article II, section 4 subjects the president, vice president, and all other officers of the United States to impeachment by the House of Representatives and removal upon conviction by a two-thirds Senate majority for "treason, bribery, or other high crimes and misdemeanors." The impeachment process is shielded from judicial review. (*Nixon v. United States,* 506 U.S. 224 (1993).)

Treason is specifically defined in the Constitution, i.e., levying war against the United States. And bribery of a public official has a well-defined legal meaning, i.e., receiving anything of value to influence official behavior. The meaning of high crimes and misdemeanors, however, is less precise. At the constitutional convention, delegate George Mason maintained attempts to subvert the Constitution would be impeachable. Alexander Hamilton in *Federalist 65* characterized impeachable offenses as "those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."

Congress has neglected to provide greater specificity to comply with due process, i.e., the principle that the law must warn before it strikes. It has tacitly endorsed Congressman Gerald Ford's uninformed arbitrary assertion in 1970 during his attempt to impeach Supreme Court Associate Justice William O. Douglas: "An impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."

Congressman Ford was wrong. Impeachment is too important to tolerate abandonment of the due process principle of fair warning. The House should pass a resolution setting forth with reasonable specificity an inexhaustive list of executive branch extra-constitutional actions which will be treated as impeachable offenses. The initial list should include:

1. The offensive use of the armed forces without a declaration of war by Congress;

2. Defiance of a congressional subpoena;

3. Expending monies of the United States either not appropriated by Congress, in violation of an appropriations condition or limitation, or diverting appropriated funds for a purpose not authorized by Congress;

4. Substituting an executive agreement for a treaty requiring a two-thirds Senate majority for ratification;

5. Conspiring or participating in insurrection against the United States;

6. Presidential assassinations, i.e., killing persons not actively engaged in hostilities against the United States in a war not declared by Congress based upon a presidential suspicion or prejudgment that the target is or may become a national security threat to the United States, unless the killing is justified in self-defense to prevent loss of life or serious bodily injury;

7. Surveillance of American citizens or persons residing in the United States except as authorized by federal statute; an executive order such as E.O. 12333 cannot do the work of a statute;

8. Obstruction of justice; and,

9. Granting a pardon to influence testimony or cooperation with law enforcement.

IX.

PRIVACY

The American Revolution was ignited by British invasions of privacy—the right to be let alone absent probable cause of wrongdoing determined by a neutral magistrate. Electrified by James Otis' 1761 denunciation of British writs of assistance, i.e., general search warrants, John Adams maintained: "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In 15 years, that is in 1776, he grew up to manhood, and declared himself free."

In 1763, William Pitt the Elder's address to the British Parliament thundered like a hammer on an anvil throughout the American colonies: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his forces dare not cross the threshold of the ruined tenement."

The Fourth Amendment was ratified to secure citizen privacy and to repudiate British writs of assistance. The Amendment prohibits suspicionless, warrantless government searches. It also requires search or arrest warrants to be issued only by neutral magistrates based on probable cause of criminal wronging and particularly describing the place to be searched or the person or things to be seized.

Justice Louis D. Brandeis explained the Amendment's philosophical predicates in *Olmstead v. United States*, 277 U.S. 438 (1928) (dissenting opinion):

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

Justice Robert Jackson served as chief prosecutor before the International Military Tribunal in the trial of senior Nazi officials at Nuremberg. He knew firsthand how the Gestapo had

cowed the German people into docility. He instructed in *Brinegar v. United States*, 338 U.S. 160 (1949) (dissenting opinion):

> "[Fourth Amendment rights] are not mere second-class rights, but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual, and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."

