

## *THE FEDERALIST NO. 48, THE SEPARATION OF POWERS, AND “THE IMPETUOUS VORTEX”*

PAUL D. CLEMENT\*

Given that the focus of the Symposium is on the structural Constitution, what I want to talk about today is the separation of powers and, in particular, James Madison’s *The Federalist No. 48*<sup>1</sup> and the differences between the strengths of the relative branches of government today versus what Madison envisioned. If you look at *The Federalist No. 48*, you will see that Madison was most concerned with the power that had been given to the new national Congress.<sup>2</sup> In fact, he famously described Congress in *The Federalist No. 48* as the “impetuous vortex” into which all power would be sucked but for the separation of powers.<sup>3</sup> He was particularly concerned about Congress because of the power of the purse. As he wrote, “[it] alone has access to the pockets of the people.”<sup>4</sup>

The executive, by contrast, was less of a concern for Madison because, as he wrote, it is “restrained within a narrower compass, and

---

\* Paul Clement is a partner in the Washington, D.C. office of Kirkland & Ellis LLP and a Distinguished Lecturer in Law at the Georgetown University Law Center. He served as the 43rd Solicitor General of the United States from June 2005 until June 2008. Before his confirmation as Solicitor General, he served as Acting Solicitor General for nearly a year and as Principal Deputy Solicitor General for over three years. This Essay is a lightly edited version of Mr. Clement’s keynote speech at the Federalist Society’s Student Symposium, delivered on March 14, 2020.

1. THE FEDERALIST NO. 48 (James Madison) (Clinton Rossiter ed., 2003).

2. *See id.* at 310 (“The legislative department derives a superiority in our governments. . . . Its constitutional powers being at once more extensive, and less susceptible of precise limits . . .”).

3. *Id.* at 309.

4. *Id.* at 310.

[is] more simple in its nature.”<sup>5</sup> The judiciary was even less of a concern for Madison. As he said, “[it is] described by landmarks, still less uncertain,”<sup>6</sup> by which I believe he meant the case and controversy requirement of the Constitution.<sup>7</sup>

Madison was sufficiently concerned with the Congress and sufficiently unconcerned about the executive and the judiciary that he wrote, “projects of usurpation by either of these departments,” — the executive or judiciary — “would immediately betray and defeat themselves.”<sup>8</sup> Congress, in Madison’s view, was not just the most powerful and most dangerous branch, but, if you read *The Federalist No. 48* carefully, it is not an overstatement to say that Madison believed that the power of Congress was the *raison d’être* for the separation of powers. The checks and balances were there largely to constrain Congress. As he wrote, “it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.”<sup>9</sup>

So, let’s take a moment now to compare Madison’s vision with our present-day reality. What you see is that both the judiciary and the executive are more powerful than Madison envisioned, and Congress is certainly less active and less of the impetuous vortex that Madison had in mind.

First of all, let’s talk about the judiciary. The case for saying that the judiciary is more powerful today than James Madison conceived that it would be is an easy case to make. It is true in the obvious sense that the Supreme Court of the United States today is deciding many of the most fraught and contentious issues that arise in society as a whole,

---

5. *Id.*

6. *Id.*

7. See U.S. CONST. art. III, § 2, cl. 1.

8. THE FEDERALIST NO. 48, *supra* note 1, at 310.

9. *Id.* at 309.

such as issues of race,<sup>10</sup> abortion,<sup>11</sup> and sexual orientation.<sup>12</sup> All of these issues are being definitively resolved in the Supreme Court of the United States rather than in the Congress.

This would not only surprise Madison, but it is fair to say that nobody designing a system from scratch would think it was a good idea to have these kinds of issues decided by nine unelected lawyers who serve with life tenure. And it is not a surprise, as a result, that the Supreme Court nomination process has become fraught with difficulty because of the power now exercised by the Supreme Court.<sup>13</sup>

But the power of the judiciary *vis-à-vis* the other branches is underscored in less obvious ways too. Right now, a federal district court judge in Ohio is attempting to solve the nationwide opioid crisis armed with tools no more specific than the state law of public nuisance.<sup>14</sup> And that federal judge is not alone in tackling a national

---

10. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016); *Schuetz v. Coal. to Defend Affirmative Action*, 572 U.S. 291 (2014) (plurality opinion); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

11. See, e.g., *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103 (2020); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Gonzalez v. Carhart*, 550 U.S. 124 (2007); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

12. See, e.g., *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). Note that Mr. Clement delivered this address before the Court announced its opinion in several of the October 2019 cases, including *June Medical* and *Bostock*.

