

St. John's University School of Law

## St. John's Law Scholarship Repository

---

Faculty Publications

---

2018

### How Long is History's Shadow?

Anita S. Krishnakumar

*St. John's University School of Law*

Follow this and additional works at: [https://scholarship.law.stjohns.edu/faculty\\_publications](https://scholarship.law.stjohns.edu/faculty_publications)



Part of the [Law Commons](#)

---

This Book Review is brought to you for free and open access by St. John's Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# THE YALE LAW JOURNAL

ANITA S. KRISHNAKUMAR

## How Long Is History's Shadow?

### *Congress's Constitution: Legislative Authority and the Separation of Powers*

BY JOSH CHAFETZ

YALE UNIVERSITY PRESS, 2017

**ABSTRACT.** In *Congress's Constitution*, Josh Chafetz takes issue with those who have questioned the value of Congress in recent years. He argues that Congress's critics focus too heavily on its legislative function and ignore several important *nonlegislative* powers that enable Congress to exert significant authority vis-à-vis the other branches. Chafetz engages in close historical examination of these nonlegislative powers and notes that in some cases, Congress has ceased exercising them as robustly as it once did, while in others it has unwittingly ceded them to another branch. *Congress's Constitution* urges Congress to reassert several of its ceded powers more aggressively going forward, in order to recapture some of the authority and influence it has lost over time.

While admiring Chafetz's project—and sharing in his nostalgia for some of Congress's lost powers—this Review questions Congress's ability and inclination to rehabilitate its underused powers in the manner Chafetz advocates. It argues, first, that at least some of the powers Chafetz seeks to revive read like ancient history—the record of an era of legislative governance that has long since passed and that subsequent political and legal events have transformed—perhaps irreversibly. Second, it notes that Chafetz may be underestimating some important dynamics, such as partisanship, that could make Congress itself less likely to *want* to exercise its powers, and *the public* unlikely to accept Congress's attempts to aggressively exercise powers that have lain dormant for decades. More fundamentally, the Review suggests that the present-day Congress may be too shortsighted to look past what it “wants in the moment” in order to take steps that will benefit it as an institution. Moreover, Congress may not care as much about preserving its own traditions and history as Chafetz does.

In the end, the Review therefore submits that while reinvigorating Congress's underappreciated powers is a good idea in theory, in practice it may prove more challenging than Chafetz recognizes.



**AUTHOR.** Professor of Law and Associate Dean for Faculty Scholarship, St. John's University School of Law. I owe deep thanks to Kate Shaw for valuable insights and comments, to the editors at the *Yale Law Journal* for exceptional editorial assistance, and to my husband, Ron Tucker, for his patience with this project. Special thanks to Dean Michael A. Simons and St. John's University School of Law for generous research support. All errors are my own.



## BOOK REVIEW CONTENTS

INTRODUCTION	883
I. UNDERAPPRECIATED CONGRESSIONAL POWERS	885
A. Checking the Executive	885
1. The Power of the Purse	886
2. The Personnel Power	892
3. The Speech or Debate Power	894
B. The New <i>Marbury v. Madisons</i>	897
II. SOME OBSTACLES TO REHABILITATING CONGRESS'S POWERS	904
A. "Sticky" Historical Developments and Precedents	907
1. The Power of the Purse	910
2. The Personnel Power	915
3. The Speech or Debate Power	920
B. Partisanship	923
C. Congressional Shortsightedness	928
CONCLUSION	934

**INTRODUCTION**

Josh Chafetz's *Congress's Constitution* opens with the observation that it is, and long has been, in vogue to question the value of Congress—calling it dysfunctional, “the broken branch,” lamenting its seeming inability to make law.<sup>1</sup> Chafetz quickly takes issue with such criticisms, arguing that they focus narrowly on Congress's power to legislate and ignore numerous *nonlegislative* powers that the Constitution confers on the first branch. The book's project is to illuminate these other, nonlegislative powers—which Chafetz argues have been underappreciated by scholars and commentators—and to demonstrate how such powers give Congress significant ability to “assert itself vigorously” against the other branches.<sup>2</sup> Chafetz's approach is historical and rich in political context. He urges that if we examine Congress's nonlegislative powers historically, we will see that Congress (as well as the British Parliament and colonial assemblies before it) has, through a combination of design and judicious execution, served as a powerful counterweight to the other branches on numerous occasions. Moreover, the history reveals that over the years, Congress has unwisely ceded to the other branches many powers that it once exercised vigorously.

*Congress's Constitution* is more, however, than just a reference guide for the origins and historical evolution of Congress's nonlegislative powers. Its central thesis is that Congress should more forcefully rehabilitate and exercise its nonlegislative powers. Chafetz makes the case that it is in Congress's best interests as a coequal branch to revitalize these powers—that doing so would enhance Congress's legitimacy with the public, and that it is consistent with the constitutional design for Congress to assert itself more robustly against the other branches. Ultimately, Chafetz posits that whether Congress can successfully recapture its ceded powers will depend on its ability to persuade the public to its side.<sup>3</sup> He contends that the tools given to Congress in the Constitution merely set the stage, forming the basis for making Congress's case to the public, and that it is public support that ultimately determines whether Congress can successfully check the executive or judicial branches.<sup>4</sup>

*Congress's Constitution* is an impressive and important book. It provides perhaps the most authoritative account to date of how the constitutional powers of the legislative branch developed—as well as the effective and ineffective use of those powers, their contemporary constitutional status, and the most significant

- 
1. JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 1 (2017).
  2. *Id.* at 2.
  3. *See id.* at 14.
  4. *See id.* at 14, 20–21.

interpretive questions that remain open for constitutional debate. I have great admiration for Chafetz's historical analysis and his bold, optimistic vision of congressional power. Like Chafetz, I am a supporter of Congress and am predisposed to see virtue in its ability to act as a meaningful counterweight to the President and the courts. And I am perhaps peculiarly fascinated by Congress's arcane procedures, history, and rules, as manifested by my own earlier work on congressional procedure.<sup>5</sup>

But once Chafetz moves beyond the historical account, I harbor some skepticism about both his specific recommendations and Congress's ability to reclaim or rehabilitate its powers in the manner he advocates. I also part company, reluctantly, with Chafetz's idealistic faith in Congress to rise to the occasion and reclaim its rightful authority. I foresee at least three potential obstacles: (1) some of the powers Chafetz describes read like ancient history—the record of an era of legislative governance that has long since passed and that subsequent political events have transformed, perhaps irreversibly; (2) Chafetz ignores or undersells important dynamics, such as partisanship, that may make Congress itself less likely to *want* to exercise its dormant powers and the public less likely to accept modern congressional attempts to aggressively exercise those powers; and (3) Congress as an institution may not have the integrity or farsightedness to look past what it “wants in the moment”<sup>6</sup> and consider what will benefit it as an institution. Indeed, Congress may not care as much as Chafetz or other academics do about preserving its own traditions and history.

This Review proceeds in two Parts. Part I is descriptive: it outlines several of the underappreciated nonlegislative powers that *Congress's Constitution* examines and notes Chafetz's recommendations for how Congress should reinvigorate them going forward. Part II then argues that some of the powers Chafetz recommends reinvigorating may be difficult to revive as a practical matter, and that some should not be revived even if it would be practically feasible to do so. Specifically, Part II notes that historical developments—including changes to the congressional budget process, the professionalization of the civil service, and power grabs by other branches—have dramatically altered the political landscape.<sup>7</sup> It may be too late, and in some cases undesirable, for Congress to exercise

---

5. See, e.g., Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1 (2009); Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based Approach to Lobbying Regulation*, 58 ALA. L. REV. 513 (2007); Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARV. J. ON LEGIS. 135 (2005) [hereinafter Krishnakumar, *Debt Limit*]; Anita S. Krishnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget Train Wreck*, 35 HARV. J. ON LEGIS. 589 (1998) [hereinafter Krishnakumar, *Reconciliation*].

6. CHAFETZ, *supra* note 1, at 302.

7. See discussion *infra* Section II.A.

its latent powers in the manner of Parliament versus the Stuart Crown, or colonial assemblies, or even Congress itself during Reconstruction. Part II also considers how partisanship, the polarization of the voting public, and congressional shortsightedness may impact both Congress's willingness to exercise some of its powers robustly and the *public's perception* of Congress if it chooses to do so.

## I. UNDERAPPRECIATED CONGRESSIONAL POWERS

This Part provides an overview of the institutional resources and nonlegislative powers that *Congress's Constitution* argues the legislature can and should use to exercise substantial influence over the other branches. Chafetz's underlying theme is that Congress has ceded its constitutional authority to the other branches and should recapture that authority by revitalizing its nonlegislative powers and being more "judicious" in its use of them.<sup>8</sup> Section A discusses nonlegislative congressional powers that historically have been used to check the executive branch. Section B explores powers that Congress has ceded to the judiciary or, perhaps more accurately, that the judiciary has seized from Congress in cases that can be viewed as modern-day *Marbury v. Madisons*—in that they wrest power from the political branches for the judiciary.<sup>9</sup>

### A. Checking the Executive

This Section summarizes how *Congress's Constitution* treats three underappreciated powers that serve as a check on the executive branch: the power of the purse, the freedom of speech or debate (and specifically the freedom to leak classified information), and the personnel power. A fourth power that has traditionally served as a check on the executive branch, the power to punish contempts,

---

8. CHAFETZ, *supra* note 1, at 6.

9. All of the powers examined in *Congress's Constitution* are summarized in this Part, save one: the authority given to each house to "determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cl. 2. This power, which Chafetz refers to as "cameral rules," is omitted because *Congress's Constitution* neither suggests that Congress has let this power fall into disuse nor makes any recommendation that Congress rehabilitate it. Rather, Chafetz observes, based on historical examples, that Congress can use its authority to determine its own internal rules either to strengthen its institutional capacity or to diminish it, arguing that the latter occurs when Congress deploys its internal rules in a manner that obstructs legislative action, allowing the other branches to paint Congress as irresponsible or dysfunctional. Chafetz urges Congress to steer clear of such obstructionist uses of its cameral rules. See CHAFETZ, *supra* note 1, at 300-01. Because Chafetz makes no concrete recommendations that Congress reinvigorate its authority to determine its internal rules in the future but merely cautions Congress to be judicious in its use of this power, this Review does not address the plausibility or desirability of Congress following his suggestions.

is discussed in Section B because it is also a power that Congress has ceded to the judicial branch. Section B also examines Congress's internal discipline power, which likewise has been ceded to the judiciary. As *Congress's Constitution* reveals, Congress and its predecessors have vigorously deployed each of the powers discussed in this Section at various points in Anglo-American history. This Section both reviews the history provided in *Congress's Constitution* and discusses whether Congress has allowed the power at issue to fall into disuse or has continued to exercise it in recent years. In the former cases, *Congress's Constitution* tends to recommend that Congress reassert the underused power in the manner formerly employed; in the latter cases, it recommends new applications of the power to counteract the executive branch.

### 1. *The Power of the Purse*

Chafetz begins with the observation that although Congress's exercise of the power of the purse requires legislative action, appropriations laws differ from other legislation because their annual passage "is necessary to the continued functioning of the entire government" and this "guarantees that, every year, each house of Congress has the opportunity to give meaningful voice to its priorities and its discontentments."<sup>10</sup> I would characterize the appropriations power as a superlegislative power, or one that is not subject to the legislative roadblocks that often derail other legislation, rather than group it together with Congress's non-legislative powers as Chafetz does. But I take Chafetz's underlying point to be that the appropriations power provides Congress with unique and underappreciated opportunities, not present in the ordinary legislative process, to assert itself and to check the other branches. Chafetz focuses on three forms of the appropriations power that Congress historically has used to its advantage: (1) specific appropriations, including riders; (2) zeroing out government officials' salaries to express displeasure with executive policies; and (3) government shutdowns. As with all of the powers examined in *Congress's Constitution*, he argues that Congress has underutilized these powers, that scholars have underestimated their efficacy, or both.

Annual legislative appropriations originated in the British Parliament and were tied closely to specific expenditures.<sup>11</sup> In acts analogous to modern appropriations riders, legislatures beginning in the late Middle Ages not only appropriated funds, but also specified how the money was to be spent – even going so

---

10. CHAFETZ, *supra* note 1, at 45.

11. *See id.* at 51.



far as to ban the use of appropriated funds for other unspecified purposes.<sup>12</sup> Thus, for example, an appropriation to King Charles II during wartime contained the following specific limitation: “[T]hirty thousand pounds and noe more of the money to be raised by this Act may be applied for the payment of His Majesties Guards.”<sup>13</sup> Colonial assemblies in the 1600s continued this strong assertion of legislative authority over appropriations, even withholding funds when they did not approve of the way the royal government was spending them.<sup>14</sup> Indeed, Chafetz notes, “‘foot-dragging on appropriations and other bills became a favored tactic in the burgesses’ struggles’ with royal governors in Virginia” – including petty refusals to appropriate funds for the customary annual celebrations of the King’s birthday, accession, and coronation.<sup>15</sup>

By the 1700s, the assemblies were withholding appropriations not just to express disagreement with policies, but also to punish crown-appointed officials in their personal capacities by “zeroing out” – i.e., refusing to pay – their salaries. *Congress’s Constitution* describes in colorful detail how the Massachusetts Assembly, for example, postponed the semiannual appropriation for the Governor’s salary until the end of the session and then reduced it by one hundred pounds to add insult to injury.<sup>16</sup> Similarly, when the commanding officer of the royal army in the colony would not follow the Assembly’s orders, it refused to vote him his pay and “compelled his discharge.”<sup>17</sup> In the same vein, the South Carolina House of Commons refused to appropriate any salary at all for the crown-appointed Chief Justice because he sided with the royally appointed Governor in a dispute with the legislature.<sup>18</sup>

Chafetz draws bold conclusions from this history. Specifically, he notes that although the U.S. Constitution protects presidential salaries from alteration during the President’s term, judicial salaries from diminishment, and congressional

---

12. *See id.* at 46.

13. *Id.* at 48 (alteration in original) (quoting Taxation Act 1666, 18 & 19 Car. 2 c. 1, § 31 (Eng.)).

14. *See id.* at 54.

15. *Id.* (quoting WARREN M. BILLINGS, *A LITTLE PARLIAMENT: THE VIRGINIA ASSEMBLY IN THE SEVENTEENTH CENTURY* 183 (2004)).

16. *Id.* Chafetz reports that the ultimate grant to the Lieutenant Governor was so small in amount that he returned it “in disgust.” *Id.* (quoting 3 HERBERT L. OSGOOD, *THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY* 156–57 (1958)).

17. *Id.* (quoting EVARTS BOUTELL GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA* 191–92 (Russell & Russell 1966) (1898)).

18. *Id.* (citing 3 HERBERT L. OSGOOD, *THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY* 123 (1958)).

salaries from “varying” until after the next election,<sup>19</sup> “it does not otherwise prevent officers’ salaries from being reduced.”<sup>20</sup> Chafetz argues that based on this omission, combined with the history and an understanding that the allocation of powers between the branches is constantly being recalibrated through constitutional politics, we should view Congress’s authority to “zero out” specific programs or officials’ salaries as “simply another one of the tools by which Congress can press for decision-making authority in substantive areas.”<sup>21</sup> In other words, Chafetz advocates that the present-day Congress should rehabilitate the power to zero out salaries as a mechanism to express disapproval of executive branch officials.

*Congress’s Constitution* also discusses Congress’s historical use of riders, attached to must-pass appropriations bills, that seek to force the executive to accept policies (or limitations) important to Congress. Chafetz’s examples are sporadic, ranging from an 1810 proviso requiring that certain diplomatic officials be confirmed by the Senate in order to receive their salary (even though no substantive legislation mandated such confirmation)<sup>22</sup> to post-Reconstruction riders seeking to repeal laws that protected voting rights.<sup>23</sup> Based on this history, Chafetz argues that the present-day Congress should employ appropriations riders aggressively, as leverage to force policy concessions that are important to it.<sup>24</sup>

Finally, *Congress’s Constitution* embraces Congress’s power to shut down the federal government. Chafetz notes that the federal government has shut down eighteen times since 1976 – including two memorable and lengthy shutdowns in 1995 and 1996.<sup>25</sup> He argues that despite the fact that Congress “was the clear institutional loser” in the infamous 1995-96 shutdowns, it is a mistake to infer that Congress will inevitably lose in all shutdowns.<sup>26</sup> Rather, in his view, such shutdowns present both opportunities and dangers for Congress. For example, Chafetz points to the 2011 showdown between President Obama and the Republican-controlled Congress as a victory for Congress, arguing that the credible threat of a shutdown enabled the House leadership to bargain for and obtain a great deal of what it wanted policy-wise, as well as to maintain, and perhaps

---

19. U.S. CONST. art. II, § 1, cl. 7 (presidential salaries); *id.* art. III, § 1 (judicial salaries); *id.* amend. XXVII (congressional salaries).

20. CHAFETZ, *supra* note 1, at 56.

21. *Id.* at 67.

