

From 9/11 to 1/6: Lessons for Congress from Twenty Years of War, Legislation, and Spiraling Partisanship

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INTRODUCTION

The Framers of the Constitution made the national legislature the federal government’s first branch. In Article I, they gave the United States Congress expansive authority and responsibility to “provide for the common Defence,” what today we call national security: questions of war and peace, organization and governance of the military and other parts of the national security apparatus, safety against domestic threats to republican self-government, and foreign affairs. Two decades on from the September 11, 2001 (9/11) attacks by foreign terrorists and the continual armed conflict and chronic domestic insecurity they produced, and in the wake of the violent insurrection at the U.S. Capitol on January 6, 2021 (1/6), it is appropriate to appraise Congress’s performance over the past twenty years.

The record is mixed. Going forward, Congress certainly can and urgently must summon its foresight, civic courage, and institutional resolve to do a better job providing for the common defense while also doing its constitutional duty to “insure domestic Tranquility.”

Part I of this essay takes stock overall. Congress helped the nation to mitigate the foreign terrorist threat more effectively than most probably expected immediately after 9/11. That is the good news. But Congress has done worse regarding the domestic terrorist threat than almost anyone twenty years ago would have predicted or hoped. Additionally, Congress has provided the Executive Branch a predictable but dangerously expansive degree of latitude in national security. Part II

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of this essay sets out particular lessons learned and actionable steps toward national and institutional redemption. These recommendations center on stemming the spiraling partisanship that now—worse than any foreign actor—threatens the nation’s ability to “secure the Blessings of Liberty to ourselves and our Posterity.” Congress would better play its constitutional role by asserting more confidently and carefully its abundant authorities vis-à-vis the Executive Branch. This agenda may well not be sufficient to correct dangerous governance trends, but it is necessary.

I. TAKING STOCK OF CONGRESS’S PERFORMANCE

Despite profound worry after 9/11 of additional catastrophic attacks, twenty years on, the nation has suffered no attack by a foreign actor on the scale of the Al Qaeda attack of that day. That is a major accomplishment. Congress deserves significant credit, because the national security apparatus has operated with legislatively-provided funding, personnel, equipment, and legal authority (including force authorizations that are reaching the two decade mark). Congress importantly, if imperfectly, restructured the intelligence and homeland security enterprises. Other legislative accomplishments include statutory repudiation of torture in the wake of revelation of its practice by the U.S. government in the years following 9/11; modernization of the Foreign Intelligence Surveillance Act (FISA) in response to technological change and revelation of Executive Branch overreach; enhancing oversight of other intelligence activities via amendments to the covert action statute and other laws; creation of a statutory framework for detainees; repeal of the Don’t Ask Don’t Tell policy that discriminated against military servicemembers based on sexual orientation; facilitation of the opening of additional positions in the military to women; advice and consent to two strategic nuclear arms control treaties with Russia (the Moscow Treaty and New START); ongoing construction of a statutory regime governing cyber operations over a series of annual National Defense Authorization Acts (NDAA’s); and finally, despite spiraling partisanship and legislative dysfunction, enactment every year of an NDAA, a massive annual bill that does Congress’s constitutional duty of raising, structuring, governing, and regulating the armed forces. Congress also adjusted its operations to remain legislatively active in the terrifying days after 9/11, throughout the Covid-19 pandemic, and in the hours after the 1/6 insurrection. In terms of oversight, bright spots included investigations of the 9/11 attacks (and particularly establishment of the independent and bipartisan 9/11 Commission that helped Congress and the country understand what happened and how to respond), of the CIA torture program, and of Russian espionage during the 2016 election.

If the good news is a sizable list of enacted legislation, continued operations in perilous times, and some oversight successes, the bad news about Congress since 9/11 starts but does not end with Congress’s own role in accelerating the spiraling partisanship that ultimately resulted in the 1/6 domestic terrorist attack upon itself and upon the world’s foremost symbol of democracy, the U.S. Capitol.