The executive branch, however, is notorious for industrial-scale violations of the Fourth Amendment under bogus national security banners or to suppress political dissent. During World War I, free speech in opposition to the war was punished as regularly as the rising and setting of the sun. Warrantless spying against putative "subversives" began in the 1930s, with alarming effects. The Church Committee ("United States Select Committee to Study Government Operations with Respect to Intelligence Activities") reported as follows:

> "Since the 1930's, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant . . . . . past subjects of these surveillances have included a United States Congressman, Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam War protest group. (Church Committee Report Vol. 2, p.12, 1976) The application of vague and elastic standards for wiretapping and bugging has resulted in electronic surveillance which, by any objective measure, was improper and seriously infringed the Fourth Amendment rights of both the targets and those with whom the targets communicated. The inherently intrusive nature of electronic surveillance, moreover, has enabled the Government to generate vast amounts of information — unrelated to any legitimate government interest — about the personal and political lives of American citizens. The collection of this type of information has, in turn, raised the danger of its use for partisan political and other improper ends by senior administration officials. (Id. Vol. 3, p. 32.)

A companion Senate Judiciary Committee Report also focused on the potentially chilling effect of warrantless electronic surveillance upon the exercise of First Amendment rights (S. Rept. 95-604 (Part 1) (1976) at 8:

> "Also formidable — although incalculable — is the 'chilling effect' which warrantless electronic surveillance may have on the constitutional rights of those who were not targets of the surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets. Our Bill of Rights is concerned not only with direct infringements on constitutional rights, but also with government activities which effectively inhibit the exercise of these rights. The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life."

In a Memorandum to Attorney General Jackson, President Roosevelt wrote on May 21, 1940:

> "You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and limit them insofar as possible to aliens."

President Truman approved a memorandum drafted by Attorney General Tom Clark in which the Clark advised that "it is as necessary as it was in 1940 to take the investigative measures" authorized by President Roosevelt to conduct electronic surveillance "in cases vitally affecting the domestic security."

The FBI under J. Edgar Hoover routinely engaged in suspicionless surveillance and spying unrelated to crime targeting suspected Communists, black leaders, anti-war groups, or indeed any person falling outside Director Hoover's conventional, conservative, orthodoxies with the approval of both Democratic and Republican administrations. Attorney General Robert Kennedy authorized the wiretapping of Dr. Martin Luther King, Jr. seeking proof of adherence to Communism. Director Hoover's notorious COINTELPRO warrantless, suspicionless spying gathered evidence of Dr. King's extramarital affairs.

President Richard Nixon authorized warrantless wiretapping targeting persons suspected of leaking information about his illegal secret bombing of Cambodia in 1969 to *New York Times* reporter William Beecher. Presidential assistant John Ehrlichman authorized the burglary of the offices of Daniel Ellsberg's psychiatrist seeking to discredit Mr. Ellsberg for disclosing the voluminous government lies about the Vietnam War in the Pentagon Papers.

The executive branch is instinctively hostile to the Fourth Amendment and privacy. The

president and law enforcement would make everything subservient to security to aggrandize power and cultivate citizen docility or submissiveness—an institutional phenomenon aggravated by 9/11 and our perpetual war against terrorism. They do so by magnifying danger to frighten or terrify.

These stupendous, chronic executive branch lies typically thrive undetected by the American people or Congress through unjustified assertions of state secrets or executive privilege. Transparency has never been shown to have compromised executive branch candor or national security. The executive branch operates on the assumption that no lie or illegality will ever be revealed or punished. Director of National Intelligence James Clapper falsely denied under oath to the Senate Intelligence Committee that the National Security Agency was collecting intelligence on millions or hundreds of millions of Americans. He was never prosecuted, disciplined, demoted, or reprimanded. His reputation remained untarnished.

Congressional oversight of executive spying or surveillance was non-existent until the Church Committee (1975-1976) exposed alarming lawlessness and abuses. The House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence were created in 1977 and 1978, respectively. But they have never been more than ornamental. Members and staff are unschooled in intelligence. They are ingenues unable to ask informed questions and to comprehend or critique answers or evasions. They even permit the intelligence community to classify and conceal the Committees' own handiwork, for example, the 2014 Torture Report of the Senate Select Committee on Intelligence and the Congressional Joint Inquiry into the 9/11 attacks. The Torture Report was redacted but not totally concealed.