22. *Id.* (citing Act of May 1, 1810, ch. 44, § 2, 2 Stat. 608, 608).

23. *See id.* at 68.

24. *See id.* at 71-72.

25. *Id.*

26. *Id.* at 68-69.

enhance, its institutional power.<sup>27</sup> Who ultimately wins in these budget battles, Chafetz maintains, depends on the “artfulness with which political actors exercise the power that they do have.”<sup>28</sup>

In Part II, I question a number of Chafetz’s suggestions urging Congress to more aggressively deploy the power of the purse. For example, I observe that modern historical developments, including the rise of the civil service, may have moved public opinion to a point where the “zeroing out” of salaries is no longer a feasible or legitimate congressional move.<sup>29</sup> Moreover, a colonial legislature’s refusal to pay the salary of officers appointed by an external sovereign, who lacked support or an electoral connection with the American public, seems qualitatively different from a present-day Congress’s refusal to pay the salary of executive branch officials appointed by a President who has a meaningful electoral connection to every state’s voters. In addition, the “underutilization” of the appropriations power that Chafetz complains of is the result of numerous structural changes that Congress (and in some cases the President) made over time to the annual budget process—often without appreciating the effect that these cumulative changes would have on Congress’s power to check the executive branch.<sup>30</sup> For example, in 1917, Congress enacted the Second Liberty Bond Act, which delegates standing authority to the Treasury Secretary to borrow funds without seeking congressional approval, up to a maximum debt limit established by Congress.<sup>31</sup> While the debt limit statute requires the Secretary to periodically ask Congress for additional borrowing authority, it eliminates the need for the executive branch to request congressional approval for every specific instance of borrowing—and thus constitutes a substantial cession of power to the executive. Further, during the 1960s, Congress created several entitlement programs, such as Social Security and Medicare, which establish automatic rights to public funds for citizens who meet statutory requirements.<sup>32</sup> These automatic payments, combined with interest payments owed on the national debt, account for over two-thirds of annual government spending, effectively taking two-thirds of the

---

27. *Id.* at 69-70.

28. *Id.* at 71.

29. See discussion *infra* Section II.A.

30. See CHAFETZ, *supra* note 1, at 45.

31. Second Liberty Bond Act, Pub. L. No. 65-43, § 1, 40 Stat. 288, 288 (1917) (codified as amended at 31 U.S.C. § 3101 (2012)).

32. See ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 57 (3d ed. 2007) (explaining that direct spending for Social Security and Medicare benefits “is not controlled by annual appropriations but by the legislation that establishes eligibility criteria and payment formulas, or otherwise obligates the government”).

annual budget out of Congress's hands.<sup>33</sup> Congress also enacted the Budget and Accounting Act of 1921, which directs the President to initiate the annual appropriations process by submitting a draft budget to Congress.<sup>34</sup> This practice gives the President the "first-mover" advantage and forces Congress to react to the President's proposals.<sup>35</sup> Thus, the erosion of Congress's power of the purse has been caused, not by a single or simple act of executive branch usurpation or even by simple congressional disuse, but rather by numerous structural changes that combine to limit the scope of Congress's discretion over appropriations. Many of these structural changes were designed to streamline or centralize the appropriations process because Congress's piecemeal approach to budgeting had proved unwieldy and inadequate to meet the needs of an expanding American state. None seems to have been designed with the purpose of enhancing Congress's institutional standing—or, indeed, shows any sign that its drafters even paid attention to the impact that a particular change would have on Congress's appropriations power.

Last, I find Chafetz's take on government shutdowns both intriguing and troublesome. As someone who has written extensively on the congressional budget process and the 1995-96 shutdowns in particular, I confess that I am among those who have tended to view government shutdowns as harmful to Congress, because they make it look petty.<sup>36</sup> But Chafetz may be right that scholars and commentators have been too quick to conclude that Congress always

---

33. See STAFF OF S. COMM. ON THE BUDGET, 105TH CONG., *THE CONGRESSIONAL BUDGET PROCESS: AN EXPLANATION* 5-6, 56 (Comm. Print 1998); OFFICE OF MGMT. & BUDGET, *BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2017*, at 120 tbl.S-4 (2016) (projecting total spending of fiscal year 2017 to be \$4.089 trillion, of which \$2.878 trillion would go to mandatory spending and net interest); Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 314 (1998) (noting the considerable growth in mandatory spending since the 1960s); Alan L. Feld, *The Shrunken Power of the Purse*, 89 B.U. L. REV. 487, 492 (2009) (noting that the prevalence of "permanent fiscal legislation limits Congress's ability to review and change priorities through the appropriation process").

34. Budget and Accounting Act of 1921, Pub. L. No. 67-13, §§ 207-217, 42 Stat. 20, 22-23.

35. See Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 589 (2008) (noting the "first-mover advantage [that] . . . accrues from the President's ability to propose an initial budget"); see also LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 218-22 (6th ed. 2014) (noting the executive-empowering features of the 1921 Act); SCHICK, *supra* note 32, at 14 (suggesting that the 1921 Act ushered in an era of "presidential dominance" of the budget process).

36. See, e.g., Krishnakumar, *Reconciliation*, *supra* note 5, at 608-09 (contrasting the 104th Congress's loss of standing with the public with President Clinton's soaring approval ratings during the 1995-96 government shutdown); see also Krishnakumar, *Debt Limit*, *supra* note 5, at 174, 175 (describing failed congressional efforts to attach policy riders to must-pass debt limit

loses in these situations.<sup>37</sup> I take some issue in Part II with his recommendation that Congress use the power to shut down the government more often to extract concessions from the President, mostly because my work in the area<sup>38</sup> makes me nervous when the annual budget process is used in a game of high-stakes chicken. Failure to fund government agencies, for example, can lead to delays in the payment of program benefits to eligible recipients and permanently lost wages for government employees; further, refusals to increase the debt limit can have enormous fiscal and reputational costs for the nation, including costing the Treasury billions of dollars in increased interest payments.<sup>39</sup> But as Part II elaborates, a second reason for skepticism about aggressive use of government shutdowns is that modern developments in how the budget process works – like the debt limit statute, the growth of the administrative state, and the expansion of media coverage – have stacked the deck in favor of automatic congressional approval or renewal of spending commitments. The result is that Congress is likely to lose the public perception battle if it attempts to hold annual appropriations bills hostage in a manner that harkens back to the colonial assemblies' petulant refusal to appropriate funds to celebrate the King's birthday or to pay governors and army officials for their work.<sup>40</sup>

---

increase bills during budget showdowns with the President, and arguing that Congress rather than the President likely would bear the political blame for provoking a debt limit default).

37. The 2011 shutdown provides an important counterexample, suggesting that when the President faces significant voter backlash (in 2011, many voters were upset by the passage of the Affordable Care Act, and many Republican members of Congress felt emboldened by voters' anger), Congress may be able to overcome his structural budget process advantages and extract concessions from him.
38. See sources cited *supra* note 5.
39. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-701, DEBT LIMIT: ANALYSIS OF 2011-2012 ACTIONS TAKEN AND EFFECT OF DELAYED INCREASE ON BORROWING COSTS 22-23 (2012), <http://www.gao.gov/assets/600/592832.pdf> [<http://perma.cc/QA8N-YMBN>] (noting that the delay in raising the debt ceiling during the 2011 debt ceiling crisis raised borrowing costs for the government by \$1.3 billion and would continue to raise costs in later years); Heather Long, *With the Debt Ceiling, President Trump Is Playing with Fire*, WASH. POST (Aug. 25, 2017), <http://www.washingtonpost.com/news/wonk/wp/2017/08/25/5-reasons-why-hitting-the-debt-ceiling-would-be-disastrous> [<http://perma.cc/6K9V-55FE>] (noting that the mere threat of default costs the U.S. government hundreds of millions of dollars in increased interest payments on Treasury bonds); *Debt Limit Analysis*, BIPARTISAN POL'Y CTR. 25 (2012), <http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/files/Debt%20Limit%20Analysis%20Slides.pdf> [<http://perma.cc/MR5S-KT2P>] (estimating that the delay in raising the debt ceiling in 2011 raised borrowing costs by \$18.9 billion over ten years).
40. See discussion *infra* Section II.A.

## 2. *The Personnel Power*

Chafetz also discusses Congress's "personnel power" in detail and urges Congress to deploy this power more vigorously. The personnel power encompasses three different forms of congressional authority over executive branch appointments and officials: (1) impeachment; (2) confirmation; and (3) removal. The summary below focuses on impeachment and confirmation.

The leading lesson from Chafetz's historical primer is that legislative control over the personnel of the state originated, and primarily has been used, as a tool to ensure "responsible government." As Chafetz explains, "responsible government is 'those laws, customs, conventions, and practices that serve to make ministers of the King rather than the King himself responsible for the acts of the government, and that serve to make those ministers accountable to Parliament rather than to the King.'"<sup>41</sup> Initially, impeachment was the weapon of choice used by Parliament to express displeasure with English ministers' actions,<sup>42</sup> but in the colonies, confirmation and removal soon became important weapons as well.<sup>43</sup>

A subsidiary lesson from Chafetz's history is that impeachment has rarely been concerned with punishing actual misbehavior, treason, or high crimes and misdemeanors committed by the Crown's ministers, the President, or other executive branch officials. Rather, impeachment historically has been employed when Parliament, colonial assemblies, or Congress possessed deep policy disagreements with the executive. Indeed, many of Parliament's early charges against the Crown's ministers were based on trumped-up allegations of treason that obscured the underlying policy differences that constituted the true basis for Parliament's grievances.<sup>44</sup> In other words, impeachment is a tool that legislatures have historically used when they clash with the executive on policy matters, not to punish the executive for actual crimes.

This insight may shed some new perspective on current events, including congressional investigations involving President Trump and calls for his impeachment.<sup>45</sup> That is, history suggests that Congress is unlikely to impeach if a

---

41. CHAFETZ, *supra* note 1, at 78 (quoting CLAYTON ROBERTS, *THE GROWTH OF RESPONSIBLE GOVERNMENT IN STUART ENGLAND*, at viii (1966)).

42. *See id.* at 79-88.

43. *See id.* at 92-93 (asserting that "it [wa]s clear that by the time of the Revolution many of the assemblies were asserting substantial and meaningful control over who held colonial office").

44. *See, e.g., id.* at 84 (describing impeachment proceedings against the Earl of Strafford).

45. *See, e.g.,* Barry H. Berke et al., *Presidential Obstruction of Justice: The Case of Donald J. Trump*, BROOKINGS INSTITUTION (Oct. 10, 2017), <http://www.brookings.edu/wp-content/uploads/2017/10/presidential-obstruction-of-justice-the-case-of-donald-j-trump-final.pdf>

majority of its members find themselves on the same side of policy issues as the President. Thus, so long as Republican members of Congress agree with President Trump about the major policy issues of the day – e.g., cutting taxes, defunding abortion, stiffening immigration laws and penalties – they have no incentive to try to use the impeachment power to extract concessions from him. Democrats, by contrast, want to use whatever hook they can to exert pressure on President Trump because they are deeply dissatisfied with his policy agenda.<sup>46</sup> But in neither case is the underlying focus on whether the President or members of his staff have violated the law; rather, Congress's focus is on whether impeachment will help it to ensure responsible government – i.e., policy control over the President. In Part II, I question whether at some point in an investigation, non-partisan factors such as good government or public outrage over the obstruction of justice (at issue in the Watergate investigation and Clinton impeachment) may force Congress's hand. In such cases, Congress may be compelled to impeach a President it sees no need to rein in, policy-wise, because of the public's demand that he be punished.<sup>47</sup>

Importantly, impeachment is not a power that Chafetz urges Congress to assert more aggressively. Rather, recognizing the gravity of this power, he applauds Congress's limited use of it across history.<sup>48</sup> Nor is impeachment a power that Congress has abandoned or allowed to fall into disuse. But as Part II discusses, it may be a power over which Congress has lost some control – insofar as public engagement, stoked by twenty-four-hour media coverage, could pressure Congress to impeach the President or a high-level executive branch official even when members of Congress themselves do not wish to do so.<sup>49</sup>

Chafetz's history also reveals, unsurprisingly, that Congress has tended to most vigorously flex its personnel powers – whether in the form of removal, im-

---

[<http://perma.cc/2UAL-LPGN>]; Melina Delkic, *Trump Obstructed Justice in Russia Investigation and Could Be Impeached, New Think Tank Report Claims*, NEWSWEEK (Oct. 10, 2017, 12:55 PM), <http://www.newsweek.com/president-donald-trump-impeachment-paper-brookings-institution-681546> [<http://perma.cc/RMT8-NGHA>].

46. See Catherine Campo, *Democrats Warn Trump Not To Impede Mueller's Russia Probe*, CNBC (Oct. 30, 2017, 1:26 PM ET), <http://www.cnbc.com/2017/10/30/democrats-call-for-muellers-russia-probe-to-continue-without-obstruction.html> [<http://perma.cc/96XA-7YDM>]; Nolan D. McCaskill, *Six Democrats Demand Trump Impeachment Hearings*, POLITICO (Nov. 15, 2017), <http://www.politico.com/story/2017/11/15/trump-impeachment-democrats-244927> [<http://perma.cc/87Y8-7E43>].

47. See discussion *infra* Section II.A.

48. See CHAFETZ, *supra* note 1, at 150–51.

49. See discussion *infra* Section II.A.

peachment, or refusals to confirm – during divided government, when the President’s standing with the public or within his own party is weak.<sup>50</sup> Thus, Chafetz describes how the weak and unpopular President Tyler, who assumed office after the death of William Henry Harrison and quickly alienated members of both parties, saw the Senate reject eight of nine Supreme Court nominations and seven of twenty cabinet nominations.<sup>51</sup> Conversely, when the popular President Lincoln was in office, Congress expanded the Court’s size to ten in order to give him an appointment; after Lincoln was assassinated, Congress reduced the Court’s size to seven to prevent the unpopular President Johnson from making any appointments to the Court.<sup>52</sup>

Chafetz draws from these and other historical examples the lesson that Congress’s personnel power includes the power to create offices and to decide which offices require Senate confirmation.<sup>53</sup> This leads him to endorse the provocative idea, put forward by Bruce Ackerman, that Congress can and should require Senate confirmation for all significant White House staffers.<sup>54</sup> This is justified, Chafetz argues, “when we remember that the origins of the legislative personnel power lie in the development of responsible government. Congress is well within its rights to seek responsibility and responsiveness from even, and perhaps especially, the president’s closest advisers – his privy council, if you will.”<sup>55</sup> In other words, Chafetz argues that the President’s closest advisers should be responsible to Congress, just as the British monarch’s closest ministers were responsible to Parliament. I am sympathetic to this suggestion as a matter of abstract historical and constitutional analysis. But as discussed in Part II, I question whether (1) our now-longstanding past practice of allowing the President to pick his closest advisers has become a “sticky” precedent that cannot be undone at this stage; and (2) the public would perceive a congressional attempt to insert itself into the President’s process of selecting his closest advisers as an unseemly power grab.<sup>56</sup>

### 3. *The Speech or Debate Power*

*Congress’s Constitution* also champions the Speech or Debate Clause as a source of power that Congress can and should use to check the executive branch.

---

50. See, e.g., CHAFETZ, *supra* note 1, at 111-13.

51. See *id.* at 111-12.

52. See *id.* at 112.

53. See *id.* at 121.

54. See *id.* at 122.

55. *Id.*

56. See discussion *infra* Section II.A.



Specifically, Chafetz points to the immunity that legislators enjoy for actions taken within the statehouse and urges them to use that immunity to disseminate information to the public.<sup>57</sup> Chafetz identifies two categories of legislative behavior that arguably should be protected under the Clause: (1) legislators' communications with their own constituents; and (2) the release of "state secrets" or "classified information."<sup>58</sup> This Review will focus on the second category, and Chafetz's suggestion that Congress should rehabilitate its past practice of checking the executive by judiciously releasing classified matter to the public.

As always, *Congress's Constitution* provides numerous colorful historical examples of congressional exercise of the power to "leak" classified information under the protection of the Speech or Debate Clause. One such example is the leak of the *Pentagon Papers*, 4,100 pages of which were read on the House floor and then placed into the public record of the relevant subcommittee by Mike Gravel, "a little-known senator from Alaska"<sup>59</sup> *the night before* the U.S. Supreme Court issued its famous ruling allowing the *Papers* to be published by the *New York Times* and the *Washington Post*.<sup>60</sup> Similarly, in 1973, Representative Michael Harrington leaked to the press the substance of testimony by CIA director William Colby regarding CIA activities during a military coup in Chile.<sup>61</sup> Public reaction to that leak led to legislation expanding presidential and congressional oversight of the CIA.<sup>62</sup> And shortly after the First Gulf War, Chairman Henry B. Gonzalez of the House Banking Committee repeatedly read aloud from classified documents on the House floor and placed several documents in the legislative record;<sup>63</sup> the documents showed that the George H.W. Bush Administration had been cozying up to the Iraqi regime just months before Iraq invaded Kuwait.<sup>64</sup>

---

57. For an example of the Speech or Debate Clause providing congressional immunity for actions on the floor, see *United States v. Johnson*, 383 U.S. 169, 180 (1966).

