

Executive Overreach is a Symptom of Congress's Disease

Congress has lost its power to check the executive branch. Reviving it will require an agenda of radical liberal republicanism.

By Tobias Straus

The panic around executive overreach in the United States is misplaced. **Executive overreach is a symptom—not the disease itself.** The actual breakdown within the American system of government is taking place within another branch entirely: Congress.

The framers of the Constitution had a Trump-like figure in mind when designing our system of checks and balances. It is human nature, the thinking goes, for people to desire the accumulation of power. Checks and balances allow this desire to self-correct *within* the system. Federalist Paper #51, written by James Madison, captures this idea beautifully:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.¹

In this poetic peak of Madison's writing, the fault for a "runaway executive" cannot be placed in a single individual. The desire to accumulate power is rightly considered a given—we are governed by humans, not angels. The inordinate amount of power Trump has sought to accumulate, in Madison's theory, is perfectly natural.

Congress has failed to jealously guard its powers—it lacks the ambition with which to counteract ambition. Perhaps this result is obvious to contemporary political observers: the executive branch is clearly the route to pursue power for any ambitious politician. How can power be maximized in the United States? To our contemporary eyes, clearly the Presidency is the optimal route.

But this view is biased by our own time's institutional arrangements. In the early days of the republic, the legislature was the site of power. In a 1789 letter to Madison, Thomas Jefferson

prophesies that a tyrannical executive will be a concern of the future—the great power of their time was Congress. “The tyranny of the legislatures is the most formidable dread at present, and will be for long years. That of the executive will come in its turn, but it will be at a remote period.”

So what caused Congress’s downfall from domination of America’s tripartite government? How did this happen? And how can Congress regain its ambition—the only viable solution to checking the branch with an appetite for power?

Congress lost its powers gradually and then suddenly. Throughout the 20th century, Congress slowly gave away powers *de jure* on foreign affairs and international trade, treaty making, military and war, national security, and even lawmaking powers. These powers were quietly gathered from administration to administration:

The United States moved away from Treaties, which required Senate approval under the Constitution, to “executive agreements” or other deals which require only the President’s nod. “Special operations” authorized only by the President became the new norm of military engagement, circumventing “wars” which both houses of Congress are required by the Constitution to declare.

Executive orders and independent agencies have become major sources of how this country’s rules are made. Tariff powers were only recently taken out of Trump’s hands...by the Supreme Court. Why couldn’t Congress use its powers to retrieve its stolen competencies? The Republican Party’s fealty to the President is only part of the story.

In reality, a complex set of institutional arrangements incentivized Congress to both actively and passively give away its powers. Consider Congress’s constitutionally designated power to “lay and collect Taxes, Duties, Imposts and Excises”—to conduct international trade. Throughout the 20th century, Congress repeatedly delegated authority to the President in response to immediate political and economic pressures like the Great Depression, Cold War, and demands for speedy trade negotiations and use of trade powers as a tool for international politics. But because legislators represent specific districts, trade protectionism was incentivized for local industries. The President, representing a national constituency, was more likely to support trade liberalization. Often because of this, local industry turned export-focused and supported the executive’s free trade policies, making Congress’s delegation of powers more palatable.

This is a pattern for Congress’s powers. Throughout the 20th and 21st centuries, global crises emerged, and it was not politically viable for Congress to respond. The President would act, and only later would Congress complain. After Pearl Harbor and 9/11, for instance, national security powers under the President expanded drastically without Congress’s guidance.

The administrative state is also a mechanism through which Congress sheds powers often snapped up by the executive branch. For years, Congress would give extremely broad legislating powers to independent agencies. The Federal Trade Commission, for example, is granted very broad assignments like “don’t allow deceptive advertising” from Congress. Wide open to interpretation, these agencies would write laws. Though there were strong benefits to giving these agencies legislating power—these bodies are largely filled with experts—this is simply not how legislating was meant to be designed under the Constitution.