Insurrection Day thankfully resulted in fewer deaths than 9/11 (less than ten versus nearly 3,000). But 1/6 was as bad or worse than 9/11 from the standpoints of Congress and democracy. On 9/11, American citizens interdicted a probable terrorist attack on the Capitol, subduing Flight 93's hijackers at the cost of their own lives. On 1/6, Americans were the terrorists. A mob—encouraged by the President and some Members of Congress—used violence against the civilian seat of government for political purposes.¹ Americans sacked their own Capitol. Insurrection Day was an attack our country conducted on itself. Insurrection in the United States inevitably gave aid and comfort to authoritarians in Moscow and Beijing, as well as Salafist militant groups and extremist movements in backsliding democracies. The 1/6 attack reflected a country deeply divided in terms of politics and demographic identity, one that could not respond with a post-9/11-like national sense of unity because a large part of one party—the Republican Party—remained in thrall to what fueled the attack: the lie of a stolen election, perpetrated by a defeated President at the center of a hyper-partisan cult of personality. Indeed, mere hours after the insurrectionists were expelled, the majority of then-President Donald Trump's party in the House of Representatives indulged the rioters' meritless allegations and voted to overturn a free and fair election. Several weeks later, large majorities of the President's party in Congress voted against impeaching Trump and successfully prevented him from being barred from future office for foreseeably inspiring a crowd to attack the Legislative Branch of government as it performed its constitutionally-required work. Unlike after 9/11, Congress—thanks to a combination of extreme partisanship and the supermajority-requiring filibuster in the Senate—failed to charter an independent bipartisan commission to investigate the attack.

Well before Trump entered the political arena, Congress had already granted an excessive degree of latitude to the Executive Branch and whomever is elected to the presidency. This deference was no less unfortunate for being predictable; the Framers understood that the “violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger,” tend to empower government actors most dangerous to liberty, and particularly the Executive and the military it commands.² The more that national security matters, the more that the President and the Executive Branch tend to be empowered relative to the other branches, the states, and the people. Congress too often has facilitated rather than mitigated this dangerous proclivity.

1. The violent attack with the political purpose of preventing Congress from doing its constitutional work facially meets the statutory definition of domestic terrorism: acts within the United States that are dangerous to human life, violate the law, and “appear to be intended— . . . (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping” 18 U.S.C. § 2331(5). The attack also qualifies as the crime of seditious conspiracy: “[W]here two or more persons . . . conspire . . . to oppose by force the authority [of the United States Government], or by force to prevent, hinder, or delay the execution of any law of the United States” 18 U.S.C. § 2384.

2. See THE FEDERALIST NO. 8 (Alexander Hamilton); see also THE FEDERALIST NOS. 24-29 (Alexander Hamilton).

II. PARTICULAR LESSONS AND ACTION ITEMS

A. Reducing Partisanship

Each of the post-9/11 legislative accomplishments identified above was enacted with strong bipartisan support in Congress. In part for that reason, none of these laws were repealed in the two decades after 9/11, despite three transfers of power between parties at the White House and seven different arrangements of party control in Congress. Because the Congress is the branch closest to the people, that bipartisan support also reflected stronger democratic legitimacy and public support. The lesson here is that where bipartisanship operates, it can enhance the durability and legitimacy of law.

In contrast, spiraling partisanship—evident in increasingly tribal voting patterns, escalating use of the filibuster and “holds” on bills in the Senate, and a constantly distracting atmosphere of acrimony and enmity—has made it dramatically harder for Congress to do its constitutional legislative and oversight work. As a result of hyper-partisanship and its dysfunctions, over the past two decades fewer statutes carefully tailored for particular problems have been passed, the laws that are enacted have more often been massive omnibus measures (some of which have been hastily cobbled together amid the panic of impending or blown deadlines), the “regular order” and its multiple process points for careful deliberative process have been routinely skipped even where legislation does make it through, and flat funding extensions in “continuing resolutions” have frequently substituted for finely honed and timely-enacted appropriations measures, including for national security. Multiple annual Intelligence Authorization Acts (IAAs) have failed to be enacted over the past two decades, and even the “must pass” Pentagon-managing annual NDAA appeared headed several times for doom. Regarding oversight, hearings focused thoughtfully on policy substance and Executive Branch accountability have been progressively displaced by sensational and hyper-partisan political theater. At several points in recent decades when both Congress and the White House have been controlled by the same party, congressional oversight has nearly halted. Separation of parties has too often supplanted separation of powers. Factional passions have overcome the constitutional structure meant to mitigate and manage them.