58. See CHAFETZ, *supra* note 1, at 215.

59. *Id.* at 216.

60. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). Indeed, even after that ruling, Gravel thought the newspapers were too cautious and published too little of the material contained in the *Papers*, and so "arranged to have the entire '4,100-page subcommittee record' published by Beacon Press." CHAFETZ, *supra* note 1, at 216 (quoting MIKE GRAVEL & JOE LAURIA, *A POLITICAL ODYSSEY: THE RISE OF AMERICAN MILITARISM AND ONE MAN'S FIGHT TO STOP IT* 50-51 (2008)).

61. CHAFETZ, *supra* note 1, at 218.

62. *Id.* at 218-19 (citing CECIL V. CRABB, JR. & PAT M. HOLT, *INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY* 164 (1980); L. BRITT SNIDER, *THE AGENCY AND THE HILL: CIA'S RELATIONSHIP WITH CONGRESS, 1946-2004*, at 32-33 (2008)).

63. *Id.* at 219.

64. *Id.* at 220.

Chafetz describes these episodes as heroic acts by members of Congress. And he contrasts them unfavorably with recent disclosures of classified information by Chelsea Manning and Edward Snowden.<sup>65</sup> Perhaps most intriguingly, Chafetz suggests that it would be better if executive branch actors like Snowden and Manning leaked to members of Congress rather than “engag[e] in indiscriminate public releases.”<sup>66</sup> That is, it would be better to have the “final decision on releasing information to the public . . . made by a democratically accountable official, who would be likely to exercise at least some measure of care – as Senator Gravel did – to avoid releasing especially damaging information.”<sup>67</sup> Members of Congress, Chafetz believes, would be more cautious about the information they leaked, perhaps exercising greater judgment and care to redact where appropriate. (Chafetz’s concerns are not imaginary; there is evidence that some of the materials Snowden leaked were improperly redacted, leading to the exposure of intelligence activity against al-Qaeda.<sup>68</sup>)

It is worth noting that the power to leak classified information is not one that Congress appears to have abandoned in recent years. Indeed, as Chafetz chronicles, some members of Congress have exercised this power as recently as 2011, when Senators Ron Wyden and Mark Udall “announced on the Senate floor that the Obama Administration had adopted a secret, implausible interpretation of portions of the [PATRIOT] Act dealing with domestic surveillance,” and subsequently sent an open letter to Attorney General Eric Holder publicizing their concerns about this secret legal interpretation.<sup>69</sup> Senators Wyden and Udall did not release the details of the secret interpretation itself, but they did specify the provision of the PATRIOT Act at issue.<sup>70</sup> Their disclosure prompted news investigations and lawsuits by public interest groups and was ultimately clarified

---

65. See, e.g., Peter Finn & Sari Horwitz, *U.S. Charges Snowden with Espionage*, WASH. POST (June 21, 2013), [http://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-ao16-92547bfo94cc\\_story.html](http://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-ao16-92547bfo94cc_story.html) [<http://perma.cc/3UM4-Z392>]; Julie Tate, *Manning Apologizes, Says He 'Hurt the United States' by Giving Documents to WikiLeaks*, WASH. POST (Aug. 14, 2013), [http://www.washingtonpost.com/world/national-security/manning-apologizes-said-he-hurt-the-united-states/2013/08/14/e1de6cb4-0525-11e3-ao7f-49ddc7417125\\_story.html](http://www.washingtonpost.com/world/national-security/manning-apologizes-said-he-hurt-the-united-states/2013/08/14/e1de6cb4-0525-11e3-ao7f-49ddc7417125_story.html) [<http://perma.cc/7MB9-BYXS>].

66. CHAFETZ, *supra* note 1, at 223.

67. *Id.*

68. See, e.g., Alan Yuhas, *John Oliver Presses Edward Snowden on Whether He Read All Leaked NSA Material*, GUARDIAN (Apr. 6, 2015, 9:42 AM), <http://www.theguardian.com/us-news/2015/apr/06/edward-snowden-john-oliver-last-week-tonight-nsa-leaked-documents> [<http://perma.cc/4AFV-T5HW>].

69. CHAFETZ, *supra* note 1, at 221.

70. See *id.*

in the leaks made by Edward Snowden.<sup>71</sup> Highlighting the power to leak as an underappreciated congressional power, and contrasting leaks by members of Congress with leaks by executive branch employees, Chafetz seems to be calling for more detailed or more regular disclosures by congressional members – perhaps in order to discourage executive branch employees from filling the void (as Snowden arguably did when he dumped documents that Senators Wyden and Udall had been unwilling to reveal).

*B. The New Marbury v. Madisons*

One of the most valuable and intriguing contributions that *Congress's Constitution* makes to the literature is its exposition of a shift of power from Congress to the judiciary during the twentieth century. The story of this shift is important but risks getting buried given commentators' current preoccupations with checking a dangerous and dysfunctional executive branch. As part of this shift, two nonlegislative powers in particular have suffered substantial judicial encroachment: (1) Congress's power to punish third parties acting in contempt of Congress; and (2) Congress's power to discipline its own members. As Chafetz demonstrates, the loss of these congressional powers was not merely accidental, but the result of deliberate and opportunistic judicial power grabs and congressional acquiescence in those grabs. I use the term the "new *Marbury v. Madisons*" to describe these judicial usurpations because in both contexts, the judiciary seized the authority to decide certain categories of legal and political questions for itself, diminishing Congress's authority to decide those same questions in the process – much as Chief Justice Marshall in *Marbury* seized the power of judicial review for the Court.<sup>72</sup>

Consider, first, Congress's power to punish third parties, including executive branch officials, for acting in contempt of Congress – typically by refusing to produce subpoenaed documents.<sup>73</sup> Chafetz provides a long history of parliamentary and congressional use of the power to hold private citizens and the Crown or executive branch officials in contempt – including arresting members of the

---

71. *See id.*

72. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

73. *See CHAFETZ, supra note 1*, at 176–78 (describing the use of the contempt power against the Minister to China, George F. Seward, and the threat to use the contempt power against a reporter who helped expose a scandal involving U.S. Attorney H. Snowden Marshall).

executive branch<sup>74</sup> – and argues that “in order for legislative oversight to be effective in rooting out executive-branch malevolence and incompetence, Congress must . . . have the power to hold executive-branch officials in contempt.”<sup>75</sup>

This history is followed by a compelling story about how Congress, in recent history, has ceded its power to enforce its own contempt citations to the courts. According to Chafetz, the cession of power began when Congress started turning to the courts to enforce its contempt citations, rather than issuing punishment itself when faced with recalcitrant witnesses or refusals to produce documents. Chafetz argues that Watergate in particular acted as a turning point in the demise of Congress’s contempt power.<sup>76</sup> In 1973, when the Senate Select Committee on Presidential Campaign Activities demanded five tapes of White House conversations between President Nixon and his aide John Dean, Nixon famously asserted executive privilege and refused to produce the tapes.<sup>77</sup> At that point, the Select Committee chose to go to court, seeking a declaratory judgment from the judiciary affirming that it had a right to the tapes, rather than holding the President in contempt itself.<sup>78</sup> In Chafetz’s telling, Congress surrendered its inherent power to subpoena and insist on compliance – and the courts took advantage of this transfer of power, declaring themselves to be the exclusive, final arbiters of whether executive branch officials (and presumably anyone else) must comply with congressionally issued subpoenas.<sup>79</sup>

In *Senate Select Committee*, the U.S. District Court for the District of Columbia balanced the public interest in obtaining the subpoenaed information against the President’s right to executive privilege and ruled that the public interest did not outweigh the privilege – noting that the tapes were available in proceedings before grand juries investigating Watergate and that requiring disclosure to Congress as well would “imply that the judicial process has not been or will not be effective in this matter.”<sup>80</sup> In other words, the court privileged its own judicial

---

74. *Id.* at 176-79.

75. *Id.* at 181-82.

76. *Id.* at 182.

77. *See id.*

78. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521, 521-22 (D.D.C.), *aff’d*, 498 F.2d 725 (D.C. Cir. 1974) (en banc).

79. CHAFETZ, *supra* note 1, at 183.

80. 370 F. Supp. at 524.

branch investigation over Congress's investigation of Watergate.<sup>81</sup> Chafetz convincingly argues that “[t]he courts thus made themselves the heroes of the Watergate story, and in the process they sent the message that Congress was not up to the task.”<sup>82</sup> This insight about the devastating effect that the Watergate executive privilege cases had on Congress's contempt power is incisive – and a highly valuable contribution of the book. Congress, as Chafetz explains, has largely acquiesced in this transfer of power to the judiciary, and this in turn has diminished Congress's standing in the public sphere and left it less able to assert a strong institutional role in checking the executive branch.

As with many of the other powers he examines, Chafetz looks longingly backward at Congress's contempt power and laments that “[u]ntil the late twentieth century, the legislative house was generally understood to be the final judge of legislative contempts.”<sup>83</sup> He encourages Congress, which has to date capitulated and acquiesced in the judiciary's assertion of authority to decide who must comply with a congressional subpoena, to rehabilitate its contempt power – that is, to use its own inherent powers to enforce its subpoenas,<sup>84</sup> rather than turn to

---

81. See CHAFETZ, *supra* note 1, at 183 (“The result of the suite of executive privilege cases arising out of Watergate, then, was an assertion by the courts that executive privilege claims are stronger against Congress than they are against criminal process.”).

82. *Id.* The problem has since been compounded, as subsequent congressional subpoenas, such as those issued to Bush Administration executive branch officials Harriet Miers and Joshua Bolten to testify and produce documents, have ended in further arrogation of power by the judiciary. See *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 71 (D.D.C. 2008) (finding that the dispute was of “the sort that is traditionally amenable to judicial resolution” because “(1) in essence, this lawsuit merely seeks enforcement of a subpoena, which is a routine and quintessential judicial task; and (2) the Supreme Court has held that the judiciary is the final arbiter of executive privilege, and the grounds asserted for the Executive's refusal to comply with the subpoena are ultimately rooted in executive privilege” (citing *United States v. Nixon*, 418 U.S. 683 (1974))).

83. CHAFETZ, *supra* note 1, at 190.

84. Congress has long been deemed to possess an inherent power to declare persons who obstruct its legislative or investigative processes to be in contempt of Congress. See *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821); TODD GARVEY, CONG. RESEARCH SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE (2017). Congress's inherent contempt power is not specifically enumerated in the Constitution, but it is considered necessary to investigate and legislate effectively. GARVEY, *supra*, at 10. In the modern era, the contempt power has most often been employed in response to a witness's refusal to comply with a congressional subpoena – whether in the form of a refusal to provide testimony or a refusal to produce requested documents. See, e.g., *Jurney v. MacCracken*, 294 U.S. 125 (1935) (holding that destruction of documentary evidence subpoenaed by a congressional committee can constitute punishable contempt). Under the inherent contempt power, the obstructing individual is brought before the House or Senate by the Sergeant-at-Arms, tried at

the courts. Indeed, he notes that “each house has a sergeant-at-arms, and the Capitol building has its own jail.”<sup>85</sup> “The sergeant can be sent to arrest contemnors,” he urges. And he observes that even if an arrested contemnor files a habeas petition in court, at that point Congress can argue that the courts “should limit [their] inquiry to the question of whether the [arresting] house [is] jurisdictionally competent to hold the contemnor” — i.e., whether the contemnor’s alleged infraction in fact amounts to contempt of Congress — and if so, the courts should let Congress’s internal enforcement procedures play out.<sup>86</sup>

As much as I love the historical specter of Congress asserting itself in this manner, I think Chafetz is overly nostalgic and idealistic about the assertion of this congressional power. The historical precedent is there. But it is distant and far removed from the present day. I am sympathetic to Chafetz’s argument that Congress unwittingly gave away its power to punish contempt and unwisely acquiesced in the judiciary’s seizure of this power. But for reasons discussed in detail in Part II, I also believe that the ship has sailed on Congress’s exercise of the power to arrest contemnors and that it is too late to resurrect it in the manner Chafetz recommends.<sup>87</sup>

A second instance Chafetz highlights in which the judiciary seized some part of a significant nonlegislative congressional power involves Congress’s power to discipline its own members. As in other chapters, *Congress’s Constitution* begins with a detailed and illuminating historical arc of internal discipline by legislative bodies from Parliament to colonial assemblies to Congress, both in the early years of the Republic and through the modern era.<sup>88</sup> It notes, for example, that “colonial assemblies ‘over and over again’ disciplined their members for offenses ranging from absenteeism to ‘scandalous’ papers to unparliamentary conduct, and the assemblies’ power to do so went largely unquestioned.”<sup>89</sup>

Importantly, the history of internal congressional discipline reveals that prosecution in the courts for “ethics” violations by members of Congress — i.e., the exercise of influence over members in a manner believed to corrupt their judgment — is a recent development.<sup>90</sup> The first case Chafetz could find in which

---

the bar of the body, and may be imprisoned or detained in the Capitol or elsewhere. GARVEY, *supra*, at 10.

85. CHAFETZ, *supra* note 1, at 193.

86. *Id.* at 193–94.

87. See discussion *infra* Section II.B.

88. CHAFETZ, *supra* note 1, at 232–53.

89. *Id.* at 239 (quoting MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 185–90 (1943)).

90. *Id.* at 253–54.

members of Congress were convicted in federal court for ethics transgressions occurred in the first decade of twentieth century; prior to that, it was understood that internal discipline was up to each house to handle.<sup>91</sup> Moreover, use of the disciplinary power to address “ethics” violations at all is a relatively modern phenomenon.<sup>92</sup>

As with the contempt power, *Congress’s Constitution* shows that once Congress began to turn to the courts for enforcement, the courts (and the executive) quickly seized authority over congressional discipline for themselves. Criminal proceedings before grand juries became the normal venue for investigating and punishing offending legislators, with Congress deferring to those proceedings rather than pressing its own inquiries.<sup>93</sup> Chafetz’s history chronicles how over time, primary responsibility for ethics enforcement shifted away from Congress and toward the executive and the courts—to the point where today, congressional members who engage in serious ethical improprieties are no longer investigated or tried by their own chambers, but instead have their cases prosecuted and decided by the executive and judicial branches.<sup>94</sup> Chafetz laments this shift, arguing:

When congressional ethics violations are prosecuted by the executive and adjudicated by the courts, those branches get to play the heroes as they ferret out corruption by powerful actors in the name of the public interest. Meanwhile, congressional enforcement is relegated to the status of an also-ran . . . . The message sent to the public is that Congress protects its own, handing out slaps on the wrist at most, and that only the executive and the courts can be trusted to keep politics clean.<sup>95</sup>

*Congress’s Constitution* notes that both houses of Congress have accepted this shift of power over the investigation and discipline of members of Congress to the judiciary, treating criminal proceedings as the primary forum for enforcing congressional ethics.<sup>96</sup> Chafetz casts this shift, along with the Supreme Court’s

---

91. *Id.* at 250–51, 254.

92. *Id.* at 253.

93. *Id.* at 256 (describing the cases of John Langley of Kentucky and Frederick Zihlman of Maryland).

94. *Id.* at 255; *see also id.* at 261 (discussing the examples of Dan Rostenkowski, Duke Cunningham, Bob Ney, and Tom DeLay, all of whom were indicted or convicted in criminal proceedings, but none of whom were subjected to any form of internal congressional discipline).

95. *Id.* at 255.

96. *See id.* at 259–60 & nn.219–21. Chafetz notes, for example, that in 1972 the House Ethics Committee reported out a resolution expressing the sense of the House that a member convicted of a crime that carried a sentence of at least two years in jail should refrain from participating

ruling in *Powell v. McCormack*,<sup>97</sup> as another usurpation of power by the judiciary. In *Powell*, as in the Watergate executive privilege cases, the Court took power for itself, pronouncing that Congress had failed to properly follow its own internal rules about votes to expel versus exclude a member, and going so far as to set aside a congressional vote to exclude a member.<sup>98</sup> As Chafetz observes, it is remarkable that the Court ruled on the propriety of Congress's vote to exclude at all, when it simply could have deferred to Congress's interpretation of its own internal rules.<sup>99</sup>

Chafetz recommends that Congress take back, or rehabilitate, the disciplinary power it has ceded to the judiciary (or allowed the judiciary to usurp). He hails, for example, the creation of the House Office of Congressional Ethics (OCE) and Ethics Committee, and offers reasonable recommendations to improve how they function – e.g., adopting a similar office for the Senate or giving the OCE and Ethics Committee jurisdiction over former members so members cannot simply escape discipline from their chamber if they resign or lose reelection.<sup>100</sup> Chafetz's history is compelling, and I agree with his assessment that Congress has disempowered itself and diminished its public credibility by leaving discipline of its members to the other branches. Further, Chafetz may be correct in theory that entities like OCE, which is required to act when certain conditions are met, can be useful in getting Congress back into the business of investigating its own members. However, the history recounted in *Congress's Constitution* reveals that partisanship has long played a significant role in whether Congress disciplines its members and in the punishments it metes out.<sup>101</sup> As discussed in Part II, I question whether, in practice, factors such as partisanship, reluctance to go after one's friends, and the judiciary's own interest

---

in House business until the conviction was overturned or the member was reelected. *See id.* at 259. The report accompanying the resolution stated that “where an allegation involves a possible violation of statutory law, . . . the policy has been to defer action until the judicial proceedings have run their course.” *See id.* at 259-60.

