



Reclaiming the Balance of Power: An Agenda for the 111th Congress

Pendulums swing by their nature, but sometimes they swing too far in one direction and need a push to return to balance. For several decades, the pendulum of power in the federal government has been swinging toward the president; in the past eight years, the president's powers have reached unprecedented heights.

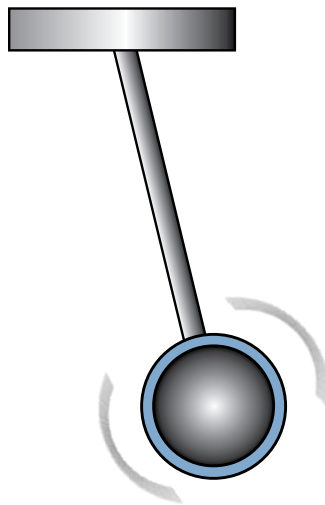
The last two presidents have taken more power for themselves, but Congress has also ceded significant power to the executive branch.

The 111th Congress has the opportunity to restore the balance. When members take their seats in January, reclaiming their constitutionally granted power to check the executive should be at the top of the agenda.

Power Balanced by Design

The framers of the Constitution had balance of power on their minds when they designed the U.S. government. They had recently rebelled against a monarchy with near total power over the people. Based on this experience, the framers limited specific government powers, such as compelling citizens to house soldiers in their homes, searching and seizing private property, and imposing taxes without a democratic process.

The framers also structured the U.S. government to catch and prevent these kinds of abuses. They gave independent powers to the three branches of government — executive, legislative, and judicial — but they instituted mechanisms allowing the other branches to limit and balance these powers.



In the first three words of the Constitution, “We the People,” the framers recognized a fourth branch of government to check the other three: the civil society.

Unlike monarchs, U.S. presidents cannot act alone to commit their countries to war, empty their national treasuries, and impose new taxes on the citizenry to finance military adventures. Presidents can make treaties with other nations, and in time of war a president serves as commander in chief of the armed forces. Constitutionally, only Congress can formally declare war, “raise and support armies,” and increase taxes or otherwise fund a war.

Maintaining these divisions is not easy. In the past 200 years, presidents have committed troops to military combat dozens of times without a formal declaration of war, and Congress has voted to cut off funding for war on only a few occasions.

In the past eight years, Congress has failed to exercise adequate oversight of executive actions and uphold the Constitution in several areas. Most recently, President George W. Bush has defended the torture of prisoners held by the United States, denied prisoners the right to appeal their detention, and permitted spying on people in the United States without a warrant. Congress has turned a blind eye or acquiesced to the president's requests to legalize his administration's actions.

The 111th Congress should reclaim its power on our behalf. In the mid-1970s, Congress passed laws to correct a pendulum of power that had swung too far toward the executive. The Congress that takes office in 2009 should do the same. ■

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Power Quiz

How much do you know about presidential and congressional powers? Choose all answers that apply, then check your answers on page 6.

1. The current commander in chief of the armed forces is
 - a. Gen. David Petraeus.
 - b. Gen. Raymond Odierno.
 - c. Secretary of State Condoleezza Rice.
 - d. President George W. Bush.
 - e. Secretary of Defense Robert M. Gates.

2. The U.S. Constitution gives the president the power to act without Congress to
 - a. make treaties with other nations.
 - b. declare war.
 - c. handle foreign affairs.
 - d. commit U.S. funds for foreign aid.
 - e. all of the above.
 - f. none of the above.

3. True or False: Once the commander in chief of the armed forces has committed U.S. troops to combat on foreign soil, Congress is legally obligated to allocate funds to support that mission.

4. The Constitution requires the president to report on the State of the Union
 - a. every year in January.
 - b. every year.
 - c. every even-numbered year.
 - d. from time to time.

5. True or False: Only Congress can decide when it meets and when it adjourns.

6. True or False: When the United States is engaged in military action, the Constitution allows the president to set aside certain laws and rights, such as the writ of habeas corpus, free speech, and the right of privacy.