The Supreme Court has compounded the evisceration of privacy and the Fourth Amendment under the so-called "third-party doctrine" announced in *Miller v. United States,* 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979). The doctrine, fashioned in the pre-digital age, generally denies Fourth Amendment protection to any communication shared with third parties whether via newspaper, radio, or television. In the digital age, however, communicating without sharing information with an internet contractor is virtually impossible. It has replaced the U.S. Postal Service as the primary transmitter of non-in person communication. But whereas the confidentiality of communications sent by mail is protected by the Fourth Amendment, *Ex parte Jackson*, 96 U.S. 727 (1878), *United States v. Van Leeuween,* 397 U.S. 249 (1970), Fourth Amendment confidentiality is denied to internet users under the third-party doctrine because the contents of electronic communications are shared with the users' service contractors.

The Amendment, however, places a floor, not a ceiling on privacy protection. Congress is empowered to raise the floor by statute. It should exercise that power by providing that the reasonableness of a search under the Fourth Amendment shall be based on the totality of the circumstances, including but not limited to, whether the communications to be seized, examined, or searched have been shared with third parties.

The executive branch asserts an inherent constitutional right to collect foreign intelligence pursuant to Executive Order 12333 issued in 1981. It is a comprehensive charter for gathering foreign intelligence shielded from congressional or judicial oversight or review. There is no

textual, constitutional support for the Executive Order. It has never been affirmed by the United States Supreme Court. And the definition of foreign intelligence in a shrinking world is virtually synonymous with domestic intelligence governed by the Fourth Amendment (*United States v. United States District Court*, 407 U.S. 297 (1972)). Congress should by statute void the Executive Order. To the extent the collection, storage, and analysis of foreign intelligence is necessary and proper for national security, to that extent it should be authorized by congressional statute.

Congress has addressed foreign intelligence in the Foreign Intelligence Surveillance Act (FISA), as amended. Refinement is needed. FISA should prohibit any non-criminal surveillance of United States citizens or permanent residents to collect foreign intelligence. A defined threshold of suspected *criminal* activity determined by a neutral magistrate should be required to justify disturbing the cherished right of Americans to be let alone from government snooping that informs the Fourth Amendment.

Foreign intelligence beyond what is already in the public domain has never been credibly shown to fortify national security. It does not enable anticipating the future. The foreign intelligence gathered and analyzed about the Soviet Union did not enable Soviet experts to predict the dissolution of the Soviet Empire in 1991 or the fall of the Berlin Wall in 1989. The vast foreign intelligence assembled by the Central Intelligence Agency did not prevent its colossal error in predicting China would not enter the Korean War, or 9/11, or weapons of mass destruction in Iraq. As to Korea, the CIA advised President Truman on October 12, 1950, in a secret memorandum:

"Despite statements by Chou En-lai, troop movements in Manchuria, and propaganda charges of atrocities and border violations, there are no convincing indications of an actual Chinese Communist intention to resort to full-scale intervention in Korea."

China did intervene massively in October 1950, four months after the war began.

The government's interest in collecting foreign intelligence is too flimsy to justify encroaching on the privacy of Americans.

The Fourth Amendment has also been crippled by the good faith immunity defense conferred by the Supreme Court on law enforcement to defeat civil damages suits initiated by the victims of the constitutional violations under federal law or the Constitution. The result emboldens the police to flout the Amendment confident that no penalty will be paid. The flagship case is *Pierson v. Ray,* 386 U.S. 547 (1967).

Under existing law, victims of Fourth Amendment wrongdoing can recover damages against the police only if the violations transgressed clearly established Supreme Court precedents of which a reasonable officer should have been aware. Such precedents, however, are few and far between because each police encounter is unique. The result is an epidemic of Fourth Amendment violations with no remedy and no deterrence of wayward police. Congress should give teeth to the Amendment and the hallowed right to be let alone by enacting a statute abolishing the good faith immunity defense and creating liability for a violation of the Fourth Amendment, *simpliciter,* which already requires proving objectively unreasonable police behavior.

Proponents speciously argue that immunity is needed to encourage muscular rather than anemic law enforcement. But the Fourth Amendment strikes an Aristotelian mean. It proscribes only objectively "unreasonable" police behavior. Police who do not run amok will not worry about the absence of good faith immunity. Police who do run amok can protect themselves by acting reasonably under all the circumstances.