97. 395 U.S. 486 (1969).

98. Adam Clayton Powell, Jr. was a senior member of the House of Representatives who became embroiled in an ethics scandal. *Id.* at 490. The House voted to exclude him from his seat, and Powell sued, claiming that the vote to exclude amounted to an expulsion, which had not occurred. *Id.* at 493. The Court agreed; it held that the House could exclude a member only for failure to meet the qualifications for office specified in Art. I, § 2, cls. 1-2 and that so long as a member met those qualifications (which Powell did), the only way the House could prevent him from taking his seat was through a vote to expel, which required a two-thirds supermajority. *See id.* at 506-12.

99. *See* CHAFETZ, *supra* note 1, at 254-55.

100. *See id.* at 263-64.

101. *See id.* at 253.



in retaining power will stand in the way of meaningful reinvigoration of this congressional power.

\*\*\*

As *Congress's Constitution* demonstrates, the demise (or transfer) of Congress's various nonlegislative powers occurred in a number of ways. In some cases, Congress stopped exercising a particular constitutional power on its own, or at least stopped exercising the power in the aggressive manner employed by earlier Congresses, Parliament, and colonial assemblies.<sup>102</sup> In other cases, another branch stepped in to claim powers previously exercised by Congress, and Congress silently or expressly acquiesced in the other branch's actions.<sup>103</sup> In still other cases, Congress agreed to structural changes in the way government is run that have had the effect over time of shifting power away from Congress.<sup>104</sup> In each of these cases, Congress voluntarily abnegated its power, although it appears to have done so gradually and unconsciously rather than deliberately. The method by which a particular congressional power was diminished may have some bearing on whether Congress can reclaim that power. Specifically, in cases where another branch seized a congressional power, it may be difficult for Congress to seize back the power, particularly if the other branch has perpetuated a narrative about its institutional ownership of the power or its superiority vis-à-vis Congress in exercising the power – e.g., the insufficiency of self-executed ethics investigations, the scope of executive privilege, and the value of judicial independence. Similarly, where structural changes that diminish Congress's powers have long been in place – e.g., the administrative state and changes to the budget process – it may be difficult, if not impossible, for Congress to turn back the clock and exercise old powers in the manner it once did. Indeed, Congress's best hope for resurrecting its power may lie in those powers that were diminished due to congressional disuse alone, without complicating factors such as encroachment by other branches or structural changes in how the government operates. As the next Part elaborates, it likely would be easier for Congress to reinvigorate, for example, its power to leak classified information – which no other branch has appropriated – than to reclaim the power to punish contempts of Congress by arresting offenders.

---

102. This was how the power to arrest persons in contempt of Congress, the power to leak classified information, and the appropriations-related power to zero out salaries fell into disuse.

103. This describes how Congress ceded to the judiciary the power to conduct ethics investigations of congressional members and the power to review and punish refusals to comply with congressional subpoenas.

104. These include changes to the budget process that made specific appropriations a small feature of the annual budget and the creation and expansion of the administrative state, which empowered the executive by delegating many of Congress's powers to agencies headed by his appointees.

## II. SOME OBSTACLES TO REHABILITATING CONGRESS'S POWERS

This Part questions whether some of the underappreciated congressional powers that *Congress's Constitution* recommends rehabilitating may be difficult to resurrect as a practical matter or undesirable to revive as a normative one. I argue that while Chafetz's historical research is compelling and paints a picture of strong congressional power, in some cases that history may be too ancient or attenuated to support aggressive contemporary congressional action. There is a fine line between sharing the lessons of history and indulging in outright nostalgia for a distant and unrecoverable past, and some of Chafetz's recommendations have the distinct feel of wistful remembrance rather than viable historical lessons that can be applied in the present.

Notably, historical developments and past practice—including changes to the budget process, the growth of the administrative state, and the professionalization of the civil service—may have so changed the constitutional landscape that it has become difficult to argue that things should be done the way they were in seventeenth-century England, the colonial era, or during Reconstruction. Further, the executive and judicial branches are unlikely to quietly cede back powers they have gained at Congress's expense and would likely fight congressional efforts to reclaim those powers. In any battle with the other branches, past practice is likely to work against Congress, making it easier for the other branches to characterize Congress's attempts to revive its underused powers as unduly aggressive. Indeed, many of these practices and historical developments have become “sticky” — by which I mean deeply entrenched and difficult to overcome absent an exceptional event.<sup>105</sup> In addition to these external challenges, there may be two internal challenges to the rehabilitation of Congress's underused powers that Chafetz recognizes but undersells: partisanship and shortsightedness. Party loyalty may, in at least some cases, prevent Congress from *wanting* to assert its nonlegislative powers in the manner Chafetz suggests. And partisanship, along with a deterioration of norms, may also lead politicians to put short-term political gain ahead of the long-term institutional power of Congress. Section A explores the obstacles that sticky historical precedents may pose for Chafetz's recommendations. Section B explores how partisanship may undermine his proposed assertions of congressional power. Section C offers recent examples that highlight the rise of short-term thinking in Congress.

Before turning to these potential obstacles, however, it is worth pausing to say a few words about the role of public perception and support—which Chafetz

---

105. Cf. WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 114 (2010) (defining “entrenchment” as “beyond partisan debate”).

describes as the determinative factor in whether Congress will be able to successfully reassert its powers against the other branches. Chafetz argues that a key feature of interbranch conflicts – battles over political authority – is that they are “public focused.”<sup>106</sup> Quoting David Mayhew, he explains that “political activity takes place before the eyes of an appraising public” and contends that public discourse affects the relative power of the branches and shapes how interbranch conflicts ultimately play out.<sup>107</sup> As an example, Chafetz notes that a President “who enjoys high levels of public support will find it much easier to get his way with Congress” than a President who does not.<sup>108</sup>

Chafetz’s “public support” insight is unorthodox, as many scholars view the powers held by each branch to be static and specified by the Constitution, rather than constantly evolving.<sup>109</sup> His account is ultimately convincing, however, because *Congress’s Constitution* provides numerous examples of how public discourse and opinion (including public outrage) have influenced the outcome of interbranch battles and helped shift the locus of power throughout history. Nevertheless, I disagree with Chafetz about the implications of this insight for Congress’s ability to rehabilitate its long-unused powers. While Chafetz views the public discourse element as one that liberates Congress by rendering its constitutional powers constantly open to renegotiation, for at least two reasons I view it as one that is equally likely to act as a check on the recapture of congressional power. First, in many cases, the public is likely to view congressional attempts to seize back powers that have long been exercised by the executive or the judicial branch as acts of legislative usurpation – particularly since the other branches are likely to cast Congress’s behavior that way, and since Congress’s assertion of such powers would go against recent historical practice.

---

106. CHAFETZ, *supra* note 1, at 20 (emphasis omitted).

107. *Id.* at 20-21.

108. *Id.* at 21. *Congress’s Constitution* contains other similar examples of public engagement playing a role in determining which branch wins a political battle. See, e.g., *id.* at 10-13 (describing President Obama’s public warnings about judicial activism while the Supreme Court was reviewing the constitutionality of the Affordable Care Act and the effect of public discourse on the Court’s ultimate ruling); *id.* at 218-19 (describing leaks of classified information about CIA misdeeds and arguing that public criticism resulting from the disclosures played a role in the passage of legislation expanding presidential and congressional oversight of the CIA).

109. See, e.g., John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1947 (2011) (contending that the Constitution “reflects countless context-specific choices about how to assign, structure, divide, blend, and balance federal power”); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752-53 (2009) (arguing that the constitution “must be given the meaning on which its enactors voted”).

Second, in the modern era, there is very little public support for the kind of obstructionism that would result from Congress's aggressive assertion of many of its nonlegislative powers in the manner Chafetz recommends – e.g., zeroing out salaries and forcing government shutdowns to win concessions from the executive. When Parliament, colonial assemblies, and early Congresses zeroed out salaries or refused to legislate until their grievances were addressed, they did not do so under the watchful eye of the public. Moreover, those earlier legislatures acted at a time when government regulation – and congressional action relating to such regulation – was far less prevalent or necessary for the delivery of services expected by citizens than in the modern era.<sup>110</sup> Today, by contrast, technology and the twenty-four-hour news cycle ensure that the public is aware of every minute, petty action taken by either side during an interbranch conflict, and media coverage itself influences the public's perception of which branch is in the right.<sup>111</sup> A Congress that seeks to hold legislation, salaries, or government funding hostage in order to get its way risks playing into common perceptions that it is obstructionist and dysfunctional.<sup>112</sup> Indeed, in the modern era, what the public wants most from Congress may be real *legislative* accomplishments, not further use of *nonlegislative* tools to gum up the works and prevent action.

For these reasons, some of Chafetz's recommended reassertions of nonlegislative congressional power could ultimately undermine, rather than restore, public faith in Congress. This disagreement over whether the public is likely to support Congress's efforts to rehabilitate its long-dormant nonlegislative powers

---

110. See WILLIAM N. ESKRIDGE JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 55-56 (5th ed. 2014) (contrasting the Founders' conception of the legislative process – that few laws should be enacted and that private autonomy and free markets should reign free – with the post-New Deal regulatory state, in which governmental regulation and the enactment of statutes may be the expected norm).

111. See Robert Bejesky, *How Security Threat Discourse Can Precipitate a Press Clause Death Spiral*, 63 *DRAKE L. REV.* 1, 42 (2015) (“The media selects the story, filters the sources for the story, and chooses how to present the news to the public, which influences the viewing populace's perceptions about events in the world.”).

112. See, e.g., *Congress in a Wordle*, PEW RES. CTR. (Mar. 22, 2010), <http://www.pewresearch.org/2010/03/22/congress-in-a-wordle> [<http://perma.cc/7GKK-A5UL>] (noting that when asked to describe Congress in one word, eighty-six percent of respondents “said something negative”; the “three most frequently offered terms were dysfunctional . . . , corrupt . . . and some version of selfish”; and that “[m]any of the words reflected perceptions that Congress has been unable or unwilling to enact legislation (inept, confusing, gridlock, etc.)”); *Public Says Dysfunctional Government Is Nation's Top Problem*, PEW RES. CTR. (Oct. 10, 2013), <http://www.pewresearch.org/fact-tank/2013/10/10/public-says-dysfunctional-government-is-nations-top-problem> [<http://perma.cc/7Z3B-QCBW>] (reporting that fifty-one percent of survey respondents were “frustrated” with the federal government, with thirty-six percent of respondents saying that the reason Congress cannot get things done is a few members who refuse to compromise).

informs much of the discussion about sticky historical precedents, partisanship, and shortsightedness that follows in the next three Sections.

A. “Sticky” Historical Developments and Precedents

A central contention of *Congress’s Constitution* is that the authority possessed by political actors is not static but, rather, is “continually being worked out through constitutional politics.”<sup>113</sup> Chafetz argues throughout that “[p]olitical institutions are involved in constant contestation, not simply for the substantive outcomes they desire, but also for the *authority* to determine those outcomes.”<sup>114</sup> In other words, Chafetz believes that in the context of everyday politics – e.g., judicial review of the Affordable Care Act, or Senate confirmation of the President’s choice for FBI Director – questions of political authority are at stake alongside substantive outcomes, and the branches’ relative authority is constantly being renegotiated. Every political conflict, perhaps even every political interaction between the branches, therefore, carries the potential to reshape congressional authority.

While I admire Chafetz’s lofty vision, I am skeptical of his dynamic conception of constantly evolving constitutional authority – at least in some cases. With respect to a number of the nonlegislative powers that Chafetz urges Congress to revive or assert more aggressively, I worry that Congress’s past abandonment or muted use of the power, or another branch’s usurpation of the power, has established a sticky historical precedent that is difficult to reverse. In other cases, historical developments, such as changes in the way the government is run since the Founding – e.g., the emergence of the administrative state and the professionalization of the civil service – have shifted power to the executive, or simply away from Congress, in a manner that creates sticky vested interests or public expectations. These shifts render it difficult, as a practical matter, for Congress to reassert its authority in the manner Chafetz suggests.

In using the term “sticky,” I do not mean to suggest that these historical developments are necessarily irreversible, but rather, that they are deeply entrenched and difficult to overcome for the reasons outlined below. It may be possible to overcome these precedents, but it would take an extraordinary political incident to do so – not merely the ordinary interbranch disputes that Chafetz seems to view as sufficient to reshape constitutional powers.

There are a number of reasons certain historical developments and precedents are likely to be sticky and to interfere with the renewed exercise of Congress’s nonlegislative powers. First, some historical developments are sticky in

---

113. CHAFETZ, *supra* note 1, at 67.

114. *Id.* at 18 (emphasis added).

the sense that they permanently recalibrate the playing field on which Congress and the other branches compete for authority. The expansion of media coverage, for example, is a historical development that has enhanced the President's power to speak directly to the public, thereby enhancing his power vis-à-vis Congress.<sup>115</sup> Similarly, the enactment of the debt limit statute is a historical development that permanently shifted some of Congress's power of the purse to the executive branch—giving the Treasury Secretary authority to borrow up to the statutory limit set by Congress and the President, without seeking congressional approval.<sup>116</sup> The technological advances that have given us modern, twenty-four-hour media coverage are unlikely to be reversed. Likewise, because the President must sign off on any repeal of the debt limit statute, it is highly unlikely that the delegation of power effected by the statute will be undone.

Second, historical changes in how government works and Congress's longstanding failure to exercise the powers at issue may have created entrenched interests that are likely to resist, rather than quietly acquiesce in, congressional efforts to aggressively reassert long-dormant powers. The professionalization of the civil service, for example, has created thousands of government employees who would be harmed by the zeroing out of salaries or departments and who are statutorily protected from termination absent good cause.<sup>117</sup> Similarly, the expansion of the administrative state has created numerous federal agencies with employees and constituencies who are likely to be harmed by and object to congressional efforts to use the agency's funding as a bargaining chip in budget quarrels with the executive. Media coverage of the impact that Congress's aggressive use of its appropriations power would have on such employees, moreover, is likely to cast Congress in an unsympathetic light and cost it in the public perception battle so crucial to any effort to recapture its ceded powers.

Third, historical practice may become sticky by creating norms that influence the public's perception of Congress's actions. Where Congress has long failed to exercise a power or has acquiesced in another branch's exercise of the power, or where historical developments that change the scope of Congress's power have

---

115. See, e.g., John D. Castiglione, *A Structuralist Critique of the Journalist's Privilege*, 23 J.L. & POL. 115, 135 (2007) ("The aggrandizement of executive power is especially acute vis-à-vis the legislative and judicial branches when it comes to using the media to meet the White House's political goals . . ."); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 521 (2008) ("The fact that the President can demand media attention and use the public culture to his advantage diminishes the visibility, and therefore the effectiveness, of a Congress that does not have similar tools."); see also *infra* notes 133-134 and accompanying text.

116. This is a partial delegation to the executive of Congress's constitutional power to borrow. See U.S. CONST. art. I, § 8, cl. 2; Second Liberty Bond Act, Pub. L. No. 65-43, 40 Stat. 288 (1917) (codified as amended at 31 U.S.C. § 3101 (2012)).

117. See Lloyd-La Follette Act of 1912, 5 U.S.C. §§ 7511-7513 (2012).

long been in effect, the public may come to view certain aspects of the status quo – e.g., civil service statutes protecting the tenure of government employees or judicial independence – as rights belonging to certain groups or as key features of our constitutional system. This may make it difficult for Congress to threaten to eliminate those rights or to act in a manner that challenges those perceived key features. In other words, once the public comes to regard a historical development or practice as part of the framework of government, it may become difficult to persuade the public to support congressional efforts to undo that historical development or practice. This is particularly so because several of the aggressive reassertions of congressional power that Chafetz recommends take the form of throwing up roadblocks to prevent needed action, in an effort to force the executive to accede to Congress's demands – think government shut-downs and refusals to pay official salaries. In such cases, if Congress attempts to follow Chafetz's advice, it may play into public perceptions that it is obstructionist and dysfunctional rather than emerge the hero, as Chafetz hopes.