7. True or False: The Constitution names a specific date when Congress must convene each year.

8. According to the Constitution, the president may take the following actions on a bill that Congress presents to the president:
 - a. approve (sign)
 - b. disapprove (veto)
 - c. send a message to Congress regarding the president's judgment about the constitutionality or applicability of parts of the legislation

Congress Needs to Stand Up

"The preservation of liberty requires . . . that the three great departments of power [executive, legislative, and judiciary] should be separate and distinct."

~James Madison, Federalist Paper no. 47

Presidents are not required to stay on their end of Pennsylvania Avenue. They have many opportunities to influence and shape congressional business without violating the spirit or intent of the constitutional separation of powers. Presidents suggest budgets, legislation, and comprehensive programs, and they capitalize on their own powers of persuasion. Congress usually grants presidents a lot of leeway to lead with their own ideas.

But the pendulum of power has been swinging too far toward the president and Congress needs to reclaim its power so that the pendulum swings back to balance.

To do this, Congress will need to exercise its constitutionally mandated power to spend the government's money and to exercise oversight of the executive branch. It will also need to stand up for the Constitution itself and for the checks on government power over individual people that

allowed democracy to flourish in the United States for more than 200 years.

Executive Consolidating Power

When presidents centralize their power, funneling communication, information, and detailed authority over agency activities tightly through the White House, Congress has a harder time finding out what is really going on and overseeing the implementation of laws it has approved.

President George W. Bush set up such a centralized model when he announced his interpretation of the "unitary executive" doctrine. In this model, all consultations between Congress and executive agencies have to be cleared through the White House, agency testimony has to be approved by the president's own Office of Management and Budget, and responses to questions from congressional committees often have to be deferred until an answer can be approved.

The Bush administration has also removed information from agency websites, including

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Six Steps Congress Should Take to Restore the Balance of Power

When members of the 111th Congress take their seats in January, they will have their work cut out for them to restore constitutional checks and balances. Here are six steps they should take in their first six months:

1. **Restore Habeas Corpus.** Restore the writ of habeas corpus for all prisoners held by the United States.
2. **Outlaw Torture.** Require all branches of the U.S. military and intelligence agencies to abide by the requirements of the Geneva Conventions on the treatment of prisoners captured in combat.
3. **Refuse to Fund without Oversight.** Use the power of the purse to withhold funding if the president or other executive agencies refuse to answer questions in congressional hearings or to respond to congressional inquiries. If necessary, use subpoena powers to ensure that the president and his administration follow the law, regardless of any comments he may have delivered in "signing statements."
4. **End Unconstitutional Government Spying.** Restore protections from and judicial review of searches and seizures of private communications, as required by the Fourth Amendment.
5. **Protect Freedom of Speech.** Repeal those parts of the USA PATRIOT Act that violate the First and Fourth Amendments.
6. **Restore Freedom of Information.** Require agencies of the U.S. government to restore historically available databases for public and academic use. By depriving the public of information, the executive branch is able to centralize more power.

Congress (continued from page 3)

research and statistical databases that had previously been publicly available and used by academic and other researchers, further hampering efforts not only by Congress but also by ordinary people in the United States to find out what the executive branch is doing.

Playing with War Powers: Who's in Charge?

A large gray area looms between the congressional powers to declare war and the president's powers as commander in chief. Congress has formally declared war only a few times in history. Yet the United States has sent its troops into combat dozens of times.

The War Powers Act, adopted in 1972 over a presidential veto, attempted to define a balance of power in war-making by requiring presidents to report to Congress within a certain time frame whenever the president commits U.S. troops to combat. But every president since then has

insisted that the act is unconstitutional and has complied with its provisions only insofar as it was convenient.

The real balance of war powers, however, lies not in the letter of the law but in the faithfulness of members of Congress to their duty to represent the people and the people's interests. Careful oversight and questioning, coupled with practical controls over how money from the federal treasury is spent, give Congress the tools it needs to rein in any overly adventurous president. The failure of Congress to assert its share of responsibility for war-making decisions in the past eight years has resulted in a runaway war in Iraq that most members are now reluctant to challenge.