Extreme partisanship has also compromised the constitutional conscience of many Members of Congress. As then-Senate Majority Leader Mitch McConnell noted as many Senate and House Members tried to overturn a free and fair election, such hyper-partisan conduct could not be more dangerous: “If this election were overturned by mere allegations from the losing side, our democracy would enter a death spiral. We’d never see the whole nation accept the election again.”³ National security includes not just physical security but also civic liberty and the rule of law, and therefore out-of-control partisanship of this kind has become a

3. See Jordain Carney, *McConnell Rebukes Effort to Overturn Electoral College*, THE HILL (Jan. 6, 2021, 1:55 PM), <https://perma.cc/49YF-N2RS> (quote by then-Senate Majority Leader McConnell).

national security problem of the greatest urgency. Our political culture is destroying its purposes.

What is to be done? Our country has faced few harder questions. Practitioners and scholars have long urged a well-known slate of counter-partisan reforms that get at congressional and electoral processes and the habits of legislators once elected. These include elimination of the filibuster and “holds” in the Senate, expanding the congressional workweek, banning gerrymandering, restoring the use of comity-fostering spending earmarks, and fostering bipartisan caucus and social opportunities for legislators. Others emphasize grass-roots political reconciliation efforts. Some observers rightly note that the hyper-partisan trend is much larger than Congress, calling for reform to social media platforms and the candidate-selection processes of parties. Still others urge federal efforts to protect and expand ballot access for the poor, minorities, and other marginalized people, or to end the disenfranchisement in Congress of millions of U.S. citizens who live in Washington, D.C., Puerto Rico, Guam, and other territories (and in presidential elections too, with the exception of the nation’s capital).

Many of these proposals have great merit, but are not substitutes for something simple, hard, and imperative: legislators must decide individually and collectively to stand against escalating tribalism and stand for bipartisanship, and for longstanding common constitutional norms and values. They must demand a Congress capable of checking the Executive, of legislative compromise, and ultimately of acting in the national interest. The time for legislators of conscience to wait in self-protective hopeful silence for the political perils of the moment to pass is over. Legislators simply must find and voice their constitutional conscience: ethical commitment to foundational principles, the rule of law, and non-partisan good governance values, despite powerful political headwinds. Legislators must decide, and regularly reaffirm their decision, to be leaders of integrity and courage, acting as fiduciaries for the interests of all Americans and not simply the narrow agenda of a constituency, party, person, or faction. As Rep. Bill McCulloch (R-OH), one of the architects of the 1964 Civil Rights Act, reminded his colleagues almost exactly 50 years ago, in a diverse country:

the prime purpose of a legislator . . . is to accommodate the interests, desires, wants, and needs of all our citizens. To alienate some in order to satisfy others is not only a disservice to those we alienate, but a violation of the principles of our Republic. Lawmaking is the reconciliation of divergent views. In a democratic society like ours, the purpose of representative government is to soften tension—reduce strife—while enabling groups and individuals to more nearly obtain the life they wish to live.⁴

4. 117 CONG. REC. 35800 (1971) (statement of Rep. McCulloch).