Finally, some historical developments that are likely to undermine Chafetz's recommendations have been formally adopted in statutes or judicial decisions that are difficult to invalidate. The rules governing the civil service, including those establishing qualification exams and protecting government employees from removal except for cause, are contained in statutes, as is the debt limit provision and the thousands of enabling statutes establishing federal agencies.<sup>118</sup> And the judiciary's power grabs – e.g., claiming for itself the exclusive authority to decide the scope of executive privilege with respect to evidence subpoenaed by Congress – are enshrined in judicial decisions.<sup>119</sup> A congressional reassertion of power that conflicts with any of these statutes or decisions would thus require the violation of established laws or judicial rulings, or the repeal of those laws or rulings. Repeal is unlikely since the President would have to sign any repeal statute, and the judiciary would have to acquiesce in the effective retraction of its decision. Accordingly, if Congress were to act to recapture its powers in such cases, it would have to act in the face of the current law. Ignoring statutorily protected rights or judicial decisions might cause Congress to lose public support and, ultimately, the battle to reassert its power.

Thus, entrenched interests, formalized power shifts, technological advances, and their overarching effect on public support may collectively impede Congress's ability to resurrect at least some of its relinquished powers. The remainder of this Section explores how congressional efforts to rehabilitate each of the

---

118. See *id.*; Second Liberty Bond Act; Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883).

119. See, e.g., Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521, 521-22 (D.D.C.), *aff'd*, 498 F.2d 725 (D.C. Cir. 1974) (en banc).

powers discussed in Part I might be affected by specific sticky historical developments or precedents.

1. *The Power of the Purse*

Recall from Part I that *Congress's Constitution* urges Congress to reassert its power of the purse in three concrete ways: (1) being more aggressive in attaching riders that forbid the use of funds for certain purposes to appropriations measures;<sup>120</sup> (2) threatening to reduce or eliminate salaries or staff positions as a negotiating tactic;<sup>121</sup> and (3) credibly employing the threat of government shutdowns in a manner that wins Congress public support and enables it to extract concessions from the President.<sup>122</sup> The latter two recommendations strike me as problematic given historical developments since the Founding. In addition, they are normatively undesirable.

“Zeroing out” *offices or salaries*. While Chafetz’s history lesson on parliamentary and congressional withholding of executive salaries is colorful and entertaining, it reads like outdated history far removed from the way modern government—and particularly the administrative state—works. Withholding the governor’s salary or refusing to appropriate funds to celebrate the King’s birthday were powerful symbolic acts, but eliminating offices or personnel in our vast administrative state is more consequential because it is more likely to prevent ordinary citizens from receiving government services. For example, when Congress eliminates federal funding for state-sponsored veterans’ housing programs, veterans lose their housing and end up on the street.<sup>123</sup> This is a far cry

---

120. See CHAFETZ, *supra* note 1, at 67.

121. See *id.* at 66.

122. See *id.* at 68–71.

123. See, e.g., Todd Richmond, Associated Press, *Federal Cuts Force WDVA To Stop Housing Homeless Veterans*, U.S. NEWS (July 20, 2017, 6:09 PM), <http://www.usnews.com/news/best-states/wisconsin/articles/2017-07-20/federal-cuts-force-wdva-to-stop-housing-homeless-vets> [<http://perma.cc/676M-88M9>]. Similarly, when Congress has failed to renew appropriations that fund federal employees’ salaries during recent government shutdowns, news reports have speculated about whether Social Security, Medicare, and veterans’ benefits would be halted or delayed. See, e.g., Robert Pear, *Federal Departments Lay Out Plans in the Event of a Government Shutdown*, N.Y. TIMES (Apr. 6, 2011), <http://www.nytimes.com/2011/04/07/us/politics/07shutdown.html> [<http://perma.cc/LZU4-N5N6>]; Brad Plumer, *The Nine Most Painful Impacts of a Government Shutdown*, WASH. POST (Oct. 3, 2013), <http://www.washingtonpost.com/news/wonk/wp/2013/10/01/the-nine-most-painful-consequences-of-a-government-shutdown> [<http://perma.cc/QC35-6NWS>]; Jennifer Steinhauer, *Death Benefits for Soldiers To Continue*, N.Y. TIMES (Oct. 9, 2013), <http://www.nytimes.com/2013/10/10/us/politics/pentagon-links-with-charity-to-pay-benefits-to-families-of-service-members-killed-in-action.html> [<http://perma.cc/XUK7-BEDF>]; Steve Vogel, *VA: All Veterans’ Benefit Payments*



from the withholding of funds from a powerful external sovereign as an act of rebellion against his authority. Cutting off the Supreme Court's air conditioning or refusing to pay judicial clerks, also among Chafetz's suggestions,<sup>124</sup> are more in line with some of Parliament's and the colonial assemblies' actions—but they are far pettier behavior than we are accustomed to seeing from our legislators in the modern era. Moreover, they are hardly the kind of legislative behaviors—or interbranch conflict—that should be encouraged. There has already been a lamentable coarsening and degradation of the political discourse among the branches; congressional behavior such as cutting off the Supreme Court's air conditioning would accelerate that degradation rather than encourage interbranch cooperation and respect.

Further, as a practical matter, two historical developments have changed the political landscape against which Congress and the President battle over the budget. The first development, already mentioned above, is the growth of the administrative state and the perception that the funding of certain government departments and services is necessary rather than within Congress's discretion. This development makes it likely that in the modern era, congressional actions such as eliminating offices or salaries will be viewed by the public as petty and inappropriate behavior. The second development, also mentioned above, is the professionalization of many of the offices that Congress would eliminate (or threaten to eliminate). Innovations such as the civil service have transformed the government offices in question from patronage positions filled by the executive's lackeys into professional positions filled through examinations and protected by good behavior and tenure standards.<sup>125</sup> This professionalization is a sticky historical development because it has significantly changed the political terrain upon which both Congress and the President act in selecting, funding, and removing government employees, eliminating much of their discretion over hiring and firing decisions. Moreover, professionalization has created a constituency with vested rights that would be harmed by aggressive congressional action.<sup>126</sup>

---

*Will Be Disrupted If a Shutdown Goes Beyond Two Weeks*, WASH. POST (Sept. 27, 2013), <http://www.washingtonpost.com/news/federal-eye/wp/2013/09/27/va-all-veterans-benefit-payments-will-be-disrupted-if-a-shutdown-goes-beyond-two-weeks> [<http://perma.cc/9K99-9JZY>].

124. See CHAFETZ, *supra* note 1, at 66, 345 n.219 (citing Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 331 (2007)).
125. See Pendleton Civil Service Reform Act, ch. 27, §§ 1, 2, 5, 6, 9-14, 22 Stat. 403, 403, 405-07 (1883); see also CHAFETZ, *supra* note 1, at 113-16 (discussing the work of the Civil Service Commission).
126. See SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 69-88 (1999) (describing the professionalization of the civil service as a developmental milestone for government); Eric Posner, *And If Elected: What President Trump Could or*

In light of these historical developments, efforts by Congress to zero out salaries or eliminate government positions as a negotiating tactic for obtaining policy concessions from the executive may be viewed by the modern public as partisan and petulant behavior, rather than as a legitimate exercise of Congress's power of the purse. Indeed, the executive is sure to cast any efforts to zero out expenditures in an unflattering light, and given that Congress has not employed the power of the purse in this manner for decades, it is difficult to envision it winning this public relations battle.

*Government shutdowns.* Recall that Chafetz provocatively characterizes government shutdowns as bargaining chips that present both opportunities and dangers for Congress and urges that “artful” action by Congress could earn it points with the public and translate to success in policy negotiations.<sup>127</sup> Chafetz’s take is unconventional, but as noted in Part I, he may be correct that commentators have too quickly dismissed the potential benefits to Congress of credibly and “artfully” threatening a government shutdown.

Still, as a budget scholar, it makes me uneasy when anyone, even someone as thoughtful as Chafetz, recommends that Congress employ government shutdowns as a weapon to force executive compliance with Congress’s priorities.<sup>128</sup> Even if we set aside pure budgetary caution, modern developments may have reset the stage in at least two ways that tend to favor the President and disfavor Congress in most budget showdowns. The first is the debt limit statute and the periodic need that it creates for Congress to raise the debt ceiling to allow the Treasury Secretary to borrow additional funds to service the national debt.<sup>129</sup> Historically, when Congress and the President have engaged in a budget showdown, the debt ceiling has figured prominently in their interbranch battle.<sup>130</sup> But

---

*Couldn't Do*, N.Y. TIMES (June 3, 2016), <http://www.nytimes.com/2016/06/04/opinion/campaign-stops/and-if-elected-what-president-trump-could-or-couldnt-do.html> [<http://perma.cc/NP36-9XQB>] (noting the difficulty of firing civil service employees).

127. See CHAFETZ, *supra* note 1, at 69, 71. By “artful” action, Chafetz appears to mean politically astute and judicious. He argues, for example, that if Newt Gingrich had been more “skilled” and not made “tactical mistakes” such as “personalizing the fight” between himself and President Clinton and “overreading his mandate to press for conservative fiscal policy,” or if President Clinton had been less skilled, “we might well remember the 1995–1996 budget showdown as a win for Congress.” *Id.* at 69.

128. See, e.g., Krishnakumar, *Reconciliation*, *supra* note 5.

129. For a detailed history and analysis of the debt limit statute, see Krishnakumar, *Debt Limit*, *supra* note 5.

130. All three of the most recent budget showdowns—1995–96, 2011, and 2013—involved a debt limit crisis. See, e.g., D. ANDREW AUSTIN, CONG. RESEARCH SERV., RL31967, THE DEBT LIMIT: HISTORY AND RECENT INCREASES 21–25 (2015) (discussing the 2011 and 2013 debt limit crises);

refusing to raise the debt ceiling is not a realistic or prudent fiscal option; failure to do so would ultimately result in the United States defaulting on its debt payments and having its credit rating downgraded – both of which would have pernicious consequences domestically and internationally.<sup>131</sup> Indeed, during the 2011 budget showdown, the United States' credit rating was downgraded and the stock market plummeted, and during the 2013 showdown, a prominent credit-rating agency threatened to downgrade the nation's rating.<sup>132</sup> Because the debt limit statute puts the Treasury Secretary and President in the position of asking Congress to vote to raise the limit, Congress appears obstructionist and petty when it holds an increase hostage to budget negotiations with the President.

A second sticky development that may hinder Congress's effective use of government shutdowns to recapture some of its lost budgetary power is the media and the effective bully pulpit it provides the President in battles with Congress.<sup>133</sup> Simply put, congressional threats to shut down the government may be

---

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/AIMD-96-130, DEBT CEILING: ANALYSIS OF ACTIONS DURING THE 1995-1996 CRISIS 19-20 (1996), <http://www.gao.gov/assets/160/155577.pdf> [<http://perma.cc/734N-ERAE>].

131. For example, the Government Accountability Office (GAO) estimated that the delay in raising the debt ceiling increased government borrowing costs by \$1.3 billion in 2011 and indicated that there would be unestimated higher costs in later years. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 39, at 22. The Bipartisan Policy Center extended the GAO's estimates to later years and concluded that delays in raising the debt ceiling would raise borrowing costs by \$18.9 billion over ten years. *Debt Limit Analysis*, *supra* note 39, at 25; see also Michael Cooper & Louise Story, *Q. and A. on the Debt Ceiling*, N.Y. TIMES (July 27, 2011), <http://www.nytimes.com/2011/07/28/us/politics/28default.html> [<http://perma.cc/E63G-L536>] (detailing the negative consequences that could result from the United States defaulting on its debt obligations); Shushannah Walshe, *The Costs of the Government Shutdown*, ABC NEWS (Oct. 17, 2013), <http://abcnews.go.com/blogs/politics/2013/10/the-costs-of-the-government-shutdown> [<http://perma.cc/43QC-BFM8>] (noting that financial rating agency Standard & Poor's found that the shutdown took \$24 billion out of the economy as of 2013 and "shaved at least 0.6 percent off annualized fourth-quarter 2013 GDP growth").
132. See, e.g., Binyamin Appelbaum & Eric Dash, *S. & P. Downgrades Debt Rating of U.S. for the First Time*, N.Y. TIMES (Aug. 5, 2011), <http://www.nytimes.com/2011/08/06/business/us-debt-downgraded-by-sp.html> [<http://perma.cc/CT74-LRAA>]; Associated Press, *Wall St. Climbs as Hopes for Détente on Debt Emerge*, N.Y. TIMES (Oct. 9, 2013), <http://www.nytimes.com/2013/10/10/business/daily-stock-market-activity.html> [<http://perma.cc/JE2Y-TR4A>]; Jim Puzanghera, *Fitch Warns that Debt-Limit Delay Could Hurt U.S. Credit Rating*, L.A. TIMES (Jan. 15, 2013), <http://articles.latimes.com/2013/jan/15/business/la-fi-mo-fitch-ratings-debt-limit-credit-u.s.-20130115> [<http://perma.cc/2SNV-9FJN>].
133. See, e.g., SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* 110 (4th ed. 2007) (describing the presidential practice of using media to solicit public support for the President's legislative program when it becomes stalled in Congress); JEFFREY K. TULLIS, *THE RHETORICAL PRESIDENCY* 186 (1987) (noting that in modern times, the President is

perceived differently than parliamentary clashes with the Stuart Crown in part because they play out in full view of the public. During the 1995-96 government shutdowns, for example, President Clinton cast Newt Gingrich and the 104th Congress as bad actors for standing in the way of the administrative state and normal government operations and for trying to do away with Medicaid – a message he was able to deliver successfully in large part because of his media access.<sup>134</sup>

But beyond these practical concerns, I disagree normatively with Chafetz's argument that more aggressive use of government shutdowns is a desirable way to recapture congressional power. Refusing to fund ongoing government operations in order to force the President to concede on other, unrelated policy matters is irresponsible and unfair to government employees who lose their paychecks during this game of chicken. Similarly, failing to provide the Treasury Department with the funds needed to make interest payments on the nation's debts is a reckless, irresponsible move that risks the United States' credit standing and jeopardizes the nation's future borrowing ability.

*Aggressive use of riders.* Chafetz also argues that attaching riders to appropriations bills that forbid the use of the funds for specific purposes is an important modern application of Congress's once robust approval (or disapproval) of every specific spending item.<sup>135</sup> I agree that riders, particularly those that ban the use of funds for certain disfavored expenditures, are a valuable and feasible modern application of the power of the purse and that they provide Congress with substantial leverage to control policy connected to the subject of the rider. During the late 1990s, for example, Congress enacted numerous riders limiting or prohibiting the enforcement of several environmental laws.<sup>136</sup> While riders often are

---

given more attention by media than any other institution or personality, while in the nineteenth century, newspaper coverage of Congress exceeded that of the President).

134. See, e.g., ELIZABETH DREW, SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE 323-26 (1996); Krishnakumar, *Reconciliation*, *supra* note 5, at 608-09 (noting that "the President's approval ratings soared throughout the shutdown, while congressional Republicans' declined" (citing DAVID MARANISS & MICHAEL WEISSKOPF, "TELL NEWT TO SHUT UP!" 146-49, 152-53 (1996))).

135. See CHAFETZ, *supra* note 1, at 67-68.

136. See Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 642-47 (2006). In 2000, in response to what it perceived to be attempts by Clinton appointees to push regulations through before leaving office, Congress enacted numerous appropriations riders that, inter alia, placed substantive limits on the Department of the Interior's ability to promulgate final rules pertaining to hard-rock mining, restricted the agency's ability to establish a new national wildlife refuge in a given location, and barred the use of funds to study or implement any plan to drain Lake Powell or otherwise reduce it to a level below that necessary to operate the Glen Canyon Dam. See Department of

criticized as congressional efforts to enact legislation that would not otherwise pass or to hold the President hostage because of the must-pass nature of annual appropriations,<sup>137</sup> I agree with Chafetz that they are a legitimate tool for congressional control over policy through the purse strings. Indeed, as Chafetz's history lesson shows, Congress originally approved government expenditures one at a time, which gave it considerable influence over policy choices connected to each expenditure.<sup>138</sup> Modern-day riders are a poor substitute for the older, more meaningful control over individual appropriations that Congress once enjoyed, but they do enable Congress to extract policy concessions on discrete, narrow issues.

Importantly, more aggressive congressional use of riders is unlikely to present sticky precedent problems because Congress has never abandoned or ceded its authority to employ riders to another branch. Accordingly, although the public might perceive Congress to be engaging in an act of gamesmanship when it attaches riders, the public will not question Congress's *authority* to employ riders, which it has done since the Founding. Nor will the President, whose power would be checked by aggressive congressional use of riders, question Congress's authority to enact such riders – although he might complain publicly about the substance of specific riders.

## 2. *The Personnel Power*

In Part I, this Review discussed Chafetz's personnel power recommendations with respect to impeachment and confirmation.<sup>139</sup> Here, I consider each recommendation in turn.

*Impeachment.* Perhaps surprisingly, Chafetz does not recommend reinvigoration, or even robust exercise, of the potent congressional power to impeach. Rather, while he acknowledges the central role that impeachment played in British and American legislative history, Chafetz recognizes its severity and seems content to have it employed only cautiously, as “one mechanism among many . . . for maintaining congressional influence over personnel.”<sup>140</sup>

---

the Interior and Related Agencies Appropriations Act, Pub. L. No. 106-291, §§ 119, 126, 156, 114 Stat. 922, 944, 945, 962-63 (2000).