Presidents Seize New Powers, Congress Acquiesces

Presidents sometimes venture into activities and pronouncements explicitly beyond their constitutional powers. These stretches of presidential authority may arise as an emergency response to what the president sees as a national need. Ultimately, the president has to get congressional approval for these stretches or risk having the courts strike them down. The two world wars and the Great Depression provided occasions for extreme reaches of presidential power. When the emergencies were over, however, some vestiges of the overreaching power remained.

Decisions by Congress to approve or censure these stretches of executive authority are critical, especially when the time frame for the stretch is unclear. In the name of national security and the "War on Terror," the Bush administration has cowed Congress into accepting the indefinite suspension of constitutional rights and protections and the violation of international laws, often by acting first and then hounding Congress into accepting the suspension and violation after the fact.

For example, President Bush created a new category of military prisoners — "enemy combatants" — although the Constitution explicitly assigns decisions about military captives to Congress. When the courts struck down the review procedures set up for these prisoners, Bush demanded that Congress

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Are You, or Someone You Know, Over Age 70? Do You Love FCNL?

If so, the just-passed economic rescue package included a special provision just for you! The new law provides for tax-free charitable giving from one's IRA.

People age 70.5 and older are required to take minimum distributions each year from their IRA. Normally these distributions count toward taxable income. But for 2008 and 2009 only, gifts made directly from an IRA to a "qualified charity," such as the FCNL Education Fund, do not count as taxable income but do count toward the required minimum distribution. For additional details go to www.fcnl.org and click on "how to give," then "contribute from your IRA," or contact Caroline Slobodzian at 800-630-1330 ext. 2526.

Age has its privileges!

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write a new law to authorize his ongoing program. Congress acquiesced.

In direct violation of the Constitution, the president denied these prisoners the writ of habeas corpus – the right of prisoners to know the legal basis for their detention. Congress did not move to restore the writ.

In violation of the Geneva Conventions, the president permitted U.S. military personnel to torture individuals captured and held under the new unregulated category. The photographs of torture released in 2004 from the U.S.-controlled prison at Abu Ghraib got the attention of Congress – and the world. In 2005 Sen. John McCain (AZ) led a successful congressional campaign to require U.S. armed forces to recognize and adhere to the standards set by the Geneva Conventions on the treatment of prisoners of war.

In violation of U.S. statutes and the Fourth Amendment, President Bush ordered a massive program of warrantless wiretaps of telephone and Internet communications by people in the United States.

This year, Congress responded by making the illegal actions legal, and the telecommunications companies that participated in the illegal searches immune from prosecution and civil suits.

In none of these cases did Congress effectively question the president's overreaching; instead, Congress has given a tidy pile of new powers to the executive branch at the expense of its own power of oversight and of the constitutional rights of people in the United States or in U.S. custody.

Signing Statements Hinder Congress

President Bush has also encroached on the ability of Congress to legislate. Under the Constitution,

presidents can either sign into law legislation passed by Congress or veto that legislation, sending it back to Congress. Bush made extensive use of a third option not mentioned in the Constitution, issuing "signing statements" to qualify his approval of legislation.

The president responded to more than 1,000 legislative provisions by expressing concerns about constitutionality, practicality, or contradiction with other requirements of law. In many of these messages, after signing the legislation into law the president indicated that he would not comply with that law and would order executive agencies not to comply. Congress seldom challenged the content of these statements by demanding reports that the president said he would not send, or by calling oversight hearings on the implementation of laws the president said he would not implement. Again and again Congress acquiesced.

The growing imbalance of power is more than just a contest between two sets of politicians. Ultimately, this imbalance diminishes the rights of ordinary citizens and their ability and willingness to influence their government.



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Fear of Government Stifles Protest

If people are afraid of government interference and retribution, they may be less likely to critique the government and ask questions about government actions. Fear can divide citizens into groups that attack and blame each other rather than work collectively to solve their common problems. The framers of the Constitution were familiar with the consequences of fear, because it had been used against them. They developed a framework that would protect the civil liberties of individuals by building in checks and balances among the branches of government.