This is where contemporary balance-of-powers-politics get involved and things get interesting. The Supreme Court has recently been weighing in on independent agencies. *Trump v. Slaughter* and *Seila Law v. CFPB* determined that the President can remove the leaders of these independent agencies. Meanwhile, the Roberts Court has introduced the “Major Questions Doctrine,” a legal principle which requires independent agencies to have explicit Congressional approval before making any major regulatory decisions.

David French has described the Supreme Court’s end goal here as a “more power over a less powerful executive branch.” The President controls executive agencies completely (i.e. they’re less independent), but executive agencies have less power to regulate. Regulations are left to Congress, where the Constitution intends them to be.

This would be a fine system if Congress could manage to legislate. The Supreme Court’s recent rulings make the American government look like a schoolyard in which a bully amasses toys by stealing them from an increasingly sick young child and every now and then a slow-acting teacher gives the sclerotic, beaten boy back his bicycle.

Congress’s inability to legislate largely comes from rules the body has made for itself. The Constitution gives both houses the right to make their own rules. And they’ve ruled themselves into a corner.

When Congress *did* function, it worked largely as a network of committees, like Appropriations, Ethics, Foreign Affairs, and Oversight. Members of Congress became experts in designated fields and drove legislation accordingly.

Nowadays, congressional leadership has concentrated power. The Senate and House Majority Leaders and Minority Leaders set the agenda, which party members are expected to follow.

Legislation is often passed through “omnibus bills,” like the Big Beautiful Bill, CHIPS and Science Act, or the Inflation Reduction Act, which range from hundreds to thousands of pages in length. These massive bills which few, if no single human being has read in full, are the result of an inability to agree on any single piece of legislation. Instead, congressional leaders make deals on hundreds of disparate legislative priorities, mashing them together into a single unreadable document.

Most bills require three-fifths of the Senate to pass. But because Congress can't form coalitions this large between the two polarized parties, they often use a process called budget reconciliation, where a bill having to do with spending, taxing, or debt may be passed with a simple majority. Through this power, Congress has avoided the need for supermajority agreement in passing legislation thousands of pages long.

In years past, a congressional representative might be punished by their constituents for assenting to negative provisions buried in obscenely large omnibus bills. But congressional elections have grown increasingly nationalized, making party affiliation and national fundraising ability more important than representation of local priorities.

Election spending has become an all-consuming role for members of Congress. Members of Congress spend ridiculous amounts of time on fundraising—much of which goes to party-wide fundraising systems like the Democratic Congressional Campaign Committee or the National Republican Congressional Committee, further centralizing Congressional power in the hands of a few leaders.

In sum, Congress has lost the ability to act as an effective branch of government. It has largely done this through rules of its own making. This depletion of power has destabilized the balance of power, allowing the executive to collect powers like Pokémon cards.

If you are worried about executive overreach in America today, it is easy to blame this single individual who seeks power so blatantly. But this is an oversimplification of the problem the United States faces. If we do not want a king, do not look to the benevolence of any President. Rather, let's look to the failed system of our legislature with the clear eyes of Madison.

I wish I could express my love for this paragraph more greatly and eloquently. It is poetic, philosophical, and mechanical. I am moved by Madison's rich vision of some of the most fundamental political problems.

That "the interest of the man must be connected with the constitutional rights of the place" rings of Plato's *Republic*, in which the human soul is considered a smaller version of the *politeia* (πολιτεία), the actual title of Plato's *Republic* (the title "Republic" is based on a Latin translation). The *politeia* can be described as the character of the governmental system. Madison, then, means for the character of the American system to relate to the character of human nature.

Madison does not shut the spigot of political philosophy here. He recognizes a fundamental problem of political life: government can be abused. Tyranny is common—natural—in the course of human events. Men are not angels. We are evil: we lie and cheat and steal. The government is a powerful tool for this. If we didn't do these things, then what would the point of government be in the first place? This is the Hobbesian problem from which liberalism is born: we are warring creatures.

Here is a problem Madison solves beautifully. Government must reflect human nature, but human nature is dangerous and mean. “Ambition must be made to counteract ambition” is the solution. The Constitution is meant to *structure* the evil parts of human nature into a positive system. This is the fundamental accomplishment of the Founding Fathers.