137. See, e.g., Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456; Lazarus, *supra* note 136, at 635; Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457 (1997).

138. CHAFETZ, *supra* note 1, at 59.

139. See discussion *supra* Section I.A.2.

140. CHAFETZ, *supra* note 1, at 150-51.

As discussed in Part I above, I find the history of legislative use of impeachment to reign in the executive highly illuminating and instructive, and believe that it sheds light on why the 115th Republican Congress has shown little inclination to impeach President Trump so far. But I also find myself in a bit of a role reversal with Chafetz with respect to this power. For while I agree on the merits that impeachment is a serious matter and should be used sparingly, I wonder whether there is a tipping point in certain cases of malfeasance — a point at which the decision to impeach could get taken out of Congress's hands because of public pressure, based on norms established by prior presidential impeachments, to punish egregious executive branch misbehavior. If so, this would turn congressional power on its head, forcing Congress to use one of its most potent nonlegislative powers *when it does not want to* because of sticky historical precedents.

Here is how this might play out with the investigation into President Trump's Russia connections and potential obstruction of justice charges. Suppose that concrete, smoking-gun evidence emerges demonstrating that members of President Trump's presidential campaign violated campaign finance laws or that President Trump himself obstructed justice by firing FBI Director James Comey, for example. If clear evidence were to surface demonstrating that a crime had been committed by an executive branch official and that evidence were reported widely in the media — perhaps even presented in televised testimony before the nation — the public might demand impeachment of the implicated official. We no longer live in the Middle Ages when Parliament could draw trumped up charges against the Crown's ministers and unveil them behind closed doors, away from public eyes and ears. The legislature no longer controls what information the public can access; rather, the omnipresent media and the twenty-four-hour news cycle ensure that congressional investigations and testimony are widely accessible and viewed. Indeed, we have seen the power of public pressure to compel impeachment proceedings before. After President Nixon fired Archibald Cox during the Saturday Night Massacre and after transcripts of his infamous White House tapes were released, Congress faced significant public pressure to impeach the President. This public pressure was an important factor in forcing Congress to investigate and ultimately initiate impeachment proceedings against President Nixon.<sup>141</sup>

---

141. The firing of Archibald Cox was viewed by the public as a gross abuse of presidential power. Upon learning of it, citizens sent a record number of telegrams to the White House and Congress in protest. See, e.g., Associated Press, *Impeachment Mail Floods Congress*, GADSDEN TIMES (Oct. 24, 1973), <http://news.google.com/newspapers?id=hMofAAAAIBAJ&sjid=wdcEAAAAIBAJ&dq=telegrams&pg=694%2C3954202> [http://perma.cc/7HQR-ZMWY] (“Sen. Barry Goldwater, R-Ariz., had 270 telegrams for impeachment and about a dozen against it with telephone calls more evenly divided in sentiment. Sen. John G. Tower, R[-]Tex., reported 275

Perhaps most significantly, Watergate and the more recent impeachment of President Clinton—both of which involved obstruction of justice charges<sup>142</sup>—may have established sticky precedents, or baselines, for what constitutes impeachable behavior and even for what *necessitates* impeachment of the President in the public's view. If impeachment proceedings could be initiated against President Nixon for his efforts to cover up his aides' involvement in the Watergate break-in and President Clinton could be impeached for lying about his sexual conduct in a deposition in a personal lawsuit,<sup>143</sup> then it may follow inexorably that President Trump must be impeached if the evidence shows that he obstructed the FBI's Russia investigation. And importantly, it may be the public, rather than Congress, who effectively pushes for impeachment.

---

telegrams against Nixon, 16 for him; and Sen. Peter Dominick, R-Colo., more than 1,000 telegrams with the ratio 100 to 1 against Nixon.”); McClatchy Newspapers Serv. & UPI, *Record Numbers Jam Western Union*, MODESTO BEE (Oct. 22, 1973), <http://archive.is/20120718162705/http://news.google.com/newspapers?id=KBIuAAAAIIBAJ&sjid=jn8FAAAAIBAJ&pg=3099,1866772&dq=western-union&hl=en> [<http://perma.cc/D66X-QHKQ>] (“Western Union today reported a record 71,000 telegrams received in its Washington office about the firing [of] Watergate special prosecutor Archibald Cox in the first 36 hours after his dismissal Saturday under President Nixon’s order.”). The transcripts of President Nixon’s taped conversations with his advisers also dominated news coverage and even the popular cultural landscape. See BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 145-46 (1976).

142. See, e.g., WOODWARD & BERNSTEIN, *supra* note 141, at 252; Daniel H. Erskine, *The Trial of Queen Caroline and the Impeachment of President Clinton: Law as a Weapon for Political Reform*, 7 WASH. U. GLOBAL STUD. L. REV. 1, 13 (2008); Office of the Clerk, *Final Vote Results for Roll Call 545*, U.S. HOUSE REPRESENTATIVES (Dec. 19, 1998), <http://clerk.house.gov/evs/1998/roll545.xml> [<http://perma.cc/XGQ8-MD7Y>] (noting a final vote of 221-212 on President Clinton’s obstruction charge).
143. The attempted impeachment of President Clinton differed from the impeachment proceedings initiated against President Nixon in that the latter led to the disgrace and resignation of President Nixon while the former ended in acquittal and even continued overall high approval ratings for President Clinton. See *Presidential Approval Ratings – Bill Clinton*, GALLUP NEWS, <http://news.gallup.com/poll/116584/presidential-approval-ratings-bill-clinton.aspx> [<http://perma.cc/7UZB-G6ZQ>]. But see David S. Broder & Richard Morin, *American Voters See Two Very Different Bill Clintons*, WASH. POST. (Aug. 23, 1998), <http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/voters082398.htm> [<http://perma.cc/KE5Q-R2S2>] (showing that President Clinton’s poll numbers regarding honesty, integrity and moral character declined after impeachment proceedings). Despite these different political end results, the two impeachments taken together provide a strong precedent for holding Presidents to task when they obstruct justice. Perhaps more importantly, the charges that could lead to the impeachment of President Trump—obstructing investigations regarding his political campaign’s connections to Russia during the 2016 election—are a far closer parallel to the obstruction of justice charges that roused the public’s ire and brought down Nixon’s Presidency than they are to the lying under oath charges that led to President Clinton’s impeachment.

On the other hand, it is also possible that, in this highly polarized and partisan era, President Trump could escape public censure even in the face of overwhelming, concrete proof that he violated the law. Particularly because the media itself has become polarized and citizens tend to get their news from media sources that share their ideological outlook,<sup>144</sup> the Nixon precedent may not hold, and the public may not call for impeachment even in the face of clear-cut evidence of presidential wrongdoing. Indeed, President Trump's core supporters have remained remarkably loyal to him in the face of several episodes that likely would have undone politicians in the past, including the Access Hollywood tape and comments following the Charlottesville riots.<sup>145</sup> That said, right-leaning media and some supporters might respond differently to evidence that President Trump colluded with a foreign state or obstructed justice than they did to the sexist and racist comments in the Access Hollywood and Charlottesville incidents.<sup>146</sup>

*Confirmation.* Recall that *Congress's Constitution* also calls for the rehabilitation of Congress's power vis-à-vis the other branches through congressional insistence on Senate confirmation of White House staff. This is an intriguing recommendation and a logical one in light of the history presented in the book. But again, once we move from the abstract to the concrete, attempts to extend Congress's confirmation power to White House staff seem unlikely to gain traction.

---

144. See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 328 & nn. 110-14; Amy Mitchell et al., *Covering President Trump in a Polarized Media Environment*, PEW RES. CTR. (Oct. 2, 2017), <http://www.journalism.org/2017/10/02/covering-president-trump-in-a-polarized-media-environment> [<http://perma.cc/4XLY-2Y8W>] (reporting findings that during the early days of President Trump's Administration, media outlets covered similar storylines but their assessments of Trump's actions differed based on political ideology).

145. See, e.g., Meghan McCarthy, *Republican Voters Remain Loyal to Trump in First National Poll After Video*, MORNING CONSULT (Oct. 9, 2016), <http://morningconsult.com/2016/10/09/republican-voters-remain-loyal-trump-first-national-poll-video> [<http://perma.cc/JRT4-YVDB>] (reporting that Trump retained support after the release of the Access Hollywood tape); Sabrina Tavernise, *A Deal Breaker for Trump's Supporters? Nope. Not this Time, Either*, N.Y. TIMES (Aug. 19, 2017), <http://www.nytimes.com/2017/08/19/us/politics/trump-supporters.html> [<http://perma.cc/JDE5-M6NM>] (reporting that sixty-seven percent of Republicans said they approved of the President's response to the violence in Charlottesville).

146. *But see* Cameron Easley, *Republicans Are Warning Up to Russia, Polls Show*, MORNING CONSULT (May 24, 2017), <http://morningconsult.com/2017/05/24/republicans-warming-russia-polls-show> [<http://perma.cc/KDC7-MWD2>] (finding that forty-nine percent of Republicans view Russia as an ally or as "friendly"); *Views on the Russia Investigation*, AP-NORC CTR. PUB. AFF. RES. (June 2017), [http://apnorc.org/PDFs/June%20AP%20Poll\\_Russia/June%202017%20Poll%20Fact%20Sheets\\_Russia.pdf](http://apnorc.org/PDFs/June%20AP%20Poll_Russia/June%202017%20Poll%20Fact%20Sheets_Russia.pdf) [<http://perma.cc/6QD4-5B46>] (finding that only one in four Republicans views President Trump's firing of James Comey as an attempt to impede the Russia investigation).



First and foremost, Congress's failure to assert a power to confirm White House staff over the past two hundred-plus years is a difficult precedent to overcome. The President would have every incentive to cast any congressional effort to assert power in this context as an illegitimate interference with his right to hire the advisers he wants. Congress is likely to appear suspicious and power-hungry, or at least obstructionist, for suddenly inserting itself into this choice. Moreover, Presidents tend to appoint their White House staff at the outset of their presidencies, when their approval ratings typically are high<sup>147</sup> – meaning that a congressional attempt to assert this power would come at a time when the public is especially likely to side with the President in a battle with Congress. Second, partisanship is likely to play a role in Congress's own willingness to pursue this application of its confirmation power, as members of the President's party are unlikely to want to tie his hands in choosing advisers. Indeed, it is difficult to imagine legislators who belong to the President's party viewing any institutional gain to Congress that comes from having a voice in the President's choice of White House staff as sufficient to justify interfering with the discretion afforded to the de facto head of their party.

There could be a flip side here if, for example, an administration experiences serious problems or scandals involving White House staff and the scandals are of a kind that could have been avoided through the vetting that accompanies the confirmation process. The Trump Presidency has already produced at least one such episode: the revelations surrounding former National Security Advisor Michael Flynn. Flynn was forced to resign after it came to light that he had lied about his communications with Russian officials in the months leading up to President Trump's inauguration; and in December 2017, he pleaded guilty to lying to the FBI about these charges.<sup>148</sup> The National Security Advisor post does

---

147. See, e.g., Michael W. McConnell, *Moderation and Coherence in American Democracy*, 99 CALIF. L. REV. 373, 388 (2011) (noting that most Presidents “enjoy broad support” at the outset of their presidencies); Nate Cohn, *Trump's Approval Ratings Are Down. How Much Does It Mean?*, N.Y. TIMES (Feb. 17, 2017), <http://www.nytimes.com/2017/02/17/upshot/trump-is-down-to-38-approval-how-much-does-it-mean.html> [<http://perma.cc/UR77-Y8AX>] (explaining that “[u]sually, presidents ride high at the start of their terms” and that the average approval rating for Presidents one month into their presidencies is around sixty percent).

148. See, e.g., Derek Hawkins, *Flynn Sets Record with Only 24 Days as National Security Adviser. The Average Tenure Is About 2.6 Years*, WASH. POST (Feb. 14, 2017), <http://www.washingtonpost.com/news/morning-mix/wp/2017/02/14/flynn-sets-record-with-only-24-days-as-nsc-chief-the-average-tenure-is-about-2-6-year> [<http://perma.cc/647X-P8SS>]; Jonathan Landay, *Pentagon Probes Trump's Ex-Adviser Flynn over Foreign Payments*, REUTERS (Apr. 27, 2017), <http://www.reuters.com/article/us-usa-trump-russia-flynn/pentagon-probes-trumps-ex-adviser-flynn-over-foreign-payments-idUSKBN17T26Q> [<http://perma.cc/BQ8L-U9GT>]; Greg Miller et al., *National Security Adviser Flynn Discussed Sanctions with Russian Ambassador, Despite Denials, Officials Say*, WASH. POST (Feb. 9, 2017), <http://www>

not require Senate confirmation,<sup>149</sup> and the vetting that accompanies Senate confirmation likely would have uncovered at least some of Flynn's problematic behavior. The Trump Administration provides other possible candidates for scandal as well, including President Trump's son-in-law, Jared Kushner, who serves as a senior adviser to President Trump and whose role has drawn criticism from many corners.<sup>150</sup> Public support for Senate confirmations of White House staff could grow if political scandals embroil more staff or President Trump pardons family members who have served as his unconfirmed close advisers to shield them from FBI or congressional investigations.<sup>151</sup> But it would take an extraordinary scandal, or series of scandals, to shift this norm.

### 3. *The Speech or Debate Power*

Chafetz also recommends that members of Congress reinvigorate their role as disseminators of information by leaking classified or other sensitive information to the public when necessary to expose executive branch wrongdoing. Chafetz's analysis regarding leaks of classified information is incredibly smart and thought-provoking. Indeed, I am largely persuaded that congressional releases would be preferable to the leaks made by Manning and Snowden, as the

---

.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-11e6-b4ff-ac2cf509efe5\_story.html [http://perma.cc/N2G4-LDJY]; Michael D. Shear & Adam Goldman, *Michael Flynn Pleads Guilty to Lying to the F.B.I. and Will Cooperate with Russia Investigation*, N.Y. TIMES (Dec. 1, 2017), <http://www.nytimes.com/2017/12/01/us/politics/michael-flynn-guilty-russia-investigation.html> [http://perma.cc/T6VG-SJW3].

149. See John P. Burke, *The National Security Advisor and Staff*, WHITE HOUSE TRANSITION PROJECT 2, 38 (2017), <http://whitehoustransitionproject.org/wp-content/uploads/2016/03/WHTP2017-24-National-Security-Advisor.pdf> [http://perma.cc/D48H-KGJK]; David A. Graham, *How Did Michael Flynn Ever Get Hired as National Security Adviser?*, ATLANTIC (Mar. 10, 2017), <http://www.theatlantic.com/politics/archive/2017/03/flynn-lobbying-disclosure/519249> [http://perma.cc/6RMM-KDSW].

150. See, e.g., Jeet Heer, *The Scary Power of Nepotism in Trump's White House*, NEW REPUBLIC Apr. 4, 2017), <http://newrepublic.com/article/141835/scary-power-nepotism-trumps-white-house> [http://perma.cc/VZB4-6BTG].

151. See, e.g., Peter Baker, *Trump Says He Has 'Complete Power' To Pardon*, N.Y. TIMES (July 22, 2017), <http://www.nytimes.com/2017/07/22/us/politics/donald-trump-jeff-sessions.html> [http://perma.cc/HBD4-TALB]; Daniel Hemel & Eric Posner, *If Trump Pardons, It Could Be a Crime*, N.Y. TIMES (July 21, 2017), <http://www.nytimes.com/2017/07/21/opinion/if-trump-pardons-crime-russia.html> [http://perma.cc/V7RU-97GS]; cf. Ryan Lizza, *Why Jared Kushner Will Be Able To Keep His Security Clearance*, NEW YORKER (July 18, 2017), <http://www.newyorker.com/news/ryan-lizza/why-jared-kushner-will-be-able-to-keep-his-security-clearance> [http://perma.cc/HD94-PR7C] (noting that the White House, and not the FBI, has the ultimate say over security clearances).

calculus would be focused on what information the public really needs to know balanced against the costs to national security of revealing such information, rather than governed by one employee's discomfort, or perhaps personal gripe, with the executive branch's actions. That is, I am persuaded by Chafetz's argument that members of Congress are on balance more likely to be attentive to what information should be redacted or omitted from a public dump than are ordinary citizens.