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When Congress loses or abdicates its oversight role in the protection of civil liberties, individual citizens are left on their own in the face of threats and retribution. People can become afraid to exercise their constitutionally protected rights because those rights have been so eroded that people do not trust them anymore.

Consider college librarians at a midwestern university who were served with a "national security letter" by a government agency requiring them to turn over records of books checked out by all foreign students. The letter and the law behind it (the USA PATRIOT Act) directed the librarians not to discuss the order with anyone. The librarians refused to turn over the records and took the risk of going public. The order was ultimately withdrawn following massive national attention and outrage at the idea that it should ever be illegal either to read a book or to object to government spying.

Sometimes people find that they don't even have an opportunity to protest. Recent events at the Republican National Convention in St. Paul, MN, offer more examples of invasions into the constitutional rights of ordinary citizens and public policy critics. As peace advocates gathered from around the country to plan protests and press conferences

against the ongoing U.S. wars, several meetings were raided by the Joint Terrorist Task Force and law enforcement officers wearing riot gear and carrying semiautomatic weapons. Homes and offices were raided and occupants were handcuffed and forced to lie on the floor while their documents, computers, and books were searched and seized.

One of the groups raided was Food Not Bombs, an organization that has worked for nonviolent social change since the 1980s and has been one of the first responders in food aid for natural and human-made disasters, including the attacks on September 11, 2001. Another group whose members were arrested and charged included more than 40 journalists covering the convention, including Amy Goodman and the producers of *Democracy Now!* When the raids occurred, no protests had been held and no crimes were alleged.

These pre-emptive actions are defended as attempts to "stop terrorism" before another attack. The notion of pre-emptive action, however, authorizes actions (spying, raiding, arrests, unlimited detentions) before any evidence is gathered. Pre-emptive actions against individuals and organizations run counter to the constitutional principle that every person is innocent until proven guilty. The burden of proof flips from the government to a person who has not

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Answers to Power Quiz

1. **d.** The president is the commander in chief.
2. **f.** The Constitution explicitly mentions making treaties with other nations, but only with the agreement of 2/3 of the Senate. Foreign affairs and foreign aid are not mentioned. Congress has the sole power to declare war.
3. **False.**
4. **d.** Only by tradition does the president deliver a State of the Union speech each January. The Constitution does not specify when the president must give this report.
5. **False.** The president can call a special session of Congress, and the president can adjourn a Congress.
6. **False.** The president and all other officers are obliged to uphold the Constitution, which provides, among other things, that the writ of habeas corpus "shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."
7. **True.** The Constitution states that Congress must convene the first Monday in December. The 20th Amendment changed the date to January 3.
8. **a. and b.** If the president disapproves, Congress can reconsider the bill and determine whether it can override the president's veto. "Signing statements," in which the president signs legislation but qualifies his approval by questioning the law's constitutionality or even stating that he will not enforce it, are not provided for in the Constitution.

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even been accused of a crime.

In this Kafkaesque new order, there is no defense. Organizations must reveal confidential information or are shut down when the government seizes vital resources like computers. Asylum seekers are deported before they can plead their case. And at the more extreme end, immigrants and terror suspects — including children — are held without charge and subjected in some cases to cruel and inhumane interrogation practices.

President Bush has claimed for the executive branch the power to authorize and take this kind of pre-emptive action. Without controls from Congress or the courts to check this claim, the president has gained new authority at the expense of “We the People” — the original authors and owners of the Constitution.

For ordinary people, weakened civil liberties and expanded executive power can be particularly pernicious. Last year, at a college in the Midwest, FCNL’s young adult coordinator was training students in how to influence their members of Congress. One student said she was afraid to send a letter to her member of Congress because her name could wind up on a list, subjecting her to future investigation. Our young adult coordinator assured this student that the Constitution guaranteed every person the right to speak out, but the coordinator left the gathering shaken at the chilling effect of recent government actions.