X.

STRENGTHENING CONGRESS'S ANEMIC INTELLECTUAL INFRASTRUCTURE

James Madison sagely observed: "Knowledge will forever govern ignorance. . . ."

Congress, however, has chosen ignorance over knowledge in overseeing a federal budget exceeding $6 trillion annually, which supports over 2.1 million federal civilian employees and millions of federal contractors. Congress continues to fund ultra-bloated Department of Defense budgets notwithstanding its defiance of a law requiring an audit of its books. Congress has similarly embraced ignorance over knowledge in dwindling public hearings and discharging its responsibility for legislation—especially updating the United States Code in response to conditions changing at warp speed.

Congress has diminished itself ever since House Speaker Newt Gingrich in 1995 concentrated power in congressional leadership at the expense of diminished committees and individual member offices slashing the congressional workforce by 33 percent. Every House Speaker since Gingrich has followed or exceeded his deplorable actions. Congressman Bill Pascrell, Jr. wrote in *The Washington Post,* "Why is Congress so dumb?" (January 11, 2019): "Our available resources and our policy staffs, the brains of Congress, have been so depleted that we can't do our jobs properly . . . Congress is increasingly unable to comprehend a world growing more socially, economically, and technologically multifaceted—and we did this to ourselves." While the size of the federal government was exploding, staff levels in House member offices ticked down from 6,556 in 1977 to 6,329 in 2021.

Congressional diminishment begins with hugely inadequate funding, a tiny fraction of what is needed to hire and to maintain first-class professionals with the longevity needed for institutional memory. At present, the annual budget for Congress—the House and the Senate combined—is $5.3 billion, a decimal point in the Pentagon's annual budget alone approaching $900 billion, and only one-tenth of the $5.3 billion is spent on people as opposed to buildings, the Capitol Police, and maintenance. As Congressman Pascrell highlights in his article: "A stunning 2015 study found that corporations now devote more resources to lobby Congress than Congress spends to fund itself." Consequently, many staff in members' offices and committees are few, young, inexperienced, inexpert, and the positions underpaid. Turnover is high and institutional memory lacking because staff employees commonly move on to lucrative K Street lobbying after a few years. They are outmanned and outgunned by more experienced executive

branch officers. The latter are typically paid more. They plan careers in the executive branch. They are highly trained and seasoned. Although turnover is increasing in federal agencies like the IRS and EPA because of Speaker Gingrich's myopic parsimony, they continue to serve longer than the 3-year average tenure of a congressional staffer.

The pronounced discrepancy between intellectual infrastructures of the Congress and the executive branch is the difference between the United States Supreme Court and a United States District Court. The result has been anemic congressional oversight leading to an ultra-bloated, lawless, unchecked, irresponsible, executive that has annihilated separation of powers in favor of one-branch government with the earmarks of monarchy. As Congressman Pascrell lamented, "for every $3,000 the United States spends per American on government programs, [Congress] allocates only $6 to oversee them.

The House and Senate, respectively, determine their own budgets with no interference. It is within their sole discretion whether to fund a legislative intellectual infrastructure equipped with the knowledge and wisdom necessary to reverse the unilateral congressional surrender of its powers and duties on the installment plan over the past century or more, but which has accelerated to warp speed since 1969.

Congressional staff should be compensated at the same rate as their executive branch counterparts to make a career of congressional service. That longevity is necessary to acquire and maintain institutional memory. Executive-congressional disputes routinely turn on previous arrangements that were not memorialized in formal rules or court judgments. They cannot be readily retrieved except by persons who were knowledgeable at the creation. Nothing kills an idea faster on Capitol Hill than the alarm, "It's never been done before." But an imaginative mind with memory can often discern a precedent.