13. See generally JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007).

14. See John Culhane, *The Little Known Legal Doctrine Making Big Pharma Pay for the Opioid Crisis*, POLITICO (Aug. 28, 2019), <https://www.politico.com/magazine/story/2019/08/28/johnson-and-johnson-decision-opioids-227913> [<https://perma.cc/AZ6Z-4AKA>] (explaining public nuisance in the context of the opioid litigation); Tom Hals & Nate Raymond, *Judge's unorthodox approach has huge opioid settlement within reach*, REUTERS (Oct. 18, 2019, 7:04 AM), <https://www.reuters.com/article/us-opioids-litigation-judge/judges-unorthodox-approach-has-huge-opioid-settlement-within-reach-idUSKBN1WX1AT> [<https://perma.cc/D9A3-62LQ>] (explaining Judge Dan Polster's strategy for trying to help the parties reach a productive settlement instead of going to trial).

problem with very minor and meager judicial tools. Another federal judge in California is trying to address the problem of youth vaping,<sup>15</sup> and there are other federal judges who are being implored to address the global issue of climate change.<sup>16</sup>

At the same time that the judiciary is plainly exercising more power than Madison could have imagined, the executive, too, is more powerful than he envisioned. Now in saying that, I don't mean to enter into the debate about the unitary executive and whether the current executive is exercising the executive power vested in him by the Constitution in a way that is similar to or different than what the Framers had in mind.<sup>17</sup> What I really have in mind is how much authority has been delegated to the executive branch by Congress.

You see this very dramatically in the current coronavirus situation. It is not an overstatement to say that in dealing with this crisis all eyes are on the President.<sup>18</sup> To be sure, Congress worked with the Trump Administration to enact an emergency spending measure that had some minor provisions that went beyond spending to address substance.<sup>19</sup> But the interaction has been telling. As far as I can tell, the principal legislative response to the initial administrative request for funding to deal with this crisis was to say, "You did not ask for enough money, and we need to give you at least twice

---

15. See Complaint for Declaratory & Injunctive Relief, R.J. Reynolds Tobacco Co. v. Cty. of Los Angeles, No. 20-04880, 2020 WL 5405668 (C.D. Cal. June 1, 2020).

16. See, e.g., Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020); Juan Carlos Rodriguez, *NYC Faces Tough 2nd Circ. In Sweeping Big Oil Climate Case*, LAW360 (Nov. 22, 2019, 3:11 PM), <https://www.law360.com/articles/1222555/nyc-faces-tough-2nd-circ-in-sweeping-big-oil-climate-case> [<https://perma.cc/5HAA-6HV8>].

17. For more on the unitary executive debate, see generally John C. Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935 (2009).

18. See, e.g., Shannon Pettypiece, *It's Trump's coronavirus response now, to his political profit or peril*, NBC NEWS (Mar. 29, 2020, 5:14 AM), <https://www.nbcnews.com/politics/2020-election/it-s-trump-s-coronavirus-response-now-his-political-profit-n1171171> [<https://perma.cc/N66N-8J97>] (quoting a White House aide as saying, "All eyes are focused on the president and the White House.").

19. See generally *Coronavirus Aid, Relief, and Economic Security Act*, Pub. L. No. 116-136, 134 Stat. 281 (2020) (addressing, for example, supply chain shortages, health workforce coordination, and sick leave provisions).

as much as you asked for.”<sup>20</sup> That is an odd use of the power of the purse, to say the least, in terms of constraining the other branches of government.