The weakening of civil liberties threatens to isolate members of Congress from the people they represent and undercut democracy itself.

Protecting “We the People”

Nineteen years ago this October, protests broke out in East Berlin at the Berlin Wall. The Wall, built to isolate East Germans from the encroaching West, was both a symbol and a tool of violations of the rights of the East German people.

The United States celebrated the protests and the eventual removal of the Wall. Today, however, the United States is building its own political and physical walls to similarly restrict the rights and

civil liberties of people in this country or under its custody.

To tear down the walls being built ever closer around the civil liberties of the people in the United States, the balance of power must be restored among the three branches of government and between the people and the government. Having ceded so much power to the executive in recent times, Congress has an obligation to reclaim that power, both to stabilize the U.S. government and to protect the people, whom members of Congress represent.

“I believe that there are more instances of the abridgment of the freedom of the people by gradual and silent encroachment of those in power than by violent and sudden usurpations.”

~James Madison, speech at the Virginia Convention to ratify the Federal Constitution, June 6, 1788

Celebrate Young Adult Leadership at Annual Meeting

“I have been privileged to live and work in Burkina Faso, Palestine/Israel . . . , and Indonesia. . . . I am excited and energized to be serving FCNL as a member of the General Committee and the Development Committee.”

~Jonathan Evans,
FCNL intern 1977–78

“Starting my career working with Ruth Flower on domestic issues was the best beginning I could have had.”

~Catherine “Kitty” Ufford-Chase,
FCNL intern 1988–89

Since 1970, FCNL’s intern program has been cultivating new generations of Quaker leaders and advocates for peace and justice. Help celebrate at our 2008 Annual Meeting, November 13–16, in Washington, DC. Find out more and register at www.fcnl.org/am/ann_meeting2008.htm.



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INSIDE: RECLAIMING THE BALANCE OF POWER

No. 731, October 2008

FCNL Successes in 2008

Congress has gone home for the year after months of increasingly partisan division and inaction. Yet even in this election year, we at FCNL can mark several significant accomplishments. These successes even in a tough climate show what the focused, dedicated work of our lobbyists and our network across the country can achieve. Next year, we will be able to build on this foundation of success.

Iran Blockade Legislation Fizzles

In June, House leaders wanted to “fast track” legislation that urged the president to pursue an international blockade of Iran and possibly provoke a war. The FCNL network spent the next four months intensely lobbying against the bill, H. Con. Res. 362, and helped convince five representatives to remove their names from the legislation, a rare step. The bill did not pass despite being cosponsored by more than half the House.

No Permanent U.S. Military Bases in Iraq

For the third year in a row, Congress approved the FCNL-initiated proposal to ban the U.S. government from establishing permanent U.S. military bases in Iraq.

Congress Bans Cluster Bomb Exports

A one-year moratorium on cluster bomb exports was set to expire on September 30, 2008. In the waning hours of the 110th Congress, members included an extension of the ban on the export of most types of cluster bombs in a bill that will keep the government running through March 2009.

Congress Says No to New Nuclear Weapons

FCNL lobbying has helped block funding for the Bush administration’s proposed Reliable Replacement Warhead program. FCNL led the effort to prevent this weapon from being authorized or funded. This is the second year in a row FCNL has helped block this program.

Congress Invests in Peace

Congress created and funded a civilian response corps, which FCNL had been lobbying for as one of five things Congress can do now to build structures for peace. This civilian effort strengthens the U.S. ability to prevent and resolve violent conflicts, creating teams that can be sent to crisis-torn countries to provide basic services and support political and economic reconstruction.

Congress Supports Students, Low-Income Families

As part of a bill to continue funding the government through March 2009, Congress increased funding for a program providing home heating assistance for poor households, student aid, and supplemental nutrition for low-income women, infants, and children.

Congress Renews Energy Tax Credits

Tax credits that encourage production of electricity from renewable sources, such as wind and solar energy, were set to expire on December 31, 2008. As part of the financial bailout bill, Congress extended these tax credits for at least one more year.