But is a reassertion of a congressional power to leak one that the public would support? At first blush, the idea seems too reckless and dangerous to win support, particularly in an era of global terror and heightened concerns about public safety. On further reflection, however, I have softened to Chafetz's suggestion that this is a power that Congress can and should assert vigorously. One reason is that the executive branch should not be permitted to hide behind its own unilateral conclusions and bald assertions that certain information is too sensitive for anyone else to possess, share, or even evaluate. Another is the recent partial leaks about intelligence community acquisitions and surveillance practices made by Senators Wyden and Udall in 2004 and 2011, which demonstrate that members of Congress can be cautious and judicious in their leaks and can leak information in a manner that ultimately benefits and is supported by the public.<sup>152</sup>

A third reason to support greater congressional exercise of the power to leak classified information relates to the problems raised by executive branch employees' direct leaks to the press. Chafetz emphasizes the redaction and discretion issues posed by employee leaks, arguing that members of Congress would have been more discerning about what information they chose to leak and would have done so in a manner more careful and protective of state secrets than the dumps made by Snowden and Manning.<sup>153</sup> In addition to such discretion-based concerns, direct leaks by employees also create distraction problems. First, by revealing classified information to the press, such employees violate the law, which means they either will be prosecuted and go to prison, as Manning did, or will flee the country, as Snowden did.<sup>154</sup> Either way, the leaker is then unavailable to

---

152. See CHAFETZ, *supra* note 1, at 220-22 (noting that Senators Wyden and Udall were hailed as "folk heroes" by some).

153. See *id.* at 223.

154. Another similar example is Thomas Drake, a former senior executive at the NSA who was prosecuted under the Espionage Act for leaking information about government surveillance activities. Drake maintained that he did not leak any information that was classified, and many regarded his prosecution as inappropriate. Drake's prosecution shows that prosecution is inevitable, even when the leaked information may not have been classified, because the Justice Department feels compelled to prosecute in order to deter future leaks. See Jane Mayer, *The Secret Sharer*, NEW YORKER (May 23, 2011), <http://www.newyorker.com/magazine/2011/05/23/the-secret-sharer> [<http://perma.cc/B65T-YP69>] (noting that "top officials at the Justice

participate as effectively and as immediately in the debate generated by the leaked information regarding the appropriate scope of executive branch behavior. Second, when the leaker is an ordinary citizen employee, rather than an elected official, his or her decision to leak and the propriety of the punishment meted out by the criminal justice system (or the leaker's escape from punishment if he flees) can itself become the subject of public debate, coloring the lens through which the leaked information and the executive branch's actions are viewed. In contrast, when a member of Congress leaks classified information, the Speech or Debate Clause shields her from prosecution, enabling her to participate in the conversation that follows concerning the executive branch behavior revealed through the leaks.

But even if one accepts Chafetz's recommendation that Congress should be more active in leaking classified information that exposes executive branch misbehavior, the question remains whether the public is likely to accept such leaks from members of Congress. As Chafetz emphasizes throughout, Congress's success in rehabilitating any of its powers will depend on how "judiciously" its members behave in reasserting those powers.<sup>155</sup> In the context of leaking classified information, this means that members of Congress must be cautious and thoughtful in what they choose to leak the public—leaking only information that is necessary to expose real corruption or misbehavior by the executive branch, not information designed to produce partisan benefit. If Congress limits itself in this manner, using leaks to reveal wrongdoing that the public perceives itself as having a right to know, and does so in a manner that does not seem to threaten public safety, then the public may well gain respect for it as an institution. The leaks made by Senators Wyden and Udall in 2004 and 2011 were exemplars of judiciousness—the Senators leaked only enough information to spur news investigations that uncovered executive branch misdeeds, and they did not indiscriminately reveal sensitive information in a manner that threatened national safety. Moreover, the Senators who initiated the leaks were members of President Obama's party, not opposition-party partisans seeking to score political points. If, by contrast, members of Congress were to leak classified information in an injudicious manner—e.g., using leaks to embarrass or undermine a President of the opposite party or leaking information that could harm counterterrorism efforts—such leaks could backfire and cost Congress public support.

---

Department describe such leak prosecutions as almost obligatory"); Ellen Nakashima, *Prosecution of Ex-NSA Official Thomas Drake Was 'Ill-Considered,' Former Agency Spokesperson Says*, WASH. POST (Mar. 12, 2012), [http://www.washingtonpost.com/blogs/checkpoint-washington/post/prosecution-of-ex-nsa-official-thomas-drake-was-ill-considered-former-agency-spokesman-acknowledges/2012/03/12/gIQAXE6L7R\\_blog.html](http://www.washingtonpost.com/blogs/checkpoint-washington/post/prosecution-of-ex-nsa-official-thomas-drake-was-ill-considered-former-agency-spokesman-acknowledges/2012/03/12/gIQAXE6L7R_blog.html) [<http://perma.cc/6583-K4GH>].

155. See, e.g., CHAFETZ, *supra* note 1, at 19, 24, 33.

In the end, the real obstacle to congressional use of leaks to check the executive may be Congress itself—i.e., whether it *wants* to take on the executive branch in this manner and whether it can remain nonpartisan in so doing. Some members of Congress may be unwilling to embarrass a President of the same party (or an agency controlled by a President of the same party) by revealing sensitive information; others, conversely, might be tempted to leak information precisely in order to weaken a President of the opposing party. The Udall-Wyden leaks offer hope that such partisan considerations can be overcome, but partisan motivations remain a potential impediment to aggressive use of this congressional power. The next Section explores the party loyalty obstacle to rehabilitating congressional power in greater detail.

### B. Partisanship

As Chafetz notes, some scholars have argued that political parties are to blame for Congress's self-disempowerment.<sup>156</sup> The reasoning runs as follows: by rendering legislators more loyal to their parties than to Congress as an institution, political parties have interfered with the constitutional design—leading legislators to sacrifice institutional interests in favor of party interests—and have left Congress far weaker than it was designed to be.<sup>157</sup> Although he acknowledges this party-based account, Chafetz is not ultimately persuaded by it. Indeed, he quickly counters the party-based account by arguing (1) that the problem of partisan concerns trumping institutional ones is true only during unified government, that truly unified government exists only when both houses of Congress, the Presidency, *and the courts* are controlled by the same party, and that such unity of control is rare; (2) that if and when truly unified government occurs, fewer checks by Congress are necessary or appropriate because the public has put its trust in one party to an unusual degree and this should translate into more leeway for that party to act; and (3) that there are actually many instances in which Congress has stood up to a President of the same party, despite party allegiances.<sup>158</sup> Chafetz does not dismiss political parties as *a factor* in Congress's loss of power, but he does resist the idea that their influence is inevitable or insurmountable. Indeed, one of the goals of *Congress's Constitution* appears to be to reawaken Congress to the full array of power it has as an institution and to inspire it to behave in ways that are more institutional and less partisan.

---

156. *Id.* at 28 (citing Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006)).

157. *See id.*

158. *See id.* at 28-30, 33-35.

While I am sympathetic to Chafetz's project to revive congressional power, I believe that his heavily historical approach to evaluating congressional power has led him to ignore – or at least to seriously underestimate – the ways in which partisanship may prevent Congress both from wanting to exercise its powers more robustly and from winning the public's trust when it tries to do so. First, Chafetz's rejoinder to party-based theories of diminished congressional power focuses on how Congress interacts with the *other branches*, but ignores how partisanship affects Congress's treatment of its own members during both divided and unified government. Second, Chafetz's account misses the ways in which partisanship on the part of the *voting public* may influence the public's perception of congressional action – perhaps leading those whose favored party is out of power to dismiss Congress's reassertions of power automatically, irrespective of the merits of the underlying dispute with another branch. Third, some of the actions Chafetz urges Congress to take in order to enhance its institutional standing may appear partisan in ways that Chafetz fails to recognize and that may undermine their efficacy.

Consider, first, how Congress treats its own members. The power to conduct internal discipline and ethics investigations provides a good example of the role that partisanship has played, irrespective of unified or divided government, in Congress's virtual abandonment of certain powers. *Congress's Constitution* chronicles how Congress ceded the power to investigate its own members to the executive and the power to discipline members for ethics violations to the judiciary, and recommends that Congress reclaim these powers in the future in order to prove its integrity and improve its standing with the public.<sup>159</sup> But as Chafetz acknowledges, internal congressional discipline long has been colored by party loyalty, with each party brushing off investigations of its own members and eagerly investigating members of the opposing party.<sup>160</sup> Ethics investigations, in particular, have a long history of partisanship.<sup>161</sup> Republicans protect Republicans and Democrats protect Democrats, no matter how bad the behavior at issue, and Democrats are willing to go after Republicans (and vice versa), for even mild behavior.<sup>162</sup> Yet Chafetz nowhere explains how or why it is realistic to expect members of Congress to set aside their party loyalty to pursue investigations and discipline against their colleagues. Even if Chafetz is correct that unified, one-

---

159. See *id.* at 261-64.

160. See *id.* at 241-44, 253.

161. See, e.g., *id.* at 241-42, 253-54.

162. See, e.g., Michael D. Cobb & Andrew J. Taylor, *Paging Congressional Democrats: It Was the Immorality, Stupid*, 47 PS: POL. SCI. & POL'Y 351, 354 (2014) (discussing evidence that Republicans sheltered Representative Mark Foley from investigation following a sex scandal involving pages while Democrats called for ethics investigation).

party government does not prevent Congress from serving as a check on *other branches*, partisanship *has* historically prevented Congress from acting as a robust check on its own members.

Further, even beyond partisan concerns, there is little appetite in Congress for conducting ethics investigations at all – perhaps because members feel uncomfortable investigating their friends or perhaps because those conducting the investigations fear that they could one day be subject to such investigations themselves.<sup>163</sup> While innovations such as the creation of the House Office of Congressional Ethics (OCE) take some of the decision making power away from members of Congress and have the potential to force investigations when the evidence is strong enough,<sup>164</sup> it is hardly encouraging that the first act of the 115th Congress was to attempt to abolish the Office.<sup>165</sup> Indeed, that remarkable move illustrates just how far Congress must travel to even *want* to rehabilitate its internal discipline powers in the manner Chafetz recommends.

Second, the country is more polarized today than ever before.<sup>166</sup> It is at least possible that as a result, the public, like members of Congress themselves, may judge congressional reassertions of power in light of partisan considerations. For example, the voting public – perhaps persuaded by “fake news” or one-sided accounts generated by partisan blogs – could evaluate the propriety of particular

---

163. See CHAFETZ, *supra* note 1, at 262.

164. The House Ethics Committee is required to act on any recommendations it receives from OCE within forty-five days and must publicly release both its own actions and the OCE report and findings within that time period. See JACOB R. STRAUS, CONG. RESEARCH SERV., R40760, HOUSE OFFICE OF CONGRESSIONAL ETHICS: HISTORY, AUTHORITY, AND PROCEDURES 21 (2015).

165. See, e.g., Eric Lipton, *With No Warning, House Republicans Vote To Gut an Independent Ethics Office*, N.Y. TIMES (Jan. 2, 2017), <http://www.nytimes.com/2017/01/02/us/politics/with-no-warning-house-republicans-vote-to-hobble-independent-ethics-office.html> [<http://perma.cc/PHF2-MBNF>]; Jennifer Schutt, *House GOP Moves To Curb Independent Ethics Office*, ROLL CALL (Jan. 2, 2017), <http://www.rollcall.com/news/policy/house-gop-shoots-move-scrap-appropriations-committee> [<http://perma.cc/867N-W5KX>].

166. See, e.g., Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POL. 542, 554 (2008) (“The American people, especially those that care about politics, have . . . become much more polarized in recent years.”); James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 44 (2013) (observing that political parties and private lobbying have become more national over the past several decades, which he attributes to the nationalization of the media, and observing, “voters too have adopted an increasingly national orientation in their political attention and decision making”); *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public> [<http://perma.cc/TM29-72ZC>] (showing an increase in polarization across a variety of metrics).

investigations through a partisan lens, supporting only investigations of the opposing party and viewing investigations of like-minded officials as witch hunts. That is, partisanship may have corrupted not only Congress, but the public as well, possibly affecting its receptiveness to trustworthy behavior by members of Congress.

Third, some of the powers Chafetz urges Congress to rehabilitate may appear partisan in ways that Chafetz has failed to appreciate. And that will affect how the public as a whole perceives Congress's actions, even if Chafetz is correct that party loyalty itself would not necessarily prevent Congress from asserting those powers. This perception can occur both in spite of and because of the increasing partisanship of the public. Polarized voters may be especially primed to view reassertions of power by the other side as partisan, but even more moderate voters may find these reassertions generally suspicious. Consider, for example, Congress's power to punish contempt. Chafetz provides several historical examples of congressional sergeants at arms arresting contemnors during the early years of the republic.<sup>167</sup> But it is difficult to imagine similar behavior by the modern Congress playing out well before the public. I think one cause of this – and perhaps one reason Congress ceded this power to the Justice Department, including the FBI – is partisanship. Specifically, Congress may have been worried that a Democratic Congress's arrest of executive officials serving a Republican administration or its search and seizure of documents held by a Republican appointee (or vice versa) would appear inherently partisan and therefore untrustworthy. There is, perhaps, something more impartial and valid about having such arrests and seizures conducted by unelected career FBI agents and their validity determined by the judiciary, rather than by Congress.

Further, now that decades have passed since Congress last exercised its power to arrest contemnors, there also exists historical precedent supporting the exercise of these functions by the executive and judicial branches. If Congress were to suddenly start waving *Congress's Constitution* or other historical sources in the air and asserting its long-dormant power to arrest executive branch officials or search and seize documents from the subjects of its investigations, the public would likely view this as a partisan spectacle created by Congress to embarrass the executive branch, rather than as a legitimate exercise of an established congressional power. This is particularly likely given how polarized the parties and the electorate have become and given the explosion of online news sources that enable people to get their information from only those with similar views.

Finally, consider what would happen if Congress were to send its sergeants at arms to arrest a senior White House official, one who has a Secret Service

---

<sup>167</sup>. See CHAFETZ, *supra* note 1, at 171-79.



detail, and if that official were to resist arrest, questioning Congress's authority. What then? Would the nation be treated to an armed standoff between congressional and White House security?<sup>168</sup> While this might make for great theater, it hardly seems like the kind of interbranch confrontation we should encourage. Moreover, if such a spectacle were caught on camera and replayed over and over by the omnipresent media, the public might view Congress as overstepping its authority and harassing the executive branch.

A number of the other powers that Chafetz urges Congress to reassert or assert more vigorously raise similar partisan concerns. For example, Chafetz's Speech or Debate Clause-inspired recommendation that members of Congress leak classified information to the public—which I support—could be viewed as partisan gamesmanship if a member of the party that does not control the Presidency leaks the information. Likewise, a congressional decision to zero out executive officials' salaries could be viewed as mere partisan retaliation if Congress and the executive branch are controlled by different parties—and that is independent of the sticky-precedents problems outlined in the previous Section. Efforts to make the White House staff subject to Senate confirmation similarly could be considered inappropriate partisan interference or even obstructionism if the Senate and Presidency are controlled by opposing parties. Conversely, as noted in the previous Section, it is difficult to envision a Congress controlled by the *same* party as the President exercising any of these recommended powers absent a serious (and historically rare) rift with the President.

On a slightly different note, Chafetz also suggests that Congress could force compliance with its contempt and subpoena powers by issuing public censures, defunding programs, refusing to confirm nominees, or refusing to pass proposed legislation. In other words, he suggests that Congress refuse to take any other legislative action until its requests for information are honored.<sup>169</sup> History is on Chafetz's side in that Parliament and the colonial assemblies once engaged in similar behavior.<sup>170</sup> But this history feels rather ancient, and Chafetz's call to resurrect it seems more nostalgic than realistic. Parliament, the colonial assemblies, and earlier Congresses all were more petulant than recent Congresses—even descending into physical altercations on the House and Senate floor<sup>171</sup>—

---

168. I thank Kate Shaw for highlighting this possibility.

169. See CHAFETZ, *supra* note 1, at 198.

170. See *id.* at 159-60 (describing the House of Lords' refusal to conduct other business until King Charles answered its inquiry concerning the imprisonment of the Earl of Arundel); *id.* at 168-69 (discussing the South Carolina House of Commons' resolution not to "enter into any further business" with the Governor until he recognized the House's exclusive power to determine the validity of its own members' elections).

171. See *id.* at 54, 153-54, 244-45.

and they operated in an era when less action was expected of Congress.<sup>172</sup> Modern Congresses, by contrast, have been excoriated merely for refusing to pass a debt limit increase<sup>173</sup> – that is, for exercising their judgment about whether more borrowing is appropriate – a milder form of confrontation than holding legislation or nominations hostage because the executive branch has not turned over documents in an unrelated investigation. Today, it seems likely that a Congress that refuses to legislate, approve nominations, or take other actions until and unless the executive branch complies with its subpoena requests would be viewed by the public as behaving in a petty, partisan, and obstructionist manner. This perception likely would be amplified by the increasing polarization of the public itself, with half the country primed to view this kind of obstructionism as partisan. Thus, some of Chafetz's recommendations may create public perception problems for Congress because the modern public wants more legislative action from Congress, not clever threats, negotiations, and reassertions of power that further gum up the legislative works.