B. Asserting Congress's Constitutional Authorities

Extreme partisanship hobbles Congress's ability to do its work. Unfortunately, toxic tribalism is but one way in which Congress has empowered the Executive Branch to a degree that is inconsistent with the Framers' Congress-centric constitutional vision and placement of key national security authorities with the legislature. A constitutional order tilted hard toward the Executive undermines one of the Constitution's main checks on error and abuse of authority by the Executive Branch. Executive dominance also reduces the democratic legitimacy of U.S. national security policy by leaving it mainly with unelected agencies and their nationally and indirectly-elected President rather than with a legislative body chosen directly from 50 states and 435 districts. Congress can and should reassert its legislative authorities and oversight responsibility.

Too often over the past two decades, Congress has been passive on national security matters of great importance. Explanations for Congress's failure to use its abundant constitutional authorities include capacity problems (too much to do, too little time, too few expert professional staff members), partisanship and political risk-aversion (it is often politically easier to remain silent, or to pass the buck to or criticize an energetic Executive Branch), information problems (the Executive Branch is so large, does so much, and classifies so much), and ignorance of Congress's abundant powers under the Constitution. Whatever its causes, there is no question that deference by Congress has been discernable, unfortunate, and worsening since 9/11.

The following points collect lessons under a half-dozen headings. They emphasize that the solution for congressional inaction is action: implementation of a ready series of solutions articulated by practitioners and scholars in recent years.

- *In contrast to a handful of obsessive partisan inquiries, Congress has insufficiently probed intelligence and Executive Branch claims on important matters.* Prior to authorizing force against Iraq in 2002 and under great time and political pressure, Congress failed to surface the combination of faulty intelligence and unsupported claims that underlay the case of the George W. Bush Administration for war with Iraq. Similarly, after limited classified briefings in the 2000s, House and Senate leaders and the intelligence committees failed to inform themselves fully of the disruptive technological capabilities, massive civil liberties violations, and weak legal theories undergirding the NSA's plainly problematic STELLARWIND warrantless wiretapping program and other surveillance activities. *Congress, on important matters, must thoroughly interrogate the intelligence, legal theories, and other information and assumptions behind Executive Branch claims, particularly regarding use of force and surveillance.*
- *When legislating regarding use of force, Congress has initially acted but thereafter remained passive in the face of changed factual*

circumstances and expansive Executive Branch legal interpretations. This year marks the twentieth and nineteenth anniversaries respectively of the 9/11 and Iraq Authorizations for the Use of Military Force (AUMFs). These statutes no longer operate in the circumstances of their enactment. The Executive Branch has asserted broad interpretations of these statutes across multiple administrations, claiming that they variously provide authority to use force against Al Qaeda offshoots spawned after 9/11 and after the fall of Iraqi strongman Saddam Hussein (including the so-called Islamic State) and in places (including Iraq, Syria, and Libya) that had no role in the 2001 attacks, and even against Iranian intelligence chief Qasem Soleimani. Similarly, Congress has not revisited the 1973 War Powers Resolution, despite Executive Branch legal interpretations of the statute over the past two decades that significantly narrowed its reach, military operations reasonably understood to violate the WPR, and ever broader assertions of presidential Article II constitutional authority to use force. There are many ready proposals to cancel or update the AUMFs and to revitalize the WPR. *Congress should repeal and replace legacy AUMFs with authorizations tailored to today's world, and revisit and strengthen the WPR.*

- *Congress has failed to revisit a vast, multi-decade accumulation of statutory delegations of emergency powers to the President.* These authorities—including arguable power to shut down large parts of the internet on potentially pretextual national security grounds—lay about as proverbial loaded weapons for presidential abuse. *Congress should revisit the emergency powers statutory regime by repealing many outmoded and overbroad emergency powers and imposing standing sunsets and other sensible limitations.*
- *Congress has failed to address readily imaginable and already manifested national security problems.* Congress has taken no meaningful action to correct well-established problems with federal leadership succession laws that could easily present in the event of a mass casualty event that kills or incapacitates many of the federal government's senior officials; repeatedly failed to pass bipartisan legislation reforming immigration, a major issue not only domestically but in U.S. relations with many foreign countries; failed to respond legislatively to the Trump Administration's abuse or threatened abuse of foreign assistance appropriations (including to Ukraine), the Insurrection Act, security clearance process, pre-publication review process, intelligence reporting process, whistleblower protections, and other well-established national security good governance laws and norms; and, as of summer 2021, has failed to appoint a bipartisan independent commission to investigate

the 1/6 insurrection modeled on the 9/11 Commission. *Appreciating its central role in national security under the Constitution, Congress should promptly pursue well-developed bipartisan proposals to address each of these matters.*