Committee staff should be expanded commensurate with the size, powers, and responsibilities of the agencies or departments to be vetted, checked, funded, and overseen. The House and Senate Armed Services Committees, for example, need vastly greater manpower to oversee the nearly trillion-dollar annual unaudited Pentagon spending. On September 10, 2001, Secretary of Defense Donald Rumsfeld shared that $3 trillion in Pentagon spending accumulated over an unknown number of years could not be accounted for. The years are unknown because there were no DOD audits. Further, a pool of funds should be made available to Committees and individual member offices to hire experts or consultants, as needed, to assist their legislative and oversight functions. Congress should also fund its own in-house expert bodies to advise Congress like the dormant Office of Technology Assessment (OTA) which was defunded by Speaker Gingrich. Among other things, a fully funded OTA is necessary to update legislation to address novel issues that recurringly surface in a technologically advanced digital world.

Congress should establish a congressional college devoted exclusively to teaching members and staff about their constitutional powers and responsibilities. The small campus should be near the House and Senate office buildings and operate year-round. The executive branch has the National Defense University, the Army War College, the Navy War College, and the Air

Force War College. Congress needs to be equally educated as executive branch officers who fight undeclared wars.

Congress should also urge law schools to offer courses about Congress, Committees, hearings, fund-raising, and the legislative processes. Members should be eager to provide full-time or part-time instruction. At present, most law school graduates and professors know nothing about how Congress actually operates.

The Congressional Research Service of the Library of Congress and the General Accounting Office should expand staff and upgrade expertise with enhanced compensation and career paths required for professional and first-rate work products. Staff of CRS and the Library of Congress and GAO should be permitted to testify at congressional hearings within their range of expertise regarding Congress's defense of its constitutional legislative prerogatives.

Starting around 2014, CRS officials insisted that its staff adhere to a new standard of "neutrality," meaning that analysts would be required to present evidence on one side and the other without taking a personal position. That policy makes no sense. Members of Congress and their committees expect CRS analysts to meticulously research an issue and decide based on evidence which arguments are most credible. It is unprofessional for CRS analysts to merely present three points on one side and three points on the other and walk away, akin to declaring agnosticism between the heliocentric and geocentric theories of the universe.

Renowned former CRS scholar Louis Fisher testified to the Committee on House Administration regarding "Oversight of the Congressional Research Service" on June 20, 2019:

> "By 1988 there were 18 'senior specialists.' To be selected., one had to compete with other 'nationally recognized experts'... Since that time, CRS management has allowed the number of research senior specialists to drift down until there are now only two senior specialists, with each person close to retirement. Similarly, CRS management has allowed the number of research specialists (GS-16) to drop from about 38 in the late 1980s to about three. That number will soon reach zero because of pending retirements."

Congress also should fortify the Speech or Debate Clause protection members command from executive domination or intimidation in performing their legislative duties. Israeli Prime Minister Benjamin Netanyahu banned two Democratic U.S. congresswomen from visiting the country and the Palestinian territories to assess United States policies towards Israel at the instigation of President Trump. He urged the Israeli leader on Twitter to block Reps. Ilhan Omar (D-MN) and Rashida Tlaib (D-MI) saying "It would show great weakness if Israel allowed Rep. Omar and Rep. Tlaib to visit. They hate Israel & all Jewish people, & there is nothing that can be said or done to change their minds. Minnesota and Michigan will have a hard time putting them back in office. They are a disgrace!"

Congress should make criminal any attempt by the president to thwart a Member of Congress from visiting a foreign country or territory in discharging their legislative responsibilities.

Civics textbooks heroize and exalt the presidency and slight or ignore congressional history and congressional power brokers like Daniel Webster, Henry Clay, Stephan Douglas, and Charles Sumner. Congress should fund scholars to write books that chronicle the history of Congress and its constitutional superiority to the executive branch in a Republic whose glory is liberty, not the armored knight. In comparison with the executive, in theory Congress exhibits greater public transparency, deliberation, moderation, and diversity of views essential to the discovery of truth. The recent exclusion of Congresswoman Ilhan Omar (D-MN) from the House Foreign Affairs Committee is an exception and has provoked House Speaker Kevin McCarthy, at the insistence of Congressman Ken Buck (R-CO) to require future removals to be handled by majority vote in the evenly split House Ethics committee. Mr. Buck explained that Congress needs to "stop this nonsense of kicking people off of committees because it's just wrong." Experience corroborates that the deliberative characteristics of Congress would safeguard against the chronic blunders and misadventures of the president.