But there are more mundane examples as well of the executive tackling lots of issues James Madison would have thought were in Congress’s bailiwick. One I have run across in my own practice is a recent effort by the FCC to reallocate spectrum to jumpstart the 5G revolution.<sup>21</sup> The 5G revolution is obviously an important issue that should be wrestled with somewhere in the federal government. But the idea that the FCC should do this without any specific direction from Congress does seem anomalous, especially considering that the reallocation of the spectrum is a matter worth literally tens of billions of dollars.<sup>22</sup> Some of these dollars may even be generated for the federal government fisc through an auction of the spectrum,<sup>23</sup> but all of the economic value is going to be reallocated from some parties to others. And all of that does seem, especially given the stakes, something that James Madison would have thought that Congress would have dealt with.<sup>24</sup>

But the biggest surprise to Madison probably would be less that the judiciary and executive are more powerful than that Congress

---

20. See Erica Werner & Mike DeBonis, *House passes \$8.3 billion emergency spending package to respond to coronavirus outbreak*, WASH. POST (Mar. 4, 2020, 3:42 PM), <https://www.washingtonpost.com/us-policy/2020/03/04/congress-coronavirus-emergency-spending/> [<https://perma.cc/URM9-PJWU>] (discussing the bipartisan view that the initial White House spending proposal was inadequate to address the coronavirus crisis).

21. See Expanding Flexible Use of the 3.7 to 4.2 GHz Band, 85 Fed. Reg. 22,804 (Apr. 23, 2020) (to be codified at 47 C.F.R. pt. 1, 2, 25, 27, & 101).

22. See *id.* at 22,827–28, 22,830–31.

23. See, e.g., 85 Fed. Reg. at 22,828; Mark Colwell, *How Will Congress Spend Over \$40 Billion in C-Band Auction Revenues?*, VOQAL (Dec. 12, 2019), <https://voqal.org/telecommunications-update-how-will-congress-spend-over-40-billion-in-c-band-auction-revenues/> [<https://perma.cc/5HL7-CL4Z>] (predicting a C-Band FCC auction could raise between \$30 and \$60 billion).

24. See Letter from James Madison to George Washington (Apr. 16, 1787), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-09-02-0208> [<https://perma.cc/MZ2H-EY2J>] (“I would propose next that in addition to the present federal powers, the national Government should be armed with positive and compleat [sic] authority in all cases which require uniformity; such as the regulation of trade . . .”).

has largely yielded power to the other branches and is anything but the “impetuous vortex” that he feared. And there are plenty of examples of this. I am going to just pick very briefly a couple of obvious examples and a couple of more obscure examples to illustrate that it is a broad-scale problem.

Two obvious examples are immigration and the authorization for the use of military force. Immigration is clearly an issue that the federal government should be dealing with in the main. And there is no doubt that there have been great controversies about the proper immigration policy. Now, perhaps it is precisely because immigration policy is so contentious and divided between the parties that there has not been a congressional resolution of the current controversies. However, whatever the reason, Congress has not changed the immigration laws in any material respect in the last decade, while we have seen very different executive branch policies from the last administration to the current administration.<sup>25</sup> We have seen individuals caught in the middle, such as the DREAMers who were allowed to stay in the country under the Obama Admin-

---

25. Compare Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. (June 15, 2012) (regarding the exercise of prosecutorial discretion with respect to individuals who came to the United States as children), with Memorandum from Elaine C. Duke, Acting Sec’y, Dep’t Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017) (regarding the rescission of the June 15, 2012 memorandum entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*); see also John Gramlich, *How border apprehensions, ICE arrests and deportations have changed under Trump*, PEW RES. CENTER (Mar. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/> [https://perma.cc/JV6K-GBJ8] (describing the Trump Administration’s immigration policy and how it compares statistically with the Obama Administration, including data on both border detentions and arrests of unauthorized immigrants in the country’s interior).

istration despite an arguable lack of statutory authority for the policy.<sup>26</sup> The question of whether the executive has the power to simply reverse that policy is currently before the Supreme Court.<sup>27</sup>

The Authorization for the Use of Military Force passed in September of 2001 is another good example of Congress ceding its powers to the other branches.<sup>28</sup> The attacks of 9/11 prompted Congress into quick and bipartisan action. Congress acted in a way that gave substantial authority to the President,<sup>29</sup> which was probably perfectly appropriate in the immediate wake of those attacks. And so, the Authorization for the Use of Military Force broadly authorized the use of force against those individuals and groups responsible for the attacks of 9/11.<sup>30</sup>

What is striking is not what Congress did in that first week after the attacks because it did act quickly, sending the bill to President Bush's desk for signing within a week.<sup>31</sup> What is surprising is that

---

26. Compare Hans A. von Spakovsky, *DACA Is Unconstitutional, as Obama Admitted*, HERITAGE FOUND. (Sept. 8, 2017), <https://www.heritage.org/immigration/commentary/daca-unconstitutional-obama-admitted> [<https://perma.cc/UU4Z-HBET>] (“Congress has never given the president the power to provide pseudo-amnesty and government benefits to illegal aliens.”), with Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 112 (2015) (praising President Obama's approach to reshaping immigration law through administrative means as “lawful and desirable”).

27. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1919 (2020). As noted in *supra* note 11, Mr. Clement delivered this address before the case was decided. In June 2020, the Supreme Court held that the Trump Administration's decision to rescind the Deferred Action for Childhood Arrivals program was arbitrary and capricious and violated the Administrative Procedure Act. *Id.* at 1915. The Court then reinstated the program but noted that in some instances the executive does possess the authority to overturn a prior policy. *See id.* at 1913.

28. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 (2018)).

29. Congress gave the following authority to the President: “[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” *Id.* § 2(a).

30. *Id.*

31. *See Congress approves resolution authorizing force*, CNN (Sept. 15, 2001, 3:14 PM), <http://www.cnn.com/2001/US/09/15/congress.terrorism/index.html>

Congress has not revisited the issue even though the War on Terror has changed in many different respects in the ensuing two decades and has largely become a war against ISIS,<sup>32</sup> which is a group that did not exist (at least in its current form) at the time of the attacks of 9/11.<sup>33</sup> Nonetheless, Congress has not seen fit to revisit an authorization of force quickly enacted within a week of the attacks.

There are many less obvious examples, which underscore that congressional inaction is a widespread phenomenon. One of the most important developments of the last quarter century, and one would think one of the principal objects of congressional action, would be the development of the Internet. But yet, if you look at the congressional laws that principally regulate actors on the Internet, many of the most important ones, such as Section 230 of the Communications Decency Act<sup>34</sup> or the Digital Millennium Copyright Act,<sup>35</sup> were passed in the 1990s. There is a huge chasm, particularly in the context of the fast-moving Internet age, between the technology of the mid-1990s and today. Yet, most of today's issues are governed by laws that were passed in the very earliest days of the Internet.

To pick just one example that illustrates the phenomenon, take the Telephone Consumer Protection Act<sup>36</sup> or "TCPA." This statute

---

[<https://perma.cc/78T3-5F45>] (discussing the Senate's unanimous authorization of the use of force resolution).

32. See *The Future Of The President's Authorization For Use of Military Force* (NPR radio broadcast Oct. 30, 2017), <https://www.npr.org/2017/10/30/560778907/the-future-of-the-presidents-authorization-for-use-of-military-force> [<https://perma.cc/WKE9-FUCE>] (suggesting that the Authorization for the Use of Military Force Act should be replaced).

33. See James A. D'Cruz, *The Kansas City Shuffle: Arguing Jus in Bellum When Everyone is Looking to the Jus in Bello*, HARV. NAT'L SEC. & L. ASS'N BLOG (last visited Sept. 9, 2020), <https://orgs.law.harvard.edu/nslnsnc/research-blog/> [<https://perma.cc/QWL5-YQ9Y>] (noting that ISIS did not exist in 2001 when Congress passed the Authorization for Use of Military Force, but arguing that ISIS is logically associated with Al-Qaeda).

34. Communications Decency Act, Pub. L. No. 104-104, 10 Stat. 133, 137-39 (1996) (codified as amended at 47 U.S.C. § 230 (2018)).

35. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. § 101 (2018)).

36. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227 (2018)).

was enacted in 1991 to address one of the annoyances of 1991, namely having the family dinner interrupted by your landline phone ringing because some telemarketer was trying to deliver a prerecorded message to your home phone. Congress passed a statute that largely outlawed such “robocalls” and the use of autodialing machines to reach cellphones that were still relatively scarce and involved costly per-minute charges even for incoming calls.<sup>37</sup> Now, nearly thirty years later, the technology has evolved substantially. People are more likely to get an annoying text on their smartphone than they are to get an annoying call on their landline, and cellphones are ubiquitous and generally come with unlimited packages without charges for incoming calls or texts. Yet in all these years, Congress has not revisited the statute. And you now have a situation where, at least in the Ninth Circuit, the statute has been interpreted as providing that even a smartphone may well be an automatic dialing machine.<sup>38</sup> And in the face of all that, Congress instead of revisiting the issue has been waiting for the FCC to promulgate a new rule.<sup>39</sup>

So, what are the consequences of this overly cautious Congress in terms of the separation of powers? First, it has a direct impact on the other branches. Its impact on the judiciary is well illustrated just by looking at the cases before the Supreme Court this term. I am not going to go into the details of the cases, but I will tick off three of the major cases that the Supreme Court is dealing with this term, each of which stems from relative congressional inactivity.

One is the DACA case about the fate of the DREAMers and whether or not they can stay in the country.<sup>40</sup> Another is the three cases consolidated to deal with the question of whether Title VII and its prohibitions against discrimination based on sex apply to

---

37. See 47 U.S.C. § 227(b)(1)(A)(iii) (2018).

38. See *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018) (holding that if a device can automatically dial a stored number, then it is an automatic dialer within the meaning of the statute).

39. See *Advanced Methods to Target and Eliminate Unlawful Robocalls: Report and Order and Further Notice of Proposed Rulemaking*, 32 FCC Rcd. 9706, 9706 n.3 (2017) (listing letters from members of Congress in support of rulemakings to stop unwanted robocalls).

40. *Dep’t Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

sexual orientation or transgender status.<sup>41</sup> And the last of these cases is the case involving the Little Sisters of the Poor.<sup>42</sup>

The Little Sisters case involves the validity of a major change in policy by the executive branch.<sup>43</sup> It is worth noting that the Little Sisters case is a byproduct of the Affordable Care Act.<sup>44</sup> And if you were going to identify one area where Congress has not been quiet in the last decade and a half, it would be health care, with the Affordable Care Act as an example of major legislation, though not major bipartisan legislation.

But even that major legislation left many contentious issues to the executive branch, in particular the question of whether or not there should be a mandate to provide contraception as part of a broad and general preventative health mandate.<sup>45</sup> And trying to resolve how a contraception mandate would interact with the Religious Freedom Restoration Act was, again, an issue that Congress did not decide directly but left to the executive branch.<sup>46</sup> So, the Obama Administration did relatively little to accommodate religious exercise, and its executive orders were challenged by religious groups like the Little Sisters and others on those grounds.<sup>47</sup> And now the Trump Administration has done much more to accommodate religious exercise, and its efforts to accommodate religious exercise have been challenged by several states under the Administrative Procedure Act.<sup>48</sup> The Supreme Court and not Congress will decide

---

41. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

42. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

43. *Id.* at 2372–73; see also Editorial Board, *Religious Liberty Lives at the Supreme Court*, WALL ST. J. (July 8, 2020, 7:06 PM), <https://www.wsj.com/articles/religious-liberty-lives-at-the-supreme-court-11594249558> [<https://perma.cc/MFL8-QYAL>]; Robert Pear, Rebecca R. Ruiz & Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html> [<https://nyti.ms/2y090eY>].

44. See *Little Sisters of the Poor*, 140 S. Ct. at 2372.

45. See *id.* at 2373–75.

46. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–91 (2014).

47. See, e.g., *id.*; *Little Sisters of the Poor*, 140 S. Ct. at 2367.

48. See *Little Sisters of the Poor*, 140 S. Ct. at 2378; *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410 (9th Cir. 2019), *vacated*, *Little Sisters of the Poor Jeanne Jugan Residence v. California*, No. 19-1053, 2020 WL 3865245 (U.S. July 9, 2020); Robert

all of these contentious issues—on immigration, sexual orientation, contraception, and religious liberty.

The effect on the executive branch has been equally obvious in that many important issues are being decided today by executive orders.<sup>49</sup> It is not an exaggeration to say that in many respects we have a government by executive order, which, of course, creates the dynamic that when there is a change in administration, one set of executive orders goes out the window to be replaced by another set of executive orders. Such a practice is fine if the orders deal with matters traditionally addressed by executive order such as executive policy or intra-executive interpretation. But when wide swaths of primary conduct are addressed in executive orders covering matters as important as religious freedom and immigration, governing by executive order creates a dynamic in which the basic law of the land is up for grabs and subject to change every four years.