- *Congress has failed to manage Executive Branch legal secrecy (“secret law”).* Three of the most searing scandals of the past two decades, each injurious to public confidence in the rule of law, involved use of secret law—legal authorities that are not published—to radically reconstruct or entirely evade statutes. These revelations include NSA’s STELLARWIND warrantless wiretapping program in violation of the Fourth Amendment and Foreign Intelligence Surveillance Act (FISA) (declared legal in a highly classified Justice Department legal opinion that made overbroad claims of presidential authority), interrogation of terrorism detainees in violation of the statutory ban on torture (also authorized in a highly classified Justice Department memorandum that again made extreme constitutional claims and creatively argued that inflicting extreme suffering for interrogation purposes is not torture), and NSA’s suspicionless bulk collection of the telephone records of millions of Americans pursuant to an aggressive interpretation of Sec. 215 of the USA PATRIOT Act that facially looked nothing like the statute when leaked (authorized in classified FISA court opinions on the basis of classified Justice Department interpretations of statute). Congress responded to these scandals piecemeal and incompletely. Congress enacted Sec. 702 of the FISA Amendments Act of 2008 to bring part of STELLARWIND onto statutory footing, statutorily overturned the torture memo, and, in the USA FREEDOM Act of 2015, added process protections to telephony metadata collection. In the latter statute, Congress managed judicial secret law by requiring that any novel construction of law by the FISA court must be published in complete, redacted, or unclassified summary form. Congress also managed a limited area of Executive Branch secret law by requiring that Congress be informed of the legal bases of covert actions and other intelligence activities. However, Congress did not otherwise limit the ability of the Executive Branch to interpretively narrow or disregard statute in unpublished opinions, to make those interpretations the binding “law of the Executive Branch,” or to keep Executive Branch secret law hidden from Congress, the courts, and the public. Based on the public record, we know that the universe of Executive Branch secret law is vast, including an unknown number of presidential, Justice Department, and other agency-level precedents, some classified and many others simply unpublished. Although there are reasonable arguments for some limited amount of well-regulated legal secrecy, discretion of this kind interrupts our

constitutional system's law-improvement feedback loop by denying the other actors notice of the content of the law as understood by its implementers. *Congress should enact a framework statute on secret law, at a minimum requiring deference to the public understanding of public law when doing legal interpretation in secret, reporting at least the existence of all secret laws to the public and their full contents to Congress, and imposing short, regular sunsets on all secret legal authorities to ensure that today's leaders affirmatively act to take ownership of any earlier secret law they wish to perpetuate.*

CONCLUSION

The lessons of twenty years of congressional action and inaction are apparent to anyone who has been watching the nation's legislature between evacuation of the Capitol under foreign threat on the morning of 9/11 and the expulsion of domestic attackers on the afternoon of 1/6. Some of the steps this essay recommends to Congress to reassert its constitutional role and prevent repeat of Executive abuses of power are obvious and relatively easy. Other prescriptions, especially individual and collective action to stem spiraling partisanship, will be very difficult. But they are no less urgent. Their difficulty reflects the severity of the problems.

Our times call for true leaders. The time has passed when the republic can accommodate a large number of legislators who are mere followers, or who have a constitutional conscience but no courage when it counts. No governmental structure or process reform can substitute for individual character and a strong civic culture. The upside of the adversity we face is that women and men of courage can go down in history as heroes: true leaders who defied strong incentives against serving with integrity, who acted in the interest of all Americans, and who re-secured the Constitution's promise of "the Blessings of Liberty to ourselves and our Posterity."