### C. *Congressional Shortsightedness*

Toward the end of *Congress's Constitution*, Chafetz comments that he has tried to show, through “detailed developmental accounts,” that “Congress has a powerful suite of tools at its disposal” and that, if “used judiciously – which is to say, with real sensitivity to the surrounding politics – they can not only be effective in getting Congress what it wants in the moment, they can also increase congressional power vis-à-vis the other branches in the long run.”<sup>174</sup> I part company with Chafetz here because, in my view, the present-day Congress has proved itself incredibly shortsighted, focused on the immediate political moment, and relatively uninterested in its own long-term institutional legacy. In other words, I fear that today's Congress may be incapable of looking past what it wants in the moment in order to achieve an “increase” in institutional power vis-à-vis the other branches and that it will instead always be so focused on the immediate

---

172. See, e.g., ESKRIDGE ET AL., *supra* note 110, at 55-56 (explaining that the Founders' conception of the legislative process was that few laws should be enacted, whereas in the post-New Deal regulatory state, widespread governmental regulation and lawmaking are expected).

173. See, e.g., Dan Balz & Scott Clement, *Poll: Major Damage to GOP After Shutdown, and Broad Dissatisfaction with Government*, WASH. POST (Oct. 22, 2013), [http://www.washingtonpost.com/politics/poll-major-damage-to-gop-after-shutdown-and-broad-dissatisfaction-with-government/2013/10/21/dae5co62-3a84-11e3-b7ba-503fb5822c3e\\_story.html](http://www.washingtonpost.com/politics/poll-major-damage-to-gop-after-shutdown-and-broad-dissatisfaction-with-government/2013/10/21/dae5co62-3a84-11e3-b7ba-503fb5822c3e_story.html) [<http://perma.cc/YRJ3-VJH5>].

174. CHAFETZ, *supra* note 1, at 302.

political moment that it cannot act in the ways *Congress's Constitution* recommends. In short, a third obstacle to the rehabilitation of Congress's powers may be Congress's own shortsightedness.

I say this despite sympathizing with, and admiring, Chafetz's idealistic vision of Congress. In theory, I too want to see Congress embrace its glory days and rehabilitate powers it has ceded to the judiciary and the executive. But I question whether Congress cares enough about its institutional legacy or is farsighted enough to do so. Indeed, two recent events suggest that the present-day Congress has changed from the idealistic institution it was at the Founding to one that is opportunistic and cavalier about its own history and precedents.

The first stark illustration of Congress's inability to put long-term institutional concerns ahead of short-term political ones – or even to take into account how the public will view its actions – was congressional Republicans' tone deafness in seeking to eliminate OCE as the first act of the 115th Congress, discussed above.<sup>175</sup> The public uproar that followed this attempt suggests that Chafetz is correct, in principle, that Congress's power to investigate and discipline its own members is one that is closely linked to public trust.<sup>176</sup> But Congress's self-interested action also demonstrates that there is a wide gap between how Congress theoretically or ideally should behave and how Congress in practice is inclined to behave.

A second example of congressional shortsightedness from recent history is Congress's treatment and criticism of the Congressional Budget Office (CBO) during the 115th Congress's recent effort to repeal the Affordable Care Act. As *Congress's Constitution* notes, CBO was created to empower Congress vis-à-vis the President.<sup>177</sup> Indeed, CBO was established as part of the 1974 Congressional Budget Act, which strengthened Congress's budget authority in direct response to budget clashes between Congress and President Nixon,<sup>178</sup> and is designed to

175. See *supra* notes 164-165 and accompanying text.

176. See, e.g., Katie Leslie & Jamie Lovegrove, *Pressured by Trump and Public Outcry, House GOP Retreats from Effort To Weaken Ethics Board*, DALL. MORNING NEWS (Jan. 3, 2017), <http://www.dallasnews.com/news/politics/2017/01/03/trumps-twitter-rebuff-republicans-drop-effort-weaken-congressional-ethics-board> [<http://perma.cc/9S3U-EK6K>]; Eric Lipton & Matt Flegenheimer, *House Republicans, Under Fire, Back Down on Gutting Ethics Office*, N.Y. TIMES (Jan. 3, 2017), <http://www.nytimes.com/2017/01/03/us/politics/trump-house-ethics-office.html> [<http://perma.cc/4L7F-NLB9>] (“The day after House Republicans voted to eliminate an independent ethics body, members returned to work on Tuesday to find their offices inundated with angry missives from constituents amid a national uproar.”).

177. See CHAFETZ, *supra* note 1, at 63-64.

178. See Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 601-688 (2012)). The primary motivating factor behind the 1974 Act was President Nixon's refusal to disburse funds appropriated by Congress

be Congress's resource. Its function is to provide impartial economic estimates of legislation and serve as a counterweight to the Office of Management and Budget, which provides the President with budget estimates used in negotiations with Congress.<sup>179</sup> Given the high stakes nature of the work that CBO does—providing cost estimates and economic forecasts for nearly every piece of legislation that Congress considers—CBO often finds its estimates questioned or criticized by those who do not like the estimates' policy implications.<sup>180</sup> During Congress's recent healthcare repeal efforts, however, CBO found itself attacked *as an institution*. The attacks did not come just from the executive branch, but from several members of Congress as well.<sup>181</sup> It makes sense that the President would attack CBO, as CBO is designed to check and limit the President's power. But for Congress itself to attack CBO is a classic case of putting short-term political expediency—in this case, the majority party's dissatisfaction with CBO's scoring of its proposed repeal of the Affordable Care Act—ahead of institutional concerns.<sup>182</sup>

---

that went against his preferred policies—a tactic known as “impoundment.” See, e.g., H.R. REP. NO. 93-658, at 16 (1973), as reprinted in 1974 U.S.C.C.A.N. 3462, 3462.

179. See RUDOLPH G. PENNER & ALAN J. ABRAMSON, *BROKEN PURSE STRINGS: CONGRESSIONAL BUDGETING, 1974 TO 1988*, at 19, 45 (1988); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1057 n.109 (2013); James A. Thurber, *The Consequences of Budget Reform for Congressional-Presidential Relations*, 499 ANNALS AM. ACAD. POL. & SOC. SCI. 101, 104 (1988).
180. See Alan Rappoport, *C.B.O. Head, Who Prizes Nonpartisanship, Finds Work Under G.O.P. Attack*, N.Y. TIMES (June 19, 2017), <http://www.nytimes.com/2017/06/19/us/politics/cbo-congressional-budget-office.html> [<http://perma.cc/C3H5-JNHC>].
181. See, e.g., Mike DeBonis, *Congressional Budget Office Is Freedom Caucus's Target in Spending Bill*, WASH. POST (July 24, 2017), <http://www.washingtonpost.com/news/powerpost/wp/2017/07/24/congressional-budget-office-is-freedom-caucuss-target-in-spending-bill> [<http://perma.cc/RPQ4-KMSU>]; Rappoport, *supra* note 180 (reporting comments by White House budget director, Mick Mulvaney, that CBO's time has “come and gone,” accusing its employees of holding a liberal political bias, and suggesting changes to the Congressional Budget Act that would make CBO less influential in the legislative process; similar comments were made by Health and Human Services Secretary Tom Price questioning CBO's ability to provide accurate estimates).
182. In particular, Republican legislators were dissatisfied with CBO's estimates that over twenty million people would lose their health insurance under the proposed plan. See, e.g., DeBonis, *supra* note 181; Juliet Eilperin & Kelsey Snell, *Uninsured Ranks Still To Grow by Tens of Millions Under Latest House Health-Care Bill, CBO Says*, WASH. POST (May 24, 2017), [http://www.washingtonpost.com/national/health-science/uninsured-ranks-still-to-grow-by-tens-of-millions-under-latest-house-health-care-bill-cbo-says/2017/05/24/81a42648-40b0-11e7-8c25-44d09ff5a4a8\\_story.html](http://www.washingtonpost.com/national/health-science/uninsured-ranks-still-to-grow-by-tens-of-millions-under-latest-house-health-care-bill-cbo-says/2017/05/24/81a42648-40b0-11e7-8c25-44d09ff5a4a8_story.html) [<http://perma.cc/ULZ2-NHJJ>]; Robert Pear, *G.O.P. Health Bill Would Leave 23 Million More Uninsured in a Decade, C.B.O. Says*, N.Y. TIMES (May 24, 2017), <http://www.nytimes.com/2017/05/24/us/politics/cbo-congressional-budget-office-health-care.html> [<http://perma.cc/V72J-2WXR>]. For the report itself, see

Notably, for most of its history, CBO has worked closely with members of Congress during the legislative drafting process, with members of Congress and their staff often altering the language of proposed statutes to ensure that the budgetary impact of the statute falls in line with their policy goals.<sup>183</sup> Following Congress's recent efforts to repeal the ACA, however, some Republican legislators were so focused on their immediate political goals that they were willing to throw away this close working relationship with CBO. Members of the House Freedom Caucus, for example, offered two separate amendments to an appropriations bill that would have eliminated CBO's Budget Analysis Division; one of the amendments would have required CBO to use data assimilated from four private think tanks rather than calculate its own budget estimates.<sup>184</sup> This is a stunning act of legislative disempowerment based on a disagreement over one policy item and a move that emboldens the President at Congress's expense. To be sure, only some members of Congress tried to strip CBO of its powers; others have continued to recognize CBO's value and have cautioned against such attacks.<sup>185</sup> But the fact that the attacks went this far—including proposed legislation that would eliminate CBO's budget-scoring function and greatly diminish its value as a resource to Congress—is significant. Such attacks constitute powerful evidence that some of Chafetz's recommendations for how Congress should rehabilitate its underused powers may be doomed because the Congress of the twenty-first century is more cavalier in its attitude towards its own power than were its predecessor legislatures.

---

CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 1628 AMERICAN HEALTH CARE ACT OF 2017 (May 24, 2017), <http://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr1628aspassed.pdf> [<http://perma.cc/63HJ-88XG>].

183. See, e.g., PHILIP G. JOYCE, *THE CONGRESSIONAL BUDGET OFFICE: HONEST NUMBERS, POWER, AND POLICYMAKING* 224 (2011); KIMBERLY J. MORGAN & ANDREA LOUISE CAMPBELL, *THE DELEGATED WELFARE STATE: MEDICARE, MARKETS, AND THE GOVERNANCE OF SOCIAL POLICY* 122-23 (2011); WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 72 (9th ed. 2014); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 *STAN. L. REV.* 725, 764 (2014); Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying To Do*, 84 *U. CHI. L. REV.* 177, 188 (2017).
184. See DeBonis, *supra* note 181. The think tanks were the Heritage Foundation, the American Enterprise Institute, the Brookings Institution, and the Urban Institute.
185. See *id.* (quoting comments by House Speaker Paul Ryan that “[i]t is important that we have a scorekeeper,” and that “[w]e can always complain about the nature of the score”; and comments by Rep. John Yarmuth (D-Ky.), top Democrat on the House Budget Committee: “CBO is a long-respected institution whose rigorous analysis and reports are critical resources for Congress as we consider legislation that affects the lives of the American people . . . These attacks should be beneath Congress. They need to stop.”).

Chafetz might counter that OCE and CBO are not inherent congressional powers and that Congress's elimination or modification of them to suit its political needs is therefore appropriate rather than a sign of institutional weakness. But while they may not be powers in themselves, OCE and CBO are mechanisms that Congress created to enhance its existing powers or to improve its credibility and image – and CBO in particular was designed as a check against presidential power (specifically, presidential encroachment on the power of the purse). Thus, in my view, Congress's willingness to dump or misuse these mechanisms demonstrates something troubling about its commitment to its own institutional authority, history, and image.

Congress's institutional shortsightedness is, in part, connected to the partisanship developments discussed in Section II.B. As Congress has grown more partisan and more polarized, it has become increasingly willing to abandon its own powers and institutional levers to achieve short-term political gains. In this respect, too, partisan interests have superseded the interests of the legislative branch as an institution. But there may be more than mere partisanship behind the modern Congress's institutional shortsightedness. As the OCE episode demonstrates, there also seems to be a fundamental disconnect between members of Congress and the American public. Congressional members appear not to have given any forethought to how their attempt to dismantle an ethics office would look to the voting public. Perhaps the problem is that members of Congress no longer see themselves as a collective institution but, rather, as a collection of individuals or as a vehicle for their parties. The OCE episode at least suggests that Congressional members have become more focused on their individual self-interests than on Congress's institutional image or standing.

\*\*\*

This Part has disagreed with Chafetz about the extent to which some of Congress's underused or underappreciated powers remain open for contestation. Chafetz argues that the Constitution merely provides guidance, not definitive answers, to questions about political actors' authority and contends that political institutions are involved in ongoing contestation not simply for policy outcomes, but also for the authority and powers to achieve those outcomes.<sup>186</sup> I do not necessarily disagree with him in theory. But in practice, this Part has suggested that modern political and historical developments may have moved the baseline of public and interbranch expectations with respect to some powers so much that Congress is unlikely to attempt – and the public is unlikely to accept – the reassertion of long-dormant legislative powers.

---

186. See CHAFETZ, *supra* note 1, at 15-18.

Some, including Chafetz, might counter that if the baseline moved once to diminish congressional power, then it can move again to restore it. That is, congressional contestation with the executive or judiciary in some new political context can shift the balance of constitutional power. This Part has suggested that the likelihood of success in recapturing ceded congressional powers depends on the power at issue. Some powers are more open to renegotiation or aggressive congressional assertion than others. Specifically, where historical developments have created entrenched institutions or constituencies that would be harmed by Congress's resurrection of old powers (e.g., the administrative state and the professionalization of the civil service), or where Congress has ceded its power to another branch through a formal act (e.g., the debt limit statute), or where another branch has seized congressional power and enshrined that power grab in a formal act (e.g., the judiciary's seizure of the power to punish contempt and decide the scope of executive privilege), Congress may be unable to revive its old powers in the manner Chafetz advocates. This could be because another branch now automatically exercises at least part of Congress's old power (e.g., the debt limit statute), because restoring Congress's power would require repealing a statute or overturning a precedent and the executive or judiciary are unlikely to cooperate in such a reversal (e.g., the debt limit, the power to punish contempt and decide the scope of executive privilege), or because the public would view any attempt to reassert an old power as an illegitimate attempt to undermine established institutions, rights, or norms (e.g., the administrative state, professionalization, and judicial independence).

Ultimately, it may be harder for Congress to take back power than it was for Congress to give up power in the first place. We might call this the "scrambled eggs" problem. As the adage goes, once the eggs have been scrambled, they cannot be unscrambled. Giving up power required either *inaction* by Congress or action by Congress and another branch together; it did not require Congress to step on other branches' toes. Recapturing power, by contrast, requires congressional action that would intrude on another branch's authority and would upset settled norms, practices, and expectations – including, potentially, dismantling agencies and eliminating government jobs. This is far more difficult than the initial ceding of power because once institutional structures have been built and rights created (scrambling the eggs), those who benefit from those structures and rights will fight any efforts to reduce or eliminate them (unscrambling the eggs). Moreover, the impact of Congress's actions on those people and programs will be highlighted in the media and may cause Congress to lose the battle for public support that ultimately determines who wins the contestation over constitutional power. In addition, Congress itself may be reluctant to exercise its nonlegislative powers more aggressively, for reasons ranging from partisan loyalty to self-interest to short-term thinking.

Despite all of the above, it is possible that an extraordinary political event—e.g., a controversial and self-serving decision by the President to fire the special prosecutor or Attorney General or to pardon his family members or himself while FBI and congressional investigations are pending—could shock the public and members of Congress sufficiently and so significantly exceed the bounds of political precedent that both Congress and the public could become willing to support renewed exercise of the legislature's dormant powers to check the executive. That is, an extraordinary act of overreaching or misbehavior by one of the other branches could move the baseline of public expectations and support back toward Congress in a way that makes unscrambling the eggs more feasible.

## CONCLUSION

*Congress's Constitution* is a rich, valuable guide to the origins of several congressional powers, with many original and insightful applications to contemporary politics. At its core, it argues that Congress is significantly more powerful than most scholars and commentators have recognized. And it aims, through detailed historical accounts, to highlight Congress's underappreciated powers, describe how Congress in some cases unwisely has ceded those powers to the other branches, and urge Congress to reclaim and reassert those powers more vigorously in the future. This Review has admired the ambition and scope of the book's historical accounts and recommendations. But it has taken issue with Chafetz's specific recommendations on three fronts. First, it has questioned whether some of Chafetz's suggestions for how Congress should reestablish its powers are practically feasible in the modern era. It has argued, for example, that Congress's own past practice in failing to assert certain powers—along with modern developments including the centralization of the budget process, adoption of the debt limit statute, the growth of the administrative state, the evolution of the civil service and good government norms, and the expansion of the media—have established sticky precedents that might make it practically impossible for Congress to rehabilitate powers it once exercised. Second, the Review has questioned whether Congress can reassert long-dormant powers without appearing abjectly partisan and, thereby, losing public support for its actions. Finally, the Review has suggested that Congress itself may pose the greatest obstacle to reinvigoration of legislative power along the lines Chafetz suggests—as it may simply be incapable of looking past the political battles of the moment in order to focus on its own larger institutional interests. In short, while reinvigorating Congress's underappreciated powers may be a good idea in theory, in practice, it may prove significantly more challenging than Chafetz recognizes.