But probably the biggest ramifications of Congress's lack of activity are on Congress itself. There are two effects in particular I would emphasize. One is that, by legislating relatively little, particularly on important issues, members of Congress have lost the art of the compromise. Legislation by its nature requires compromise, especially if you legislate all the way down to the details. One way to avoid an actual substantive compromise on the details is to legislate in relatively general terms about what everyone can agree on and kick everything else to the executive branch. But if Congress were actually to legislate down to the details, compromise would be unavoidable.

Compromise is not always easy, and it is rarely fun. I worked in the Senate for a couple of years for the then-junior senator from Missouri, John Ashcroft, who had previously been the governor of Missouri. One of his favorite lines from that time that still sticks

---

Pear, *White House Acts to Roll Back Birth-Control Mandate Rule for Religious Employers*, N.Y. TIMES (May 29, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html> [<https://nyti.ms/2rhbOmN>].

49. See, e.g., *Executive Orders*, FED. REGISTER (last updated July 31, 2020), <https://www.federalregister.gov/presidential-documents/executive-orders> [<https://perma.cc/PN2Q-H3LP>] (“Donald Trump issued 175 executive orders between 2017 and 2020. . . . Barack Obama issued 276 executive orders between 2009 and 2017.”).

with me is that, “Somebody who tells you being a senator is as much fun as being a governor will lie to you about other things as well.” Now what he meant by that, of course, was that an executive can get things done quickly and unilaterally through what Hamilton would call “energy in the executive.”<sup>50</sup> Legislating, by contrast, requires many iterations of the law and compromise.

The second effect I would highlight is that, with less activity in Congress and more activity in the executive branch, there is a natural tendency to exacerbate partisanship and for members of Congress, since they are not acting themselves through legislation, to find themselves in one of two partisan roles. If the President is from the same party as the members of Congress, then those members tend to cheer on what the President is doing through executive orders.<sup>51</sup> Conversely, if members are from the opposite party of the President, they tend to spend most of their time criticizing what is being done through executive orders rather than legislating, at least in a way that leads to signed legislation, instead of drafting bills simply to signal policy differences with the Executive.<sup>52</sup> All this creates a dynamic that was aptly described by Jonah Goldberg as producing a “parliament of pundits,”<sup>53</sup> where, instead of spending

---

50. THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

51. See, e.g., Jane C. Timm, *Republicans Alarmed Over Obama's Executive Orders, Cheer Trump's On*, NBC NEWS (Jan. 26, 2017, 1:30 PM), <https://www.nbcnews.com/politics/politics-news/republicans-alarmed-over-obama-s-executive-orders-cheer-trump-s-n712231> [https://perma.cc/TP25-MGEK]; *GOP, Democrats spar over legality of executive orders, as lawsuits begin*, FOX NEWS (Nov. 23, 2014), <https://www.foxnews.com/politics/gop-democrats-spar-over-legality-of-executive-orders-as-lawsuits-begin> [https://perma.cc/H23R-9F9T].

52. See, e.g., *supra* note 51; Mike DeBonis, *Democrats launch health-care law rescue in face of Trump's threat of repeal*, WASH. POST (May 9, 2019, 6:38 PM), [https://www.washingtonpost.com/politics/democrats-launch-health-care-law-rescue-in-face-of-trumps-threat-of-repeal/2019/05/09/4554b3f6-7272-11e9-9331-30bc5836f48e\\_story.html](https://www.washingtonpost.com/politics/democrats-launch-health-care-law-rescue-in-face-of-trumps-threat-of-repeal/2019/05/09/4554b3f6-7272-11e9-9331-30bc5836f48e_story.html) [https://perma.cc/5QWK-UA2E]; *House Republicans Vote to Block Obama's Immigration Order*, NBC NEWS (Dec. 4, 2014, 2:45 PM), <https://www.nbcnews.com/politics/immigration/house-republicans-vote-block-obamas-immigration-order-n261706> [https://perma.cc/A3UZ-86EQ].