But a caveat is in order. Congress must also wean itself away from corporate lobbyists, first cousins to the multi-trillion-dollar military-industrial-security complex. Lobbyists aim to hijack legislation to enrich their clients at the expense of the 99 percent facilitated by handsome campaign contributions or expenditures. The corporate lobby distortions of Congress's handiwork, however, is beyond the scope of this booklet.

Congress has imposed term limits for serving on important committees. Term limits, however, prevent acquiring the experience and expertise necessary for drafting legislation, holding hearings, and overseeing the executive branch. As Patrick Henry explained: "I have but one lamp by which my feet are guided and that is the lamp of experience." Term limits for committee service or chairs should be abolished. But experience and expertise are not everything. Equally if not more important is a congressman's dedication to the public interest and resistance to becoming a corporate toady, like former Chairman of the House Ways and Means Committee Richard Neal (D-MA). Voters must be vigilant to prevent corporate capture of their Representatives and Senators. Term limits prevent committee sclerosis, but they are a cure worse than the disease by boosting the ascendancy of the federal bureaucracy with *de facto* lifetime appointments.

As noted above, commencing with House Speaker Newt Gingrich in 1995, vast unchecked powers over Congress have been seized by congressional leadership. They include controlling floor votes, committee hearings, amendments, debate time, and scheduling. This concentration of power diminishes congressional transparency and compromises the deliberative processes. Congressional leadership cripples the ability of members to challenge legislation or police the executive branch and reduces them to functionaries. Most of the powers currently lodged with the House Speaker and Senate Majority Leader should be devolved to committees, chairs, and individual member offices.

The executive branch routinely instructs its employees to serve temporarily in congressional offices to learn the dynamics of Congress and legislative plans that might challenge executive branch ambitions or supremacy. The executive branch even sports offices in congressional office buildings.

In self-defense, Congress should similarly arm itself against the executive branch. It should detail legislative employees to work in departments and agencies temporarily to learn the culture, unwritten rules, and ethos of the executive branch and its strategies to clip congressional powers or oversight. That information should be reported back to Congress. Committees should also establish and staff congressional offices in the departments and agencies they oversee. To prevent capture, the legislative employees should be prohibited for at least five (5) years from employment in the executive branch.

If these measures are taken, Congress will command the knowledge to undo its unilateral surrender of powers to the executive branch and regain its constitutional role of *primus inter pares*. But knowledge, *simpliciter,* will not cure the constitutional disease. Political will and fealty of members to their respective constitutional oaths are equally if not more necessary. That will require a watershed change in our political culture which this booklet declines to address as a concession to the shortness of life.

CONCLUSION

No empire in history has walked back from the precipice of self-ruination—squandering vast sums on superfluous or soon-to-be-antiquated weapons in lieu of schools, hospitals, roads, and bridges. The British Empire involuntarily abandoned its colonies and protectorates because depleted of manpower and money after World War II. And it did so only because it enjoyed the military protection and financial assistance of the United States. Remember Winston Churchill's words in November 1942, "I have not become the King's First Minister to preside over the liquidation of the British Empire."

The American Empire, however, is unique. It continues to feature a written Constitution celebrating separation of powers, checks and balances, and congressional dominance over the executive branch. Congress is first among equals. Members should have a higher estimate of their own significance in the constitutional order. Honoring rather than trampling our Constitution is our deliverance from collapse. Members of Congress should take the lead, but sister branches, lawyers, the media, and the foundational citizenry must be strong supporting actors. They must insist on a return to regular constitutional observance—a constitutional foundation for each and every government action.

Who dares fail to try?

The first step should be panoramic hearings before the House and Senate Judiciary Committees.

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THE CENTER FOR STUDY OF RESPONSIVE LAW is a nonprofit Ralph Nader organization that supports and conducts a wide variety of research and educational projects to encourage the political, economic and social institutions of this country to be more aware of the needs of the citizen-consumer. The Center publishes a variety of reports on a number of public interest issues.