53. Jonah Goldberg, *Government by Rabble-Rousing*, THE DISPATCH (Nov. 1, 2019), <https://thedispatch.com/p/government-by-rabble-rousing> [https://perma.cc/GLP7-MCPB]; see also Mark Leibovich, *This Is the Way Paul Ryan's Speakership Ends*, N.Y. TIMES

their time legislating, many of the members of the legislature are instead reduced to being armchair commentators on what the executive is doing or not doing on issues that lie squarely within the power of Congress itself to address.

I want to finish with a caveat and then a few thoughts about the path forward. The caveat is that I do not mean to be heard as saying that congressional action for its own sake is a good thing. There is certainly something to be said for a do-nothing Congress. And in particular, there is something to be said for leaving issues to the states through the structural protections of federalism. My point is simply that given how much is getting done at the federal level, the fact that so much of it is being done by the other branches and not by Congress is something that I think would very much surprise Madison.

Now, in terms of the path forward and whether things can be made any better, I would make two observations. One is that the courts can certainly play a role in trying to create better incentives for Congress to act. Indeed, the Court may be on the verge of reviving the nondelegation doctrine. That possibility is suggested by the opinions in the *Gundy* case<sup>54</sup> and by a separate writing by Justice Kavanaugh who did not participate in the *Gundy* case.<sup>55</sup> That prospect is one thing that could force Congress to revitalize its legislative role and legislate down to the details.

Another thing that the courts could certainly do is adhere to principles of statutory construction that minimize the incentives for Congress to simply kick issues to the executive branch or to the courts. But if you think that the ultimate solution to this problem is

---

(Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/magazine/paul-ryan-speaker-ship-end-trump.html> [<https://perma.cc/6KAN-TTUK>].

54. See *Gundy v. United States*, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting) (suggesting that the Court revive the nondelegation doctrine); *id.* at 2131 (Alito, J., concurring in judgment) (noting that “[i]f a majority of this Court were willing to” consider reviving the nondelegation doctrine, he would support the effort).

55. *United States v. Paul*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (“Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”).

for the courts to do more, then I think you will have missed the import of the first part of my speech underscoring that the judiciary is much more powerful than Madison could have imagined. And I think you will also have missed Madison's view of how the separation of powers are supposed to work: As he wrote in *The Federalist No. 51*, the key to the separation of powers is that "[a]mbition must be made to counteract ambition."<sup>56</sup> There really is no substitute for Congress itself trying to reassert the authority to actually legislate in areas and not simply delegate to the executive branch. As Madison wrote, each department must have powerful motives to resist encroachment by the others.<sup>57</sup>

So, what can Congress do in this respect? I am not an expert on that particular issue, but I do have some thoughts having spent a couple of years in the Senate and having spent several more years watching Congress operate *vis-à-vis* the other branches. One thing Congress can do is try to revisit issues where technology and other advances have overtaken the legislation on the books. Things like the Internet and the TCPA provide examples where Congress could usefully revisit an issue where technology has rendered certain statutes largely obsolete. Another possibility is that Congress could try to essentially force itself to revisit some issues by imposing sunset clauses in legislation. Such clauses force legislators to reassess the issue every decade or so. Those sunset clauses also happen to have the additional virtue of enhancing liberty by making statutes expire if they are not renewed through the democratic process.

And the last thought, which is perhaps more inside baseball and may be more controversial, is there may be something to be said for giving greater power back to some of the committees of Congress so they can accumulate the kind of expertise you need to deal with some of these cutting-edge issues. There is such a disparity today between relatively lean congressional staffs and the vast executive branch agencies that there is an inevitable temptation to think,

---

56. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 2003).

57. See *id.* at 321–22 (avoiding a "gradual concentration" of power requires "giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others").

“Well, we have experts for that in the executive branch. We will just defer it to the executive branch.”

In closing, my point is to emphasize that we have a system of separation of powers that was largely premised on the notion that Congress was going to be the dominant actor on the federal level such that, if left unchecked, it could become an impetuous vortex. In reality, we have a situation where Congress is, perhaps, the least active and the least self-aggrandizing of the branches. That is a situation that would certainly surprise James Madison, and it is not something that the institutions Madison helped to fashion are perfectly well designed to address.